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Product Liability

UPDATE

National Association of Wholesaler-Distributors
1725 K Street N.W., Washington, D.C. 20006
202/872-0885

November, 1981

SYNOPSIS OF ENACTED STATE PRODUCT LIABILITY LAWS

ALABAMA

Senate Bills 109 and 210
Enacted: July 30, 1979

REPOSE PROVISION

Senate Bill 109 sets forth certain periods of limitation within which product liability suits must be brought against the original manufacturer or the original seller of the product. Provides that suits are barred unless filed:

(1) Within one year of injury, or in the case of a latent injury, within one year after the injury was discovered or should have been discovered, but not later than - -

(2) Ten years after the product is first put to use by any person who did not acquire it for resale in its unused condition.

Where the action arises from a breach of governmental duty to take action for safety reasons, a suit may be maintained within one year of injury, but not later than ten years after the date the governmental duty to act was imposed.

Statute of repose applies only to sellers of new products. A seller may waive the application of the statute by an express written agreement. The law applies to all injuries occuring after July 30, 1979.

COLLATERAL SOURCE EVIDENCE

Senate Bill 210 provides that in product liability actions, evidence of payment or reimbursement for a claimant's medical and hospital expenses through insurance or otherwise is admissible.

ARIZONA

House Bill 2215
Enacted: April 21, 1978

SELLER'S EXEMPTION

A seller who does not control the manufacturing process and who tenders his defense to a manufacturer is entitled to indemnification and reimbursement from the manufacturer for costs incurred in defending such action, including costs and attorney's fees. A manufacturer is entitled to indemnification where a seller provides plans or specifications to the manufacturer which alledgedly causes the product to be defective.

REPOSE PROVISION

The law establishes a 12-year statute of repose following the product's first sale for use or consumption which would thereafter bar all product liability actions based on the doctrine of strict liability in tort.

DEFENSES - ALTERATION, MODIFICATION AND MISUSE

A defendant in a product liability action would have a defense where:

(1) The proximate cause of injury was an unforeseeable alteration or modification made by a person other than the defendant, and, after the product was first sold by the defendant;

(2) The proximate cause of injury was an unforeseeable use of the product, or, a use contrary to expressed adequate instructions or warnings accompanying the product that should reasonably have been known by the injured person.

STATE OF THE ART

In design defect cases, the defendant has a defense if the design or the manufacturing and testing process conformed to the state of the art at the time the product was first sold.

Evidence of advances in the state of the art and industry standards and evidence of post-accident changes in the product are not admissible as direct evidence of a defect.

DAMAGES CLAIMED

Under the law's provisions no dollar amount for damages may be specified in the complaint filed by the injured party.

ARKANSAS

Senate Bill 476
Enacted: March 21, 1979

SELLER'S RIGHT TO INDEMNITY

A non-manufacturing seller has a right to indemnity for loss sustained by reason of a defective product unless the product is sold after any expiration date placed on the product as required by law.

STATE OF THE ART

The state of scientific and technological knowledge (state of the art) existing at the time the product is first sold is admissible in evidence. Evidence of post-sale advances in the state of the art are excluded.

COMPLIANCE WITH GOVERNMENT OR INDUSTRY STANDARDS

Evidence that a product complied with government standards or industry custom at the time of manufacture is admissible as evidence.

USER FAULT

Use of a product beyond its anticipated life; alteration, change or improper maintenance; or abnormal use may be considered as evidence of fault on the part of the user.

CALIFORNIA

Senate Bill 227
Enacted: August 1, 1979

PUNITIVE DAMAGES

The law requires a claimant to produce evidence of a prima facie case of liability for punitive or exemplary damages prior to introducing specified evidence relating to the defendant's wealth or profits.

The California legislature also passed a bill that would have given product sellers a defense if their products were altered or modified without their consent. This bill was vetoed by the Governor.

COLORADO

House Bill 1536
Enacted: June 14, 1977

SELLER'S EXEMPTION

Any product liability action based on the doctrine of strict liability in tort cannot be maintained against a non-manufacturing seller unless the court cannot assert jurisdiction over the manufacturer.

REPOSE PROVISION

It is rebuttably presumed that a product is not defective and no manufacturer or seller was negligent where ten years have passed since the product was first sold for use or consumption.

STATE OF THE ART

Evidence of advancements in the state of the art or product improvements made after the date of manufacture are inadmissible in a product liability action except to show a duty to warn. It is rebuttably presumed that a product which conformed to the state of the art at the time of manufacture is not defective.

COMPLIANCE WITH GOVERNMENT STANDARDS

It is rebuttably presumed that a product is not defective if it complied with government standards at the time of sale. If a product fails to meet government standards it is rebuttably presumed that the product is defective.

CONNECTICUT

House Bill 5870
Enacted: June 20, 1979

REPOSE PROVISION

Product liability suits are barred unless filed within three years of injury, and: (1) in the case of workplace injuries within 10 years after the manufacturer sells the product; or (2) in all other cases prior to the expiration of the useful life of the product which is presumed to be 10 years.

ALTERATION DEFENSE - FRIVOLOUS CLAIMS AND DEFENSES

A defendant has a defense where injury is caused by an unauthorized alteration to the product which was not reasonably foreseeable. Under the law, a court is permitted to award attorney's fees and costs if a claim or defense is frivolous.

COMPARATIVE RESPONSIBILITY

If the claimant is partially at fault, compensatory damages will be reduced according to the proportion of fault attributed to claimant. The amount of punitive damages are to be determined by the court, not the jury, if the jury finds clear and convincing evidence of a reckless disregard for safety by the product seller.

FLORIDA

House Bill 1190
Enacted: June 27, 1980

INSURANCE CONSIDERATIONS

The law prevents a product liability insurer from being made a party defendant in any case involving the insured's liability. However, each insurer must file a statement with the court containing certain data, including any defense to coverage which the insurer believes he has. If the insurer asserts a defense to coverage, the insurer may then be made a party defendant.

The law makes the existence and extent of product liability insurance discoverable in product liability actions. The act was effective on October 1, 1978 and applies only to injury or damage occurring after this date.

REPOSE PROVISION

The act provided for statute of repose barring all product liability actions brought later than 12 years after the date of delivery of the completed product to its original purchaser. In March of 1979 the Florida Supreme Court ruled that this statute violates the Florida constitution and is therefore inoperative.

GEORGIA

Senate Bills 511 and 512
Enacted: April 10, 1978

REPOSE PROVISION

The law provides a 10 year statute of repose which starts when the product is introduced into commerce. After 10 years, a product liability action based upon the strict liability in tort doctrine is barred.

ALTERATION AND MODIFICATION DEFENSE

Provides a defense in a product liability action where a cause of the injury complained of is a substantial product alteration or modification.

SELLER'S EXEMPTION

Prior Georgia law limits liability under the doctrine of strict liability in tort to manufacturers.

IDAHO

House Bill 577
Effective: July 1, 1980

REPOSE PROVISION

Provides that a seller is not responsible for injuries that occur after expiration of the products useful, safe life. After 10 years, it is a rebuttable presumption that useful, safe life has passed. Repose period does not apply in cases of prolonged exposure or where defect is not reasonably susceptible to discovery until after 10 years after delivery of the product.

SELLER'S EXEMPTION

The law eliminates liability of non-manufacturing sellers where they did not have a reasonable opportunity to inspect a product or if the product was acquired and sold in a sealed container. Non-manufacturing seller remains liable if the manufacturer cannot be judicially served or is insolvent or where he had reason to know of defects or made unauthorized modification or installation of the product.

COMPARATIVE RESPONSIBILITY

If claimant is partially at fault, damages shall be reduced in proportion to the fault attributable to claimant. Conduct that would act to reduce damages includes misuse, alteration or modification, failure to discover a defective condition and use of known defective product.

EVIDENCE IN PRODUCTS CASES

Evidence of changes in a product's design or warning labels, or in the state of the art or trade custom, after manufacture of the product are not admissible to show the defectiveness of the product.

ILLINOIS

House Bill 1333
Enacted: August 14, 1978

REPOSE PROVISION

The law provides for a statute of repose applicable to product liability suits brought under the doctrine of strict liability in tort. A strict liability case must be commenced within 12 years from sale by the manufacturer or 10 years from sale to the initial user, whichever occurs first.

An exception to this general statute of repose applies where injury is claimed to have resulted from an alteration, modification or change to the product. When an alteration is claimed, a strict liability action may be brought within ten years after the alteration was made against the person making, authorizing or furnishing the materials to make the alteration provided the change introduced a new hazard into the use of the product.

This restart provision does not apply when a replacement part having the same formula and design as the original equipment part is installed where strict liability for design is at issue. There is additional liability exposure, however, to the manufacturer, seller, and installer of a different-design replacement part.

The repose provision was amended in 1979 to provide that the repose law previously enacted does not create a cause of action nor does it affect one's right to indemnity or contribution.

House Bill 2658
Enacted: September 24, 1979

SELLER'S EXEMPTION

The law repeals the 16-year-old court-created doctrine of strict liability in tort in Illinois as it applies to wholesaler-distributors. The legislation permits wholesalers, distributors and other non-manufacturers to be dismissed out of strict tort liability lawsuits brought for injuries caused by defective products where: (1) the manufacturer is identified; (2) the non-manufacturers did not know of the defect; and (3) did not design or manufacture the product. The law does not change the existing law of negligence where the wholesaler-distributor is at fault, or in a limited number of cases where the manufactuer is out of business, cannot be sued, or is insolvent.

INDIANA

House Bill 1396
Enacted: March 10, 1978

REPOSE PROVISION

The law provides a 10-year statute of repose which commences when the product is delivered to its initial user, and other relief measures. The statute applies to all injuries occuring on or after June 1, 1978.

DEFENSES - MISUSE, ALTERATION OR MODIFICATION, STATE OF THE ART

The law provides defenses where the plaintiff assumes the risk of injury, where nonforeseeable misuse of the product causes injury, where nonforeseeable modification or alteration proximately causes injury, or where the product complied with the state of the art in existence at the time of manufacture. The doctrine of strict liability in tort is limited to products which are both defective and unreasonably dangerous.

KANSAS

Senate Bill 165
Enacted: April 23, 1981

SELLER'S EXEMPTION

The law provides a defense for non-manufacturing sellers in those instances where a financially solvent manufacturer is available and no independent cause of action exists against the non-manufacturing seller.

REPOSE PROVISION

Where an injury occurs more than 10 years after delivery of the product to a user, a presumption arises that the harm was caused after the useful safe life had expired. This presump-tion can be rebutted by clear and convincing evidence, a standard of proof that is higher than that required for other issues.

COMPLIANCE WITH GOVERNMENT STANDARDS

Compliance with mandatory governmental contract specifications is an absolute defense. Conversely, non-compliance with such a mandatory standard renders the product defective as a matter of law. Compliance with non-mandatory standards creates for the plaintiff a burden of proving that a reasonably prudent seller would have taken additional precautions.

DUTY TO WARN

There is no duty to warn against open or obvious dangers. Nor is there a duty to warn with respect to safeguards, precau-tions or actions which a reasonable product user could or should take.

KENTUCKY

Senate Bill 119
Enacted: March 31, 1978

SELLER'S EXEMPTION

The law relieves a wholesaler-distributor from liability if the product was sold in its original manufactured condition or package and the manufac-turer is identified and subject to the jurisdiction of the court unless the wholesaler-distributor knew or should have known that the product was in a defective condition at the time of sale.

RESPOSE PROVISION

The law provides a rebuttable presumption that a product is not defective if: the injury to the plaintiff occurs more than five years after the first sale for use or consumption or eight years after the date of manufacture. The same presumption arises if the product complied with the state of the art or standards existing at the time of manufacture.

ALTERATION OR MODIFICATION DEFENSES

The law provides defenses to a product liability suit: where the plaintiff makes an unauthorized modification to the product which is a substantial cause of the injury; and where the plaintiff's own negligence in using the product was a substantial cause of the injury. A defendant is not responsible for injuries sustained by a plaintiff on account of a third party's alteration to, or failure to repair and maintain the product. Evidence of post-injury alterations or repairs to a product are admissible only if the court, in a hearing outside the presence of the jury, rules it relevant and material.

LOUISIANA

House Bill 1171
Enacted: July 23, 1980

BIFURCATED TRIALS

Effective September 14, 1980 product liability actions are tried in two separate trials. The first trial deals with the issue of liability. The second trial, conducted before a different jury, will commence only upon a finding in the first trial that the defendant is legally responsible and will be concerned only with the issue of damages.

MICHIGAN

House Bill 5689
Enacted: December 11, 1978

EVIDENCE IN PRODUCTS CASES

The law permits the admission of evidence that the product was designed, manufactured, packaged, labeled and sold in conformity with industry or governmental standards in effect when the product was first sold to its initial purchaser, and bars evidence of any post-accident change or improvement in the product offered to prove liability. Also admissible to product liability actions is evidence: that an alteration, modification or misuse of the product was the cause of injury or damage; and that booklets, labels, warnings or instructions warned of risks connected with foreseeable uses of the product.

COMPARATIVE NEGLIGENCE - FRIVOLOUS CLAIMS

Under the law, the court can reduce any award in proportion to the degree which a plaintiff's own contributory negligence contributes to the accident. Frivolous product liability claims are discouraged by a provision awarding costs and reasonable attorney's fees to the prevailing party in a frivolous law suit.

REPOSE PROVISION

In a suit involving a product that has been in use at least 10 years, the injured party has the burden of proving liability without the benefit of any presumption.

MINNESOTA

House File 338
Enacted: April 5, 1978

COMPARATIVE FAULT

Provides that contributory fault of a person does not bar recovery if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages are diminished in proportion to the amount of fault attributable to the person recovering.

LIMITATION ON PUNITIVE DAMAGES

Provides that punitive damages are allowed only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.

House File 2476
Enacted: April 24, 1980

SELLER'S EXEMPTION

The law permits wholesaler-distributors and other non-manufacturing sellers to be dismissed out of strict liability lawsuits for injuries caused by defective products where: (1) the manufacturer is identified; (2) the non-manufacturer did not exercise significant control over the design or manufacture of the product; (3) the non-manufacturer did not have actual knowledge of the defect nor did he create the defect which caused the injury; and (4) the manufacturer exists, is able to satisfy a judgment or settlement. Dismissal is accomplished by the filing of an affidavit by the non-manufacturer at the beginning of the litigation process.

NEBRASKA

Legislative Bill 665
Enacted: April 5, 1978

SELLER'S EXEMPTION

The law exempts a wholesaler, distributor, seller or lessor of a product from the doctrine of strict liability in tort unless such persons are also the manufacturer of the product or the part claimed to be defective.

REPOSE PROVISION

The law contains a 10-year statute of repose which would bar product liability actions brought later than 10 years after the product was first sold or leased for use or consumption.

STATE OF THE ART

The statute creates a defense for a defendant who manufactures or sells a product which complied with the state of the art at the time of manufacture.

COMPARATIVE FAULT

The Nebraska comparative fault statute was amended to include a strict tort liability case. Thus, a jury can mitigate damages where plaintiff's negligence contributed to the injury in proportion of the plaintiff's negligence.

NEVADA

Assembly Bill 333
Enacted: June 2, 1979

COMPARATIVE RESPONSIBILITY

The law provides that where the action is to recover damages for an injury resulting in a death, the contributory negligence of the decedent shall be a factor in determining the amount of any award and where that negligence is greater than that of the defendant. Where the contributory negligence is not greater than that of the defendant, the award is to be diminished in proportion to such negligence. Where there are multiple defendants in an action, their comparative negligence is to be taken into account in determining the amount of any award attributable to them.

NEW HAMPSHIRE

Senate Bill 28
Enacted: June 23, 1978

REPOSE PROVISION

Product liability action can be brought within three years after injury, but no later than 12 years after the manufacturer of the final product sold it. Where the defendant is a lessor under a legal duty to inspect, maintain or repair the product, the action can be brought against the lessor within 12 years after he ceases to be under the legal duty. The statute would not bar an action for indemnity or contribution or actions based upon fraud.

ALTERATION OR MODIFICATION DEFENSE

A seller is not liable for harm which occurred on account of an alteration or modification to the product. The law is effective 60 days after passage. The statute of repose generally applies to injuries occurring after the effective date, while the alteration defense applies to all suits filed after the effective date.

NORTH CAROLINA

Senate Bill 189
Enacted: May 24, 1979

SELLER'S EXEMPTION

The North Carolina Product Liability Act contains a "seller's exemption", barring product liability actions against non-manufacturers (including wholesaler-distributors) when the product is acquired and sold in a sealed container or without a reasonable opportunity to inspect the product in a manner which would reveal the defect. The provision does not apply where the non-manufacturer mishandles the product, where the manufacturer is not subject to the jurisdiction of the court or is insolvent.

DEFENSES - ALTERATION OR MODIFICATION - MISUSE

The law establishes a defense in product liability actions where an injury is caused: (1) by an unauthorized alteration to the product; (2) by the failure of the claimant to exercise reasonable care in the use of the product; (3) by the user assuming a known risk with respect to the product; or (4) by the user's disregard of adequate warnings or instructions given with respect to the product.

REPOSE PROVISION

The law includes a statute of repose which bars a product liability lawsuit if it is not filed within six years after the date the product was initially purchased for use or consumption.

NORTH DAKOTA

House Bill 1705
Enacted: March 22, 1979

REPOSE PROVISION

The Act bars product liability lawsuits that are not filed within 10 years from the date of first purchase of the product for use or consumption, or 11 years from the product's date of manufacture.

DEFENSES - ALTERATION OR MODIFICATION - COMPLIANCE WITH GOVERNMENT STANDARDS

The Act provides for a defense where a product is altered or modified after sale and such alteration or modification is a substantial cause of the alleged injury or damage. There is a rebuttable presumption that a product is free from defects where it complied with applicable government standards at the time of design or manufacture of the product. Specific dollar amounts in the *ad damnum* clause of the complaint in excess of $50,000 are prohibited.

OHIO

Senate Bill 165
Effective: June 20, 1980

COMPARATIVE RESPONSIBILITY

Under this law, the comparative fault of the parties will be considered in actions based upon negligence in order to determine the amount of the award. This law takes the place of the common law doctrine of contributory negligence whereby in an action based upon negligence, the slightest amount of negligence on the part of the injured party barred any recovery. The new law would not bar the recovery but would reduce the award by the amount of the negligence of the injured party. The law does not apply to actions based on the doctrine of strict liability in tort which do not permit the negligence of the injured party to be taken into account under any circumstances.

OREGON

House Bill 3039
Enacted: July 27, 1977

REPOSE PROVISION

The law establishes an eight-year statute of limitation on product liability actions, which commences from the date of first purchase for use or consumption.

DEFENSES - ALTERATION OR MODIFICATION

The law also establishes user alteration or modification of a product as a defense against imposition of liability on wholesaler-distributors or other sellers. In addition, the law allows the trial judge to instruct the jury that the defendant is, in effect, "innocent until proven guilty" in every product liability case, thus repealing an Oregon Supreme Court ruling that prevented the judge from issuing such instructions.

RHODE ISLAND

House Bill 7634
Enacted: May 12, 1978

REPOSE PROVISION

The law provides for a statute of repose which bars product liability actions not brought within 10 years following the date the product was first purchased for use or consumption.

DEFENSES - ALTERATION OR MODIFICATION

It is a defense to a product liability action that an alteration or modification made to the product after the defendant sold it is a substantial cause of injury or damage.

SOUTH DAKOTA

House Bill 1116
Enacted: February 18, 1978

REPOSE PROVISION

The statute bars a product liability action from being brought more than six years after the product is delivered to first purchaser for use or consumption. The limitation applies regardless of the date the defect could have been discovered, but would apply to injuries sustained prior to the effective date of July 1, 1978.

SELLER'S EXEMPTION

The law repeals the doctrine of strict liability in tort for non-manufacturers of products or component parts. The "seller's exemption" bars any suit based on strict liability against a wholesaler-distributor, dealer or retail seller of the product, unless such person manufactured or assembled the product or knew or should have known of the defective condition in the product.

DEFENSES - ALTERATION OR MODIFICATION

The law also establishes a defense in strict liability cases to defendants where a post-sale alteration or modification to the product is the proximate cause of injury, is not foreseeable and renders the product unsafe.

TENNESSEE

Senate Bill 2188
Enacted: March 27, 1978

SELLER'S EXEMPTION

A non-manufacturer is not liable for a product sold in a sealed container or for a product which he had no reasonable opportunity to inspect, and a non-manufacturer is no longer subject to the doctrine of strict liability. The foregoing "seller's exemption" does not apply to warranty cases, or when the manufacturer cannot be brought under the jurisdiction of the Tennessee courts, or the manufacturer has been judicially declared insolvent.

REPOSE PROVISION

The Act contains a statute of repose requiring a product liability action be brought within 10 years after the product was first purchased for use or consumpton or, if shorter, within one year after the expiration of the product's useful life.

DEFENSES - ALTERATION OR MODIFICATION - COMPLIANCE WITH GOVERNMENT STANDARDS

The law establishes a defense where an unforeseeable alteration, improper maintenance or abnormal use renders the product unreasonably dangerous. Also the law provides a rebuttable defense where the product met relevant government standards at the time of manufacture, and restricts the admission of post-manufacture state-of-the-art evidence.

UTAH

Senate Bill 158
Enacted: March 22, 1977

REPOSE PROVISION

The Act provides that no seller of a hazardous product may be used after six years from the date of initial purchase for use or consumption, or 10 years from the date of manufacture.

DEFENSES - ALTERATION OR MODIFICATION - COMPLIANCE WITH GOVERNMENT STANDARDS

The seller is immune from product liability suits if subsequent alteration or modification of its product by another proves to be a substantial causing factor of the injury. The Act also gives a new definition of "substantial hazard", and creates a rebuttable presumption that the injury-causing product was not defective if its manufacturer complied with government standards applicable at the time of manufacture. Also, the Act prohibits plaintiffs from requesting specific sums to be awarded, and instead requires that complaints merely ask for "reasonable compensation."

WASHINGTON

Senate Bill 3158
Effective July 26,1981

SELLER'S EXEMPTION

The law provides that a product seller other than a manufacturer is liable only if the harm is caused by the seller's negligence, for breach of an express warranty of the seller or the intentional misrepresentation or concealment of information about the product by the seller. Strict liability may be imposed upon non-manufacturing sellers only where the manufacturer is insolvent or cannot be brought under jurisdication of the court or is a controlled subsidiary of the manufacturer or the product was marketed under the trade or brand name of the non-manufacturing seller or where the non-manufacturing seller provided plans and specifications which were the proximate cause of the injury.

REPOSE PROVISION

Utilization of a product beyond its useful safe life is a defense. It is a rebuttable presumption that the useful safe life has expired more than 12 years after delivery of the product.

EVIDENCE-INDUSTRY CUSTOM AND STANDARDS

Evidence of industry custom, technological feasibility or the compliance or non-compliance with non-governmental standards can be introduced by either party.

COMPLIANCE WITH GOVERNMENTAL STANDARDS

Compliance with mandatory governmental contract specifications is an absolute defense.

RESPONSIBILITY OF MANUFACTURERS DUTY TO WARN - DESIGN CASES

Design defects and duty to warn cases may not be brought under the strict liability in tort theory and must be brought under negligence theories. Construction defects and breach of warranty, express or implied, may utilize a strict liability theory based on a determination of the not reasonably safe aspect of the products.

CONTRIBUTORY FAULT

Contributory fault proportionately diminishes a claimant's compensatory damages but does not absolutely bar recovery. Existing law dealing with a defense of contributory negligence was repealed.

STATES

WITH WHOLESALER-DISTRIBUTOR PRODUCT LIABILITY TASK FORCES

*ALABAMA

*ARIZONA

*ARKANSAS

*CALIFORNIA

*COLORADO

*CONNECTICUT

*FLORIDA

*GEORGIA

**ILLINOIS

*INDIANA

IOWA

*KANSAS

MARYLAND

MASSACHUSETTS

*MICHIGAN

**MINNESOTA

MISSISSIPPI

MISSOURI

*NEBRASKA

NEW JERSEY

NEW YORK

*NORTH CAROLINA

*NORTH DAKOTA

*OHIO

*OREGON

PENNSYLVANIA

SOUTH CAROLINA

**SOUTH DAKOTA

*TENNESSEE

TEXAS

VIRGINIA

*WASHINGTON

WISCONSIN

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* Enacted product liability legislation.

** Has enacted its second product liability reform measure.

NOTE: Idaho, Kentucky, Louisiana, Nevada, New Hampshire, Rhode Island and Utah have enacted product liability legislation without wholesaler-distributor task forces, but with strong assistance from wholesaler-distributors.

Product
Federal

Victor E. Schwartz

On October 15, 1981, Staff Working Draft No. 1 was introduced for public comment by the Consumer Subcommittee staff of the U.S. Senate Commerce Committee. The draft attempts to bring uniformity into most major areas of product liability tort law.

Sen. Robert Kasten, who asked the staff to prepare the draft, said:

> The need to stabilize this area of law is clearly evident. Conflicting product liability rules have made it extraordinarily difficult for consumers to know their rights and for product sellers to know their obligations. This has created extensive and burdensome legal costs which are passed on to consumers. The uncertainty has also created instability in the insurance market, which has been subject to sharp swings in cost.

Kasten also recognized that:

> Federal product liability legislation is needed to bring uniformity and certainty to the law and to stabilize what has become a serious burden on interstate commerce.

The staff draft calls for the minimum amount of federal action necessary to bring about uniformity. It calls for no new federal office, no federal expenditures and no expansion of the federal courts. (See Staff Working Draft No. 1 Section 3 (d).)

Need for certainty

A federal interagency task force on product liability and every state task force that has studied the subject have identified uncertainty in the tort litigation system as one of the basic causes of problems that have arisen in the product liability field. These include sharp swings in insurance costs, disincentives toward product innovation and sharply rising costs in resolving product liability disputes.[1]

To address the growing uncertainties in the tort litigation system, the Department of Commerce recommended that a model product liability law be drafted with a presumption that it would be enacted at the federal level. See 43 Fed. Reg. 14624 (April 6, 1978). A draft law was prepared and offered for public comment. 44 Fed. Reg. 29996 (January 12, 1979). A final version, based in part on that comment, was published in October, 1979. 44 Fed. Reg. 62714 (October 31, 1979).

At that time, the Carter administration decided to offer the model law as a basis for state action. There were three reasons behind this decision. First, in general, the development of tort law has been traditionally left to the states. Second, it was thought that the states should be given time to adopt uniform product liability law on their own. Third, it was thought

(Continued on page 9)

Liability: Legislation?

NO!

James D. Ghiardi

The current mood of the country reflects the desire for government action by local and state units. "Get the feds out" appears to be the call of the 1980s. Disillusionment with Washington solutions is prevalent, particularly in the business community. Therefore, it is completely incomprehensible that a segment of the business community is looking to the federal government for relief in the area of product liability.

Product liability is being touted as a national problem that demands a national solution. This Alice in Wonderland approach by "big" business and trade associations is utopian at best. Since when can Washington provide a solution that is fair and equitable to the majority of citizens in the 50 states? Washington's "wonder cures," epitomized by the Employee Retirement Income Security Act (ERISA),[1] Black Lung Legislation,[2] the Occupational Safety and Health Administration (OSHA),[3] and the Consumer Product Safety Commission,[4] to mention only a few, depict a dismal record of success.

For more than a decade, Congress struggled with legislation intended to usurp the power of the states over automobile liability issues. Millions of dollars were spent, millions of pages of testimony were recorded, but the burning liability issue of the late 1960s was allowed eventually to become dormant and left to the states. The states have handled the issue of automobile liability in many ways, some by legislation, others by common law. No one solution was determined to be the best. Each state has been able to deal fairly with the problem in the best interest of its citizens and no calamity has fallen on the land because the "tablets" were not delivered from "on high"—the federal government.

The federal government has performed a valuable service by promulgating a model product liability act[5] and adopting legislation allowing manufacturers to self-insure.[6] However, federal legislation that would usurp the legislation and common law of the states is unwarranted and unwise. It would merely create an absolute legal morass for American business and consumers.

The development of tort law has traditionally been an area reserved exclusively to the states. Any reform required in the tort law of products should occur at the state level. Each state should be allowed to develop the law to meet its own particular concerns and problems.

Uniformity and certainty

Supporters of a federal product law base their argument on the lack of consistency among the various state

approaches to product liability law. But the basic premise that a federal law will bring stability to the area is unfounded. On the contrary, such legislation would create more inconsistency and uncertainty than now exists. The imposition of a federal product law would create uncertainty in jurisdictions that now have stable and well-developed product law.

Constitutionality

One factor in the application of a federal law that would create instability is the inevitable litigation over its constitutionality. There would be nationwide constitutional challenges to both the legislation as a whole and to particular provisions.

Because of the unprecedented withdrawal of a state's power to develop its own tort law there would be numerous challenges to the power of the federal government to legislate tort law for the states. Such an invasion of state sovereignty raises serious separation of powers questions. Further, an equal protection issue is raised as to any constitutionally valid rationale for the preemption of only a part of state tort law while leaving the rest intact.

Constitutional challenges also would be made to the validity of particular provisions of a federal product liability statute. A good example is the statute of repose that is part of the present Senate working draft of a federal product liability statute.[7] Statutes of repose already are constitutionally questionable at the state level.[8] To impose a national statute of repose applicable to all product actions would be met with serious and constant challenge.

This inevitable constitutional litigation would result in uncertainty as to whether the federal legislation would apply to a given jurisdiction. Courts finding all or part of the statute to be unconstitutional would then resort back to state law. An anomalous situation would develop in that some jurisdictions would be relying on federal law while others would continue to apply state product law. It would be years before the constitutionality of the law would be decisively determined by the U.S. Supreme Court. Further, if the legislation, or parts of it, were found to be unconstitutional, courts would be required to retrieve their state law after years of litigation under the federal law.

Judicial interpretation

Another factor that would defeat the goal of uniformity is the differing judicial interpretations that would be given to the same statutory language.

The draft now being considered by the Senate gives jurisdiction over this "federal" law to the state courts.[9] It is not unlikely that such a situation would result in 50 different interpretations of the same provision by 50 different state courts. Each state would develop its own unique interpretation of the law with the bare statutory language as the only common factor. Thousands of trial courts, hundreds of intermediate appellate courts and, finally, the 50 highest appellate courts would struggle with interpreting the less than precise federal legislation developed through the less than artful legislative process.

A related problem would be the varying treatment of areas not covered by the statute. It is impossible to codify product law to deal with every situation that gives rise to litigation. The question becomes how the state courts are to fill in gaps in the legislation. Because it does not appear to be constitutionally permissible to make decisions of one state court binding on a court in a different state, it is assumed that each jurisdiction would follow existing law or create new law to fill in the holes. It is clear that inconsistency would result from such a patchwork of state court decisions.

The result of this state implementation of "federal" law would be even greater instability in the law than now exists. Despite the present diversity in product law, each jurisdiction has its own body of law that can be identified and used to predict the law under new situations. However, a federal statute would require the wholesale junking of this law without any prior evaluation of its effectiveness. The courts in each state would be writing on a clean slate with only bare statutory language as a common factor. Any predictability and stability that had been established previously would be destroyed and replaced with a federal law of very uncertain application. Federal legislation, in an area reserved to the states, would result in a tremendous waste of court time relitigating issues previously settled in the particular jurisdiction at a horrendous cost to the consuming public in both dollars and uncertainty.

Rather than curbing judicial activism, heralded as the cause of many of the problems in product law, the judiciary would no longer be constrained in any way by established precedent, but would be free to decide the law on the basis of the "length of the chancellor's foot." It is readily apparent that it would be even more difficult for manufacturers and consumers to determine their respective rights and responsibilities. Rather than bringing stability to the law, such a statute would foster even greater unpredictability and inconsistency.

The same problems would exist if the already overburdened federal courts were given jurisdiction over cases falling within the purview of the statute. Different circuits would disagree on the meaning and application of any particular provision. Unless and until the Supreme Court decisively interpreted each provision there would be no consistency in the law. While it is clearly undesirable to inundate the Supreme Court with product litigation, without one court having the final word as to the interpretation of such a statute any degree of uniformity is clearly unattainable.

Further, the federal courts also would have the same problems as the state courts in filling in the areas not addressed by the legislation. Should they apply state law, under the Erie

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doctrine,[10] that would have applied in the absence of federal preemption, should they look to decisions of other federal courts or should they create an entirely new federal tort law?

It is clear that the uniformity and stability that a federal law would create is more myth than reality.

What road to take?

Even if a federal law could establish the desired uniformity, how is it to be determined which single system will be the most effective in accomplishing the needed reform? A federal product law would require important policy decisions to be made at a national level ignoring very real distinctions between the states. Those decisions would clearly impinge on areas of particular state concern and expertise. Many policy issues arise, but this article deals with only a few.

Comparative negligence

A good example is the inclusion in the Senate working draft of a "pure" comparative negligence section.[11] A number of jurisdictions still adhere to the rule that contributory negligence on the part of a person seeking recovery in tort actions completely bars recovery.[12] Other states have adopted, either legislatively or judicially, a modified form of comparative negligence.[13] There are good arguments for each approach based on each state's local needs. But the proposed law would require all jurisdictions to allow a plaintiff who is found to be 99 percent negligent to recover against a defendant who is only 1 percent negligent. This is contrary to the position taken in a majority of jurisdictions.[14] The determination of whether to abolish or modify contributory negligence as a defense in a tort action is a matter of local concern and policy.

Further, the statute does not deal with the many issues that are intricately related to the operation of a comparative negligence statute. States applying some form of comparative negligence have spent years interpreting and refining their comparative negligence law as an integral part of their tort law. Each state has different rules as to joinder, defenses, releases, settlements, setoffs, contribution and indemnity. The problems that arise in multiparty suits when comparative negligence is applied cannot possibly be dealt with on a national level.

In March, TIPS Chairman-Elect Ernest Sevier stated the position of the section and the ABA in opposition to federal legislation in the product liability field during testimony before the Senate Consumer Subcommittee. The subcommittee is considering a draft of such legislation.

The federal government has neither the power nor the ability to override the individual wisdom of each state in determining whether comparative negligence, or what form of it, should be part of its tort system.

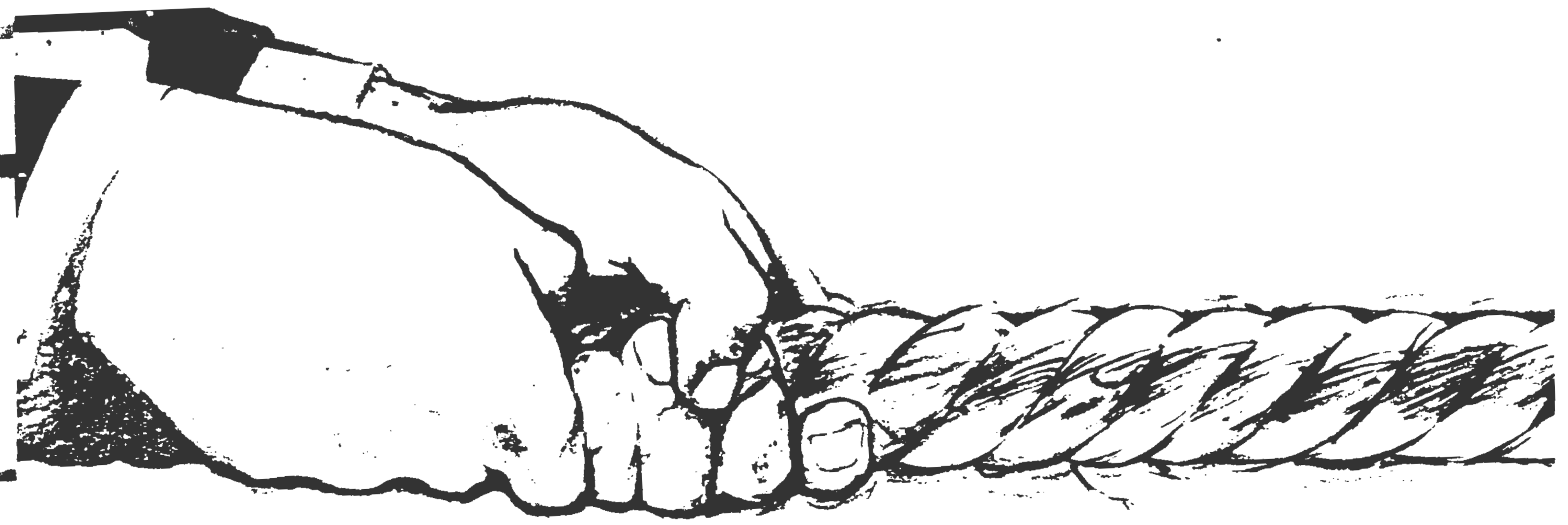
Another area of special local concern is the imposition of punitive damages in product liability action. Many states have recently come to grips with this issue and reached different conclusions.[15] Whether punitive damages are to be allowed in product cases or any other civil action is a matter of state policy. It is an unwarranted invasion of state autonomy to legislate for or against punitive damages on a federal level.

The form of statute of limitations to be applied in product cases is also an area best left to the states. The Senate draft contains a national statute of limitations which includes both a statute of repose and a discovery rule.[16] The states have taken very different approaches to such statutes. It is inappropriate for the federal government to legislate a national statute of limitations.

A dual system

Another problem posed by federal product legislation is the creation of a dual tort system in the states. The states would be required to apply a federal statute in product actions while applying state law in other tort actions. Litigants in various tort actions would be treated differently based on policy decisions made in Washington. In a jurisdiction which does not apply comparative negligence, litigants in a negligence action involving a product would be subject to comparative fault apportionment, while litigants in all other negligence actions would be subject to the contributory negligence defense.

The adoption of federal product legislation would also result in the application of a dual set of tort rules in the same action in many cases. An example is an automobile accident in



which the plaintiff joins both the negligent driver and the manufacturer of the allegedly defective product. Different rules, such as the limitations period, the availability of punitive damages and contributory negligence would be applied in the same action. One defendant would be subject to the federal comparative negligence statute while the other defendant may have the benefit of a contributory negligence defense.

The impracticality and inequity of such a situation is obvious. If a dual system is required to establish stable product law, it should be done at the state level, where the practical, procedural and evidentiary issues can also be considered.

A national legal nightmare?

Federal product liability legislation would create more uncertainty and inconsistency than now exists. Any reform needed in product liability law should be dealt with at the state level. Twenty-six states have enacted some form of product liability legislation[17] and many others have bills pending in their legislatures. Other states have highly developed and entrenched product liability common law. These legislative and judicial decisions reflect the political, social, economic and geographical realities in each state.

It is inappropriate for the federal government to intervene in the face of these state reform attempts. The states have traditionally been, and should continue to be, laboratories for innovation and experimentation. The best reform can be accomplished by allowing the states to draw from the experience of other states and adopt product law to meet their own needs. They can readily reform their law as needed. Federal law would ignore the real distinctions that exist between the states and could create a national legal nightmare not readily changed or reformed.

All the states do not encounter the same product liability law problems. While federal law may affect needed reform in one state, it would destroy a system that is working well in another state. Each individual legislature and judiciary is in a better position to judge the problems that exist in its own state and develop laws which solve those problems while retaining the best parts of existing law.

Responsible reform on a state-by-state basis would allow action based on real experience and local concerns, rather than speculation at the federal level. Federal product legislation is an inappropriate and unwarranted invasion of state power, denying the states the opportunity to develop product law that best meets the economic and legal needs of their own citizens.

FOOTNOTES

1. Employee Retirement Income Security Act, 29 U.S.C. § 1001 (1974).
2. Coal Mine Health and Safety Act, 30 U.S.C. § 801 (1966).
3. Occupational Safety and Health Act, 29 U.S.C. § 651 (1970).
4. 15 U.S.C. § 2053 (1972).
5. Model Uniform Product Liability Act, 44 Fed. Reg. 62, 714 (1979).
6. Product Liability Risk Retention Act, 15 U.S.C. § 3901 (1981).
7. S. 97-112, 97th Cong., 1st Sess. § 10 (1981).
8. *Compare* Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671, PROD. LIAB. REP. (CCH) ¶ 8935 (Fla. 1981) (Florida's twelve year statute of repose for all product liability actions violates the Florida Constitution's guaranty of access to the courts); Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874, PROD. LIAB. REP. (CCH) ¶ 8862 (Fla. 1980), with Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 54 Ill. Dec. 657, 425 N.E.2d 522 (1981) (Ten-year statute of repose did not violate the "certain remedy" clause of the Illinois Constitution).
9. S. 97-112, *supra* note 7, § 3(e).
10. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).
11. S. 97-112, *supra* note 7, § 7.
12. *E.g.*, Nelms v. Allied Mills Co., 387 So.2d 152 (Ala. 1980); Marean v. Petersen, 259 Iowa 557, 144 N.W.2d 906 (1966); Miller v. Mullenix, 176 A.2d 203, 227 Md. 229 (1962); Walsh v. Southtown Motors Co., 445 S.W.2d 342 (Mo. 1969).
13. *E.g.*, ARK. STATS. ANN. § 27-1765 (1979); COLO. REV. STATS. ANN. § 13-21-111 (1973); HAWAII REV. STATS. § 663-31 (1976); OHIO REV. CODE § 2315.19 (1981); OKLA. STATS. tit. 23 § 2315.19 (1979); WIS. STATS. § 895.045 (1979). *See also* C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE MANUAL, App. II (rev. ed. 1978 & Supp. 1981); V. SCHWARTZ, COMPARATIVE NEGLIGENCE, (1974 & Supp. 1981).
14. Only 11 states have adopted "pure" comparative negligence. *E.g.*, Kaatz v. State, 540 P.2d 1037, (Alaska 1975); Li v. Yellow Cab Co. of California, 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); MISS. CODE ANN. § 11-7-15 (1972); N.Y. CIV. PRAC. LAW § 1411 (1976). *See also* C. HEFT & C. HEFT, *supra* note 13; V. SCHWARTZ, *supra* note 13, at § 3.2.
15. *See generally* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES—LAW AND PRACTICE, §§ 6.01-6.38 (1981).
16. S. 97-112, *supra* note 7.
17. *See* 2 PROD. LIAB. REP. (CCH) ¶ 90,000.

YES!

(Continued from page 4)

appropriate for the federal government to first address the insurance aspect of the product liability problem, primarily overly subjective insurance rates.

State actions

In the past six years, 22 states have enacted some form of product liability statute. The overwhelming majority of these statutes only provide for defenses of some type, primarily statutes of repose. They do not outline the basics of product liability claims or deal with most key issues in the field.

As Secretary of Commerce Malcolm Baldridge has noted, state action has not reduced uncertainties. He observed that "no two laws are the same" and expressed doubt that states that already have enacted laws "will consider additional product liability legislation in the near future."

Meanwhile, state courts have moved in a multiplicity of directions on fundamental issues of product liability law. For example, they have sharply differing views on whether a plaintiff must show the defendant manufactured the product in question.[2] States disagree on whether claimants may introduce evidence of postmanufacture improvements in product safety to establish that the product in question was defective.[3] They also disagree on whether product sellers may use tort law (as compared to commercial law) for proving a harm that is purely economic in nature.[4] Apart from any question of whether these decisions are just, they have aggravated a basic cause of the product liability problem.

This helter-skelter state action is at total counterpoint to the method in which insurance rates and premiums are set. Product liability insurance rates are set on a nationwide basis. This contrasts sharply with the manner in which liability rates are set in other areas, such as medical malpractice and automobiles. Those rates may be set on a state-by-state basis because meaningful data can be derived from experience in individual states. This is not true with products. A product may be manufactured in state *A*, distributed through state *B* and used in state *C*.

The result is that an individual state cannot address the product liability problem in a meaningful way. Even if a state enacted a well-developed product liability law, it would make little difference in resolving the problem. This fact has been noted by governors in a number of states when they have vetoed product liability tort bills.

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Limited federal action

A product liability law developed in accordance with the limited federal action outlined in the Staff Working Draft No. 1 will bring predictability and stability to the product liability process and help stabilize product liability insurance rates. It will allow consumers to know their rights. It also will give product sellers assurance of "what the rules are," which would encourage research, development and innovation in product manufacturing.

Uniform standards also will expedite the reparations process and reduce legal costs. At present, the American Insurance Association estimates that, for every 66 cents a victim receives, 77 cents is spent in legal costs. A significant percentage of those legal costs is involved in continued litigation to determine exactly "what the law is."

Arguments against federal action

The Carter administration's decision that federal action on product liability should first address the problem of overly subjective insurance rate making was a sound one because public policy makers should be assured that savings fostered by federal product liability law will be passed along to product sellers and consumers. This assurance has been provided by passage of the Risk Retention Act. (Public Law 97-45, 97th Cong., 1st Sess.) The Risk Retention Act provides a ready means for product sellers to form their own insurance groups and puts in place a competitive mechanism assuring that commercial product liability insurance rates are set on a fair and reasonable basis.

The Carter administration also believed that the states should be given time to establish uniform product liability law on their own. Unfortunately, the passage of time has brought about the opposite result. Product liability law in the United States is considerably more uncertain and uneven than it was when the federal interagency task force completed its work in 1977.

It has also been argued that a federal tort law would not produce stability in the system because courts and juries would continue to resolve important questions affecting the outcome of a case, such as evidentiary and damage questions and the application of "reasonableness" standards.

Although some uncertainties would remain in the system even under the uniform federal law, this does not argue against enactment of any federal product liability law. A bill drafted with care to avoid confusion would go far to improve the present climate of almost total uncertainty. It would reduce legal and litigation costs. The fact that uncertainty cannot be eliminated entirely does not suggest that the problem should not be addressed in its most effective way.

Another argument is that federal legislation may create difficulties in meshing with state tort law rules in other areas, such as automobile liability. These concerns can be met in the drafting of the federal law. First, as the staff draft indicates, the law can focus almost exclusively on product liability problems. Second, as the staff

Robert Kasten (R-Wisconsin) is chairman of the Senate Commerce Committee's Consumer Subcommittee, which is considering a working draft of a proposed bill to apply uniform federal rules to product liability suits in state courts.

draft also suggests, the law can avoid entering procedural areas best left to state controls. Under these two guidelines, a federal tort law could mesh well with state law. Evidence that this can be done is that it has already happened under the Federal Employer's Liability Act, enacted in 1909.

Fairness and balance

It has also been argued that a federal law would somehow contain a proindustry or proconsumer bias. To the contrary, Congress offers the best forum to develop a fair and balanced bill.

The work of the federal task force, the hearings held by the House of Representatives in the 96th Congress, the work of the entire Congress on the Risk Retention Act and the recently issued Senate Commerce Consumer Subcommittee staff draft present a strong background for sound congressional action. All interested groups would have an opportunity to be heard, and it is highly unlikely that the legislation would be captured by one group or another. The federal effort could also build on both the virtues and mistakes that have occurred in the 22 states that have enacted some form of legislation.

Finally, it has been argued that it is simply inappropriate for the federal government to enter an area that has traditionally been resolved by the states. This was also a concern when the Uniform Product Liability Act was first drafted. However, blind adherence to this argument ignores both the dire need for a solution to the product liability problem and the inability or reluctance of the states to develop that solution. It also ignores traditional areas in which national uniform standards have been in the interest of promoting and facilitating interstate commerce and were adopted by the U.S. Congress.

Federal action precedents

There are ample precedents in federal action based on the fact that diverse and changing state laws adversely affect interstate commerce. The need for nationwide uniformity preempted state efforts to mandate maximum train lengths[5] and even mudguards on trucks.[6] Although federal legislation was not enacted to establish national standards, the Supreme Court found that an individual state could not impose unique requirements on vehicles entering its borders. The requirements, which would have been economically burdensome or wasteful or which would have forced vehicles to circumvent the state, were impediments to the free flow of commerce.

The adverse effects of individual, nonuniform requirements in the area of transportation are easy to understand, and the rationale has prompted federal legislation in a number of other areas. For example, the Cotton Standards Act, 7 U.S.C. Sections 51 *et seq.*, and the Grain Standards Act, 7 U.S.C. Sections 71 *et seq.*, require compliance with uniform national classifications. The standards are designed to protect and promote commerce in the interest of producers, merchandisers, warehousers, processors and consumers to ensure that the products are marketed in an orderly and timely manner and to facilitate trading. 7 U.S.C. Section 74. The Tobacco Inspection Act, 7 U.S.C. Sections 511 *et seq.*, recognized the purpose and effect of uniform standards of classification and inspection as imperative to interstate commerce. Congress noted that without uniform standards, evaluation of tobacco was susceptible to speculation, manipulation and control causing unreasonable fluctuations in prices which were detrimental to producers and, ultimately, consumers. 7 U.S.C. Section 511a.

In the investment market area, the adverse or ineffective impact of varying state laws prompted the enactment of uniform federal standards. For example, in enacting the Public Utility Holding Company Act, 15 U.S.C. Sections 79a *et seq.*, Congress noted that the activities involved, extending over many states, were "not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public utility companies." 15 U.S.C. Section 79a(a). The act was designed to promote, among other things, the proper functioning of public utility holding company activities. 15 U.S.C. Section 79a(c). The Investment Company Act, 15 U.S.C. Sections 80a-1 *et seq.*, similarly noted that the activities in question extended over many states and that the wide geographic distribution of security holders made "difficult, if not impossible, effective State regulation." 15 U.S.C. Section 80a-1(a)(5).

Further, the Consumer Product Safety Act, 15 U.S.C. Sections 2051 *et seq.*, was enacted "to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations" because control by those governments was recognized as "inadequate" and "burdensome to manufacturers." 15 U.S.C. Section 2051. Similarly, the Cigarette Labeling and Advertising Act, 15 U.S.C. Sections 1331 *et seq.*, recognized that national standards were essential in order that "commerce and the national economy . . . (not be) impeded by diverse, nonuniform, confusing cigarette labeling and advertising regulations." 15 U.S.C. Section 1331(2).

The same findings that prompted federal action in these areas apply to a federal product liability tort act. Uniformity in the tort litigation system is necessary first, to facilitate trading and commerce (Cotton Standards Acts and Grain Standards Act

discussion); second, to prevent speculation and unreasonable fluctuations in product liability insurance rates that are detrimental to both product sellers and consumers (Tobacco Inspection Act discussion); third, to address, as states cannot effectively do, an interstate problem involving a nationwide market of product manufacturers, sellers, and users (Public Utility Holding Company Act and Investment Company Act discussion); and fourth, to assure that interstate commerce is not impeded by confusing, diverse or burdensome requirements (Consumer Product Safety Act and Cigarette Labeling and Advertising Act discussion).

Federal tort reform legislation not unique

The fact that the federal action at issue here affects product liability tort law does not diminish these valid considerations. Federal tort reform legislation is not unique. There are a number of federal workmen's compensation statutes that were enacted to provide benefits in areas where state law was deemed inadequate. *E.g.*, 5 U.S.C. Sections 8191 *et seq.* (providing compensation benefits for non-federal law enforcement officers); 30 U.S.C. Sections 901 *et seq.* (providing compensation for black lung victims). The tort act called for here, however, is distinguishable from those compensation schemes in that it would require no additional federal bureaucracy and no federal monies.

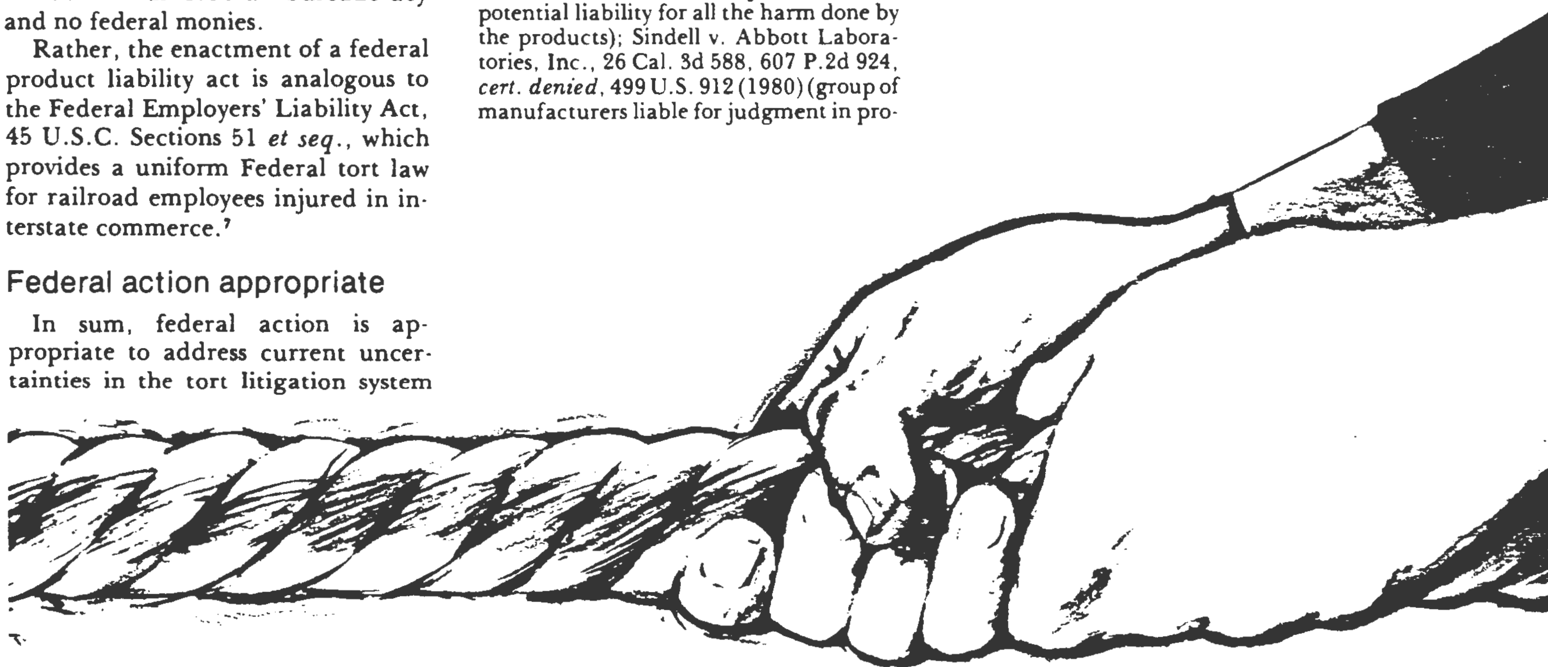
Rather, the enactment of a federal product liability act is analogous to the Federal Employers' Liability Act, 45 U.S.C. Sections 51 *et seq.*, which provides a uniform Federal tort law for railroad employees injured in interstate commerce.[7]

Federal action appropriate

In sum, federal action is appropriate to address current uncertainties in the tort litigation system and to remedy the adverse impact of those uncertainties on interstate commerce. Individual states cannot effectively address the nationwide problem. There are precedents for enacting a federal uniform law and for modifying tort concepts. Limited federal action along the lines of the Senate Consumer Subcommittee staff draft would address the most serious aspects of the product liability problem and will be of benefit to both business and consumers.

FOOTNOTES

1. Shortly after the final report was issued, the Department of Commerce, which had chaired the federal task force, prepared an options paper on what action, if any, the federal government should take to address this problem. *See* 43 Fed. Reg. 14612 (April 6, 1978). *See also* 43 Fed. Reg. 40438 (September 11, 1978) (Synthesis of Public Comment).
2. The traditional view requires a plaintiff to prove that the defendant manufacturer caused the harm. *E.g.*, Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D. S.C. 1981); Namm v. Charles E. Frosst and Co., 178 N.J. Super. 19247 A.2d 1121 (1981). Some courts have departed from this view. *E.g.*, Hall v. E.I. DuPont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) (shifting to group of defendants the burden of proving causation); Bichler v. Eli Lilly & Co., 436 N.Y. 2d 625, 2 Prod. L. Rptr. ¶ 8885 (1981) (plaintiff's proof that product sellers acted in "conscious parallelism" by marketing the same product at the same time subjected each to potential liability for all the harm done by the products); Sindell v. Abbott Laboratories, Inc., 26 Cal. 3d 588, 607 P.2d 924, *cert. denied*, 499 U.S. 912 (1980) (group of manufacturers liable for judgment in proportion to their respective shares of the market).
3. Traditionally, the courts applied Rule 407, Fed. R. Evid., and excluded evidence of product improvements. *E.g.*, Knight v. Otis Elevator Co., 596 F.2d 84 (3d Cir. 1979); Roy v. Star Cooper Inc., 584 F.2d 1124 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979). Some courts have rejected this rule. *E.g.*, Abel v. J.C. Penney Co., 488 F. Supp. 891 (D. Minn. 1980); Schuldies v. Service Machine Co. Inc., 448 F. Supp. 1196 (E.D. Wis. 1978); Caprara v. Chrysler Corp., 423 N.Y.S. 694, *aff'd*, 52 N.Y.2d 114, 417 N.E.2d 545 (1981).
4. States are fairly evenly divided on whether purely economic losses are recoverable under a tort theory. *Compare* Schiavonne Constr. Co. v. Elgood Mayo Corp., 2 Prod. L. Rptr. ¶ 8981 (N.Y. App. Div. 1981); Berg v. General Motors Corp., 87 Wash. 2d 584, 555 P.2d 818 (1976); LaCrosse v. Schubert, Schroeder & Assoc., 72 Wisc. 2d 38, 240 N.W.2d 124 (1976); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), with Jones & Laughlin Steel Corp. v. Johns-Mansville Sales Corp., 626 F.2d 280 (3d Cir. 1980) (applying Illinois law); Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 496 F.2d 712 (M.D. Pa. 1980); Mead Corp. v. Allendale Mut. Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979); Henderson v. General Motors Corp., 152 Ga. App. 63, 262 S.E.2d 338 (1979); Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145 (1965).
5. Southern Pacific Co. v. Arizona. 325 U.S. 761 (1945).
6. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).
7. *See also* 46 U.S.C. § 688 (conferring on seamen the same rights as apply to railway employees).



The Business Roundtable

PRODUCT LIABILITY REFORM LEGISLATION

RECOMMENDATIONS OF

THE BUSINESS ROUNDTABLE

February, 1982

Introduction

In recent years product liability has become a national problem. Damage awards and the expansion of the concept of strict liability (liability without fault) by the courts have contributed to higher insurance rates and increased product costs to manufacturers and consumers.

At the same time, the wide variation among state product liability laws and court decisions limits the ability of manufacturers to design and distribute products for nationwide sale. This restraint is detrimental to manufacturers, product sellers, workers, and consumers. Manufacturers and their insurers are unable to predict potential liability and, in many cases, are actually discouraged from improving their products. Workers and consumers not only must ultimately pay the cost of product liability judgments but also are faced with such wide differences in policy among state laws that their ability to recover legitimate damages is impeded.

Finally, in some states, manufacturers may be found responsible for injuries from a product even when the injured consumer or worker misused the product or an employer modified it. And this responsibility can go on for ever, as long as the product is in existence.

Recognizing that the system was out of hand, the Department of Commerce under President Carter issued a model product liability law for adoption by the states. Unfortunately, no state has adopted the model law. If anything, variations among states have become greater.

The business community believes the time has come to address the legitimate concerns of companies and consumers alike by adopting a single, uniform product liability law.

Principles of Federal Legislation

Fairness, among all states and parties, must be the guiding principle of a Federal product liability statute. To achieve equity, the Business Roundtable believes legislation must address the following issues:

I. Product Design

If a product is designed with reasonable care for a specific use and is designed in accordance with generally accepted technology, the manufacturer should not be required to do more. On the other hand, if a manufacturer is negligent, the claimant should recover damages from the manufacturer.

II. Commercial Loss

In some states, the difference between personal injury and commercial loss actions has been seriously eroded. Product liability has been expanded to encompass commercial lawsuits traditionally governed by the Uniform Commercial Code and contract law. Commercial transactions should be governed by traditional commercial rules developed to reflect commercial expectation.

III. Time Limits on Liability

Several states have adopted so-called statutes of repose, which limit the period of time during which an action can be brought after the product sale. Such time limits are founded on the premise that at some point in time a manufacturer's liability must end.

Statutes of repose correctly acknowledge that defective conditions in most products do not lie dormant for decades suddenly to appear and cause harm. Product liability law should include such a repose statute. The period of time should be long enough to assure the consumer adequate protection and to provide manufacturers with a degree of certainty.

IV. Government Standards

To protect the health and safety of consumers and workers, Congress has mandated the development of safety standards for a wide range of products. Failure of a manufacturer to comply with such standards may be used to prove a manufacturer's negligence. Therefore, it is only fair that manufacturers who comply with government standards be able to claim compliance as a defense in product liability actions.

V. Identification of The Manufacturer

Product liability reform legislation should include a requirement that an injured party prove the identity of the manufacturer of the product that actually caused the injury.

For centuries a claimant could not recover damages without proof that the defendant's conduct actually caused the harm. Recently, however, some courts have rejected this rule where a claimant could not identify the manufacturer of the product that caused an injury. This change has shifted the burden of proof to each manufacturer of a similar product to prove its product was not the cause. The result is that all manufacturers of similar products may be held liable, regardless of which was actually responsible. This forces all members of an industry to assume liability for a product made by any one of its members.

VI. <u>Comparative Responsibility</u>

Frequently, injury from a product may actually have several causes. For example, a person who misuses or alters a product may be responsible to some degree for his own or someone else's injury. Any product liability reform legislation should permit the allocation of liability among all responsible parties. To require manufacturers to absorb the cost of someone else's carelessness creates an inequitable financial burden, a burden which the manufacturer must pass on to the consumer in the form of higher prices on future products.

VII. <u>Alteration and Misuse</u>

The user of a product must assume responsibility for reading and following the instructions and warnings provided by the manufacturer or seller.

Also, a distinction should be made between product hazards that are obvious to anyone and those that are known only to those people ordinarily expected to use the product. For example, many products are intended to be used only by people who are trained and experienced in their jobs. Many hazards of such products are so obvious to trained workers that warnings are not needed. On the other hand, if such products were sold to ordinary consumers, warnings would be both necessary and appropriate.

VIII. <u>Distribution and Sale</u>

One of the principal concepts of product liability reform should be to match liability with responsibility. Thus, only those in the chain of distribution who have contributed to a claimant's injury should be exposed to liability. If, for example, a product seller has participated in the design of a product in a way that contributed to an injury, the seller should be included as a responsible party. However, a seller who has in no way participated in the design or manufacture of a product and who has not altered the product after its manufacture should not be exposed to liability. Similarly, a manufacturer should not be responsible for breach of a warranty made by a product seller.

IX. <u>Relationship To Workers' Compensation</u>

Normally, if an injured worker recovers damages from the manufacturer of a product that caused the injury, the worker is required to pay back benefits he may have

received under his employer's workers' compensation plan. This pay-back process known as "subrogation" simply has the effect of increasing the cost of litigation, the size of product liability awards and settlements without benefiting the injured worker. Subrogation in such situations should be eliminated. Injured workers would receive the same total compensation as before; insurance companies would be spared the legal cost of recovering previously paid benefits; there would be no appreciable loss to the employer.

X. Expert Witnesses

Frequently, in product liability actions, the testimony of expert witnesses is vitally important in establishing a case or providing a defense, even though the testimony about scientific or technical matters may be merely an unsubstantiated personal opinion. Product liability reform legislation should address this issue by prohibiting a claimant from establishing a case merely by opinions which may be at variance with objective scientific or technical knowledge on the subject.

XI. Product Improvements

Clearly, as a matter of national policy, manufacturers should be encouraged to improve product designs and to advance the state of the art in order to reduce the potential for injury. Therefore, it would be illogical and contrary to the consumers' interest, if

future product improvements could be used to prove that past products were unsafe. Evidence could still be offered that a product did not conform to technology available at the time of manufacture, but evidence of product improvements should not be considered in determining liability for earlier designs.

XII. Punitive Damages

Punitive damages have become a major concern in product liability litigation and should be addressed in any attempt at product liability reform. Whereas compensatory awards are intended to reimburse the worker or consumer for any loss or harm caused by a product, punitive damages are intended to punish and make an example of a wrongdoer. Recently, however, the clear distinction between these two types of damages have become blurred, with claimants seeking punitive damages simply as a means for boosting compensatory damage awards.

Legislation addressing punitive damages in product liability should separate the imposition of punitive damages from the principal claim for compensation. Evaluation of conduct meriting punitive action should be based on flagrant indifference to product safety and extreme departure from accepted practice. Finally, there should be appropriate limits on the amount of punitive damages in single or multiple actions.

XIII. Legal Fees

The primary cost of product liability is generated by legal fees. According to one study,* for every dollar received by a claimant for personal injury, a total of $.92 is received by attorneys for the defendant and claimant. In major product liability litigation, the award of contingent fees of as much as 40% of multi-million dollar damage awards inequitably reduces compensation to the injured worker or consumer. Such legal fees also increase the cost of future products to the consumer. Limiting contingent fees to a maximum of 40% for small awards with a sliding scale to no more than 10% for awards in excess of one million dollars should be considered for inclusion in product liability reform legislation.

XIV. Collateral Estoppel

The rule of collateral estoppel tradionally is intended to prevent relitigation of matters between the same parties. Recently, some courts have broadened the rule to bar a defendant who has lost a case on one issue from raising the same issue as a defense in a subsequent case involving different parties. Ironically, the courts disregard the fact that the defendant may have won that

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*Extrapolated by the Business Roundtable from data contained in "Product Liability Closed Claims Survey," Insurance Services Office, 1977.

same issue in many previous cases. In short,, if a defendant loses on a given issue, that loss could be applied to all future cases; if the defendant wins, that victory is open to repeated challenge in future cases.

To restore balance between defendants and claimants, product liability reform legislation should include the traditional rule of collateral estoppel that only prevents relitigation of issues between the same parties.

Conclusion

The Business Roundtable believes that failure to take Federal action to resolve the dilemma of conflicting product liability law from state to state will create increasing problems that will be harmful to companies and consumers alike. There is a need for a comprehensive and balanced approach to solve the problem once and for all by enacting Federal product liability legislation.

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SUMMARY OF

PUBLIC COMMENT ON PRODUCT LIABILITY ACT STAFF WORKING DRAFT NO. 1 OF THE CONSUMER SUBCOMMITTEE, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

Prepared by

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COMMENTS SUMMARIZED

Allis-Chalmers Corporation
American Insurance Association
American Mining Congress
American Supply Association
American Textile Manufacturers Association (ATMI)
ASARCO Incorporated
Atlantic Wood Industries
Beloit Corporation
Bicycle Manufacturers Association of America (BMA)
Black & Decker
The Business Round Table (BRT)
Chemical Manufacturers Association (CMA)
Cincinnati Milacron, Inc.
Colt Industries, Inc.
Construction Industry Manufacturers Association (CIMA)
Consumer Federation of America
Conveyor Equipment Manufacturers Association
Cumberland Leesona Corporation
Fire Equipment Manufacturers' Association (FEMA)
Gas Appliance Manufacturers Association, Inc. (GAMA)
General Tire & Rubber Company
The Goodyear Tire & Rubber Company
Allen Greenberg, Public Citizen
Gulf Oil Corporation
Harris Corporation
Household International
International Telephone and Telegraph
Jervis B. Webb Company
JLG Industries, Inc.
Keene Corporation
Litton Industries, Inc.
Machinery and Allied Products Institute (MAPI)
Machinery Dealers National Association
The Material Handling Institute, Inc. (MHI)
Narco Scientific Corporation (NSC)
National Association of Independent Insurers (NAII)
The National Association of Insurance Brokers, INc. (NAIB)
National Association of Manufacturers (NAM)
National Presto Industries, Inc.
National Association of Wholesaler-Distributors (NAW)
National Federation of Independent Business
National Insulation Contractors Association
National Machine Tool Builders Association (NMTBA)
National Products Liability Council (NPLC)
National Solid Wastes Management Association
Outdoor Power Equipment Institute, Inc. (OPEI)
Pharmaceutical Manufacturers Association (PMA)
Reynolds Aluminum
Risk and Insurance Management Society, Inc. (RIMS)
Marshall S. Shapo, Northwestern School of Law
Specialty Equipment Market Association (SEMA)
The Society of the Plastics Industry, Inc. (SPI)
Snell & Wilmer
Special Committee for Workplace Product Liability Reform (WPLR)
Textron, Inc.
Westinghouse Electric Corporation
Malcom E. Wheeler, University of Kansas
Whirlpool Corporation

SECTION 2 DEFINITIONS

Section 2(1)

(1) "Claimant" means any person who brings a product liability action, and if such as action is brought through or on behalf of an estate, the term includes the claimant's parent or guardian;

Comments:

NICA would amend the provision to expressly provide that "claimant" includes product sellers and employers. The Owen draft would amend the definition so that "claimant" would be defined as "any person who claims to have suffered harm from a product and who asserts a product's liability action."

Section 2(2)

(2) "Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established;

Comments:

To make it clear that the Act requires more than "preponderance of the evidence," Professor Wheeler of the University of Kansas Law School would define "clear and convincing" as "evidence that does more than tip the balance in favor of the allegation sought to be established; evidence can be clear and convincing only if it produces in the mind of the trier of fact a firm belief

that the allegation sought to be established has been proved." Colt Industry and WPLR also believe that such an amendment is necessary.

Section 2(3)

(3) "commerce" means trade, traffic, commerce, or transportation (A) between a place in a State and any place outside of a State; or (B) which affects trade, commerce, or transportation described in clause (A);

Comments:

Professor Wheeler would delete the word "commerce" from the definition of "commerce," and suggests that the definition be amended as follows: "'commerce' means trade, traffic, or transportation (A) between a place in a state and any place outside of that state; or (B) that affects trade, traffic, or transportation described in clause (A)." The underlined material has been added to the proposed definition.

PMA would delete the first reference to "transportation" in the definition and amend the provision to deny a foreign plaintiff's cause of action under the bill. Clause (A) would read: "among the several states or any territory, or the District of Columbia or any insular possession or other place under the jurisdiction of the United States."

WPLR would include intrastate commerce in the definition, to clarify that the Act applies in all product liability actions, regardless of whether it involves interstate or intrastate commerce.

Section 2(4)

(4) "Express warranty" means any positive material: statement; affirmation of fact; promise; or description relating to a product, including any sample or model of a product;

Comments:

Black and Decker manufacturing company would limit "express warranty" to express statements made by the manufacturer and delete the clause "including any sample or model of the product" from the definition proposed in the staff draft. Cincinnati Milacron, suggests that the definition of "express warranty" should be narrowed to incude only "representations which would create reasonable reliance by another as to a material characteristic of the product."

IT&T would include samples, models, and statements, made by authorized representatives of the manufacturers.

Greenberg, of Public Citizen, would object to the above definitions. According to Greenberg, the Act should adopt a broader definition of express warranty."

express warranty." Greenberg suggests that the Act adopt the definition set out in U.C.C. Section 2-313 to prevent different interpretations of the same warranty depending on whether the plaintiff is suing in tort for personal injuries or contract for deficiencies in the product itself.

NPLC also recommends adopting the definition of express warranty provided in the U.C.C. because it is more precise and is familiar to the courts. Because the U.C.C. defines warranty as a statement which is "part of the basis of a bargain," the imprecise "materiality" reference in Sections 4(e) and 5(b) are unnecessary.

Section 2(5)

(5) "Harm" means (A) damage to property other than the product itself; (B) personal physical injury, illness, or death; or (C) mental anguish or emotional harm related to such personal physical injury, illness or death;

Comments:

1. Mental Anguish/Emotional Harm

Section 3(7) of the Owen draft would add a subsection (D) which provides as follows: "(D) mental anguish or emotional harm caused by the claimant's being placed in direct personal physical danger and manifested by a substantial objective symptom."

The Business Round Table would amend the definition of harm to include mental anguish or emotional harm only to the extent manifested by an objective symptom directly related to physical injury or illness. The National Association of Manufacturers, Black and Decker and Westinghouse Electric believe that such a definition is necessary to prevent spurious claims based on alleged mental reactions.

Professor Wheeler of the University of Kansas Law School believes that the staff draft's definition covering mental anguish or emotional harm is unclear as to the scope of recovery intended. Professor Wheeler, NAW, NPLC and Sturm, Ruger & Co. believe that the staff intended to foreclose actions based on harm suffered from having witnessed or been informed of the physical injury to a loved one. Professor Wheeler proposes that the definition be amended as follows: "mental anguish or emotional harm related to, and suffered by the same person who suffered, such physical injury, illness, or death."

PMA would amend Clause (C) to make explicit reference to the claimant's injury. The amended clause would read: "mental anguish or emotional harm <u>of the claimant resulting</u> from the claimant's personal physical injury <u>or</u> illness.

CMA would add a new subsection which limits the amount of non-pecuniary damages that a claimant can collect to $25,000 or twice the amount of the pecuniary damages, whichever is less, unless the claimant proves by a preponderance of the evidence that the product caused serious and permanent disfigurement, impairment of bodily function, pain, or mental illness.

2. Economic Injury

Narco Scientific Corporation would allow recovery of commercial loss caused by defective product by amending section 2(5)(A) by adding "including direct or consequential economic loss" to the end of the phrase. The National Association of Manufacturers, on the other hand, applauds the restriction against economic injuries but would also specify that "harm" does not include economic loss. NAW would exclude not only damage to the relevant product itself but also damage to its component parts. Section 3(7) of the Owen draft provides that "harm" "does not include commercial loss." Westinghouse supports this suggestion

3. Causation

SPI would delete phrase "related to" in the definition of "harm" and replace it with "caused by." According to SPI, causation should be the only basis for recovery in a products liability action.

Section 2(6)

(6) "Manufacturer" means (A) any person who is engaged in a business to design, produce, make, fabricate, construct, or remanufacture any product (or component part of a product); or (B) any product seller not described in clause (A) holding itself out as a manufacturer to the user of the product; except that any product seller who acts primarily as a wholesaler, distributor, or retailer of products may be a manufacturer with respect to a given product to the extent that such seller designs, produces, makes, fabricates, constructs, or remanufactures the product before its sale.

Comments:

Rather than using the customer's perception of who is the manufacturer be a determining factor, The Business Round Table suggests that "manufacturer" be limited to those that participate in a manufacturing process, for example, by providing specifications.

NAW also recommends striking consideration of the customer's perception of who the manufacturer is. In addition, NAW would exclude an independent product designer from the definition of "manufacturer" unless he both designs and constructs, produces, or makes a product.

Colt Industries would clarify the definition of "manufacturer" by adding the following: (1) a product seller will be deemed a manufacturer if it sells products under its own name or trademark; (2) one who merely assembles, services or prepares a product is not

deemed a manufacturer; (3) a wholesaler or retailer will only be deemed a manufacturer if it played a significant role with respect to the aspect of the product which caused the injury; (4) if a retailer, wholesaler or distributor makes an unauthorized alteration it may be treated as a manufacturer.

Under section 3(8)(B) of the Owen draft, a "manufacturer" includes "any product seller . . . selling products under its own trademark or name, or holding itself out as a manufacturer to the user of the product." The Owen draft adds the following to the end of section 2(6)(b): "but it does not include one who merely distributes a product and in the course thereof assembles, services, or otherwise prepares the product as authorized by the person who manufacturers the product."

General Tire and Rubber would change the term "remanufacture" to "assemble" which has the meaning and is defined in National Traffic and Motor Vehicle Safety Act. (15 U.S.C. Section 1391 (5)).

GAMA would include "installer, repairer, or retrofilter" in the definition of "manufacturer."

NPLC would expand the definition of "manufacturer" to include "importers;" otherwise plaintiffs would be left without domestic "manufacturers" as defendants.

NPLC also recommends that the definition be amended to make it clear that wholesalers and retailers who perform "minor servicing and assembly" of products prior to sale are not "manufacturers."

To prevent the manufacturer from being subject to the full responsibilities of Section 4, the Keene Corporation would amend section 2(6) by adding the following to the definition of manufacturer: "any person who is in a business to mine, supply a raw material, . . ." This provision would subject miners and suppliers of other raw materials which are found to cause injury either alone or when used in conjunction with other components to liability.

Section 2(7)

(7) "Practical technological feasibility" means the technical and scientific knowledge relating to the safety of a product which is available, adequately demonstrated and economically feasible for use by a product seller at the time of manufacture of a product;

Comments:

Textron, Inc. supports this provision and declares that it is very important to retain the concept of "practical technological feasibility" because it acknowledges the reality of the manufacturing process. The provision requires the trier of fact to consider the state of the art, economic feasibility, and other similar factors. SPI endorses the provision for similar reasons.

Greenberg, of the Public Citizens, believes that "practical technological feasibility" should be measured at the time of sale rather than manufacture; manufacturers should be obligated to take appropriate remedial action to prevent harm due to defective design when it becomes aware of a problem after manufacture but before sale.

Under some legal theories, knowledge available to some members of a given industry is held available to everyone, therefore, Westinghouse Electric would amend the definition to make "practical technological feasibility" knowledge "which is generally available in the product seller's industry, adequately demonstrated by use and economically feasible. . . ." ATMI concurs with this definition.

The Keene Corporation would amend section 2(7) by changing "a" product seller to "the" product seller to make the differentiation between large and small manufacturers clearer.

Section 2(8)

(8) "Person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity);

(No Comments.)

Section 2(9)

(9) "Preponderance of the evidence" is that measure or degree of proof which, by the weight, credit, and value of the aggregate evidence on either side, establishes that it is more probable than not that a fact occurred or did not occur;

(No Comments.)

Section 2(10)

(10) "Product" means any object possessing intrinsic value which is capable of delivery either as an assembled whole or as a component part and is produced for introduction into trade or commerce; but such term does not include human tissue or organs;

Comments:

Litton Industries would amend the definition of "product" to exclude blood or plasma which is neither a "tissue" nor "organ." NFC agrees but would not exclude bioengineered or genetically engineered and synthetic tissue, organs or blood, because it believes that they should be subject to product liability standards. Keene Corporation would in the definition of product artificial or grown human tissues or organs.

Under section 3(4) the Owen draft, "product" means "any object which is capable of delivery either as an assembled whole or as a component part produced for introduction into trade or commerce. Such term does not include human tissue, organs, or human blood and its components."

The Chemical Manufacturers Association and the National Association of Manufacturers would amend the definition of product to include the term "or substance" to clarify that the Act applies to chemical, pharmaceutical and agricultural products.

NAW, Colt Industries and Professor Wheeler recommend striking the term "possessing intrinsic value" because any object capable of delivery should be covered by the Act. Professor Wheeler suggests that the new definition of product mean any tangible object is capable of delivery. NAW would exclude services where a sale or use of a product may be incidental to the transaction, i.e. to avoid the inclusion of a recipe printed in a newspaper in the definition of product.

Section 2 (11)

(11) "Product seller" means --

(A) a manufacturer; or

(B) a person who, in the course of a business conducted for that purpose, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce;

but such term does not include --

(i) a seller of real property, unless that person is engaged in the sale of manufactured housing or in the mass production of dwellings;

(ii) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or

(iii) any person who --

(I) acts in only a financial capacity with respect to the sale of a product,

(II) is not a manufacturer, wholesaler, distributor, or retailer; and

(III) leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor; and

Comments:

Colt Industries suggests that section 2(11) be changed to provide that a product seller does not include a person acting only in a financial capacity with respect to a product. Under section 3(9)(A)(ii) of the Owen draft, includes "any person who . . . sells, wholesales, distributes, retails, . ."

Professor Wheeler suggests that the phrase "or otherwise is involved in placing a product in the stream of commerce" is overbroad and unnecessary in light of the list that proceeds it.

The Keene Corporation recommends that section 2(11)(B) be amended to include miners and suppliers of raw materials.

Section 3(9)(B)(i) of the Owen draft would amend section 2(11)(B)(i) as follows: ". . . unless and to the extent that such person is engaged in the mass production and sale of standardized dwellings;" in addition, section 3(9)(B)(ii) of the Owen draft would rewrite subsection (B)(ii) as follows: "a provider of professional services who uses or sells his products within the legally authorized scope of his or her professional practice."

Household International agrees with exempting those engaged in finance leasing from the definition of product seller as provided in subsection (B)(iii)(III). Subsection (3)(9)(B)(iii) of the Owen draft would substitute subsection (B)(iii) with: "is not in the business of manufacturing, wholesaling, distributing or retailing products." This goes to both II and III.

Professor Shapo of Northwestern University School of Law believes that exempting product leases from the definition of "product seller" arguably cuts against some goals of both efficiency and fairness. He believes it should be left to the courts to decide whether lessors should be subject to the liability of manufacturers.

GAMA would include "installer, repairer, or retrofitter" in the definition of "product seller."

Section 2(12)

(12) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Canal Zone, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

(No Comments.)

Section 2 Suggested Definitions

The Owen draft contains four definitions not found in the Staff Draft.

1. Representation

Section 3(10) of the Owen draft defines "representation" as "any explicit statement, affirmation of fact, promise, or description related to a product."

2. Preponderance of the evidence

Section 3(11) of the Owen draft defines "preponderance of the evidence" as "that measure or degree of proof which, by the weight, credit, and value of the aggregate evidence on either side, establishes that it is more probable than not that a fact occurred or did not occur."

3. Clear and envincing evidence

Section 3(12) of the Owen draft defines "clear and convincing evidence" as "that measure or degree of proof

that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. The level of proof required to satisfy this standard is more than a preponderance of the evidence but less than proof beyond a reasonable doubt."

4. Products liability action

Section 3(5) of the Owen draft defines "products liability action" as "any claim or action brought by a claimant against a product seller for harm caused by a product. Such term includes, but is not limited to, any action previously based on strict liability and tort: negligence; breach of express or implied warranty; misrepresentation, concealment, or nondisclosure whether intentional, negligent, or innocent; manufacturer's liability; products liability; or under any other legal theory in tort, contract, or otherwise." In accord with section 3(5) the Owen draft, NPLC would combine sections 3(a) and section 3(b) by providing a definition for the term "products liability action" in the section 2 definitions.

The Machinery Dealers National Association suggests that "remanufacturer," as used in the definition, is not defined and does not have a trade definition. MDNA would add the following definition: "remanufacture

means to make alterations in the design or construction of a product such that the product has capabilities or meets standards which are different than those which the product had when produced originally. Merely restoring the product to the capabilities and standards which it had or met when new shall not constitute remanufacturing."

The Bicycle Manufacturer's Association of America would add a provision defining "state of the art" and a presumption that compliance therewith would raise the rebuttable presumption that the product was not unreasonably safe in design or unreasonably safe because of failure to provide adequate warnings or instructions.

Cincinnati Milacron, Inc. would define "industry standard" as "a guideline published by an industrial group which is representative of directly affected manufacturers." In addition, Cincinnati Milacron would define "the state of scientific and technical knowledge" to mean "the state of the art at the time the product was first placed on the market" and would define "post-manufacturing obligations" as "conduct which a reasonably prudent manufacturer or seller would take under the specific circumstances involved, not to exceed the requirements of the Act."

FEMA offers a definition of "commercial loss."

SECTION 3 PREEMPTION OF OTHER LAWS

Section 3

SPI believes that preemption is essential. Greenberg of Public Citizen criticizes the staff draft for preempting state laws on implied warranties and misrepresentation, concealment, and non-disclosure without establishing a cause of action for these theories.

NAW and MAPI would amend section 3 to provide that civil actions for a commercial losses "are not products liability actions and shall be governed by the Uniform Commercial Code or other applicable contract law."

NPLC would move the definition of "product liability action" in subsections (a) and (b) to section 2, it would also change the title to "Preemption and Jurisdiction."

Section 4 of the Owen draft would delete subsections (a) and (b) of section 3, having already defined products liability action in section 2.

Section 3(a)

Except as excluded under subsection (b), any civil action brought against a manufacturer or other product seller for harm caused by a product is a product liability action and is governed by the provisions of this Act. This Act is intended to govern any civil action