for harm caused by a product, including any action which before the effective date of this Act would have been based on any of the following theories: (1) strict liability in tort; (2) negligence; (3) breach of express or implied warranty; (4) failure to discharge a duty to warn or instruct; or (5) misrepresentation, concealment, or nondisclosure.

Comments:

RIMS believes that Section 3(a) is necessary to prevent forum shopping and would reduce the uncertainty and instability presently found in tort law. Since insurance loss rates are set on exposures resulting from nationwide loss experiences, it is necessary that the underlying tort law, which directly influences such loss experience, contain a reasonable degree of uniformity and consistency.

NSC would amend section 3(a) to include actions brought against misusers or alterers as well as manufacturers and product sellers to make section 3(a) consistent with section 8. NSC would also clarify that the Act "supercedes any action before the effective date of this Act" to make sure that the Act supplants the existing multiplicity of actions and does not merely supplement them. NAM would not list actions superceded by the Product Liability Act but rather would specify that the Act governs any civil action for harm caused by product.

CMA would add "ultrahazardous activities" to the list of theories of liability preempted by the Act.

The Consumer Federation of America criticizes section 3(a) for eliminating the concept of strict liability which it believes serves as an incentive for manufacturers to design safer products.

Colt Industries would substitute "any loss" for "harm" in lines 17 and 19, page 5, to include actions for mental or emotional injury of those governed by the Act.

Section 3(b)

(b) A product liability action does not include any civil action against a manufacturer or seller for harm caused to a product itself or for commercial less, which shall be governed by the Uniform Commercial Code or other applicable contract law.

Comments:

CIMA, NAM, and FEMA would amend section 3(b) to expressly tie recovery under the Act to the definition of "harm." They believe that non-product liability actions should be governed by applicable commercial law rather than the U.C.C. because the U.C.C. has been adopted with modifications by the various states. CIMA would make it explicit that harm done to a product itself is excluded from product liability actions.

NSC would omit section 3(b) altogether. Its rationale is that commercial loss should be recoverable under the Act if it is caused by a defective product.

Textron, Inc., on the other hand, supports the Staff Draft's provision leaving recovery for commercial losses to be addressed by the U.C.C. This would prevent cases like Schiavone which rejected the majority rule by permitting suits for economic recovery in tort. Allowing economic recovery in tort ignores the fact that the individual states adopted the U.C.C. to deal with economic loss. WPLR supports the provision excluding actions for harm to product or commercial loss.

The Business Roundtable and ATMI would delete everything in section 3(b) after "commercial loss" (reference to other sources of law where the Act does not provide a rule of decision).

Westinghouse Electric believes that section 3(b) is necessary to prevent expansion of product liability actions to include purely commercial disputes governed by the U.C.C. and traditional contract law. Westinghouse would precede the provision with the following sentence: "Recovery for loss or damage caused by a product shall be made only to the extent that the loss or damage constitutes harm" and would replace "harm" in definition with "loss or damage" and specify that a product liability action does not include economic or commercial loss whether direct or consequential. The Business

Roundtable would clarify that actions for damage to the product itself are not product liability actions.

Professor Shapo of Northwestern criticizes the exclusion of tort actions for harm caused to the product itself. He would allow a cause of action to a claimant who asserts that he or she has bought a potentially dangerous product which has not yet caused injury.

Colt Industries would substitute the word "damage" for "harm" on line 2 to eliminate ambiguity with respect to the definition of harm in the Act.

Household International supports the idea of a uniform federal legislation and the efforts to prevent strict liability doctrines from being applied to areas traditionally governed by contract and warranty principles.

RIMS approves limiting preemption to the tort area while explicitly reserving actions for recovery of economic loss to the states.

Section 3(c)

(c) This Act supersedes any other Federal or State law regarding matters governed by this Act. Whenever this Act does not provide a rule of decision, reference may be made to other sources of law.

Comments:

Section 4 (a) of the Owen draft would replace this provision with "This Act supercedes any other federal or state law regarding matters governed by this Act to the extent that such law is inconsistent with this Act." Similarly, NPLC would revise section 3(c) to make it clear that Congress intended to supercede all inconsistent state laws and common-law principles by providing as follows: "Any state or federal law, rule or regulation which is inconsistent with this Act shall be null and void."

Professor Shapo of Northwestern criticizes the preemption provision in section 3(c) as not helpful in a situation which "will require front line combat in the state courts and federal courts applying state law."

NAM would amend the second sentence of section 3(c) to read as follows: "Whenever this Act does not deal with a subject area of product liability law, reference may be made to other sources of law."

The Pharmaceutical Manufacturers Association would add a phrase to exclude special legislative remedies, for example, the National Swine Flu Immunization Program, 42 U.S.C. 247(b), that establish federal indemnity and compensation for claims arising out of particular circumstances specified in the legislation. PMA

suggests that the following phrase be added to the end of section 3(c): "provided that laws establishing exclusive tort remedies in specifically named circumstances are not superseded by this Act, except that aspects of any claim arising under such laws not governed therein shall be governed by this Act to the extent that this Act deals with such aspects."

Section 3(d), (e)

(d) Notwithstanding any other law, except as provided in subsection (e), the district courts of the United States shall not have jurisdiction over any claim arising under this Act.

(e) The district courts of the Urited States shall have jurisdiction over any claim arising under this Act if --

(1) the United States or any agency or officer of the Federal Government is a party; or

(2) jurisdiction exists under sections 1332 or 1441 of title 28, United States Code.

Comments:

NPLC would delete these provisions.

Section 4(b) of the Owen draft would combine subsections (d) and (e) of section 3 as follows:

"Notwithstanding any other law, a claimant may bring a products liability action under this Act -- (1) in any court of competent jurisdiction in any state; or (2) in any appropriate district court in the United States but only if -- (A) the United States or any agency or officer of the federal government is a party; or (B) diversity jurisdiction exists.

SECTION 4 RESPONSIBILITY OF MANUFACTURERS

General Comments:

NAIB would retain Section 4 as written. General Tire and Rubber would add a section placing the burden of proof on the claimant to establish that the product was properly used. MAPI believes that the draft language is ambiguous, they understand the bill to apply strict liability to actions based upon unsafe construction or express warranty violations, and to apply negligence or fault standard in products liability actions based on design defects or inadequate warnings or instructions. Colt Industries would change the language to clarify the exclusivity of each of the circumstances under which a manufacturer may be subject to liability in a products liability action. MDNA would include a requirement that manufacturers supply instructions and warnings to subsequent purchasers of products when so requested.

Section 4(a)(1)

In any product liability action, a manufacturer is liable to a claimant if--

(A) the claimant establishes by a preponderance of the evidence that--

(i) the product was unreasonably unsafe in construction;

(ii) the product was unreasonably unsafe in design;

(iii) the product was unreasonably unsafe because the manufacturer failed to provide adequate warnings or instructions about a danger connected with the product or about the proper use of the product; or

(iv) the product was unreasonably unsafe because the product did not conform to an express warranty made by the manufacturer with respect to the product; and

(B) the claimant establishes by a preponderance of the evidence that the product was manufactured by the defendant and that the unreasonably unsafe aspect of the product was the proximate cause of the harm complained of by the claimant.

Comments:

1. Section 4(a)(1)(A)

NMTBA supports the provision. It believes that the provision assures a clear understanding for all products liability actions, and assures that congressional intent will not be circumvented by defining causes of action in ways not covered by the Act. For example, if the Act only covered design and failure to warn defects, causes of actions would be redefined as construction defect or express warranty cases to avoid application of the Act.

Narco would add to subsection (a)(1)(A)(i) that the product was unreasonably unsafe in construction "by standards applicable at the time of manufacture." This would make the provision explicitly consistent with the

statutory standard "practical technological feasibility" defined in Section 2(7).

Allis-Chalmers Corporation is concerned that subsection (a)(1)(A) may impose strict liability on the manufacturer. It would limit liability to negligence, contract, express warranty or misrepresentation. It would also provide that "in any product liability action based upon a claimed failure to provide adequate instructions or warnings, the defendant shall not be liable . . . accept upon the basis of negligence."

NTMA would make the manufacturer of the component of a product who did not draw the design of the component subject to liability only to the extent provided under Section 4(a)(1)(A)(ii) and (iv).

Professor Wheeler would replace "adequate" in Section 4(a)(1)(A)(iii) with "reasonable."

2. Section 4(a)(1)(B)

NMTBA approves section 4(a)(1)(B). It believes that the provision codifies the majority rule adopted by every state, except California, that claimant must prove that the defendant manufactured or sold the product. This prevents the expansion of a manufacturer's liability for the fault of other manufacturers of similar products simply because a claimant was unable to identify

the proper manufacturer. In such a situation, insurers would have to raise the product liability premiums of all product sellers in order to cover the expanded risks of some.

BMA approves the intent to eliminate the market share liability theory of Sindell. It would amend the provision by adding that the claimant must establish by a preponderance of the evidence that the product "unit that actually caused the harm complained of" was manufactured by the defendant. NICA would amend the provision to clarify that a manufacturer would only be responsible for actions that create an unreasonably unsafe aspect of the product. Under NICA's proposal, persons that modify or assemble products, such as fabricators and contractors, would be considered "manufacturers," and they, rather than the original manufacturer, would be responsible for any harm resulting from improper assembly. SPI and NAIB urge retention of this provision which it believes would overrule the market share theory of liability adopted in the Sindell decision. NAM would require in Section 4(a)(1)(B) that expert opinion on casualty be corroborated by scientific support. CMA would make it clear that claimant must prove that the defendant's product caused the injury, not just that the defendant was one of a number of

manufacturers of the product and such product in a broad sense caused the harm.

Allen Greenberg of Public Citizen opposes the provisions requirement that plaintiff prove who manufactured the product. CFA criticizes placing the burden of showing who produced the product in question on the consumer rather than the manufacturer.

Colt Industries would substitute "unit which allegedly caused the harm complained of" for "product" on page 7, line 13, to clarify that the specific product unit must have allegedly caused the harm.

Section 4(a)(2)

A court may not submit a product liability action to the trier of fact unless the court has determined that sufficient evidence has been admitted to allow a reasonable person, by a preponderance of the evidence, to make the determinations described in paragraph (1).

Comments:

Both the NPLC and The Business Roundtable would prevent the court from submitting the action to the jury for a directed verdict but would rather leave this determination to the parties. Where they move for a directed verdict, NPLC would not restrict the court to the "preponderance of the evidence" standard, it suggests the court should apply the "required measure or degree of proof" standard. The Business Roundtable

would require scientific evidence be corroborated by substantial objective evidence based on general scientific or technical knowledge before it is deemed "sufficient evidence." BMA makes the same suggestion.

Section 4(a)(3)

[A claimant may not establish any fact necessary to make the determinations described in paragraph (1) by showing that the identical issue of fact was determined adversely to the manufacturer in another action.]

Comments:

FPI, NMTBA, The Business Roundtable, Black and Decker Manufacturing Company, PMA, NPLC, WPLR, and NAIB strongly support this provision because they believe that the offensive use of collateral estoppel deprives the manufacturer of its right to a fair trial on all issues and that each case should stand on its own merits. NICA, Westinghouse and Colt Industries support the provision but would add the phrase "brought by another claimant" to the end of the provision to maintain the existing rule of res judicata.

Textron supports the provision but would allow offensive use of collateral estoppel in limited instances, for example mass disaster cases.

Both Greenberg and the Consumer Federation of America criticized the elimination of collateral

estoppel which they believe will discourage valid suits due to the expense of relitigating the same issues. They further argue that eliminating collateral estoppel would waste court time by having to relitigate the issue of the defendant's negligence in every action. Greenberg believes that the use of collateral estoppel should be left to the court's discretion.

Section 4(b)

A product may be considered unreasonably unsafe in construction if, when the product left the control of the manufacturer, the product deviated in a material way--

(1) from the design specifications or performance standards of the manufacturer; or

(2) from otherwise identical units of the same product line.

Comments:

The Business Roundtable and Westinghouse would consider a construction defect "unreasonably unsafe" if the design deviation creates an unreasonable risk of harm.

NAW recommends that the condition of a particular product unit be judged by the manufacturer's design specifications or performance standards in effect at the time the product is manufactured, rather than when the product left the control of the manufacturer. NSWMA agrees with this comment and would add a requirement

that a reasonably prudent manufacturer in similar circumstances would not have placed the product in commerce.

Greeberg believes that requiring the plaintiff to prove reliance on an express warranty is not consistent with the provisions of the UCC. He cites, U.C.C. § 2-313 which states that no reliance need be shown and would eliminate the reliance element from the section.

Section 4(c) General Comments:

The Business Roundtable believes that the test should be whether the product was designed with reasonable care; if the design is not unreasonably unsafe there is no need to determine whether the manufacturer or product seller was negligent for distributing the product. Generally the comments submitted by industry groups on this provision expressed this type of fault standard. Sturm, Ruger and Company would revise this provision to make it clear that liability for design defects is based upon fault. Similarly, NAW, Colt Industries, NPLC, and Black and Decker Manufacturing Company would amend the provision to make a manufacturer liable for defective products only where a safer alternative design was available at the time of manufacture.

Before finding a manufacturer liable for a design defect, Colt Industries would require the plaintiff prove that an alternative design was available, would have been better than the chosen design, and would have been capable of preventing the harm. Colt Industries would also add a new paragraph to provide that a manufacturer should not have to design a product to take into account misuse, alterations, or modifications which are not reasonably anticipated.

NMTBA applauds the design liability provisions of section 4(c) as "the most sensible statement of the responsibility of product sellers to design their product safely that we have ever seen."

Section 4(c)(1)

A product may be considered unreasonably unsafe in design if, at the time of the manufacture of the product, a reasonably prudent manufacturer in the same or similar circumstances would not have placed the product in commerce.

Comments:

Gulf Oil Company supports the provision and, in particular, its use of the standard of a "reasonably prudent manufacturer in the same or similar circumstances" in section 4(c)(1) because this test recognizes the risks and burdens in marketing a safe product. The Consumer Federation of America, however, believes that

the defendant should not be allowed to escape liability by compliance with industry standards, which may be the product of industry neglect or incompetence.

Section 4(c)(2)

In making a determination under paragraph (1), the trier of fact may consider such factors as--

> (A) the likelihood that the product would cause the harm of the type alleged by the claimant, and the seriousness of that harm; and
>
> (B) any burdens on the manufacturer to adopt a product with a safer alternative design that would have prevented that harm, and any adverse effects such an alternative design would have had on the usefulness of the product.

As used in this paragraph, "usefulness of the product" means the effectiveness with which the product performs its intended function or the desirability of the product to the person who uses or consumes it.

Comments:

Allis-Chamlers Corporation criticizes subsections (c)(2) and (3). It would like more certainty regarding the factors to be considered and would require the claimant to show that the likelihood of harm from the defendant's design would outweigh any burdens of adopting a safer alternative design.

Cincinnati Milacron would amend the section to read that a trier of fact "shall" rather than "may" consider such factors.

Specialty Equipment Market Association would amend the section to show that determinations thereunder are based on conditions at the time of manufacture of the product, as is provided under section 4(c)(1) and section 4(c)(3).

Greenberg would amend section 4(c)(2)(A) to assign liability for negligence even if the injury was not foreseeable.

Section 4(c)(3)

Any safer alternative design considered pursuant to paragraph (2)(B) must have been within practical technological feasibility at the time of manufacture and have provided--

(A) equivalent or better safety with respect to all hazards associated with use of the product; and

(B) better safety with respect to the particular hazard which allegedly caused the harm of the claimant.

Comments:

Snell and Wilmer would modify section 4(c)(3) to make the determination of technological feasibility at the time of completion of design rather than at the time of manufacture.

Whirlpool would delete section 4(c)(3)(A) and (B) because they confuse the provision's "state of the art" defense. Requiring higher standards under subsections

(A) or (B) would be unreasonable if the manufacturer is already producing goods that are "within practical technological feasibility."

The Consumer Federation of America believes that the manufacturer, rather than the consumer, should have the burden of proof with respect to whether a product design is unreasonably dangerous, because the manufacturer has access to the necessary information.

Section 4(c)(4)

(A) A manufacturer is not liable under this subsection for harm caused by an unavoidably dangerous aspect of a product.

(B) As used in this paragraph, "unavoidably dangerous" means that aspect of a product incapable, in light of the state of scientific and technological knowledge at the time of manufacture, of being made safe without seriously impairing the product's usefulness.

Comments:

The Keene Corporation would amend section 4(c)(4)(A) to change "subsection" to "Act" so that the unavoidably dangerous exception applies to all products.

Sturm, Ruger and Company supports the section's treatment of "unavoidably dangerous aspects of products" to refocus inquiry upon the question of whether the products seller is at fault.

Greenberg, on the other hand, would more precisely define "unavoidably dangerous" in 4(c)(4).

SPI would delete the phrase ". . . state of scientific and technical knowledge" and substitute "practical technological feasibility."

Section 4(d)(1)

A product may be considered unreasonably unsafe because of the failure of the product seller to provide adequate warnings or instructions about a danger connected with the product or about the proper use of the product if--

> (A) at the time of the manufacture of the product--
>
> > (i) in light of the likelihood that the product would cause the claimant's harm and the seriousness of that harm, a reasonably prudent manufacturer in the same or similar circumstances would not have placed the product in commerce without the warnings or instructions which the claimant alleges would have been adequate;
> >
> > (ii) if such warnings or instructions were provided, a reasonably prudent product user either would have declined to use the product or would have used it in a manner so as to have avoided the harm; and
> >
> > (iii) if such warnings or instructions had been provided, the claimant or a person in a position to respond to such information would have used the product in a manner so as to have avoided the harm;
>
> (B) subject to paragraph (3), the warnings or instructions pertaining to the product were not provided to the product user; or
>
> (C) the manufacturer did not safisfy his post manufacturing obligations to provide warnings regarding the product.

Comments:

Both The Business Roundtable and MAPI would amend section 4(d)(1)(A)(i) to clarify that the section requires warnings only for those dangers that create an unreasonable risk of harm. MAPI suggests that the following be added: "(i) the danger created an unreasonable risk of harm to persons in the same or similar position as the claimant."

Textron, Inc. supports section 4 as written, except that it would amend 4(d)(1) and (2) to expressly provide that manufacturers are not responsible for dangers created by third parties once the product leaves the manufacturer's control. It would not impose a duty to warn about post-manufacture alterations upon manufacturers when such alterations are made by third parties.

SPI believes that section 4(d)(1)(A)(iii) is unclear as to whether the claimant or the manufacture is required to prove that the claimant would have heeded a warning or instruction. It would insert "must demonstrate that he" in the third line between "information" and "would."

NAW would include in section 4(d)(1)(B) and (C) the 4(d)(1)(A) requirement of proof in all warning cases that an allegedly proper warning would cause a reasonable and a claimant to avoid harm. In addition, NAW

would substitute "manufacturer" for "seller" in 4(d)(1) for consistency as well as in 4(e). Westinghouse would modify 4(d)(1)(C) to make it clear that the obligations mentioned are those that are set forth in section 4(d)(4).

Section 4(d)(2)

In any product liability action based upon the failure to provide adequate warnings or instructions, the manufacturer is not liable for--

(A) the failure to warn or instruct about dangers that are obvious;

(B) the failure to warn on instruct about dangers that were not known to the manufacturer and could not have been discovered in the exercise of reasonable care;

(C) product misuse; or

(D) alterations or modifications of the product which do not constitute reasonably anticipated conduct on the part of the user of the product.

As used in this paragraph, "dangers that are obvious" means dangers of which a reasonably prudent user of a product would have been aware without warning or instruction; and the term "reasonably anticipated conduct" means the conduct which would be expected of a reasonably prudent person who is likely to use the product in the same or similar circumstances.

Comments:

The Business Roundtable would expressly provide that the product user must assume responsibility for the result if he does not follow instructions or does not heed the warning. In addition, they would not require

warnings for dangers that are a matter of common knowledge to the claimant and persons of his class.

NPLC would relieve manufacturers who reasonably believe that consumers would receive warnings from another source from 4(d)'s duty to warn.

Colt Industries would amend 4(d)(2) to clarify to whom danger must be obvious and that no warnings or instructions need be provided where the danger is known to such persons and would also clarify that product misuse is to be manners of use "other than reasonably anticipated conduct on the part of the product user." Finally, Colt Industries would add a clause (E) stating that warnings need not be provided as to risks that are trivial in terms of remoteness and severity.

Under section 4(d)(2)(B), Keene Corporation would determine whether the manufacturer exercised a reasonable care according to the "knowledge received by the manufacturer in the usual course of business."

Greenberg would eliminate section 4(d)(2)(B) because it abolishes strict liability as a cause of action.

MAPI would expand section 4(d)(2)(C) beyond "product misuse" to specify that the product user is responsible for any use contrary to warnings or instructions. To exclude recovery based on product misuse which is

arguably foreseeable but irrational, Narco would define any use that is not reasonably anticipated by the manufacturer as misuse. Specialty Equipment Market Association believes that the provision should be amended to prevent a conclusive defense based upon product misuse if the misuse was reasonably foreseeable by the manufacturer, the danger was not obvious to the product user, and there was no warning with regard to such misuse by the manufacturer.

To relieve the component supplier from responsibility for all hazards arising from an end product that uses certain of the supplier's components, even if the final fabricator knows of uses of the components that may present a hazard in the end product, Westinghouse would add the following clause to section 4(d)(2): "(E) failure to warn or instruct about the hazards created by the use of the product as a component part in a particular application, where the application is performed by any person in the business of making such application."

Section 4(d)(3)

(3) A manufacturer is not liable under this subsection for the failure to provide adequate warnings or instructions to the actual product user if--

(A) the manufacturer provided those warnings to a person who could reasonably have been expected to assure that action would be taken to avoid the harm or that the risk of the harm would be explained to the actual product user;

(B) the product involved is one that may be legally used only by or under the supervision of a class of experts, and the manufacturer employed means reasonably calculated to make warnings or instructions available to the using or supervisory expert. As used in this subparagraph, "means reasonably calculated to make warnings or instructions available" does not require actual, personal notice to the expert where such personal notice would be impossible or impracticable;

(C) the product was used in a workplace, and warnings or instructions were provided to the employer of the claimant, because there was no practical and feasible means of transmitting them directly to the claimant; or

(D) the product was sold as a component or material to be incorporated into another product, warnings or instructions were provided to the manufacturer's immediate buyer, and the claimant was exposed to the component or material after it was incorporated or converted into another product.

Comments:

NMTBA approves the provision's codification of the majority view that liability should not be imposed in a failure to warn case without proof of manufacturer's fault. It suggests that the committee make it clear that under subsection (d)(3), if the manufacturer of a workplace product provides instruction manuals to the employer/user, it has satisfied the obligation imposed by (A), and that the employer, not the product seller,

is liable for injuries caused by failure to provide guarding or shielding for multi-purpose machines which are not useable until equipped with cutting tools or dyes and when guarding can only be accomplished after the cutting tools or dyes are installed. Colt Industries would add a provision to include those persons who, while not required to take action to avoid the harm, would reasonably be expected to pass the warnings onto such persons. Colt would also provide that a manufacturer will have fulfilled its obligation to warn or to instruct if it provided warnings to the person, other than the employer, who has custody over the product, Colt would also clarify that the manufacturer of bulk goods is only obligated to provide warnings to its immediate vendee.

SPI strongly endorses section 4(d)(3)(A) as "it is both necessary and legitimate that a manufacturer be allowed to reasonably rely on another in the distribution chain to warn the ultimate user." National Presto Industries would expand the provision to provide that the manufacturer is not liable if the manufacturer provided adequate warnings with all products it sold.

Greenberg would eliminate section 4(d)(3)(A) because it codifies the irrational (but majority) rule.

He does not believe that a doctor will weigh all risks and benefits associated with a drug.

Virtually every industry group commenting on section 4(d)(3)(B) recommended deletion of the language "where personal notice would be impossible or impracticable." NARCO and Westinghouse would broaden the application of the provision by amending the provision to cover product users that are supervised by highly trained technicians or that are certified such as those involved in "critical choice" situations.

Section 4(d)(4)

If a reasonably prudent manufacturer would have learned about a danger connected with a product after the product was manufactured, the manufacturer of the product is under an obligation to provide any instruction or warning with regard to such danger as would a reasonably prudent manufacturer in the same or similar circumstances. The obligation under this paragraph is satisfied if the manufacturer makes reasonable efforts to--

(A) inform product users about the danger; or

(B) inform another person in accordance with paragraph (3).

Comments:

NARCO would add a subclause (i) to prevent the use of evidence of changes to a product after the product was introduced into the stream of commerce, in a products liability action.

Black and Decker Manufacturing Company is concerned that 4(d)(4) leaves manufacturers without guidelines to determine when its obligation to warn arises. Black and Decker would not require warnings for circumstances where safety improvements are made to later product models if the improvements were not within practical technological feasibility at the time earlier products were manufactured. MAPI believes that there is no need to warn of deviations from specifications unless the deviation caused the harm complained of. MAPI would also place a time limit upon the duty to warn; the duty to warn should be made coterminous with the period covered by the applicable statute of repose. NPLC believes that the duty to warn should inhere only when the hazard existed at the time of manufacture and is sufficiently great so that knowledge of it would have caused a prudent manufacturer to provide the warnings. TBR would restrict the manufacturer's post-manufacture obligation to warn of dangers that create an unreasonable risk of harm to persons in the same or similar position as the claimant.

Section 4(e)

(1) A product may be considered to be unreasonably unsafe because it did not conform to an express warranty if--

(A) the claimant (or a person acting on the claimant's behalf) reasonably relied on an express warranty made by the manufacturer about a material fact concerning the safety of the product;

(B) this express warranty proved to be untrue; and

[(C) had the representation been true, the claimant would not have been harmed.]

(2) As used in this subsection, "material fact" means any specific characteristic or quality of the product, but does not include a general opinion about, or praise of, the product or its quality.

(3) A product seller may be subject to liability under this subsection although it did not engage in negligent or fraudulent conduct in making the express warranty.

Comments:

NAW would change 4(e)(1)(A) to make it clear that the claimant must prove that his reliance on the express representation was reasonable.

NPLC would delete sections 4(e)(1)(C) and 4(e)(2).

NAIB would retain section 4(e)(1)(C) because it believes that the provision helps establish a causal link between the failure to conform to an express warranty and the harm. The Keene Corporation agrees with NAIB, it believes that subpart (C) is an essential part of the provision because a product should be considered unreasonably unsafe for failure to meet a warranty only if such failure caused the plaintiff's harm.

NICA would amend section 4(e)(3) to substitute "manufacturer" for "product seller" because section 4 only deals with manufacturer's responsibilities.

Keene Corporation would amend section 4(e)(3) to impose liability upon a product seller only if it engaged in negligent or fraudulent conduct in making the express warranty. The concept of strict liability should not be extended to cover breach of warranty.

New Provisions:

The NTMA proposes a subsection (F):

> "A manufacturer of a component part of a product, which component part is not designed by that manufacturer and is required to be manufactured in accordance with the design, specifications, or standards supplied by the person purchasing the component part for inclusion in the product user only under subsection (a)(1)(A)(ii) or subsection (a)(1)(A)(iv) hereof."

SECTION 5 RESPONSIBILITY OF OTHER PRODUCT SELLERS

General Comments:

NAIB, NPLC, and MDNA would retain this section as written. MDNA believes that this section is a positive step towards reducing uncertainty in products liability matters; the distinction made in the standards of liability for nonmanufacturing product sellers, who neither design nor construct the product, will eliminate the necessary litigation costs now found where claimant includes product sellers as defendants in products liability suits. Although the nonmanufacturing product seller is rarely found liable, the litigation costs raise its insurance premiums.

Gulf Oil Company requests that section 5 be deleted because the product seller does not have the information or control necessary to provide an adequate defense and should not be subject to a manufacturer's liability solely because the manufacturer is judgment-proof.

NAIB sees potential confusion because there is no clear indication of when "another product seller," such as a retailer, would be exempt from, or open to, plaintiff's suit.

Section 5(a)(1)

In any product liability action brought against a product seller other than a manufacturer, such a product seller is liable to a claimant, subject to subsections (b) and (c), if--

> (A) the claimant establishes by a preponderance of the evidence that the product was sold by the defendant and was the proximate cause of the harm complained of by the claimant; and
>
> (B) the claimant establishes by a preponderance of the evidence that the product seller failed to exercise reasonable care with respect to the product.

Comments:

OPEI would amend 5(a)(1)(A) to include persons who are required to maintain a product, as included in the definintion of "product seller" in section 1, to subject them to liability.

NAW and Litton Industries would limit the liability of product sellers other than manufacturers to a standard of fault. NAW would extend this limitation to cases involving breach of express warranties so that a seller would be held liable for injuries resulting from a breach of a seller's express warranty but not for an express warranty made by a manufacturer, as would occur under the draft. Litton Industries proposes an amendment that would delete reference to the two subsections in section 5(a)(1) and combine them into a single subsection.

Greenberg, of the Public Citizen, repeats the same objections he set forth in his comments to section 4 against the elimination of the use of offensive collateral estoppel and strict liability. He believes that a claimant should be able to rely on Sindell and other cases that allow a claimant to pursue a claim without identifying a particular manufacturer.

Both MAPI and The Business Roundtable believe that a product seller should be judged according to the standard of the "reasonable seller similarly situated" rather than "whether the seller has exercised reasonable care." MAPI notes that under section 4, the standard for a manufacturer is that of a reasonably prudent manufacturer.

Both the Keene Corporation and the Specialty Equipment Market Association offer suggestions to limit what would be considered "reasonable care by the seller." Keene Corporation would amend section 5(a)(1)(B) to provide that failure to test or inspect a closed product does not constitute failure to exercise reasonable care. The Specialty Equipment Market Association believes that greater guidance is required as to what constitutes "reasonable care." According to SEMA, the definition of reasonable care should reflect the limited contact many product sellers have with the products they sell;

information available to product sellers is not the same as that available to manufacturers.

Section 5(a)(2)

[(A)] A court shall not submit any action referred to in paragraph (1) to the trier of fact unless the court has determined that sufficient evidence has been admitted to allow a reasonable person, by a preponderance of the evidence, to make the determinations described in paragraph (1).

[(B)] A claimant may not prove any fact necessary to make the determinations described in paragraph (1) by showing that the identical issue of fact was determined adversely to the product seller in another action.]

Comments:

The comments to section 5(a)(2)(B) are essentially the same as those given for section 4(a)(3). See comments from NAIB, NICA, The Business Roundtable, and Colt Industries. Section 6(e) of the Owen Draft would prevent both a claimant and a product seller other than a manufacturer from using offensive collateral estoppel to prove any issue or fact "unless they were adverse parties to each other in the other action and had the opportunity and reason fully to contest the fact or issue therein."

Section 5(a)(3)

(A) In determining whether a product seller is subject to liability under this subsection, the trier of fact may consider the effect of the conduct of the seller with respect to the design, construction, inspection, or condition of the product, and any failure of

the seller to transmit adequate warnings or instructions about the dangers and proper use of the product.

(B) A product seller is not subject to liability under this subsection unless the seller had a reasonable opportunity to inspect the product in a manner which would have revealed the existence of the defective condition if the inspection were conducted with the exercise of reasonable care.

Comments:

OPEI would amend section 5(a)(3)(B) to make it clear that if a product seller other than the manufacturer assembles or modifies a product according to a manufacturer's written instructions, it will be subject to liability for failure to properly implement the instructions.

Speciality Equipment Market Association believes that section 5(a)(3)(B) should provide greater guidance as to the nature of inspection required by product sellers.

Under the section 6(a)(2) of the Owen Draft, the product seller other than a manufacturer shall not be subject to liability if it did not know, at the time it sold the product, of the dangerous aspect of the product that harmed the claimant or did not have the opportunity to inspect the product in a manner which would have revealed the existence of that danger.

NICA would add a provision exempting a product seller from liability for failing to provide adequate

warnings or instructions, if they are not provided by the manufacturer, unless claimant proves that a reasonably prudent product seller would have provided such instructions.

Section 5(b)

A product seller other than a manufacturer who makes an express warranty about any material fact concerning a product is liable for harm to the claimant caused by the product in the same manner as the manufacturer of the product.

Comments:

NICA would amend section 5(b) to provide that a product seller would be treated as a manufacturer for violations of express warranties only to the extent of the seller's warranty. NPLC would delete the phrase "about any material fact" from this provision. Section 6(b) of the Owen Draft differs from section 5(b) by referring to a seller's "representation" about any material fact concerning a product rather than "express warranty."

Section 5(c)

A product seller other than a manufacturer is liable for harm to the claimant caused by the product in the same manner as the manufacturer of the product if--

(1) the manufacturer is not subject to service of process under the laws of the State in which the action is brought; or

(2) the court determines that the claimant would be unable to enforce a judgement against the manufacturer.

Comments:

Narco, NAW, NSWMA, and NICA would delete subsection(c) as written in the Staff Draft. Narco believes that the clause is overbroad; it makes the product seller guarantor of debts or liabilities of the manufacturer and exceeds the scope of congressional authority. In addition, Narco believes that the risk is too remote and speculative to be adequately insured against. NAW believes that a provision that makes the product seller liable if the manufacturer cannot be sued or cannot satisfy judgment is inconsistent with section 5(a) which limits the seller's liability to fault. According to NAW, section 5(c) is illogical and adds an element of uncertainty as to the seller's potential liability. NSWMA concurs with NAW's comments. NICA would amend section 5(c) by requiring the claimants to bring action where the manufacturer is subject to process.

Litton Industries would eliminate subsection (c)(1). It believes that a seller's liability should depend on fault or culpability for the injury, not just because the manufacturer is either not amenable to service of process or judgment-proof. The Keene Corporation would amend subsection(c) by providing that a pro-

duct seller would be treated as a manufacturer only if the manufacturer is not subject to service of process in the United States, rather than only the state where the action is brought.

Professor Shapo of the Northwestern School of Law opposes the limitations on a product seller's liability provided in Section 5; would impose a strict liability standard. Limiting the liability of sellers other than manufacturers to negligence ignores several important policy considerations. "Subsection (5)(c) seems to be an expedient solution of a problem which could be solved in an intellectually persuasive way."

Section 6(d)(1) of the Owen Draft would broaden section 5(c) by subjecting a product seller to the same liability as a manufacturer if "the manufacturer cannot be located or probably is not subject to service of process under laws of the claimant's domicile or other jurisdiction where claimant brings suit."

Narco would eliminate section 5(c) through 5(c)(2).

NAII believes that subsection (c) goes further than the absolute liability theory evolved by some courts in construing Section 402A. Under this provision, product sellers in the chain of distribution completely free of any type of fault would be liable if the manufacturer

cannot be served, is insolvent, or where the claimant may have difficult enforcing the judgment against the manufacturer. This latter provision prescribes no protective guidelines for a court to follow. NAII does not believe that the innocent product seller (and his insurer) should be placed in a position of having to right the world's wrongs or become a branch of the governmental welfare system.

Suggested Provisions:

Cincinnati Milacron would add a section 5(d) which would add the requirement that a product seller shall not be liable unless the product seller is shown to be the proximate cause of the harm so that the seller will not be liable solely because of the inability, due to passage of a statute of limitations or otherwise, of the plaintiff to collect a judgement from the manufacturer.

BMA would amend section 5 by adding a subsection which would remove the manufacturer of any liability for any injuries caused by a non-manufacturer product seller's failure to follow manufacturer's instructions. OPEI concurs with this suggestion and in addition, would assign liability under section 5 to those who improperly maintain a product.

NICA suggests the following provision: "In no event shall the product seller other than a manufacturer be held to a higher standard of care than a manufacturer under the provisions of section 4." NICA believes that this is implied but never clearly stated in the Staff Draft.

SECTION 6 RELEVANCE OF GOVERNMENT STANDARDS OR SPECIFICATIONS

General Comments:

NAW, PMA, Sturm, Ruger & Company, and Colt Industries all support the intent of section 6(a). Their comments emphasize that it makes little sense to force product sellers to meet government standards if such standards are effectively meaningless. NAW would substitute "requirement" for "standard" and "manufacturer" for "producer seller" whenever those terms occur in section 6. Colt Industries recommends that this provision be expanded to include standards promulgated by other government agencies whose standards meet the criteria implicit in the staff draft's selection of the two enumerated agencies. PMA concurs with Colt Industries' recommendation and suggests that the language be clarified to include regulations that do not expressly pertain to the individual aspects of the product that caused the injury, but relate to the product as a whole, when the regulating agency considers all aspects of the product. PMA believes that products subject to safety regulations should be given the benefit of the presumption.

Section 6(a)(1)(A)

If there was a Federal, State, or local government standard pertaining directly to that aspect of a product

which caused claimant's harm, and that aspect of the product was in compliance with the standard at the time of its manufacture, the product shall not be considered to be unreasonably unsafe in design unless the claimant proves by clear and convincing evidence that a reasonably prudent product seller would have taken additional precautions in the design of the product, and that a safer design not only was available and within practical technological feasibility but would also have complied with all mandatory Federal, State, and local government standards [: Provided, however, That a product which complies with a standard of the National Highway Traffic Safety Administration of the Department of Transportation or with the terms of an approval of the Federal Drug Administration of the Department of Health and Human Services shall not be considered unreasonably unsafe in design under section 4(c) or section 5 with respect to that aspect of the product design of which the standard or approval relates].

Comments:

Professor Wheeler of the University of Kansas strongly supports section 6(a)(1)(A). He believes that this provision is required because of the reasons set forth in Dawson v. Chrysler. Compliance with "minimum standards" that are related to reasonable conduct or public safety are entitled to the presumption.

MAPI, BMA, CMA, Reynolds Aluminum, and Allis-Chalmers Corporation suggest that section (a)(1)(A) should be amended to provide an absolute defense to a claim that a product was unreasonably unsafe in design, if the design of the injury-causing aspect of the product was mandated by government standard. MAPI would enlarge the scope of the section to include standards of other government agencies. Allis-Chalmers Corporation believes that the purpose of subsection (A) is defeated

by permiting rebuttal of the presumption that a manufacturer met the post-manufacture duty to warn, raised by compliance with government standards.

Greenberg, of the Public Citizen, believes that section 6's rebutable presumption of safety for compliance with government design standards is without justification. According to Greenberg, compliance with government standards should be nothing more than some evidence of safety. Because the FDA cannot predict every possible adverse affect, he strongly opposes giving a conclusive presumption of safety to drugs with FDA approval.

NAM would refer to the section 4(c) requirements to achieve internal consistency by replacing the phrase beginning with "unless" and ending with "standards" with the following: "unless the claimant proves by clear and convincing evidence, subject to all requirements of section 4(c), that at the time of manufacturer (sic) of the product, a reasonably prudent manufacturer in the same or similar circumstances would have taken additional precaution in the design of the product."

The Business Round Table would amend section 6(a)(1)(A) so that a product would not be considered unsafe if it complies with relevant government standards

unless the claimant proves that these standards are inadequate to protect members of the public from unreasonable risk of harm from that aspect of the product design to which they relate. Keene Corporation would delete that part of the provision which allows the claimant to show that a reasonably prudent seller would have taken additional precautions beyond compliance with government standards. Keene Corporation believes that compliance with government standards should be sufficient to establish that a product is not unreasonably unsafe.

SPI would delete reference to "local" standards in section 6(a)(1)(A) because the purpose of the Act is to bring uniformity to product liability actions. SPI would add that compliance with "National Voluntary Consensus standards" that have the same stature as federal and state government regulations would be given the benefit of the presumption. Finally, SPI would provide that if federal government regulations conflict with state regulations that federal government regulations shall govern.

NAW would amend to substitute the term "alternative design" for the term "safer design."

Section (6)(a)(1)(B)

If there was a Federal, State, or local government standard pertaining directly to that aspect of a product which caused the claimant's harm, and that aspect of the product was not in compliance with the standard at the time of its manufacture, the product shall be considered to be unreasonably unsafe in design unless the product seller proves by clear and convincing evidence that the failure of the seller to comply with those standards was a reasonably prudent course of conduct under the circumstances.

Comments:

Cincinnati Milacron would delete section 6(a)(1)(B) because it believes that a product's failure to meet federal, state, or local government standards should not create a presumption that the product was unsafe. According to Milacron, the seller should be able to show that the standard was inappropriate without having to rebut a negative presumption. Compliance with industrial standards should be given the same effect as compliance with government standards.

Narco would substitute "a preponderance of the evidence" for "clear and convincing evidence" in section 6(a)(1)(B). This amendment would conform to established case law regarding a defendant's burden for proving an affirmative defense. The higher standards suggested in the Staff Draft would be a disincentive for manufactures to improve a product's safety over minimal federal, state, or local government standards.

Snell & Wilmer would eliminate state and local standards from subsection (B).

Greenberg would make the subsection (B) presumption of defectiveness for a manufacturer's failure to comply with an applicable government standard conclusive rather than rebuttable.

Section 7(a)(1) of the Owen Draft is essentially the same as subsection (B) except that the Owen Draft would examine whether the product met the applicable safety standards at the time of sale rather than at the time of manufacture.

OPEI would add a subsection (C) which would provide that compliance with government standards that mandate a product use a particular design would provide an absolute defense to a seller's liability.

Section 6(a)(2)(A)

(A) If the warnings and instructions relating to that aspect of a product which caused the harm of the claimant were in compliance with all applicable Federal, State, or local government standards pertaining to the product existing at the time of manufacture, the product shall not be considered to be unreasonably unsafe because of the failure of the product seller to provide adequate warnings and instructions unless the claimant establishes by clear and convincing evidence that (i) a reasonably prudent product seller would have provided additional warnings or instructions; or (ii) there was a failure to satisfy the post manufacture duty to warn [: Provided, however, That a product accompanied by warnings and instructions which comply with a standard of the National Highway Traffic Safety Administration of the Department of Transportation or with the terms of an

approval of the Federal Drug Administration of the Department of Health and Human Services shall not be considered unreasonably unsafe because of a failure to provide adequate warnings or instructions under section 4(d) or section 5 with respect to that aspect of the product warnings or instructions to which the standard or approval relates].

Comments:

Greenberg, of the Public Citizen, asserts that compliance with government requirements governing instructions and warnings should not give rise to a presumption that such warnings or instructions are adequate. He would, however, establish a conclusive presumption of negligence for failing to conform with labeling requirements.

RIMS and NAIB support subsection (2)(A) and the bracketed portion of this section. RIMS would expand the language of this section to include standards of other government agencies such as EPA. NAIB believes that compliance with standards of government agencies referred to in the bracketed language should create an absolute presumption that a product was not unreasonably unsafe with respect to aspects of the product to which the standards apply.

NAM would amend section (2)(A) to make it clear that there must be compliance with requirements that address the precise aspect of the product that is alleged to have caused the harm. NAW believes that, in

fairness to the consumer, a manufacturer's conduct should be judged as of the date of sale rather than at the date of manufacture. In addition, NAM would amend (2)(A) to make it clear that section 6(a)(1)(A) refers to the standards of section 4.

The Business Round Table would require that the claimant prove that government standards governing the warnings or instructions are inadequate. The Keene Corporation would delete that portion of section 6(a)(2)(A) that allows the claimant to establish that reasonably prudent seller would have provided additional warnings beyond that required by government standards. Keene Corporation believes that government standards for warnings should be sufficient.

Section 7(a)(2) of the Owen Draft differs from section 6(a)(2)(A) in that if the product seller proved that the product complied with mandatory safety standards at the time of sale that pertained directly to the aspect of the product which caused the harm, the product seller will not be held liable "unless the claimant proves by clear and convincing evidence that such standards were unsound."

Section 6(a)(2)(B)

With respect to any aspect of a product for which warnings or instructions were not provided in compliance

with an applicable Federal, State, or local government standard pertaining to the product existing at the time of manufacture, the product shall be considered to be unreasonably unsafe because of the failure of the product seller to provide adequate warnings and instructions unless the product seller proves by clear and convincing evidence that the failure of the seller to comply with such standard was a reasonably prudent course of conduct under the circumstances.

Comments:

NAW would require a causal link between the harm to the claimant and noncompliance with a required warning or instruction. NAM would make the same changes it suggested in its comments to section 6(a)(2)(A). Narco would again substitute "a preponderance of the evidence" for "clear and convincing."

Section 6(b)

(b)(1)(A) If an aspect of the product which caused the harm of the claimant was in compliance with applicable specifications of a Federal, State, or local government contract, the product shall not be considered to be unreasonably unsafe in design.

(B) If the aspect of the product which caused the harm of the claimant was not in compliance with applicable specifications of a Federal, State, or local government contract, that aspect of the product shall be considered to be unreasonably unsafe in design.

(2)(A) If warnings and instructions for that aspect of a product which caused the harm of the claimant were provided in compliance with applicable specifications of a Federal, State, or local government contract, the product shall not be considered to be unreasonably unsafe because of the failure of the product seller to provide adequate warnings and instructions unless the claimant proves by a preponderance of the evidence that there was a failure to satisfy the post manufacture duty to warn.

(B) If warnings or instructions for that aspect of a product which caused the harm of claimant were not provided in compliance with applicable specifications of a Federal, State, or local government contract, the product shall be considered to be unreasonably unsafe because of the failure of the product seller to provide adequate warnings and instructions.

Comments:

Westinghouse would amend section 6(b) to make it clear that compliance with government contract specifications provides a defense whether the product was actually sold or otherwise transferred pursuant to such a contract.

NPLC and Northrop Corporation would add to section 6(b) a provision that the product complies with contract specifications if the product is accepted, in discharge of Producer's obligations, by an authorized contracting agency of the government.

NAM would amend section 6(b)(1) so that a manufacturer would not be held liable for design defects when it is required to design a product according to government specifications or requirements.

Under section 7(b)(1) of the Owen Draft, a claimant has proven that a product was unreasonably dangerous, or that the product seller failed to exercise reasonable care with respect to the product, if he proves that the manufacturer's noncompliance with applicable contract specifications caused the injury. Similarly, under section 7(b)(2) of the Owen Draft, a product is not

considered unreasonably dangerous, and the product seller is deemed to have exercised reasonable care, if the product seller proves by a preponderance of the evidence that the aspect of the product, or its use of which the claimant complains, complied with applicable mandatory contract specifications.

The Keene Corporation strongly supports section 6(b)(1)(A), it believes that if the product was produced in conformity with government standards it should be found safe. On the other hand, Greenberg believes that if the seller or manufacturer is insulated from liability by complying with the specifications of the government contract, the government should be liable for injuries suffered as a result of the inadequacy of those specifications.

NMTBA would delete sections 6(b)(1)(B) and 6(b)(2)(B) because a claimant need not prove fault pursuant to section 4 of the Act.

Narco and Litton Industries would amend subsection (b)(1)(B) and (b)(2)(B) to allow a manufacturer to rebut the presumption; i.e., manufacturer's modifications may have made the product safer, or the government may have orally ordered a modification to specifications. Narco would delete the period after "design" and would add the following: "unless the product seller proves by

preponderance of the evidence that that aspect of the product exceeded the safety specifications the Federal, State, or local government contract." This would expressly provide that codified safety standards are not violated by greater precautions; otherwise, product sellers would be discouraged from providing more than the minimum care. Litton Industries would add to the provision: ". . . unless the product seller proves by clear and convincing evidence that the failure to comply with applicable specifications of the government contract was a result of changes in requirements by and with the consent of governmental entity."

NAM would make the same changes to section 6(b)(2)(A) as in section 6(b)(1). The Keene Corporation would not make any changes in section 6(b)(2)(A); post manufacturing warnings are very difficult to comply with.

Litton Industries would add the following to section 6(b)(2)(B): "unless the product seller proves by clear and convincing evidence that failure to provide warnings in compliance with government contract was a result of changes in requirements by and with the consent of the government agency."

Suggested Provisions:

Rather than establish a subsection for failure to warn and instruct under the design defect or government contract specification provisions, section 7(c) of the Owen draft simply notes that "for the purposes of this section, the phrase 'the aspect of the product or its use of which the claimant complains' shall include any failure to warn or instruct."

NICA believes that other government standards such as OSHA and EPA regulations should be considered presumptively reasonable standards of conduct. BMA supports a provision admitting evidence of non-government safety-standards. Jurvis B. Webb Company believes that voluntary industry standards are often as stringent as government standards and that it is therefore arbitrary to allow as a presumption that a product in compliance with government standards is not unreasonably unsafe and not afford the same presumption to compliance with voluntary standards.

SECTION 7 COMPARATIVE RESPONSIBILITY

General Comments:

The Business Roundtable, Allis-Chalmers Corporation, and NPLC object to this section. The Business Roundtable believes that the section creates confusion regarding apportionment of responsibility among joint tortfeasors and recommends that the section undergo further consideration. NPLC also urges reconsideration of this section. It is concerned of treatment of tortfeasors who are not parties to the action; once responsibility has been assessed among parties, each party should be responsible for its own contribution to the tort. Allis-Chalmers Corporation objects to imposing liability for damages on a pure comparative basis; defendant must pay even when claimant's fault is more than half the total. CMA would amend the first paragraph in section 7(a) to bar a claimant from recovery if his own contributory negligence or assumption of risk accounted for more than 50 percent of the proportionate responsibility.

If the provision for a comparative responsibility is retained, MAPI believes that a defendant should not be held jointly responsible for actions of others but should be responsible only for his own actions.

BMA would delete any reference to "responsibility" and substitute for it "fault" as a standard.

Asarco believes that Section 7 completes the "fairness package" through comparative fault principles, recognizing that each party should bear a portion of the damages equal only to its own responsibility for harm.

Section 7(a)

The comparative responsibility of the claimant shall not bar the claimant's recovery in a product liability action, but shall reduce compensatory damages awarded to the claimant in an amount proportionate to the responsibility of the claimant. [Except as set forth in subsection (b)(2),] "comparative responsibility" means conduct of the claimant involving contributory negligence or assumption of risk.

Comments:

Whirlpool Corporation, Narco, and NSWMA are concerned with the claimant's responsibility in a products liability action. To prevent the inference that a claimant may recover even under circumstances where the claimant's contributory negligence or assumption of the risk was 100 percent, Whirlpool Corporation would delete the words "shall not bar the claimant's recovery in a products liability action." Narco proposes the addition of a section 7(a)(2) to bar recovery when the claimant assumed the risk of harm associated with the product. Narco's provision is as follows: "In any product

liability action in which it is shown that the plaintiff assumed the risk of harm associated with the use of the product, any recovery by such claimant shall be barred."

NSWMA would add the following language to the first full paragraph of subsection (a):

> . . . shall not bar recovery in a product liability action, if such responsibility is not as great as the person or persons against whom recovery is sought, but shall reduce any damages awarded to the claimant proportionate to the responsibility of the claimant.

NAW would include the bracketed language in section 7(a).

Greenberg supports 7(a) and its use of comparative fault as the basis for determining recovery, but notes that it is inconsistent with section 4(d)(2)(C) which bars recovery for failure to warn when the plaintiff misused the product.

Narco would add language to explicitly establish that all claims under this Act are governed by comparative responsibility principles. Narco also suggests deleting the last sentence in section 7(a) to avoid confusion by reference to supplanted doctrine. NAM would insert the following definition of contributory negligence to help establish a consistent interpretation: "i.e., conduct of the claimant which would not be

expected of a reasonably prudent person in the same or similar circumstances."

Colt Industries suggests amending section 7(a) by inserting claimant's negligence as conduct that would be considered in deciding comparative responsibility.

The Keene Corporation supports section 7(a) and would not change in this section. It believes that it is appropriate for the employer's liability to be reduced by any strict liability award.

Instead of reducing the claimant's award against a product seller proportionate to the employer's responsibility for the harm, the Harris Corporation would delete section 9(d) of the Staff Draft and add a subsection (2) to section 7(a) that would require the employer to contribute to the product seller that portion of the award attributed to the employer's responsibility.

Section 9(a) of the Owen Draft would reword section 7(a) as follows:

> All products liability actions under this Act shall be governed by the principles of comparative responsibility. Except as otherwise provided in subsection (b)(4), in such actions the comparative responsibility attributed to the claimant shall not bar the claimant's recovery but shall reduce the amount of compensatory damages awarded to the claimant to the extent proportionate to the responsibility attributed to the claimant.

Section 7(b)(1)

[(1)] In any product liability action involving a claim of comparative responsibility, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories (or, if there is no jury, the court shall make findings) indicating the following:

(A) The amount of damages each claimant would be entitled to recover if comparative responsibility were disregarded.

(B) The percentage of the total responsibility for the harm to be allocated to each claimant, to each defendant, to any third-party defendant, to any person who misused, modified, or altered a product, and to any person who voluntarily and unreasonably used of stored a product with a known defective condition. For purposes of this subparagraph, the court may determine that two or more persons are to be treated as a single party.

Comments:

OPEI would amend (b)(1)(B) to provide a basis for determining relative responsibility by deleting the phrase "percentage of total responsibility" and substituting "percentage of total fault" and similarly, by deleting "proportionate to the responsibility" and substituting "proportionate to fault."

Colt Industries would rewrite subsection (B) to read as follows: "The separate percentage of the total responsibility attributable to each party, including the claimant, and any nonparties responsible for the harm in any way."

Section 9(b)(2) of the Owen Draft would apportion responsibility as follows:

> In determining and allocating responsibility under this section, the trier of fact shall consider on a comparative basis, the nature of the conduct of each person responsible for the harm of the claimant and the extent of the approximate causal relation between such conduct and the damages claimed. A person's responsibility for the claimant's harm shall be based upon the principles of the liability in this act, where relevant, the person's knowledge of the risk, and whether the person's creation of the risk or actions toward the product were unresponsible.

Section 7(b)(2)

[(2) In the case of responsibility of the employer of the claimant or any coemployee of the claimant for the claimant's harm, damages shall be reduced (A) by the amount determined under section 9(a) if that section is applicable; or (B) by the percentage of responsibility apportioned to the employer or coemployee, whichever is greater.]

Comments:

Asarco, Textron, Westinghouse, NAIB, and NMTA support section 7(b)(2) for the same reasons. They believe that the subsection (b)(2) is fair and equitable; employer's fault should be assessed with the comparative fault of all persons involved. Product seller's liability should be reduced if employer's fault exceeds the worker compensation award. Product seller's liability should depend on the percentage of total damages

attributed to this fault. Requiring a product seller to pay for the entire amount of damages, even though a major share of the fault lies with the employer, is unfair. NICA would add that if claimant is an employer or coemployee, damages should not be reduced automatically but only to the extent of the claimant's comparative responsibility.

Asarco adds that the comparative fault principle may reduce transaction costs by encouraging claimants to sue the party or parties actually at fault, rather then pursuing a defendant simply because that defendant is easily available or financially sound. In addition, the comparative fault incur costs of trial. Cf. V. Schwartz, Comparative Negligence § 21.1 at 337 (1974), citing Columbia University Study.

Section 7(c)(1)

The court shall determine the award of damages to each claimant in accordance with the findings made under subsection (b)(1) (subject to any adjustments required under subsection (b)(2)) and shall enter judgment against each party determined to be liable.

Comments

NAW proposes that a "modified," rather than "pure," form of comparative responsibility be adopted. NAW's suggestion is as follows: "upon a finding by the court . . . that the comparative responsibility of the

claimant is of greater degree than the comparative responsibility of the [defendants] . . . the claimant is not entitled to recover damages." This modified rule would deny recovery to one whose own acts are the principal cause of harm. This would be an intermediate position between the absolute bar of the contributory negligence rule and the permissiveness of the pure comparative negligence rule.

Greenberg would leave it to the jury, rather than the court, to determine the damage judgments.

Section 9(c)(1) of the Owen Draft differs from section 7(c)(1) in the following respects: "The court shall determine the amount of damages to be awarded to each claimant . . . ."

Section 7(c)(2)

(2) If a party is responsible for a distinct harm or if there exists some other reasonable basis for apportioning the responsibility for harm caused by a party on an individual basis, damages shall be apportioned severally.

Comments:

BMA would delete section 7(c)(2) and specify that contribution is to be determined according to percentage of fault. OPEI would delete section 7(c)(2) and substitute it with the following: "for purposes of contribution under subsection (c)(1), the court shall determine and state in the judgment each party's equitable share

of the obligation to each claimant in accordance with the respective percentages of fault."

Litton Industries suggests changing subsection (c)(2) to apportion damages severally and in strict accordance with assignable fault; a defendant should not be required to pay for injury he has not caused.

Section 7(c)(3)

If a motion is made by a claimant not more than 1 year after judgment is entered in any product liability action, the court shall determine whether any part of the obligation of a joint tortfeasor involved in the action is not collectible from such a person. Any amount of obligation which the court determines is uncollectible from that tortfeasor shall be reallocated as an obligation to be paid by the other tortfeasors involved in the action according to the respective percentages of their responsibility as determined under subsection (b).

Comments:

Narco, Textron, Whirlpool, Litton Industries, and OPEI would delete section 7(c)(3). Narco would delete this subsection for the following reasons: (1) it is logically inconsistent to make comparative responsibility a basis for one tortfeasor to guarantee the liability of another; (2) the potential burden of an insolvent joint tortfeasor is too speculative and remote to be insured against with certainty; (3) the provision potentially burdens the most minimal tortfeasor with damages disproportionate to its liability; (4) the provision has

a punitive, not compensatory result; and (5) the provision would provoke joinder of the most tangential parties and clog the courts. OPEI would delete (c)(3) because of the possibility that a defendant would have to pay more than its fair share of the damages if the primary wrongdoer becomes insolvent. Textron asks that this subsection be reevaluated to consider making all determinations regarding co-tortfeasor liability absolute and not reallocable if a tortfeasor should be unable to pay his share. Litton Industries believes that subsection (c)(3) is contrary to comparative fault principles; in the very least, it should be changed to provide that the unpaid portion will be allocated among all parties, including the claimant, according to their degrees of fault.

Narco and Black & Decker would delete the last sentence of subsection (c)(3) because it is unfair to force a person to pay a portion of the damage award solely because of actions or omissions of third parties that are not under that person's control.

SPI believes that subsection (c)(3) is inconsistent with section 7 because the claimant's inability to collect judgment against a particular tortfeasor should not provide a basis for increasing the amount of judgment against the remaining tortfeasors.

Specialty Equipment Market Association would amend section 7(c)(3) so that a defendant's liability for damages shall not exceed his share of the responsibility, as determined under section 7(b).

Section 9(c)(3) of the Owen Draft differs from section 7(c)(3) as follows:

> Upon motion made by a claimant not more than on year after judgment against a tortfeasor in any products liability action has been entered and appeals have been exhausted, the court may determine whether any part of such joint tortfeasor's obligation is not collectable from such person.

Section 9(c)(3) is identical to section 7(c)(3) in all other respects.

New Provisions:

OPEI notes that the Staff Draft fails to state the effect of "Mary Carter" agreements. It would add a subsection 7(c)(4) which would require all agreements concerning comparative responsibility to be filed with the court. A third party would be entitled to petition for mistrial upon the discovery of an unconscionable agreement designed to cast liability upon a third party. A party proving the existence of a "Mary Carter" agreement may recover damages, including costs and expenses, and attorneys fees incurred in the previous action. BMA

also notes that section 7 fails to deal with the "Mary Carter" agreements.

Section 9(b)(4) of the Owen Draft relieves persons lacking a substantial relationship to the subject of the products liability action from liability by providing as follows:

> If one person's actions or inactions toward the product and its risk were trivial as compared to the resonsibility of one or more other persons, the responsibility of such other person or persons shall be deemed as sole proximate cause of the claimant's harm and the first person shall no legal responsibility therefore.

NICA would amend section 7(c) to clarify that product sellers are permitted to bring cross claims and other actions against each other.

SECTION 8 MISUSE OR ALTERATION

General Comments:

The Bicycle Manufacturers of America believe that a claimant should bear sole responsibility for injuries resulting from misuse of a product if the claimant had been given adequate warnings and instructions. In addition, BMA believes that manufacturers should not be responsible for misuse that they cannot reasonably anticipate. MHI concurs with this view because it is both unjust and ineffectual to impose liability upon a product seller or manufacturer for a third party's misuse or alteration of product when the product seller or manufacturer has no degree of control over that third party. Both Black and Decker and SPI would remove the comparative responsibility provisions of this section; they would bar a claimant's recovery for damages caused by misuse or alteration of a product.

Allis-Chalmers Corporation would clarify section 8 to ensure that a third party is liable for any misuse or alteration of a product that is partially responsible for claimant's injuries. It is also concerned that the use of "product seller" instead of "manufacturers" will affect a manufacturer's defenses where the retailer

alters a product in a way that was not specified or reasonably anticipated by the manufacturer.

Section 8(a)[(1)]

If a product seller proves by a preponderance of the evidence that misuse of a product by any person other than the product seller has caused the claimant's harm, the claimant's damages shall be reduced or apportioned to the extent that the misuse was a cause of the harm. Under this subsection, the trier of fact may determine that the harm caused by the product occurred solely because of misuse of the product.

Comments:

Both Colt Industries and NAW believe that misuse of a product should be a factor for determining each party's comparative responsibility. They would amend section 8(a)(1) to reduce claimant's recovery according to the claimant's comparative responsibility.

Narco would add "in which event there shall be no liability upon the product seller" to the end of 8(a)(1) to make the statutory language explicitly consistent with its intent.

Section 8(a)

[(2) For purposes of this subsection, misuse shall be considered to occur when a product is used for a purpose or in a manner which is not consistent with the common or reasonable practice of users of such product.]

Comments:

Rather than defining misuse as a departure from the "common or reasonable practice of users," Litton

Industries would define misuse as a use that is "at substantial variance with a manufacturer's design or instructed usage." Westinghouse would amend this subsection by defining misuse as occurring when a product is used in a manner which is not consistent with the common and reasonable practice of users of such product. In addition, Westinghouse would add the following to the end of the subsection: "or is not consistent with warnings or instructions furnished to the purchaser, user, or person who makes the product available for use." FEMA concurs with the above suggestions. It believes that the unreasonable use of a product, even if the use is a common practice, should be considered misuse.

NPLC would add the following to the end of subsection (a)(2): "Uses contrary to adequate, reasonable and practicable instructions and warnings shall constitute misuse under this subsection." CMA makes a suggestion to the same effect.

SEMA believes that it is appropriate to limit the defense of misuse where the danger of such misuse is open and obvious. It does not believe, however, that the claimant should be able to prevent a counterclaim of misuse or alteration because the product seller failed to provide a warning against foreseeable misuse, if the danger of such misuse is not open and obvious.

Greenberg, of the Public Citizen, believes that the definition of misuse in section 8(a)(2) imposes a lower standard of liability than the common law negligence. He believes that manufacturers should be held liable for foreseeable, although unintended, uses of a product.

Suggested Provisions:

OPEI believes that section 8 should provide an incentive to use a product in a manner for which it was designed, manufactured and sold. It would amend section 8(a) by adding the following subsections:

> (3) The alteration or modification of the product by a claimant which was not done in accordance with the product seller's instructions or with the express written consent of the product seller is a misuse of the product.
>
> (4) Where claimant has misused a product by using it in a manner which a product seller had warned the claimant against, or in a manner in which the product seller could not have reasonably anticipated, or by failing to inspect, use or maintain a product as instructed by the product seller, the product seller shall not be held liable for the harm incurred as a result of such misuse.

The National Product Liability Council would rewrite section 8(a) as follows:

> In any product liability action, the defendant shall not be liable for any injury or damage if the defendant proves by a preponderance of the evidence that such injury or damage arose out of, or subsequent to, an alteration, modification, or change made in the

product complained of, including its function, formula, or design, by someone other than the defendant, and that such modification, alteration or change was the cause of the injury or damage and was made other than in accordance with:

(1) express adequate recommendations, specifications, instructions, and warnings, if any, made by the defendant or

(2) the express consent of defendant.

Section 8(b)(1)

If a product seller proves by a preponderance of the evidence that an alteration or modification of the product has caused the claimant's harm, the damages of the claimant shall be reduced or apportioned to the extent that the alteration or modification was a cause of the harm. Under this subsection, the trier of fact may determine that the harm arose solely because of the product alteration or modification. Reduction or apportionment under this subsection shall not be made if--

(A) the alteration or modification was in accordance with instructions or specifications or the product seller;

(B) the alteration or modification was made with the express or implied consent of the product seller; or

(C) the alteration or modification was reasonably anticipated conduct, and the product seller failed to provide adequate warnings or instructions with respect to that alteration or modification.

Comments:

NAW would amend (b)(1) to make an alteration or modification of a product a factor determining the parties' comparative responsibility according to the rules set forth in section 7. Litton Industries would dismiss

those parties who did not authorize or participate in modifying or altering a product if the modification or alteration is the cause of the injury and is beyond the manufacturer's permissible guidelines.

GAMA, OPEI, NMTBA, and Litton Industries are concerned with the use of the term "implied consent" in subsection (b)(1)(B). GAMA fears that a product seller's authorization of one service organization to modify a product may be interpreted as implied consent to the same modification by another service organization whose capability to do the job is not known to the seller. NMTBA is concerned that the use of "implied consent" would be the basis of substantial litigation and encourage the courts to significantly erode the meaning of this subsection. To eliminate questions of proof and credibility, OPEI would amend subsection (b)(1)(B) to require written consent from the product seller. GAMA would require that the implied consent of the seller be evidenced by specific conscious actions or expressions made directly between the product seller and the party authorizing or performing the alteration or modification.

Gulf Oil Company requests that subsection (b)(1)(C) be deleted because it believes that foreseeability has no application in the analysis of the causal chain of

events. When an injury is caused by a third party's modification, and not by a defective product itself, causation is missing and a plaintiff should not be allowed to recover against the manufacturer; purchasers are protected because section 4 requires that warnings and instructions be provided. Textron is concerned that subsection (b)(1)(C) requires a product seller to anticipate and provide warnings for all possible alterations and modifications.

Snell and Wilmer believes that precluding reduction or apportionment when the alteration or modification "was reasonably anticipated" renders the misuse or alteration defense almost meaningless. It would require the claimant to prove that the modification did not make the injury complained of more likely to occur.

NPLC suggests amending subsection (b) to provide as follows:

> In any product liability action, the defendant shall not be liable for any injury or damage if the defendant proves by a preponderance of the evidence that such injury or damage was caused by misuse of the product by any person other than the defendant.

NMTBA would add a subsection (b)(1)(D) to define the term "reasonably anticipated conduct" as defined in section 4(d)(2)(D).

Section 8(b)(2)

For purposes of this subsection, alteration or modification shall be considered to occur--

(A) when a person other than the product seller changes the design, construction, or formula of the product, or changes or removes warnings or instructions that accompanied or were displayed on the product; or

(B) when a product user fails to observe the routine care and maintenance required for a product.

Comments:

To encourage employers to provide safer work places and to maintain their machinery, MHI would add "...or where an employer permits the use of a machine after such changes or removal or warnings or instructions has occurred" to the end of subsection (b)(2)(A).

WPLR would change the phrase "warnings or instructions" in subsection (b)(2)(A) to read "warnings, instructions or safety devices;" a NMTBA study determined that the employer's failure to properly guard machinery caused 63% of workplace injuries which occur on machine tools. A manufacturer should not be liable if the employer fails to provide adequate safeguards in situations where these safeguards are site-specific and cannot be provided by the manufacturer.

NAM would amend subsection (b)(2)(B) to include persons "in possession or control of the product" as

well as product users. Professor Shapo of Northwestern University School of Law criticizes defining "alteration or modification" to include occasions where "a product user fails to observe the routine care and maintenance required for a product."

NMTBA would add the following subsections:

> "(C) when a product user fails to adequately train its employee in the safe use of a product, and that lack of training was the cause of the claimant's harm;
>
> (D) where product user fails to comply with Government regulations relating to the use of the product."

Suggested Provisions:

The National Product Liability Counsil suggests adding a subsection (c) which provides as follows:

> (1) uses contrary to adequate recommendations, specifications, instructions and warnings accompanying the product or otherwise provided by the defendant, unless the defendant knows or is aware of facts from which a reasonable person would infer that identifiable hazard are associated with the substantial pattern of use contrary to such recommendations, specifications, instructions and warnings and fails to take reasonable precautions against such hazard; and
>
> (2) uses other than those which persons of ordinary skill and judgment (or in the case of prescription products, practitioners of appropriate skill and judgment) would normally and reasonably expect the product to be suitable.

SECTION 9 EFFECT OF WORKER COMPENSATION BENEFITS

Section 9

(a) In any product liability action in which damages are sought for harm for which the person injured is entitled to compensation under any State or Federal worker compensation law, the damages shall be reduced by the sum of (1) the amount paid as worker compensation benefits for that harm; and (2) the present value of all worker compensation benefits to which the employee is or will be entitled for the harm.

(b) Unless the product seller has expressly agreed to indemnify or hold an employer harmless for harm to an employee caused by a product--

(1) the employer shall have no right of subrogation, contribution, indemnity or lien against the product seller if the harm is one for which a product liability action may be brought under this Act; and

(2) the worker compensation insurance carrier of the employer shall have no right of subrogation against the product seller.

(c) If final judgment in a product liability action brought by an employee under this Act has been entered before there has been a determination made with respect to the entitlement of the employee to worker compensation benefits under State or Federal law, the product seller may bring an action after the date such a final judgment is entered--

(1) for reduction of the judgment (in accordance with subsection (a)) by the amount of the worker compensation benefits to which the employee is subsequently determined to be entitled; or

(2) for recoupment from the employee of the amount of the worker compensation benefits to which the employee is subsequently determined to be entitled if the product seller has already paid to the employee, in satisfaction of a judgment under this Act, an amount which includes the amount of those worker compensation benefits.

(d) In any product liability action in which damages are sought for harm for which the person injured is entitled to compensation under any State or Federal worker compensation law, no third party tortfeasor may maintain any action for indemnity or contribution against the employer of the person who was injured.

Comments:

Section 9 is strongly supported in the comments. General Tire & Rubber, CEMA, Asarco, Beloit Corporation, The Business Roundtable, NPLC, Westinghouse, NMTBA, Textron, Litton Industries, MHI, RIMS, SPI, GAMA, Keene Corporation, OPEI, MAPI, and NICA strongly support section 9. Section 10 of the Owen Draft is essentially the same as section 9 of the Staff Draft.

RIMS supports section 9 and believes it will go a long way towards reducing insurance costs of both manufacturers and employers since it decreases the expenses that presently exist as a result of subrogation against the product seller. RIMS would broaden section 9 to offset all collateral source recoveries generated from publicly funded sources.

NICA would delete subsection 9(b). It believes that employers who pay out worker compensation awards should be entitled to recoup those payments from manufacturers to the extent that it is established that product defects were the cause of the injury in question.

On the other hand, GAMA, Keene Corporation, and Litton Industries support subsection 9(b) and criticize subsection 9(d). Litton Industries believes that it is not fair for the employer to obtain indemnity or contribution from the product seller under subsection 9(b) when subsection 9(d) prevents the product seller from doing the same in any case in which the employee has received worker compensation benefits. GAMA suggests that section 9(d) be modified by adding the introductory phrase, "unless the employee has expressly agreed to such action;" this would limit the product seller's right to indemnity or contribution against a claimant's employer. Keene Corporation would accept subsection 9(d) only if subsection 7(b)(2) is in the Act; otherwise, the manufacturer or seller pays for the wrongful acts of the employer but is precluded from recovering the payments paid from the employer.

Asarco supports section 9 as maintaining integrity of the worker compensation system. Elimination of employer's right of subrogation or indemnification from

the product seller is fair in light of his immunity to tort suits by the injured employee.

The Business Roundtable, MAPI, OPEI, and the NPLC support the proposed bar on subrogation rights against the product seller. The Business Roundtable and OPEI would bar insurance carriers from obtaining subrogation rights against the product seller; it is unfair to grant subrogation rights to the insurance company against a product seller for compensation the claimant received by virtue of his insurance policy. NPLC believes that recognizing the subrogation rights of worker compensation carriers against sellers of products found to have tortiously caused worker's injuries places the burden of work-related injuries upon the product sellers, even in the typical situations in which the employer's negligent management of the work area contributed to the injury. Textron is concerned that allowing indemnity or hold harmless agreements will encourage employers to demand such agreements from product sellers, thus subverting subsection (b)(1).

To avoid requiring the product seller from bringing a separate lawsuit to recoup damaes awarded before the worker compensation benefits are determined, WPLR suggests putting a portion of the damages equal to the maximum possible worker compensation award in escrow

until the final disposition of the worker compensation award. WPLR also suggests adding an exception to the Collateral Source rule to inform the injury as to the compensation the claimant has already received for the injury.

SECTION 10 TIME LIMITATION ON LIABILITY

General Comments:

Sturm Ruger and Company recommends the adoption of section 10 but would change the title to "Statute of Repose." NAM would change the title to "Presumption of Non-Defect." NAM and NAII are concerned that the Staff Draft does not provide for a statute of repose.

Section 10(a)

No claim in any product liability action may be brought if the harm was caused after the end of the longer of the following periods:

[(1) The useful safe life of the product.

[(2) Any period during which the product seller expressly warrants that the product can be safely utilized.

Comments:

Rather than relying on the "useful safe life" concept for determining the time period for products liability actions, NPLC would provide a uniform ten-year time limit from date of delivery to first purchaser or leasee, unless the product seller expressly warrants that the product may be safely used for longer time at the time of sale. JLG Industries would add a provision that the useful safe life of a product shall be deemed to have expired if a person other than the manufacturer has modified, altered, or misused the product to create a hazard.

Snell and Wilmer believes that manufacturers will take advantage of section 10(a)(2) to unreasonably limit their liability. Greenberg, of the Public Citizen, questions the need for a useful safe life provision, noting that one report found that 97.1 percent of bodily injuries caused by products occur within five years after purchase.

Section 10(b)

[(b) Subsection (a) is not applicable if--

[(1)(A) the product seller intentionally misrepresented facts about the product or fraudulently concealed information about the product; and (B) that conduct was a substantial cause of the claimant's harm;

[(2) the harm of the claimant was caused by the cumulative effect of prolonged exposure to a defective product;

[(3) the aspect of the product which caused the harm of the claimant was not discoverable by a reasonably prudent person until the expiration of the period referred to in subsection (a); or

[(4) the harm, caused within the period referred to in subsection (a), did not manifest itself until after the expiration of that period.

Comments:

The Allis-Chalmers Corporation believes that this subsection does not accomplish the purpose of a statute of repose. It believes that subsection 10(b)(1) should not deny the benefit of the statute of repose because

of fraud causing plaintiff to suffer harm (as opposed to fraudulent concealment or representation preventing preventing plaintiff from suing within his statute of limitations). It believes that there is no logical basis for denying statutes of repose for certain types of products.

NMTBA would make the repose established for products not falling within the four exceptions listed in subsection 10(b) absolute, rather then conditional.

The Keene Corporation recommends limiting compensation for latent defects that are discovered after the time limitation to a multiply of the claimant's out-of-pocket expenses including medical expenses and lost wages.

Household International believes that subsection 10(b)(3) should be omitted as it destroys the application of the bar in subsection 10(a); in most cases the claimant could assert that the defect was not discovered until after the accident. The Business Roundtable also believes that the exception subsection 10(b)(3) makes the statute of repose in section 10 meaningless, it should be deleted. TBR would shorten useful safe life from 30 to 20 years from the date of first purchaser or leasee if the harm of the claimant was caused by the

cumulative or prolonged exposure or did not manifest itself until after the expiration of ten years.

Whirlpool Corporation would delete subsection 10 (b)(3) because it would neutralize the intent of section 10 by obligating manufacturers to a much longer liability periods than those listed in this bill. NMTBA would amend subsection 10(b)(3) to read as follows: "The aspect of the product which caused the harm of the claimant was present at the time of delivery and was not discoverable by reasonably prudent person until the expiration of the period referred to subsection (a); or."

NPLC would delete subsection 10(b)(3). NAM suggests deletion of subsection 10(b)(3) or, if retained, only open and obvious dangers should be covered. As NAM interprets section 4(b)(2)(A), it bars actions for failure to warn of obvious dangers.

The Allis-Chalmers Corporation would delete subsections 10(b)(3) and (4) because the claim should not be allowed where harm manifests itself many years after the product is used.

Greenberg is concerned that subsection 10(b)(3) and (4) relieves drug manufacturers of any liability for defects in their product except for manufacturing flaws.

OPEI believes that subsection 10(b)(4) would eliminate the statute of repose for all but the most obvious defects. It would reword as follows: "The contact with the product which leads to an injury occurred before the product referred to in (a) but the harm caused by such contact did not manifest itself until after the expiration of that period."

BMA would replace subsection 10(b)(4) reference to "harm" with "injury" and would only permit actions after the statute of repose where the injury becomes apparent after it has expired.

Section 10(c)

Nothing contained in subsection (a) shall affect the right of any person who is subject to liability for harm under this Act to seek and obtain contribution or idemnity from any other person who is responsible for such harm.

Comments:

No comments.

Section 10(d)

(1) As used in this section, unless the manufacturer marks a shorter period on a product in a clear and permanent manner which is reasonably noticeable to a user, "useful safe life" means--

[(A) 30 years from the date of first delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling the product or using the product as a component

part of another product, if the product is a major capital good;

[(B) 20 years from the date of first delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling the product or using the product as a component of another product, if the product is a major home appliance; and

[(C) 10 years from the date of first delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling the product or using the product as a component part of another product, in the case of any other product.

(2) As used in this subsection--

[(A) "major home appliance" means a stove, furnace, hot water heater, washer, dryer, dishwasher, refrigerator, freezer, or other similar home appliance; and

[(B) "major capital good" means any product which was offered or sold for $1,000, or more, or any component of any such product, if it is also of a character subject to allowance for depreciation under the Internal Revenue Code, as amended, and was--

[(i) used in a trade or business; or

[(ii) held for the production of income.]

Comments:

The comments are virtually unanimous in asking for a shorter "useful safe life." Litton Industries, BMA, Harris Corporation, SPI, NDNA, WPLR and NAIB would change subsection 10(d) to provide a ten year statute of repose for all products. Both the Allis-Chalmers

Corporation and MAPI believe that the periods provided subsection 10(d) are too long. MAPI suggests that a general statute of repose period of ten years be established with the exception allowing a 20 year period if (a) the harm of the claimant was caused by the cumulative effect of prolonged exposure to the product; or (b) the harm did not manifest itself until the expiration of ten years.

Although RIMS supports the concept of a "useful safe life" with staggerred time frames, it believes that time limitations of 30, 20 and 10 years may be too long. The Jervis B. Webb Company believes that the definition of useful safe life should be more reflective of rapid changes in technology. The National Federal of Independence Business is concerned about how the periods of liability ("useful safe life") were determined. Black & Decker believes that the labelling requirement in subsection (d)(1) is unworkable. It proposes that a time bar that would remove a manufacturer's liability after 10 years after the date of manufacture for all products except those covered by subsection (b).

American Mining Congress would shorten the "useful safe life" of a major capital good to 15 years, 10 years for a major home appliance, and 5 years in the case of

any other product. It believes that these periods are more realistic. Cincinnati Milacron recommends a 15 year time period rather than a 30 year useful life for major capital goods. Whirlpool Corporation would reduce the period of liability from 20 years to 12 years for a major home appliance which would more realistically reflect the medium life average of major appliances. The Bicycle Manufacturers Association of America would change the statute of repose from 10 years to 8 years for subsection 10(d)(1)(D).

Cincinnati Milacron would add a subsection 10(d)(1)(D) specifying the useful life of a component product which is a major capital good and which may be sold separately as well as in conjunction with another product, they have a lesser useful life than the product in which it is used.

NAW would amend subsection 10(d)(2)(B) to define a "major capital good" as

> [(C) "any product which is of a character subject to allowance for depreciation under the Internal Revenue Code, as amended, and--
>
> (i) was used in a trade or business or held for the production of incomes; and
>
> (ii) was reasonably anticipated at the time of sale or offer for sale to be useful for such purpose for a period in excess of ten years.

Greenberg is concerned that subsection 10(b) will allow the manufacturer to unilaterally shorten the length of time that is liable for harm caused by defective product.

Suggested Provisions:

To avoid confusion with state statutes of limitations and explictly verify a bar to proceeding, Narco would eliminate section 10 as it appears in its entirety and substitute in its place the following:

Time Limit of Liability

Sec. 10 (1) No claim in any product liability action may be brought if the harm was caused after the end of the longer of the following periods:

(1) ten years from the date of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such product or using the product as a component part of another product.

(2) Any period during which the product seller expressly warrants that the product can be safely utilized.

(b) Section (a) is not applicable if -
(1) (A) the product seller intentionally misrepresented facts about the product or fraudulently concealed information about the product, and (B) that conduct was a
(B) that conduct was a substantial cause of the claimant's harm.

(c) Nothing contained in subsection (a) shall affect the right of any person who is subject to liability for harm under this act to seek and obtain contributions or indemnity from any other person who is responsible for such harm.

The Owen Draft differs substantially from section 10. Section 12 of the Owen Draft, entitled "Periods of Limitation and Repose for Products Liability Actions" provides as follows:

LIABILITY ACTIONS

(a) Any claim under this Act must be brought within 3 years from the time the claimant discovered, or in the exercise of due dilligence should have discovered, the harm and its cause.

(b) Notwithstanding subsection (a), no products liability action may be commenced more than 10 years after the product seller sold the particular product that caused the claimant's harm, except as provided in subsection (c) and (d) of this section, unless such seller expressly represented that it could be used safely for a longer period. If a longer period was so represented, an action must be commenced within three years from the earlier of --

(1) the end of such period represented; or

(2) the period provided in subsection (a).

(c) An action may be commenced within 15 years after the sale, but not thereafter, if --

(1) the claimant's harm is caused within 10 years after the product is sold, but does not manifest itself until thereafter; or

(2) the claimant's harm is proven by clear and convincing evidence to have been caused by an intentional misrepresentat ion of a product seller.

(d) Nothing in this section shall affect the right of any person subject to liability for harm under this Act to seek and obtain contribution or indemnity from any other person responsible for such harm.

SECTION 11 PUNITIVE DAMAGES

General Comments:

General Tire and Company, NAII, BMA, Snell & Wilmer, SPI, and Whirlpool would delete section 11. They believe that it is inappropriate to allow punitive damages in a products liability action. NAII opposes punitive damages in any civil action and would award costs, expenses and attorney fees to defendants in cases involving frivolous claims for punitive damages.

NAIB opposes punitive damages but if punitive damages are to be allowed, it would retain this section as written.

BMA would set a limit on the amount of punitive damages that can be awarded to five percent of the product seller's average annual net profits.

To avoid giving the plaintiff a windfall, NAW would award punitive damages to the Government. It would also raise the claimant's burdent of proof to "beyond reasonable doubt" and limit the punitive damage award to three times the compensation award.

MHI supports section 7's restrictions on punitive damages. It emphasizes that punitive damages are windfall to the plaintiff and nothing else.

Harris Corporation beleives that punitive damages should only be awarded if the claimant proves the

product seller had an evil intent or engaged in outrageous conduct.

MAPI offers a definition for "outrageous conduct" required to sustain an award of punitive damages.

The Allis-Chalmers Corporation believes that Congress should not force the states to permit recovery of punitive damages in product liability cases. In any event, it believes the standard of proof should be "beyond a reasonable doubt" and punitive damages should be limited.

The Business Roundtable suggests the following changes: (1) would separate consideration of punitive damages from the principal claim; (2) would impose punitive damages only for flagrant indifference to customers safety and an extreme departure from accepted practice; (3) limit punitive damages awarded to one claimant to the lesser of twice the actual damages or one million dollars; (4) would limit the amount of punitive damages for a single "mistake" to the lesser of five million dollars or five percent of the defendant's net worth.

Section 11(a)(1)

Punitive damages may be awarded to any claimant who establishes by clear and convincing evidence that the harm suffered was the result of the reckless disregard of the product seller for the safety of product users, consumers, or others who might be harmed by the product.

Punitive damages may not be awarded in the absence of a compensatory award.

Comments:

The Keene Corporation would delete this section. It believes that punitive damages should not be permitted in strict liability cases; it is unfair to consider punitive damages after the jury as already considered whether or not the product was unreasonably dangerous.

FEMA, CIMA, and NPLC would raise the standard of proof to "beyond unreasonable doubt" and would not allow the punitive damages award to exceed three times the compensatory award. NPLC believes that it is appropriate to impose the "beyond unreasonable doubt" standard because punitive damages are quasi-criminal in nature.

The Consumer Federation of America believes that the two step standard for punitive damages will seriously weaken the ability of jurors to impose them.

Section 11(a)(2)

As used in this subsection, "reckless disregard" means outrageous conduct manifesting a conscious indifference to the safety of those persons or entities who might be harmed by a product, except that ordinary manufacturing design or other choices, whether negligent or not, do not constitute "reckless disregard."

Comments:

Greenberg believes that the preclusion of an award of punitive damages for "ordinary manufacturing design or other choices" would exclude actions such as decisions not to include relatively cheap safety features from being considered "reckless disregard."

Section 11(b)

If the trier of fact determines under subsection (a) that punitive damages should be awarded to a claimant, the court shall determine the amount of those damages. In making that determination, the court may consider--

(1) the product seller's awareness of the likelihood that serious harm would arise from the sale or manufacture of a product

(2) the conduct of the product seller upon discovery that the product caused harm or was related to harm caused to users or others, including whether upon confirmation of the problem the product seller took appropriate steps to reduce the risk of harm;

(3) the duration of the conduct and any concealment of it by the product seller;

(4) the financial condition of the product seller, and the profitability of the product to the product seller;

(5) the total effect of other punishment imposed upon the product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of other penalties to which the product seller has been or may be subjected; and

(6) whether the harm suffered by the claimant was partly the result of the claimant's own negligent conduct.

Comments:

OPEI would amend section 11(b) to provide that punitive damages will not exceed treble the amount of compensatory damages awarded, excluding damages for pain and suffering and other intangible loss.

Narco would have the court determine whether punitive damages are appropriate, after the jury determines the initial liability.

Beloit Corporation believes that the phrase "clear and convincing" and "preponderance of the evidence" mean the same thing to most juries. It would have the court decide the amount of punitive damages and also whether those damages should be imposed.

The Keene Corporation would add the following to the end of subsection (5):

> Only one award for punitive damages may be made by reason of any particular product and such award shall be contributed to research for curing the injury caused by the product;

The Keene Corporation believes that there is no reason for the plaintiff to receive a windfall after being fully compensated.

Suggested Provisions:

JLG Industries would add a subsection (c) which would provide as follows:

> Punitive damges shall not be awarded if the product has been found to be in compliance with applicable federal, state or local standards of inductry standards or if the product complies with the specifications of a federal, state, or local government contract.

In such cases, JLG Industries believes that there is no gross, flagrant or intentional conduct to justify imposing punitive damages.

Westinghouse and NAM support the Owen Draft's provision for punitive damages which provides as follows:

Section 11 PUNITIVE DAMAGES (Owen Draft)

(a) Following a determination of the product seller's liability for actual damages and the amount thereof, and following a determination of all post-trial motions thereon, punitive damages may be sought by a claimant upon motion to the court. If such damages have been properly pleaded, are awardable under State law, and are not otherwise inappropriate as a matter of law, the court, siting without a jury, shall thereupon take evidence relevant to liability for an the amount of such damages.

(b) A product seller shall be liable for punitive damages only if the court determines that in selling the product in violation of section 5 or 6 --

(1) the product seller acted with a flagrant indifference to consumer safety; and

(2) the violation of section 5 or 6 was an extreme departure from accepted practice.

(c) If the court determines that the product seller should be liable for punitive damages, it shall base its determination of the amount of such damages, subject to the limitations in subsections (d) and (e), upon a consideration of the following--

(1) the likelihood that serious harm would arise from the misconduct of the product seller;

(2) the extent of the product seller's awareness of the likelihood that such harm would arise;

(3) the profitability of the misconduct to the product setter;

(4) the duration of the misconduct and any concealment thereof by the product seller;

(5) the attitude and conduct of the executive officers of the product seller upon discovery of the misconduct, including whether or not the misconduct was thereupon promptly terminated;

(6) the financial condition of the product seller;

(7) the total effect of other punishment imposed and likely to be imposed upon the product seller as a result of the misconduct, including any compensatory and puntivie damage awards to persons similarly situated to the claimant and any criminal penalties to which the product seller has been or may be subjected; and

(8) whether the harm suffered by the claimant was also the result of the claimant's own reckless disregard for personal safety.

(d) The amount of punitive damages that may be recovered by one claimant may not exceed, but may be less then, twice the amount of actual damages the claimant is determined to have suffered, but in no event shall an award of punitive damages exceed $1 million for any one claimant.

(e) If the product seller proves that it has previously paid or been finally adjudicated liable for punitive damages and fines totalling the lesser or $5 million or five percent of its net worth, its liability for punitive damages shall not exceed the lesser of--

(1) claimant's litigation expenses, including reasonable attorneys' fees; or

(2) the amount determined under subsection (d).

(f) Notwithstanding the provisions of Section 8, a product seller may introduct relevant evidence of post-manufacturing improvements in defense of punitive damages.

SECTION 12 SUBSEQUENT REMEDIAL MEASURES

Section 12

Evidence of measures taken after an event, which if taken previously would have made the event less likely to occur, is not admissible to prove liability under this Act in connection with the event. [This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.]

Comments:

NPLC supports section 12 in the bracketed language, however, they would delete the feasibility exception. Allis-Chalmers Corporation would also delete the feasibility exception. Sne ll and Wilmer believe that the feasbility exception will result in unrestricted evidence of subsequent remedial measures.

Most comments submitted on section 12 were concerned that the exceptions included in the bracketed language would swallow the rule. The following groups are concerned that the recognized exceptions to the rule against the subsequent repair are presently being abused, especially the feasibility exception, and would delete the second sentence of section 12 which codifies these exceptions from the provision: MAPI; SPI; NAII; NAM; OPEI; BMA; TBR; PMA; WPLR; Textron and Beloit Corporation.

General Tire and Rubber Company opposes section 12 and does not believe it is appropriate for this Act to deal with the Rules of Evidence on a piecemeal basis. Reformation of the Rules of Evidence, as they relate to product litigation, should be accomplished in either separate legislation or as a complete section in the instant Act.

Textron would delete the bracketed provision of section 12 which pertains to the introduction of evidence of subsequent remedial measures. Textron is especially concerned with the feasibility exception in the bracketed language. If the feasibility exception is not eliminated, Textron could suggest a more narrow application and would provide in the report of the bill that before admitting evidence of the feasibility of precautionary measures, the issue must be clearly controverted.

Sturm Ruger offers language that would exclude evidence of subsequent remedial measures except as relevant in a design case: (1) to impeach a witness for the product seller who expressly denies the feasibility of such improvements; (2) to any post-sale duties of the product seller; or (3) to the manufacturer's proof of compliance with subsequently established standards. Sturm Ruger would also allow the court to exclude evidence of

subsequent remedial measures that fall within these exceptions if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury.

Colt Industries substitutes new language for all of section 12. It would exclude evidence of subsequent remedial measures for all purposes except as relevent in a design case to impeach a seller's witness who denies the feasibility of such improvements.

Cincinnati Milacron would exclude changes resulting from subsequent industrial or governmental standards, including revisions, or the state of the art, which are made after the sale of the product but prior to injury.

In substitution for the language in the Staff Draft's section 12, NMTA would adopt the language of the Federal Rules of Evidence 403 and 407 and would define "culpable conduct" in terms of section 4(a)(1) of the Act.

Westinghouse would rewrite section 12 to provide that evidence of subsequent remedial measures is neither admissible to prove that a product was defective in design or that a warning or instruction should accompany the product at the time of manufacture. It also would require a separate hearing, where the court must find the probative value of such evidence substantially

outweighs its prejudicial effect and that there is no other proof available, before admitting it for one of the exceptions.

To minimize the possibility that a jury may misuse evidence of subsequent remedial measures, NAW would have the court instruct the jury on the proper use of such evidence and exclude evidence when its probative value is substantially outweighed by its prejudicial effect or if it would confuse the issues, or mislead the jury. FEMA makes a similar suggestion.

Greenberg believes that evidence of subsequent remedial measures should be admissible to prove a defect.

National Presto Industries would rewrite section 12 as follows:

> "Relevance of Industry Custom, Safety or Performance Standards, and Practical Technological Feasibility.
>
> (A) Evidence of changes in (1) a product's design, (2) warnings or instructions concerning the Product, (3) instructions concerning the product, (4) technological feasibility, (5) 'state of the art', or (6) the custom of the product seller's industry or business, occurring after the product was manufactured, is not admissible for the purpose of proving that the product was defective in design or that a warning or instruction should have accompanied the product at the time of manufacture.
>
> If the court finds that the probative value of such evidence substantially outweighs its prejudicial effect and that there is no

other proof available, this evidence may be admitted for other relevant purposes if confined to those purposes in a specific court instruction. Examples of 'other relevant purposes' include proving ownership or control, or impeachment.

(B) For the purposes of this subsection 'custom' refers to the practices followed by any ordinary product seller in the product seller's industry or business.

(C) Evidence of custom in the product seller's industry or business or of the product seller's compliance or non-compliance with a non-governmental safety or performance standard, existing at the time of manufacture, may be considered by the trier of fact in determining whether a product was defective in design, whether there was a failure to warn or instruct or to transmit warnings or instructions.

(D) If the product seller proves, by a preponderance of the evidence, that it was not within practical technological feasibility for it to make the product safer with respect to design and warnings or instructions at the time of the manufacture so as to have prevented claimant's harm, the product seller shall not be subject to liability for harm caused by the product unless the trier of fact determines that:

(1) The product seller knew or had reason to know of the danger and, with that knowledge, acted unreasonably in selling the product at all;

(2) The productive was defective in construction;

(3) The product seller failed to meet the post-manufacture duty to warn or instruct; or

(4) The product seller was subject to liability for express warranty."

Section 8 of the Owen Draft, evidence of post-manufacturing improvements, provides as follows:

> No evidence shall be admissible in any products liability action, except as provided in section 11(c), of any alteration, modification, improvement, repair or change in or discontinuance of the manufacture, constructiom, design, formula, standards, preparation, processing, assembly, testing, listing, certifying, warning, instruction, marketing, advertising, packaging, or labelling of the product, whether made by defendant or any other person after the date of manufacture of the product, except as relevant in a design case to impeach a witness for the product seller who expressly denies the feasibility of such improvement.

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