Testimony of

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On behalf of the Institute for Legal Reform
Of the United States Chamber of Commerce

Before the
Subcommittee on Commercial and Administrative Law
of the
House Committee on the Judiciary

"Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products"

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Oversight Hearing on
"Protecting the Playroom:
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Madame Chairwoman Sanchez, and Ranking Member Cannon, and members of the Subcommittee, thank you for your kind invitation to testify today on the topic of holding foreign manufacturers accountable for defective products. I will directly speak to that question and also, because I understand that the issue has arisen in the context of other presentations, address whether civil justice reforms that have been enacted by Congress have been effective. And, finally, I will also address how the reauthorization of the Consumer Product Safety Act may affect the important issue of protecting our children and our population in general from defective products.

My background for addressing these issues includes practical experience as both a plaintiff and defense lawyer. I also co-author the leading torts casebook in the United States, Prosser, Wade & Schwartz's Cases and Materials (11th ed. 2005). In addition, I have authored the leading text on multi-state litigation and comparative negligence.

While I have the privilege to testify today on behalf of the Institute for Legal Reform of the Chamber of Commerce of the United States of America, the views expressed are my own in light of my experience with these important topics.

Foreign Product Manufacturers and Liability

At the outset, it is important to note that the extent to which foreign manufacturers should be subject to the U.S. tort system is an area of which there is not clear consensus in the business community. However, there is consensus that our tort system can "overheat" and impose liability that is above and beyond what is reasonable (a point I further elaborate upon below). Furthermore, the cost of the American liability system can significantly increase the prices of products that are subject to it.

Major foreign manufacturers who do business in the United States, such as the large foreign-based auto manufacturers, are subject to our legal system and their products are priced accordingly. If they sell a considerable amount of their products in other countries where these is less liability exposure than in the United States, then they may be able to reduce their costs. Nevertheless, if one of their products proves defective and injures a person in this country, they are subject to liability here and the costs associated with such liability. The interesting impact of this phenomenon, though,

is that a foreign-based company that can inappropriately avoid these costs can reduce its price accordingly and place those companies who are subject to the full effects of the U.S. legal system at a competitive disadvantage.

The U.S. legal system should have uniform standards of liability that are consistent with the principle that those who are responsible for harm to the person or property of another should, to the extent of that responsibility, offset the harm they have done. Accordingly, non-domestic manufacturers who deliberately avail themselves of the U.S. marketplace but inappropriately avoid subjecting themselves to the U.S. legal system should be held accountable for the harms caused by their defective products. Currently, there is a disparity between those non-domestic manufacturers who escape accountability and the domestic and international manufacturers who do not. The net result can impact international trade, the pricing of products, and most importantly, incentives for safety.

Positive Results of Federal and State Civil Justice Reforms

While we can enhance the power, the budget and the personnel of the Consumer Product Safety Commission ("CPSC"), a topic that I will address in a few moments, our tort system is a necessary deterrent and a powerful one. However, as I have indicated, it can also engage in overkill. The most recent Tillinghast study indicates that the American tort system costs $261 billion last year. That translates to $880 for each and every American – or a little over $3,500 for a typical family of four.[1] While at least some of this liability may be justified, when the system "overheats," it can cause manufacturers and other businesses to curb innovation, take beneficial products off the market, and people can be denied access to necessary medical care.

Congress, on occasion, has been sensitive to this problem and unlike comments suggested by some, Congress's work at civil justice reform has been effective. For example, in 1994 Congress, on a bipartisan basis, with support of this Subcommittee as well as the full Judiciary Committee, enacted into law the General Aviation Revitalization Act (GARA).[2] At the time, excessive liability had crushed our private plane manufacturing industry. Cessna and Piper had closed almost all their major plants. It was suggested that Congress enact an eighteen-year statute of repose for private aircraft, meaning that if a plane that had worked well for nearly two decades subsequently failed, the manufacturer would generally not be subject to liability, subject to certain exceptions. Opponents of this legislation claimed it would result in the manufacture of thousands of defective products and that planes would be literally falling out of the sky. They suggested further that new innovations in general aviation would never see the light of day. It is now more than ten years later, and history and fact has

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[1] Towers Perrin, Tillinghast, 2006 Update on U.S. Tort Cost Trends 4 (2006), at http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort_2006_FINAL.pdf.

[2] General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552-54 (1994) (codified at 49 U.S.C. § 40101 note).

proven the proponents of the legislation correct and the opponents wrong. The legislation helped created over 25,000 new jobs and led to safety innovations that have dramatically reduce the number of adverse private plane incidents.[3]

Furthermore, in 1998, Congress enacted the Biomaterials Access Assurance Act.[4] This bipartisan legislation placed strict limits on the liability of suppliers of raw materials to manufacturers of medical devices. Under that legislation, the raw materials manufacturers would be subject to liability for defects in the product they supplied, but not for failures that arose on the part of the manufacturer of the final product. This legislation addressed a crisis where manufacturers of medical devices could not obtain the raw materials they needed. Once again, opponents claimed that the legislation would allow suppliers to commit mayhem, but this adverse prognostication did not occur. The legislation worked. A similar model may be appropriate in this situation.

In 2005, the House of Representatives and the full Judiciary Committee, after a long battle, helped assure the passage of the Class Action Fairness Act (CAFA).[5] Congress intended CAFA to address forum shopping run wild where a certain band of lawyers attempted to place large interstate class actions in local plaintiff-friendly state courts. Once again, opponents claimed it would deny people justice, but results to date show that this did not occur. Rather, class actions involving plaintiffs from a multiplicity of states against out-of-state defendants are now properly heard by federal courts. CAFA has reduced improper forum shopping.

While it is only indirectly related to this hearing, states have achieved similar progress with medical liability reform. Both Mississippi[6] and Texas[7] enacted such reforms and the result has been a revitalization and cost reduction of medical liability insurance.[8]

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[3] *See* Victor E. Schwartz & Leah Lorber, *The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry*, 67 J. of Air Law & Commerce 1269, 1341 (2002).

[4] Biomaterials Access Assurance Act of 1998, Pub. L. No. 105-230, 112 Stat. 1519 (1998) (codified at 21 U.S.C. § 1601).

[5] Class Action. Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

[6] H.B. 2, 1st Extra. Sess. (Miss. 2002); H.B. 13, 1st Extra. Sess. (Miss. 2004).

[7] H.B. 4, Reg. Sess. (Tex. 2003).

[8] *See, e.g., Laura Hipp, Med Malpractice Rates Cut*, Clarion-Ledger, Sept. 13, 2007, *at* http://www.clarionledger.com/apps/pbcs.dll/article?AID=2007709130379 (reporting that since the 2004 reforms, the largest medical malpractice insurer in Mississippi has reduced premiums by 45 percent);*Malpractice Insurer to Cut Rates*, Fort Worth Star-Telegram, Sept. 7, 2007, at C2 (reporting that Texas policyholders have saved about $275 million since enactment of the reforms);*TMLT to Cut Rates for Doctors*, Austin Bus. J., Sept. 7, 2007 (reporting that the Texas Medical Liability Trust, the largest writer of medical malpractice insurance in the state, cumulatively reduced its rates by 31%); David Hendricks, *Insurance Companies, Doctors Flock to Texas*, San Antonio Express-News, June 2, 2007, at 1D (reporting that 30 insurance

Consumer Product Safety Commission Reform Act

I have long been a supporter of the mission and purpose of the CPSC. Before the CPSC existed and I was teaching tort law at the University of Cincinnati, I wrote a paper entitled "tort law sometimes comes in too late." It is a basic fact that tort law only "comes in" after someone is injured. The thesis of my paper was that a national consumer product safety organization could prevent such injuries if it were properly constituted. While there has been a great deal of criticism of the CPSC of late, in general, over the years it has done its job, especially considering its relatively small staff and budget. It has been since 1990 when Congress last carefully looked at the CPSC and its powers, and it is most appropriate that it do so now.

The CPSC Reform Act should focus on the problem this Subcommittee is considering today, namely holding manufacturers of truly defective products responsible for their wrongful behavior. While it is virtually impossible to catch every defective product that crosses our shores, the CPSC should have sufficient resources and the very best enforcement powers to move toward that goal. Unfortunately, especially in S. 2045, reported by the Senate Commerce Committee, this focus has been compromised by provisions that could blunt this basic goal. For example, empowering state attorneys general in fifty-one jurisdictions to enforce CPSC regulations and obligations according to their own subjective judgment would cause havoc. While the S. 2045, empowers the CPSC to intervene in actions when it thinks a state attorney general has gone awry, such action would siphon its limited staff resources to curb uncoordinated and perhaps, unwise, actions of state attorney generals. It does not further its mission of stopping, as soon as practicable, importation of products that contain defective components parts.

As I have indicated, the CPSC can not, no matter how large, monitor every product that is imported into the United States. To accomplish its mission, it is going to need the full cooperation of American manufacturers. The skyrocket-sized penalties in S. 2045 can seriously compromise that cooperation. For example, if a manufacturer fears $100 in million penalties, it is more likely to speak to its lawyers than the CPSC.

There are other provisions in Senate version of the CPSC Reform Act that might also be incorporated into the House bill, that are similarly misdirected, but in the time allotted here, I put forth those two examples. Thank you for the opportunity to testify today and I look forward to your questions.

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companies are offering medical malpractice insurance, a 650% increase from only four prior to the 2003 medical liability reforms and that "[t]he lower cost of being a doctor in Texas has helped trigger a stampede of applications for physician licenses, with the waiting line now up to 12 months.").