NLWJC - Kagan
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Product Liability - Interest Group Materials [1]

Product liability - interest group materials

Consumer Federation of America

PRODUCT LIABILITY INSURANCE

A REPORT OF THE INSURANCE GROUP OF
CONSUMER FEDERATION OF AMERICA
by J. Robert Hunter[1]

Executive Summary

a) Effects on American Industry

i) The cost of Product Liability Insurance is remarkably small.

Product liability insurance costs in the United States are a small part of the retail cost of products. If product liability was totally abolished, it would drop retail prices by 24 cents for each $100 of retail sales in the country. In other words, abolition of all product liability would save $24 on a $10,000 purchase.

The product liability premium cost relative to retail sales is so small, charting it produces no visible result, viz:

[1] Mr. Hunter is Director of Insurance for the Consumer Federation of America (CFA). He formerly served as Insurance Commissioner for the State of Texas and as Federal Insurance Administrator during the Carter and Ford Administrations. He is a Fellow of the Casualty Actuarial Society and a Member of the American Academy of Actuaries.
CFA is a non-profit association of some 240 pro-consumer groups, with a combined membership of 50 million Americans. It was founded in 1968 to advance the consumer interest through advocacy and education.

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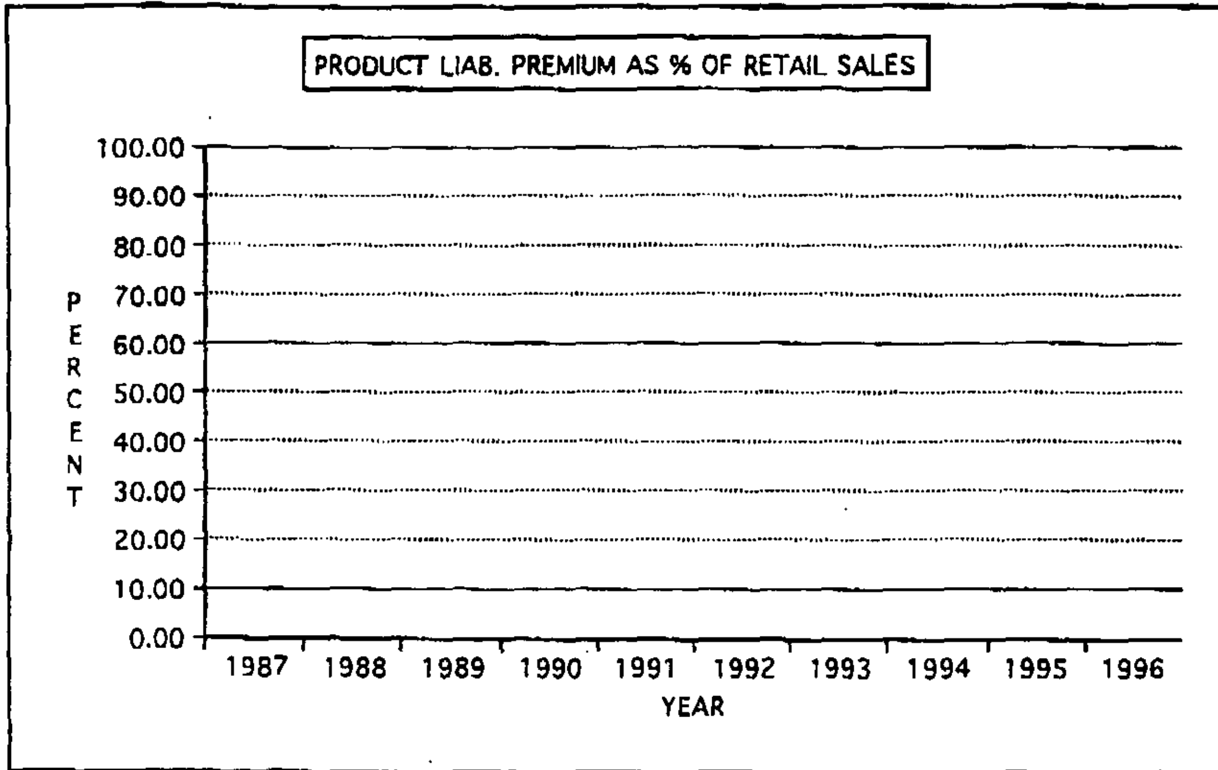
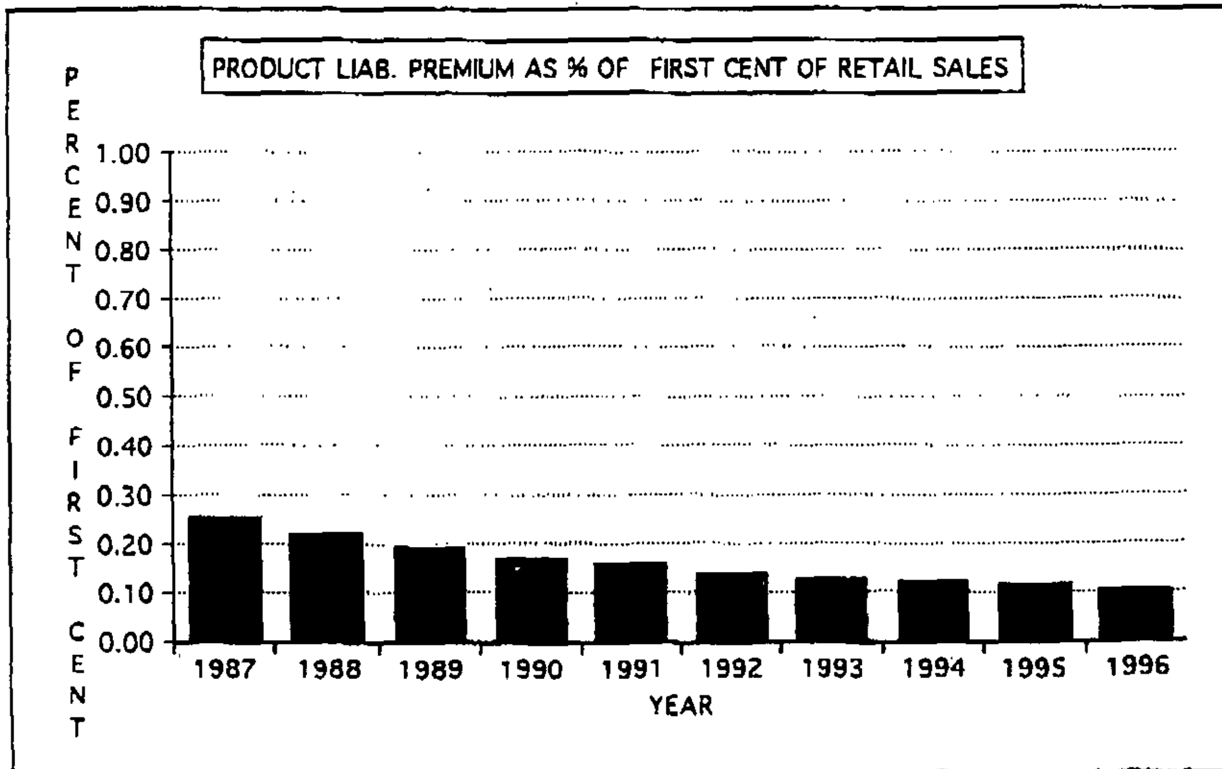
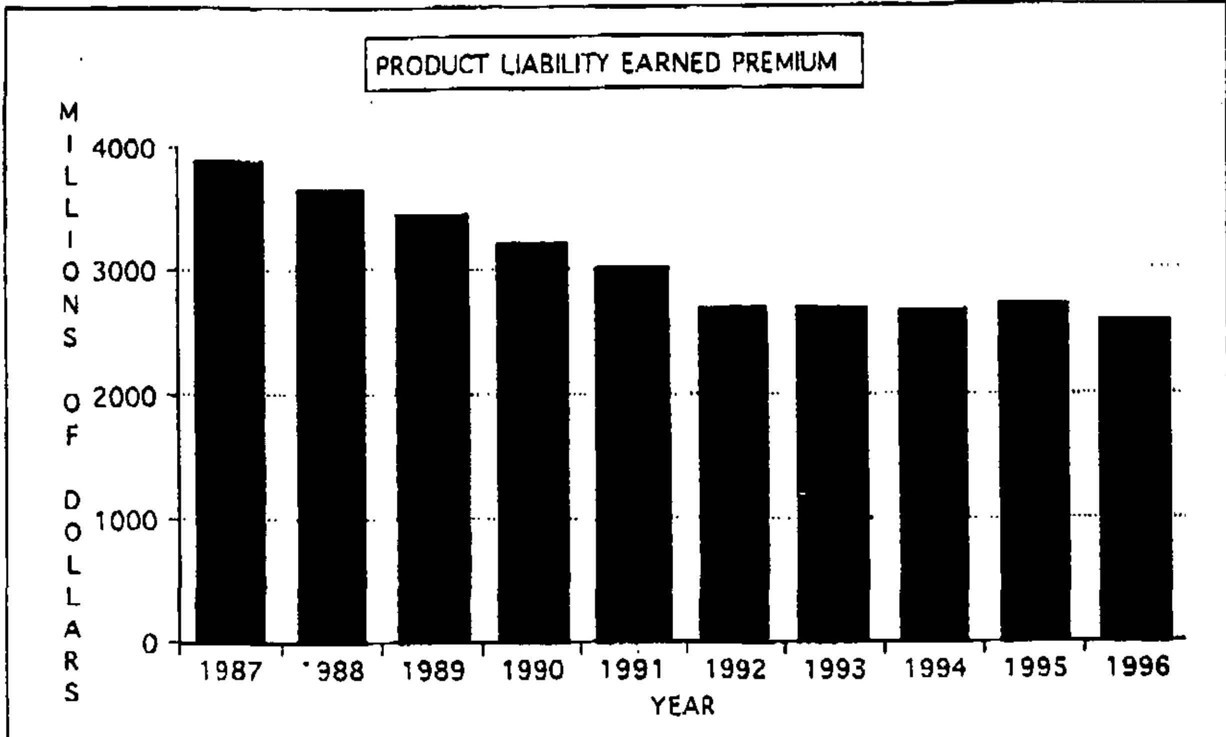


Only if we change the scale can we see the cost. Looking at only one cent of the retail sales dollar the cost appears:

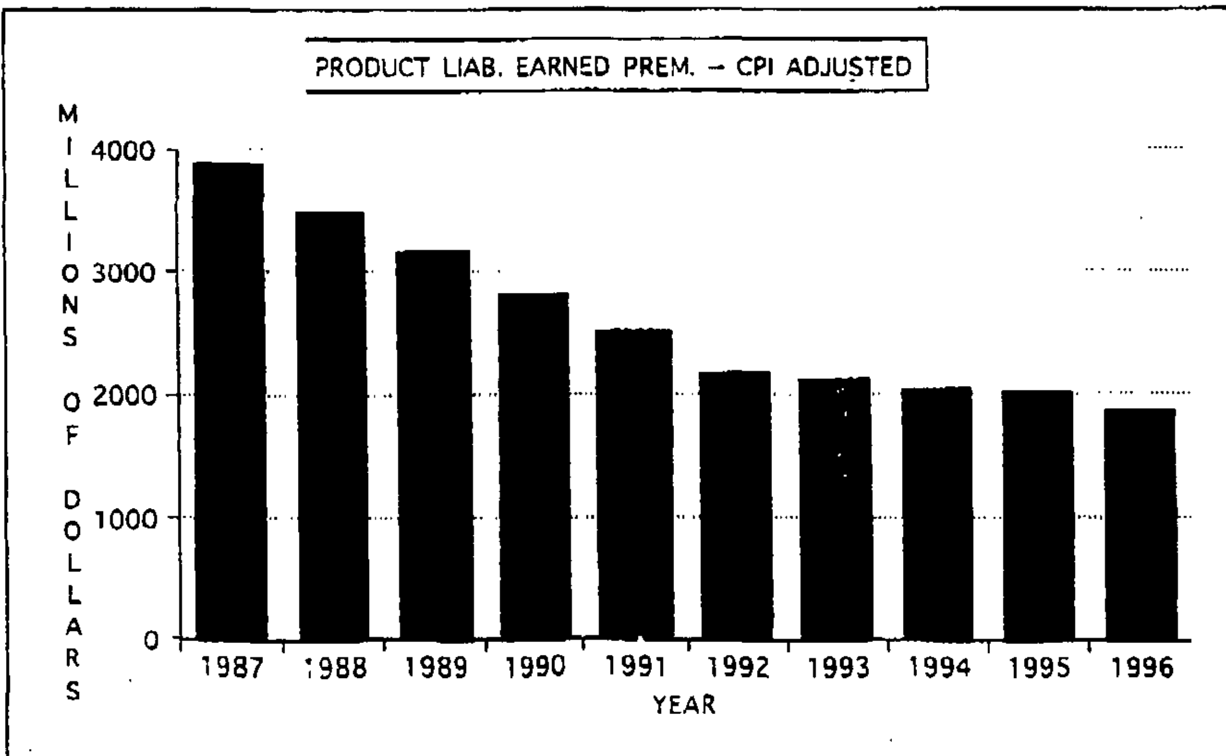


ii) The cost of Product Liability Insurance is declining.

Over the decade, product liability premiums fell from $3.9 billion in 1987 to $2.6 billion in 1996. The drop in the costs since 1987 has been 34%, as shown in the next chart, unadjusted for inflation:



Adjusted for inflation (CPI, all items), the change over the decade was a decline of 52%., viz:



b) Claimant effects

i) Under half of all claimants get any payment for their injury from a product

Under one in two claimants get a payment. About 55% of those bringing claims have their claim closed without a payment.

ii) The average payout for a product liability claim, including million dollar verdicts, is less than $12,000 a claim.

Those who succeeded in getting a payment received, over the last decade, an average of under $12,000 per claim. For all who filed claims, the payout was $5,003.

PREFACE

Some products have large costs for product liability. But the typical product manufactured in the United States is so safe that product liability insurance costs are minute. Further, these costs have been decreasing.

The report which follows first reports the key findings, then lays out the caveats, data sources, definitions and methods and concludes with the tables of product liability insurance data.

KEY FINDINGS

1. Total costs of Product Liability Insurance is a very small fraction of retail sales. Over the last decade, for every $100 of retail product sales in the United States, Product Liability Insurance cost 24 cents, the latest year cost is only 16 cents.

Exhibit A shows the product liability insurance experience over the latest available decade of experience, 1987-1996. Column N calculates the cost of product liability insurance as the number of cents per $100 of sales for retail products in America. The finding is that insured products cost, as measured by the total direct earned premium related to retail product sales, 16 cents per $100 of product sales over the decade. The cost ranged from a high of 25 cents in 1986 to a low of 11 cents in 1996. The cost in the most recent year, 1996, was the lowest in the decade.

These data are for all products. It may well be that the costs are significantly higher for some products and lower for others.

Using the rule of thumb cited in the methods section in this report, that 32% of this risk is insured in other than commercial insurance (e.g. by self insurance or captives or off-shore), the 16 cents would rise to 24 cents per $100 of retail sales; the 1996 figure of 11 cents would rise to 16 cents.

2. Product Liability Insurance is not an Insurance Industry Profit Center. On a Losses and Loss Adjustment Expense Incurred to Premiums Earned Basis, Product Liability Insurers Incurred a loss ratio of 75% for the decade.

Exhibit A shows that the insurance industry earned $30.6 billion in premiums over the 1987-1996 decade, and incurred $23.1 billion in losses, for a loss ratio of 75%. The highest loss ratio was 87% in 1994. The low was 53% in 1987. Occurrence policies had lower loss ratios for insurers than claims made (73% vs. 87%) over the decade.

In Exhibit C, it is shown that insurers made money writing product liability insurance in 1992 and 1994 but not the other years in the 1991-1996 period.

The overall result for the period was a loss of $1.3 billion, or 11% of premiums earned. It should be noted that $1 billion of that loss is attributable to a single reserve change made by a company in California in 1993.

3. Less than one in two persons who bring a product liability claim collect. On average, a person bringing a claim gets about $5,000. If a claim succeeds, the average rises to almost $12,000.

Exhibit B shows the payouts over the last decade. There were 1,294,351 claims closed with a payment and 1,529,028 closed with no payment. The cumulative payouts were just under $15.5 billion. The average payout for all claims closed was $5,003. For those who received payment, the average payout was $11,956.

Data Sources, Method, Definitions, Caveats

Since 1991, insurance companies have been required to separately report Product Liability insurance experience as part of their annual submission of experience to the state insurance departments. Prior to 1991, these data were reported as part of the "Other Liability" data and was therefore not separately identifiable. This report analyzes the national experience of insurance companies in this line of insurance.

In this analysis, we reviewed:

*The relationship of insured product liability costs to total product sales, nationally;

*National loss experience related to premiums collected by insurance companies over the last decade, with particular emphasis on data from recent periods where more complete data are available;

*Average claim payouts;

*Overall efficiency and cost/benefit ratios.

Data sources are footnoted on the attached exhibits. The source documents are the Annual Statements of insurance companies as reported to the state regulators. Annual Statements are submitted by the insurance companies to the state regulators with an affidavit swearing to their accuracy by an official of the filing insurance company. State officials audit these reports each year by desk audit and do an on-site audit about once every three years.

The data are for insurance companies that report to the regulators, which unregulated insurance companies will not be included. Neither will self insured products coverage be included. Data for all insurance companies that are subject to regulation are included in this report, however. The rule of thumb for the industry is that about 33% of the property/casualty commercial risk is insured by other than commercial insurance (22% self insurance, 4% excess and surplus lines and 6% by other mechanisms such as captives and risk retention groups)[2] . As shown below, product liability costs are estimated using this estimate of alternative market costs.

Insurance data on the cost of product liability insurance by type of product are not available in the financial reports of insurance companies and is not studied. These costs vary greatly, depending on the safety of the product being insured.

[2] Source: Business Insurance; January 28, 1991; page 3.

Insurance data on the cost of product liability insurance by type of product are not available in the financial reports of insurance companies and is not available to us for inclusion in this report. It is expected that a wide fluctuation of costs by product exists, depending on the relative safety record of the product being insured.

Some of the experience is labeled "Direct." This means that this is the data for the insurer prior to any ceding of business to a reinsurer (a "reinsurer" is an insurance company that insures other insurance companies writings, thus "re"insuring the business). In the attached exhibits, direct includes any reinsurance assumed by the insurer and thus overstates the amounts of premiums actually paid by the product manufacturers and product sales operations.

"Net" experience deducts from the direct any reinsurance ceded to a reinsurer.

Data for products liability are split on some exhibits between "occurrence" and "claims made." This refers to the type of policy the insurer wrote. "Occurrence" means a policy that insures any occurrence that occurs during the policy term, regardless of when the claim is filed by an injured party. "Claims made" refers to a newer type of coverage offered by some insurance companies where only claims filed (or "made") during the policy term are covered. Frequently, these policies will not cover claims that occurred before a date set out in the policy.

"Losses" refer to the dollars affiliated with the claims brought against the insurance company. "Claims" refer to the number of filings by claimants against an insurer. Losses can be either paid (the amount the insurance company actually pays out to the claimant) or incurred (which also reflects the reserves set up by the insurance company to cover its estimates of future payouts).

A word on incurred losses: The estimates for future payouts include case basis reserves which are made on a case-by-case basis. But incurred losses also include Incurred But not Reported (IBNR) reserves that may have happened but the insurance company doesn't know about them as yet.

As such, IBNR reserves are much more speculative in nature than case based reserves.

Premiums are the amounts collected by the insurance companies from products manufacturers and sales firms to cover their costs. Premiums "written" is the amount actually collected during a period. Premiums "earned" are the portions of premiums written that are booked by the insurer as their own due to the passage of time of coverage being granted and would not be returned to the insured product manufacturer or sales firm if the policy was canceled.

A comparison of premiums written to losses paid gives a cash flow picture of the insured result. A comparison of losses incurred to premiums earned gives an accrual picture, a more cause and effect picture, of the same results.

A "loss ratio" is a division of losses by premium and represents the percentage of premium used to cover claims dollars.

Losses are often reported combined with loss adjustment expenses. The loss adjustment expense (LAE) can be either allocated (ALAE) or unallocated (ULAE). The former is fundamentally the defense attorney cost. The latter is overhead costs for the claims departments of the insurance companies.

Expenses, other than loss adjustment, include commission and brokerage (the amount paid or to be paid to the sales force of the insurance company), taxes (paid or owed to states, including licenses and fees, but excluding federal taxes), other acquisition (advertising, policy writing costs, etc.) and general (everything else, from gardeners at the home office of the insurance company to overhead costs).

Investment income is the amount that insurance companies make by investing reserves on claims and unearned premiums as well as the amount earned on retained earnings (surplus or net worth). For a line, such as products liability, where claim reserves are held for a long period before victims receive the money, investment income is large. Lines of insurance where the period of float is long are called "long tail" lines. "Short tail" lines are those, such as fire insurance, where the period

between the occurrence of the claim and the payment to the claimant is short. The earnings for retained earnings is, of course, only for the amount of the surplus designated by the NAIC to back up the product liability line.

EXHIBITS OF PRODUCT LIABILITY INSURANCE DATA

The exhibits of data upon which the above findings were made follow this page.

PRODUCT LIABILITY EXPERIENCE — EXHIBIT A, SHEET 1

YEAR	OCCURRENCE DIRECT PREM ERND MILLIONS	OCC. DIRECT LOSSES & LAE INCURRED	OCCURRENCE LOSS & LAE RATIO	CLAIMS MADE DIRECT PREM ERND MILLIONS	CL. MD. DIRECT LOSSES & LAE INCURRED	CLAIMS MADE LOSS & LAE RATIO
1987	3163	1670	53	737	445	60
1988	2907	1687	58	735	558	76
1989	2749	1864	68	711	634	89
1990	2539	1835	72	683	637	93
1991	2335	1861	80	682	555	81
1992	2198	1792	82	494	535	108
1993	2273	1837	81	424	383	90
1994	2185	1857	85	485	476	98
1995	2395	1946	81	322	342	106
1996	2259	1865	83	332	329	99
TOTAL	25003	18214	73	5605	4894	87

SOURCES: Schedule P of Annual Statements

A.M. Best and Co., Aggregates and Averages, 1997 Edition, page 178-179

U.S. Census Bureau is source of retail sales statistics

EXHIBIT A, SHEET 2

	H	I	J	K	L	M	N
1							EXHIBIT A, SHEET 2
2						$ MILLIONS	PRODUCT LIAB.
3	TOTAL	TOTAL DIRECT	TOTAL	TOTAL	AVERAGE	RETAIL SALES	PREMIUM
4	DIRECT PREM	LOSSES & LAE	LOSS & LAE	REPORTED	LOSS & LAE	OF PRODUCTS	AS A % OF
5	ERND MILLIONS	INCURRED	RATIO	CLAIMS (000)	INC. RESERVES	(CENSUS BUR)	RETAIL SALES
6							
7	3900	2115	54	303	6980	1541299	0.25
8	3642	2245	62	205	10951	1656202	0.22
9	3460	2498	72	223	11202	1758971	0.20
10	3222	2472	77	295	8380	1844611	0.17
11	3017	2416	80	255	9475	1855937	0.16
12	2692	2327	86	201	11577	1951589	0.14
13	2697	2220	82	184	12065	2072788	0.13
14	2670	2333	87	180	12961	2227325	0.12
15	2717	2288	84	120	19067	2324038	0.12
16	2591	2194	85	73	30055	2455296	0.11
17							
18	30608	23108	75	2039	11333	19688056	0.16
19							
20							
21							
22							
23							

	O	P	Q	R
1			EXHIBIT A, SHEET 3	
2	PRODUCT LIAB.			
3	CLAIMS AS	YEAR		
4	A % OF			
5	RETAIL SALES			
6				
7	0.14	1987		
8	0.14	1988		
9	0.14	1989		
10	0.13	1990		
11	0.13	1991		
12	0.12	1992		
13	0.11	1993		
14	0.10	1994		
15	0.10	1995		
16	0.09	1996		
17				
18	0.12	TOTAL		
19				
20				
21				
22				
23				

	A	B	C	D	E	F	G
1	PRODUCT LIABILITY INSURANCE					EXHIBIT B, SHEET 1	
2							
3		OCC. NUMBER	CL MD NUMBER	TOTAL NUMB.	OCC. NUMBER	CL MD NUMBER	TOTAL NUMB.
4		OF CLAIMS	OF CLAIMS	OF CLAIMS	OF CLAIMS	OF CLAIMS	OF CLAIMS
5		CLOSED WITH	CLOSED WITH	CLOSED WITH	CLOSED W/O	CLOSED W/O	CLOSED W/O
6	YEAR	PAYMENT	PAYMENT	PAYMENT	PAYMENT	PAYMENT	PAYMENT
7							
8	PRIOR	272145	4111	276256	779086	5027	784113
9	1987	46759	11406	58165	142374	16774	159148
10	1988	49533	10990	60523	99701	17494	117195
11	1989	114740	9895	124635	67755	10437	78192
12	1990	192046	9211	201257	66328	8901	75229
13	1991	166249	6554	172803	66498	5633	72131
14	1992	130492	1523	132015	51923	2676	54599
15	1993	102244	1997	104241	53081	2808	55889
16	1994	84831	2382	87213	61576	3115	64691
17	1995	53123	861	53984	40003	3090	43093
18	1996	22954	305	23259	22144	2604	24748
19							
20	TOTAL	1235116	59235	1294351	1450469	78559	1529028
21							
22	Source: A. M. Best & Co.; Aggregates and Averages, 1997 Edition; Page 107						

	H	I	J	K	L	M	N
1						EXHIBIT B, SHEET 2	
2							
3	OCCURRENCE	CLAIMS MADE	TOTAL	OCCURRENCE	CLAIMS MADE	TOTAL	OCCURRENCE
4	LOSS &ALAE	LOSS &ALAE	LOSS &ALAE	AVERAGE	AVERAGE	AVERAGE	AVERAGE
5	PAYMENTS	PAYMENTS	PAYMENTS	PAID LOSS	PAID LOSS	PAID LOSS	PAID LOSS
6	(000 DELETED)	(000 DELETED)	(000 DELETED)	PER PD CLAIM	PER PD CLAIM	PER PD CLAIM	ALL CLAIMS
7							
8	7073693	340188	7413881	25992	82751	26837	6729
9	934077	210681	1144758	19976	18471	19681	4939
10	960758	291075	1251833	19396	26485	20684	6438
11	980854	304556	1285410	8548	30779	10313	5375
12	874818	284718	1159536	4555	30911	5761	3386
13	818307	207676	1025983	4922	31687	5937	3516
14	696146	131451	827597	5335	86311	6269	3816
15	523757	105884	629641	5123	53022	6040	3372
16	311945	113358	425303	3677	47589	4877	2131
17	182840	38136	220976	3442	44293	4093	1963
18	78782	11387	90169	3432	37334	3877	1747
19							
20	13435977	2039110	15475087	10878	34424	11956	5003
21							
22							

	A	B	C	D	E	F
1	PRODUCT LIABILITY INSURANCE PROFITABILITY					EXHIBIT C
2						
3		EARNED	INCURRED	OVERHEAD	TOTAL	
4	YEAR	PREMIUM	LOSSES	EXPENSES	PROFIT (LOSS)	
5						
6	1987	DATA NOT YET AVAILABLE IN ANNUAL STATEMENT				
7	1988	DATA NOT YET AVAILABLE IN ANNUAL STATEMENT				
8	1989	DATA NOT YET AVAILABLE IN ANNUAL STATEMENT				
9	1990	DATA NOT YET AVAILABLE IN ANNUAL STATEMENT				
10	1991	2168093	1220567	1702707	-90215	
11	1992	1920417	1345416	1470882	208767	
12	1993	1853836	2462534	1471394	-991243	
13	1994	1852918	1353142	1105564	334593	
14	1995	1745196	1825773	1475198	-486757	
15	1996	1779404	1575732	1621590	-245593	
16						
17	TOTAL	11319864	9783164	8847335	-1270448	
18	% OF ER PREM	1.00	0.86	0.78	-0.11	
19						
20	Dollar amounts in thousands					
21	Data Net of Reinsurance					
22	Source: A.M. Best & Co.; Aggregates and Averages; various years.					

Product liability -
interest group materials

Latham?

Sarah - didn't we already have copies of this? Is anyone drafting a reply? Do we need to have a reply?

March 12, 1998

President William J. Clinton
The White House
Washington, DC 20500

Dear President Clinton:

The products liability deal negotiated between the White House and Senator Jay Rockefeller contradicts in key respects your message vetoing similar legislation in May, 1996. For example, this deal not only would cap punitive damages for smaller corporations that commit reckless or deliberately harmful acts, but would do so on a "one-way" basis, preempting only state laws that are more favorable to consumers. The chief beneficiaries of the deal's provisions will be culpable companies that want to take away fundamental judicial rights of all our citizens, including the most vulnerable -- sick and injured children, the elderly and the poor -- so they can get away without being made to pay for the harm they cause. Despite your veto statement pledge that you would not support legislation that did nothing for consumers, this deal, in fact, contains nothing for consumers. One key provision the White House staff expressed interest in including to address a serious problem for injured consumers in products liability cases -- the abuse of secrecy orders to hide critical information about product dangers -- was left out of the deal.

There is no economic justification for dismantling 200 years of tort laws with PAC-greased federal legislation that ties the hands of state judges and juries. Recent news makes this point more clearly than ever. For the fourth year in a row, insurance costs for U.S. businesses declined significantly. The annual survey of business insurance conducted by Tillinghast-Towers Perrin and the Risk & Insurance Management Society calculates annual insurance costs for property damage, other liability insurance and workers' compensation. <u>These total liability costs are minimal -- only $5.70 for every $1000 in revenue in 1996.</u> (See attached Wall Street Journal article). This important fact (not to mention record corporate profits year after year) makes it impossible for corporations or politicians to argue there is any economic need to limit compensation to people injured by their products.

This bill is a potpourri of special protections requested by the major industries lobbying for its passage. The your administration should abandon this misbegotten effort to push forward with this unfair legislation. Instead, it appears that you are sitting down with Senator Slade Gorton and others to discuss making matters even <u>worse</u>. As if the deal negotiated wasn't unfair enough, Senator Gorton is proposing a number of changes to make it even harder for people to exercise their legal rights.

The Gorton amendments are largely based on memos prepared and distributed last fall by Victor Schwartz on behalf of the corporate coalitions pushing for passage of federal products liability legislation. Using those memos as a guide, we have done an analysis of some of the worst of the proposed amendments. Although I have heard that Senator Gorton and others have characterized these as "technical" changes, you will see that is far from accurate. All of the

proposed changes we are aware of are quite substantive, and would go even further than the Clinton-Rockefeller deal in limiting people's legal rights and endangering public health and safety.

As I understand it, the Gorton Amendments include:

A Proximate Cause Trigger for Punitive Damages. The Clinton-Rockefeller deal places significant new evidentiary burdens on plaintiffs seeking punitive damages. For example, the deal would mandate that punitive damages may only be awarded if the plaintiff shows *by clear and convincing evidence* that the harm was the result of defendant's *conscious, flagrant indifference* to the safety of others. In addition to these new requirements, Senator Gorton proposes to require that a plaintiff show that the defendant's flagrant conduct was the *proximate cause* of the plaintiff's injuries.

Based on our research, no state in the country requires plaintiffs to show a proximate cause nexus between the defendant's egregious conduct and the injury to the plaintiff. In many, if not all, products liability cases, this is tantamount to a bar on punitive damages awards because it would be impossible to show a direct causal link between the defendant's behavior and the plaintiff's injury. For example, last year the family of a South Carolina child who was killed when the defective latch on their Chrysler minivan popped open won a $250 million punitive damages award against the auto manufacturer. The punitive award was no doubt based in part on evidence of Chrysler's extensive stealth campaign to lobby Congress to take actions that would have made it more difficult for the National Highway Traffic Safety Administration to initiate an official recall of the vehicle. Such a large punitive damages award was surely justified to punish this kind of sleazy and outrageous corporate behavior that puts profits and dividends before people's lives. It would have been impossible, however, for these plaintiffs to prove that Chrysler's lobbying efforts to head off a recall was the proximate cause of their child's death.

Time Limit on Exclusion from Statute of Repose for Toxic Harm. The Clinton-Rockefeller deal excludes injuries caused by "toxic harm" from the deal's 18-year statute of repose for workplace injuries. "Toxic harm" is not defined in the proposal. While part of the rationale for the toxic harm exception was to exempt asbestos cases from the statute of repose, the present language will not accomplish this unless the proposal is amended to explicitly include asbestos injuries in a definition of toxic harm.

Senator Gorton proposes a definition for toxic harm that would, again, make matters even worse. He would define toxic harm as a "physical injury, illness, disease, or death, the evidence of which did not manifest itself within 18 years after the harmful substance was first ingested, inhaled, absorbed, or introduced into the body." Under this definition, which particularly benefits the chemical and asbestos industries, if there was some evidence of the injury that *did* occur within 18 years of exposure, that injury (or death) *would* be covered by the statute of repose, and the claim would be barred. There are several obvious problems with this. First, the statute of repose completely bars suits against manufacturers once their product becomes 18

years old. If a worker were exposed to a 20-year old toxic substance and got cancer 10 years later, their cause of action would be covered by the statute of repose and thus barred. Second, if a worker were exposed to new chemicals, started having symptoms of illness 16 years later but did not realize until year 19 that she had a disease that may have been caused by this exposure, her claim would also be barred under the Gorton definition. The proposed definition of "toxic harm" wipes out many of the claims the exception for "toxic harm" was originally intended to preserve.

"Reverse Erie" Preemption of State Courts by Lower Federal Courts The Gorton proposal would add a provision that was in the bill you vetoed in 1996 that would require all state courts to accept decisions of federal courts of appeal construing this act as binding precedent. This federal mandate is directly contrary to Article III, Section 1 of the Constitution, which provides that the "judicial power of the United States shall be vested in one Supreme Court." This has always been construed to mean that state courts must follow the decisions of the Supreme Court, but not the decisions of the lower federal courts. Although it would almost surely be found to be unconstitutional, the inclusion of this amendment on Senator Gorton's list shows how far certain members of Congress are willing to go in their relentless efforts to preempt state courts in order to protect corporate wrongdoers from full accountability for their injurious acts.

A Proposal to Limit the Tobacco Exclusion to Manufacturers. The Clinton-Rockefeller deal would exclude all actions involving tobacco products from the liability limits and other provisions of the bill. The Gorton amendments would limit this exclusion to tobacco manufacturers only. Thus, tobacco wholesalers, distributors, and retailers would be able to take advantage of the protections provided by the bill.

A Proposal to Limit the Breast Implant Exclusion to Silicone Implants. The Clinton-Rockefeller deal would exclude all actions involving breast implants from the liability limits and other provisions of the bill. The Gorton amendment would limit the exception to "actions alleging harm caused by either the silicone gel or the silicone envelope" used in a breast implant. The amendment also forbids revealing this limitation to a jury. Under this proposal, manufacturers, distributors and sellers of saline and polyurethane breast implants could be protected by the bill's limitations on civil actions, including the higher standards for proof required to get punitive damages, regardless of whether or not the manufacturers knew their products were dangerous.

Broadening the Alcohol and Drug Defense. The Clinton-Rockefeller deal proposes to bar a manufacturer's liability when alcohol or drug intoxication is 50 percent or more responsible for the harm that is the subject of the suit. Among its other problems, this language that benefits the auto manufacturers at the expanse of injured consumers threatens to overturn the entire body of law on auto crash-worthiness.

The Gorton proposal would make it even worse for plaintiffs. While the Clinton-

Rockefeller deal would bar liability when an alcohol or drug impaired plaintiff is 50 percent or more responsible for the *harm*, Gorton wants to expand this to include cases where the impairment is 50 percent or more responsible for the *accident* or *event*. Therefore, if the majority of the *harm* was caused not by the plaintiff's intoxication but by a manufacturing defect in the product (i.e., a safety defect in the automobile), the plaintiff could recover under the Clinton-Rockefeller deal but may not be able to recover under Gorton's proposal.

Other Gorton non-technical amendments include findings and purposes that contain unsubstantiated and untrue allegations about products liability litigation, a broad definition of the "commercial loss" cases that are excluded from the bill's limitations placed only on lawsuits brought by consumers, expanded preemption language, and the inclusion of the House Republican's version of the biomaterials bill.

Rather than even considering any of these unfair, anti-consumer proposed amendments, you should reexamine your decision to support *any* federalization of products liability law. Whether or not the Gorton amendments are accepted by the Administration today, the fact that Senator Gorton is peddling this list of additional anti-consumer products liability proposals is concrete evidence of what we have said all along: if our nation's tort law is federalized, corporate lobbyists backed by their campaign money, will come back, year after year after year, to take away more and more of consumers' legal rights. The notion that the Administration can somehow lay down a "reasonable" line on a federal products liability law that will be respected in future years is no more than wishful thinking at best and a cruel deception at worst.

Sincerely,

Ralph Nader
P.O. Box 19312
Washington, DC 20036

Product liability - interest group materials

March 11, 1998

Erskine Bowles
Chief of Staff
The White House
Washington, DC 20500

Dear Erskine:

The products liability deal negotiated between the White House and Senator Jay Rockefeller contradicts in key respects the President's message vetoing similar legislation in May, 1996. For example, this deal not only would cap punitive damages for smaller corporations that commit reckless or deliberately harmful acts, but would do so on a "one-way" basis, preempting only state laws that are more favorable to consumers. The chief beneficiaries of the deal's provisions will be culpable companies that want to take away fundamental judicial rights of all our citizens, including the most vulnerable -- sick and injured children, the elderly and the poor -- so they can get away without being made to pay for the harm they cause. Despite the President's veto statement pledge that he would not support legislation that did nothing for consumers, the Clinton-Rockefeller deal, in fact, contains nothing for consumers. One key provision the White House staff expressed interest in including to address a serious problem for injured consumers in products liability cases -- the abuse of secrecy orders to hide critical information about product dangers -- was left out of the deal.

There is no economic justification for dismantling 200 years of tort laws with PAC-greased federal legislation that ties the hands of state judges and juries. Recent news makes this point more clearly than ever. For the fourth year in a row, insurance costs for U.S. businesses declined significantly. The annual survey of business insurance conducted by Tillinghast-Towers Perrin and the Risk & Insurance Management Society calculates annual insurance costs for property damage, other liability insurance and workers' compensation. These total liability costs are minimal -- only $5.70 for every $1000 in revenue in 1996. (See attached Wall Street Journal article). This important fact (not to mention record corporate profits year after year) makes it impossible for corporations or politicians to argue there is any economic need to limit compensation to people injured by their products.

This bill is a potpourri of special protections requested by the major industries lobbying for its passage. The Clinton Administration should abandon this misbegotten effort to push forward with this unfair legislation. Instead, it appears that you are sitting down with Senator Slade Gorton and others to discuss making matters even worse. As if the deal negotiated wasn't unfair enough, Senator Gorton is proposing a number of changes to make it even harder for people to exercise their legal rights.

The Gorton amendments are largely based on memos prepared and distributed last fall by Victor Schwartz on behalf of the corporate coalitions pushing for passage of federal products liability legislation. Using those memos as a guide, we have done an analysis of some of the

worst of the proposed amendments. Although I have heard that Senator Gorton and others have characterized these as "technical" changes, you will see that is far from accurate. All of the proposed changes we are aware of are quite substantive, and would go even further than the Clinton-Rockefeller deal in limiting people's legal rights and endangering public health and safety.

As I understand it, the Gorton Amendments include:

A Proximate Cause Trigger for Punitive Damages. The Clinton-Rockefeller deal places significant new evidentiary burdens on plaintiffs seeking punitive damages. For example, the deal would mandate that punitive damages may only be awarded if the plaintiff shows *by clear and convincing evidence* that the harm was the result of defendant's *conscious, flagrant indifference* to the safety of others. In addition to these new requirements, Senator Gorton proposes to require that a plaintiff show that the defendant's flagrant conduct was the *proximate cause* of the plaintiff's injuries.

Based on our research, no state in the country requires plaintiffs to show a proximate cause nexus between the defendant's egregious conduct and the injury to the plaintiff. In many, if not all, products liability cases, this is tantamount to a bar on punitive damages awards because it would be impossible to show a direct causal link between the defendant's behavior and the plaintiff's injury. For example, last year the family of a South Carolina child who was killed when the defective latch on their Chrysler minivan popped open won a $250 million punitive damages award against the auto manufacturer. The punitive award was no doubt based in part on evidence of Chrysler's extensive stealth campaign to lobby Congress to take actions that would have made it more difficult for the National Highway Traffic Safety Administration to initiate an official recall of the vehicle. Such a large punitive damages award was surely justified to punish this kind of sleazy and outrageous corporate behavior that puts profits and dividends before people's lives. It would have been impossible, however, for these plaintiffs to prove that Chrysler's lobbying efforts to head off a recall was the proximate cause of their child's death.

Time Limit on Exclusion from Statute of Repose for Toxic Harm. The Clinton-Rockefeller deal excludes injuries caused by "toxic harm" from the deal's 18-year statute of repose for workplace injuries. "Toxic harm" is not defined in the proposal. While part of the rationale for the toxic harm exception was to exempt asbestos cases from the statute of repose, the present language will not accomplish this unless the proposal is amended to explicitly include asbestos injuries in a definition of toxic harm.

Senator Gorton proposes a definition for toxic harm that would, again, make matters even worse. He would define toxic harm as a "physical injury, illness, disease, or death, the evidence of which did not manifest itself within 18 years after the harmful substance was first ingested, inhaled, absorbed, or introduced into the body." Under this definition, which particularly benefits the chemical and asbestos industries, if there was some evidence of the injury that *did* occur within 18 years of exposure, that injury (or death) *would* be covered by the statute of

repose, and the claim would be barred. There are several obvious problems with this. First, the statute of repose completely bars suits against manufacturers once their product becomes 18 years old. If a worker were exposed to a 20-year old toxic substance and got cancer 10 years later, their cause of action would be covered by the statute of repose and thus barred. Second, if a worker were exposed to new chemicals, started having symptoms of illness 16 years later but did not realize until year 19 that she had a disease that may have been caused by this exposure, her claim would also be barred under the Gorton definition. The proposed definition of "toxic harm" wipes out many of the claims the exception for "toxic harm" was originally intended to preserve.

"Reverse Erie" Preemption of State Courts by Lower Federal Courts The Gorton proposal would add a provision that was in the bill President Clinton vetoed in 1996 that would require all state courts to accept decisions of federal courts of appeal construing this act as binding precedent. This federal mandate is directly contrary to Article III, Section 1 of the Constitution, which provides that the "judicial power of the United States shall be vested in one Supreme Court." This has always been construed to mean that state courts must follow the decisions of the Supreme Court, but not the decisions of the lower federal courts. Although it would almost surely be found to be unconstitutional, the inclusion of this amendment on Senator Gorton's list shows how far certain members of Congress are willing to go in their relentless efforts to preempt state courts in order to protect corporate wrongdoers from full accountability for their injurious acts.

A Proposal to Limit the Tobacco Exclusion to Manufacturers. The Clinton-Rockefeller deal would exclude all actions involving tobacco products from the liability limits and other provisions of the bill. The Gorton amendments would limit this exclusion to tobacco manufacturers only. Thus, tobacco wholesalers, distributors, and retailers would be able to take advantage of the protections provided by the bill.

A Proposal to Limit the Breast Implant Exclusion to Silicone Implants. The Clinton-Rockefeller deal would exclude all actions involving breast implants from the liability limits and other provisions of the bill. The Gorton amendment would limit the exception to "actions alleging harm caused by either the silicone gel or the silicone envelope" used in a breast implant. The amendment also forbids revealing this limitation to a jury. Under this proposal, manufacturers, distributors and sellers of saline and polyurethane breast implants could be protected by the bill's limitations on civil actions, including the higher standards for proof required to get punitive damages, regardless of whether or not the manufacturers knew their products were dangerous.

Broadening the Alcohol and Drug Defense. The Clinton-Rockefeller deal proposes to bar a manufacturer's liability when alcohol or drug intoxication is 50 percent or more responsible for the harm that is the subject of the suit. Among its other problems, this language that benefits the auto manufacturers at the expanse of injured consumers threatens to overturn the entire body of law on auto crash-worthiness.

The Gorton proposal would make it even worse for plaintiffs. While the Clinton-Rockefeller deal would bar liability when an alcohol or drug impaired plaintiff is 50 percent or more responsible for the *harm*, Gorton wants to expand this to include cases where the impairment is 50 percent or more responsible for the *accident* or *event.* Therefore, if the majority of the *harm* was caused not by the plaintiff's intoxication but by a manufacturing defect in the product (i.e., a safety defect in the automobile), the plaintiff could recover under the Clinton-Rockefeller deal but may not be able to recover under Gorton's proposal.

Other Gorton non-technical amendments include findings and purposes that contain unsubstantiated and untrue allegations about products liability litigation, a broad definition of the "commercial loss" cases that are excluded from the bill's limitations placed only on lawsuits brought by consumers, expanded preemption language, and the inclusion of the House Republican's version of the biomaterials bill.

Rather than even considering any of these unfair, anti-consumer proposed amendments, the President should reexamine his decision to support *any* federalization of products liability law. Whether or not the Gorton amendments are accepted by the Administration today, the fact that Senator Gorton is peddling this list of additional anti-consumer products liability proposals is concrete evidence of what we have said all along: if our nation's tort law is federalized, corporate lobbyists backed by their campaign money, will come back, year after year after year, to take away more and more of consumers' legal rights. The notion that the Administration can somehow lay down a "reasonable" line on a federal products liability law that will be respected in future years is no more than wishful thinking at best and a cruel deception at worst.

What's the need, Erskine, for giving all that reckless power to all that greed? Have you consulted with state judges on this federal preemption on state common law? Is this why you came to the White House with Bill Clinton?

Sincerely,

Ralph Nader
P.O. Box 19312
Washington, DC 20036

cc: Bruce Lindsey, Deputy Counsel to the President
Gene Sperling, Assistant to the President for Economic Policy

A2 THE WALL STREET JOURNAL MONDAY, JANUARY 5, 1998

ECONOMY

Outlays for Insurance By U.S. Businesses Declined Again in '96

By a WALL STREET JOURNAL *Staff Reporter*

NEW YORK – Insurance costs for U.S. businesses declined in 1996 for the fourth straight year, partly as a result of lower payments for workers' compensation, a survey found.

The Cost of Risk Survey, conducted jointly by the consulting firm Tillinghast-Towers Perrin and the nonprofit Risk & Insurance Management Society, calculates costs for property and liability insurance and workers' compensation.

Overall, the survey said companies spent $5.70 insuring against risk for every $1,000 of revenue in 1996, down 12% from $6.49 in 1995. The most recent decrease represents the largest in a four-year decline and was broadly reported by respondents of all sizes and for most of the 26 industry groups surveyed.

The survey said the cost decreases were found in both premiums and losses, reflecting a competitive insurance market, heightened attention to cost-control measures and a healthy economy.

Workers' compensation costs, which dropped 23% to $1.87 per $1,000 of revenue in 1996, were reduced by the increased use of managed care, the competitive insurance market and the increased use of safety and loss-reduction techniques, the survey said.

Product liability – interest group materials

ER

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

FACSIMILE

TO: Bruce Reed

FROM: Joan Claybrook Joan Claybrook

DATE: October 8, 1997

Dear Bruce:

We are deeply concerned about this and feel consumers have been totally ignored. Why is there, at a minimum, no provision to prevent gag orders that prevent disclosure of health and safety information?

Attachment

Ralph Nader, Founder
1600 20th Street NW • Washington, DC 20009-1001 • (202) 588-1000

MAJOR PROVISIONS IN WHITE HOUSE/ROCKEFELLER FEDERAL PRODUCTS LIABILITY DEAL

The proposed federal products liability bill negotiated by the White House and Senator Jay Rockefeller (D-WV) would be a massive preemption of state law, dictating for the first time in U.S. history broad federal products liability standards to the courts in all 50 states. Each of these standards would weaken the rights of innocent consumers who are wrongfully injured by defective and dangerous products. Proponents say that it would standardize laws across 50 states. However, its *one-way* preemption of certain pro-consumer state law provisions makes clear that the intent of this legislation is not uniformity. Rather, it is a carefully crafted bill to provide relief and protections for the industries lobbying for it. It offers nothing for consumers. In addition, this legislation would create a framework, easily amended by future Congresses, that could result in even worse damage to consumers and the public.

SEC. 111: PUNITIVE DAMAGES

The bill establishes a punitive damages cap of $250,000 or two times compensatory damages, whichever is less, for smaller corporations defined as fewer than 25 full-time employees with an annual revenue of $5 million or less. (Other proposed caps, which may be considered as negotiations proceed, would be a 10% of annual revenue cap for companies with fewer than 25 employees). The bill establishes a new standard for awarding any punitive damages -- "clear and convincing evidence" of "conscious, flagrant indifference" to safety. This provision preempts "one-way" -- it overrides state laws where punitive damages are allowed; it leaves in place state laws that do not allow punitive damages.

This provision contradicts in two major respects President Clinton's message upon vetoing similar legislation last year. Clinton said, "I oppose arbitrary ceilings on punitive damages, because they endanger the safety of the public" and one-way preemption "peculiarly disadvantages consumers ... I cannot accept, absent compelling reasons, such a one-way street of federalism."

Many businesses with fewer than 25 employees produce products that threaten the public's health and safety. For example, a 1995 *New York Times* article revealed that some airlines use fake replacement parts bought from "scrap yard dealers" -- companies that could be covered by this cap. (*Fake Replacement Parts Often Used on Airliners: One Fatal Crash is Said to Have Resulted*, New York Times (May 5, 1995, at A18). The Consumer Federation of America conducted a review of recent Consumer Product Safety Commission press releases and found that several companies with fewer than 25 employees had been fined or cited for failing to conform with federal mandatory safety standards or because a product was alleged to contain a product defect. Many of these products were toys, fireworks or baby products -- underscoring the impact this provision will have on the health and safety of children.

According to the Violence Policy Center, small companies that could be covered by the punitive damages cap are typical manufacturers of Saturday Night Special guns or "junk guns"-- cheap,

concealable, low-quality handguns, many of which do not meet the minimum design and safety standards required of imported handguns by the Bureau of Alcohol, Tobacco and Firearms (ATF). These safety standards do not apply to domestically manufactured handguns. As a result, the tort system provides the only regulation of domestic "junk gun" manufacturers.

SEC. 107: STATUTE OF REPOSE

The bill provides a statute of repose for durable goods used in the workplace, if there is an applicable workers compensation law. The statute of repose cuts off a manufacturer's liability for a defective product after a certain number of years, in this case 18 years. The statute of repose overrides many state laws that allow injured workers to sue manufacturers of products responsible for causing workplace injuries to recover full damages for the harm caused by the defective product.

Under this provision, workers injured by defective products, including those built to last much longer than 18 years, like workplace elevators and industrial machinery, are prevented from recovering any compensation from manufacturers of defective products over 18 years old. The worker must be covered by a state workers compensation law. Workers compensation laws allow employees hurt on the job to get only partial compensation for their injuries and lost wages. For example, many laws provide workers with only a couple years of disability payments for a lifetime injury, and prohibit compensation for non-economic damages, such as for loss of fertility, loss of a limb or permanent disfigurement. The employer cannot be sued by the worker for any additional amount.

This provision discriminates against workers, especially those in states that have cut their workers compensation benefits in recent years, leaving injured employees with less help and no recourse if hurt by a product protected by a statute of repose. If a consumer/bystander were injured by the same product, they could still sue the manufacturer and receive full compensation plus punitive damages, since they would not be covered by a workers' compensation statute.

ASBESTOS PROBLEM: In the statute of repose section of the bill, there is a parenthetical exemption for injuries caused by "toxic harm." While part of the intent of the toxic harm provision is to exempt asbestos cases from the statute of repose, the language will not accomplish this. "Toxic harm" is not defined in the bill. Without a definition, its meaning will be determined on a case by case basis. There is debate within the legal community as to whether asbestos is a toxic substance, because there is much scientific evidence to the contrary. Specifically, a toxin is a poisonous substance. As stated long ago in a 1964 *Journal of the American Medical Association* article, "Asbestos is not currently considered a toxic substance since it does not produce systemic poisoning." Instead, it is a naturally-occurring mineral which causes a slowly progressive fibrotic reaction in the lungs that can induce cancer, often 30 to 40 years after inhalation.

In order to avoid any inadvertent termination of asbestos or other cases intended to be covered by the "toxic harm" exemption, any definition of "toxic harm" *should* be: "Harm caused by acute or repeated exposure to naturally-occurring or synthesized minerals or mineral products, organic compounds, microorganisms, biological products, radioactive compounds, or any chemical or hazardous substance listed by the Centers for Disease Control Agency for Toxic Substances and Disease Registry."

SEC. 110: OFFER OF JUDGEMENT

This is a new provision which is poorly drafted, complicated and confusing. Several trial attorneys who have studied the provision have reached different conclusions about how it would operate, how it would interact with the Rule 68 (Offer of Judgment) of the Federal Rules of Civil Procedure and similar state rules, as well as the provision's constitutionality.

Generally, this section says that if a party rejects a settlement offer and pursues their right to present their case in court, but ultimately gets a judgment that is less favorable than the settlement offer, the party can be penalized by up to $50,000, slashing the damages the jury may award. This provision applies to offers made by both plaintiffs and defendants, but will be most damaging to consumers because of its chilling effect on an injured consumer's rights to obtain full and fair compensation in court. Even victims with very strong cases could fear pursuing trial after an offer is made, no matter how low and despite the merits of the case, on the chance the verdict might be less than the offer. Injured consumers who are in need of medical care, who are disabled or perhaps in pain, who can not work and whose lives have been disrupted, are in a substantially weaker financial position than the corporate perpetrator of their harm. They could be economically devastated by this sort of penalty, which could drastically reduce their compensatory damages. Those seeking modest compensation for product-related injuries could lose most of their jury award if their lawyers guess wrong about going to trial after an offer to settle is made.

SEC. 102: NEGLIGENT GUN SALES

The bill exempts from its provisions three types of liability theories for negligent gun sales: negligent entrustment, negligence per se and dram shop action.

The intent of this section is to exempt from the bill actions brought by consumers injured as a result of negligent gun sales. However, the bill fails to accomplish this purpose. According to the Violence Policy Center, there are additional liability theories that have been used successfully against firearm retailers and proprietors of gun clubs or target ranges, that would be covered by the bill's extremely broad "product seller" and "product liability action" definitions. For example, theories of nuisance and trespass have been used successfully by plaintiffs harmed by bullets fired at gun clubs. Under these other theories, an injured consumer would have to show that the seller was negligent, breached an express warranty or engaged in intentional wrongdoing. A nuisance action, increasingly used in firearm litigation, would not fall within any of these categories. Thus, the bill would provide great benefits for these gun companies.

SEC. 103: SELLER LIABILITY

The bill eliminates strict liability and replaces it with a negligence standard -- which requires the consumer to prove that the seller failed to use reasonable care with regards to the product. It protects sellers where there was no reasonable opportunity to inspect the product, or if inspection would not have revealed the aspect responsible for the harm. Seller liability is maintained for violations of an express warranty, or for intentional wrongdoing.

Strict liability for product sellers is the standard developed by courts because they recognized that stores are often in the best position to spot a product defect and to notify consumers about the

dangers. Under this new standard, retailers no longer have a duty to warn their customers about known product defects or even have an incentive to stop selling products they know are unsafe. In addition, by holding every defendant in a product's chain of distribution -- including product sellers -- strictly liable, the tort system can alleviate the need for the injured consumer to discover and use complex and often difficult-to-obtain evidence about which defendant was responsible for a particular product defect and the resulting injury. The negligence standard under this bill can be very difficult and very expensive to prove.

SEC. 105: MISUSE OR ALTERATION

If an injured consumer misuses or alters a product, the manufacturer's or seller's liability may be reduced by the percentage of the consumer's fault. However, under this section's *one-way preemption*, if the state has a contributory negligence standard, whereby even the smallest percentage of fault by the consumer completely immunizes the manufacturer or seller, that state law prevails.

Under this provision, innocent third parties who are injured by products would be unable to collect full, or in states with contributory negligence, any, damages. For example, suppose someone is injured by a product because it is both unreasonably dangerous due to a design defect, and it also has been misused -- despite the manufacturer's warning against misuse of the product. The innocent but injured third party sues the manufacturer and the user of the product. In states with comparative negligence, the manufacturer would be liable only for the percentage of harm not caused by the misuse or alteration, so if the misuser is judgment-proof, the innocent claimant will be prevented from obtaining a full recovery. In states with contributory negligence, the innocent third party could collect nothing.

SEC. 106: STATUTE OF LIMITATIONS

The bill establishes a two-year statute of limitations from the date the injured consumer discovered, or in the exercise of reasonable care should have discovered, the harm.

This provision fails to incorporate a key rule of law that has been adopted and approved in many decisions around the country, and is the majority rule in complex medical malpractice and medical products cases. The rule was developed in the DES case of *Dawson v. Eli Lilly Co.*, 543 F.Supp. 1334 (D.D.C. 1982). The *Dawson* rule holds that before a statute of limitations commences, three conditions must be met: 1) the victim must have discovered the injury; 2) the victim must have discovered the cause of the injury; and 3) the victim must have notice of wrongful conduct or wrongdoing on the part of the potential defendant. The *Dawson* rule recognizes that it is notice of a potential cause of action against a wrongdoer -- not just the notice of the disease -- that should start the statute of limitations running. Without this rule, a woman who is unable to conceive a child, who learns years later that her infertility was due to an IUD that she wore five years before, which the manufacturer knew would cause infertility but withheld this information, would be precluded from suing and holding the manufacturer accountable. The legislation's statute of limitations does not make it clear that it incorporates the last element of the *Dawson* rule and, therefore, may bar such injured victims from filing lawsuits. At the very least, it is sure to spawn a flood of litigation over an issue that most states have already resolved.

SEC. 102: BUSINESS LOSSES

The bill contains a special exemption for lawsuits filed by businesses for any commercial loss suffered as a result of a defective product. In other words, the cap on punitive damages and other limitations would apply to consumers but not to other businesses.

A primary reason given by proponents of federal product liability legislation is to curb "excessive" products liability litigation and punitive damage awards won by injured consumers. Business-to-business lawsuits pose a much greater "burden" on corporations advocating this legislation than do product liability suits. Eleven percent of new civil case filings in general jurisdiction state courts are contract cases alone, typically between businesses. This is over 10 times as many lawsuits as are filed by injured consumers in products liability and medical malpractice actions, combined. Almost half of all federal court cases are businesses suing each other, according to the *Wall Street Journal*. And 47% of all punitive damage awards are in business-to-business suits, whereas only 4.4% of such awards are assessed in product liability cases. Yet the proposed legislation, while restricting consumers' access to the civil justice system, would leave corporations with unfettered use of the courts, including full rights to obtain compensation for their commercial loss from defective products.

OTHER PROVISIONS

The bill contains several other provisions, including: exclusion of cases involving tobacco, breast implants, blood or blood products, and electricity or natural gas (Sec. 102); a complete defense to a claim if a claimant was intoxicated or under the influence of alcohol or a drug, as defined by state law, and as a result, was more than 50% responsible for the harm (which could be interpreted as overturning the entire body of law on auto crash worthiness) (Sec. 104); workers compensation subrogation (if an employer or a co-employee is partially at fault for injuring a worker, damages that the manufacturer or seller could pay are correspondingly reduced) (Sec. 113); alternative dispute resolution (voluntary, non-binding)(Sec. 109).

Omitted from the bill is any specific limitation on joint and several liability. Provisions to limit the liability of biomaterial suppliers of medical devices is "to be supplied" (Title II). Public Citizen will provide analysis of this language when it becomes available.

The bill contains nothing for consumers. Public Citizen has proposed that Congress consider an anti-secrecy provision to stop the overuse of gag orders and confidential settlements that keep information about hazardous products from regulatory agencies and the public.

For more information, contact Joanne Doroshow or Joan Mulhern, Public Citizen Congress Watch, (202) 546-4996(p); (202) 547-7392 (f); joanne@citizen.org; jmulhern@citizen.org.

Date: October 7, 1997

Product liability - interest group materials

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

October 15, 1997

Ellen Seidman
National Economic Council
Old executive Office Building
Room 234
Washington, DC 20502

Dear Ellen:

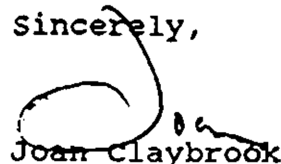
We are very distressed as I've mentioned to you that the President's product liability deal does not contain anything for consumers, particularly an anti-secrecy provision cocerning health and safety information. You mentioned that you were working on such a provision but that it would be limited to disclosure to federal agencies. This would only minimally help the public because most agencies would be loathe to disclose any information under a gag order, even if pertinent to a rulemaking or a defect investigation. However, there is to my knowledge nothing on secrecy in the bill.

I know that the White House is being badgered by the business community, Senators Lott, Gorton, and others to make so-called "technical" amendments to the bill, and I hope that you are not making any more concessions.

However, I would urge you and your colleagues to follow through, at least minimally, on the President's pledge for a so-called balanced bill by adding at least one item for consumers -- an anti-secrecy amendment -- that focuses on the release of information to protect the public health and safety. I am enclosing a draft amendment which accomplishes that purpose and ask that you include it in your bill.

I'd be pleased to know your reaction.

Sincerely,



Joan Claybrook

cc: Bruce Lindsey
Bruce Reed
Ron Klain

AVAILABILITY OF INFORMATION IN PRODUCT LIABILITY ACTIONS --

(1) (A) In any civil action brought pursuant to this Act, no person shall seek and no court shall enter an order under applicable State or Federal rules of civil procedure restricting the disclosure of information obtained through discovery or an order restricting access to court records in a civil case, if such information or court records are relevant to the protection of public health or safety.

B) No order entered to restrict the disclosure of information obtained through discovery or restrict access to court records in a civil case shall be made unless the court makes a particularized finding of fact that the terms of paragraph (1)(A) have been met.

C) No order entered to restrict the disclosure of information obtained through discovery or restrict access to court records in a civil case shall continue in effect after the entry of final judgement, unless at or after such entry the court makes a separate particularized finding of fact that the terms of paragraph (1)(A) have been met.

D) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order.

(2) No agreement between or among parties in a civil action pursuant to this Act filed in a State court or court of the United States may contain provisions that:

A) prohibit or otherwise restrict a party from disclosing any information which is relevant to the protection of public health or safety;

B) prohibit disclosure of the amount of any settlement between or among the parties, provided that nothing herein shall require any person to make such disclosure;

C) require parties to return documents related in any way to the action, unless, for a request that documents be returned, the person making such request retains the documents returned in the same order and condition; or

D) prohibit an attorney from representing any other claimant in a similar action or in any other action against any other party to the action.

Product liability - interest group materials

American Lung Association
Citizen Action
Consumer Federation of America
Consumers Union
Handgun Control, Inc.
International Association of Fire Fighters
National Farmers Union
National Organization for Women
National Women's Health Network
Public Citizen
Rainbow/PUSH Coalition
Sierra Club
United Auto Workers
U.S. Public Interest Research Group
Violence Policy Center

July 14, 1997

Mr. Erskine Bowles
Chief of Staff
The White House
Washington, D.C. 20500

Dear Mr. Bowles:

As you know, we were pleased last year when President Clinton vetoed H.R. 956, the product liability bill. The President did this saying "the bill would undermine the ability of courts to provide relief to victims of harmful products and thereby endanger the health and safety of the entire American public." The President had five principal objections to the legislation:

- Preemption of state law, particularly one-way preemption, which "inappropriately intrudes on State authority and does so in a way that tilts the legal playing field against consumers;"
- Elimination of joint and several liability for non-economic damages, which "would prevent many persons from receiving full compensation for injury" and "unfairly discriminates against the most vulnerable in our society -- the elderly, the poor, children and nonworking women;"
- Caps on punitive damages, because they "endanger the safety of the public;"

- Statute of repose of 15 years (raised to 18 years in current legislation, S. 648), because it "will preclude some valid suits;" and
- Application of the limits on punitive damages and non-economic damages to lawsuits where a gun dealer has knowingly sold a gun to a convicted felon.

Recently, the White House formed an interagency task force on product liability, presumably to determine if the pending Senate bill (S. 648) that passed the Commerce Committee can be revised to meet the objections of the President and the views of the business community. Significantly, the composition of this task force includes the important departments and agencies more likely to reflect the concerns of industry -- National Economic Council, Council of Economic Advisers, Commerce and Treasury Departments, and Small Business Administration. Other than the Consumer Products Safety Commission, the other federal agencies with principal jurisdiction over health and safety matters that are more likely to reflect the concerns of those who are wrongfully injured -- the Departments of Labor and Health and Human Services, and the Food and Drug Administration, Environmental Protection Agency, National Highway Transportation Safety Administration and the Occupational Safety and Health Administration -- were not included in the interagency task force.

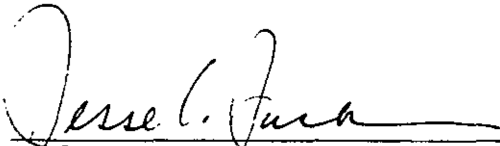
We are very concerned about this development. We want to ensure that the President receives a balanced perspective and that adequate attention is given to the interests of consumers, workers, and others who may be wrongfully injured.

We request the opportunity to meet with you to express our views about the product liability legislation. We would hope that such a meeting could occur prior to the President taking any action on recommendations from the interagency task force.

Please have your staff contact Joan Claybrook at Public Citizen, (202) 588-1000, to make arrangements, or to provide additional information. Thank you for your consideration.

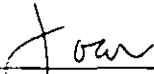
Sincerely,

Mr. Erskine Bowles
July 14, 1997
Page Three



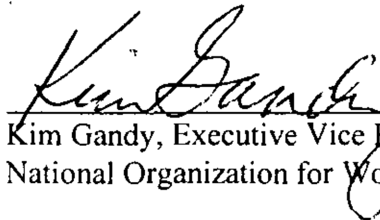
Rev. Jesse Jackson
Rainbow-PUSH Coalition

Sen. Howard Metzenbaum, Chairman
Consumer Federation of America

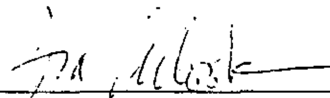


Joan Claybrook, President
Public Citizen

Fran Du Melle, Deputy Managing Director
American Lung Association



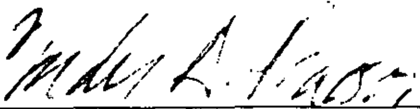
Kim Gandy, Executive Vice President
National Organization for Women



Ira Arlook, Executive Director
Citizen Action

Carl Pope, Executive Director
Sierra Club

Leland Swenson, President
National Farmers Union



Cindy Pearson, Executive Director
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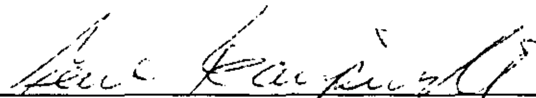

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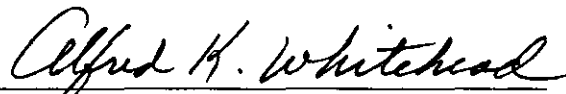
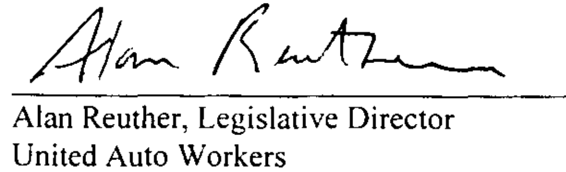


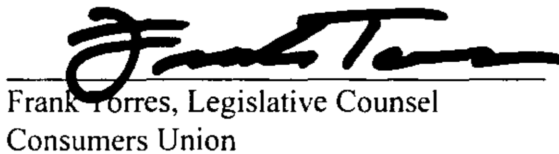
Alfred K. Whitehead, General President
International Association of Fire Fighters

Mr. Erskine Bowles
July 14, 1997
Page Four

Sarah Brady, Chair
Handgun Control, Inc.



Alan Reuther, Legislative Director
United Auto Workers



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Product liability - interest group materials

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

July 22, 1997

Bruce Lindsey
Deputy Counsel to the President
The White House
Washington, DC 20500

Dear Bruce:

At our March meeting on products liability, you indicated an interest in research or analysis on the practical impact of a punitive damages cap on product safety. The enclosed report, "Smoking Guns," is the product of our research on this subject.

The cases presented in this study reveal that punitive damages, either actual or potential, very much factor into corporate decision making about product safety. The "smoking gun" documents uncovered in these cases show how manufacturers engage in abstract cost/benefit analyses to determine whether it is more profitable to sell a defective product and risk considerable liability costs, rather than to redesign, remove from the market, or recall the product, even when the product will clearly kill or injure users. They also show how a particularly stubborn manufacturer must actually be assessed punitive damages before it is motivated to correct a defective design, even when people have actually been killed or cruelly injured. In either case, a punitive damages cap will reduce the potential risk to manufacturers and lead to an increase of dangerous products on the market.

We also recently prepared the enclosed report on "Discovery Abuse," which reveals how defendants, including companies pressing for enactment of products liability legislation, hide and destroy evidence. This can delay for years, or sometimes foreclose completely, the ability of consumers injured by defective products to sue wrongdoers successfully. Using such unscrupulous discovery tactics as destruction of documents, inappropriate claims of attorney-client privilege, or failure to respond honestly to discovery requests, defendants can not only thwart a victim's right to seek compensation, but also allow defective products to remain on the market for years while consumers continue to be injured and killed.

Taken together, these reports document the need for greater consumer protections, rather than more restrictions on consumers' rights, as would occur under the Senate products liability bill (S. 648).

Ralph Nader, Founder
215 Pennsylvania Avenue SE • Washington, D.C. 20003 • (202) 546-4996

Letter to Bruce Lindsey
July 22, 1997
Page Two

We would be pleased to provide any additional information or analysis that would be useful in your assessment of the products liability bill. I hope you will let us know if we can be of further assistance, and that you will not hesitate to call.

Sincerely,

Joan Claybrook
President

Frank Clemente
Director, Congress Watch

cc:
John Podesta, Assistant to the President and Deputy Chief of Staff
Bruce Lindsey, Deputy Counsel to the President
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SMOKING GUNS:

Corporate Behavior and the Harmful Impact of Capping Punitive Damages in Products Liability Cases

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Congress Watch
July 1997

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SMOKING GUNS:
Corporate Behavior and the Harmful Impact of Capping Punitive Damages in Products Liability Cases

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SMOKING GUNS:

Corporate Behavior and the Harmful Impact of Capping Punitive Damages in Products Liability Cases

We must remember that the very existence of the proposed tobacco agreement is a credit to our civil justice system. In fact, without the use of class action and the likelihood of punitive damage recoveries, the tobacco companies would have never come to the negotiating table.
-- Senator Patrick Leahy, (D-Vt.), July 16, 1997

The potential for punitive damages is the lever that brought the tobacco industry to the table.
-- Michael Pertchuk, former FTC Chairman, Co-Director, The Advocacy Institute, July 10, 1997

INTRODUCTION

Over the last 20 years, the U.S. civil justice system has faced some of the fiercest political attacks in its 200-year history. Business interests have lobbied relentlessly at both the state and federal levels to convince public officials to limit the liability of corporations responsible for causing injuries or death. One of their most common objectives has been the capping of punitive damages -- damages awarded as punishment for particularly egregious, reckless or intentional misconduct.

Punitive damages are one of the least understood features of the civil justice system. For example, it is commonly said that punitive damages awarded by juries in products liability cases -- those involving manufacturers or sellers of dangerous or defective products -- are often excessive. According to jury verdict publishing firm Jury Verdict Research, the median punitive damage award in products liability cases is $1 million.[1] When one considers that Mike Tyson was recently fined $3 million just for biting Evander Holyfield's ears -- his license being revoked as well -- $1 million in punitive damages for reckless or malicious corporate misconduct, sometimes resulting in death or severe injury, hardly seems excessive.

It is also said that punitive damages are awarded too frequently in products liability cases, when in fact, they are extremely unusual -- awarded in only 2.6 of all products liability verdicts.[2] Although rare, they have critical social importance lying not in their frequency, but in the "signals" they send

to the rest of society -- their "deterrent and shadow" effect. According to the Rand Institute for Civil Justice,

> The jury's decision in any particular case indicates the potential costs of engaging in behavior similar to the defendant's.... Punitive damages are designed to punish a defendant for grossly inappropriate actions and, in so doing, to deter future such actions by signaling that their consequences can be severe.[3]

For many years, the U.S. Congress has considered federal products liability legislation that would, among other things, cap the amount of punitive damages that corporations could be required to pay. The cap contained in legislation vetoed by President Clinton in 1996 (H.R. 956) and proposed again in 1997 (S. 648) is $250,000, or two times compensatory damages, whichever is more (or whichever is less for companies under 25 employees). This cap would apply nationwide, except where state law provides a more restrictive cap, in which case the state law would prevail.

No matter what form, a punitive damages cap contained in federal products liability legislation would fundamentally disrupt this country's products liability system, which has operated pursuant to state law for over 200 years. Moreover, such legislation places at risk achievement of the well-recognized dual goals of this system: compensating victims of defective products, and deterring manufacturers from making defective products.

Potential corporate liability for punitive damages in products liability cases is an integral part of the deterrence function. As President Clinton noted in last year's veto message, punitive damages are meant to "punish and thereby deter egregious misconduct."[4] He also stated that punitive damage caps can "increase[ ] the possibility that defective goods will come onto the market as a result of intentional misconduct."[5]

Smoking Guns takes a fresh look at the practical impact of a nationwide punitive damages cap and confirms that such a cap will negatively affect corporate decision-making about product safety in two fundamental areas: how safe to make products in the first instance and whether to take corrective action with respect to a defective product that is already on the market because of actual or potential punitive damages.

Because manufacturers can be reluctant to openly discuss the decision-making process regarding how safe to make products in the first instance, this report examines the public record in a number of cases where a defective product caused severe injury or death and resulted in litigation. Some cases were chosen because an actual award of punitive damages seemed to motivate the manufacturer to take corrective action with respect to a defective product. Other cases were chosen not because of the impact of punitive damages in a particular case (some defendants settle to avoid punitive damages), but because documents and testimony in a case provide a unique window into how manufacturers factor potential liability, including potential liability for punitive damages, into decisions about product safety. By examining cases that show the actual corporate response to the risk or actual imposition of punitive damages, we can better understand the likely corporate response

to the reduced exposure posed by a cap on punitive damages. Based on these cases, it is very likely that a punitive damages cap would result in many more defective products being sold to consumers.

PUNITIVE DAMAGES AND DETERRENCE

Critics of the current civil justice system have traditionally complained that the "unpredictable" nature of the common law and jury awards is the "heart of the product liability crisis."[6] Far from signifying a crisis, however, the jury's discretion to assess the scope of the harm, the egregiousness of the corporate conduct, and the amount of punitive damages it would take to impose real punishment is the very essence of the system's crucial deterrence function. Studies have shown that the *threat* of punishment is more effective in deterring intentional, egregious misconduct than the severity of the sanction actually imposed.[7]

Manufacturers support caps on punitive damages because such caps allow them to precisely budget their potential liability as a cost of doing business. Nothing proves this point more than the desire of the tobacco companies to achieve predictable litigation costs, including complete elimination of punitive damages awards for past misconduct, through a "global" tobacco settlement.

This precept was also recognized in the famous Ford Pinto case, *Grimshaw v. Ford Motor Company*, where the court observed that "the manufacturer may find it more profitable to treat compensatory damages as a part of the cost of doing business rather than to remedy the defect.... Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass-produced articles."[8] This principle was similarly recognized by the court in the Dalkon Shield case, *Palmer v. A.H. Robins Company*, where the court noted that "[i]f punitive damages are predictably certain, they become just another item in the cost of doing business, much like other production costs, and thereby induce a reluctance on the part of the manufacturer to sacrifice profit by removing a correctable defect."[9] Recently, the Rand Institute for Civil Justice drew the same conclusion in a report on punitive damages, noting "the deterrent and shadow effects of punitive damages awards may be far stronger and, thus, more significant, than the corresponding effects of compensatory awards."[10]

THE NEXUS BETWEEN PRODUCTS LIABILITY AND PRODUCT SAFETY

As the examples in this report illustrate, since the 1970s, corporate decision-makers have been giving a great deal of consideration to products liability in determining the level of product safety that should be achieved. In 1977, the president of Cincinnati, Inc., a press brake manufacturer, testified as follows in a lawsuit brought by a man whose fingers were amputated by the machine:

> Q: Sir, would you agree with the statement that in the last four or five years there has been an increased concern on the part of Cincinnati with regard to safety in the use of its press brake machines?
>
> A: Yes.

Q: What factor or factors have caused that increased concern on the part of Cincinnati with regard to the safety of its press brake machines?

A: Well, I guess the major factor is the fact that we are more and more being held responsible for the way our machines are used.

Q: Could you elaborate on that, sir?

A: Well, people are suing us when somebody gets hurt, and this has happened more and more lately.[11]

Similarly, the link between product safety and products liability was discussed in an August 29, 1974 memorandum from the legal department of Clark Equipment Company, makers of lift trucks. In that memorandum, the assistant counsel urged the company to make back-up alarms standard on Clark equipment, in order to avoid pedestrian accidents:

> [T]he lack of a back-up alarm presents a substantial product liability exposure to Clark .... In every case in which we have had an injury involving a person struck by a machine, the absence of a back-up alarm has been very crucial. I must conclude that it is a very substantial fact in the mind of any juror that if the machine had had a back-up alarm, the injury might have been prevented.[12]

See Exhibit 1. The relationship between products liability and product safety that is revealed in the foregoing examples is also documented in the 1987 findings of The Conference Board, Inc., a business information service that assists senior executives in making decisions on significant issues in management practice, and economic and public policy. The organization surveyed 232 risk managers of large U.S. corporations and concluded that:

> Where product liability has had a notable impact -- where it has most significantly affected management decision making -- has been in the quality of the products themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit.[13]

However, there are other disturbing trends in corporate behavior that suggest a nationwide punitive damages cap, potentially eliminating a manufacturer's exposure to large and unbudgeted punitive damages, would result in an increase in unsafe products on the market and a corresponding increase in consumer deaths and injuries. This outcome is inevitable for various reasons.

As several of the examples in this report demonstrate, manufacturers often engage in cost/benefit analyses, sometimes called "value analyses," when deciding whether to take corrective action with respect to a defective product by either redesigning it, removing it from the market or recalling it. These analyses balance the manufacturer's potential financial liability for deaths and injuries caused by the defective product against the costs of taking the corrective action. A cap on punitive damages will have a direct and significant impact on such calculations by decreasing the potential costs of

liability that are factored into the equation. Consequently, the analysis is more likely to yield a conclusion that tells the manufacturer that it may be more cost-effective to simply pay victims and their families for any deaths or injuries caused by a defective product than to design a safe product in the first instance or to correct a defect that has been discovered after the fact. Moreover, even where cost/benefit analyses are not conducted, caps will inevitably affect product safety decisions because of the financial consequence of liability.

In addition, situations often arise where a sharp and responsible company employee, frequently an engineer, realizes that a design defect will expose the manufacturer to potential liability. The employee recommends to management that the design be changed or that corrective action be taken to reduce or negate the risk of death or injury that may lead to liability. As the Conference Board study suggests, products are often made safer as a result. However, even under current law, management can fail to recognize the importance of an employee's recommendation or deliberately choose to ignore it; sometimes the result is death or injury and litigation. Several examples in this report illustrate this point. A punitive damages cap would exacerbate this situation by reducing the risk to the manufacturer, thereby giving the employee less incentive to make such recommendations. Certainly there would be less incentive for management to respond positively to such employee advice.

The cases presented in *Smoking Guns* reveal that punitive damages, either actual or potential, very much factor into corporate decision making about product safety. The "smoking gun" documents uncovered in these cases show how manufacturers engage in abstract cost/benefit analyses to determine whether it is more profitable to sell a defective product and risk considerable liability costs, rather than to redesign, remove from the market, or recall the product, even when the product will clearly kill or injure users. They also show how a particularly stubborn manufacturer must actually be assessed punitive damages before it is motivated to correct a defective design, even when people have actually been killed or cruelly injured. In either case, a punitive damages cap will reduce the potential risk to manufacturers and lead to an increase of dangerous products on the market.

COST/BENEFIT ANALYSES AND OTHER WAYS CORPORATIONS CONSIDER LIABILITY

Typically, manufacturers strongly resist disclosing the decision-making process regarding the level of safety their products should achieve. During litigation, however, documents may surface or former employees may come forward to testify, revealing how a manufacturer balances consumer safety against corporate profits in determining whether to redesign a defective product, remove it from the market or recall it. This "cost/benefit" process was first brought to public attention in the Ford Pinto fuel tank case, *Grimshaw v. Ford Motor Company.*[14]

According to evidence in *Grimshaw*, Ford's crash tests revealed that several design defects in the Pinto's fuel tank and rear structure exposed consumers to serious injury or death in a 20-30 mile per hour collision.[15] In April 1971, some time before the 1972 Pinto was placed on the market, Ford Vice President of Car Engineering, Harold MacDonald, chaired a product review meeting to discuss a report that had been prepared by Ford engineers. This report recommended deferring from 1974 to 1976 the incorporation into all Ford cars, including the Pinto, of either a shock absorbent "flak suit" to protect the fuel tank at a cost of $4 per car, or a nylon bladder within the tank at a cost of $5.25 to $8 per car.[16] This deferral would allow Ford to realize a savings of $10.9 million.[17] Harley Copp, a former Ford engineer and executive in charge of the crash testing program, testified that Ford's management knew that the gas tank created a significant risk of death or injury from fire but decided to go forward with the Pinto anyway, knowing that these "fixes" were feasible at nominal cost.[18]

As Justice Tamara concluded in the majority opinion, Ford "engage[d] in cost-benefit analyses which balanced life and limb against corporate savings and profits."[19] In June of 1978, the automaker finally recalled all 1.4 million 1971 through 1976 Pintos for fuel system modification,[20] after it was required to do so by the National Highway Traffic Safety Administration (NHTSA). By the time of the recall, however, Pinto fuel-fed fires had killed at least 27 people and injured many others.[21]

An even more damaging cost/benefit analysis was excluded from evidence in *Grimshaw*. In that internal memorandum, captioned "Fatalities Associated with Crash Induced Fuel Leakage and Fires," Ford valued a human life at $200,000, a burn injury at $67,000 and an incinerated car at $700. The automaker then calculated that proposed government regulations aimed at preventing fuel-fed fires in roll-over crashes would benefit society by $49.5 million. This figure was then compared with the cost of Ford's complying with the proposed regulations -- $11 per car or a total cost of $137 million.[22] *See* Exhibit 2.

Such cost/benefit calculations are not unusual. Another disturbing example involving General Motors was revealed in a 1973 memorandum captioned "Value Analysis of Auto Fuel Fed Fire Related Fatalities."[23] *See* Exhibit 3. This memorandum, authored by GM engineer Edward Ivey of the company's Advance Design unit, evaluated the cost to GM of "burned deaths." The document was explained in testimony given in 1993 by former GM engineer Ronald E. Elwell, who specialized in post-collision fire analysis, in a case involving a Chevy Blazer.[24]

Ivey determined in 1973 that burned deaths cost the company $2.40 per vehicle. As for the amount that the company should spend on new cars to prevent these deaths, Ivey determined this figure to be $2.20 per vehicle. In his testimony, Elwell explained, "the Value Analysis says all we got is $2.20 to play with, if you will. We can put that money in a fuel tank, put that money in a fuel pump, put that money in a fuel line, but in our opinion, in order to save these people from dying, we can only put $2.20 into the new cars."[25]

The following representative cases reveal how manufacturers consider potential liability, whether by employing a callous cost/benefit analysis or some other method, in determining how great an investment to make to achieve product safety. The cases also confirm that company employees often alert upper management to product safety problems and the potential for liability.[26]

GENERAL MOTORS "SIDE SADDLE" FUEL TANKS

The Defective Product:

Between 1973 and 1987, General Motors Corporation (GM) manufactured approximately 9.6 million C/K pickup trucks equipped with one or two "side saddle" fuel tanks mounted outside the main frame rail. As a result, the GM pickup had a four to eight times higher crash fire fatality rate in side impacts than did comparable Ford and Chrysler vehicles.[27] From 1973, when the trucks were first put on the road, until today, there have been at least 750 fire deaths involving GM pickup crashes.[28]

Case Study: Moseley v. General Motors Corp.[29]

In 1989, 17-year-old Shannon Moseley of Snellville, Georgia dropped off his girlfriend on the night before his college entrance exams and headed home in his 1985 GMC pickup truck, which was equipped with side saddle fuel tanks. As he entered an intersection, another vehicle ran a red light and smashed into the side of Shannon's truck, which skidded 150 feet and then burst into flames. An autopsy revealed that Shannon Moseley had survived the crash, but died in the fire from burns and smoke inhalation.[30]

Cost/Benefit Analysis:

In *Moseley*, thousands of documents were produced by GM over three years of intensive discovery.[31] In one March 2, 1964 document, a GM engineer helping to design a new pickup truck warned that the gas tank should be mounted as near to the center of the vehicle as practical.[32] *See*, Exhibit 4. GM ignored this advice, placing the fuel tank outside the frame instead. In a deposition, Chevrolet chief engineer Earl Stepp admitted that this decision had "nothing to do with safety and nothing to do with engineering;" rather, GM wanted to capitalize on the larger 40-gallon (capacity of two side saddle) tanks as a "sales tool."[33]

Among other internal GM memos was a 1972 engineering analysis, approved by Ron Elwell, J. Steger and P. Judson, that concluded:

> As a long range goal, all GM vehicles should be equipped with a fuel system which will not leak during and after impact, when the vehicle is subjected to a 30 mph side moving barrier impact; ... Lawsuits where fire is involved can be costly. Including wins, settlements, and losses, the average cost per lawsuit is approximately one-half million dollars. This is about ten cents per passenger car in a five million unit production year; ... The level of fuel system performance recommended herein would have eliminated 20 or 28 lawsuits (75%); seventy-five percent of the estimated 60 lawsuits should be prevented by the recommended performance level. This would represent a 22.5 million dollar savings, or about $.90 per passenger car based on 25 million units built during the five year period; should the cost of achieving this level of performance be less than $.90 per vehicle, a net savings would accrue to the Corporation.[34]

The Outcome:

In early 1993, the jury in *Moseley* assessed $101 million in punitive damages against GM and $4.24 million in compensatory damages against both GM and the driver of the other vehicle.[35] Plaintiffs' counsel had asked the jury to award $20 in punitive damages for each of the 5 million GM side saddle pickup trucks still on the road and it appears that the jury followed that equation.[36]

On appeal, the Georgia Court of Appeals determined in 1994 that the punitive damages award was adequately supported by evidence, noting that:

> GM was aware of the problems inherent with placement of the fuel tanks outside the frame on its full-size pickup trucks, which exposure could have been significantly reduced ..., yet it did not implement such modifications because of economic considerations. This evidence of a knowing endangerment of all who may come in contact with one of the 5,000,000 GM full-size pickup trucks still on the road, motivated by economic benefit, was sufficient to support an award of punitive damages.[37]

Moreover, the amount of the award "was not unreasonable and rationally served the purpose of punishing and deterring."[38] The appellate court ordered a new trial, however, on account of a number of procedural errors including improper references, in the presence of the jury, to 120 other lawsuits and deaths in connection with the GM pickup trucks.[39] GM ultimately settled the case in September, 1995 for a confidential amount.[40]

In 1988, GM finally placed on the market a newly-designed truck, with a fuel tank located inside the frame.[41] When NHTSA called upon the company to voluntarily recall the side saddle pickup trucks in 1993, GM refused.[42] While GM continues to insist that the trucks are safe, the Secretary of Transportation initially determined in October 1994 that a recall was in order. GM averted the recall

by suing to prevent a federal hearing on the trucks' safety and then reached a last-minute settlement with the Departments of Justice and Transportation, in which the company pledged tens of millions of dollars for vehicle safety programs.[43]

More than 300 accident victims or their survivors have sued over the alleged defect in the pickups. Only eight cases have gone to trial, with GM winning five and losing three. However, the non-profit Center for Auto Safety estimates that GM has paid out $500 million to settle other claims, always on the condition that the settlements be confidential.[44]

REMINGTON BOLT ACTION RIFLES

The Defective Product:

Starting in the 1950s, Remington Arms Company, one of the country's largest sellers of shotguns and rifles, manufactured several versions of a popular high-power, bolt-action hunting rifle.[45] The current version of the rifle, Model 700, is one of the top-selling hunting rifles in the United States.[46] Its sister version, Model 600, was recalled in 1978.[47] The rifle has a trigger connector problem that may cause it to fire intermittently and unexpectedly when the safety is released.[48] The weapon may also discharge upon bolt closure, bolt opening and jarring, all of which exacerbate the trigger connector defect.[49] The defective Model 700 has been linked to at least four deaths and dozens of injuries.[50]

Case Study: Collins v. Remington Arms Company [51]

On December 29, 1989, Glenn W. Collins was hunting in Eagle Pass, Texas when his Remington Model 700 rifle accidently discharged into his foot while he was unloading it. The seriousness of the wound required that his foot be amputated. Mr. Collins asserted that he never touched the trigger.[52]

Cost/Benefit Analysis:

Remington knew about a problem in its bolt-action line when the fire control system was patented in 1950. The original patent application states that "we have found it to be essential that the safety means be so arranged that an inadvertent operation of the trigger while the safety is in the 'Safe' position will not condition the arm to fire upon release of the safety."[53] In 1978, Remington settled a case brought by a man who was paralyzed when a Model 600 rifle suddenly discharged as the safety release was pushed into the "off" position.[54] The company calculated that *50% of the 200,000 Model 600 rifles it had sold would fail.*[55] Facing the threat of future multi-million dollar awards and the prospect of having its insurance canceled, the company recalled the Model 600 rifles within a few days of the settlement.[56]

The company's cost/benefit analysis was very different for the Model 700 rifle. Remington has sold at least 10 times as many Model 700 rifles as Model 600 rifles; however, in a company Product Safety Subcommittee meeting held in January 1979, Remington decided that *only 1% of these rifles might be subject to the discharge problem.*[57] *See* Exhibit 5. Therefore, despite the fact that the Model 600 rifles and the Model 700 rifles evidenced the same discharge problem leading to the same kinds of injuries,[58] the Subcommittee decided against recalling the Model 700 rifles because "the recall would have to gather 2,000,000 guns just to find 20,000 that are susceptible to this condition."[59] Publicly, Remington denies their guns are defective, saying such accidents stem from user mistakes.[60] According to Richard C. Miller, Esq., attorney for a number of plaintiffs who have been injured by these rifles, Remington would rather defend against lawsuits and pay claims on the Model 700 than lose sales due to a recall.[61]

The Outcome:

On May 7, 1994, a jury awarded Mr. Collins, the man whose foot was amputated due to the faulty discharge, $17 million in damages, including $15 million in punitive damages.[62] Remington subsequently settled for an undisclosed amount.[63] Before this verdict, they had won 8 of 12 jury trials, settling 18 others since 1981. However, the *Collins* case was the first time a jury saw internal documents indicating that Remington had developed a safer design but chose not to market it.[64]

In early 1982, citing "customer preference," Remington redesigned the Model 700 so that it could be loaded and unloaded while the safety device is engaged. This reduced the frequency of accidental discharges due to the trigger connector defect by decreasing the number of times that the safety is released; however, the trigger connector defect remains uncorrected.[65]

Remington continues to manufacture the defective Model 700, selling more than 100,000 annually, contributing $58 million to Remington's $370 million in annual revenues.[66] In attorney Miller's opinion, at this point it is still less expensive for Remington to litigate rather than to recall the Model 700 and correct the trigger connector defect.[67]

AMERICAN MOTORS "CJ" JEEPS

The Defective Product:

From 1972 through 1986, the American Motors Corporation (AMC) manufactured a small army-type Jeep known as the "CJ". The CJ's high center of gravity rendered it more unstable than most of its competitors and prone to rolling over unexpectedly -- even on paved roads. In an emergency handling situation, the vehicle could roll over at speeds as low as 22 miles per hour. This problem was compounded by a defect in the shackle system, which connected the auto's suspension to the body. Even a slight impact to the side of the vehicle would cause the shackle pin to break; the driver would then lose control and the vehicle would roll over. As of 1990, an average of two hundred fatalities occurred *each year* due to CJ rollovers.[68]

Case Study: Licea v. AMC

Lizabeth Licea was driving a CJ when she was struck in the side by a slow-moving vehicle. This minor collision caused the shackle pin to break and the small Jeep rolled over five times. As a result of the crash, Lizabeth was in a coma for three months; she lost an ovary, a kidney, her teeth, her sense of smell and she suffered severe and permanent brain damage.[69]

Corporate Concern Over Potential Liability:

Internal company documents reveal that, at least as early as 1979, AMC was aware that the CJ "will probably roll over quite easily" on account of its high center of gravity.[70] *See* Exhibit 6. In 1982, an AMC engineer working on the defective shackle system recommended that

> the new design be[ ] incorporated at the earliest possible time ... I will press for retrofit of all CJ-7 and Scrambler vehicles produced in the 1982 model year. ... *Not to retrofit will subject Jeep Corporation to possible punitive damages* on a component which has previously been the subject of several causes of action.[71] [Emphasis added.]

See Exhibit 7. In this situation, AMC management did not follow this engineer's advice and thousands of CJ Jeeps were produced and placed on the market.

The Outcome:

Licea v. AMC settled for a confidential amount.[72] After several lawsuits, including at least one in which punitive damages were awarded, the CJ Jeep is no longer manufactured or sold. In 1987, Chrysler purchased AMC and discontinued the CJ Jeep, introducing the Wrangler in its place. While Chrysler publicly stated that the Wrangler was simply a routine product upgrade, an internal company memorandum listed the CJ defects which had been corrected in the Wrangler design. Chrysler did not, however, recall the CJ. In 1990, 400,000 CJ's were still on the road.[73]

PITMAN HOTSTIK "CHERRY-PICKERS"

The Defective Product:

Pitman Manufacturing marketed equipment commonly known as "cherry-pickers." This equipment was used by line workers engaged in routine construction and maintenance of electric power distribution systems.[74]

According to attorney Jude Nally, the "boom tip" area, which included the boom and the attached personnel bucket along with its controls and auxiliary tool hook-ups, contained metal that was partially exposed to the operator. While the metal components appeared to be insulated beneath

fiberglass covers, they were actually bonded to the metal controls used by the line worker to operate the equipment.[75]

Consequently, an incidental contact between the cherry-picker's boom tip and an electric power line would allow the electric current to flow into the control handle at the operator's side. If the operator reached for the control while also touching a power line, the electric current would flow directly through his or her body, resulting in burns, amputation and sometimes death. By the mid-1970s, at least eight line workers had been killed and twenty-two had suffered serious burns and amputations in boom tip accidents.[76]

Cost/Benefit Analysis:

Sometime around 1975-76, the company generated an undated internal document captioned "Product Liability Task Force Findings and Recommendations."[77] *See* Exhibit 8. This report noted that injuries arising from boom tip contact with a power line account for "67 percent of the total dollar value of the [total] active claims. ($18,500,000)."[78]

The company's task force went on to estimate that the cost of developing a cherry-picker that included an insulated boom tip and lifting attachments would be approximately $225,000.[79] Assuming that the average award to a line worker who was injured because his or her cherry-picker made boom tip contact with a power line was $462,500, the task force concluded that "[i]f $225,000 could be spent to alleviate the liability exposure due to 'boom tip contact,' it would appear that this expense could be justified."[80]

Although the task force concluded that there was economic justification to spend $225,000 to correct the problem, the company first experimented with a series of less costly corrective measures that were not successful. It is not known how many additional injuries and deaths occurred during this "experimental" period.[81]

The Outcome:

Fortunately for line workers using the Pitman Hotstik cherry-picker, the company eventually corrected the defect after a number of lawsuits. Once the defect was corrected in the mid to late 1980s, boom tip contact accidents ceased to occur.[82]

BLOOD AND BLOOD PRODUCTS

The Defective Product:

Hemophiliacs suffer from a lifelong, hereditary blood-clotting disorder and rely on clotting agents, known as factor concentrates, manufactured from donated blood plasma. In the United States, these agents were not tested for the HIV virus or subjected to viral inactivation procedures until 1983 or 1984 when AIDS was already rapidly spreading.[83] This was so even though plasma manufacturers

knew by the late 1970s how to purify their product of hepatitis viruses -- a method which would also have inactivated HIV viruses.[84] Moreover, cases of hemophiliacs infected with HIV were apparent by at least 1982.[85] As a result of this inaction, unscreened and untreated blood products infected between 5,000 and 10,000 hemophiliacs,[86] or approximately 50% of the hemophiliac population, with AIDS. Many hemophiliacs also unknowingly infected their spouses and children.[87] The Goedken family of Iowa was particularly devastated by unscreened and untreated blood products. Five of six surviving brothers in the family suffered from hemophilia. By February of 1986, all five had been diagnosed as HIV-positive. All but one eventually died of AIDS.[88]

Corporate Concern Over Potential Liability:

Several documents reveal that potential liability was very much on the mind of the industry as it considered its response to the growing AIDS crisis. As early as 1982, the legal department of pharmaceutical company Cutter Laboratories advised that company literature should include an AIDS warning to prescribing physicians. In-house counsel Ed Cutter, the company president's brother, noted in a memorandum that, although the connection between the AIDS virus and factor concentrates was unclear, "litigation is inevitable and we must demonstrate diligence in passing along whatever we do know... ."[89] *See* Exhibit 9.

In January 1983, when the Center for Disease Control's studies already were strongly suggesting that blood and blood products transmitted AIDS,[90] Dr. Joseph Bove, Chair of the American Association of Blood Banks' Committee on Transfusion Transmitted Diseases wrote:

> the most we can do ... is buy time. There is little doubt in my mind that ... additional cases in patients with hemophilia will surface. ...
>
> ...
>
> ... We are reluctant to [issue guidelines for donor screening] since we do not want anything ... to be interpreted by society (or by legal authorities) as agreeing with the concept -- as yet unproven -- that AIDS can be spread by blood.[91]

See Exhibit 10.

A March 1984 letter from Marietta Carr, Vice President of factor manufacturer Alpha Therapeutic Corporation, to the Food and Drug Administration (FDA) also reveals industry's concern with products liability lawsuits. Carr discusses manufacturers' options when plasma donated by an individual, later found to have AIDS, was incorporated into the company's plasma pools. Citing "products liability considerations," Carr considers "untenable" the option of *not* recalling already distributed plasma pools but destroying all those still within the company's possession.[92] She says a hemophiliac who contracted AIDS from a contaminated blood product, "some of which had been destroyed by the manufacturer because of possible association with AIDS, might well argue successfully in court that the manufacturer was negligent for not having recalled the distributed material."[93]

Carr also cites problems where one manufacturer "has increased his products liability exposure" as compared with other manufacturers. The author then suggests that the FDA "specify a period of time between donation and diagnosis [so that] manufacturers could evaluate individual situations with some assurance that their exposure was no more and no less than other manufacturers."[94] *See* Exhibit 11.

According to a report prepared for the Committee on Government Reform and Oversight of the U.S. House of Representatives, among the reasons for the blood plasma industry's failure to respond to the AIDS crisis was an "emphasis on profit with a need to maintain productivity in a competitive market."[95] Although viral inactivation procedures could have been developed before 1980, progress in viral inactivation was inhibited because the industry was "interest[ed] in gaining competitive advantage and concern[ed] over yield and cost."[96]

The Outcome:

In 1984, the pharmaceutical companies finally warned the general public of the risk of AIDS from factor concentrates. The following year, industry implemented screening procedures for detecting HIV antibodies in donated blood and commenced heat-treating blood products.[97] It was not until 1989 that all untreated units were recalled and destroyed.[98]

The four companies whose contaminated blood products infected thousands of U.S. hemophiliacs and others with the AIDS virus during the early 1980s recently agreed to pay $670 million in settlement. About 6,000 hemophiliacs will receive $100,000 each.[99]

STUD GUNS

The Defective Product:

A stud gun is a type of hand tool that is actuated by a gunpowder charge and shoots nails and other fasteners into concrete, masonry and structural steel. The degree of force with which a nail is shot depends on whether the gun is low- or high-velocity. Stud guns use cartridges ranging from .22 through .38 caliber and are capable of driving nails at 300 to 1290 feet per second. This can be extremely dangerous if the stud gun is used on work that does not offer sufficient resistance to the nail. In these circumstances, the nail may completely penetrate the work and become a projectile, causing serious injury and death.[100]

Case Study: Doran v. Desa International, Inc.[101]

On April 17, 1986, 38-year old Eugene Doran was getting his hair cut at a barber shop in a strip mall in Andover, Mass. At a liquor store next door, a carpenter installing a walk-in beverage cooler was attaching two-by-four studs to the wall and floor. A portion of the wall shared by these two shops consisted of plywood and plaster board mounted on wooden studs. Believing that the interior of the wall was made of concrete blocks, the carpenter rented a high-velocity stud gun at a Taylor Rental

Corp. franchise store for use in this project. The carpenter was not licensed to use this tool.[102] When the carpenter proceeded to use the stud gun, a 3" nail went through the wall on the other side, flew across the barber shop and struck Mr. Doran in the neck as he was seated in a barber chair. The nail pierced his spinal cord and he was instantly and permanently rendered a quadriplegic.[103]

At the time of the accident, Mr. Doran was a highly successful general agent for John Hancock Mutual Life Insurance earning approximately $150,000 per year. He had a successful marriage and three children aged 4, 9 and 13. He was about to participate in the Boston Marathon. On account of his injury, he is confined to a wheelchair, is unable to breathe without assistance and keeps warm by living in a controlled climate. He experiences constant health problems. For a time, he was forced to leave home and live at a Veterans Administration hospital where he could receive 24-hour care from an RN.[104]

Corporate Concern Over Potential Liability:

On March 19, 1986, one month before the accident, the president of Taylor Rental Corporation directed that high- and standard-velocity stud guns be removed from the shelves of Taylor stores because of concerns over potential liability. The memorandum expressly recognized that low-velocity stud guns will accomplish the same jobs as the standard- and high-velocity stud guns. Moreover, the memorandum directed that all standard- and high-velocity stud guns be destroyed because of potential liability. *See* Exhibit 12. While the company sent the memorandum to Taylor's 100 company-owned stores, it did not send it to its 250 franchise stores, including the Andover store.[105] The memorandum was discovered by Mr. Doran's attorneys during the course of litigation.[106]

The Outcome:

Mr. Doran sued, naming several parties as defendants, including Taylor Rental, the stud gun manufacturer and the mall. The carpenter was uninsured. The case settled in April of 1988 after a jury had been selected but before the trial commenced. The total settlement was $15.35 million, $9 million of which was paid by Taylor and $3.25 million paid by the manufacturer.[107] The settlement was one of the largest of its kind in the nation,[108] and it allowed Mr. Doran to move out of the hospital and into a home adapted to his needs with 24-hour RN care. Although admitting little liability for the accident, Taylor has since stopped renting the high-velocity stud gun.[109]

THE LAST RESORT -- IMPOSITION OF PUNITIVE DAMAGES SPURS MANUFACTURERS TO REDESIGN, REMOVE FROM THE MARKET OR RECALL UNSAFE PRODUCTS

As in some of the earlier examples, sometimes the mere possibility of punitive damages is insufficient to induce a manufacturer to make safe products. For these recalcitrant corporations, it may take the actual imposition of one or more punitive damage awards before the defective product is redesigned, removed from the market or recalled. The following examples illustrate this scenario.

TAMPONS

The Defective Product:

In the early 1980s, several brands of tampons, including Kotex, Playtex and Tampax, were made of polyacrylate fibers which encouraged the growth of staphylococcus-aureus bacteria. The bacteria produce toxins which can enter, infect and ultimately poison a person's system within a few days -- a condition commonly known as "toxic shock syndrome" or "TSS".[110] Over 2,000 women developed TSS associated with use of these tampons, and approximately 100 of them died between 1979 and 1995.[111]

Case Study: O'Gilvie v. International Playtex, Inc.[112]

On the weekend of March 26-27, 1983, while using Playtex tampons during her menstrual period, Betty O'Gilvie developed a sore throat and a vaginal infection. By Wednesday, March 30, she was suffering from vomiting and diarrhea; that evening her temperature rose to 105 degrees and she had more or less lost consciousness. On Thursday her condition continued to deteriorate and by early afternoon her fingers had turned blue and she was having difficulty speaking. Betty O'Gilvie died on Saturday, April 2, of toxic shock syndrome.[113]

The Corporate Misconduct:

In the *O'Gilvie* majority opinion by the federal court of appeals, Judge Seymour noted that there was "abundant evidence" that

> Playtex *deliberately disregarded* studies and medical reports linking high-absorbency tampon fibers with increased risk of toxic shock at a time when other tampon manufacturers were responding to this information by modifying or withdrawing their high-absorbency products. Moreover, there is evidence that Playtex *deliberately sought to profit from this situation* by advertising the effectiveness of its high-absorbency tampons when it knew other manufacturers were reducing the absorbency of their products due to the evidence of a causal connection between high absorbency and toxic shock.[114] [Emphases added.]

Moreover, Playtex knew that its super deodorant tampon was "exceptionally overabsorbent" -- more absorbent than necessary for its intended use. In an internal memorandum, a Playtex employee admitted: "In being obsessed with 'absorbency' we lost sight of the fact that 'leakage' complaints did not decrease as the tampon absorbency potentials were increased."[115] Hence, when Playtex increased tampon absorbency, it did not improve the *performance* of the product -- it merely increased the *dangerousness* of the product.

The Outcome:

The jury assessed $1,220,000 in actual damages and $10 million in punitive damages against Playtex.[116] The trial judge stated that "the amount of the verdict does not ... shock my conscience" and that punitive damages in the amount of $20 million would not have surprised him.[117] Nevertheless, he reduced the punitive damage award to $1.35 million in response to remedial measures taken by Playtex, including removing the polyacrylate fibers from its tampons and removing all tampons containing such fibers from the market.

On appeal, the 10th Circuit Court of Appeals reinstated the jury's award of $10 million in punitive damages because the trial court lacked authority to reduce the award on the basis of Playtex's subsequent conduct. In so doing, the appellate court noted that "[t]he trial court here rewarded the company for continuing its tortious conduct long enough to use it as a bargaining chip" for reducing punitive damages.[118]

Playtex stopped making tampons containing the polyacrylate fibers that appeared to encourage the quick growth of bacteria within two weeks of the jury's punitive damage award and the trial judge's suggestion that he might reduce or eliminate it if the company took corrective action. Hence, the company's post-verdict conduct was apparently motivated by a desire to avoid paying substantial punitive damages.[119]

FLAMMABLE BABY PAJAMAS

The Defective Product:

Reigel Textile Corporation manufactured a cotton material known commercially as "flannelette." The material, which was not treated with any available flame retardant, was distributed to a clothing manufacturer which made it into children's sleepwear for sale in Associated Merchandising Corporation's member retail stores, including stores owned by the Dayton-Hudson Corporation.[120] Approximately six accidents occurred on account of flannelette.[121]

Case Study: Gryc v. Dayton-Hudson Corp.[122]

In December of 1969, four-year-old Lee Ann Gryc was severely burned when her "flannelette" cotton pajama top burst into flames after she leaned over an electric stove to turn off a timer. She suffered severe 2nd and 3rd degree burns over her upper body forcing her to undergo several skin graft

procedures.[123] As a result, she is permanently scarred and will require additional surgery at least six times in her adult life. Moreover, she is vulnerable to future ulcerations and other benign or malignant growths.[124]

The Corporate Misconduct:

Reigel Textile Corporation, which manufactured the material from which the pajamas had been made, knew that "flannelette" cotton fabric was highly flammable -- almost as flammable as ordinary newspaper.[125] Nevertheless, the company failed to treat the fabric with a flame-retardant chemical; a Reigel official explained in a 1968 letter that the company would not use flame-retardant chemicals on its flannelette until required to do so by federal law because of the cost factor.[126] Neither did the company warn consumers of the flammability danger for fear that its product would be "stigmatized" and sales would suffer.[127]

The company was well aware that consumers were being harmed as several other claims had been filed for severe burn injuries. Over a decade earlier, a top company official had written in a memorandum entitled "Flammability -- Liability" that "[w]e are always sitting on somewhat of a powder keg as regards our flannelette being so inflammable."[128]

The Outcome:

The jury awarded the child $1 million in punitive damages and $750,000 in compensatory damages. The verdict was affirmed on appeal.[129] After the jury verdict, Reigel stopped manufacturing flannelette.[130]

DALKON SHIELD INTRAUTERINE DEVICE

The Defective Product:

From 1971 until 1974, A.H. Robins Co., Inc. (Robins) sold a plastic intrauterine device (IUD), known commercially as the Dalkon Shield, with a tailstring to assist in its placement and removal. When correctly positioned, the tailstring passed from the uterus through the cervix and into the vagina. Unlike the tailstring used by other IUD manufacturers, the Dalkon Shield tailstring consisted of a multifilament strand surrounded by a nylon sheath unsealed at both ends. This configuration allowed the interior portion of the tailstring to "wick" bacteria-containing vaginal fluid into the normally sterile uterus, thereby causing infection. As a result, many Dalkon Shield users suffered from pelvic inflammatory disease, perforated uteruses, and infertility. Those who became pregnant were in danger of suffering spontaneous septic abortion.[131] At least seventeen American women died and over 200,000 were injured on account of the Dalkon Shield.[132] Many became sterile.[133]

Case Study: Palmer v. A.H. Robins Co.[134]

In January of 1973, 24-year-old Carie Palmer was fitted with the Dalkon Shield. When she became pregnant in August, her doctor did not remove the device because he thought it could cause no harm. The pregnancy progressed normally until November, when Ms. Palmer became violently ill with flu-like symptoms. She suffered a miscarriage caused by a bacterial infection centered in the uterus and subsequently went into septic shock. In order to save her life, doctors removed her uterus, Fallopian tubes and ovaries. As a result of this total hysterectomy, she continued to suffer health problems.[135]

The Corporate Misconduct:

In August 1971, Robins was warned by a quality control supervisor that the tailstring could "wick" bacteria into the uterus and cause infection. However, the company's pharmaceutical research director instructed that no changes be made in the product.[136]

In June 1972, Robins was alerted by one of its physician-consultants that, of the six women who became pregnant after he had fitted them with the contraceptive device, five suffered spontaneous infected abortions. He warned that "it is hazardous to leave the device in [pregnant women] and I advise that it be removed." Nevertheless, the company made no attempt to warn Dalkon Shield users or their doctors of the danger.[137]

Between June 1972 and November 1973, Robins received 22 reports of spontaneous infected abortions in women who became pregnant while using the Dalkon Shield, including one which resulted in death. The company failed to immediately inform the medical community. Rather, in October 1972, Robins revised its patient brochure to state that, if a woman becomes pregnant while wearing the Dalkon Shield, "the bag of water pushes the IUD to one side and the developing baby is not really touching the device at all. There is no evidence that the frequency of abnormal births is any greater among women wearing IUDs than among women not wearing IUDs." Moreover, through at least April 1973, Robins continued to counsel physicians to leave the IUD in place if pregnancy occurred.[138]

There was also evidence that Robins hired an advertising agency to encourage favorable publicity about the company's products, including the Dalkon Shield. This action "demonstrated a motive on the part of Robins to profit by making exaggerated statements regarding the safety and efficacy of its product."[139]

In 1974, a company document entitled "Status Report for Dalkon Shield" stated that "[i]t is the opinion of [Robins attorney Roger L.] Tuttle that if this product is taken off the market it will be a 'confession of liability' and Robins would lose many of the pending lawsuits."[140] That same year, the FDA suspended distribution of the Dalkon Shield in the United States;[141] however, the company continued its distribution overseas.[142] For the next 10 years, Robins continued to promote and defend the device while concealing its hazards, thereby causing thousands of additional injuries.[143]

The Outcome:

A jury returned a verdict in Ms. Palmer's favor, requiring the company to pay $6.2 million in punitive damages and $600,000 in compensatory damages, and the trial court entered judgment thereon.[144] On appeal, the Supreme Court of Colorado affirmed the awards, noting that there was "ample evidence" to support the punitive damage award,[145] and that Robins' economic status was a legitimate factor to be considered in determining the amount.[146]

By 1984, more than 10,000 women had sued the company and several punitive damages awards had been assessed.[147] Robins finally urged women to have the Dalkon Shield removed and offered to pay for the removal.[148] The Wall Street Journal characterized the company's actions as "an apparent sign of Robins' growing concern about the rising tide of punitive-damages claims against the company," noting a recent court filing in which Robins stated that "[t]he primary difficulty ... in the resolution of Dalkon Shield litigation is the possibility of an award of substantial punitive damages."[149] Ultimately, over a period of 15 years, Robins incurred 11 punitive damage awards totaling in excess of $24.8 million.[150]

SURGICAL VENTILATOR

The Defective Product:

Airco, Inc. manufactured artificial breathing equipment known as a ventilator for use during surgery. The ventilator works in conjunction with the anesthesia machine, controlling the flow of air to the patient's lungs through alternate positive and negative pressure so that the lungs will expand and contract as in normal breathing. The Airco ventilator could be connected to the anesthesia machine in two ways -- either manually by connecting two black hoses to the machine or by using an optional accessory called a selector valve.[151]

The selector valve accessory had three equal-sized ports. When properly used, a black hose would be connected to each of the two ports on the side of the device, while a bag would be connected to the third port located in the middle and extending downward. If the anesthetist wanted to ventilate the patient manually, he or she would squeeze the bag; if automatic ventilation was desired, the anesthetist would simply flip a switch and the machine would create the alternate positive and negative pressure.[152]

The three similar ports, located closely together without any labels or warnings, significantly increased the risk of human error in attaching the two black hoses.[153] Thus, the optional selector valve did not perform any essential function since the ventilator could be manually connected to the anesthesia machine; rather it simply increased the probability of the patient being injured or killed.[154]

Case Study: Airco, Inc. v. Simmons First National Bank[155]

In May 1980, Georgia Huchingson underwent surgery and, because her ability to breathe was impaired, the anesthetist connected her to an Airco ventilator. Unfortunately, someone had improperly connected the hoses so that one of them was attached to the middle port where the manually-operated bag was supposed to be attached.[156]

For several minutes, this improper connection allowed the anesthesia machine to continuously pump air into Ms. Huchingson's lungs under circumstances where the air could not escape. This caused pressure to build up in her lungs, and insufficient oxygen to reach her brain. As a consequence, she suffered serious lung and brain damage. Ultimately, Simmons First National Bank was appointed her legal guardian.[157]

The Corporate Misconduct:

At trial, the Airco staff engineer who designed both the ventilator and the optional selector valve testified that he was aware of the hazard inherent in the selector valve: "[S]ince you have a choice now, you can make the wrong choice." Reports from 30 pre-marketing field tests had been unfavorable; several reports stated that the selector valve option could kill people. Although the company was aware of the dangerousness of the selector valve option, Airco proceeded with its marketing plans.[158]

There was also evidence that the selector valve did, in fact, cause precisely the type of problem that the field tests had indicated. A 1972 article referred to accidents like the Huchingson case and another article in 1979 recounted a similar incident.[159]

During his testimony, the Airco staff engineer gave some insight into the company's thinking on the matter. Noting that the selector valve was an optional accessory, he stated that "[t]he user can buy it or not as he chooses. If he chooses to buy it, the choice is his, not mine. ... I see no reason why we should refuse to sell it if he wants it, and there is an obvious market for it."[160]

The Outcome:

A jury assessed $1,070,000 in compensatory damages against Airco and the partnership of doctors responsible for providing the anesthesiological services. In addition, the jury assessed $3 million in punitive damages against Airco.[161] On appeal, the Supreme Court of Arkansas upheld the punitive damage award[162] -- the first time the court had done so in the context of a product liability action.[163] As a result of this decision, Airco issued a nation-wide medical device alert, warning physicians and hospitals of the potential for product misuse.[164]

ORAL CONTRACEPTIVES

The Defective Product:

Ortho Pharmaceutical Corporation manufactured an oral contraceptive known as Ortho-Novum 1/80, which contained 80 micrograms of estrogen,[165] as well as an oral contraceptive containing only 50 micrograms. It was suspected that products containing 75 micrograms or more of estrogen caused an increased incidence of thromboembolic disorders, which relate to blocked blood vessels.[166] By the early 1980s, there were thirty-nine reported cases of women developing hemolytic uremic syndrome or HUS associated with the use of oral contraceptives.[167]

Case Study: Wooderson v. Ortho Pharmaceutical Corp.[168]

Carol Lynn Wooderson started taking the oral contraceptive Ortho-Novum 1/80, as prescribed by her physician, in the fall of 1972. By January 1976, her blood pressure had increased and she was suffering from a cold; six months later she was also experiencing stomach pains, nausea, vomiting, dizziness, headaches, weakness, sore throat, cough, shortness of breath and aching legs. She was ultimately diagnosed as suffering from acute kidney failure secondary to HUS.[169]

Ms. Wooderson was forced to undergo dialysis and eventually removal of both kidneys. She had recurrent eye problems and a failed kidney transplant. By May 1981, she had developed peritonitis and, after exploratory surgery, approximately one-third of her large intestine was found to be gangrenous and removed. A second kidney transplant was successful, making dialysis unnecessary. She continued to suffer from blind spots in one eye and was required to take steroids in connection with the donated kidney. Child-bearing was no longer an option because of the risk involved.[170]

The Corporate Misconduct:

At the time of Ms. Wooderson's injury, there had been twenty-one reported cases of HUS associated with oral contraceptives and a number of scientific articles linked oral contraceptives to this serious condition. Nevertheless, Ortho did not warn physicians of the possible connection in its package inserts.[171]

As early as 1970, the FDA had issued a letter warning about the relationship between oral contraceptives and certain thromboembolic diseases. The letter cited a British Study indicating that only products containing 0.05 mg. or less of estrogen should be used because of the high incidence of such diseases associated with products containing 0.075 mg. or more. Ortho downplayed the British Study, however, and sent a bulletin to its sales representatives urging the continued sale of the Ortho-Novum 1/80.[172] The bulletin suggested that concerned doctors should be told "Doctor, nothing in this British data offers enough sound evidence to cause you to switch patients who are on 100 gammas of mestranol [.1 mg. of estrogen]. ... [Y]ou may wish to move patients to low activity products such as ORTHO-NOVUM 1/80 or ORTHO-NOVUM 1/50."[173]

Apparently, Ortho had determined that the continued manufacture and sale of Ortho-Novum 1/80 was important to its market position because other manufacturers were producing oral contraceptives at the 1/50 estrogen level.[174]

The Outcome:

A jury assessed $2,000,000 in actual damages and $2,750,000 in punitive damages against Ortho.[175] On appeal, the Supreme Court of Kansas upheld the award, holding that there was sufficient evidence for the jury to find that Ortho was "grossly negligent and recklessly indifferent."[176] Ortho reduced estrogen levels after this punitive damage award.[177]

CONCLUSION

As the foregoing examples illustrate, corporations frequently consider potential exposure to liability and conduct cost/benefit analyses, or other similar methods to weigh the potential costs of liability, to determine whether a defective product should be redesigned, removed from the market or recalled. They do so with the knowledge that their customers will die, suffer permanent brain damage, become paraplegics, and endure other horrible injuries. A key component of this analysis is the corporation's potential liability for punitive damages.

We know the foregoing largely from documents obtained during the course of litigation. Unavailable to the public, however, are the multitude of corporate documents that demonstrate the common sense corollary: many unsafe and defective products are never introduced to the marketplace at all because of the corporation's concern over liability, particularly punitive damages.

Some recalcitrant corporations decline to take corrective action simply because there exists the possibility of punitive damages. These corporations sometimes require the imposition of one or more punitive damages awards before they are compelled to redesign the defective product or take it off the market.

If punitive damages were capped or linked to the compensatory damages awarded to an injured party, they would become predictable and a manufacturer of a defective product could simply treat liability as a cost of doing business. This is particularly true for large multi-national companies for which a capped punitive damage award is a mere slap on the wrist. Capping punitive damages in products liability cases would seriously erode the deterrent value of the tort system and create an environment in which unsafe products would proliferate to the detriment of all Americans.

NOTES

1. Jury Verdict Research Series, *Current Award Trends in Personal Injury 1996 Edition*, Personal Injury Valuation Handbook 47 (1996).

2. Erik Moller, Nicholas M. Pace, Stephen J. Carroll, *Punitive Damages in Financial Injury Jury Verdicts*, Rand Institute for Civil Justice 10 (1997). Most punitive damages occur in intentional tort cases (assault, battery, harassment, libel, slander) or "financial injury" cases between businesses (contractual or commercial litigation). *Id.* at ix, 10. *See also*, Jonathan S. Massey, *Analysis of Total Number of Punitive Damage Awards 1965-1994*, prepared at the request of Sen. Ernest F. Hollings, April 13, 1995, Cong. Rec. S5951 (May 2, 1995) (Only 379 punitive damage awards in state and federal product liability lawsuits since 1965 -- an average of 13 per year); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa Law Review 1 (1992) (Only 355 punitive damages awards in state and federal product liability lawsuits nationwide between 1965 and 1990).

3. *Id.*

4. Message on Returning Without Approval to the House of Representatives the Common Sense Product Liability Reform Act of 1996, 32 Weekly Comp. Pres. Doc. 780 (May 2, 1996).

5. *Id.*

6. *See, e.g.*, Victor E. Schwartz & Liberty Mahshigian, *A Permanent Solution for Product Liability Crises: Uniform Federal Tort Law Standards*, 64 Denv. U. L. Rev. 685, 686 (1988).

7. Richard Abel, *The Real Tort Crisis -- Too Few Claims*, 48 Ohio St. L. J. 443 (1987).

8. 174 Cal. Rptr. 348, 382-83 (1981)(citations omitted).

9. 684 P.2d 187, 218 (1984). Apart from the predictability factor, manufacturers also support caps on punitive damages simply because such caps limit their overall exposure; if a manufacturer's exposure is reduced, so is the economic incentive to make products as safe as possible. Thus, "[i]f caps on punitive damages are enacted, especially caps based solely on economic loss, companies like A.H. Robins might decide they can financially ride out the cost of litigation without improving or withdrawing a product that destroys women's reproductive health." Lucinda Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 Tenn. L. Rev. 847, 867 (1997).

10. Moller, Pace, and Carroll, *supra* note 2, at 10.

11. *Matson v. Cincinnati, Inc.*, (L.A. County Superior Court 1977), *reprinted in* Public Citizen, Inc. & U.S. PIRG, *The Treacherous Ten: A Survey of Major Product Liability Cases* 9-10 (1987).

12. Internal Clark Equipment Company Memorandum from Steve Anderson, Assistant Counsel, to Phil Hoel, Hancock Division (Aug. 29, 1974).

13. Nathan Weber, *Product Liability: The Corporate Response* 2 (1987)(footnote omitted).

14. 174 Cal. Rptr. 348 (1981). The case was brought on behalf of a woman and a 13-year-old child who were traveling on a California freeway in a 1972 Ford Pinto when the vehicle stalled, was struck from behind by another vehicle traveling between 28 and 37 miles per hour and burst into flames. The force of the impact had driven the Pinto's gas tank forward so that it was punctured, spraying fuel into the passenger compartment. The woman died three days later from congestive heart failure as a result of severe burns. The child also suffered severe burns on his face and entire body, requiring numerous surgeries and skin grafts; he lost portions of several fingers and portions of his ear. *Id.* at 359.

15. *Id.* at 384.

16. *Id.* at 360-61.

17. *Id.* at 361-62 and n.2.

18. *Id.* at 361.

19. *Id.* at 376. The *Grimshaw* jury assessed $3,500,680 in compensatory damages and $125 million in punitive damages against Ford. The trial judge subsequently reduced the punitive damage award to $3.5 million as a condition of rejecting Ford's motion for a new trial. *Id.* at 358 and n.1. Ford nevertheless appealed the punitive damage award and was unsuccessful. *Id.* at 380-89.

20. Patricia Ann McKanic, *Ford Recalls 1.1 Million Cars Due To Ignition*, Wall St. J., May 1, 1987, 1987 WL-WSJ 336966.

21. Ralph Nader & Wesley J. Smith, *No Contest: Corporate Lawyers and the Perversion of Justice in America* 72 (1996).

22. Nader & Smith, *supra* note 21, at 71; David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chic. L. Rev. 1, 54-55 and n.264 (1982).

23. "Value Analysis of Auto Fuel Fed Fire Related Fatalities," prepared by Edward Ivey, GM Advance Design Unit, June 29, 1973.

24. Transcript from Court Hearing, *Baker v. General Motors Corp.*, (No. 91-0991-CV-W-8, Vol. III, Kansas City, Missouri) (testimony of GM engineer Ronald Elwell, August 11, 1993, at 401 *et seq.)*

25. *Id.* at 418-419.

26. Because our examples necessarily arise in the context of litigation, these cases typically reflect situations where management chose either to ignore the concerns raised by the employee or to overrule the employee's judgment.

27. Center for Auto Safety, *Impact*, Vol. 18, Nos. 2&3 (Nov.-Dec. 1992/Jan.-Feb. 1993).

28. Telephone Interview with Clarence Ditlow, Director, Center for Auto Safety (July 18, 1997).

29. *General Motors Corp. v. Moseley*, 447 S.E.2d 302 (1994).

30. *Id.* at 305; Nader & Smith, *supra* note 21, at 72.

31. Center for Auto Safety, *Impact*, Vol. 18, Nos. 2&3 (Nov.-Dec. 1992/Jan.-Feb. 1993).

32. Center for Auto Safety, *Impact*, Vol. 18, No. 1 (Sept.-Oct. 1992), (citing Inter-organizational Letter, Chevrolet Engineering Department, from A.C. Mair, Executive Engineer Truck Department, to P.E. Hitch, G.J. Mach, D.J. Olender and W.W. Berger (March 2, 1994)).

33. Center for Auto Safety, *Impact*, Vol. 18, No. 1 (Sept.-Oct. 1992).

34. *Id.*; General Motors Engineering Analysis 1972, to F. Winchell, V.P. Engineering, from R. Elwell, J. Steger, P. Judson.

35. 447 S.E.2d at 305. The jury also awarded the plaintiffs, Shannon Moseley's parents, $1.00 for pain and suffering. *Id.*

36. *Id.* at 312.

37. *Id.* at 311-12.

38. *Id.* at 312.

39. *Id.* at 306-07, 314.

40. Nader & Smith, *supra* note 21, at 196, 201.

41. *Id.* at 308-09; Center for Auto Safety, *Impact*, Vol. 18, No. 1 (Sept.-Oct. 1992).

42. Center for Auto Safety, *Impact*, Vol. 18, No. 4 (Mar.-Apr. 1993).

43. *Cost of Saving Lives*, N.Y. Times, Dec. 5, 1994.

44. Telephone Interview with Clarence Ditlow, Director, Center for Auto Safety (July 18, 1997); David Halperin, *Discovery Abuse; How Defendants in Products Liability Lawsuits Hide and Destroy Evidence* (1997) at 20.

45. Letter from Richard C. Miller, Monsees, Miller & DeFeo, to Joan Claybrook and Frank Clemente, Public Citizen (May 19, 1997)("PC Letter"). Mr. Miller represents individuals who have been seriously injured and the families of individuals who have been killed as a result of problems with Remington's Model 600 and Model 700 rifles.

46. Loren Berger, *Remington Faces a Misfiring Squad*, Bus. Wk., May 23, 1994, at 90.

47. Thomas Lambert, *Suing for Safety*, Trial, Nov. 1983, at 50.

48. Letter from John T. Butters, Engineering Consultants, Inc., to Richard Miller, Woolsey, Fisher, Whiteaker, McDonald & Ansley (Sept. 22, 1988); Violence Policy Center, *Lawyers, Guns and Money: The Impact of Tort Restrictions On Firearm Safety And Gun Control* 14 (1996); PC Letter, *supra* note 45.

49. Letter from John T. Butters, *supra* note 48; Violence Policy Center, *supra* note 48, at 14; Letter from Richard C. Miller, Monsees, Miller & DeFeo, to Editor, Shooting Industry (July 14, 1993)("Shooting Industry Letter").

50. Berger, *supra* note 46, at 91.

51. No. 91-10856-CV, 293 D. Jud. Dist. Ct., Maverick County, Tex. (June 15, 1994).

52. Berger, *supra* note 46, at 90.

53. U.S. Patent No. 2,514,981 (July 11, 1950).

54. Lambert, *supra,* note 47 at 50; PC letter, *supra* note 45.

55. Lambert, *supra,* note 47 at 50; Minutes of Remington Arms Company Product Safety Subcommittee Meeting at 4 (Jan. 2, 1979).

56. Lambert, *supra,* note 47 at 50.

57. Minutes of Remington Arms Company Product Safety Subcommittee Meeting at 4 (Jan. 2, 1979).

58. *See generally*, Berger, *supra* note 46, at 91.

59. Minutes of Remington Arms Company Product Safety Subcommittee Meeting at 4 (Jan. 2, 1979).

60. *Id.*

61. Shooting Industry Letter, *supra* note 49, at 5; *see also Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1107 (8th Cir. 1988)("the jury may have concluded that rather than suffer the expense of a recall, Remington would rather take their chances that the 20,000 potentially dangerous

M700 rifles held by the public will not cause an accident").

62. Berger, *supra* note 46, at 90.

63. Violence Policy Center, *supra* note 48, at 14 n.26.

64. Berger, *supra* note 46.

65. Telephone Interview with Richard C. Miller (July 9, 1997).

66. *Id.* at 91.

67. Shooting Industry Letter, *supra* note 49.

68. *20/20* (ABC television broadcast, June 1, 1990).

69. *Id.*

70. *See* AMC Corporation Internal Memorandum from D.N.R. (D.N. Renneker) to M.W.S. and R.C.L. (R.C. Lunn), "Vehicle Rollover -- CJ Type Vehicle" (Feb. 2, 1979); AMC Corporation Internal Memorandum from D.N. Renneker to D.E. Dawkins and R.C. Lunn, "Answers to Questions on CJ Rollover" (July 26, 1979).

71. AMC Corporation Internal Memorandum from R.M. Huffstutler to J.E. MacAfee, "CJ Shackles" (Jan. 7, 1982).

72. Telephone Interview with John Overchuck, Attorney, Overchuck and Langa (May 1997).

73. *20/20* (ABC television broadcast, June 1, 1990).

74. Letter from Jude Nally, Blumer, Nally & Siro, to Frank Clemente, Director, Public Citizen's Congress Watch (May 1, 1997). From approximately 1975-84, Mr. Nally represented plaintiffs in approximately 8-10 cases brought against Pitman Manufacturing in connection with its cherry-picker, all of which settled. Telephone Interview with Jude Nally, Blumer, Nally & Siro (May 20, 1997).

75. Letter from Jude Nally, *supra* note 74.

76. *Id.*; Telephone Interview with Jude Nally, Blumer, Nally & Siro (May 27, 1997)

77. Armin Bruning, *et al.*, "Product Liability Task Force Findings and Recommendations" (undated). According to Mr. Nally, the document was probably produced inadvertently by the company that designed and sold the Pitman Hotstik during the course of multiple lawsuits against it. Telephone Interview with Jude Nally, Blumer, Nally & Siro (May 20, 1997).

78. Bruning, *et al.*, *supra* note 77, at 5.

79. Bruning, *et al.*, *supra* note 77, at 8.

80. *Id.*

81. Telephone Interview with Jude Nally, Blumer, Nally & Siro (May 20, 1997).

82. Letter from Jude Nally, *supra* note 74. Mr. Nally believes that the fear of punitive damages was a factor in the company's deciding to settle. Telephone Interview with Jude Nally, Blumer, Nally & Siro (May 20, 1997).

83. Committee to Study HIV Transmission Through Blood and Blood Products, Division of Health Promotion and Disease Prevention, Institute of Medicine, *HIV and the Blood Supply: An Analysis of Crisis Decisionmaking* at 4 (prepublication copy, 1995) (hereinafter "HIV Crisis Rep."); James Dao, *Hemophiliacs Organizing to Sue Over Blood-Clotting Product*, N.Y. Times, May 11, 1997.

84. HIV Crisis Rep., *supra* note 83, at 4.

85. HIV Crisis Rep., *supra* note 83, at C-1 *et seq.*

86. James Dao, *supra* note 83. Every year, approximately 4 million patients in the United States receive transfusions from approximately 20 million units of whole blood and blood components. HIV Crisis Rep., *supra* note 83, at 2. H. Rep. No. 104-746, 104th Cong., 2d Sess. at 2 (1996). Because they are exposed to more blood products from more blood donors than any other patient group, the hemophiliac population is the first to exhibit signs of an infectious agent. *Id.* at 3.

87. *Id.* at 3.

88. Judith Valente, *Blood Bond*, People Wkly. Mag., Apr. 21, 1997, at 43.

89. Internal Memorandum from Ed Cutter, Counsel, to Jack Ryan, *et al.*, "AIDS" (Dec. 29, 1982).

90. HIV Crisis Rep., *supra* note 83, at 2.

91. Joseph R. Bove, M.D., Report to the Board -- Committee on Transfusion Transmitted Diseases at 1 (Jan. 24, 1983).

92. Letter from Marietta Carr, Vice President of Regulatory Affairs, Alpha Therapeutic Corporation, to John Petricciani, M.D., Director, Division of Blood and Blood Products, Office of Biologics, Food and Drug Administration (Mar. 15, 1984).

93. Letter from Marietta Carr, *supra* note 92, at 3.

94. *Id.* at 4.

95. H. Rep. 104-746 at 4 (Aug. 2, 1996).

96. HIV Crisis Rep., *supra* note 83, at 4-12.

97. *Id.* at 6-3; Valente, *supra* note 88, at 43.

98. HIV Crisis Rep., *supra* note 83, at 6-3.

99. Reuter, *Drug Firms Settle Suit With HIV-Infected Hemophiliacs*, Wash. Post, May 8, 1997, at A11.

100. National Safety Council, *Powder-Actuated Hand Tools*, Data Sheet 1-236-Rev. 85, National Safety and Health News at 46, 47 (June 1985).

101. No. 86-1423-T (D. Mass.).

102. *Lawsuit settled for quadriplegic for $15.35 million*, The Evening Gazette (Worcester, Mass.), Apr. 7, 1988; *Paralyzed Andover man wins $15.3M settlement*, The Boston Herald, Apr. 7, 1988, at 26; Ed Quill, *$15m settlement reached on stud-gun accident*, Boston Globe, Apr. 7, 1986, at 1; Don Staruk, *Life in a wheelchair*, Andover Townsman, July 6, 1995, at 1.

103. *Id.*

104. *Id.*

105. *Paralyzed Andover man wins $15.3M settlement*, *supra* note 102.

106. *Id.*

107. *Id.*

108. *Lawsuit settled for quadriplegic for $15.35 million*, *supra* note 102.

109. Quill, *supra* note 102.

110. *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1452 (Seth, dissenting).

111. See statistical information compiled by Center for Disease Control, "Cases of TSS known to occur during menstrual period and outcome (1979-95)."

112. 609 F. Supp. 817 (D. Kan. 1985), *rev'd*, 821 F.2d 1438, 1450 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

113. 821 F.2d 1438, 1450-51 (Seth, dissenting).

114. *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1446 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

115. 821 F.2d 1438, 1446 n.6.

116. *Id.* at 1440.

117. *Id.* at 1448.

118. *Id.* at 1450.

119. *Id.* at 1440-41, 1447-50.

120. *Gryc v. Dayton-Hudson Corporation*, 297 N.W.2d 727, 730 (Minn. 1980).

121. *Id.* at 740.

122. 297 N.W.2d 727 (Minn. 1980), *cert. denied*, 449 U.S. 921 (1980).

123. *Id.* at 729-30.

124. *Id.* at 744.

125. *Id.* at 734.

126. *Id.* at 740.

127. *Id.*

128. *Id.* at 734, 740.

129. *Id.* at 729, 744.

130. Nader & Smith, *supra* note 21, at 316. The punitive damage cap of S. 648 would not have affected the punitive damage award in this case. Nevertheless, this example serves to illustrate the point that punitive damages do prompt manufacturers to take corrective action with respect to defective products.

131. *Palmer v. A.H. Robins Co.*, 684 P.2d at 195-96; Finley, *supra* note 9, at 866.

132. Michael L. Rustad, *How The Common Good Is Served By The Remedy Of Punitive Damages*, 64 Tenn. L. Rev. 793, 818 (1997) (citing Thomas Koenig, *The Law Arises Out Of Fact, Even For A "Poet Laureate,"* 28 Suffolk U. L. Rev. 1021, 1039 (1994)).

133. Paul M. Barrett, *For Many Dalkon Shield Claimants Settlement Won't End the Trauma,* Wall St. J., Mar. 9, 1988, at 29.

134. 684 P.2d 187 (1984).

135. *Id.* at 196-97.

136. *Id.* at 196.

137. *Id.*

138. *Id.*

139. *Id.* at 204.

140. Internal A.H. Robins Document from Stuart Petree to E.L. Bender, "Status Report for Dalkon Shield," May 24, 1974; *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1221 (1987).

141. 738 P.2d at 1221; Finley, *supra* note 9, at 869 n.88. The FDA did not recall existing stock or require Robins to tell doctors and women to have the IUD's removed. *Id.*

142. 738 P.2d at 1221, 1245.

143. Finley, *supra* note 9, 866, 869 n.88.

144. 684 P.2d at 198.

145. *Id.* at 218.

146. *Id.* at 219-20. Robins had accumulated gross revenues exceeding $11 million from the Dalkon Shield; its net worth had doubled during the marketing period, reaching over $157 million in 1974. *Id.* at 220.

147. *See, e.g.*, *Deemer v. A.H. Robins Co.*, Case No. C-26420 (Kansas 1975) (jury awarded $75,000 in punitive damages); and *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210 (1987) (Supreme Court of Kansas affirmed jury awards of $1.7 million in compensatory damages and $7.5 million in punitive damages to a 27-year-old woman who, after wearing a Dalkon Shield for eight years, suffered severe pelvic infection requiring removal of her uterus, Fallopian tubes and ovaries).

148. Mary Williams Walsh, *A.H. Robins Begins Removal Campaign for Dalkon Wearers*, Wall St. J., Oct. 30, 1984; Finley, *supra* note 9, at 866.

149. Walsh, *supra* note 148.

150. 738 P.2d at 1243.

151. *Airco, Inc. v. Simmons First National Bank*, 638 S.W.2d 660 (Ark. 1982).

152. *Id.* at 661.

153. *Id.*

154. *Id.* at 662.

155. 638 S.W.2d 660 (1982).

156. *Id.* at 661.

157. *Id.* at 660.

158. *Id.* at 662.

159. *Id.*

160. *Id.*

161. *Id.* at 660.

162. *Id.* at 663.

163. Nader & Smith, *supra* note 21, at 316.

164. *Id.*

165. *Wooderson v. Ortho Pharmaceutical Corp.*, 681 P.2d 1038, 1063 (1984).

166. *Id.* at 1062-63.

167. *Id.* at 1062. Hemolytic uremic syndrome is a cluster of symptoms pertaining to the destruction of red blood cells and the toxic presence of urine in the blood. *Id.* at 1045.

168. 681 P.2d 1038 (1984), *cert. denied*, 469 U.S. 965 (1984).

169. 681 P.2d 1038, 1043 (1984).

170. *Id.* at 1044.

171. *Id.* at 1062.

172. *Id.* at 1062-63.

173. *Id.*

174. *Id.*

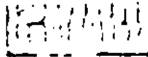
175. *Id.* at 1064. Ms. Wooderson's two gynecologists settled prior to trial. *Id.* at 1065 (Schroeder, C.J., dissenting).

176. *Id.* at 1064.

177. Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 Wash. L. Rev. 1, 51 (1995). Like *Gryc*, discussed *supra*, the punitive damage award in this case would not have been affected by the S. 648's cap on punitive damages; however, the case does highlight that the imposition of punitive damages can prompt manufacturers to take remedial action.

Exhibits

Exhibit 1



RECEIVED
ADMINISTRATION DEPT
1974
CLARK EQUIPMENT CO.
HANCOCK DIVISION

BUCHANAN, MICHIGAN

29 August 1974

CONFIDENTIAL LEGAL OPINION

TO: PHIL HOEL
Hancock Division

I have received your memo concerning making back-up alarms standard on all scrapers. I disagree with you that the decision concerning making back-up alarms standard should be made by the Sales Department.

Although there are many states that do not require a back-up alarm at this time, and, in fact, OSHA would make it optional since you can also provide a flagman to signal when to back up, the lack of a back-up alarm presents a substantial product liability exposure to Clark that far exceeds any requirements of state safety laws or OSHA. In every case in which we have had an injury involving a person struck by a machine, the absence of a back-up alarm has been very crucial. I must conclude that it is a very substantial fact in the mind of any juror that if the machine had had a back-up alarm, the injury might have been prevented. This thought must be in the minds of the jurors no matter how great the evidence is that the back-up alarms are not required by state safety laws or are not effective because the engine noise is too loud.

I think this must be an overall management decision and should not be left to the Sales Department since that department only gives basically a reflection of what the customer wants. The customer is not in the same position as the manufacturer and Clark must take all steps necessary to protect itself, whether the customer wants it or not. Accordingly, I again strongly suggest that you consider making back-up alarms standard on all scrapers. I was informed yesterday by Walt Black that Benton Harbor has decided to make such alarms standard on all loaders, and I applaud them for that decision. I would hope you could reach the same conclusion.

Steve Anderson
Assistant Counsel

STAnderson/ck
cc: Walt Black
Jerry Baker
Ed Donahue

Exhibit 2

This was the so-called Grush-Saunby Report referred to by the court of appeal in *Grimshaw*. See 119 Cal. App. 3d at 800, 174 Cal.Rptr. at 376. The key cost-benefit calculations appeared in Table 3 of the report:

BENEFITS AND COSTS RELATING TO FUEL LEAKAGE ASSOCIATED WITH THE STATIC ROLLOVER TEST PORTION OF FMVSS 208

BENEFITS:

Savings: 180 burn deaths, 180 serious burn injuries, 2100 burned vehicles.

Unit Cost: $200,000 per death, $67,000 per injury, $700 per vehicle.

Total Benefit: 180 x ($200,000) + 180 x ($67,000) + 2100 x ($700) = *$49.5 million.*

COSTS:

Sales: 11 million cars, 1.5 million light trucks.

Unit Cost: $11 per car, $11 per truck.

Total Cost: 11,000,000 x ($11) + 1,500,000 x ($11) = *$137 million.*

Exhibit 3

VALUE ANALYSIS OF AUTO FUEL FED FIRE RELATED FATALITIES

Accident statistical studies indicate a range of 650-1,000 fatalities per year in accidents with fuel fed fires where the bodies were burnt. There has been no real determination of the percent of these people which were killed by the violence of the accidents rather than by fire. The condition of the bodies almost precludes making this determination.

Based on this statistic and making several assumptions, it is possible to do a value analysis of automotive fire related fatalities as they relate to General Motors.

The following assumptions can be made:

1. In G.M. automobiles there are a maximum of 500 fatalities per year in accidents with fuel fed fires where the bodies were burnt.
2. Each fatality has a value of $200,000.
3. There are approximately 41,000,000 G.M. automobiles currently operating on U.S. highways.

Analyzing these figures indicates that fatalities related to accidents with fuel fed fires are costing General Motors $2.40 per automobile in current operation.

$$\frac{\text{500 fatalities} \times \$200{,}000/\text{fatality}}{\text{41,000,000 automobiles}} = \$2.40/\text{automobile}$$

This cost will be with us until a way of preventing all crash related fuel fed fires is developed.

If we assume that all crash related fuel fed fires can be prevented commencing with a specific model year another type analysis can be made.

Along with the assumptions numbered above the following assumptions are necessary:

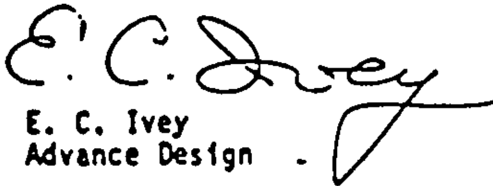
1. G.M. builds approximately 5,000,000 automobiles per year.
2. Approximately 11% of the automobiles on the road are of the current model year at the end of that model year.

This analysis indicates that for G.M. it would be worth approximately $2.20 per new model auto to prevent a fuel fed fire in all accidents.

500 fatalities x 11% new model autos = 55 fatalities in new model autos

$$\frac{55 \text{ fatalities} \times \$200{,}000/\text{fatality}}{5{,}000{,}000 \text{ new model autos}} = \$2.20/\text{new model auto}$$

This analysis must be tempered with two thoughts. First, it is really impossible to put a value on human life. This analysis tried to do so in an objective manner but a human fatality is really beyond value, subjectively. Secondly, it is impossible to design an automobile where fuel fed fires can be prevented in all accidents unless the automobile has a non-flammable fuel.



E. C. Ivey
Advance Design

pb

6-29-73

Exhibit 4

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INTER-ORGANIZATION LETTERS ONLY

CONFIDENTIAL CHEVROLET CONFIDENTIAL

TO	See Below	ADDRESS	Engineering Department
FROM	Mr. A. C. Mair	ADDRESS	Engineering Department
SUBJECT	1967 Safety Program	DATE	March 2, 1964

TO: Messrs. P. X. Fitch
G. J. Mach
E. J. Olender
W. W. Berger

CC: Mr. E. J. Premo

A Budget Authorization is in the process of being prepared for the 1967 Chevrolet Safety Program. The purpose of this budget is to allow each of you to have mockup type designs for each area of your responsibility that can be costed and then furnished to Mr. Premo for him to obtain approval from the Corporation to proceed. Meanwhile, the 1967 Truck must proceed in a relatively conventional manner in this area until we have approval to proceed with those items which are quite new or different.

You must work very rapidly on these ideas such that if approved, they can be incorporated in the design without seriously upsetting the program. All designs must be predicated on the fact that the occupants will be wearing seat belts. Listed below are the major areas requiring new design:

1. Energy Absorbing Steering Column -

   A. Must collapse between gear and toe pan.

   B. Must absorb energy of human impact between steering wheel rim and instrument panel. All effort must be made to reduce unit pressure on the human body to the minimum while collapsing the steering wheel rim, but maintain maximum energy absorption.

   * Be sure to co-ordinate steering wheel and steering gear design with Inland, Saginaw Steering Gear, and our own passenger car group, since the problem here is really the same.

2. The Instrument Panel must be a collapsible, replaceable energy absorbing unit without protrusions and damaging knobs. Several studies are currently in process with various design approaches, such as a wire mesh or crushing plastics. Such a design practically eliminates the Instrument Panel as a structural member, and compensation for this must be made.

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PLAINTIFF'S EXHIBIT 1216

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3. All glass in windshield, side and back light must be the latest material available with high energy absorption, and well restrained so that it does not pop out with human impact. Considerable work is being done currently by increasing the thickness of the film between the two glass layers, which allows more energy to be absorbed before the human head breaks through the glass.

4. The windshield header, the windshield portion of the hinge pillars, and the door opening area at the roof rail and part way down the lock pillar must be covered with, or constructed of, an energy absorbing media to increase the threshold of head injury.

5. The arm rest must be designed into the door as a crushable energy absorbing unit.

6. The seat attachment and its structural strength must be such that it does not break loose from the vehicle in severe accidents.

7. The seat back must not be the folding type such that its energy is not imposed upon the occupant.

8. The fuel tank must be mounted outside the cab and as near the center of the vehicle as practical.

9. For rearward collisions, the cab back inner panel must be covered with, or constructed of, an energy absorbing material in the areas of head impact and, as noted before, the back light must be the best energy absorbing glass available. Incidentally, this is an area of advantage in the truck since no head rest is needed.

10. Improvements must be made to keep the doors closed during collision.

A good starting point for this design criteria is to be able to withstand 45 mph solid impacts in forward collisions and 45 mph vehicle to vehicle rearward collisions. Consider identical weight and configuration vehicles for the rearward collision with a stopped vehicle being struck from the rear by one traveling 45 mph. The forces involved in side collisions are so great that you will have to use as much energy absorbing material as is deemed practical by judgement; that is, the total thickness of the arm rest is really all you can go, and perhaps a 1-1/4" would be the maximum roof rail material that could be added. But, of course, this would be a drastic gain over what we now offer.

Please obtain these costs as quickly as possible to include in the 1967 design, if approved. Your engineers should begin scheming their thoughts on this immediately.

A. C. Mair

A. C. MAIR
Executive Engineer
Truck Department

ACM:is

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Exhibit 3 MINUTE #1 - 1979

Exhibit 5

LIMITED DISTRIBUTION

PRODUCT SAFETY SUBCOMMITTEE MEETING
JANUARY 2, 1979

PRESENT:

SUBCOMMITTEE

E. F. BARRETT, CHAIRMAN
J. G. WILLIAMS
E. HOOTON, JR.
R. A. PARTNOY

OTHER

R. B. SPERLING, ACTING SECRETARY

SAFE GUN HANDLING

It was reported to the Committee that in 1975, due to what we learned from a quality audit on the Mohawk 600, Remington instituted new inspection procedures for all center fire bolt action rifles which were designed to catch a gun capable of being "tricked" into firing when the safety lever is released from the "safe" position. "Tricked" in this context means, safety lever placed in between "safe" and "fire" positions, trigger is then pulled, and the safety lever is subsequently moved to the "fire" position and the gun discharges. The inspection procedures involve the following:

(1) A visual check for adequate clearance between the sear and the connector.

(2) Measurement of this clearance by use of a .005 shim.

(3) Attempting to trick the gun--three times in assembly, three times in gallery and three times at final inspection.

In addition to the above inspection procedures, Remington also changed the trigger assembly for the Model 600 family of guns by adopting Model 700 design features. Changes to the 600 included:

1. Going from a folded housing to an assembly consisting of side plates held together by rivets and spacer block.
2. Providing more lift to the sear.

No such changes were made in the design of the Model 700 because it already had those features.

Remington is confident because of the checks instituted in 1975, that bolt action rifles made during and after 1975 will not trick. Since June 1978, 500 post-1975 Model 700's have been returned to Ilion for repair for various reasons. Starting in June, Remington conducted a quality audit on these returned guns and none could be tricked.

During this same period (June 1978 to the present), two hundred pre-1975 Model 700's were returned to Ilion for repair, and it was found that two could be tricked (one because of insufficient clearance between sear and connector, and one because of a warped connector). **Based on this sample, about 1% of the pre-1975 Model 700's in the field may be subject to tricking.** There are about 2,000,000 pre-1975 Remington guns in the field with the Model 700 trigger assembly. (By comparison, it is noted that the **1975 quality audit indicated about 50% of the Model 600 family of guns in the field were susceptible to**

TO: M.N.S., R.C.L. (NO OTHER COPIES)

FROM: DNR

Exhibit 6

SUBJECT: VEHICLE ROLLOVER - CJ-TYPE VEHICLES

A fairly simple steady state handling calculation can be used to give a "ballpark" indication of how easily a vehicle will roll over.

If the vehicle is driven in a true circle on a flat dry skidpad at increasingly higher speeds, it will be subjected to increasingly higher lateral accelerations. As this lateral "g level" is increased, at some point the vehicle will either skid out or roll over.

The g level at which a given vehicle will roll over is principally a function of its C.G. height relative to its track width. On page 3 are calculated values of roll over g level for our CJ7 and other vehicles. They range from a low of 0.67 for the Daihatsu F20V to a high of 1.26 for the Pacer. While these figures are useful for comparative purposes, "real world" factors will cause the vehicle to roll at somewhat lower values.

Most normal vehicles will skid out at 0.65 to 0.75 g's. Page 4 gives a summary of "Road and Track" test data on passenger and sport cars.

Considering "real world" factors, I think any vehicle with a calculated roll over g level of 0.80 or less will probably roll over quite easily on a skid pad.

Values of 0.80 to 0.95 are marginal. Vehicles above 0.95 probably can not be made to roll over unless they are "tripped" by sliding into a curb or other obstruction.

Page 2 shows relationship between g level and skid pad speed.

DNR
2-2-79

IntraCompany Correspondence

To	Location	Copy To
D. E. Dawkins R. C. Lunn		No Other Copies
From	**Location – Ext**	
D. N. Senneker	Advanced Engrg.-32546	
Subject	**Date**	
Answers to Questions on CJ Rollover	July 26, 1979	

Attachment #1

Graph of vehicle CG height and track vs. lateral g to cause rollover. Any combination of CG height and track which plot on the u = 0.8 line will theoretically roll over at 0.8 g's.

I believe a true safe design limit to be 0.9 g's. Any vehicle which falls below the 0.9 line on the graph will not roll over on a smooth surface. Any above probably will. The greater the perpendicular distance from the point to the 0.9 line, the greater the tendency to roll. From the graph, you would expect the CJ-7, Toyota FJ-40 and Pinzgauer to act about the same, but the Daihatsu to be significantly worse.

In reality, I expect the Pinzgauer to be worse than the CJ-7 because of its swing axle suspension.

Attachment #2

This graph illustrates the magnitude of change required to improve the CJ-7 to the level of the CJ-II (u = 0.93). Proposal A is CG lowering only. With no track increase, the CG would have to be lowered by 5.9" - an impossible task. Proposal B, track increase only, is equally impractical - requiring 10.9" of increase.

Proposals C and D involve 1.0" of CG lowering and 2.0" to 4.0" of track widening. While not a cure for rollover, I believe a change of this magnitude would make a significant improvement in the CJ.

In talking to the Steyr Puch engineers last week, I find they are working on a package of 1.0" CG lowering and 4.0" track increase to improve handling of the Pinzgauer. Their package, plotted on the graph as E, gets them from 0.78 to 0.86 - probably a worthwhile improvement.

I have started a study to determine feasibility of lowering the CJ-5 and 7 by 1.0". We are also looking at other handling improvement possibilities - tires, geometry, etc.

DOCUMENT 5

Attachment #3

Copy of my original letter on CJ rollover. Vehicle data on page 3 has been updated to include Pinzgauer and Eagle.

D. N. Renneker

ljl
Attachments

Exhibit 7

IntraCompany Correspondence

Mr. J. E. MacAfee

R. M. Huffstutler — AMTEK/[illegible]

CJ Shackles — January 7, 1982

Confirming our telephone conversation of this P.M., we understand that vehicle 1509 will soon be tested. This test will be the fourth in the series of 1461, 1477, and 1484, a test we presume will meet with the complete satisfaction of you and your engineering staff.

Upon successful completion of testing on the new shackle design, we would appreciate the ECR being with obsolescence and the new design being incorporated at the earliest possible time. Assuming the shackle is released for CJ-5, CJ-7, Scrambler, and various export models, I will press for retrofit of all CJ-7 and Scrambler vehicles produced in the 1982 model year. This action I believe is warranted since the FMVSS 301-75 movable barrier 20 mph test which indicated a problem was completed July 22, 1981, three weeks prior to the 1982 production. Not to retrofit will subject Jeep Corporation to possible punitive damages on a component which has previously been the subject of several causes of action. Our legal staff has, to date, not seen the merits of testing the current design before a jury; it is my belief that the new design will have to be tried and thus Jeep Product Engineering should have a sufficient data file to convince not only engineers but lay persons as well.

Any action by Engineering to our purchasing group to forestall their dilatory tactics in this matter would be appreciated. An early warning to them that the design will be changed may preclude Jeep Corporation from having to pay for stock ahead of our production requirements.

R. M. Huffstutler

RMH/ag

1021v

Exhibit 8

PRODUCT LIABILITY TASK FORCE

FINDINGS & RECOMMENDATIONS

PLAINTIFF'S EXHIBIT
5
[illegible] 8-23-[illegible]

Plaintiffs
Ex. 2
[illegible] 1/29/79

DISCUSSION OF PERTINENT DATA

Electrical accidents account for 29 percent of the total number of accidents, but account for 77 percent ($21,500,000.00) of the active claims.

The largest single type of electrical accident is "Boom Tip Contact." It accounts for 40 percent of the number of electrical accidents and 67 percent of the total dollar value of the active claims. ($18,500,000.00) Those electrical accidents involving metal boom machines usually do not lead to lawsuits and represent only 9 percent ($2,500,000.00) of the dollar value of our active claims. The same is true for "Phase-Phase" contacts, which account for only 1.5 percent ($500,000.00) of the active claims.

Contractors have fewer numbers of accidents than utilities, but contractors have a higher accident rate per machine. (This statement may be somewhat inaccurate, because it is felt that utilities, in some cases, tend to hide some of their accidents.)

Contractors account for 76 percent ($21,200,000.00) of the active claims against the A. B. Chance Company, while utilities account for only 15 percent of the active claims ($4,300,000.00). Of the $21,200,000.00 claims from the contractors, $18,000,000.00 resulted from electrical accidents, $15,000,000.00 of which was attributed to "Boom Tip Contact."

RECOMMENDATIONS FOR REDUCING LIABILITY

Based on information relative to past history of accidents, the following recommendations would appear to be instrumental in reducing our exposure to liability:

1. Design a complete non-metallic boom tip and lifting attachment.
2. Improve the bucket leveling system and hydraulic controls.
3. Improve our present methods of informing the operator/owner by better use of placards, signs, manuals, literature, movies, etc.
4. Design a boom interlock system and a tip-over warning device.
5. Identify any non-insulated use of insulative materials. Example: cylinder inside insulated boom.
6. Continue exposure of designers to the field in order to be aware of how machines are used.
7. Continue present activities and efforts in F.I.E.I., relative to machines in the field and new machines.
8. Propose and initiate efforts toward establishing a licensing program for operators of aerial devices.
9. Establish a coordinating group (Bosch, Myers, Stallbaumer) to establish company policies concerning aerial device applications, such as minimum insulated boom lengths, work practices, review publications, etc.

AREAS FOR FUTURE CONSIDERATION

1. Develop a groundman protection system.
2. Develop a two-compartment bucket -- one for the man, one for tools.
3. Develop an insulative or conductive suit for lineman protection.
4. Eliminate hydraulics and all mechanical linkages inside insulated boom by use of radio controls.
5. Develop a machine in order to remove the lineman from the energized area completely. Example: Controlled from ground via closed circuit T.V. and having mechanical manipulator on boom tip.

COST TO IMPLEMENT TECHNICAL RECOMMENDATIONS

A) Estimated cost to design a machine with the following features:

1. Insulated boom tip
2. Insulated lifting attachments
3. Boom interlock system
4. Tip-over warning system
5. Improved leveling system
6. Improved hydraulic control system
7. Improved placards

Estimated Time 2 Years	[Design] [Prototype] [Test] [Document]	$200,000.00
	Tooling	$10-,25,000.00

B) Estimated Cost Increase of Machine	2,000.00
C) Dollar value of active lawsuits as result of "Boom Tip Contact"	$18,500,000.00
D) Assuming average awards paid out equal to 2.5 percent of total claims dollar value (.025 x 18,500,000)	$ 462,500.00

- CONCLUSION -

If $225,000.00 could be spent to alleviate the liability exposure due to "boom tip contact", it would appear that this expense could be justified.

Exhibit 9

Cutter

TO: Jack Ryan, Carolyn Patrick, Wayne Johnson, Ralph Roussell, George Akin

DATE: December 29, 1982

FROM: Ed Cutter

COPIES TO: Arnold Leong

SUBJECT: AIDS

It appears to me to be advisable to include an AIDS warning in our literature for Factor IX and Factor VIII. I realize that very little is known about AIDS and the relationship the products we manufacture have in causing the syndrome. However, litigation is inevitable and we must demonstrate diligence in passing along whatever we do know to the physicians who prescribe the product. In my opinion, three steps are called for, once we agree on the wording of our message.

1. Include it in the package insert.

2. Educate the sales force.

3. Since MDs won't be reading the package insert in most cases, send a letter to hematology specialists informing them of the warning we are putting in the insert.

Ed

Ed Cutter
EAC:lk

Exhibit 10

Report to the Board
Committee on Transfusion Transmitted Diseases

The major report of your Committee on Transfusion Transmitted Diseases has been issued as our recommendations to the Association. These few additional paragraphs are more my current views and concerns than a formal committee report. Nonetheless, because of my recent experiences I am anxious to share some thoughts with you.

The report that we have submitted to our members is, in my view, appropriate considering the data at hand. Since we met, however, an additional child with AIDS has been admitted to a Texas hospital. At birth the child had received seven transfusions, one of which came from a donor who now seems to have AIDS. This case increases the probability that AIDS may be spread by blood. Furthermore, the CDC continues to investigate the current cases aggressively and may even have a few more. While I believe our report reacts appropriately to the data at hand, I also believe that the most we can do in this situation is buy time. There is little doubt in my mind that additional transfusion related cases and additional cases in patients with hemophilia will surface. Should this happen, we will be obliged to review our current stance and probably to move in the same direction as the commercial fractionators. By that I mean it will be essential for us to take some active steps to screen out donor populations who are at high risk of AIDS. For practical purposes this means gay males.

The matter of arranging an appropriate screening program is delicate and difficult. We have had excellent cooperation from individuals in the gay community and our deliberations have been made easier by their knowledge and ability to help us. I have no doubt that they will continue to support us and, should we need to be more aggressive in this area, will help us do it in a way that is socially responsible.

Blood banks that wish to sell plasma for further fractionation already face the need to do something. Perhaps our Committee should prepare guidelines with suggested wording for them to use. We are reluctant to do this since we do not want anything that we do now to be interpreted by society (or by legal authorities) as agreeing with the concept - as yet unproven - that AIDS can be spread by blood.

All in all this is a knotty problem and one that we will not solve easily.

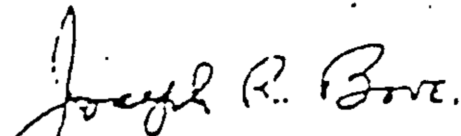
I want to make a few comments about the process by which our joint document developed. We spent a great deal of time and energy and did the best we could in attempting to reach a consensus. The difficulty was to get AABB, ARC, CCBC and all the other groups to adopt a position which was acceptable to each other. It was impossible to have a small meeting; everybody wanted to attend. When we got the group together we were able to hammer out a statement that pleased the attendees. Unfortunately, the statement had to go through several iterations with our own Board and the Boards of the other involved organizations. In

all probability these modifications resulted in a better statement, but the process of getting these changes incorporated and run back and forth through the three organizations was difficult. We have had a good start at working together on this and we hope to keep it up. The mechanism was a little less smooth when it came to releasing the statements and the public relations that went with it.

I hope that we are equipped psychologically to continue to act together. I have been in contact with ARC (Dr. Katz) and CCBC (Dr. Menitove) and believe that the three of us can, together, work out whatever new problems may arise. We plan frequent conference calls to keep each other informed.

I want to comment about the Committee. They worked well together and I was particularly pleased with the input of advisory members. Having individuals who are not associated with the blood banks nor a traditional part of the blood banking community proved most useful to us. Their comments and suggestions were excellent. In a like manner, we were helped by participants from the National Gay Task Force. As we continue to react to the various challenges before us, I am sure that their help will be essential. Finally, let me acknowledge the help from the Central Office and, in particular from Lorry Rose.

No immediate end to the publicity is in sight and we will get continued calls for us to act more aggressively. We need to do whatever is medically correct. In addition, we may have to do a little more, since we are accused of burying our heads in the sand. We are not being helped by the spate of publicity about this illness, but will continue to react responsibility to whatever scientific and medical information we have.



Joseph R. Bove, M.D., Chairman
Committee on Transfusion Transmitted Diseases
American Association of Blood Banks

JRB:tmf

1/24/83

Exhibit 11

5555 Valley Boulevard, Los Angeles, CA 90032
(800) 421-0008 (213) 225-2221 TWX: (910) 588-3253

March 15, 1984

John Petricciani, M.D.
Director, Division of Blood and Blood Products
Office of Biologics
Food and Drug Administration
Bethesda, MD 20205

Dear Dr. Petricciani:

I am writing to solicit your assistance on a matter of great public importance. As you are aware, in July of last year the Blood Products Advisory Committee met to consider the problems associated with the increase of Acquired Immune Deficiency Syndrome (AIDS) throughout the population. Particular attention during the meeting was paid to the problems associated with the incorporation of AIDS into plasma fractionation pools subsequently manufactured into Antihemophilic Factor (AHF). The Advisory Committee, as well as members of the Office of Biologics, the National Hemophilia Foundation, and AHF manufacturers, were attempting to develop a consensus policy which balanced the understandable but still hypothetical concern that AIDS might be transmitted through AHF with the very real concern that precipitous action (such as automatic recalls) would severely impact the continued availability of vitally needed AHF.

Understandably, but in our view unfortunately, neither the Advisory Committee nor the FDA has been able to come to any conclusion beyond the fact that the problem is indeed a complex one. Thus the sole guidance which has been provided to AHF manufacturers with respect to dealing with situations where plasma from an individual subsequently diagnosed as having had AIDS has been incorporated into a plasma pool, manufactured into AHF, and distributed, has been to evaluate each such situation on a "case-by-case" basis. The only additional guidance which has been forthcoming was the suggestion that such a case-by-case evaluation should take into account "the accuracy of the diagnosis, the occurrence of symptoms in relation to the time of donation of plasma, and the impact of the recall (on) the supply of AHF". In Dr. Novitch's August 23, 1983 memorandum to Assistant Secretary Brandt, it was indicated that this "case-by-case" approach would be the working policy of the Office of Biologics, and to the best of our knowledge it remains the policy to the present time.

While we certainly understand the factors which led to the adoption of this "case-by-case" approach, we would suggest that this approach places AHF manufacturers in an ultimately untenable position. As you are aware, despite the implementation of the additional donor screening procedures set forth in your March 24, 1983 memorandum to Source Plasma (Human) and Blood Bank establishments, it remains likely that donors subsequently determined to have AIDS will nevertheless donate blood and plasma which

will subsequently be utilized to manufacture AHF. This will occur not necessarily because the blood bank or plasma collection facility improperly screens the donor, nor because the donor lies about whether he is in a high-risk group---although both of these will occasionally occur---but often it will occur simply because at the time of donation there will be no basis upon which to interdict the donor. You of course are aware that some researchers theorize that the latency period for AIDS victims, after they have been exposed to the disease and have become carriers, but before they manifest the clinical symptoms of the disease, may be as long as 3 to 5 years. It is therefore likely that if the number of AIDS victims continues to increase, as it has, a certain percentage of them will have donated plasma during the 3 to 5 year period prior to the clinical diagnosis of their AIDS. Furthermore, the likelihood of this scenario occurring is even greater with respect to all of those who donated prior to the implementation of the additional donor screening procedures in early 1983. The essentially inevitable result, then, is that AHF manufacturers such as Alpha have in the past, and will in the future, be confronted with the decision as to what to do when it is ascertained that one or more units of plasma donated by an individual subsequently determined to have AIDS have been incorporated into plasma pools from which AHF has been manufactured.

One option is of course to recall all product affected by the discovery of an AIDS donor as soon as possible, coupled with the destruction of all AHF material in house which has not yet been distributed. As you may recollect from Dr. Rodell's presentation at the July 19, 1983 Advisory Committee meeting, such a course of action would quite likely result in a serious disruption of the supply of AHF, with an obvious adverse impact upon individuals suffering from hemophilia.

A second option would be to take no action with respect to a product recall, basing this action upon the continued lack of any scientific proof associating AHF with the transmission of AIDS. Alternatively, this option could be based upon the fact that essentially all domestically available AHF is now heat-treated, a process which <u>may</u> render AHF incapable of transmitting AIDS---if AIDS is subsequently determined to be a virus of a type similar to hepatitis. For obvious reasons, neither the Advisory Committee, the FDA, or AHF manufacturers were wholly comfortable with this position at the July 19 meeting, and subsequent scientific publications have reinforced the conviction that there is sufficient evidence of a <u>possible</u> link between AIDS and blood components such as AHF so as to warrant some action. <u>See</u>, for example, "Acquired Immunodeficiency Syndrome (AIDS) Associated with Transfusions", N Engl J Med 1984; 310:69-75.

There is also an interim position, which we find to be equally untenable. This position involves not recalling AHF already distributed, but destroying all AHF material and plasma pools which are still within the company's custody and control. Our view is that there is no defensible basis upon which one could justify this bifurcated course of action, for if there is a sufficient basis for destruction of material on hand there is no rational basis for taking the position that material otherwise indistinguishable from that

destroyed material should be unaffected simply because it has been distributed prior to the discovery of an AIDS donor. Furthermore, such a position is likely rendered even more untenable when products liability considerations are taken into account. For a hemophiliac contracting AIDS who discovers that he has received AHF from a lot of product, some of which had been destroyed by the manufacturer because of a possible association with AIDS, might well argue successfully in court that the manufacturer was negligent for not having recalled the distributed material.

The present case-by-case approach which we have been left with suffers from some of the same defects. Dr. Novitch's August 23, 1983 memorandum, which represents the present position of both the FDA and the Blood Products Advisory Committee, provides very little in the way of useful guidance to a manufacturer who has discovered that a subsequently diagnosed AIDS victim has donated one or more units of plasma which found their way into AHF. Assuming that the diagnosis fits the CDC AIDS definition of a confirmed case, the Novitch memorandum indicates that the decision as to what to do should be based upon two "criteria": 1) the impact of a recall on the supply of AHF; and 2) the occurrence of symptoms in relation to the time of donation of plasma.

As you are surely aware, although any major recall by one of the four domestic manufacturers of AHF would have a significant adverse impact upon the availability of AHF, it is quite likely that the extent of that impact would not be clear until a number of months after the decision of necessity must be made. It will not be until then that other factors, including the production schedules of the other three manufacturers and whether or not they too have had recalls, not to mention product usage patterns among hemophiliacs, will have become clear. As a practical matter, then, this guideline provides very little guidance at all to a manufacturer faced with making a yes or no decision on a recall of AHF.

The other criteria offered by the Novitch memorandum is equally defective in terms of providing meaningful guidance. What is the period of time between plasma donation and subsequent AIDS diagnosis that must elapse before the plasma and any pools into which it has been incorporated become "safe"? Six months? One year? Three years? Obviously this is a difficult question, inasmuch as some researchers hypothesize that the "incubation" period of AIDS in some victims may extend from three to five years. Without any specific guidance from the FDA, however unavoidably arbitrary that guidance must of necessity be in light of our collective ignorance about how AIDS is transmitted, each manufacturer is left to make his own guess as to the "magic number". The problem created by this FDA non-policy should be obvious: from a products liability point of view, each manufacturer has an incentive to lengthen the period of time between donation and diagnosis for purposes of self-protection against an individual asserting that he contracted AIDS after receiving one or more units of AHF that "should" have been recalled. If one manufacturer, for example, decides not to recall AHF whenever the period of time between donation and diagnosis is more than six months, while a second manufacturer opts for a two year time period---or for a policy of automatic

recall in all cases---then it is obvious that the first manufacturer has increased his products liability exposure by not having adopted the "standard of care" displayed by the second manufacturer. Thus if each manufacturer attempts to protect himself by being more conservative in this area than the others, the inevitable result may well be a de facto automatic recall situation throughout the industry, which will lead to precisely the type of shortage situation about which the FDA, the Advisory Committee, and the hemophilia community expressed concern last year. In our judgment, the fact that such a shortage has not yet happened is largely fortuitous, especially in light of the increasing number of diagnosed AIDS victims. We believe, therefore, that the time to act is now, before a shortage with its serious negative impact upon the hemophilia population takes place.

For the reasons set forth above, we believe that it is incumbent upon the FDA to exercise leadership in this area, rather than to defer to a case-by-case approach which places the burden essentially upon individual AHF manufacturers. If the FDA were to specify a period of time between donation and diagnosis, for example six months (based upon the generally recognized incubation period for hepatitis B), then manufacturers could evaluate individual situations with some assurance that their exposure was no more and no less than other manufacturers. If and when more definitive scientific information becomes available about the method of transmission, length of incubation period, and clinical course of AIDS, then the FDA-established time period could of course be adjusted as appropriate. In the interim, however, and based on the lack of scientific progress to date, the establishment by the FDA of a uniform time period would provide needed direction for manufacturers faced with the difficult task of balancing their corporate obligations of prudent action with their societal obligations of assuring that the nation's hemophiliacs have access to vitally needed AHF.

I have discussed the concerns raised in this letter with the other primary domestic manufacturers of AHF, and they appear to generally share the views set forth herein. We would be pleased to meet with you at your convenience to discuss this matter in greater depth, hopefully as a prelude to the agency reconsidering its "case-by-case" policy. Please do not hesitate to contact me if you have any questions about the concerns expressed in the letter. I look forward to hearing from you in the near future.

Sincerely,

Marietta Carr
Vice President
Regulatory Affairs

MC:pw
2830R

Exhibit 12

MEMORANDUM

****

TO R. A. Burnett
K. W. Cesca
P. T. Dailey
A. C. Garnett
J. E. Gerbig
J. A. Jakob
W. E. Lumpkin
T. D. Mitchell
C. S. Richardson

DATE March 19, 1986

REFERENCE STUD GUNS

Because of liability insurance problems, it has been Taylor Rental's policy not to stock high velocity or standard velocity stud guns. We only stock the low velocity stud gun.

Because of certain acquisitions we have made, it has come to my attention that some of these stores currently have in inventory high velocity or standard velocity stud guns.

Please remove and discard these guns immediately. The low velocity stud gun will accomplish the same tasks.

NOTE: BECAUSE OF LEGAL LIABILITY, DO NOT SELL OR GIVE THE DISCARDED GUNS TO ANYONE. DESTROY AND THROW AWAY!

J. D. Kinkead

llp

Product liability – interest group materials

LETTERS

Gun Dealers Not Protected Under Tort Reform Plan

To the editor:

In a June 23, 1997, letter to *Legal Times* from M. Kristen Rand of the Violence Policy Center ["Tort Reform Would Shield Gun Dealers," Page 29], it was suggested that S. 648, the Product Liability Reform Act of 1997, would somehow "protect from suit gun dealers who sell firearms to convicted felons, minors, or other prohibited persons in violation of state or federal law."

Earlier, *Legal Times* had indicated in an article, "Talks Raise Hopes of Tort Reform" ["Lobby Talk," June 9, 1997, Page 4], that S. 648 would provide no such protection. Your article, as a matter of law and public policy, was absolutely correct.

First, there was never an intent by any proponent of S. 648 to protect gun dealers. Neither gun dealers nor manufacturers of guns are part of the Product Liability Coordinating Committee.

Second and more importantly, the text of the bill was never intended to protect such parties from legitimate lawsuits. In the course of revisions that occurred in the 104th Congress, however, the specific language that would exclude such claims was moved from the pre-emption section to the section dealing with the liability of product-sellers. Apparently, the reason for this was that the only way a person could sue a gun dealer was as a product-seller. The change in text, however, was of concern to the president of the United States in his veto.

To obviate any misunderstanding of the purpose of the legislation when the proponents made revisions in what has now become S. 648, it was stated in the pre-emption section that: "A civil action for negligent entrustment . . . shall not be subject to the provisions of this Act but shall be subject to any applicable state law."

Actions against gun dealers are predicated on a fact pattern where the gun dealer "negligently entrusts" a weapon to a minor, felon, or person acting on behalf of a felon.

Ms. Rand suggests that somehow S. 648 would obviate actions against gun dealers under the theory of "negligence per se." As my textbook makes clear, actions for negligence per se are based on violations of law and conduct of persons who have violated such laws. In the example Ms. Rand gives, the defendants violated laws by their wrongful conduct.

The Product Liability Reform Act of 1997 covers "civil actions brought on any theory of harm caused by a product." *See* §101(12). *It is the product that must cause the harm; that is what product liability is all about. See* Restatement of the Law of Torts (Third): Products Liability (1997), Section 1.

As the report of the Committee on Commerce, Science, and Transportation states: "[T]he Act would not cover a gun dealer that knowingly sells a gun to a convicted felon or a 'strawman' fronting for children or felons."

As is true with all legislation, there are things to "debate" about S. 648, the Product Liability Reform Act of 1997. But at long last, let us put death to the myth that S. 648 is intended to protect gun dealers. If that is the key issue left for debate, S. 648 should pass by unanimous consent of both houses of Congress and be signed by the president the day it is enrolled.

Victor E. Schwartz
Crowell & Moring
Washington, D.C.

Editor's note: Victor E. Schwartz is counsel to the Product Liability Coordinating Committee, a leading lobbying coalition for the passage of federal tort reform.

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July 17, 1997

Elena Kagan, Esquire
Deputy Assistant to the President
for Domestic Policy
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Product Liability

Dear Elena:

It has been a long time since we have communicated. I hope that you are having a good summer and that all is well.

We understand that you may be involved in the White House Task Force on product liability reform. For your information, we are enclosing a copy of an article that we wrote for a Tort Reform Symposium issue of the *Tennessee Law Review*. The article is entitled, "Federal Product Liability Reform in 1997: History and Public Policy Support Its Enactment Now." We hope that you will find it to be a useful reference tool.

We are also enclosing some materials that were prepared for Senator Rockefeller and Representative Dingell. One document is a paper drafted by a former chief planning economist at the U.S. Consumer Product Safety Commission and Economics Professor at the University of Wisconsin to clarify the fact that persons who are not employed at wage-earning jobs (*e.g.*, children, homemakers, and the elderly) can recover potentially substantial damages for "economic loss."

The second document was prepared in anticipation of ATLA arguing that recent decisions by the United States Supreme Court -- *United States v. Lopez* (the Gun-Free School Zones Act case), *City of Boerne v. Flores* (the Religious Freedom Restoration Act case), and *Printz v. United States* (the Brady Handgun Violence Prevention Act case) -- call into question Congress' authority to enact product liability reform legislation, because product liability law has traditionally been a matter of state law. You know this area of law well and can appreciate that this argument is without merit. Nevertheless, we thought you might like to see the paper we prepared for your Congressional colleagues on this issue.

We would be pleased to provide you with any additional materials and to answer any questions that you may have about this year's bill, The Product Liability Reform Act of 1997 (S. 648).

Sincerely,

Mark Behrens

Enclosures

HEIDEN
ASSOCIATES

July 14, 1997

The Honorable John D. Rockefeller IV
United States Senate
531 Hart Senate Office Building
Washington, D.C. 20510

The Honorable John D. Dingell
United States House of Representatives
2328 Rayburn House Office Building
Washington, D.C. 20515

Dear Senator Rockefeller and Representative Dingell:

I am writing to you on behalf of the Product Liability Coordinating Committee. The Committee has asked me to help clarify some apparent confusion on the nature of economic damages, and specifically, on their applicability in product liability cases. I am therefore offering the following comments for your consideration.

As President of Heiden Associates, Inc., an economic consulting firm in Washington, D.C., I have directed many economic studies for private and public clients in economic feasibility and damages assessment, consumer affairs, health/safety/environmental regulation, and other areas. I have conducted numerous value-of-life and value-of-injury analyses in regulatory and liability matters--for both plaintiffs and defendants--and have served as an expert witness and provider of economic analysis in several of these types of cases. I was formerly chief planning economist at the U.S. Consumer Product Safety Commission, and dealt extensively with issues related to the economic cost of product injuries. I have also been a member of the economics faculty at the University of Wisconsin (Madison), and was Director of its Center for Research in Firm and Market Behavior.

Economic losses are sustained when anyone suffers a disabling injury or death, whether this person is currently employed or not. These economic losses consist of medical expenses, reductions in the injured party's future income stream, and the cost of hiring substitute services which were previously performed by the injured party. The lost future earnings component of the award includes both wages and job benefits, such as health insurance and retirement benefits. Models for estimating economic damages take into account the many factors that would result in changes in the earnings and income picture of

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injury victims over time, including the tendency for the majority of individuals to experience rising income from their jobs, because of factors such as productivity increases and inflation.

Analysis of jury verdicts and settlements has indicated that economic damages are highly correlated with the size of overall damages awards for disabling injuries. Economic losses have been called the "driver" of total damage awards. It is widely recognized by both plaintiffs and defendants in product liability cases that all victims are entitled to such damages for a disabling injury or fatality, whether employed at a wage-earning job or not (i.e., homemakers, children, and the elderly). This is not subject to dispute. What may be disputed in many (though not all) cases is the methodology and data that should be used to calculate such damages, not whether they are a meaningful, important category of compensation.

For children, economic damages are calculated based largely on the projection of future costs that will be incurred for medical treatment and other compensatory services and on the reduction in expected net future earnings and benefits over the useful projected work life of the individual based on the time that he or she reaches work age. An attempt is made to assess what kind of employment opportunities the child would have had but for the disabling injury, and to project earnings from those opportunities, examining factors such as expected education level, evidence of vocational interest, family history, and other values. For example, persons such as the family of the young female victim of the Kentucky bus accident cited by President Clinton in his veto message in 1996 would ordinarily seek substantial economic damages based on the expectation that she would have become a productive future member of the work force and the value of household services that she would have been able to provide.

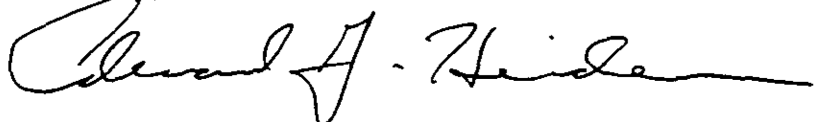
For women who are currently out of the work force and are instead providing household services to their families, calculations of economic damages include the net value of injury-induced foregone earnings from future labor force participation, and/or the economic value of domestic services such as housekeeper, cook, or caregiver whose performance has been impaired or eliminated as a result of injury. The latter value is typically based on the economic cost of hiring substitute services in the narketplace.

For many senior citizens, economic damages calculations arising out of lost earnings could produce generally lower amounts than for other groups. The medical cost component of damages from disabling injury, frequently involving special medical care or the cost of additional domestic assistance, is therefore significantly more important for this group. However, for this group, any generally lower level of damages arising out of disabling injury is frequently mitigated by the significantly greater likelihood of payments in the form of social security, and pension and/or other retirement benefits. These payments are not generally interrupted by any injury, nor are they used to offset the size of any damages award.

Moreover, there are a wealth of approaches that can be used to estimate economic damages which have been less frequently utilized in product liability litigation. One example would be the use of household production function model, which can be used to value products and services produced outside of the marketplace. This approach is well-accepted in public finance and social welfare analysis, but has not typically been used in developing estimates of economic damages in personal injury litigation. This lack of utilization can be attributed, in part, to the lack of necessity on the part of plaintiff's counsel to establish a complete assessment of economic damages when an appeal for larger awards for other aspects of damages can perhaps be made less expensively. In the event that joint-and-several liability for non-economic damages is restricted, as was proposed in the 1996 legislation, plaintiffs in future product liability cases will continue to have access to a wide range of well-accepted techniques for establishing the full extent of economic damages incurred.

I appreciate this opportunity to place these comments on the record, and would, of course, be happy to provide you with further information at your request.

Sincerely,



HEIDEN ASSOCIATES, INC.
Edward J. Heiden
President

CROWELL & MORING LLP

MEMORANDUM

TO: The Honorable Slade Gorton, Jay Rockefeller, and John Ashcroft
The Honorable Henry Hyde, Thomas Bliley, Jr., and John Dingell

FROM: Victor Schwartz, Amy Mauser, and Mark Behrens
Counsel to the Product Liability Coordinating Committee

DATE: July 11, 1997

RE: Recent Supreme Court "Federalism" Decisions Do Not Undermine Congress' Clear Authority to Enact Product Liability Reform

---

For decades Congress has passed legislation relating to matters affecting interstate commerce. Nevertheless, opponents of federal product liability reform legislation may suggest that recent decisions by the United States Supreme Court -- *United States v. Lopez* (the Gun-Free School Zones Act case) decided in 1995 and *City of Boerne v. Flores* (the Religious Freedom Restoration Act case) and *Printz v. United States* (the Brady Handgun Violence Prevention Act case) decided this past term -- call into question Congress' authority to enact product liability reform legislation. In particular, we anticipate that opponents of product liability reform legislation may argue that, because product liability law has traditionally been a matter of state law, it is beyond the power of Congress to legislate. As we explain below, this argument is without merit, and the recent decisions by the Supreme Court do not support it.

A. Product Liability Is A Matter Of Interstate Commerce

The United States Department of Commerce reports that, on average, over seventy percent of the products manufactured in a particular state are shipped outside the state of manufacture for sale in various other states.[1] Manufacturers and product sellers may be involved in product liability actions governed by the law of *any* state in which they do business. A state legislature cannot enact product liability reform legislation that is effective outside its own borders -- a federal solution is needed.

As former West Virginia Supreme Court Justice Richard Neely candidly wrote in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991):

---

[1] *See* Commodity Transportation Survey, U.S. Dept. of Commerce, Bureau of the Census, Table 1, pp. 1-7 (1977).

> State courts cannot weigh the appropriate trade-offs in cases concerning the *national* economy and *national* welfare when these trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum.

Id. at 905.[2] Insurers recognized this fact years ago and set liability insurance rates based on country-wide, not individual state, data.

B. The Commerce Clause Gives Congress The Power To Enact Product Liability Reform Legislation

The Constitution delegates to Congress the power "[t]o regulate Commerce . . . among the several States . . . ." U.S. Const., Art. I, § 8, cl. 3. "The commerce power 'is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *United States v. Lopez*, 115 S. Ct. 1624, 1627 (1995) (quoting *Gibbons v. Odgen*, 9 Wheat, 189-190, 6 L.Ed. 23 (1824)).

The United States Supreme Court has held that the Commerce Clause empowers Congress to regulate "three broad categories of activity." *Lopez*, 115 S. Ct. at 1629. The Court summarized these categories in its opinion in *Lopez*:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

Id. at 1629-30.

Congress' power under the Commerce Clause is not confined to activities having a direct effect on interstate commerce. Congress is empowered to regulate intrastate activities that "have such a close and substantial relation to interstate

[2] *See also Blankenship v. General Motors Corp.*, 406 S.E.2d 781, 786 (W. Va. 1991) ("Indeed, in some world other than the one in which we live, were this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules").

commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Where intrastate activities affect interstate commerce, Congress' regulation of those activities is appropriate under the Commerce Clause:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

United States v. Darby, 312 U.S. 100, 118 (1941).

Thus, in determining whether Congress may regulate an activity pursuant to its Commerce Clause power, the critical inquiry is not whether the activity is a local one or one extending across state boundaries, but whether the activity has a substantial effect on interstate commerce. Historically, the Court has shown a willingness to find such effects.

For example, the Court has ruled that, while local activity may not have a substantial effect on interstate commerce when considered in isolation, it may have a substantial effect on interstate commerce when considered in the aggregate. In upholding Congress' regulation of the consumption of homegrown wheat because of its aggregate economic effect on the interstate commodity market, the Supreme Court explained:

> [E]ven if appellee's activity [is] local and though it may not be regarded as commerce, it may still whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Wickard v. Filburn, 317 U.S. 111, 125 (1942). *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 277 (1981) ("Even activity that is purely intrastate in character may be regulated by Congress, when the activity, combined with the like conduct by others similarly situated, affects interstate commerce among the States . . . .").

Consistent with its power to regulate interstate commerce, Congress has enacted a number of laws that preempt state tort law. *See, e.g.*, Longshore and

Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (imposing liability without regard to fault); Price-Anderson Act, 42 U.S.C. § 2210 (limiting liability for nuclear power plant accidents); Federal Employers' Liability Act, 45 U.S.C., §§ 51 *et seq.* (governing the liability of interstate railway carriers to their employees and altering State tort law on available defenses). These laws have been found to be constitutional. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 6489, 6493 (1978) (Price-Anderson Act); *Mondou v. New York, New Haven, & Hartford R.R. Co.*, 223 U.S. 1 (1912) (Federal Employers' Liability Act).

More recently, the 103rd Congress enacted the General Aviation Revitalization Act of 1994, which was signed by President Clinton on August 17, 1994.[3] That law established a uniform, national eighteen-year statute of repose for general aviation aircraft. The 104th Congress enacted the Private Securities Litigation Reform Act of 1995,[4] the Federally Supported Health Centers Assistance Act of 1995,[5] and the Bill Emerson Good Samaritan Food Donation Act of 1996,[6] and the Coast Guard Authorization Act of 1996.[7] The 105th Congress enacted the Volunteer Protection Act of 1997, which was signed by President Clinton on June 18, 1997.[8] That law includes a uniform standard for punitive damages awards and abolishes joint liability for noneconomic loss in tort actions against volunteers. Both of these provisions are virtually identical to reforms contained in S. 648, the Product Liability Reform Act of 1997.

Federal product liability reform legislation is consistent with Congress' traditional regulation of matters affecting interstate commerce. It is also consistent with the trend since the mid-1960s toward increased federal involvement in consumer product safety, an inherent part of interstate commerce.[9]

---

[3] Pub. L. No. 103-298, 108 Stat. 1552.

[4] Pub. L. No. 104-67, 109 Stat. 737 (placing limits on the conduct of private lawsuits under the Securities Act of 1933 and the Securities Exchange Act of 1934).

[5] Pub. L. No. 104-73, 109 Stat. 777 (extending Federal Tort Claims Act coverage to community, migrant, and homeless health centers).

[6] Pub. L. No. 104-210 (providing limited tort immunity to encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals).

[7] Pub. L. No. 104-324 § 1129) (permitting state law limitations on damages awards to apply to tort claims arising out of shoreside medical care and permitting contractual limitations on noneconomic damages awards).

[8] Pub. L. No. 105-19.

[9] *See* S. Rep. No. 69, 105th Cong., 1st Sess. 30 n.90 (1997).

Moreover, as the Supreme Court cases cited above explain, the fact that some product liability cases arguably involve only intrastate activity, does not undercut Congress' authority to regulate such activity pursuant to the Commerce Clause. Hugh damage awards in product liability cases, as well as the legal costs associated with defending product liability claims, create a hostile legal environment that discourages business activity and curtails interstate economic activity.

C. Recent Supreme Court Decisions Do Not Undermine Congress' Power Under The Commerce Clause To Enact Product Liability Reform Legislation

Notwithstanding the long history of Congressional involvement in matters affecting interstate commerce, we anticipate that opponents of federal product liability reform may question whether Congress has the authority to enact product liability reform legislation based on a recent trilogy of Supreme Court decisions: (i) *United States v. Lopez,* 111 S. Ct. 1624 (1995); (ii) *City of Boerne v. Flores,* 1997 U.S. LEXIS 4035 (U.S. June 25, 1997); and (iii) *Printz v. United States,* 1997 U.S. LEXIS 4044 (U.S. June 27, 1997). As explained below, none of these decisions curtails Congress' power to regulate activity having an effect on interstate commerce.

1. In *United States v. Lopez,* the Court considered whether Congress' enactment of the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone," was a proper exercise of Congress' Commerce Clause power. The Court held that it was not because "[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." 115 S. Ct. at 1626.

The Court explained that the Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however, broadly one might define those terms." *Id.* at 1630-31. More specifically, "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm has any concrete tie to interstate commerce." *Id.* at 1634.

While the Court in *Lopez* held that the criminal statute at issue regulated a purely local issue, the Court did not in any way narrow Congress' Commerce Clause power. In fact, it left open the possibility of expanding that power in the

right case. The Court acknowledged that many of its prior cases have given the Commerce Clause an expansive reading, and "[t]he broad language in these opinions has suggested the possibility of additional expansion . . . ." But, because the statute in *Lopez* regulated purely local criminal -- not economic -- activity, it was inappropriate to accord the Commerce Clause a more expansive reading in that case.

2. *Boerne v. Flores* was not a Commerce Clause case. The issue in that case was whether Congress' enactment of the Religious Freedom Restoration Act ("RFRA") was a proper exercise of its enforcement power under Section 5 of the Fourteenth Amendment. The Supreme Court held that it was not.

Section 5 empowers Congress to enact legislation necessary to enforce the provisions of the Fourteenth Amendment that guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws." "RFRA prohibits 'government' from 'substantially burdening' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the last restrictive means of furthering that compelling governmental interest.'" *Boerne v. Flores*, 1997 U.S. LEXIS 4035, *14 (1997) (quoting 42 U.S.C. § 2000bb-1).

The Court held that, through RFRA, Congress was attempting to impose a substantive change in constitutional protections. "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause." Thus, the Court held that, in enacting RFRA, Congress exceeded its authority under Section 5.

3. In *Printz v. United States*, the Court considered the constitutionality of the provisions in the Brady Handgun Violence Prevention Act requiring the "chief law enforcement officer" (CLEO) of each local jurisdiction to conduct background checks of handgun purchasers and to perform related tasks until a national system for performing such checks was instituted. The Court explained that "the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." 1997 U.S. Dist. LEXIS 4044, *12.

The Court held that, because Article III, Section 3, of the Constitution delegates to the President responsibility for administering the laws enacted by Congress, Congress exceeded its authority when it delegated this function to CLEOs:

> The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers who he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves presidential appointees), Art. II, § 2. The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove).

Id. at *41.

The Court held that the provisions in question were unconstitutional -- not because they exceeded Congress' power under the Commerce Clause -- but because they improperly delegated to state officers responsibilities belonging to the Executive Branch of the federal government.

* * *

In sum, the Supreme Court had long interpreted the Commerce Clause to empower Congress to enact laws that regulate economic activity having a substantial effect on interstate commerce, even if that activity is intrastate in nature. The recent trilogy of Supreme Court cases has in no way eroded that broad power.

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TENNESSEE LAW REVIEW

FEDERAL PRODUCT LIABILITY REFORM IN 1997: HISTORY AND PUBLIC POLICY SUPPORT ITS ENACTMENT NOW

Victor E. Schwartz
and
Mark A. Behrens

VOLUME 64 **SPRING 1997** **NUMBER 3**

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TENNESSEE LAW REVIEW

Member of the National Conference of Law Reviews

Volume 64 | Spring 1997 | Number 3

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FEDERAL PRODUCT LIABILITY REFORM IN 1997: HISTORY AND PUBLIC POLICY SUPPORT ITS ENACTMENT NOW

VICTOR E. SCHWARTZ*
MARK A. BEHRENS**

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* Victor E. Schwartz is a senior partner in the law firm of Crowell & Moring, LLP in Washington, D.C. He obtained his B.A. *summa cum laude* from Boston University in 1962 and his J.D. *magna cum laude* from Columbia University in 1965. Mr. Schwartz is the drafter of the Model Uniform Product Liability Act and has recently been appointed to the Advisory Committees of the American Law Institute's RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY and RESTATEMENT OF THE LAW OF TORTS: APPORTIONMENT OF LIABILITY projects. He is co-author of JOHN WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS (9th ed. 1994) and author of VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE (3d ed. 1994). Mr. Schwartz is counsel to the Product Liability Coordinating Committee, the principal coalition of the business community on federal product liability reform, with over 800,000 members nationwide.

** Mark A. Behrens is a senior associate in the law firm of Crowell & Moring, LLP in Washington, D.C. He received his B.A. from the University of Wisconsin-Madison in 1987 and his J.D. from Vanderbilt University in 1990, where he served as Associate Articles Editor of the *Vanderbilt Law Review*. Mr. Behrens is co-counsel to the Product Liability Coordinating Committee.

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I. INTRODUCTION

Americans need a tort system that has enough "punch" to keep dangerous, defective products off the market. The current product liability system, however, is a blunt instrument. We need a system that is more selective and does not net the dolphins with the tuna.

Here are some specifics about problems in our product liability system. Pregnant women no longer have access to a drug once widely prescribed to treat "morning sickness," in part because of the manufacturer's legitimate concern about runaway liability.[1] The availability of medical devices such as pacemakers, brain shunts, implanted defibrillators, heart valves, and hip and knee replacements used by senior citizens is critically threatened

1. *See* S. REP. NO. 104-69, at 7 (1995).

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because of overly broad joint and several liability.[2] The chief executive officer of a biotechnology company has stated that his company decided not to pursue research into the development of an AIDS vaccine because of the current U.S. product liability system.[3]

Federal product liability reform can right the scales of justice, preserving the tort "punch" while eliminating overdeterrence caused by excessive and uncertain liability. A real life example of how this balance can be achieved is reflected in the General Aviation Revitalization Act of 1994 ("GARA"),[4] which created a federal eighteen-year limit on litigation involving noncommercial small aircraft. This law already has resulted in thousands of new high-paying jobs; the planes being manufactured are among the safest ever made.[5]

The Association of Trial Lawyers of America ("ATLA"), the principal organization of the plaintiffs' bar, and its allied professional consumer groups harshly predicted in 1994 that no new job growth could be expected from GARA and, if it did occur, unsafe planes would be produced.[6] To the best of our knowledge, these groups have never acknowledged that the law signed by President Clinton—the *only* existing example of federal product liability reform—has worked well.

After a decade-and-a-half of debate, the time has come for a broader federal product liability law. The benefits of the GARA law can and should be spread to other aspects of our society. Diligent, time consuming work by Senators[7] and Congressmen[8] has lead to balanced legislation that neither echoes the views of ATLA nor the so-called "business community."

Thus far, ATLA has refused to recognize this balancing process and has used its very ample resources to block even the most modest of federal product liability reform proposals. Fortunately, most members of Congress are likely to recognize that ATLA's resources should not stand in the path of fair and balanced law. The President may wish to build on his accomplishment for the small aircraft industry by embracing broader reform.

This article will briefly describe the extensive history of the federal product liability effort. It will then discuss the need for federal product

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2. *Id.* at 51.

3. *See id.* at 36 n.123.

4. *See* General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. §§ 40101-40120 (1994)).

5. Victor E. Schwartz & Mark A. Behrens, *The Road to Federal Product Liability Reform*, 55 MD. L. REV. 1363, 1374 n.78 (1996).

6. *Hearing on H.R. 3087, General Aviation Revitalization Act of 1993 Before the Subcomm. on Economic and Commercial Law of the House of Representatives Comm. on the Judiciary*, 103d Cong. 4-5, 16 (1994) (statement of Charles T. Hvass, Jr.).

7. Senators John D. Rockefeller, IV (D-WV), Slade Gorton (R-WA), Joseph Lieberman (D-CT), Christopher Dodd (D-CT), and many others in the Senate.

8. Congressmen Henry Hyde (R-IL), Thomas J. Bliley, Jr. (R-VA), John Dingell (D-MI), Michael Oxley (R-OH), W.J. "Billy" Tauzin (R-LA), and many others in the House.

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liability reform and provide a factual basis and public policy reasons to support it. The principal focus of the article will be the 1995–96 legislation, and in particular the Conference Report on H.R. 956.[9] Finally, this Article will suggest opportunities for product liability reform legislation in the 105th Congress.

II. HISTORICAL BACKGROUND

A. The Beginning: The Federal Interagency Task Force on Product Liability

The effort to enact federal product liability reform legislation has its foundation in in-depth research and analysis conducted by the Federal Interagency Task Force on Product Liability ("Task Force") from 1976 through 1980.[10] The Task Force made two principal recommendations after studying the problems of America's product liability system.[11]

First, to enable small businesses to have a better and fairer opportunity in the liability insurance market, the Task Force recommended federal legislation to facilitate the ability of such businesses to form self-insurance pools and purchasing groups.[12] The resulting legislation, the Product Liability Risk Retention Act,[13] became law in 1981. In general, it has worked well. Today, risk retention groups generate over $2 billion in premiums.[14]

Under the Risk Retention Act, premiums are based on true market competition.[15] This fact is important in 1997. The existence of an "easy" self-insurance option helps assure that any savings brought about by a federal product liability law will be passed along to insureds and the American public.

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9. H.R. CONF. REP. NO. 104-481 (1996). For the full text of H.R. 956, see Symposium, *Is H.R. 956 Really "Common Sense"?: A Symposium on Federal Tort Reform Legislation*, 64 TENN. L. REV. 557, 559-94 (1997).

10. *See* Schwartz & Behrens, *supra* note 5, at 1363. The Task Force, which began under President Ford in 1976 and concluded its work under President Carter in 1980, established the bipartisan nature of the entire effort to address the product liability problem. *Id.*

11. *See generally* INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT (1976) [hereinafter FINAL REPORT].

12. *See id.* at VII-142.

13. Pub. L. No. 97-45, 95 Stat. 949 (1981) (codified as amended at 15 U.S.C. §§ 3901–3906 (1994)). The law was extended to all liability coverage, with the exception of workers' compensation, in 1986. *See* Pub. L. No. 99-563, 100 Stat. 3170 (1986).

14. *Risk Retention Act Celebrates Tenth Anniversary*, RISK RETENTION REP., Oct. 1996, at 1.

15. *See* 15 U.S.C. §§ 3902-3903 (1994).

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Second, the Task Force found that easier self-insurance options alone would not address the product liability problem facing American consumers and businesses.[16] Self-insurers and commercial insurers alike still would confront growing uncertainties in the law of product liability.[17]

The Task Force found the root of the problem to be the ever-changing product liability law of the individual states.[18] To resolve this issue, the Task Force recommended and then drafted a model law, known as the Model Uniform Product Liability Act ("Uniform Act"),[19] for use by the states. The Carter Administration indicated that if the states did not enact the model law in a uniform manner, federal legislation might be needed.[20]

B. The Model Uniform Product Liability Act

The Task Force's Uniform Act served as the basis for legislation in about nine states; it was not adopted throughout the Nation.[21] Furthermore, those states which did enact the Model Act did not do so "uniformly."[22] To the contrary, because of political pressures from plaintiffs' lawyers on one side and manufacturers on the other, state legislatures adopted provisions of the model law in a piecemeal fashion.[23]

C. Federal Product Liability Legislation

The fact that individual states would not uniformly adopt the Uniform Act was foreseen as early as 1979 by Representative and then House Commerce Committee Chairman John Dingell, who stated that ultimately the product liability public policy battle would occur in "one Super Bowl at the federal level rather than fifty separate skirmishes in state legislatures." In light of this wise foresight, Representative Dingell, along with then House Commerce Committee ranking Republican James Broyhill, authorized the drafting of the first comprehensive federal product liability bill. Hearings were held and the result was a very carefully drafted proposal. The Dingell-Broyhill legislation was based on the Model Uniform Product Liability Act and focused on the key issues contained in that document, namely, liability

16. *See* FINAL REPORT, *supra* note 11, at VII-242 to VII-257.

17. *See id.* at VII-243.

18. *Id.* at I-28.

19. 44 Fed. Reg. 62,714 (1979).

20. *See* 43 Fed. Reg. 14,624 (1978).

21. Schwartz & Behrens, *supra* note 5, at 1366.

22. *Id.*

23. *See* S. REP. NO. 102-215, at 11 (1991). This trend continued into 1995 and 1996 with the enactment of various general tort reform laws in states such as Illinois, Indiana, Louisiana, Michigan, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Texas, and Wisconsin.

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standards for manufacturers and product sellers, a statute of repose, punitive damage rules, and a statute of limitations.[24]

In 1981, the development of federal product liability law shifted to the Senate. Republican Senator Robert Kasten placed a draft of Representative Dingell's bill in the Federal Register and called for public commentary.[25] After making substantial revisions to the draft based on over 2,000 pages of public comment and two days of intensive hearings, Senator Kasten introduced the first comprehensive Senate product liability bill in June 1982.[26]

Product liability reform legislation has been considered in every subsequent Congress, spanning both Republican and Democratic Congresses and Administrations. A bipartisan bill was reported out of the House Commerce Committee in 1988; the Senate Commerce Committee has reported out bipartisan bills six times.[27] Although it is likely that a majority of each branch of Congress would have supported federal product liability reform, skilled ATLA lobbying prevented both Houses from voting on bills.

In the 104th Congress, federal product liability legislation reached the Senate and House floors and was passed by both chambers of Congress.[28] Bills were introduced in the House on January 4, 1995, by House Judiciary Committee Chairman Hyde[29] and on February 13, 1995, by Michael Oxley, Chairman of the Subcommittee on Commerce, Trade and Hazardous Materials of the House Commerce Committee.[30] Hearings were held in February 1995.[31] The Judiciary and Commerce Committee bills were subsequently combined and reintroduced as H.R. 956, the Common Sense Legal Standards Reform Act of 1995[32] ("H.R. 956"). The House effort culminated on March 10, 1995, with the approval of H.R. 956 by a vote of 265 to 161.[33]

On March 15, 1995, bipartisan legislation was introduced in the Senate by Senators John D. Rockefeller, IV, Slade Gorton and others.[34] The Senate Committee on Commerce, Science, and Transportation's Subcommittee on Consumer Affairs, Foreign Commerce, and Tourism held hearings on April 3-4, 1995,[35] and reported out a bill on April 6, 1995.[36] The Senate

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24. S. REP. NO. 98-476, at 10 (1984).
25. *Id.*
26. *Id.*
27. S. REP. NO. 104-69, at 15-17 (1995).
28. *See generally* Schwartz & Behrens, *supra* note 5, at 1364.
29. *See* Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong. (1995).
30. *See* Common Sense Product Liability Reform Act, H.R. 917, 104th Cong. (1995).
31. *See* H.R. REP. NO. 104-63, at 12 (1995); H.R. REP. NO. 104-64, at 7 (1995).
32. H.R. 956, 104th Cong. (1995).
33. 141 CONG. REC. H3027 (daily ed. Mar. 10, 1995).
34. *See* Product Liability Fairness Act of 1995, S. 565, 104th Cong. (1995).
35. S. REP. NO. 104-69, at 14 (1995).

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approved H.R. 956, as amended by S. 565, the Product Liability Fairness Act of 1995, on May 10, 1995, by a vote of sixty-one to thirty-seven.[37] This was the first time that a trial lawyer filibuster against product liability reform was broken in the United States Senate.

In December 1995, the House and Senate leadership appointed members of both branches to a Conference Committee for the purpose of resolving differences between the House and Senate bills. The Conferees resolved those differences and issued a Conference Report bill, H.R. 956, the Common Sense Product Liability Legal Reform Act of 1996, on March 14, 1996.[38] Again, the Senate was able to end a trial lawyer filibuster in order to proceed to a vote on the legislation. The Senate passed the Conference Report on March 21, 1996, by a vote of fifty-nine to forty.[39] The House passed it on March 29, 1996, by a vote of 259 to 158.[40] President Clinton received the Conference Report bill on April 30, 1996, and vetoed it on May 2, 1996.[41]

Many of the President's principal concerns were predicated more on perceived unintended, rather than intended, consequences of the Conference Report.[42] Product liability reform legislation in 1997 can and should address the President's concerns, so that a bill can be produced that the President will be pleased to sign.

III. FEDERAL PRODUCT LIABILITY REFORM IS NEEDED

A. Problems With A State-by-State Approach

Congress is uniquely suited to enact a national solution to the problem of overkill in the product liability system. State product liability legislation, while useful, cannot solve the national product liability problem because a state cannot regulate product liability problems outside its borders. United States Department of Commerce data indicates that, on average, over

36. *Id.* at 15.

37. 141 CONG. REC. S6407 (daily ed. May 10, 1995).

38. *See* H.R. CONF. REP. NO. 104-481 (1996).

39. 142 CONG. REC. S2590 (daily ed. Mar. 21, 1996).

40. 142 CONG. REC. H3204 (daily ed. Mar. 29, 1996).

41. *See* John F. Harris, *Clinton Vetoes Product Liability Measure*, WASH. POST, May 3, 1996, at A14; Neil A. Lewis, *President Vetoes Limits on Liability*, N.Y. TIMES, May 3, 1996, at A1; *The Lawyers' Veto*, WALL ST. J., May 3, 1996, at A12. A veto override that was attempted in the House on May 9, 1996 in order to preserve a record on the issue fell twenty-three votes short of passage. Schwartz & Behrens, *supra* note 5, at 1365 n.18.

42. *Federal Product Liability Reform: A Focus on Realities and the Disposing of Myths: Testimony Before the Senate Comm. on Commerce, Science and Transportation*, 105th Cong. 2-13 (1997) (testimony of Victor E. Schwartz, Esq.).

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seventy percent of the goods that are manufactured in a particular state are sold elsewhere.[43]

Insurers recognized this fact years ago and set insurance rates based on country-wide, not individual state, data.[44] In that regard, one can contrast product liability with workers' compensation. When a worker is injured due to employer fault or neglect, all of the relevant facts usually occur in the same state. For that reason, workers' compensation rates vary from state to state and are based on intrastate data. Consequently, if a company moves from State A to State B, its workers' compensation insurance costs will change, but its product liability insurance costs will not.

B. States' Rights Groups Recognize the Need for Federal Reform

The National Governors' Association ("NGA") has "recognized both the need for product liability reform and the necessity of federal action to effectuate that reform."[45] Governors do not cede issues to the federal government lightly. In fact, the NGA has a strict rule against federal preemption, except in extreme circumstances.[46] Nevertheless, on several different occasions, the NGA has adopted resolutions calling for Congress to enact uniform federal product liability legislation.[47] The NGA's most recent (February 7, 1997) resolution reads, in part, as follows:

> The National Governors' Association recognizes that the current patchwork of U.S. product liability laws is too costly, time-consuming, unpredictable, and counterproductive, resulting in a severely adverse effect on American consumers, workers, competitiveness, innovation and commerce.
>
> . . . .
>
> Clearly, a national product liability code would greatly enhance the effectiveness of interstate commerce. The Governors urge Congress to adopt a federal uniform product liability code.[48]

The American Legislative Exchange Council ("ALEC"), a bipartisan organization of over 3,000 state legislators from all fifty states which

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43. *See* U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, COMMODITY TRANSPORTATION SURVEY 1-7 (1977).

44. FINAL REPORT, *supra* note 11, at I.

45. S. REP. NO. 104-69, at 13 (1995). As Governor of Arkansas, President Clinton twice sat on NGA committees that drafted and unanimously approved resolutions calling for federal product liability reform. *See Trial Lawyers' Triumph*, WASH. POST, Mar. 19, 1996, at A16.

46. S. REP. NO. 104-69, at 14 (1995).

47. *See Testimony Before the House Comm. on the Judiciary*, 105th Cong. 1 (1997) (testimony of James L. Martin, Director, State-Federal Relations, National Govenors' Ass'n) (on file with the *Tennessee Law Review*).

48. *Id.* (quoting NGA POLICY EDC-15 (1997)).

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advocates states' rights, supports federal product liability legislation.[49] The Defense Research Institute ("DRI"), a private organization especially sensitive to state control over the liability system, also supports federal product liability reform.[50]

C. Judges Experienced in Product Liability Law Support Federal Product Liability Reform

Prominent judges and authors also support federal product liability legislation. Federal District Judge Warren Eginton, author of the former *Product Liability Journal*; New Jersey Court of Appeals Judge William Dreier, author of the *Product Liability Journal of New Jersey*; and Richard Neely, former Chief Justice of the Supreme Court of West Virginia and author of numerous books on judicial practices, have provided testimony attesting to the need for uniformity.[51] Only federal legislation can create the uniformity necessary to relieve the enormous burdens imposed by the existing product liability system.

D. Competitors Operate Under Uniform Product Liability Laws

The Europeans began an effort to create a uniform product liability law two years after the U.S. Congress first looked at the subject in 1981.[52] In July 1985, the Council of the European Community adopted a uniform product liability directive that is now law in thirteen European countries.[53] This Directive served as a model for Australia in 1992 and for Japan in 1994.[54]

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49. *Id.* at 14.

50. *See Product Liability Standards: Hearings on H.R. 1910 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 103d Cong. 451 (1994) (statement of James Oliphant, President, Defense Research Institute).

51. *See* S. REP. NO. 104-69, at 6 (1995); Letter from William A. Dreier, Judge, Superior Court of New Jersey, to Joseph R. Biden, Chairman, Senate Judiciary Committee 2-4 (July 31, 1992) (on file with the *Tennessee Law Review*); *Federal Product Liability Law and S. 640: Testimony Before the Senate Comm. on Commerce*, 102d Cong. 10 (1991) (testimony of Richard Neely, Justice, West Virginia Supreme Court of Appeals) (on file with the *Tennessee Law Review*).

52. Schwartz & Behrens, *supra* note 5, at 1368.

53. *See* Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability For Defective Products, 1985 O.J. (L 210) 29.

54. *See* Mark A. Behrens & Daniel H. Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, But Access To Recovery Is Limited By Formidable Barriers*, 16 U. PA. J. INT'L BUS. L. 669, 670 (1995).

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Ironically, it has been easier for the diverse European countries, Japan and Australia to balance local sovereign needs in the area of product liability than it has been for the Congress to agree on a uniform law for the United States.

E. Legislatures Versus Courts

Some consumer advocacy groups and plaintiffs' lawyers have argued that neither Congress nor state legislatures should have a role in making liability laws.[55] They contend that the subject should be left to the courts.[56] In 1995, for example, ATLA President Larry Stewart suggested to several congressional committees that product liability law should be left to the courts on a decision-by-decision basis.[57]

Proponents of reform, however, do not advocate a complete federal "takeover" of product liability law. Instead, they believe that, in a few core areas, Congress is better suited to formulate sound national policy than courts in the fifty states and the District of Columbia.[58] When courts formulate law, they basically hear from two attorneys who are focusing on a narrow point of law on behalf of the private interests of their clients. In contrast, Congress has the opportunity of hearing, as the records clearly show, from a wide array of perspectives.[59] Furthermore, unlike judge-made common law rules, congressional enactments apply in a prospective manner, providing fair notice to all what their rights and responsibilities are under the law. A fundamental principle that opponents of reform sometimes ignore is that tort law governs conduct, as much as rules indicating the maximum speed limit on highways. Most people believe that these rules should be uniform, clear, and prospective in nature.

IV. FEDERAL PRODUCT LIABILITY REFORM IS CONSTITUTIONAL

A. The Commerce Clause Supports Federal Product Liability Reform

Congress has the power under the Commerce Clause of the United States Constitution to enact a federal product liability statute that preempts

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55. Schwartz & Behrens, *supra* note 5, at 1368.

56. *Id.*

57. *See Product Liability and Legal Reform: Hearings on H.R. 10 Before the House Comm. on the Judiciary*, 104th Cong. 54 (1995) (statement of Larry Stewart, President, the Association of Trial Lawyers of America); *Common Sense Product Liability Reform Act: Hearings Before the Subcomm. on Commerce, Trade, and Hazardous Materials of the House Comm. on Commerce*, 104th Cong. 26 (1995) (same).

58. Schwartz & Behrens, *supra* note 5, at 1369.

59. *See* congressional hearings cited *supra* notes 50, 57.

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state law.[60] In fact, Congress has long exercised its authority in matters of interstate commerce by enacting federal solutions to problems,[61] including the enactment of statutes that preempt state tort law.[62]

For example, as previously indicated, Congress enacted and on August 17, 1994, President Clinton signed the General Aviation Revitalization Act of 1994.[63] That law represents sound public policy and addresses a problem of interstate commerce. Most recently, the 104th Congress enacted the Private Securities Litigation Reform Act of 1995,[64] the Federally Supported Health Centers Assistance Act of 1995,[65] and the Bill Emerson Good Samaritan Food Donation Act of 1996.[66]

Federal product liability reform legislation is consistent with Congress's traditional regulation of matters affecting interstate commerce. It is also consistent with the trend since the mid-1960s toward increased federal involvement in consumer product safety, an inherent part of interstate commerce.[67] Curiously, the very same professional consumer groups who

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60. *See* U.S. CONST. art. I, § 8, cl. 3; *see also* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 93 (1978) (upholding Congress's power to limit liability for nuclear accidents at private nuclear power plants). Congress also is empowered by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution to implement federal punitive damages reform. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The U.S. Supreme Court has expressly indicated in recent opinions that both substantive and procedural due process protections, as expressed in the Fourteenth Amendment, apply to punitive damages. *See infra* notes 119-20 and accompanying text.

61. *See, e.g.*, Consumer Product Safety Act, 5 U.S.C. §§ 5314-5315, 15 U.S.C. §§ 2051-2084 (1994) (enacted 1972); Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341 (1994); Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-395 (1994) (enacted 1938, regulating safety and labeling of food and drugs). The 104th Congress enacted the Aviation Disaster Family Assistance Act of 1996, Pub. L. No. 104-264, §§ 701-705, 110 Stat. 3213, 3264-69, which limited unsolicited contacts by lawyers or insurance company representatives with airline crash victims or their families.

62. *See, e.g.*, Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1994) (imposing liability without regard to fault); Price-Anderson Act, 42 U.S.C. § 2210 (1994) (limiting liability for nuclear power plant accidents); Employers' Liability Act, 45 U.S.C. §§ 51-60 (1994) (governing the liability of interstate railway carriers to their employees and altering State tort law on available defenses).

63. 49 U.S.C. §§ 40101-40120 (1994).

64. Pub. L. No. 104-67, 109 Stat. 737 (to be codified at 15 U.S.C. §§ 77-78) (placing limits on the conduct of private lawsuits under the Securities Act of 1933 and the Securities Exchange Act of 1934).

65. Pub. L. No. 104-73, 109 Stat. 777 (to be codified at 42 U.S.C. § 233) (extending Federal Tort Claims Act coverage to community, migrant, and homeless health centers).

66. Pub. L. No. 104-210, 110 Stat. 301 (to be codified at 42 U.S.C. § 12672) (providing limited tort immunity to encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals).

67. *See, e.g.*, Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (1994) (enacted 1972);

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suggest that Congress has no role in the area of product liability strongly and properly supported the enactment of the Consumer Product Safety Act of 1972.[68] They contended that mixed signals from states about product safety needed to be supplemented by clear uniform action at the federal level.

B. The Lopez Decision Does Not Undermine Commerce Clause Support for Product Liability Reform

Despite the long history of congressional involvement in matters affecting interstate commerce, some opponents of federal product liability reform have recently questioned whether Congress has authority to enact legislation in light of the United States Supreme Court's 1995 decision in *United States v. Lopez*.[69]

In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990,[70] which made it a federal offense for any individual knowingly to possess a firearm at a place that individual knows or has reasonable cause to believe is a school zone, exceeded Congress's Commerce Clause authority, since possession of a gun in a local school zone was not economic activity that substantially affected interstate commerce.[71] The *Lopez* decision is clearly distinguishable from those cases upholding regulation of activities that arise out of or are connected with commercial transactions that, viewed in the aggregate, substantially affect interstate commerce—cases which directly support Congress's Commerce Clause authority over product liability.[72] Not only was the law at issue in *Lopez* "a criminal statute that

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Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-1278 (1994) (enacted 1960); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (1994) (enacted 1966, repealed 1994); Poison Prevention Packaging Act, 15 U.S.C. §§ 1471-1476 (1994) (enacted 1970); Consumer Product Safety Act, 15 U.S.C. §§ 2051-2084 (1994) (enacted 1972); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1994) (enacted 1982); Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (codified as amended in scattered sections of 21 U.S.C.) (amending the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §§ 301-395); Occupational Safety and Health (OSHA) Act, 29 U.S.C. §§ 651-678 (1994) (enacted 1970).

68. 5 U.S.C. §§ 5314-5315, 15 U.S.C. §§ 2051-2084 (1994) (enacted 1972).

69. 115 S. Ct. 1624 (1995).

70. 18 U.S.C. § 922(q)(2)(A) (1994).

71. *Lopez*, 115 S. Ct. at 1633-34.

72. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (upholding national acreage allotments and penalties for wheat under the Agricultural Adjustment Act of 1938); United States v. Darby, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act of 1938, making it unlawful to ship in interstate commerce goods produced in violation of employment standards); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding National Labor Relations Board jurisdiction over any person engaged in unfair labor practices "affecting commerce").

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by its terms has nothing to do with 'commerce' or any sort of economic enterprise,"[73] it also sought to regulate purely local activity (possession of a firearm within 1,000 feet of a school) that lacked any close "tie to interstate commerce."[74]

In contrast, product liability is without question a matter of interstate commerce and, therefore, within the scope of Congress's Commerce Clause authority.[75] Furthermore, the fact that some cases involving product liability appear to relate to intrastate activity does not undercut Congress's Commerce Clause authority.[76]

V. PRINCIPAL PROVISIONS OF LIABILITY REFORM LEGISLATION IN THE 104TH CONGRESS

The Conference Report version of the product liability legislation considered in the 104th Congress, H.R. 956, would have provided fair and balanced rules for product liability actions in state and federal courts.

A. *Fair Rules for Product Seller, Lessor and Renter Liability*

Currently, under the law in about twenty-nine states, wholesale and retail product sellers are potentially liable for defects that they are neither aware of nor able to discover.[77] "They are drawn into the overwhelming majority of product liability cases."[78] Product sellers, however, rarely pay the judgment because in more than ninety-five percent of the cases, the manufacturer is responsible for the harm.[79] Upon this showing, the seller can get contribution or indemnity from the manufacturer, who ultimately pays the damages.[80]

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73. *Lopez*, 115 S. Ct. at 1630-31.

74. *Id.* at 1634.

75. *Cf.* United States v. NL Indus., Inc., 936 F. Supp. 545 (S.D. Ill. 1996) (holding Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, to be a valid exercise of Congress's Commerce Clause power).

76. *See, e.g.*, Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) (upholding mandate of Public Utility Regulatory Policy Act of 1978 that state agencies regulating utilities "consider" proposed rate designs and standards); Fry v. United States, 421 U.S. 542 (1975) (upholding Economic Stabilization Act of 1970, which authorized the President to stabilize wages, as applied to state employees); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding Civil Rights Act of 1964 as applied to local restaurant); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding wheat allotment penalties under the Agricultural Adjustment Act of 1938 against farmer who grew 23 acres for consumption on his farm alone).

77. S. REP. NO. 104-69, at 31 (1995).

78. *Id.*

79. *Id.*

80. *Id.*

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This approach "generates substantial, unnecessary legal costs" that are, to a great extent, absorbed by smaller businesses.[81] Some of this wasteful expense is passed on to consumers in the form of higher prices.[82] A less wasteful approach would allow the claimant to sue the manufacturer directly and to sue the product seller only if it was at fault.[83] Recognizing this fact, approximately twenty-one states have changed their law and now hold product sellers, such as wholesalers and retailers, liable in tort only if they were negligent (e.g., misassembled the product or failed to convey appropriate warnings to customers).[84]

H.R. 956 would have held product sellers liable only for their own negligence or for a product's failure to conform to an express warranty made by the product seller itself.[85] A product seller, however, would have been liable for the manufacturer's errors if the manufacturer could not be brought into court in any state where the action could have been brought or if the court determined that the manufacturer lacked funds to pay the judgment.[86] Thus, the provision would have ensured that an injured person could always sue either the manufacturer or the product seller.

Republican Senator Arlen Specter of Pennsylvania, who sought to assure that the provision was fair to all parties, pointed out that it might be possible that a manufacturer would be available and solvent at the start of the case, but insolvent after a judgment was rendered against it. Meanwhile, the statute of limitations might have expired against the product seller. To respond to Senator Specter's concern, a provision was added to the legislation to toll or suspend the statute of limitations against the product seller in the case of the manufacturer's post-verdict insolvency.[87]

We offer this somewhat technical example to show that proponents of this legislation made every effort to respond to legitimate concerns raised

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81. *See id.*
82. *Id.*
83. *Id.*
84. *See* COLO. REV. STAT. § 13-21-402 (1987); DEL. CODE ANN. tit. 18, § 7001 (1989); GA. CODE ANN. § 51-1-11.1 (Supp. 1996); IDAHO CODE § 6-1407 (1990); 735 ILL. COMP. STAT. ANN. 5/2-621 (West 1992); IOWA CODE ANN. § 613.18 (West Supp. 1996); KAN. STAT. ANN. § 60-3306 (1994); KY. REV. STAT. ANN. § 411.340 (Michie 1992); LA. REV. STAT. ANN. § 2800.54 (West 1991); MD. CODE ANN., CTS. & JUD. PROC. § 5-311 (1995); MICH. COMP. LAWS § 600.2947(6) (1996); MINN. STAT. ANN. § 544.41 (West 1988); MO. REV. STAT. § 537.762 (1988); NEB. REV. STAT. § 25-21,181 (1995); N.J. STAT. ANN. § 2A:58C-9 (West Supp. 1996); N.C. GEN. STAT. § 99B-2 (1995); N.D. CENT. CODE § 28-01.3-04 (Supp. 1995); OHIO REV. CODE ANN. § 2307.78 (Anderson 1995); S.D. CODIFIED LAWS ANN. § 20-9-9 (Michie 1995); TENN. CODE ANN. § 29-28-106 (Supp. 1996); WASH. REV. CODE ANN. § 7.72.040 (West 1992).
85. H.R. 956, 104th Cong. § 103 (1995).
86. *Id.*
87. *See* H.R. 956, 104th Cong. § 103(b) (1995).

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about the legislation. In that regard, we question the case of Senator Specter because he voted *against* the bill.[88]

B. Barring Claims Due to a Person's Use of Illegal Drugs or Drunkenness

In about eleven states, a person who is inebriated or under the influence of illegal drugs can recover in a product liability action even if that condition was a substantial cause of the harm.[89] For many years, product liability proposals in Congress have sought to put an end to this situation. H.R. 956 provided that if the principal cause of an accident was the claimant's abuse of alcohol or illicit drugs, he or she would no longer be able to recover.[90] The provision was based on a Washington statute.[91]

The alcohol/drug defense implements sound public policy. It tells persons that if they are drunk or on illegal drugs, and that condition is the principal cause of an accident, they will not be rewarded through the product liability system.[92] It also relieves law-abiding citizens from having to subsidize others' irresponsible conduct through higher consumer prices.

C. Consumers Should Not Have to Pay for People Who Misuse or Alter Products

The current product liability system allows claimants in some instances to grossly misuse products, injure themselves, and then turn to a "deep pocket" for compensation. This approach is unjust to manufacturers and responsible consumers, reflects unsound policy, and deviates from traditional notions of fairness and individual responsibility.

H.R. 956 placed responsibility for the reasonable use of products where it is most effective—on the person using the product. Following the law in the majority of states,[93] H.R. 956 would have reduced a claimant's damage award by the amount attributable to misuse or alteration of a product if the

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88. *See* 142 CONG. REC. S2590 (daily ed. Mar. 21, 1996).

89. *See* S. REP. NO. 104-69, at 33 (1995).

90. H.R. 956, 104th Cong. § 104 (1995).

91. *See* WASH. REV. CODE ANN. § 5.40.060 (West 1995).

92. S. REP. NO. 104-69, at 33 (1995). The majority of states have laws that do *not* permit recovery in this situation. *Id.* at 33 n.117. Four states, Alabama, Maryland, North Carolina, and Virginia, and the District of Columbia, "continue to recognize contributory negligence as an absolute defense." *Id.* Thirty-two states have adopted a form of modified comparative fault: Arkansas, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin and Wyoming. *Id.*

93. *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE app. B (3d ed. 1994).

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defendant could show that the misuse or alteration was in violation of adequate warnings or instructions, or involved a risk of harm that should have been known by an ordinary user of the product.[94]

D. *Uniform Time Limits on Liability*

1. Pro-Plaintiff "Discovery Rule" Statute of Limitations

Early in the history of federal product liability reform efforts, consumer groups were asked what was their primary problem with the product liability system. Their answer was arbitrary statutes of limitations that bar a person's claim before he or she becomes aware of an injury or its cause.

For that reason, H.R. 956 established a two-year statute of limitations for product liability actions that would begin to run when the claimant discovered or, in the exercise of reasonable care, should have discovered *both* the harm that is the subject of the action *and* its cause.[95] Some states, such as Virginia, bar claims a number of years after a person has been injured, regardless of whether that person actually knew of the injury (*e.g.*, a lung cancer that manifested itself many years after an initial "harm" occurred).[96] A greater number of states bar claims a number of years after a person knew or should have known the cause of the harm (*e.g.*, asbestos).[97] H.R. 956 would have opened courthouse doors to many whose right to sue now depends on which state statute of limitations happens to apply to their claim.

In addition, H.R. 956 would have alleviated the frequent hardship to families who have lost a loved one caused by the statute of limitation periods in state wrongful death statutes. The prevailing rule in most state wrongful death statutes bars a claim after a certain number of years following the date of the family member's death.[98] H.R. 956 would have preserved these claims for the "discovery" period (*i.e.*, until two years after a surviving relative discovered or in the exercise of reasonable diligence could have discovered the cause of the loved one's death).[99]

We have suggested that the Conference Report, *taken as a whole*, was fair and balanced. The "discovery rule" statute of limitations provision was part of that balance. It would have had a dramatic, pro-consumer effect on today's product liability law. One of the more perplexing political aspects of the legislation, therefore, focuses on why this provision was not given

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94. H.R. 956, 104th Cong. § 105 (1995).
95. *Id.* § 106(a).
96. S. REP. NO. 104-69, at 42 (1995).
97. *Id.*
98. Schwartz & Behrens, *supra* note 5, at 1373.
99. *See* H.R. 956, 104th Cong. § 106(a) (1995).

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more acknowledgment, particularly since many cases today are *lost* because of state statutes of limitations.

2. Statute of Repose

For almost two decades, scores of small business owners have testified about the adverse effects of litigation regarding very old machine tools and durable goods.[100] The cases usually involve a product that has been used safely for a substantial period of time, but was altered or modified in some way that rendered it unsafe.[101] These small business manufacturers usually win these cases, but the legal costs are enormous.[102] For example, the Association for Manufacturing Technology (formerly The National Machine Tool Builders Association) has testified before Congress that its members spend seven times more on product liability costs than on research and development.[103]

Potential liability from stale claims has serious and adverse consequences for United States manufacturers. Foreign competitors can enter the United States market and sell products cheaper than their United States counterparts because foreign companies generally do not face liability costs for very old products.[104] Furthermore, principal foreign competitors of the United States have enacted legislation recognizing that, at some point, an outer time limit or "repose" on litigation is reasonable and necessary.[105] The new "pro-consumer" Japanese product liability law and the European Community Product Liability Directive adopted by the European countries and Australia each have a repose period of ten years that covers all products.[106]

In the United States, a growing number of states (eighteen) have enacted product liability statutes of repose, ranging from eight years to fifteen years; the typical repose period is between ten and twelve years.[107] The General

100. Schwartz & Behrens, *supra* note 5, at 1373.

101. S. REP. NO. 104-69, at 44 (1995).

102. *Id.*

103. *Product Liability Reform Act: Hearings on S. 1400 Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong. 215, 217 (statement of Howard Fark, Director, the Association for Manufacturing Technology).

104. S. REP. NO. 104-69, at 10 (1995).

105. *See id.*

106. *See* H.R. REP. NO. 104-63, at 10-11; S. REP. NO. 104-69, at 44 (1995).

107. *See* ARK. CODE ANN. § 16-116-105(c) (Michie 1987) ("anticipated life" of product); COLO. REV. STAT. § 13-21-403(3) (1987) (10 years); CONN. GEN. STAT. ANN. § 52-577a (West 1991 & Supp. 1996) (10 years); GA. CODE ANN. § 51-1-11(b)(2) (Supp. 1996) (10 years); IDAHO CODE § 6-1403(2) (1990) ("useful safe life" of product, 10 year presumption); 735 ILL. COMP. STAT. ANN. 5/13-213(b) (West 1992) (12 years from date of first sale, or 10 years from date of sale to first user, whichever is shorter); IND. CODE ANN.

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Aviation Revitalization Act of 1994[108] created a uniform, federal eighteen-year statute of repose for general aviation aircraft.[109]

H.R. 956, which was not preemptive of state statutes, selected a time limit of fifteen years:[110] fifty percent longer than the Japanese law and the European Directive,[111] and equal in length to the longest state statutes of repose.[112] The provision in H.R. 956 was limited to durable goods (*e.g.*, machine tools),[113] and did not apply in cases involving a "toxic harm."[114]

The exception for goods causing "toxic harms" was intended to blend in harmony with the bill's statute of limitations. The purpose was to avoid shutting down claims when an injury is latent. In such situations, the time period that expires is often caused by the fact that the consumer does not yet realize that the product caused a latent harm. Once again, the authors of the legislation sought to balance commercial need and consumer fairness.

E. Alternative Dispute Resolution

Apart from arbitrary statutes of limitations, consumer groups are primarily concerned that the current product liability system is inaccessible to many product liability claimants because of its complexity and expense. The alternative dispute resolution ("ADR") procedure provision in H.R. 956

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§ 33-1-1.5-5(b) (Michie 1992) (10 years); KAN. STAT. ANN. § 60-3303 (1994) ("useful safe life" of product, 10 year presumption); KY. REV. STAT. ANN. § 411.310(1) (Michie 1992) (presumption that product is not defective if harm occurred five years after sale to first consumer or eight years after manufacture); MICH. COMP. LAWS § 600.5805(9) (West 1987) (if product in use for 10 years, plaintiff must prove *prima facie* case without benefit of any presumption); MINN. STAT. ANN. § 604.03 (West 1988) ("useful life" of product); NEB. REV. STAT. § 25-224(2) (1995) (10 years); N.D. CENT. CODE § 28-01.3-08(1) (Supp. 1995) (10 years of purchase or 11 years of date of manufacture); OHIO REV. CODE ANN. § 2305.10(C) (Anderson Supp. 1996) (15 years); OR. REV. STAT. § 30.905(1) (1995) (8 years); TENN. CODE ANN. § 29-28-103(a) (Supp. 1996) (10 years or 1 year after expiration of product's "anticipated life," whichever is shorter); TEX. CIV. PRAC. & REM. CODE ANN. § 16.012(b) (West Supp. 1997) (15 years for nonagricultural manufacturing equipment); WASH. REV. CODE § 7.72.060(1) (West 1992) ("useful safe life" of product).

108. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. §§ 40101-40120 (1994)).

109. *See id.* This law has resulted in the creation of thousands of new jobs. *See* Geoffrey A. Campbell, *Study: Business Booms After Tort Reform Enacted*, 82 A.B.A. J. 28 (Jan. 1996) ("The light aircraft industry is taking off as reduced liability encourages technological innovation.").

110. *See* H.R. CONF. REP. NO. 104-481, at 9 (1996).

111. *See supra* note 52 and accompanying text.

112. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.012 (West Supp. 1997); OHIO REV. CODE ANN. § 2305.10 (c) (Anderson Supp. 1996).

113. *See* H.R. CONF. REP. NO. 104-481, at 9 (1996).

114. *See id.*

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was placed in the bill by Senator Rockefeller and others to increase access to the legal system and speed resolution of legal disputes so that money would reach injured persons more quickly.[115]

H.R. 956 allowed either party to a product liability dispute to offer to proceed pursuant to any voluntary and nonbinding ADR procedures established in the law of the state where the action is brought or under the rules of the court in which the action is maintained.[116] The bill would have required the offer to be made within sixty days after service of the initial complaint or the applicable deadline for a responsive pleading, whichever is later.[117] This provision imposed no penalty on a party who refused to proceed to ADR.[118]

F. Clear and Basic Rules for Quasi-Criminal Punishment

1. In General

The United States Supreme Court has observed that punitive damages have "run wild" in the United States, jeopardizing fundamental constitutional rights.[119] The Court has held that the Due Process Clause of the Fourteenth Amendment imposes a substantive limit on the size of punitive damages awards.[120] It has also held that the Constitution provides procedural limits on when and how punitive damages may be awarded.[121]

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115. William Fry, Executive Director of HALT, a nonprofit legal reform organization, testified before the Consumer Affairs, Foreign Commerce and Tourism Subcommittee of the Senate Committee on Commerce, Science, and Transportation that ADR mechanisms are "a way to lower costs, simplify procedures and achieve fairness through avoidance of technical rules of law." S. REP. NO. 104-69, at 29 (1995). He said that HALT supports the use of ADR mechanisms "to permit consumers to handle their own legal affairs." *Id.*

116. *See* H.R. CONF. REP. NO. 104-481, at 9 (1996).

117. *Id.*

118. *Id.* at 9-10.

119. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991); *see* Honda Motor Corp. v. Oberg, 114 S. Ct. 2331, 2340 (1994) (stating that punitive damages "pose an acute danger of arbitrary deprivation of property," thereby raising serious due process concerns).

120. *See* BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1604 (1996); *Honda Motor Corp.*, 114 S. Ct. at 2335; TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993); *Pacific Mut. Life Ins. Co.*, 499 U.S. at 23-24; *cf.* Pulla v. Amoco Oil Co., 72 F.3d 648, 661 (8th Cir. 1995) (opinion by retired Supreme Court Justice Byron White striking down punitive damages award as "excessive, unreasonable and violative of due process").

121. In *Honda Motor Corp.*, a case involving an all terrain vehicle that flipped over when an inebriated plaintiff tried to drive the vehicle up a hill, the Court struck down a punitive damages award on the ground that Oregon law violated due process, because it did not provide an opportunity for meaningful appellate review of the size of punitive damages awards. *Honda Motor Corp.*, 114 S. Ct. at 2340-41.

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Congress and the Supreme Court share responsibility for guarding due process rights.[122] Indeed, some Justices have made the practical observation that the Supreme Court cannot fashion highly specific rules in the area of punitive damages, and have, therefore, almost "invited" remedial legislation.[123]

Congress is empowered by the Due Process Clause of the Fourteenth Amendment to the United States Constitution to implement federal punitive damages reform.[124] The Fourteenth Amendment provides that no State shall "deprive any person of . . . liberty . . . without due process of law."[125] As indicated above, the Supreme Court has expressly indicated in recent opinions that substantive and procedural due process protections, as expressed in the Fourteenth Amendment, apply to punitive damages.[126]

Furthermore, Section Five of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of th[at] article."[127] The Supreme Court has interpreted this as a very expansive power, giving Congress "the same broad powers expressed in the Necessary and Proper Clause."[128] Unless prohibited by some other provision of the Constitution, it is within the power of Congress to enact "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view."[129] Federal product liability punitive damages reform legislation falls squarely within the broad power of Congress to implement punitive damages rules which carry out both the letter and spirit of the Fourteenth Amendment.

As is true with the general topic of product liability, Congress also has the power under the Commerce Clause of the United States Constitution to enact federal punitive damages reform legislation.[130] Article I, Section Eight of the Constitution provides that Congress shall have the power "[t]o regulate Commerce . . . among the several States."[131] This power extends to interstate and intrastate activities which affect interstate commerce.[132]

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122. U.S. CONST. amend. XIV, § 5.

123. *See TXO Prod. Corp.*, 509 U.S. at 472 (Scalia & Thomas, J.J., concurring).

124. U.S. CONST. amend. XIV, § 5; *see generally* William H. Volz & Michael C. Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. DET. MERCY L. REV. 459 (1992).

125. U.S. CONST. amend XIV.

126. *See supra* notes 119-20 and accompanying text.

127. U.S. CONST. amend XIV, § 5.

128. Katzenbach v. Morgan, 384 U.S. 641, 650 (1966).

129. *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879). The power conferred to Congress by Section Five of the Fourteenth Amendment has not been dormant. Recently, Congress used this power to enact the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

130. U.S. CONST. art. I, § 8, cl. 3.

131. *Id.*

132. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264,

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Punitive damages awards affect interstate commerce and, unquestionably, fall within the scope of activities which can be regulated by Congress.

2. Federal Punitive Damages Reform Is Needed

Punitive damages are quasi-criminal in nature; they are awarded to *punish*, not to compensate for harm.[133] This fact is often obscured by opponents of punitive damages reform. Punitive damages developed out of English law to serve as a "helper" to the criminal law and the focus was on conduct that was of such a publicly egregious nature that it should be subject to criminal punishment.[134] Punitive damages are not intended to compensate people for something they have lost; that purpose is accomplished by compensatory damages. Nevertheless, unlike the criminal law system, in many states there are virtually no standards for when punitive damages may be awarded and no clear guidelines as to their amount. Thus, good behavior is swept in with the bad.

H.R. 956 was designed to return punitive damage law to its basic purpose, and to focus the remedy on wrongful conduct which deserves punishment. To achieve these purposes, H.R. 956 incorporated the core elements of the criminal law.[135] First, it defined the "crime," or the offense warranting punishment.[136] Second, it provided for clear standards of proof so that judges and juries could appreciate that they are imposing punishment for reprehensible conduct, and not merely negligence.[137] Finally, and most importantly, H.R. 956 defined the potential punishment or "sentence."[138] At present, punitive damages laws in many states fail these requirements, as evidenced by the United States Supreme Court's observation that punitive damages awards have "run wild."[139]

3. Defining When Punitive Damages May Be Awarded

H.R. 956 would have permitted punitive damages to be awarded only if the plaintiff proved by "clear and convincing" evidence that the defendant

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277 (1981); Fry v. United States, 421 U.S. 542, 547 (1975).

133. *See, e.g.*, O'Gilvie v. United States, 117 S. Ct. 452, 455 (1996) (punitive damages received in tort suits are subject to federal income tax, because they do not represent damages received "on account of personal injuries [or sickness]" and, therefore, must be included in taxable gross income).

134. James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel*, 14 ST. MARY'S L.J. 351, 355 (1983).

135. *See* H.R. CONF. REP. NO. 104-481, at 6-8 (1996).

136. *Id.*

137. *See id.* at 10-11.

138. *See id.* at 10.

139. *Pacific Mut. Life Ins. Co.*, 499 U.S. at 18.

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violated the standard of "conscious, flagrant indifference to the rights or safety of others."[140] The clear and convincing evidence burden of proof standard reflects a middle ground between the burden of proof standard ordinarily used in civil cases (preponderance of the evidence) and the criminal law standard (beyond a reasonable doubt).[141] The standard is currently the law in thirty states and the District of Columbia,[142] and has been recommended by each of the principal academic groups to analyze the law of punitive damages, including the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws.[143] The Supreme Court has specifically endorsed the clear and convincing evidence burden of proof standard in punitive damages cases.[144]

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140. H.R. CONF. REP. NO. 104-481, at 10 (1996).

141. *See* H.R. CONF. REP. NO. 104-481, at 9-10 (1996); *see also* Wangen v. Ford Motor Co., 294 N.W.2d 437, 457-58 (Wis. 1980) (describing the difference in standards).

142. *See* ALA. CODE § 6-11-20 (1993); ALASKA STAT. § 09.17.020 (1996); CAL. CIV. CODE § 3294(a) (West 1997); GA. CODE ANN. § 51-12-5.1 (Supp. 1996); 735 ILL. COMP. STAT. ANN. 5/2-1115.05(b) (West 1995); IOWA CODE ANN. § 668A.1 (West 1987); KAN. STAT. ANN. § 60-3701(c) (1994); KY. REV. STAT. ANN. § 411.184(2) (Michie 1992); MINN. STAT. ANN. § 549.20 (Supp. 1997); MISS. CODE ANN. § 11-1-65(1)(a) (Supp. 1996); MONT. CODE ANN. § 27-1-221(5) (1995); NEV. REV. STAT. § 42-005(1) (1995); N.J. STAT. ANN. § 2A:15-5.12 (1995); N.C. GEN. STAT. § 1D-15(b) (Supp. 1996); N.D. CENT. CODE § 32-03.2.11 (1996); OHIO REV. CODE ANN. § 2307.80(A) (Anderson 1995); OKLA. STAT. ANN. tit. 23, § 9.1(B) (West Supp. 1997); OR. REV. STAT. § 18.537(1) (1995); S.C. CODE ANN. § 15-33-135 (Law. Co-op. Supp. 1996); S.D. CODIFIED LAWS § 21-1-4.1 (Michie 1987); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West Supp. 1997); UTAH CODE ANN. § 78-18-1 (1996); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (Ariz. 1986); Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 937 (D.C. 1995); Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982); Tuttle v. Raymond, 494 A.2d 1353, 1363 (Me. 1985); Owens-Illinois v. Zenobia, 601 A.2d 633, 657 (Md. 1992); Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 111 (Mo. 1996) (en banc); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992); Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980). One state, Colorado, requires proof beyond a reasonable doubt in punitive damages cases. *See* COLO. REV. STAT. § 13-25-127(2) (1987).

143. *See* A.B.A. SEC. LITIG., PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 19 (1986) [hereinafter ABA REPORT]; AMERICAN C. TRIAL LAW., REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 15-16 (1989) [hereinafter ACTL REPORT]; 2 AMERICAN L. INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY—REPORTERS' STUDY 248-49 (1991) [hereinafter ALI REPORTERS' STUDY]; NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM LAW COMMISSIONERS' MODEL PUNITIVE DAMAGES ACT § 5 (1996) (approved on July 18, 1996) [hereinafter MODEL PUNITIVE DAMAGES ACT]; *see generally* Victor Schwartz & Mark Behrens, *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 SAN DIEGO L. REV. 263 (1993) (discussing ALI's support for punitive damage reform).

144. *See Pacific Mut. Life Ins. Co.*, 499 U.S. at 23 n.11 (stating that "[t]here is much

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4. Making the Punishment Proportional to the Harm

Perhaps most importantly, H.R. 956 would have put reasonable parameters on the size of punitive damages awards to help assure that the punishment would be proportional to the plaintiff's harm.[145] Under H.R. 956, punitive damages would have been permitted against smaller businesses and individuals up to the *lesser* of two times the amount awarded to the claimant for compensatory damages or $250,000.[146] It permitted punitive damages to be awarded against larger businesses up to the *greater* of two times a plaintiff's compensatory damages or $250,000.[147] A judge would have been permitted to exceed the limit on the punitive damages award against a larger business up to the amount of the jury verdict if the judge determined that the proportionate award would be "insufficient to punish the egregious conduct of the defendant."[148]

Mainstream academic groups, including the American Bar Association and the American College of Trial Lawyers, have recommended that punitive damages be awarded in proportion to actual damages.[149] Furthermore, approximately one-quarter of the states have enacted legislation to address the problem of excessive punitive damages.[150]

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to be said in favor of a State's requiring, as many do, . . . a standard of 'clear and convincing evidence'").

145. *See* H.R. CONF. REP. NO. 104-481, at 10 (1996).

146. *Id.* at 10.

147. *Id.*

148. *Id.* at 10-11.

149. *See* ABA REPORT, *supra* note 143, at 64-66 (recommending that punitive damage awards in excess of three-to-one ratio to compensatory damages be considered presumptively "excessive"); ACTL REPORT, *supra* note 143, at 15 (proposal that punitive damages be awarded up to twice compensatory damages or $250,000, whichever is greater); ALI REPORTERS' STUDY, *supra* note 143, at 258-59 (endorsing concept of ratio coupled with alternative monetary ceiling).

150. *See* COLO. REV. STAT. § 13-21-102(1)(a) (1987) (punitive award may not exceed compensatory damages); CONN. GEN. STAT. § 52-240(b) (Supp. 1992) (punitive award permitted up to twice the compensatory damages); FLA. STAT. ANN. § 768.73(1)(a)-(b) (West Supp. 1997) (punitive damages may be awarded up to three times compensatory damages unless "clear and convincing evidence" is presented by the plaintiff to show that a higher award is not excessive); 735 ILL. COMP. STAT. ANN. 5/2-1115.05 (West 1996) (punitive damages limited to three times amount of claimant's economic damages); IND. CODE ANN. § 34-4-34-5 (Michie Supp. 1996) (limits punitive damages to the greater of three times actual damages or $50,000); KAN. STAT. ANN. § 60-3701 (1995) (punitive damages, in general, shall not exceed the annual gross income earned by the defendant based on the defendant's highest gross income earned for any one of the five years immediately before the act for which such damages are awarded, or $5 million, whichever is less); NEV. REV. STAT. § 42.005(a)-(b) (1995) (punitive damages awards permitted up to $300,000 in cases where compensatory damages are less than $100,000 and up to three times the amount of compensatory damages in cases of $100,000 or more); N.J. STAT. ANN. § 2A:15-5.14 (West

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Some have argued that proportionality may result in inadequate deterrence.[151] It should be remembered, however, that H.R. 956 placed no limit on the number of times a party could be punished,[152] and that a person does not know the extent of the harm which may occur when he or she engages in wrongful conduct. There is simply no way for a defendant to predetermine the actual damages of all persons who may be injured by the wrongful conduct. One must also remember that compensatory damages in many product liability cases run very high.[153]

Furthermore, the argument that proportionality may somehow result in inadequate deterrence has been rebutted by empirical evidence. A recent study published after President Clinton vetoed the Conference Report found that awards in product liability punitive damages cases, after all appeals were exhausted, have almost always been within the two times compensatory limit proposed in the Conference Report.[154] In fact, the authors found that H.R. 956 would *not* have affected *any* of the product liability cases they

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Supp. 1996) (punitive damages limited to five times amount of claimant's compensatory damages or $350,000, whichever is greater); N.C. GEN. STAT. § 1D-25 (Supp. 1996) (punitive damages limited to three times amount of claimant's compensatory damages or $250,000, whichever is greater); N.D. CENT. CODE § 32-03.2-11(4) (1996) (permitting punitive damages up to twice compensatory damages, or $250,000, whichever is greater); OHIO REV. CODE ANN. § 2315.21 (Banks-Baldwin 1996); OKLA. STAT. ANN. tit. 23, § 9.1 (West Supp. 1997) (punitive damages generally permitted up to amount of compensatory damages awarded); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West Supp. 1997) (limits punitive damages awards to $200,000 or two times economic damages plus an amount equal to any non-economic damages up to $750,000); VA. CODE ANN. § 8.01-38.1 (Michie 1992) (punitive damages permitted up to a maximum of $350,000).

151. *Testimony on S. 5, The Product Liability Reform Act of 1997 Before the Senate Comm. on Commerce, Science, and Transportation*, 105th Cong. 2-8 (1997) (testimony of Professor Lucinda M. Finley) [hereinafter *Testimony on S. 5*] (on file with the *Tennessee Law Review*).

152. *See* H.R. CONF. REP. NO. 104-481 (1996).

153. For example, in a June 1996 case involving a driver injured in an automobile accident, an Alabama jury awarded $50 million in compensatory damages and $100 million in punitive damages. The automobile's manufacturer argued that the plaintiff had been intoxicated and lost control of his car after falling asleep at the wheel. *See* Hardy v. General Motors Corp., CV-93-56 (Ala. Cir. Ct., Lowndes Co., verdict June 3, 1996). In July 1995, a Missouri jury awarded a total of $350 million to the family of a pilot killed in a helicopter crash against the French manufacturer of the helicopter's engine. The award consisted of $175 million in compensatory damages and $175 million in punitive damages. *See* Barnett v. La Societe Anonyme Turbomeca France, CV-93-24644 (Mo. Cir. Ct., Jackson Co., verdict July 20, 1995). Numerous other examples of product liability cases involving large compensatory damages exist in the case law. *See, e.g.*, Letz v. La Societe Anonyme Turbomeca France, No. CV93-19156 (Mo. Cir. Ct. 1995) ($70 million compensatory award to family of woman who died when defective helicopter crashed).

154. *See* Edward Felsenthal, *Punitive Awards Are Called Modest, Rare*, WALL ST. J., June 17, 1996, at B4 (reporting on study by two Cornell University law professors and the National Center for State Courts).

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examined, because "the awards were already under the limit" in the bill.[155] We have been asked, in light of this report, why the so-called "cap" is needed? The answer is that the present system is time consuming and wasteful.[156] It may take months or years until the final "appeal" is determined. We believe that having a firm outer limit on punitive damages will reduce appeals and legal costs without sacrificing deterrence. This should benefit both plaintiffs and defendants.

It has also been argued that unlimited punitive damages are needed to police businesses.[157] There is, however, no credible evidence that the behavior of corporations or other potential defendants is less safe in either those states that have set reasonable limits on punitive damages or in the six states (Louisiana, Nebraska, Washington, New Hampshire, Massachusetts, and Michigan[158]) that do not permit punitive damages at all. Furthermore, plaintiffs in these states have no greater difficulty obtaining legal representation than plaintiffs in those states without limits on the size of punitive damages awards.[159] Deterrence works when it is swift and sure. Under the current system, it is neither.

Uncertain and open-ended punitive damages liability also raises constitutional concerns. After the Conference Report was vetoed, the Supreme Court of the United States stated: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."[160] The Court put forth generalized standards for evaluating "how much is too much" under the Constitution.[161] It could not, as a Court, fulfill its promise of giving people notice of the amount of punishment. Congress can and should do so.

5. Bifurcation

H.R. 956 also contained a procedural reform called "bifurcation."[162] The legislation provided that, at either party's request, the trial would be

155. *See id.*

156. *See* Steven Hayward, *The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings* (Pacific Research Institute for Public Policy, Feb. 1996) (finding that lawsuits, in general, that include punitive damages demands take one-third longer to resolve than suits without such demands).

157. *See, e.g.*, *Testimony on S. 5*, *supra* note 151, at 4-6.

158. Michigan permits exemplary damages as compensation for mental suffering consisting of a sense of insult, indignity, humiliation, or injury to feelings, but does not permit punitive damages for purposes of punishment. *See* Wise v. Daniel, 190 N.W.2d 746, 747 (Mich. 1992).

159. *See* S. REP. NO. 104-69, at 39 (1995).

160. *BMW*, 116 S. Ct. at 1598.

161. *Id.*

162. *See* H.R. CONF. REP. NO. 104-481, at 11-12 (1996).

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divided so that the proceedings on punitive damages would be separate from and subsequent to the proceedings on compensatory damages.[163] Judicial economy would be achieved by having the *same jury* determine both compensatory damages and punitive damages issues.[164]

Bifurcated trials are equitable because they prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability. For example, although a jury is instructed to ignore evidence of a company's net worth unless it decides to punish the defendant, it is difficult, as a practical matter, for jurors to do so. The net result may be that jurors overlook key issues regarding whether a defendant is liable for compensatory damages. Instead, they may make an award simply because they believe that the defendant can afford it. Bifurcation would help prevent that unfair result because evidence of the defendant's net worth would be inadmissible in the first part (compensatory damage phase) of the case.[165]

Bifurcation also helps jurors compartmentalize a trial, allowing them to more easily separate the burden of proof that is required for compensatory damage awards (preponderance of the evidence) from a higher burden of proof for punitive damages (clear and convincing evidence).

Recognizing the benefit of bifurcation, some courts have adopted the procedure as a matter of common law reform.[166] Other states have made changes through court rules or legislation.[167] Bifurcation of punitive damages trials is supported by the American Law Institute's Reporters' Study, the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws.[168]

G. *Balanced Rules for Joint Liability*

The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of

163. *See id.* at 10-11.

164. *See id.*

165. *See id.* at 11-12.

166. *See Hodges*, 833 S.W.2d at 901; Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994).

167. *See, e.g.*, CAL. CIV. CODE § 3295(d) (West Supp. 1997); MINN. STAT. ANN. § 549.20 (West Supp. 1997); MISS CODE ANN. § 11-1-65(1)(b) (Supp. 1996).

168. *See* ABA REPORT, *supra* note 143, at 19; ACTL REPORT, *supra* note 143, at 18-19; ALI REPORTERS' STUDY, *supra* note 143, at 255 n.41; MODEL PUNITIVE DAMAGES ACT, *supra* note 143, at § 11.

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damages.[169] The Senate Committee on Commerce, Science, and Transportation has observed: "This system is unfair and blunts incentives for safety, because it allows negligent actors to under-insure and puts full responsibility on those who may have been only marginally at fault."[170] Thus, a jury's specific finding that a defendant is minimally at fault is overridden and the minor player in the lawsuit bears an unfair and costly burden.[171]

Joint and several liability has caused suppliers of raw materials and component parts to refuse to supply manufacturers of medical devices.[172] As a result, patients who need medical devices suffer.[173] It has also caused manufacturers of protective sporting goods equipment, such as safety helmets, to withdraw products from the market or be chilled from introducing new products.[174] At least thirty-seven states have recognized the need for reform of this unfair doctrine and have abolished or modified the principle of joint and several liability.[175]

H.R. 956 adopted a balanced approach between those who call for joint liability to be abolished and those who wish to leave it unchecked. The legislation eliminated joint liability for "noneconomic damages," *e.g.*, damages for pain and suffering or emotional distress, while permitting the states to retain joint liability with respect to economic losses, *e.g.*, lost wages, medical expenses, and substitute domestic services.[176] The "fair share" rule contained in H.R. 956 was based on a joint liability reform enacted in California in 1986 through a ballot initiative.[177] From 1990 to 1991, the Nebraska legislature carefully studied all the arguments for and against joint liability, as well as all compromise approaches. It chose to follow the "California rule" because of its basic fairness and ease of application.[178]

Some opponents of joint liability reform have argued that the California approach is discriminatory against women or other groups who may have less economic losses than others.[179] While this type of argument may grab

169. *See, e.g.*, Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197, 204 (Ill. 1983).

170. S. REP. NO. 104-69, at 45 (1995).

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.* at 46.

175. *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE app. B (3d ed. 1994).

176. *See* H.R. CONF. REP. NO. 104-481, at 12 (1996). The legislation provided that responsibility for a claimant's harm is to be apportioned in reference to all persons responsible for the plaintiff's injury, whether or not such person is a party to the action. *See id.* This position reflects sound public policy and the trend in the tort law of the states. *See, e.g.*, DaFonte v. Up-Right, Inc., 828 P.2d 140, 145 (Cal. 1992) (en banc); Fabre v. Marin, 623 So. 2d 1182, 1185 (Fla. 1993).

177. *See* CAL. CIV. CODE ANN. § 1431.2(a) (West Supp. 1997).

178. *See* NEB. REV. STAT. § 25-21,185.10 (1995).

179. *See, e.g.*, *Testimony on S. 5*, *supra* note 151, at 2-3.

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one's emotions and get one side-tracked from the facts, the overwhelming evidence clearly demonstrates that the California approach does *not* discriminate against anyone. In fact, the California law has been upheld by the California Supreme Court on federal and state constitutional grounds.[180] Moreover, Suzelle Smith, a highly respected attorney from California who practices both for plaintiffs and defendants, has testified before the Senate Commerce and Judiciary Committees that the California approach works, is fair to all groups, and is pro-consumer.[181] She testified that, prior to the California initiative, juries often rendered defense verdicts in cases where a finding to the contrary could mean that a minimally at-fault defendant would be saddled with the entire damage award.[182]

H. Creating Incentives for a Safe Workplace

Workers' compensation statutes are designed to ensure that an employee injured in the course of employment has a quick and inexpensive way to recover for the injury, while maximizing the incentive for employers to maintain a safe workplace. In most states, however, the incentive for employers to ensure workplace safety has been substantially undermined. In these states, if an employee has a successful product liability claim against a manufacturer or product seller, the employer can recover the amount of workers' compensation benefits it paid to the employee from the product liability damage award, even if the employer is responsible for the injury.[183] Workers' compensation experts have criticized this rule because it removes an incentive for employers to keep their workplaces safe or to train their employees in safe workplace practices.[184]

H.R. 956 would have reversed this effect and modified state law in a positive way by placing a private incentive on employers to keep their workplaces safe.[185] In sum, if an employer was at fault in causing a workplace injury, it would have to bear the costs of workers' compensation.[186] Many changes took place in this provision over the years and its complexity grew. Public policy supports the basic rule, but the 105th Congress will have to determine whether public policy goals can be achieved in a less complex manner.

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180. *See* Evangelatos v. Superior Court, 753 P.2d 585 (Cal. 1988).

181. *See* S. REP. NO. 104-69, at 48 (1995).

182. *Id.*

183. *See id.* at 49. The employer assumes the employee's rights against the manufacturer through subrogation. *Id.*

184. *See* 2 ARTHUR LARSON, WORKERS' COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 76 (desk ed. 1991).

185. *See* H.R. CONF. REP. NO. 104-481, at 12-14 (1996).

186. *See id.*

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I. Biomaterials Access Assurance

Each year millions of citizens depend on the availability of implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints. The availability of these devices is critically threatened, however, because suppliers have ceased supplying raw materials and component parts to medical implant manufacturers. A 1994 study by Aronoff Associates concluded that there are significant numbers of raw materials that are at risk for shortages.[187] Even though courts are not finding suppliers liable, suppliers have found that the risks and costs of responding to litigation related to medical implants far exceed potential sales revenues.[188]

H.R. 956 would have helped prevent a public health crisis by limiting the liability of biomaterials suppliers to instances in which the supplier failed to meet contractual specifications.[189] In addition, it would have established a procedure to ensure that suppliers could avoid litigation without incurring heavy legal costs.[190] The provision did not in any way diminish the existing liability of implantable medical device manufacturers. If the biomaterials supplier liability provision became law, any party who made a defective implantable medical device would still be fully liable.[191] The provision was the subject of careful examination in hearings and enjoys strong bipartisan support.

VI. PRODUCT LIABILITY REFORM LEGISLATION IN THE 105TH CONGRESS—SOME PREDICTIONS

Proponents of federal product liability reform believe that legislation modeled after the product liability Conference Report of the 104th Congress may be enacted into law by the 105th Congress. Although reform remains a difficult task, the results of the November 1996 elections appear favorable to reform supporters. First, many believe that supporters should still be able to muster the sixty votes needed in the Senate to defeat a filibuster by opponents and invoke cloture.[192] While some past Members who support-

187. ARONOFF ASSOCS., MARKET STUDY: BIOMATERIALS SUPPLY FOR PERMANENT MEDICAL IMPLANTS 3 (1994) ("In the long[] term (probably after three years), a crisis looms in which patients and doctors may be affected by shortages of vital medical implants and the disappearance of certain unique, well-established, reliable materials used in critical surgery.").

188. *See generally* Edward M. Mansfield, *Reflections on Current Limits on Component and Raw Material Supplier Liability and the Proposed Third Restatement*, 84 KY. L.J. 221, 235-37 (1995-96).

189. *See* H.R. CONF. REP. NO. 104-481, at 14-23 (1996).

190. *Id.*

191. *See id.*

192. *See* Saundra Torry, *Both Sides Tote Up the Votes for Tort Reform Redux*, WASH.

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ed reform are now gone,[193] these losses may be offset by an equal number of newcomers.[194]

Second, Senator Heflin's retirement means more than just a "switch" in that seat from an opponent to a supporter. Senator Heflin was a "veteran Senate infighter" who contributed more than just a voice on the floor to opponents.[195] Opponents of reform will miss his experience and knowledge of Senate procedure.

Third, under the rules of seniority, Senator John McCain, a Republican from Arizona, is the new Chairman of the Senate Commerce Committee. Senator McCain is seen by his colleagues as a pragmatic, effective leader and has long been closely involved in the liability reform effort. He, along with Senator Nancy Kassebaum, played a key leadership role in the passage of the General Aviation Revitalization Act of 1994. In addition, Senator McCain, along with Connecticut Democratic Senator Joseph Lieberman, was a principal co-sponsor of biomaterials supplier liability reform legislation before it became part of H.R. 956.[196]

Fourth, Missouri Republican Senator John Ashcroft has become Chairman of the Consumer Subcommittee of the Senate Commerce Committee and will be a principal co-sponsor of the effort in the 105th Congress.[197] Senator Ashcroft, a highly intelligent former State Attorney General and Governor, has a deserved reputation for being an effective leader.

Fifth, continued Republican control of the House of Representatives means that economic reforms important to job-creators (particularly small business) will again receive favorable attention by the leadership.

Finally, and of great importance, President Clinton continues to state that he supports the enactment of "reasonable tort reform" at the federal level, despite his veto of the product liability Conference Report in the 104th Congress.[198] In the first presidential debate between President Clinton and Republican challenger Bob Dole, held on October 6, 1996, President Clinton dismissed the influence of trial lawyer campaign contributions and pointed with pride to his support for the General Aviation Revitalization Act of 1994. The President said: "I signed a tort reform bill

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POST, Nov. 25, 1996, Bus. Sec. at 7.

193. Senators Sam Nunn (D-GA), Bennett Johnson (D-LA) by retirement, and Larry Pressler (R-SD) by defeat.

194. Senator Jeff Sessions (R-AL) replaces retired Senator Howell Heflin, Senator Susan Collins (R-ME) replaces retired Senator William Cohen, and Senator Mike Enzi (R-WY) replaces retired Senator Alan Simpson.

195. *Id.*

196. S. REP. NO. 104-69, at 15 (1995).

197. 143 CONG. REC. S226 (daily ed. Jan. 21, 1997) (statement of Sen. Ashcroft).

198. *See Presidential Candidates Put Tort Reform Into Debate*, LIABILITY WEEK, Oct. 15, 1996, at 1.

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that dealt with civil aviation a couple of years ago. I proved that I will sign reasonable tort reform."[199]

In fact, apart from the very successful General Aviation Revitalization Act of 1994, President Clinton signed a number of tort and civil justice reform measures in the 104th Congress:

- The Small Business Job Protection Act of 1996[200] included a provision that (1) holds punitive damages received in personal injury suits subject to federal income tax by eliminating the possibility for an exclusion from taxable gross income; (2) eliminates the possibility of an exclusion for personal injury damages in cases that do not involve physical injury or illness; and (3) provides that emotional distress is not by itself a physical injury or sickness;[201]
- The Federally Supported Health Centers Assistance Act of 1995[202] extended Federal Tort Claims Act coverage to community, migrant, and homeless health centers;[203]
- The Aviation Disaster Family Assistance Act of 1996[204] limited unsolicited contacts by lawyers and insurance company representatives with airline crash victims or their families;[205] and
- The Bill Emerson Good Samaritan Food Donation Act of 1996[206] provided limited tort immunity to encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals.[207]

These laws suggest that, based on the President's entire record, he may be receptive in the 105th Congress to signing a fair and balanced product liability bill. One must also remember that, as Governor of Arkansas, President Clinton twice sat on National Governors' Association committees that drafted and unanimously approved resolutions calling for federal product liability reform.[208]

Finally, the President's veto message is focused on certain perceptions and concerns about H.R. 956 that can and should be addressed. For example, the President suggested that the bill would have offered protection to gun dealers who sell to felons and bartenders who sell to inebriated patrons.[209] Such actions would be based on negligent entrustment, *not*

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199. *Id.*
200. Pub. L. No. 104-188, 110 Stat. 1755 (1996).
201. S. REP. NO. 104-281, at 115 (1995).
202. Pub. L. No. 104-73, 109 Stat. 777 (1995).
203. *See* H.R. REP. NO. 104-398, at 4 (1995).
204. Pub. L. No. 104-264, 110 Stat. 3213 (1996).
205. *Id.* at 3266.
206. Pub. L. No. 104-210, 110 Stat. 3011 (1996).
207. *Id.* at 3011-12.
208. *See supra* note 45 and accompanying text.
209. *Presidential Veto Message: Product Liability Bill Rejected Over Consumer, State*

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product liability. Both the language and legislative history of the Conference Report suggest that the bill was not intended to embrace such conduct; nevertheless, this matter can be subject to further clarification.

VII. CONCLUSION

The current product liability system in the United States is an example of a basic problem in our tort system: the failure to precisely separate wrongdoing from conduct that society should encourage. Justice has been exchanged for a lottery. By way of contrast, federal product liability legislation can encourage appropriate conduct and sanction bad behavior. The consumers of America, those who purchase and use products on a daily basis, will benefit by getting the products they need and by no longer paying unfair and unreasonable product liability "taxes." In addition, as demonstrated by the General Aviation Revitalization Act of 1994, federal liability reform will create good jobs and bring good results, while maintaining a precise and effective deterrent effect in tort law.

After over two decades of studying and debating the topic of product liability reform, Congress and President Clinton should reconcile their differences and bring about positive results for the American people.

Issues, CONG. Q., May 4, 1996, at 1253.

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