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Product Liability - Interest Group Materials [2]

Product liability -
interest group materials

July 11, 1997

President William Jefferson Clinton
The White House
Washington, DC 20500

Dear Mr. President:

A little more than a year ago you invited us to Washington to stand beside you when you vetoed the anti-consumer "Product Liability Legal Reform Act of 1996." We proudly did so and hope that our presence at the White House put a human face on a complicated legal issue that most Americans do not understand.

As you know, product liability is about protecting Americans and their families -- citizens like us -- from defective products. The pride and admiration we felt in our hearts when you vetoed this legislation on May 2, 1996, has persisted. Indeed, our respect for your wise and courageous action has grown stronger. We, better than any, understand that your veto helped protect millions of Americans and their families from dangerous and defective products and ensured that injured citizens can continue to hold irresponsible corporations fully accountable.

Your comments that day still carry the unmistakable ring of truth:

> *"[T]his bill would hurt families without truly improving our legal system. It would mean more unsafe products in our homes. It would let wrongdoers off the hook. I cannot allow it to become law. . . . [T]he real fact is it could have a devastating impact on innocent Americans who can presently look to our system of justice for recovery."*

As expected, the proponents of product liability "reform" have introduced legislation in the 105th Congress that is nearly identical to the bill you vetoed. More important, we understand that your Administration has established a task force that seeks to "improve" this legislation by reconciling disagreements over the most contentious issues in the bill.

Mr. President, with all due respect, we are gravely concerned that you might now consider supporting legislation that would still have, as you put it, "a devastating impact on innocent Americans." For example, consider the effects of this legislation on those of us who stood with you in May 1996:

- *Extending the statute of repose from 15 years to 18 or even 20 years would still bar Carla Miller of Missouri from seeking justice for the death of her husband. James Miller was killed when a defective 24-year-old tractor rolled over and crushed him. Many products -- some of which, because of defects, can maim or kill -- are built to last far longer than 20 years.*

- *An 18 or 20-year statute of repose also would have prevented Lola Reinhart and Jacob Reinbach of Ohio from seeking justice. Lola Reinhart was severely injured in 1994 after the defective elevator in which she was riding broke and plunged*

four stories. Jacob's parents, Max and Hanna Reinbach, both survivors of the Holocaust, died. The elevator was 22 years-old at the time of this tragic accident.

- *Arbitrarily capping punitive damages for the worst misconduct would encourage manufacturers to weigh consumer safety against corporate profits. The threat of meaningful punitive damages spurred G.D. Searle & Co. to settle with Jeanne Yanta of Minnesota and pull its defective Copper-7 intrauterine device from the market. This defective product robbed Jeanne of her fertility and almost killed her. The threat of punitive damages was genuine only because of other cases involving Copper-7, like the Minnesota jury verdict for Esther Kociemba which included $7 million in punitive damages against G.D. Searle. This award would not have been possible under the product liability legislation. Were it not for the specter of civil punishment, exploding Ford Pintos, flammable pajamas and cancer-causing asbestos might still be on the market.*

- *Eliminating joint liability for "non-economic" damages would have left Janey Fair of Kentucky with no recourse when her daughter, Shannon, was killed in 1988. Shannon and 26 other people died when a drunk driver struck the defective school bus they were riding in, and the bus fuel tank ruptured and engulfed the vehicle in flames. The acts of the drunken driver and bus manufacturer combined to cause this tragedy. Yet, the proposed changes on joint liability could still deprive the most vulnerable in our society of the justice they and their families deserve.*

Mr. President, tinkering with legislation to try to address our particular cases would do little, if anything, to help the millions of Americans and their loved ones who have suffered due to defective products. We represented all of those Americans that day 14 months ago when we proudly stood beside you. We know that you must balance the interests of American consumers and the business community on issues such as product liability, but legislation that cuts off the rights of Americans and their ability to seek justice cannot be "fixed" and must be vetoed.

You should not -- you must not -- compromise the principles of fairness you enunciated that day as you put the American people before corporate profits and vetoed the very dangerous product liability bill. We urge you once again to stand with the American people on this issue.

Sincerely yours,

Carla J. Miller
Carla Miller

Janey M. Fair
Janey M. Fair

Jeanne Yanta
Jeanne Yanta

Lola Reinhart
Lola Reinhart

Citizen Action

Product liability - Interest group materials

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TO: Elena Kagin
Bruce Lindsey
Kathy Wallman
FR: Robert Creamer
Cathy Hurwit
Rich Vuernick
DT: May 22, 1997
RE: Report on Product Liability Legislation

Per our meeting in March, we have prepared a report with statistics concerning product liability litigation, punitive damages and business versus business litigation. Also included is a breakdown of how the product liability bill would affect state laws. The report includes information relating to S.648, the bill the Senate Commerce Committee passed on May 1.

I. Introduction

For many years some of the proponents of product liability reform have espoused the need for uniformity with respect to our nation's product liability laws. The "Findings and Purposes" section of S.648, "The Product Liability Reform Act of 1997," states that, "the rules of law governing product liability actions; damage awards, and allocations of liability have evolved inconsistently within and among the States, resulting in a complex, contradictory, and uncertain regime. . . ."

However, the product liability bill passed by the Senate Commerce Committee and supported by some members of the business community is not uniform. The legislation displaces state laws that are more friendly to consumers but keeps those state laws intact that favor the defendant in punitive damages and joint and several liability for non-economic damages.

The legislation unfairly exempts businesses from its scope in two ways. First, the "Findings and Purposes" section condemns our country for being overly litigious but ignores the empirical evidence that business versus business litigation accounts for a large percentage of the litigation involving businesses. The bill fails to address business versus business litigation.

Second, the bill does not even apply to businesses when they do have product liability disputes. Instead, commercial law through the use of the Uniform Commercial Code (UCC) applies and businesses suing for lost profits are not subject to the limitations or restrictions that injured consumers face when they file similar lawsuits.

A recent article in the *Corporate Crime Reporter* suggests that uniformity may not be the goal of some of the legislation's proponents. The article quoted an April 21 memo to Victor Schwartz of the Product Liability Coordinating Committee (PLCC) from Bob McConnell of the Civil Justice Reform Group which explained that uneven preemption was preferable. Referring to the differences between the groups on the preemption issue, McConnell stated in part: "We want the legislation to be unambiguous – the higher standards in certain states and the stronger burdens of proof should be allowed to stand."

In sum, the bill cannot be considered uniform or "pro-consumer." The bill does not, as its proponents suggest, "reform" the civil justice system in a manner that allows for consumers to be compensated more quickly or make the process more efficient. The following report describes how the bill's provisions unfairly tilt the legal playing field in favor of manufacturers and against consumers.

II. One Way Preemption

Supporters of product liability legislation have stated the need for uniformity but S.648 is not uniform.

The charts accompanying this report demonstrate that state laws would be preempted if this legislation were in effect. Additionally, cases would be arbitrarily decided. The legislation would create a patchwork of laws to govern product liability lawsuits. An examination of state law in the areas of: joint and several liability for non-economic damages, punitive damages, statute of limitations and statute of repose reveals that many of the state laws and the laws of the District of Columbia are preempted.

Joint and several liability for non-economic damages

Most states allow joint and several liability for all "non-economic" damages, such as pain and suffering or loss of vision or fertility, in at least some circumstances. A minority of states have abolished joint and several liability in almost all cases. However, the product liability bill's provision abolishing joint and several liability for non-economic damages would further limit consumer rights in 40 states.

- 31 states allow joint and several liability for non-economic damages, with some limits. 18 states provide for full joint and several liability for all damages in product liability cases.

  13 states provide for joint and several liability in some form, or for some plaintiffs. 7 of these provide for full joint and several liability for all damages, except for defendants whose percentage of responsibility falls below a statutory threshold, usually 50 or 51%. 3 of the states allow joint and several liability for all damages as long as the plaintiff does not bear any fault for the injury. 2 states limit the liability of defendants to pay damages in excess of their proportionate share through a multiplier. One state allows joint and several liability to ensure that the plaintiff receives at least a 50% recovery.

- 10 states have eliminated joint and several liability for either non-economic damages or for all damages, but have made exceptions for special circumstances. Of these, 6 states have made an exception to their general rule for defendants who either "act in concert" or "conspire" to produce the harmful product. 4 states have other exceptions.

  In these 10 states, consumers' rights to recover damages would be further limited by passage of the product liability bill. Joint and several liability will be abolished for non-economic damages even for defendants who conspire to cause the injury, or for defendants who exceed a statutory threshold. Even in the limited circumstance where a state has abolished joint and several liability except cases within a narrow exception, this bill would abolish joint and several liability for non-economic damages for the exception.

- 10 states have abolished joint and several liability for either non-economic damages or all damages, and would be unaffected by passage of this provision of the product liability bill.

Caps on punitive damages

The product liability bill would impose caps on punitive damages awarded in product liability cases. This provision imposes "pick and choose" preemption, which means state laws that are better for consumers are preempted by the federal law, but those that further limit punitive awards remain in force. The results are often confusing, and can result in as many as 6 different caps depending on various factors about the award and the defendant.

- 32 states currently have **no cap** on punitive damages.

- 3 states have **higher caps** on punitive damages than provided for in the product liability bill.

- 4 states have caps which are lower than those in the product liability bill, and which would therefore not be preempted, but which would be higher than the special "small business" caps in the bill.

- 4 states have caps which are based on different criteria than the caps in the bill, which would create a confusing maze of possible caps with no consistency or fairness.

- 4 states have some other limitation on punitive damages, such as a higher evidentiary standard or an exception for extreme circumstances. This includes Massachusetts, which has eliminated all punitive damages not created by statute, but retains punitive damages in products cases involving wrongful death. These states have the worst of both laws – very tough standards and a low federal cap on damages.

- Only 4 states do not allow punitive damages in any product liability cases: Louisiana, Nebraska, New Hampshire and Washington.

Statute of limitations

The statute of limitations provision in the bill is fully preemptive and would establish a 2 year statute of limitations for all product liability cases. Proponents of the bill have pointed to this provision as a "pro-consumer" provision which would lengthen the applicable limitation period in some states. In fact, there are very few states that allow less than 2 years for a defendant to file a case with no other applicable statute of limitations.

- In only 5 states, the statute of limitations generally applicable to product liability cases is less than 2 years. However, even this does not tell the whole story, because 3 of the 5 have a 4-year limitations period that applies to cases brought on a breach of warranty theory, under the provisions of the Uniform Commercial Code (UCC). In each of these cases, courts have interpreted the UCC to apply to cases alleging a breach of an implied warranty that resulted in an injury.

- The UCC statute of limitations also applies in 5 out of the 21 states with a 2-year statute of limitations. Therefore, of the 26 states with a statute of limitations of 2 years or less, 8 have an exception allowing a longer statutory period for breach of implied warranty cases. Of course, these periods would be shortened to only 2 years by the product liability bill.

  The preemption of the UCC statute would create a disturbing anomaly if the product liability bill became law. If a person sued for breach of an implied warranty on a defective product because it simply did not work correctly, the UCC's 4-year statute would apply. *However, if a person brought the same cause of action because the product killed someone, they would have half as long to bring the action.*

- The remaining 25 states (including the District of Columbia) have statutes of limitations of 3 or more years – up to 6 years in Maine and North Dakota. In other words, there is a split among the states as to the appropriate period of time to allow as a statute of limitations.

Statute of repose

S.648 has broadened the applicable statute of repose *to all products*, rather than just "durable goods," and it has also lengthened the period to 18 years.

- Just 5 states allow a shorter period than the 18 years provided in the product liability bill. **36 states have no statute of repose at all on products.**

- 4 more states have shorter statutes of repose, but have significant exceptions to their application. For instance, two of the states do not apply the statutory period to asbestos claims. Legal analysts believe the statute of repose would extinguish all asbestos-related claims, since asbestos products have not been manufactured for more than 18 years. Only two other states have a statute of repose at all – Vermont has a 20-year statute applicable to products, and Connecticut imposes one only in cases where the injury has already been compensated by workers'

compensation. In all, only 11 states have statutes of repose, but the product liability bill would impose this restrictive requirement on the other 40 states.

- The last 4 states have a statute of repose that is fundamentally different from the one provided in the product liability bill. These impose a *rebuttable presumption* that a product older than the statutory period has reached its useful safe life. In these states, the plaintiff has the burden of rebutting this presumption at trial. This type of statute of repose merely imposes an evidentiary and procedural hurdle on plaintiffs, rather than an absolute bar on claims as provided in the product liability bill.

  Although the bill purports to preempt all state statutes of repose, these rebuttable presumption statutes would not be preempted, since they do not concern the filing of an action, but instead are one element necessary to prove a claim. *In these 4 states, the state evidentiary statute of repose and the product liability bill filing statute would both be in force.* In practice, plaintiffs would have to overcome the evidentiary statute when it comes into force (often at ten years), but then face a complete bar to their claim at 18 years under the product liability bill.

III. Treating Consumers Unfairly, Giving Business Preferential Treatment

Supporters of product liability legislation claim that lawsuits by consumers are clogging the courts and punitive damages are hurting manufacturers' competitiveness.

Product liability lawsuits are a very small percentage of all lawsuits in the nation's state courts. According to the National Center for State Courts' Annual Report for 1993, which surveyed 29 states, product liability cases account for 4 out of every 1000 cases filed in state court. The majority of the cases in state court today are criminal cases. In fact, only 27% of the cases are civil cases; 10% are tort cases and product liability cases are 3.4% of all tort cases. (1993 Annual Report of the National Center for State Courts, 1995)

In 1995, the National Center for State Courts (NCSC) and Bureau of Justice Statistics of the Department of Justice (BJS) released the findings of their collaborative 30-month study of state court civil jury trials. The study reviewed product liability cases in the 75 most populous counties in 28 states. Their reports found that in 1992 product liability cases represented about 3% of the civil jury trials studied and 3% of the projected national figure for all civil jury trials. Notably, the study found that contract cases, filed almost entirely by businesses, are dismissed twice as frequently as product liability cases. Overall, 12% of contract cases are dismissed, while only 6% of product cases are dismissed. *Litigation Dimensions: Torts and Contracts in Large Urban Areas* (NCSC, 1995); *Civil Jury Cases and Verdicts in Large Counties,* (BJS, July 1995)

Suffolk University School of Law Professor Michael Rustad conducted a study on punitive damages which confirms that they are rarely awarded. In the twenty-five year period between 1965 and 1990, only 355 punitive damages were awarded in state and federal product liability lawsuits nationwide – an average of 14 per year. Of these awards, only 35 were larger than $10 million. All but one of these $10 million-plus awards were reduced; eleven of the 35 were reduced to zero. (Michael Rustad, "In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data," 78 Iowa Law Review 1 (1992))

Further, the research shows that damage awards in product liability cases bare a rational relationship to the extent of the injury. According to a 1996 study by Jury Verdict Research, a nonpartisan legal research firm based in Ohio, the median compensatory damage award in product liability cases dropped 32% to $260,000 from the 1994 median figure of $379,685. (Current Award Trends in Personal Injury, 1996 Edition, Jury Verdict Research, LRP Publications)

In general, tort cases have either been declining or remaining stable. Tort filings decreased 9 percent from 1990 to 1993 and have remained stable for the past two years. *Examining the Work of State Courts, 1995.*

Further, studies reveal that business to business litigation drains courts of scarce resources. The *National Law Journal* in August 1995 released the findings of its study of the 11,940 civil "judicial emergencies" in federal court, termed as such under the Civil Justice Reform Act of 1990 because those cases have lasted for more than three years. The report found that business litigation, primarily over contracts, securities litigation and intellectual property claims, accounted for 33% of the judicial emergencies in federal courts. In contrast, all tort suits made up only 10% of these cases. *Probing the Backlog – The NLJ Finds that the Most Intractable Cases Involve Business Disputes* (National Law Journal, August 1995)

What kinds of suits are businesses filing? Take the case of Upjohn as plaintiff and as defendant. Upjohn, the maker of the baldness remedy Rogaine, sued the small Patron I Corporation in 1988 over advertisements for its Helsinki Formula hair treatment. Upjohn complained that Patron misrepresented the effectiveness of its product in stopping hair loss and promoting hair growth. A federal judge in Nevada dismissed Upjohn's claim in 1989.

Upjohn's experience as a defendant has been a different story. Visiting an ophthalmologist for treatment of an eye disease, Meyer Proctor went blind in his left eye minutes after receiving an injection of Upjohn's anti-inflammation drug Depo-Medrol. The eye shriveled up and had to be removed five months later. Upjohn allegedly had promoted the injection of Depo-Medrol near the eyes despite the fact the FDA never approved the drug for this use. There was also evidence that Upjohn knew of 23 other incidents of adverse reactions to Depo-Medrol, including three instances of blindness. The jury awarded the Proctor family $3 million in compensatory damages and $125 million in punitive damages, which the judge reduced to $35 million. (*Crain's Chicago Business*, Nov. 4, 1991)

A. Business versus Business Litigation with Large Compensatory and Punitive Awards

The "Findings and Purpose" section of the product liability legislation states in part that, "the civil justice system is overcrowded, sluggish, and excessively costly and the costs of lawsuits, both direct and indirect, are inflicting serious and unnecessary injury on the national economy."

An examination of litigation trends and figures suggests that businesses may be their own worst enemy. Businesses do not hesitate to seek large punitive damages when they sue other businesses. In 1984, Pennzoil launched a legal battle against Texaco over the right to purchase a majority share of Getty Oil stock. The Texas jury returned a verdict in favor of Pennzoil, awarding the company $7.53 billion in compensatory damages and $3 billion in punitive damages, plus $600 million in interest. The parties agreed to a settlement in 1987.

The Pennzoil-Texaco case is not an isolated incident. The 1995 BJS and NCSC study found only 3 punitive damage awards for product liability cases during 1992, or .8% of all product liability cases. The total amount of these three punitive awards was $40,000. By comparison, punitive damages were awarded in roughly 12% of all winning plaintiff contract cases in that year. The total amount of the punitive damage awards for these cases was $169.5 million.

A 1996 RAND Institute for Civil Justice study of jury verdicts between 1985 and 1994 in 15 state court jurisdictions covering nine metropolitan areas confirms these figures. The study found that 80% of the punitive damages in the study were in business and intentional tort cases. Punitive damages in product liability cases only accounted for 5% of all the punitive damage awards in the study. *Trends in Jury Verdicts Since 1985*, Erik Moller (RAND Institute for Civil Justice 1996).

Businesses also seek large compensatory damages. According to annual reports by the *National Law Journal* there have been 95 civil lawsuits since 1989 with a verdict or settlement exceeding $50 million. Of these 95 cases, 60, or 63% of them, have dealt with litigation that could be categorized as business or commercial litigation. In contrast, only 14, or 15% of them, have involved product liability cases. In other words, business-related lawsuits have accounted for a little more than 3/5ths of the largest verdicts and settlements since 1989 (12 out of every 20), while product liability lawsuits have made up roughly only 3 out of every 20.

While the proposed legislation provides legal hurdles and limitations on injured consumers and their ability to hold the manufacturers of defective products accountable, it exempts businesses from the scope of the bill by excluding actions for "commercial loss."

For example, if company A purchases a piece of factory equipment from company B, and that piece of equipment is defective and explodes, company A can sue company B for all of its lost profits caused by the disruption of company A's business. On the other hand, the family of the worker who is operating the machine at the time it exploded must face the legislation's limitations and hurdles to recover. To tilt the legal playing field even further in favor of reckless manufacturers, if that piece of machinery is older than eighteen years, the worker or his family cannot recover at all while the business faces no such limitations.

IV. Tilting the Field Against Biomaterials Plaintiffs

A. Biomaterials section

The biomaterials section of the bill immunizes from liability the entire medical device industry, an industry that has a history of recklessly manufacturing and placing into the stream of commerce such defective devices as the Dalkon Shield and the Bjork-Shiley heart valve. These devices have resulted in thousands of deaths and tens of thousands of injuries to unwitting patients. Proponents of this section claim that it is narrowly tailored to provide relief to a segment of the industry badly in need of relief. As the example below illustrates, this provision is not narrow, modest or fair. The portion of the bill that provides for "loser pays" indicates the size of the hurdle over which injured consumers will have to jump.

Section 203(1) defines a "biomaterials supplier" as any "entity that directly or indirectly supplies a component part or raw material for use in the manufacture of an implant." Section 203(5) defines

an "implant" as a medical device that is intended by the manufacturer of the device to be "placed into a surgically or naturally formed or existing cavity of the body for a period of at least 30 days."

Using this definition, an implant could be any medical device ranging from an extended wear contact lens to a tooth filling. Of course, it would also include heart valves, birth control devices and pacemakers. In addition, title II's immunity extends to suppliers of component parts for these products – including components like pacemaker batteries and wires.

Determining which companies are "biomaterials suppliers" is not as easy as it sounds. As the following example indicates, many implant manufacturers are also biomaterial suppliers. Telectronics Pacing Systems is a Colorado-based manufacturer of pacemakers. It is also a supplier of pacemaker components to other pacemaker manufacturers and hospitals. One of the parts that Telectronics manufactures for use on its own pacemakers, and also supplies to other pacemaker manufacturers, is known as a "lead." In November 1994, after at least seven reports of malfunctions, two deaths due to cardiac tamponade and a request for customer notification by the Food and Drug Administration, Telectronics issued a recall of one of its pacemaker leads. Currently, there are several lawsuits pending against Telectronics alleging that the defective pacemaker leads caused deaths and serious injuries.

Telectronics is both a "manufacturer" of a medical device and a "supplier" of a component part of a medical device. Because Title II could immunize Telectronics in its role as a supplier, patients who received a Telectronics pacemaker may still be able to sue Telectronics, but patients who received another company's pacemakers with Telectronics components might be barred from suing Telectronics.

B. Loser Pays Rule

Title II also contains a "loser pays" rule, which would make it difficult, if not impossible, for the average consumer to hold a device manufacturer accountable.

Section 206(g) states:

> Attorney Fees - The court shall require the claimant to compensate the biomaterials supplier . . . for attorney fees and costs, if –
>
> (1) the claimant named or joined the biomaterials supplier; and
> (2) the court found the claim against the biomaterials supplier to be without merit and frivolous.

Loser pays rules intimidate injured consumers and have a chilling effect on litigating to expose dangerously defective medical devices and biomaterials. Dangerous and defective devices such as pacemakers, defibrillators and jaw implants have been brought to light through litigation. A loser pays rule might have prohibited these plaintiffs from filing suit and exposing these devices.

V. Override Provision Is Still A Cap

Section 108(b)(3). In an attempt to address the concerns of Senators who object to a cap on punitive damages, S.648 contains an "additur" or override provision. The states' experience with judicial additur demonstrates that it is an ineffective mechanism for increasing punitive damage awards above a statutory cap.

As a practical matter, it is unlikely that additur will be used by judges to increase a punitive damage award beyond the legislation's cap. According to Professor Rustad's comprehensive study of punitive damage awards between 1965 and 1990 in all state and federal product liability awards, there is not one reported product liability case in which a judge used additur to increase a punitive damage award.

Colorado has a statute that caps punitive damages at the amount of compensatory damages but allows a judge to increase a punitive damage award to three times the amount of compensatory damages. However, since the statute was enacted in 1991, no judge has ever taken advantage of the law to increase a punitive damage award – no matter how reckless the defendant's conduct .

For example, in January 1995, a federal jury in Colorado returned a verdict of $896,921 in compensatory damages against Howmedica, Inc. – a manufacturer of a defective hip prosthesis. The prosthesis had failed in such a way that one of its components shredded inside the body of the plaintiff and caused osteolysis - a condition which causes bones to erode. The jury found that Howmedica had engaged in willful and wanton conduct and awarded the plaintiff $896,921 in exemplary or punitive damages. Despite substantial evidence that Howmedica engaged in willful and wanton misconduct with regard to the manufacture and sale of its hip prosthesis, the judge in this case refused to increase the punitive damage award.

Further, the bill's cap fails to achieve the dual functions of punitive damages – to deter and to punish – because the punitive damage award is linked to the amount of damages a victims receives. The imposition of an amount of damages sufficient to deter and punish reckless and egregious misconduct should be based on the profits and/or earnings of the wrongdoing corporation. A corporation's punishment should not be dependent upon the harm done to the consumer or the consumer's economic status. Instead, it should be based on the impropriety of the conduct.

VI. Expanded Statute of Repose Covers Every Product

S.648 greatly expands the scope of the statute of repose from the bill that President Clinton vetoed last year. Last year's legislation contained a statute of repose that covered only durable goods, while this year's legislation has a statute of repose that covers <u>all</u> products. The arbitrary 18 year limit precludes injured workers and consumers from recovering even their medical expenses despite the fact that many of the products covered under this bill have a useful working life beyond 18 years. Some products that the bill would cover include: gas water heaters, component parts of nuclear reactors, tractors, elevators and machine tools.

A cursory examination of the case law with older machinery reveals that manufacturers often have knowledge of defective products, yet keep this information from the public. In 1990, for example, James Miller of Blue Springs, Missouri, was killed when the 1966 Massey-Ferguson

tractor he was riding hit a hidden hole and rolled over. Miller, 34, was crushed to death. At trial, it was shown that Massey-Ferguson made the decision not to equip its tractors sold in the United States with rollover protection systems. The corporation's expert engineers admitted that before 1965 or 1966, Massey-Ferguson had the technology available to equip all of its tractors with rollover protection systems. Further, the experts admitted that in 1959, Sweden required that all new tractors sold in that country be equipped with rollover protection systems.

For more information regarding specific provisions or statistics, please do not hesitate to contact Rich Vuernick at (202) 775-1580.

THE PRODUCT LIABILITY BILL: WORSE FOR CONSUMERS IN EVERY STATE

*The Product Liability Bill claims to "*provide a fair balance among the interests of product users, *[and]* manufacturers,*" yet its provisions would harm consumer's rights to justice in every state. Categories where the Product Liability Bill would* ***in at least some instances*** *reduce consumers' protection under state law are marked* ☒. *States marked* ✔ *means the bill expands consumer rights in this category. Categories which would be unaffected by the bill are left blank.*

STATE	JOINT & SEVERAL FOR NON-ECONOMIC DAMAGES	PUNITIVE DAMAGES	STATUTE OF LIMITATIONS	STATUTE OF REPOSE
Alabama	X	X	X	X
Alaska		X	X	X
Arizona	X	X		X
Arkansas	X	X	X	X
California		X	✔	X
Colorado	X	X		X
Connecticut	X	X	X	X
Delaware	X	X	X	X
District of Columbia	X	X	X	X
Florida	X	X	X	X
Georgia	X	X	X	X
Hawaii	X	X		X
Idaho	X	X	✔	X
Illinois		X	X	✔
Indiana	X	X	X	✔
Iowa	X	X		✔
Kansas	X	X		X
Kentucky		X	X	X
Louisiana	X		✔	X
Maine	X	X	X	X
Maryland	X	X	X	X
Massachusetts	X	X	X	X

STATE	JOINT & SEVERAL FOR NON-ECONOMIC DAMAGES	PUNITIVE DAMAGES	STATUTE OF LIMITATIONS	STATUTE OF REPOSE
Michigan		X	X	X
Minnesota	X	X	X	X
Mississippi	X	X	X	X
Missouri	X	X	X	X
Montana	X	X	X	X
Nebraska	X		X	X
Nevada	X	X		X
New Hampshire	X		X	X
New Jersey	X	X		X
New Mexico	X	X	X	X
New York	X	X	X	X
North Carolina	X	X	X	✔
North Dakota	X	X	X	X
Ohio	X	X	✔	X
Oklahoma	X	X		X
Oregon		X	X	✔
Pennsylvania	X	X		X
Rhode Island	X	X	X	X
South Carolina	X	X	X	X
South Dakota	X	X	X	X
Tennessee		X	X	X
Texas	X	X	X	X
Utah		X	X	X
Vermont		X	X	X
Virginia	X	X	✔	X
Washington	X		X	X
West Virginia	X	X		X
Wisconsin	X	X	X	X
Wyoming		X	X	X

THE PRODUCT LIABILITY BILL: NO UNIFORMITY

The Product Liability Bill provisions generally only preempt laws that are better for consumers than existing state law. Consumers are left with the worst of all possible worlds -- the worst provisions of their current state laws, and the worst provision of the Product Liability Bill.

Categories where the Product Liability Bill would only partially preempt state law -- for instance, by wiping out an exception to the state's statute of repose preserving suits for asbestos injuries are marked ◘ with various background colors to denote different variations on the supposedly "uniform" Federal standard.

STATE	JOINT & SEVERAL FOR NON-ECONOMIC DAMAGES	PUNITIVE DAMAGES	STATE	JOINT & SEVERAL FOR NON-ECONOMIC DAMAGES	PUNITIVE DAMAGES
Alabama			Montana	●	
Alaska			Nebraska	●	
Arizona	●		Nevada		
Arkansas			New Hampshire	●	
California			New Jersey	●	
Colorado	●	●	New Mexico	●	
Connecticut		●	New York	●	
Delaware			North Carolina	●	●
District of Columbia			North Dakota	●	●
Florida	●	●	Ohio	●	
Georgia		●	Oklahoma	●	
Hawaii			Oregon		
Idaho	●		Pennsylvania		
Illinois		●	Rhode Island		
Indiana	●	○	South Carolina		
Iowa	●		South Dakota	●	
Kansas	○	●	Tennessee		
Kentucky			Texas	●	○
Louisiana	●		Utah		
Maine			Vermont		
Maryland			Virginia		○
Massachusetts		○	Washington		
Michigan		○	West Virginia		
Minnesota	●		Wisconsin	●	
Mississippi	○		Wyoming		
Missouri					

Product liability - Interest group materials

Public Citizen

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

May 22, 1997

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

Dear Bruce:

Once again thank you for the helpful meeting on civil justice issues in March. Since our meeting we have been rather preoccupied with activity on the products liability and voluntary immunity bills in the House and Senate, which has meant a delay in responding to your request for additional information.

Public Citizen has been preparing several research reports to address the particular issues we discussed regarding federal products liability legislation. This legislation, now contained in S. 648, which has passed the Senate Commerce Committee, is similar to that vetoed last year. Enclosed are the first of several reports:

- Biomaterials -- A Public Citizen survey of the 1997 Medical Device Register showing that a number of manufacturers are still producing the 84 medical devices claimed to be threatened by a biomaterials shortage. The report reveals that, in fact, there are several and often numerous manufacturers of almost every medical device that the manufacturers have stated could not be manufactured because of a so-called biomaterials "shortage."

- Business to Business Litigation -- A report, prepared jointly with Citizen Action, detailing the frequent and often frivolous use of the legal system by the very companies that are also lobbying to restrict access to the courts by consumers injured by defective products.

Over the next couple of weeks, we will send you the following:

- A report on sanctions imposed by courts on defendants in products liability cases for "discovery abuse" -- failing to release or make available information during the discovery process.

- A "wish list" of pro-consumer measures that would fix real problems in civil litigation.

- A report showing the lack of deterrence that would result from a punitive damages cap, including actual discovery documents revealing how companies evaluate liability concerns, such as fear of punitive damages, when deciding how to redesign their products.

You will also be receiving from Citizen Action a report addressing one other issue we discussed -- a state by state analysis of the impact of the bill on the major points raised by President Clinton in his veto message last year. This is a significant piece of work that we will be reviewing as well.

I hope this material is helpful. We are happy to answer any questions, or to provide you with any additional information you may need. You or your staff may also want to contact staff attorney Joanne Doroshow at (202) 546-4996 x 315, or Frank Clemente, Director of Public Citizen's Congress Watch (x390). Thank you again for your interest.

Sincerely,

Joan Claybrook

Enclosures

cc: Gene Sperling
Kathy Wallman
Elena Kagin
Ellen Seidman
Peter Jacoby
Tracey Thornton
Maria Echaveste

Product liability
Interest group materials

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NEWS RELEASE

Embargoed for Release:
April 30, 1997

Contact:
Rich Vuernick, Citizen Action (202-775-1580)
Joanne Doroshow, Public Citizen (202-546-4996)

National Assoc. of Manufacturers Accused of Gross Hypocrisy

Consumer Groups Demand that NAM Cease Support of Product Liability Bill

New Report Documents Examples of Corporations Which Want to Take Away Consumers' Legal Rights But Use the Courts to Pursue Their Own Legal Rights

(Washington D.C.) Public Citizen and Citizen Action, two of the nation's leading consumer groups, today called on the National Association of Manufacturers (NAM) and its members to "abandon at once your misleading anti-consumer, anti-worker campaign to undercut citizens' access to the courts." NAM is lobbying furiously for the Senate to pass an anti-consumer product liability bill, which is scheduled for a markup on Thursday, May 1, in the Senate Commerce Committee.

In a letter to NAM Chairman Warren L. Batts, the groups also stated that "[i]f NAM members were truly burdened by the cost of punitive damages you should focus on curbing business-to-business litigation rather than limiting the rights of injured consumers to hold corporate wrongdoers accountable for their negligence, misdeeds, and other wrongful acts. Furthermore, manufacturers also have it within their control to limit or prevent punitive damages by not acting with 'wreckless disregard' for consumer safety in the design and sale of their products, the very high standard required to prove that punitive damages are warranted."

The letter to Mr. Batts was accompanied by a new report prepared by the two groups titled "The National Association of Manufacturers: A Study in Hypocrisy." The report documents case examples showing the blatant hypocrisy of the business groups pushing anti-consumer product liability legislation, *revealing that the same companies lobbying to restrict the legal rights of people injured or killed by defective products have unfettered access to our nation's courts as their own private playground.*

This report focuses on a sampling of cases in which NAM members have been plaintiffs and defendants. The cases reveal that American businesses often file frivolous and anti-competitive lawsuits designed to intimidate or harass. In contrast, the cases in which they are defendants demonstrate a cavalier or reckless attitude toward the health and safety of American consumers.

-- more --

Examples of such hypocrisy include:

- Procter & Gamble (P&G) sued Amway Corporation distributors accusing them of spreading rumors that P&G and its executives were involved in Satanism and devil worship. The suit was dismissed. P&G had earlier been sued for manufacturing Rely tampons, which caused toxic shock syndrome that resulted in the death of a 25-year old woman. P&G was found liable for her death and it was revealed at trial that the company knew of a link between toxic shock syndrome and tampons yet kept the product on the market.

- In 1995, Exxon threatened to file suit against a minor league baseball team in Georgia, accusing the "Columbus RedStixx" of violating the company's trademark by using a double "x" in its logo. Though confident they had done no wrong, RedStixx officials decided to alter the logo in 1996 in order to avoid the possibility of having to face the world's largest oil company in court. Exxon earlier had been found liable for the 1989 Exxon Valdez spill, which dumped 11 million gallons of crude oil into Prince William Sound, and ranks as one of the worst environmental disasters in history. Exxon was ordered to pay fishermen and others whose livelihoods were affected by the spill $287 million in compensatory damages and $5 billion in punitive damages for recklessly allowing the Valdez to run aground.

- Brown & Williamson (B&W), along with other cigarette makers, recently asked a Florida judge to rule that documents released as part of the Liggett Group tobacco settlement with states' attorneys general could not be used in Florida's lawsuit against the cigarette makers. The judge rejected their request, ruling that most of the documents showed evidence of fraud by the tobacco companies. Meanwhile, in August 1996, a Florida jury found B&W responsible for an individual's lung cancer and awarded his family $750,000 in damages. The jury also found B&W negligent for not telling consumers they were dealing with a deadly product.

Report's Analysis of SEC Filings Further Document Corporate Hypocrisy

Included in the report is information from corporate annual reports filed with the Securities and Exchange Commission (SEC) that further reveals the hypocrisy of these large companies. If expenses related to product liability litigation brought by people injured or killed by defective products are truly a financial burden on corporations, the corporations are misleading shareholders by not revealing this in their annual reports. However, if litigation is not a significant expense, as is stated in their SEC filings, then the corporations are deceiving Congress and the public with their claims.

Joan Claybrook, President of Public Citizen, noted, "For the past 20 years some of the richest corporations in America have waged a well-funded campaign to prevent citizens injured or killed by defective products from bringing lawsuits against corporate wrongdoers. At the same time, NAM members are flooding the courts with their own litigation against competitors. This is hypocrisy of the worst kind."

"NAM wants unimpeded access to the courts even when one of their members objects to the color a competitor is using in his ads, but at the same time wants to impose incredible obstacles and arbitrary limits on consumers when they file lawsuits to protect their health and safety," said Richard Vuernick, Citizen Action Legal Policy Director.

-- end --

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April 30, 1997

Mr. Warren L. Batts
Chairman of the Board
National Association of Manufacturers
Chairman and CEO, Tupperware Corporation
Chairman, Premark International, Inc.
Deerfield, Illinois

Dear Mr. Batts:

We write to you in your capacity as chairman of the National Association of Manufacturers (NAM). For decades, NAM and its member companies have spent hundreds of millions of dollars lobbying at the state and federal level to limit the legal and financial responsibility of corporations which recklessly manufacture products that injure, maim and kill innocent Americans.

The principal justification for your advocacy of anti-consumer product liability legislation has been to reduce the number of consumer and worker lawsuits, which you claim are sapping industry's ability to compete. Your position is the height of hypocrisy.

Business-to-business lawsuits pose a much greater "burden" on your member companies than do product liability suits. For instance, 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. A primary reason given by NAM of the need for federal product liability legislation is to curb such "excessive" punitive damage awards won by consumers.

As you know, the federal product liability legislation you now are lobbying for would allow your member companies unfettered access to the courts. Thousands of these business-to-business lawsuits, many of which are anti-competitive and/or of questionable merit, would not be restricted in any way by the product liability legislation you advocate. Yet, you seek to take away legal rights of consumers to hold your members fully accountable for manufacturing defective products that injure, maim and kill.

NAM's "do as I say, not as I sue" approach to litigation is a blatant double standard that is clearly exposed in the repeated examples reviewed in the attached report released today by our organizations.

If NAM members were truly burdened by the cost of punitive damages they should focus on curbing business-to-business litigation rather than limiting the rights of injured consumers to hold corporate wrongdoers accountable for their negligence, misdeeds, and other wrongful acts. Furthermore, manufacturers also have it within their control to limit or prevent punitive damages by not acting with "reckless disregard" for consumer safety in the design and sale of their products, the very high standard required to prove that punitive damages are warranted.

For these reasons, our organizations call upon NAM and its members to abandon at once your misleading anti-consumer, anti-worker campaign to undercut citizens' access to the courts. Not doing so makes a mockery of our judicial system, and treats the peoples' courts as a private corporate playground.

Sincerely,

Joan Claybrook
President
Public Citizen

Richard Vuernick
Legal Policy Director
Citizen Action

THE NATIONAL ASSOCIATION OF MANUFACTURERS: A STUDY IN HYPOCRISY

How NAM Members Use America's Courts As Their Own Personal Playground

The legal "reforms" being pushed in Congress by business groups such as the National Association of Manufacturers (NAM) *affect only the rights of consumers injured or killed by faulty products.* They do *nothing* to stop the ridiculously high number of anti-competitive, costly lawsuits filed each year by businesses against each other.

Businesses suing each other comprised nearly half of all federal court cases filed between 1985 and 1991, according to *The Wall Street Journal.* And a recent study by the RAND Institute for Civil Justice revealed that business cases account for 47 percent of all punitive damage awards. In contrast, only 5 percent of punitive damage awards are assessed in product liability cases.

The duplicity of these companies is further revealed in their annual reports filed with the Securities and Exchange Commission (SEC). If litigation truly is a major burden on operations, then these businesses are misleading shareholders by omitting this fact on their reports. However, if their filings are to be believed and litigation is not a significant expense, then corporations are deceiving Congress and the public with their claims.

The following are just a few examples of NAM members' hypocrisy:

JOHN DEERE & COMPANY

John Deere as Plaintiff

- In 1979, John Deere sued Farmhand Inc. for allegedly using the same color green on its front-end loaders as Deere used on its tractors. Deere sought through its lawsuit to make "John Deere green" its exclusive color so that consumers would not be "confused." A federal judge found in favor of Farmhand and dismissed Deere's claim. *Deere v. Farmhand Inc.*, 560 F. Supp. 85 (S.D.Iowa 1982).

John Deere as Defendant

- Shelley Wingad, 37, was operating a John Deere tractor on a construction site when the machine violently tipped and ejected him, causing severe and permanent damage that rendered him unable to work. In 1993, a jury found Deere liable for this accident and awarded Wingad $652,000 in damages, $350,000 of which was for his future loss of earning capacity. The award was upheld on appeal. *Wingad v. John Deere & Co.*, 523 N.W.2d 274 (Wis. Ct. App. 1994).

John Deere's SEC Filings

- "The Company is subject to various unresolved legal actions which arise in the normal course of its business. . . . Although it is not possible to predict with certainty

the outcome of these unresolved legal actions or the range of possible loss, *the Company believes these unresolved legal actions will not have a material effect on its financial position or results of operations.*" (1/15/97).

CATERPILLAR

Caterpillar as Plaintiff

- In 1985, Caterpillar threatened to file suit against Michael Zinman, a seller of Caterpillar equipment in upstate New York, after he created the "Raterpillar Tractor Co." (consisting of two pet store rats) as a spoof on the company's name. For more than a year, Caterpillar sent intimidating letters to Zinman, which forced him to hire a lawyer. Caterpillar's harassment ended only after Zinman agreed to sell Caterpillar his "company." *AP*, Apr. 20, 1985.

Caterpillar as Defendant

- Garry Huffman was killed in 1981 while using a 1977 Caterpillar pipelayer machine at a Colorado ski area. When the machine began rolling down a hill after being shut off, Huffman tried to apply the brakes, but to no avail. He was crushed while trying to escape. Testimony revealed that Caterpillar subsequently altered the braking system on this model to include an emergency brake that would automatically and immediately stop the machine when the engine is shut off. The jury found Caterpillar liable for Huffman's death and awarded his family $475,000 in damages. *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470 (10th Cir. 1990).

Caterpillar's SEC Filings

- "The Company is involved in litigation matters and claims which are normal in the course of its operations. The results of these matters cannot be predicted with certainty; however, *management believes, based on the advice of legal counsel, the final outcome will not have a materially adverse effect on the Company's consolidated financial position.*" (3/26/97).

ELI LILLY

Eli Lilly as Plaintiff

- In 1995, Eli Lilly filed suit against manufacturers Zenith, American Cyanamid and Biocraft, seeking an injunction that would prohibit these companies from importing and selling a generic version of Eli Lilly's Ceclor drug. A federal judge rejected Eli Lilly's motion for an injunction. *Mealey's Litigation Reports*, Sept. 18, 1995.

Eli Lilly as Defendant

- Lola Jones, 81, died from a fatal kidney-liver ailment in June 1982 after taking the arthritis pain-relief drug Oraflex for two months. Testimony revealed that Eli Lilly knew of the serious liver and kidney problems associated with the drug and went so far as to not disclose to the FDA its knowledge of 32 Oraflex-related deaths in other countries when it sought approval in the United States. The jury returned a $6 million verdict -- all punitive damages -- against Eli Lilly for its reckless behavior. The parties subsequently settled out of court for an undisclosed amount. *Washington Post*, Nov. 22, 1983, at A1; *UPI*, May 16, 1984.

Eli Lilly's SEC Filings

- "The Company is also a defendant in other [in addition to DES and price-fixing cases] litigation, including product liability and patent suits, of a character regarded as normal to its business."

  "While it is not possible to predict or determine the outcome of the legal actions pending against the Company, *in the opinion of the Company the costs associated with all such actions will not have a material adverse effect on its consolidated financial position or liquidity but could possibly be material to the consolidated results of operations in any one accounting period.*" (3/25/96).

PFIZER

Pfizer as Plaintiff

- Pfizer sued rival Miles Pharmaceutical in 1993, claiming Miles was engaged in false advertising and a misleading information program for its cardiovascular drug Adalat CC (a competitor to Pfizer's Procardia XL drug). Miles responded by filing a counterclaim against Pfizer, accusing it of making false statements about Adalat CC. In 1994, a judge found Pfizer guilty of lying about Miles and Adalat CC, and ordered the company to certify within six weeks that it had made its sales force aware of the court's findings. *Pittsburgh Post-Gazette*, Aug. 25, 1994, at D12.

Pfizer as Defendant

- Just days after being given the antidepressant drug Sinequan by her gynecologist, Laura Hermes developed "hunting jaw," a condition marked by pain, lack of control of the jaw and tongue muscles, slurred speech and drooling. Evidence revealed that Pfizer knew of adverse reactions involving Sinequan going back for more than a decade before this incident, yet never warned doctors or patients of this danger. In 1987, a Mississippi jury found Pfizer liable for Hermes' injuries and awarded her $800,000 in damages. *Hermes v. Pfizer*, 848 F.2d 66 (5th Cir. 1988).

Pfizer's SEC Filings

- "The Company is involved in a number of claims and litigations, including product liability claims and litigations considered normal in the nature of its businesses."

  "Generally, the plaintiffs in all of the pending heart valve litigations discussed above seek money damages. Based on the experience of the Company in defending these claims to date, including available insurance and reserves, *the Company is of the opinion that these actions should not have a material adverse effect on the financial position or the results of operations of the Company.*" (3/28/97).

RIDDELL, INC. and SCHUTT SPORTS GROUP (SPORTING GOODS MANUFACTURERS ASSOCIATION MEMBERS)

Schutt as Plaintiff

- In 1981, Schutt sued Riddell, complaining that the face masks on Riddell's helmets looked too much like Schutt's mask "style" and that Riddell copied its sizing designations. The trial court dismissed Schutt's claims, noting "seldom have we seen a lawsuit as unwarranted and frivolous as this one." *Schutt v. Riddell*, 673 F.2d 202 (7th Cir. 1982).

- Schutt again sued Riddell in 1989 after Riddell signed a licensing agreement with the NFL that would allow it to provide 90 percent of the league's helmets. Schutt was upset that this contract would give Riddell "unfair" exposure during televised games. The trial court sided with Riddell, finding Schutt's complaints to be "without merit." *Schutt v. Riddell*, 727 F. Supp. 1220 (N.D. Ill. 1989).

Riddell as Defendant

- In 1988, James Arnold was rendered a quadriplegic and respirator-dependant after a junior high football collision caused his spine to fracture. The jury found that the Riddell helmet he was wearing was defective and that the company's decision to not add extra padding to the helmet -- padding it included in other models -- was the cause of his injury. The jury awarded Arnold $8 million in damages. The case was subsequently settled out of court for an undisclosed amount. *Arnold v. Riddell*, 882 F. Supp. 979 (D. Kan. 1995); *PR Newswire*, Dec. 5, 1995.

Schutt's and Riddell's SEC Filings

- No filing for "Schutt" or "Riddell" available from the SEC online service.

GILLETTE

Gillette as Plaintiff

- In 1996, Gillette sued competitor Norelco, claiming that Norelco's ads for a new electric razor were "false and deceptive" because they depicted non-electric razors as "ferocious creatures." The judge rejected Gillette's request for a ban on these ads, noting that a Gillette subsidiary had used similar tactics in another ad campaign. *Boston Herald*, Dec. 3, 1996.

Gillette as Defendant

- After nine years of legal feuding, Gillette and 53 other companies and municipalities that dumped toxic waste into a Tyngsborough, Massachusetts, landfill now on the federal Superfund environmental clean-up list finally agreed in 1992 to pay $35.5 million to clean up the site and replace contaminated drinking water. *Boston Globe*, Dec. 24, 1992, at 48.

Gillette's SEC Filings

- "There is no action, suit, investigation or proceeding pending against, or to the knowledge of the Company threatened against or affecting, the Company or any of its Subsidiaries before any court or arbitrator or any governmental body, agency or official in which there is a reasonable possibility of an adverse decision which could materially adversely affect the business, operations or financial condition of the Company and its Consolidated Subsidiaries, taken as a whole, or which in any manner draws into question the validity of this Agreement or the Notes."

  "The Company is subject to legal proceedings and claims arising out of its business . . . . *Management, after review and consultation with counsel considers that any liability from all of these legal proceedings and claims would not materially affect the consolidated financial position, results of operations or liquidity of the Company.*" (3/22/96).

PROCTER & GAMBLE

Procter & Gamble as Plaintiff

- In 1995, Procter & Gamble sued Randy Haugen and five other Amway Corporation distributors, accusing them of spreading rumors that Procter & Gamble and its executives were involved in satanism and devil worship. The company specifically demanded "damages" for having to cope with this gossip. A federal court in Utah dismissed Procter & Gamble's lawsuit, calling a number of its claims and allegations "insufficient." *Procter & Gamble v. Haugen*, 947 F. Supp. 1551 (D. Utah 1996).

Procter & Gamble as Defendant

- Patricia Ann Kehm, 25, died in 1980 of toxic shock syndrome after using Procter & Gamble's Rely tampons for just four days. Testimony revealed that the company knew of a link between toxic shock syndrome and tampons, including a Center for Disease Control study, yet kept this product on the market. A jury awarded Kehm's husband and two young daughters $300,000 in damages. *AP*, Dec. 2, 1983.

Procter & Gamble's SEC Filings

- "The Company is subject to various lawsuits and claims with respect to matters such as governmental regulations, income taxes, and other actions arising out of the normal course of business."

  "While the effect on future results of these items is not subject to reasonable estimation because considerable uncertainty exists, *in the opinion of management and Company counsel, the ultimate liabilities resulting from such claims will not materially affect the consolidated financial position, results of operations or cash flows of the Company.*" (9/11/96).

EXXON

Exxon as Plaintiff

- In 1995, Exxon threatened to file suit against a minor league baseball team in Georgia, accusing the "Columbus RedStixx" of violating the company's trademark by using a double "x" in its logo. Though confident they had done no wrong, RedStixx officials decided to alter the logo in 1996 in order to avoid the possibility of having to face the world's largest oil company in court. *News & Record (Greensboro, NC)*, June 11, 1995, at C12; *News & Record (Greensboro, NC)*, Sept. 1, 1996.

Exxon as Defendant

- The 1989 Exxon Valdez spill that dumped 11 million gallons of crude oil into Prince William Sound ranks as one of the worst environmental disasters in history. An Alaska jury found Exxon liable for this accident and ordered the company to pay fishermen and others whose livelihoods were affected by the spill $287 million in compensatory damages. It also assessed $5 billion in punitive damages against Exxon for recklessly allowing the Valdez to run aground. *In re the Exxon Valdez*, No. A89-0095-CV (HRH), 1995 U.S. Dist. LEXIS 12952 (D. Alaska Jan. 27, 1995); *AP Online*, Feb. 14, 1997.

Exxon's SEC Filings

- "The ultimate cost to the corporation from the lawsuits arising from the Exxon

Valdez grounding is not possible to predict and may not be resolved for a number of years."

"Claims for substantial amounts have been made against Exxon and certain of its consolidated subsidiaries in other pending lawsuits, the outcome of which is not expected to have a materially adverse effect upon the corporation's operations or financial condition." (3/8/96).

SYNTEX PHARMACEUTICALS

Syntex as Plaintiff

- In 1993, Syntex sued Apotex Inc., a Canada-based pharmaceutical company, for marketing a generic version of its arthritis drug Naprosyn. The drugs made by Apotex are approved for sale in Canada. Apotex noted that Syntex has unsuccessfully sued Apotex several times in Canada and called Syntex's U.S. action an attempt to accomplish in that country what it failed to do in Canada. A federal judge granted Syntex a limited injunction, but did not completely enjoin Apotex from exporting its product to the U.S. *Montreal Gazette,* June 20, 1993, at A5; *Syntex v. Interpharm*, Civil Action 1: 92-CV-03-HTW, 1993 U.S. Dist. LEXIS 10716 (N.D. Ga. 1993).

Syntex as Defendant

- Two infants who were fed the soy-derived Neo-Mull-Soy baby formula produced by Syntex sustained brain damage, including permanent impairment of language and motor coordination. It was revealed at trial that Syntex's decision to not add salt to its formula, an essential nutrient for brain development, was prompted solely by economic considerations. A jury awarded $27 million, including $22 million in punitive damages. *Duddleston v. Syntex Laboratories, Inc.*, Cook County Circuit Court, No. 80-I-57726 (Feb. 28, 1985).

Syntex's SEC Filings

- Acquired by Roche Holding Corp. in 1994; no annual report available from the SEC online service for Roche Holding (incorporated in Switzerland).

SCOTT PAPER

Scott Paper as Plaintiff

- Scott Paper's Canadian division sued Procter & Gamble in 1995, alleging that Procter & Gamble had misled consumers about the absorptive power of Bounty paper towels by advertising it as the "quicker-picker-upper." Scott Paper specifically demanded $723,000 in special, punitive and exemplary damages. The two parties subsequently reached an out-of-court settlement, terms of

which were not disclosed. *Cincinnati Enquirer*, Nov. 7, 1995, at B6; *Baltimore Sun*, Dec. 19, 1995, at 4C.

Scott Paper as Defendant

- In 1992, James Woodson of Philadelphia sued Scott Paper after he was terminated as part of what Scott said was a systematic reduction. He was with the company for 22 years. Woodson, an African-American, sued Scott Paper, contending that he was dismissed in retaliation for having filed discrimination charges after being repeatedly passed over for promotions. The jury agreed, awarding Woodson $1.5 million in damages and back pay. *Fresno Bee*, Feb. 16, 1995.

Scott Paper's SEC Filings

- [*With regard to breast implant litigation:*] "Although the final results of these claims cannot be predicted with certainty, it is the present opinion of the Company, after consulting with counsel, that they will not have a material adverse effect on the Company's financial condition."

  "In addition, the Company is involved in lawsuits and state and Federal administrative proceedings under the environmental, antitrust and equal employment opportunity laws, among others."

  "Although the final results in these suits and proceedings cannot be predicted with certainty, *it is the present opinion of the Company, after consulting with counsel, that they will not have a material adverse effect on the Company's financial condition.*" (3/30/95).

UPJOHN

Upjohn as Plaintiff

- Upjohn, the maker of the baldness remedy Rogaine, sued the small Patron I Corp. in 1988 over advertisements for its Helsinki Formula hair treatment. Upjohn complained that Patron misrepresented the effectiveness of its product in stopping hair loss and promoting hair growth. A federal judge in Nevada dismissed Upjohn's claim in 1989. *Reuters Financial Service*, Nov. 17, 1988; *Business Wire*, Feb. 21, 1989.

Upjohn as Defendant

- Visiting an ophthalmologist for treatment of an eye disease, Meyer Proctor went blind in his left eye minutes after receiving an injection of Upjohn's anti-inflammation drug Depo-Medrol. The eye shriveled up and had to be removed five months later. Upjohn allegedly had promoted the injection of Depo-Medrol

near the eyes despite the fact that the FDA never approved the drug for this use. There was also evidence that Upjohn knew of 23 other incidents of adverse reactions to Depo-Medrol, including three instances of blindness. The jury awarded the Proctor family $3 million in compensatory damages and $125 million in punitive damages, which the judge reduced to $35 million. *Crain's Chicago Business*, Nov. 4, 1991, at 1.

Upjohn's SEC Filings

- "Various suits and claims arising in the ordinary course of business, primarily for personal injury and property damage alleged to have been caused by the use of the Company's products, are pending against the Company and its subsidiaries."

  "Based on information currently available and the Company's experience with lawsuits of the nature of those currently filed or anticipated to be filed which have resulted from business activities to date, the amounts accrued for product and environmental liabilities arising from the litigation and proceedings referred to above are considered to be adequate. *Although the Company cannot predict the outcome of individual lawsuits, the ultimate liability should not have a material effect on consolidated financial position; and unless there is a significant deviation from the historical pattern of resolution of such issues, the ultimate liability should not have a material adverse effect on the Company's results of operations or liquidity.*" (3/30/95).

HORMEL FOODS

Hormel as Plaintiff

- In 1995, Hormel Foods, the maker of the luncheon meat SPAM, sued Jim Henson Productions to stop the creator of the Muppets from calling a humorous wild boar in a new movie "Spa'am." Hormel was worried that sales of SPAM would drop off if it was linked with such "evil in porcine form." A federal court judge rejected Hormel's claims. Hormel appealed, but also lost. *Connecticut Law Tribune*, Feb. 5, 1996.

Hormel as Defendant

- In 1996, the city of Davenport, Iowa, filed a lawsuit against a local Hormel Foods factory for destroying its major sewer line. For years the company negligently dumped industrial waste water into the sewer system, resulting in the corrosion of the line and eventually two collapses, the second of which dumped raw sewage. The city estimated the repair costs at $3.3 million. *Quad City Times*, Apr. 2, 1996, at A1.

Hormel's SEC Filings

- "*The Company knows of no pending material legal proceedings.*" (1/24/97).

CLOROX

Clorox as Plaintiff

- Clorox sued Dowbrands Inc. in 1995, complaining that Dowbrands' "Smart Scrub" liquid cleanser was too similar in name to its own "Soft Scrub" product and that this might lead to customer "confusion." Clorox also was upset that Dowbrands allegedly ran a commercial that "copied" one of its own ads that featured an animated, talking bathtub. According to a deputy clerk of court in the U.S. District Court in San Francisco, the parties later stipulated the dismissal of the case. *The Recorder (American Lawyer Media)*, June 28, 1995, at 2; telephone conversation on April 29, 1997.

Clorox as Defendant

- Two-year-old Susan Renee Bowen sustained severe burns to her esophagus that necessitated 240 surgical procedures after she ingested Clorox's "Liquid Plumr." Testimony revealed that this product, which could dissolve flesh in a fraction of a second, had no antidote. The container also lacked a child-guard cap, though such a safety device was readily available at the time of the injury. The parties agreed on a settlement worth $4.8 million. *Bowen v. Jiffee Clorox Corp.*, U.S. Dist. Ct., D. Kan., No. 82-2183 (Oct. 19, 1984).

Clorox's SEC Filings

- "*ITEM 3. LEGAL PROCEEDINGS*"

  "*None.*" (9/26/96).

AMWAY CORPORATION

Amway as Plaintiff

- In 1982, Amway threatened to file a $500 million lawsuit against the *Detroit Free Press*, claiming that the newspaper libeled it in a story about the company's plan to misrepresent the price of products imported from Canada to avoid paying full tariffs on those items. The *Free Press* stood by its story, and Amway dropped its threat a few months later. *UPI*, Aug. 23, 1982.

Amway as Defendant

- Three-year-old Heather Ferman of St. Louis suffered severe injuries in 1981 when she drank a lye-based drain cleaner negligently left in a foam cup by an

Amway distributor after a demonstration. She underwent 27 operations to repair her esophagus and stomach. Heather now has a 10 percent higher risk of developing cancer. The parties agreed on a structured settlement in 1983 for Heather's care that could be worth up to $3 million over her lifetime. *AP*, Apr. 21, 1983.

Amway's SEC Filings

- No filing for "Amway" available from the SEC online service.

DOW CHEMICAL

Dow Chemical as Plaintiff

- In 1990, Dow Chemical subsidiary FilmTec filed a patent infringement lawsuit against Hydranautics that effectively kept the company from selling its water filtration membranes until 1992, when an appellate court ruled FilmTec's patent was not valid and lifted the injunction against Hydranautics. Hydranautics has since filed suit against FilmTec, claiming FilmTec "maliciously" pursued this false infringement claim against it in order to monopolize the market. This case is now before the Ninth Circuit. *Intellectual Property Litigation Reporter*, Nov. 13, 1996, at 14.

Dow Chemical as Defendant

- Richard and Gloria Perez were awarded $2.37 million in damages in 1983 after Richard became permanently sterile after being exposed to the pesticide DBCP. Richard worked at the Dow Chemical plant that made DBCP. The jury found that Dow Chemical knew of the dangers of DBCP for years, yet did not adequately warn workers or consumers of its potential harm. DBCP was removed from the market after Richard Perez and other workers brought their injuries to light. *Perez v. Dow Chemical*, Cal., San Francisco County Superior Court, N. 729 596 (1983).

Dow Chemical's SEC Filings

- [*With regard to Dow Corning breast implant litigation*:] "It is impossible to predict the outcome of each of the above described legal actions. *However, it is the opinion of the Company's management that the possibility that these actions will have a material adverse impact on the Company's consolidated financial statements is remote, except as described below.*

  "The Company's maximum exposure for breast implant product liability claims against Dow Corning is limited to its investment in Dow Corning which, after the second quarter charge noted above, is zero. As a result, any future charges by Dow Corning related to such claims or as a result of the Chapter 11

proceeding would not have an adverse impact on the Company's consolidated financial statements."

"*Management believes that the possibility is remote that a resolution of plaintiffs' direct participation claims, including the vigorous defense against those claims, will have a material adverse impact on the Company's financial position or cash flows.*" (3/25/97).

3M

3M as Plaintiff

- In early 1997, 3M sued Microsoft, claiming that the computer company's new software program that allows users to create computer representations of yellow notes that can be repositioned on the screen is too similar to 3M's adhesive "Post-it" notes, and that consumers will "confuse" the two. This complaint is now before a federal court in Minnesota. *Atlanta Journal-Constitution*, Jan. 10, 1997, at 1F.

3M as Defendant

- A newborn infant suffered ruptures of both lungs and cardiac arrest resulting in massive brain damage after the "Baby Bird" respirator he was hooked up to malfunctioned, forcing air into his lungs without permitting the lungs to exhale. The pop-off valve that was supposed to protect the user from excessive pressurization and to sound an alarm if this occurred failed. The respirator was made by Bird Corp., a division of 3M. The parties agreed on a structured settlement, in which the family and child will receive monthly and lump-sum payments totalling $1 million. *Kennedy v. Bird Corp.*, Utah, Salt Lake City District Court, No. C-79-1148 (June 23, 1983).

3M's SEC Filings

- [*With respect to breast implant litigation:*] "The company cannot determine the impact of these potential developments on the current estimate of probable liabilities (including associated expenses) and the probable amount of insurance recoveries. . . . . As new developments occur, the estimates may be revised . . . . While such revisions or additional future charges could have a material adverse impact on the company's net income in the quarterly period in which they are recorded, the company believes that such revisions or additional charges, if any, will not have a material adverse effect on the consolidated financial position or annual results of operations of the company."

  "There can be no certainty that the company may not ultimately incur charges . . . in excess of presently established accruals. While such future charges could have a material adverse impact on the company's net income in the

quarterly period in which they are recorded, *the company believes that such additional charges, if any, will not have a material adverse effect on the consolidated financial position or annual results of operations of the company.*" (3/11/96).

NABISCO

Nabisco as Plaintiff

- Nabisco sued competitor Keebler in 1991 over its advertising campaign that claimed Keebler chocolate chip cookies contained 25 percent more chips than Nabisco's. The two parties subsequently reached an out-of-court settlement, terms of which were not disclosed. *Nabisco Brands, Inc. v. Keebler Co.*, 1991 WL 194973 (D. Ill. May 3, 1991); *Bakery Newsletter*, May 27, 1991, at 1.

Nabisco as Defendant

- In 1995, more than 50 female employees of a Nabisco Foods plant in California slapped the company with a sex-discrimination lawsuit, accusing the food maker of so restricting their restroom privileges that some workers were forced to wear diapers on the job. A number of women suffered bladder infections. Those who violated this rule were suspended, disciplined and sent home without pay. The parties reached a confidential out-of-court settlement in 1996. *L.A. Times*, Mar. 30, 1995, at B1; *L.A. Times*, Apr. 15, 1996, at B1.

Nabisco's SEC Filings

- "Nabisco is a defendant in various lawsuits arising in the ordinary course of business. *In the opinion of management, the resolution of these matters is not expected to have a material adverse effect on Nabisco's financial condition or results of operations.*" (3/10/97).

BROWN & WILLIAMSON

Brown & Williamson as Plaintiff

- Soon after the Liggett Group reached a settlement on March 20, 1997, with 22 states that would aid these states' lawsuits against the biggest cigarette manufacturers, Brown & Williamson -- along with Philip Morris, R.J. Reynolds and Lorillard -- asked a Florida judge to rule that documents released by Liggett could not be used in that state's lawsuit against manufacturers. These documents possibly could reveal an industry-wide conspiracy to mislead the public about smoking's health effects. The judge rejected this request, ruling that eight of the 13 documents in question showed evidence of fraud by the tobacco industry and therefore could be used as evidence by the state. *Wall Street Journal*, Apr. 22, 1997 at B11.

Brown & Williamson as Defendant

- In a landmark decision, a Florida jury in August 1996 found Brown & Williamson responsible for Grady Carter's lung cancer, and awarded Carter and his wife $750,000 in damages. The jury found that Carter, a 66-year-old former air traffic controller, became addicted to nicotine from smoking Brown & Williamson's unfiltered Lucky Strikes brand. It also found Brown & Williamson negligent for not telling consumers they were dealing with a deadly product, even though the tobacco industry had evidence of its product's danger since the 1950s. *Mealey's Litigation Reports*, Aug. 16, 1996.

Brown & Williamson's SEC Filings

- No filing for "Brown & Williamson" available from the SEC online service.

SCHERING-PLOUGH

Schering-Plough as Plaintiff

- In 1978, Wesley-Jessen, a vision care subsidiary of Schering-Plough, sued Industrial Bio-Test Labs for $5.3 million in damages because the lab's test results allegedly cost Wesley-Jessen FDA approval for its new soft-contact lens. The suit sought $1.75 million in general damages and $3.5 million in punitive damages. IBT and Wesley-Jessen settled this lawsuit in 1983 for an undisclosed amount. *Chemical Week*, May 17, 1978, at 17; *Chemical Week*, Feb. 9, 1983, at 11.

Schering-Plough as Defendant

- In 1988, 3-year-old Harkim Boyd of Manhattan suffered severe brain damage when he was given the asthma drug theophylline. Schering-Plough, the manufacturer, failed to warn of the danger of administering this drug when the patient also showed signs of a fever or viral illness. The case, which was against Schering-Plough and St. Vincent's Hospital, settled in November 1995 for $4.6 million. *New York Law Journal*, Nov. 28, 1995.

Schering-Plough's SEC Filings

- "Subsidiaries of the Company are defendants in 149 lawsuits involving approximately 600 plaintiffs arising out of the use of synthetic estrogens by the mothers of the plaintiffs. In virtually all of these lawsuits, one being an alleged class action, many other pharmaceutical companies are also named defendants. . . . . The total amount claimed against all defendants in all the suits amounts to more than $2 billion. While it is not possible to precisely predict the outcome of these proceedings, *it is management's opinion that it is remote that any material liability in excess of the amount accrued will be incurred.*" (3/3/97).

PENNZOIL

Pennzoil as Plaintiff

- In 1984, Pennzoil launched a legal battle against Texaco over the right to purchase a majority share of Getty Oil stock. The Texas jury returned a verdict in favor of Pennzoil, awarding the company $7.53 billion in compensatory damages and $3 billion in punitive damages, plus $600 million in interest. This legal saga, which saw Texaco forced to declare bankruptcy, did not come to an end until 1987, when both parties agreed to a final settlement plan. *Washington Post*, Dec. 20, 1987, at A1.

Pennzoil as Defendant

- Two 14-year-old Texas girls were fatally overcome by odorless methane gas while playing near a pipeline leak. Pennzoil and United Gas had contracted with nearby landowners to produce natural gas from their property, and the two companies had agreed to install and maintain on the pipeline the malodorizer the homeowners bought so that the gas would be odorized in the event of a leak. The jury found that the companies' failure to maintain the malodorizer led to the girls' deaths, and awarded the families $360,000 in damages. *Blair v. Pennzoil*, Tex., Panola County District Court, No. A-7766, Feb. 12, 1981.

Pennzoil's SEC Filings

- [*Regarding restraint of trade class action proceedings:*] "Pennzoil believes that the final outcome of these matters will not have a material adverse effect on its consolidated financial condition or results of operations."

  [*Regarding employment discrimination litigation:*] "Pennzoil believes that the final outcome of the case will not have a material effect on its consolidated financial condition or results of operations."

  "Pennzoil and its subsidiaries are involved in various other claims, lawsuits and other proceedings relating to a wide variety of matters. While uncertainties are inherent in the final outcome of such matters and it is presently impossible to determine the actual costs that ultimately may be incurred, *management currently believes that the resolution of such uncertainties and the incurrence of such costs should not have a material adverse effect on Pennzoil's consolidated financial condition or results of operations.*" (3/4/97).

GENERAL ELECTRIC

General Electric as Plaintiff

- The National Broadcasting Co. (NBC), a division of General Electric, sued the

Later Today Television Newsgroup in 1996, alleging that its "Later Today" news show violated NBC's "exclusive right" to the word "Today." Newsgroup's president Glenn Barbour wondered why his company was being sued; "Did [NBC] sue Gannett when they had USA Today or CNN Today? Why are they picking on a minority company? . . . . 'Today' is part of the American language." NBC ultimately won an injunction to keep the "Today" name for itself. *Reuters Financial Service*, Jan. 17, 1996.

General Electric as Defendant

- Richard and Virginia Klein's Missouri home was set ablaze on Christmas eve in 1980 after their General Electric Brew Starter coffee maker malfunctioned. The jury found defects in both the coffee maker's design and construction, and awarded the family $600,000. *Klein v. General Electric Co.*, 714 S.W.2d 896 (Mo. Ct. App. 1986).

General Electric's SEC Filings

- General Electric's annual report does not make any statement regarding the effect of pending legal proceedings on its financial position.

Product liability - interest group materials

Violence Policy Center

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Washington, DC 20036

202.822.8200 voice
202.822.8205 fax

April 30, 1997

Kathleen Wallman
Chief of Staff
National Economic Council
The White House
Second Floor, West Wing
Washington, D.C. 20502

Dear Kathy:

As I am sure you are aware, a new product liability bill has been introduced in the Senate as S. 648. The bill's sponsor, Senator Gorton, asserts that the new bill would not affect lawsuits against gun dealers who knowingly sell firearms to minors, felons, or other prohibited persons. As you know, one of the President's primary reasons for vetoing H.R. 956 was that it would have protected gun dealers who make negligent sales to obviously dangerous individuals.

Contrary to the claims of proponents, however, S. 648, does not "fix" the negligent sales problem with respect to firearms. Neither does S. 648 make any significant changes from H.R. 956 to address the other problems that we discussed at our April 3rd meeting.

Since so much attention has been focused on the effect of product liability reform legislation on gun dealers, I think it is important to explain in some detail why we do not believe that S. 648 preserves actions against gun dealers for negligent sales.

The new section 102 (d), "Actions for Negligent Entrustment," appears to attempt to exempt from the bill cases involving negligent sales. The provision states, "A civil action for negligent entrustment, or any action brought under any theory of dramshop or third-party liability arising out of the sale or provision of alcohol products to intoxicated persons or minors, shall not be subject to the provisions of this Act but shall be subject to any applicable State law."

While this new language in S. 648 probably would exempt from the bill actions against gun dealers based on the theory of negligent entrustment, the exemption would not apply to other similar theories, such as negligence *per se*.

A reasonable, indeed probable, interpretation of this language is that it would apply only to the specific theory of negligent entrustment in the case of any product other than alcohol. The section uses broad, sweeping language to exempt all theories used in cases involving alcohol, but mentions only negligent entrustment otherwise. The effect of this would be to complicate cases in which a sale by a gun dealer to a minor, felon, or mental incompetent results in damages but the theory used by the plaintiff is something other than negligent entrustment. The following examples illustrate the potential problems:

Knight v. Wal-Mart Stores, Inc. 889 F. Supp. 1532 (S. D. Ga. 1995) (summary attached) carefully describes negligent entrustment and negligence *per se* as separate and distinct causes of action requiring different elements of proof. Negligent entrustment is based in common law negligence, and proof is required that the seller breached a duty of care to the public to avoid sales to dangerous individuals because such sales could foreseeably result in harm to the buyer or a third party. Liability based on negligence *per se*, on the other hand, arises from the seller's failure to comply with specific statutory duties, in this case as spelled out in the federal Gun Control Act (GCA). In *Knight*, it was determined that employees of Wal-Mart, by inquiring whether the purchaser of a firearm had been adjudicated mentally incompetent, had fulfilled their statutory duty and therefore could not be negligent *per se*. However, the court held that the same employees could be found liable under traditional common law principles of negligence. The importance of this case is that it demonstrates that the two theories are distinct. The outcome could well be reversed under another set of facts in which a plaintiff could show that a seller violated a statutory duty but might not be able to show common law negligence.

For example, in *King v. Story's, Inc.* 54 F.3d 697 (11th Cir. 1995) (copy attached), the plaintiff was shot by an ex-convict armed with a rifle sold to him by the defendant store. The buyer lied on the federal form 4473, denying his criminal history and his addiction to controlled substances. The store failed to obtain the purchaser's signature when he picked up the gun as required under federal law. Because the sale was illegal, it amounted to negligence *per se*. The court of appeals ruled that it was a jury question as to whether the violation of the law was the proximate cause of plaintiff's harm. In this case, the plaintiff was able to show negligence *per se* based on a fairly technical violation of federal—the failure to obtain a signature on a federal sales form. This plaintiff may have had a slim chance of prevailing if she were required to prove common law negligence.

If the new language of § 102 (d) is interpreted only to exempt from the bill the theory of negligent entrustment in cases involving products other than alcohol, that would mean that theories such as negligence *per se* could virtually be negated by the product seller provision of S. 648. The section allows liability for sellers only when they fail to "exercise reasonable care with respect to the product," commit a breach of warranty, or engage in "intentional wrongdoing." None of these describe an instance such as that in *King* where a seller fails to comply with statutory requirements connected with a sale.

In summary, the negligent entrustment "fix" in S. 648 could have the result of shielding from liability some retailers who fail to comply with federal or state statutes regarding the sale of dangerous commodities.

Otherwise, there are no changes in S. 648 from H.R. 956 that address the many problems that would be created with respect to firearms safety and gun control. Therefore, the Violence Policy Center respectfully urges the President to oppose S. 648.

Thank you for considering our views. Please call if I can provide you with any more information.

Sincerely,

M. Kristen Rand
Director of Federal Policy

Enclosures (2)

Bureau of Alcohol, Tobacco, and Firearms (ATF) Form 4473, in a series of firearms purchases between February 1992 and July 1993. 18 U.S.C. § 922(a)(6). Berry had made "strawman" purchases for drug dealers who could not legally purchase guns. Among other challenges to his conviction on evidentiary and procedural grounds, Berry argued that the question on the form concerning drug use was unconstitutionally vague.

ATF Form 4473 must be completed by firearms purchasers and kept on file by the dealer. In the course of buying six guns over a seventeen-month period, Berry stated on the forms that he was not a user of illegal narcotics. However, evidence at trial proved that he was a regular user of crack cocaine and that he had purchased the guns in order to provide them to drug dealers.

Berry argued that question 8(d) on Form 4473 was void for vagueness, and that he could therefore not be convicted of falsifying his answers to the question. The question asks, "Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, or narcotic drug or any other controlled substance?" Berry reasoned that the question is too imprecise because it does not ask the purchaser when he most recently used illegal drugs.

The court dismissed this argument, pointing out that it is irrelevant that Congress might have specified a particular time period for use of narcotics. The fact that they chose only to ask generally about the use of drugs did not render the question void for vagueness. The vagueness doctrine "requires only that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The purpose of the doctrine is to prevent law enforcement and courts from "pursu[ing] their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

Because Berry had admitted in a statement that he was a user of cocaine during the period covered by the offenses, there was no question that he had falsified information on the ATF forms. The conviction was upheld on all grounds. ❖

Georgia Gun Sale to Mentally Ill Man May Be Common Law Negligence or Negligence *Per Se*

Knight v. Wal-Mart Stores, Inc., 889 F. Supp. 1532 (S.D. Ga. 1995).

The family of a mentally ill man who lied about his mental health history when he purchased a gun from defendant's store and then used it to commit suicide has a cause of action under Georgia's wrongful death statute, but not under the federal Gun Control Act. The state cause of action stands because it is based on the perceptions of a reasonable salesperson that the customer is mentally ill, while the federal claim fails because it requires knowledge by the salesperson that the customer has been either adjudicated mentally ill or committed to a mental institution. A negligence *per se* claim based on federal law would have been sustained had the plaintiff shown that the salesperson actually violated the federal statute.

Eric Brown purchased a rifle at Wal-Mart on March 25, 1992. Brown, who had previously been institutionalized for mental illness and displayed signs of mental illness during the time he was in the store, falsely stated on the U.S. Firearms Transaction Record, ATF Form 4473, that he had never been declared mentally ill or committed to a mental institution. In spite of evidence that some store employees were aware that he was mentally ill, no one prevented the transaction from being completed. Brown then bought ammunition at another store, went home, and shot himself in the head. This suit was brought in state court by the mother of Brown's child, claiming that Wal-Mart breached its common law duty of care in making the sale and breached its statutory duties under the federal Gun Control Act (GCA) of 1968, 18 U.S.C. § 922(d)(4). That law makes it a crime to sell a gun to anyone whom the seller reasonably believes to have been "adjudicated as a mental defective or . . . committed to any mental institution." Wal-Mart removed the case to federal court, based on federal question jurisdiction. Wal-Mart moved for summary judgment on both the state and federal claims.

continued on page 13

Georgia, *continued from page 9*

Summary judgment was granted to Wal-Mart on the federal statutory issue. In Georgia, violation of the GCA can be the underlying offense to show negligence *per se*. If Wal-Mart's employees violated the GCA, under the theory of respondeat superior, the company would be liable for the torts of its employees who were acting in the course of the company's business. However, the court found that there was no evidence that the employees had knowledge that Brown had been adjudicated mentally ill. The store employees fulfilled their duties in having Brown complete Form 4473. The GCA does not require the sellers to determine whether the customer is lying, behaving strangely, or is likely to engage in dangerous behavior in the future. It requires only that they *ask* whether he has been adjudicated to be a mental incompetent or committed to a mental institution. Under this standard, both employees engaged in the transaction fulfilled their statutory duties, and therefore could not be negligent *per se*. 889 F. Supp. 1532, 1537-38.

The plaintiff prevailed at summary judgment on the state wrongful death claim. The wrongful death statute allows recovery by children of decedents under traditional negligence principles where death results from some party's negligence, in this case, negligent entrustment. The court here applied a lower standard than on the federal claim, because common law negligence arises independently of whether the seller fulfills statutory duties; rather, it depends on the perceptions and actions of a reasonable person under the circumstances. The court cited numerous cases that established that the seller of a firearm has a duty of care to the public to avoid sales to mentally defective persons, because such sales could foreseeably result in harm to the buyer or third parties. *Id.* at 1539. The court also applied § 390 of the Restatement of Torts (Second), that the supplier of a dangerous instrumentality bears responsibility for the resulting harm when the person receiving the instrumentality is underage, inexperienced, or "otherwise" likely to use it in an unsafe manner. *Id.* The court noted that "[w]hile most such cases involved entrustment to a minor, the analogy to mentally defective adults is an easy and logical one to make." *Id.*. Under this standard, the plaintiff presented sufficient evidence that the store employees were aware of Brown's mental disability, thus breaching their duty of care and precluding summary judgment. Under the state law claim, it was irrelevant that Brown falsified his answers on the federal form or even that he had ever been adjudicated mentally incompetent or committed to a mental institution.

The defendant argued that the element of proximate causation was absent as a matter of law, because Brown's falsification of the form, subsequent purchase of ammunition at another store, and suicide were all intervening acts absolving the company of liability. The court rejected this argument, because Brown's acts were themselves foreseeable by the seller. "Foreseeable intervening forces are within the scope of the original risk created by the seller in transferring a firearm to a mentally imbalanced person, and they do not excuse him from liability." *Id.* at 1541.

Based upon the evidence presented in the summary judgment motion, the court found that material questions of fact surrounded the circumstances of the sale and that summary judgment was thus inappropriate. The case remained in federal court under diversity jurisdiction, and proceeded to trial on the state question of negligent entrustment. The plaintiff did not prevail at trial. According to attorneys for the plaintiff, a variety of factors, including local bias in favor of gun ownership, reticent witnesses, employee witnesses' loyalty to the defendant, and an unsympathetic victim probably contributed to the disappointing outcome.

Despite the jury verdict, this case is important for civil liability suits. The opinion convincingly posits that common law negligence theory imposes a duty, independent of statutory obligations, on firearms sellers to consider foreseeable misuse of guns by mentally unstable customers and for its holding that breach of the federal Gun Control Act constitutes negligence *per se*. ❖

Get the original (unBOLDed) document.

United States Court of Appeals, Eleventh Circuit.

No. 94-8343.

Sally Y. KING, Plaintiff-Appellant,

v.

STORY'S, INC., d/b/a Story's, Defendant-Appellee.

June 9, 1995.

Appeal from the United States District Court for the Northern District of Georgia. (No. 1:92-02721-CV-HTW), Horave T. Ward, Judge.

Before KRAVITCH and BIRCH, Circuit Judges, and GOODWIN[*], Senior Circuit Judge.

GOODWIN, Senior Circuit Judge:

Sally King brought this diversity claim against Story's, Inc., alleging **negligence** in selling a rifle to one Jimmy Gene Hulen, an ex convict, who used it to shoot and injure her. She appeals a summary judgment for Story's.

Hulen had started to purchase the weapon on November 22, 1991, by means of a "lay- away" payment. Hulen falsely completed two key questions on the ATF Form 4473, denying to his prior criminal record and denying his present use of controlled substances. But he did not sign the form at that time because the salesperson correctly indicated that the form should not be signed until the sale was completed by payment and delivery. Hulen paid for and picked up the weapon on December 26, 1991, without signing the ATF Form 4473. Two days after taking possession of the rifle, Hulen shot the plaintiff.

Because the sale was made without obtaining the buyer's signature on the ATF form, the sale was contrary to 27 C.F.R. § 178.124 (1992) and thus amounted to **negligence** per se. However, on cross motions for summary judgment, the trial court granted the defendant store's motion on the theory that the unwitting sale to a unqualified buyer was not the proximate cause of the shooting. Whether or not the sale was illegal, because the seller failed to obtain the signature of the buyer, the court ruled the illegality immaterial.

Putting aside the virtually undisputed point that the sale was an act of **negligence** per se, the principal question on appeal is whether, as a matter of law, the judge or the jury decides the proximate cause issue in an action by the shooting victim against the seller of a firearm to an unqualified buyer.

The case is controlled by our decision in *Decker v. Gibson Products Co., of Albany, Inc.*, 679 F.2d 212 (11th Cir.1982). There the ex- convict admitted to the salesperson his prior conviction and then exhibited a State of Florida document restoring his civil rights. The sales person then apparently telephoned the local sheriff and was told that it was legal to sell the handgun. We held that the sale nonetheless violated 18 U.S.C. § 922(d)(1); and we held further that it was for the jury, and not for the trial judge, to decide

whether the illegal sale was a proximate cause of the death of the plaintiff's decedent.

The defendant argues that the seller of the rifle in this case did not know or have reason to know of Hulen's legal disability to purchase weapons, and therefore did not violate the 18 U.S.C. § 922(d) "knowing or having reason to know" clause relating to the purchaser's disqualification. The trial court agreed with the defendant that the deliberately false information given by the unqualified purchaser on the unsigned form led the seller into the wrongful sale. The trial court disregarded, however, the seller's failure to have the purchaser sign the ATF form. The plaintiff replies that without the signature, the sale could not lawfully be completed, and therefore, the sale was illegal. Being illegal, the sale was negligent as a matter of law, and the **negligence** was a cause of the injury.

The trial court recognized that this plaintiff, as a victim of a shooting by a convicted felon, is a member of the class of persons Congress intended to protect by enacting the Gun Control Act; that the injuries were of the type contemplated by the Act; and that the sale was made in violation of the Act. The fourth requirement for liability for violation of the Act is that the violation was a proximate cause of the harm. In deciding that the fourth requirement was not met because the sale without obtaining the buyer's signature was not the proximate cause of the harm, the court took away from the jury the question that we held in *Decker v. Gibson* was for the jury. This was error.

While *Decker v. Gibson* applied Georgia law, and the trial court in this case was looking to Alabama law, we have been cited no relevant precedent that would treat the question of proximate cause as a jury question in Georgia and as a law question in Alabama. Indeed, the plaintiff has cited a number of Alabama state cases tending to support the general proposition that proximate cause ordinarily is for the jury. See, e.g. *Sullivan v. Alabama Power Co.*, 246 Ala. 262, 20 So.2d 224 (1944).

The summary judgment is VACATED and the cause is REMANDED for further proceedings.

 Case in RTF Format

 Return to 11th Circuit homepage.

Product liability – interest group materials

April 24, 1997

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

Dear Mr. President:

Congress is once again considering misguided legislation that would federalize this country's product liability laws (S. 5). Like the bill you vetoed last year (H.R. 956), this legislation would endanger public health and safety by significantly reducing the ability of the tort system to deter manufacturers from making unsafe products. In whatever guise, this anti-consumer legislation also would weaken the rights of Americans to be fairly compensated for their injuries. And its "one-way preemption" would be an inappropriate and unprecedented intrusion on state authority, tying the hands of state judges and juries and giving advantage to wrongdoers while preventing states from protecting their own citizens with stronger, consumer-oriented liability laws.

As you noted in your veto message last year, if products are defective and cause harm, consumers should be able to seek adequate compensation for their losses. Provisions that arbitrarily cap punitive damages, eliminate joint and several liability, or arbitrarily cut off liability for older, defective products, work against these goals. These provisions unfairly disadvantage consumers and their families. They also reduce the incentive for manufacturers to make safer products. Moreover, restrictions on non-economic damages unfairly discriminate against the elderly, the poor, children, and women -- especially those not employed outside the home -- whose injuries often involve mostly non-economic losses.

We urge you once again to stand with injured consumers, and against the tobacco, alcohol, firearms, insurance and manufacturing interests pushing this bill, and veto such legislation if passed by Congress.

Sincerely,

Elenora Giddings Ivory
Director, Washington Office
Presbyterian Church (USA)

Charles M. Loveless
Director of Legislation
American Federation of State, County, and Municipal Employees

Reverend Jesse L. Jackson, Sr.
Founder and President
Rainbow/Push Coalition

Ralph Nader
Consumer Advocate

Jane Hull Harvey
Assistant General Secretary
The United Methodist Church
(General Board of Church & Society)

Joan Claybrook
President
Public Citizen

Kim Gandy
Executive Vice President
National Organization for Women

Kristen Rand
Director of Federal Policy
Violence Policy Center

William Kingfelter
Legislative-Political Director
United Steel Workers

Richard Vuernick
Legal Policy Director
Citizen Action

Richard C. Gilbert
Director, State and Local Affairs
American Public Health Association

Fran DuMelle
Deputy Managing Director
American Lung Association

Alfred K. Whitehead
General President
International Association of Fire Fighters

Morris Dees
Chair, Executive Committee
Southern Poverty Law Center

Robert J. Walker
President
Handgun Control, Inc.

John Morgan
Administrative Assistant to Secretary-Treasurer
Communications Workers of America

Nancy F. Danielson
Legislative Representative
National Farmers Union

Donna S. Perline
President
Jewish Women International

Deric A. Gillard
National Communications Director
Southern Christian Leadership Conference

Edmund Mierzwinski
Consumer Program Director
U.S. PIRG

Linda S. Lucas
Director of Public Policy
National Association of School Psychologists

Ann Hoffman
Legislative Director
Union of Needletrades, Industrial & Textile Employees

Helen Norton
Director, Equal Opportunity Programs
Women's Legal Defense Fund

Joshua Horwitz
Executive Director
Educational Fund to End Handgun Violence

Mary Ellen Fise
General Counsel
Consumer Federation of America

Charles Inlander
President
People's Medical Society

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Lydia Buki, Ph.D.
Director of Programs
The National Hispanic Council on Aging

Jon Lawniczak
Coordinator, Federal Activities
National Council of Senior Citizens

Cynthia Pearson
Executive Director
National Women's Health Network

Robin Katcher
Legislative Director
Coalition to Stop Gun Violence

Jama Kim Russano
Director
Children Afflicted By Toxic Substance

Elva Yanez
Policy Manager
Americans for Nonsmokers' Rights

Jim Hightower
Radio Host and Commentator
Hightower Radio

Peter A. Brigham
President
Burn Foundation

John F. Banzhaf III
Executive Director
Action on Smoking and Health

Griff Hill
Executive Director
National Citizens' Coalition for Nursing Home Reform

Nancy Cowles
Executive Director
Coalition for Consumer Rights

Dr. Donna Allen
President
Women's Institute for Freedom of the Press

Nora Cody
Executive Director
DES Action USA

Louis Clark
Executive Director
Government Accountability Project

Gloria T. Johnson
President
Coalition of Labor Union Women

Brent Blackwelder
President
Friends of the Earth

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File - Product liability -
Interest group materials

Federal Product Liability Legislation Would Weaken the Rights of Innocent Victims and Let Wrongdoers Off the Hook

House and Senate Republicans have announced that federal product liability legislation is a top priority for this Congress. The legislation Congress is expected to consider this year, as with every federal product liability bill considered for the past 16 years, would dictate broad federal product liability standards to the courts in all 50 states. Such a law would be a major preemption of state tort law, interfering with the traditional authority of state court judges and juries in civil cases. It would significantly reduce the ability of the tort system to deter companies from making defective products. And it would weaken the rights of Americans to be fairly compensated for their injuries.

Each standard pushed by the special interests behind such legislation would limit courtroom access of Americans killed or injured by dangerous products, such as defective school buses, baby cribs, heart valves, farm equipment, the Dalkon Shield or toxic chemicals. If enacted, corporations that recklessly manufacture these products will have less financial incentive to make safe products. As a result, more innocent Americans will be injured or killed.

Among the most dangerous provisions under consideration by Congress are:

- **Limits on Punitive Damages.** Punitive damages, which are imposed by judges and juries to punish egregious misconduct, hold corporations accountable for their most reckless or deliberately harmful acts. Congressionally-imposed limits on punitive damages, such as caps, would be applied regardless of the facts in an individual case, and regardless of what a judge or jury, who hears the evidence in a particular case, may decide is necessary to punish and deter a wrongdoer. Not only would such a sweeping provision undercut the traditional authority of state courts, it would severely erode the deterrent value of the tort system. It is well recognized that the prospect of punitive damages causes manufacturers to build safer products. With limits like caps in place, reckless or malicious defendants could find it more cost effective to continue their dangerous behavior and risk paying relatively small or predictable punitive damages awards.

- **Immunity for Older Defective Products (Statute of Repose).** Under a statute of repose, injured consumers could recover no compensation (not even for health costs or lost wages) from the manufacturers of defective products that are over a certain number of years old. Prior bills suggested a statute of repose of 15 years. According to the Machine Tool Builders Association, this would encompass more than half the claims filed against the manufacturers of machine tools. It would also include products built to last much longer than 15 years, like elevators, home appliances, playground equipment, farm equipment and industrial machinery. This provision would be particularly discriminatory against low-income Americans, who often need to keep older products because they cannot afford to buy new ones.

- **Restrictions on Joint and Several Liability.** Joint and several liability means that when more than one defendant is found responsible for causing an injury, and one of them is insolvent or cannot pay compensation, the other wrongdoer must cover the cost. Otherwise, the victim would be made to pay, suffering twice. Prior bills have restricted joint and several liability for non-economic damages. Those are damages that arise from intangible losses like

infertility, loss of a loved one, permanent disfigurement, or loss of a limb. Any limit on a victim's ability to recover non-economic damages would have a disproportionate impact against women, children, the elderly and the poor, who tend to receive a greater percentage of their compensation in the form of non-economic damages.

- **Immunity for Biomaterial Suppliers.** Congress is considering legislation to immunize from liability most suppliers of "raw materials" and "components" used in the manufacture of medical implants, even if there are deadly consequences that derive from these "biomaterials." This would endanger public health and safety. Such immunity from litigation would remove an important financial incentive for biomaterial suppliers to properly research and test their products, as well as to warn manufacturers or the public if they suspect that their components are being used in an unsafe manner. Moreover, there is no need for such an extraordinary measure. The medical device industry is extremely strong, showing tremendous growth and handsome profits -- "a hot market that's only getting hotter" according to January 13, 1997, article in *Medical Economics*. Such legislation also contains a "loser pays" provision, allowing a court to impose costs and attorney's fees against any victim who loses. Even victims with very strong cases against suppliers would fear pursuing a legitimate claim on the chance that they could lose and be economically devastated by having to pay considerable legal costs on top of substantial medical bills.

There is no empirical evidence to support such a disruption of state authority and protection for liable companies.

- **While data around the country suggest that millions are injured each year in the workplace and marketplace, product liability litigation remains rare in the U.S.** In 1995, the National Center for State Courts (NCSC) and the Bureau of Justice Statistics (BJS) of the United States Department of Justice released the findings of a collaborative 30-month study of state court civil jury trials. Their report found that in 1992, product liability cases represented only about 3% of all civil jury trials. *Litigation Dimensions: Torts and Contracts in Large Urban Areas (NCSC, 1995); Civil Jury Cases and Verdicts in Large Counties (BJS, July 1995).*

- **Damage awards are consistent and conservative, not out of control.** According to a 1996 study by Jury Verdict Research, a legal research firm based in Ohio, the median compensatory damage award in product liability cases in 1995 dropped 32%, to $260,000 from the 1994 median figure of $379,685. An extensive U.S. General Accounting Office study of product liability verdicts concluded that the size of damage awards generally correlated to the severity of the injury suffered and the amount of actual economic loss. *Current Award Trends in Personal Injury, 1996 Edition, Jury Verdict Research, LRP Publications: Product Liability: Verdicts and Case Resolution in Five States, GAO/HRD-89-99 (1989).*

- **There is no epidemic of punitive damage awards in this country.** The arguments for limitations on punitive damage awards are not supported by jury verdict data and appellate court records. For example, according to research conducted by Professor Michael Rustad of the Suffolk University School of Law, in the 25-year period between 1965 and 1990, there were a total of only 355 punitive damages awards in state and federal product liability lawsuits nationwide. A recent updating of this study has found that there were 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); 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).

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Injured Consumers Who Would Have No Remedy Under S. 5's Federal Statute of Repose

S. 5, the so-called "Product Liability Reform Act of 1997," contains a strongly anti-consumer provision called a statute of repose that arbitrarily cuts off liability for older, defective products. Under a statute of repose, consumers could recover no compensation (not even for health costs or lost wages) from the manufacturers of defective products that are over a certain number of years old. S. 5 currently contains a 15-year statute of repose, and would permit state laws that establish shorter statutes of repose. Earlier bills suggested 20 years. The statute of repose encompasses products built to last much longer than 15-20 years, like elevators, home appliances, playground equipment, farm equipment and industrial machinery. This provision would be particularly discriminatory against low-income Americans, who often need to keep older products because they cannot afford to buy new ones.

- **20 Year-Old Product.** Steven Sharp was 17 years old, in 1992, when a J.I. Case diesel tractor hay baler from which he was clearing hay self-started without warning, pulling him into the baler and cutting off both his arms. The defective hay baler was 20-years old at the time of the accident. Two previous tragedies, including a decapitation, resulted from this same design defect. J.I. Case could have made the tractor hay baler safe if a 70-cent part had been included in the original manufacture of each machine. Sharp was awarded $6.5 million in compensatory (subsequently reduced to $4.3 million) and $2 million in punitive damages by a Wisconsin jury.

- **24 Year-Old Product.** In 1990, Carla Miller's 34-year old husband James was killed when the 1966 Massey-Ferguson tractor he was riding hit a hidden hole and suddenly rolled over on its top, crushing him underneath. The tractor was defective because it did not have a rollover protection system (ROPS), which would have saved James from being crushed. During trial in Missouri, it was revealed that while the manufacturer did not begin equipping this model tractor with a ROPS until 1968, it had the ability and technology to do this by 1965. The company also knew for many years prior to 1966 that hundreds of people a year had been killed in rollover accidents involving tractors that were not equipped with a ROPS. The company's marketing department, despite advice from engineers, made the decision not to equip its tractors sold in the United States with a ROPS as standard equipment. Yet beginning in 1959, all such models sold in Sweden were equipped with a ROPS system. In 1994, a jury awarded approximately $2 million to the Millers for their loss.

- **22 Year-Old Product.** Max and Hanna Reinbach, both survivors of the Holocaust, were killed in 1994 as a result of a defective apartment elevator which caused them to plunge four stories. The defective elevator was 22-years old. Ohio state investigators determined that all 50 to 60 gallons of oil used to operate this elevator had leaked out from the underground steel cylinder holding the piston, causing the elevator to fall. Further, the elevator lacked a fail-safe device to slow or stop it safely in the event of a malfunction. After the accident, Ohio officials ordered that hydraulic elevators such as this one undergo annual full-load pressure tests, pushing the machinery to limits to detect problems. The case was settled before trial.

- **33 Year-Old Product.** In New Jersey in 1988, Thomas Middleton, 33, was bending a small piece of metal in a press brake when the machine closed on his hand, crushing four fingers. Each finger's middle knuckle was removed and the remaining portions of the fingers were reattached. One finger was amputated. Middleton sued the press manufacturer, alleging that the machine, which was made and sold in 1955, was defectively designed in that it lacked appropriate operator controls. The jury agreed, awarding approximately $1.2 million, including $100,000 for loss of consortium.

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The General Aviation Revitalization Act:
When It Comes to Product Liability, It's Not What They Claim

In the past decade, the small aircraft market experienced a significant decline in production and a loss of thousands of jobs. Manufacturers blamed this decline on product liability costs, which they say forced companies to charge higher airplane prices. In 1994, after years of lobbying by general aviation manufacturers, Congress passed the General Aviation Revitalization Act (GARA). This law imposed an 18-year cut off for liability (statute of repose) for defective non-commercial piston-driven airplanes. It is similar to a proposed statute of repose contained in broad federal product liability legislation Congress is now considering.

Manufacturing interests pushing product liability legislation are making sweeping claims about the impact of GARA's limited provision, enacted only three years ago. "We are now enjoying a resurgence in the entire industry brought about by the passage of GARA," testified Paul A. Newman, Chief Financial Officer of the New Piper Aircraft, before the Senate Subcommittee on Consumer Affairs, Foreign Commerce and Tourism on March 6, 1997. Testifying before the Senate Commerce Committee on March 4, 1997, Victor Schwartz, lobbyist for the General Aviation Manufacturers Association and the Product Liability Coordinating Committee, asserted, "[GARA] restored life to the general aviation industry and has already produced over 9,000 new jobs."

However, close examination of the facts reveals that GARA has not caused an industry resurgence because product liability was not the industry's problem in the first place.

BEFORE GARA

Manufacturers point to the growth in the general aviation industry between 1972 and 1979, and the decline after 1979, and conclude this decline was caused by product liability litigation. However, this decline fit the cyclical pattern of the industry's production, which has always experienced periods of growth and decline for reasons wholly unrelated to liability costs. Pre-1972 data reveals that the general aviation industry is a "boom and bust" industry, experiencing cyclical growth and decline. For example, it experienced a significant production increase between 1960 and 1965, and a significant decline between 1965 and 1970.[1]

Before 1979, the industry's growth was fueled by a number of factors that artificially boosted demand and led to a flooding of the market with new aircraft. U.S. general aviation production peaked in 1978 with 17,811 airplanes -- mostly piston powered small planes.[2] This was due in part to a dramatic increase in student pilot starts between 1977 and 1979 as a result of changes in the G.I. bill and coverage of flight training for veterans. This was especially critical for single-engine aircraft. Also, higher

inflation rates in the late 1970s created an incentive for brokers to speculate and order new aircraft. This created artificial or unsustainable demand.[3]

The general aviation industry's decline in the early 1980s was based on a number of economic factors. Economic difficulties hit the industry while it suffered from a saturated market. The general aviation cost index peaked in 1980, in large part as a result of increased fuel costs. Interest rates topped out in 1981, and general economic conditions bottomed out.[4]

After the early 1980s, while other industries bounced back, the general aviation industry remained in the doldrums due to several factors other than product liability lawsuits, including the industry's own behavior.

- **Limited Demand.** For the most part, the industry produces high quality products, so the used aircraft market has provided an attractive alternative. As Paul A. Newman, New Piper Aircraft's Chief Financial Officer put it, "Another factor causing the decline was our own success at building long lasting products. Our airplanes are well designed and well built, often remaining in service for 30 years or longer."[5] Pilots, businesses, flying clubs, and fixed based operations had no incentive to buy new airplanes because they could get essentially the same thing for half or a third of the price in a used airplane.[6]

- **Decline in Pilots.** There was a major decline in the number of active pilots after the early 1980s. The pilot to aircraft ratio went from 7 pilots per aircraft to 3.5 pilots per aircraft. Student pilot certificates dropped from 200,000 in 1977 to 101,000 in 1995.[7] According to Cessna, 1995 showed the lowest number of individuals taking flight instructions in over three decades and, similarly, the lowest number of licensed pilots since the Federal Aviation Administration began keeping those records in 1968.[8]

- **Other Factors.** The industry seemed unable to keep pace with technological demands of aircraft enthusiasts, who turned their attention and money to the experimental and kit aircraft market. And by their own admission, the general aviation industry dropped the ball in marketing and developing the next generation of pilots and aircraft owners.[9]

AFTER GARA

The small aircraft market has experienced a very modest revival over the last two years, but nothing that even approaches the robust demand of 20 to 30 years ago. According to the General Aviation Manufacturers Association, piston shipments were up 11.9% in the first half of 1996, compared with the same period in 1995. But this is still only in units of hundreds, not tens of thousands as in the 1970s. In reopening its single engine line, Cessna projects total employment at its new plant of only 600 employees by the

middle of 1997, and predicts it will produce 2,000 new aircraft per year. Even so, this would be only from 15 percent to 20 percent of its high point in the late 1970s.[10]

Because small airplane prices have not dropped, this modest increase in demand can be attributed to other factors. For example, the used fleet is finally beginning to wear out. In addition, foreign markets have begun to open up for U.S. manufactured small planes. In late 1995, Cessna's dealer in Brazil made a surprise order for 100 single-engine piston-powered aircraft. At the time, that doubled the number of orders Cessna had in hand for its new single-engine airplanes.[11]

The effects of GARA cannot be isolated from the effects of other efforts by government, industry and organizations of aircraft owners and operators to revitalize the industry. The general aviation industry is improving its marketing in order to develop the next generation of pilots and aircraft owners. By their own admission, specific firms, such as Cessna and the New Piper Aircraft Company, have restructured the way they do business. In addition, NASA and academia have joined forces with the general aviation industry through the Advanced General Aviation Transport Experiments (AGATE) consortium, to help develop new technologies and disseminate information to industry.[12] One aim of this project will be to create piston engine technology that will cut the cost of flying 160 knots in half, creating a great demand for new airplanes.

Cessna's decision to resume single engine manufacturing in 1994 was not the result of any financial savings due to GARA, but because Cessna's Chairman, Russel W. Meyer, Jr., promised Congress that production would resume if GARA were enacted. John E. Moore, Cessna's senior vice president, testified on March 6, 1997, that the company "made the commitment that if meaningful product liability reform was enacted, Cessna would reenter the single engine business."[13] Calling GARA meaningful product liability reform, Cessna began manufacturing again, with the state of Kansas providing financial and other "incentives" to the company.[14] However, he acknowledged during questioning that to date, the company has experienced no decrease in their product liability insurance costs.

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Notes

1. Testimony of Scott E. Tarry, Assistant Professor of Political Science, Southern Illinois University at Carbondale, before the Committee on Commerce, Science and Transportation Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, United States Senate (March 6, 1997). Based on studies by Professor Tarry and Lawrence Truitt, Professor, Arizona State University. ("Tarry Testimony"), p. 3.

2. Testimony of Robert B. Creamer, Citizen Action, before the Committee on Commerce, Science and Transportation Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, United States Senate (March 6, 1997) ("Creamer Testimony"), pp. 1-2.

3. Tarry Testimony, p. 4.

4. Id., p. 4.

5. Testimony of Paul A. Newman, Chief Financial Officer of the New Piper Aircraft, before the Committee on Commerce, Science and Transportation Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, United States Senate (March 6, 1997), p. 2.

6. Creamer Testimony, p. 2.

7. Id., p. 2, 4.

8. Testimony of John E. Moore, Senior Vice President, Cessna Aircraft Company, before the Committee on Commerce, Science and Transportation Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, United States Senate (March 6, 1997) ("Moore Testimony"), p. 4.

9. Tarry Testimony, pp. 5-7.

10. Creamer Testimony, p. 2.

11. Id., p. 2.

12. Tarry Testimony, pp. 7-8.

13. Moore Testimony, p. 1.

14. Moore Testimony, p. 1 et seq; Tarry Testimony, p. 8.

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics
Special Report

July 1995, NCJ-154346

Civil Justice Survey of State Courts, 1992

Civil Jury Cases and Verdicts in Large Counties

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Over a year-long period ending June 30, 1992, juries in State general jurisdiction courts in the Nation's largest 75 counties decided an estimated 12,000 tort, contract, and real property rights cases. Thirty-three percent of these cases were automobile accident suits, 11% were medical malpractice, and 5% were product liability and toxic substance cases.

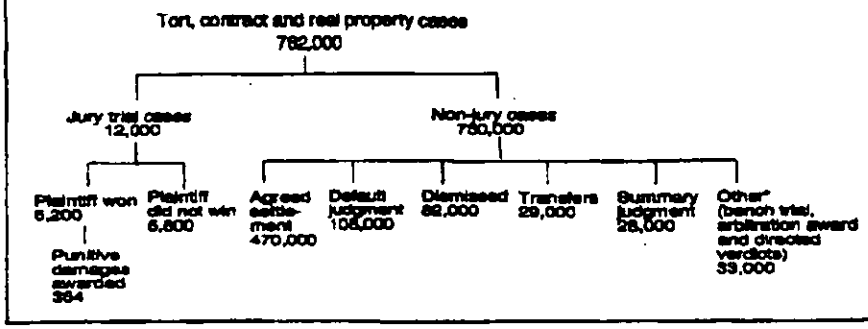
Plaintiffs won 52% of the cases and juries awarded these plaintiffs $2.7 billion in damages, of which 10% were punitive damages. The average time from the filing of the complaint to the jury verdict was 2.5 years.

These are some of the main findings from a study of civil jury trial cases in State courts involving tort, contract, and real property rights claims — the three types that together comprise the vast majority of civil jury trial cases. The sample of civil jury trial cases excluded civil cases outside the three types, Federal trials, trials in State

Highlights

- Juries in the 75 largest counties disposed of 12,000 tort, contract, and real property cases during the 12-month period ending June 30, 1992. Jury cases were 2% of the 762,000 tort, contract, and real property cases disposed by State courts of general jurisdiction in the Nation's most populous counties.
- Most of the cases decided by a jury were tort cases (79%).
- The vast majority of plaintiffs (88%) in jury cases were individuals.
- Among jury case defendants, half were businesses and less than a third were individuals.
- Among jury tort cases, plaintiffs won in 74% of toxic substance cases, 60% of auto tort cases, 41% of product liability cases and 30% of medical malpractice cases.
- In about half of all the jury cases, the jury found in favor of the plaintiff and awarded in the 12-month period an estimated $2.7 billion in compensatory and punitive damages. The median total award for a plaintiff was $52,000.
- Punitive damages were awarded in 6% of the jury cases with a plaintiff winner.
- During the 12 months, juries disposed of 360 product liability cases. Plaintiffs won 142 cases. Of the 142, punitive damages were awarded in 3 product liability cases.
- Of the 403 medical malpractice cases with a plaintiff winner, punitive damages were awarded in 13 cases. In 4 of these 13 cases, the punitive damage award was over $250,000.

Tracking tort, contract, and real property rights cases to jury verdict: State general jurisdiction courts in the Nation's 75 largest counties, 1992



general jurisdiction courts outside the 75 largest counties, jury trials in State limited jurisdiction courts and bench trials (trials by a judge rather than a jury).

Over the year-long period ending June 30, 1992, State courts of general jurisdiction in the Nation's 75 largest counties disposed of an estimated 762,000 tort, contract, and real property rights cases. Jury trials accounted for 2% or about 12,000 of these cases (table 1).[1]

Jury size and decision rules are determined by State law and vary across the States. For example, 28 States and the District of Columbia permit civil juries smaller than 12. Thirty-three States do not require a unanimous civil jury verdict. (See appendix table 1.)

[1]Estimates for the total number of tort, contract, and real property cases disposed of were derived from data collected by the BJS Civil Justice Survey of State Courts, 1992. This survey consists of two datasets. The first dataset contains a representative sample of the 762,000 tort, contract, and real property cases disposed by State courts of general jurisdiction in the Nation's 75 largest counties during the 12-month period ending June 30, 1992. Table 1 and the BJS Special Report *Tort Cases in Large Counties* (NCJ-153177) are based on this dataset. The second dataset consists of a representative sample of the approximately 12,000 civil cases which were disposed by a jury trial during the same period. All remaining tables in this report are based on this dataset of jury cases.

Cases that reach jury trial

An estimated 79% of civil jury trials in the Nation's 75 largest counties involved a tort action, 18% were contract cases, and 2% real property rights cases (table 2).

Automobile torts accounted for 33% of all jury trial cases, premises liability 17%, and medical malpractice 11%. Product liability and toxic substance cases were 5%.

Type of litigants: plaintiffs

The vast majority (88%) of all jury cases involved individuals exclusively as plaintiffs (table 3)[2]. Businesses were plaintiffs in 11% of all cases; government agencies 2%, and hospitals 0.1%. Businesses were more likely to be the plaintiff in a contract (36%) than a tort (5%) case.

[2]Each civil jury trial case, regardless of the number of plaintiff types involved, was given one of four plaintiff designations: hospital, business, government or individual.

Table 1. Types of civil cases that go to jury trial in State courts in the Nation's 75 largest counties, 1992

Case type	All tort, contract and real property cases disposed	Percent of cases disposed by jury trial
All jury cases	761,919	1.5%
Tort cases	377,421	2.3%
Automobile	277,087	1.8
Premises liability	66,372	3.3
Medical malpractice	18,396	6.4
Intentional tort	10,879	2.7
Product liability	12,763	2.6
Toxic substance	6,045	2.8
Professional malpractice	6,827	3.2
Slander/libel	3,159	1.9
Other tort	26,891	2.6
Contract cases	366,263	.7%
Seller plaintiff	188,761	.5
Buyer plaintiff	44,592	1.1
Fraud	15,917	2.0
Employment	8,064	4.0
Rental/lease	20,587	.4
Mortgage foreclosure	68,811	.1
Other contact	18,531	1.3
Real property cases	19,235	2.1%
Eminent domain	4,596	4.3
Other real property	14,640	1.4

Note: Data available for 99.4% of all cases.

Source: Data collected in the BJS Survey of Civil Cases in State Courts, 1992.

Table 2. Civil jury trial case types in State courts in the Nation's 75 largest counties, 1992

Case type	Number of jury cases	Percent
All jury cases	12,026	100.0%
Tort cases	9,532	79.3%
Automobile	3,915	32.6
Premises liability	1,991	16.6
Medical malpractice	1,370	11.4
Intentional tort	448	3.7
Product liability	360	3.0
Toxic substance*	287	2.4
Professional malpractice	187	1.6
Slander/libel	68	.5
Other tort	909	7.6
Contract cases	2,217	18.4%
Seller plaintiff	610	5.1
Buyer plaintiff	593	4.9
Fraud	317	2.6
Employment	311	2.6
Rental/lease	133	1.1
Mortgage foreclosure	6	.1
Other contract	246	2.0
Real property cases	277	2.3%
Eminent domain	204	1.7
Other real property	74	.6

Note: Data for jury trial case types were available for 99.5% of all cases. Detail may not sum to total because of rounding. Data presented in tables 1 and 2 are drawn from different samples and therefore, exact case totals do not match. See footnote number 1 on page 2.
*Data for toxic substance cases, a specific type of product liability case, were collected and reported as a separate category.

Type of litigants: defendants

The composition of defendants in jury trials differed from that of plaintiffs.[3] Half the cases had a business as the defendant. Specifically, a business was the defendant in all or nearly all of the following case types: toxic substance (100%), product liability (99%), buyer plaintiff (88%), and employment (80%) cases.

Overall, less than a third of all cases had an individual as the defendant. Individuals were about half (53%) the defendants in auto tort cases.

Among medical malpractice cases, hospitals comprised 64% of defendants. A government agency was the defendant in nearly 29% of intentional tort cases.

[3]Each case, regardless of the number of defendant types, was given a single defendant designation among the four possible.

Table 3. Type of plaintiffs or defendants, by selected types of civil jury trial cases in State courts in the Nation's 75 largest counties, 1992

	Plaintiffs					Defendants				
Case type	Total	Individual	Government	Business[a]	Hospital[b]	Total	Individual	Government	Business[a]	Hospital[b]
All jury cases	100%	87.5%	1.8%	10.7%	.1%	100%	30.2%	7.9%	52.9%	9.0%
Tort cases	100%	95.0%	.4%	4.5%	.1%	100%	32.2%	9.1%	47.8%	10.9%
Auto	100	98.1	.4	3.4	.1	100	52.9	7.8	39.2	.3
Premises liability	100	95.8	.4	4.1	0	100	11.1	12.2	73.1	3.7
Product liability	100	86.5	.3	14.2	0	100	0	0	98.8	1.2
Intentional torts	100	97.3	0	2.7	0	100	29.2	28.9	39.3	2.6
Medical malpractice	100	98.3	.2	1.4	.1	100	30.9	1.1	3.8	64.4
Professional malpractice	100	77.0	1.5	21.4	0	100	28.2	5.5	65.8	.5
Slander/libel	100	85.6	0	14.4	0	100	28.5	1.5	62.8	7.3
Toxic substance	100	97.0	2.0	1.0	0	100	0	0	100.0	0
Contract cases	100%	62.8%	.7%	36.2%	.3%	100%	21.2%	2.7%	74.3%	1.9%
Fraud	100	71.1	0	28.5	.4	100	25.7	.3	72.0	2.0
Seller plaintiff	100	34.4	1.3	63.8	.8	100	33.7	1.5	62.8	2.0
Buyer plaintiff	100	74.8	.9	24.4	0	100	10.4	1.0	88.4	.2
Employment	100	94.1	0	5.5	.4	100	2.4	13.0	80.0	4.6
Lease	100	52.4	0	47.6	0	100	33.9	2.3	61.1	2.8
Real property cases	100%	27.9%	57.2%	14.9%	0	100%	32.7%	9.3%	58.9%	1.0%
Eminent domain	100	8.6	77.9	13.5	0	100	24.3	12.7	61.5	0
Other real property	100	81.3	0	18.7	0	100	55.9	0	44.1	0

Note: Plaintiff or defendant type for each case is whichever type appears first in this list: (1) hospital/medical company, (2) business, (3) government agency and (4) individual. For example, any case involving a hospital defendant is categorized as a case with a "hospital defendant" even if there were also business, individual, or government defendants in the case.

Data on type of plaintiff, defendant, and case were available for 99.4% of all cases.
Detail may not sum to 100% because of rounding.
Zero indicates no cases in the sample.
[a]Includes insurance companies, banks, other businesses and organizations.
[b]Includes medical companies.

Who sues whom?

The most common type of civil jury case involved an individual suing a business (44% of all cases, 44% of tort cases, and 47% of contract cases) (table 4).

Thirty-two percent of tort cases involved an individual suing an individual, compared to 12% of contract cases. In nearly half (46%) of real property cases, a business, government agency, or other organization sued a corporation.

Table 4. Pairings of primary litigants in civil jury trial cases, by selected case types, in State courts in the Nation's 75 largest counties, 1992

Plaintiff v. defendant*	All jury cases Number of cases	Percent	Tort Number of cases	Percent	Contract Number of cases	Percent	Real property Number of cases	Percent
All jury cases	12,017	100.0%	9,525	100.0%	2,215	100.0%	277	100.0%
Individual versus:								
Individual	3,298	27.4	2,998	31.5	285	12.9	37	13.2
Government	907	7.5	844	8.9	49	2.2	15	5.2
Business**	5,255	43.7	4,183	43.9	1,046	47.2	26	9.5
Hospital	1,053	8.8	1,023	10.7	30	1.3	0	0
Individual and nonindividual versus:								
Individual	80	.7	51	.5	29	1.3	0	0
Government	12	.1	10	.1	2	.1	0	0
Business**	320	2.7	206	2.2	110	5.0	3	1.1
Hospital	21	.2	18	.2	3	.1	0	0
Nonindividual versus:								
Individual	247	2.1	19	.2	173	7.8	54	19.5
Government	28	.2	8	.1	9	.4	11	4.1
Business**	782	6.5	164	1.7	490	22.1	128	46.3
Hospital	14	.1	2	0	9	.4	3	1.0

Note: Data on litigant pairings and type of case were available for 99.5% of all cases. Zero indicates no cases in the sample. Detail may not sum to 100% because of rounding.
*Plaintiff or defendant type for each case is whichever type appears first in this list: 1) hospital/medical company, 2) business litigant, 3) government agency, 4) individual. For example, any case involving a hospital defendant is categorized as a case with a "hospital defendant" even if there were also business, individual, or government defendants in the case.
**Business litigants include "other organizations."

Table 5. Jury award winners and losers in State courts in the Nation's 75 largest counties, 1992

Case type	Number of jury cases	Percentage of cases Total	Plaintiff won	Plaintiff did not win*
All jury cases	11,953	100%	51.8%	48.2%
Tort cases	9,472	100%	49.9%	50.1%
Toxic substance	287	100	74.0	26.0
Automobile	3,889	100	60.2	39.8
Professional malpractice	187	100	50.3	49.7
Intentional tort	444	100	46.4	53.6
Other tort	892	100	46.5	53.5
Premises liability	1,986	100	43.7	56.3
Slander/libel	66	100	41.6	58.4
Product liability	358	100	40.5	59.5
Medical malpractice	1,362	100	30.3	69.7
Contract cases	2,205	100%	62.9%	37.1%
Rental/lease	132	100	73.3	26.7
Seller plaintiff	610	100	70.9	29.1
Buyer plaintiff	593	100	64.0	36.0
Employment	308	100	56.1	43.9
Fraud	317	100	57.1	42.9
Other contract	239	100	51.3	48.7
Mortgage foreclosure	6	100	20.0	80.0
Real property cases	277	100%	30.7%	69.3%
Eminent domain	204	100	20.7	79.3
Other real property	73	100	58.9	41.1

Note: Data on case type and jury award winners were available for 98.9% of all cases. Detail may not sum to 100% because of rounding. Zero indicates no cases in the sample.
*Includes cases where both plaintiff and defendant won damages, cases where plaintiff won liability trial, and cases where the defendant won liability trial.

Jury verdicts

Overall, juries found the defendant liable 52% of the time (table 5).[4] The likelihood of plaintiff success varied by the type of civil case. Plaintiffs won in 63% of contract cases, 50% of tort cases, and 31% of real property cases.

In greater detail, plaintiffs were most successful in toxic substance (74%), rental/lease agreement (73%), and contract cases with seller plaintiff (71%); and least successful in mortgage foreclosure (20%), eminent domain (21%), and medical malpractice (30%). (See *Methodology* for *definition of case types* page 11.)

Jury awards

Both tort and contract cases typically involve a compensatory award for economic (sometimes called special) damages, which include all financial losses that are the result of the defendant's conduct. Tort cases also can include a compensatory award for non-economic (sometimes called general) damages, which include awards for pain and suffering and emotional distress. Distinct from compensatory damages are punitive damages. Punitive damages are almost exclusively reserved for tort claims in which the defendant's conduct was grossly negligent or intentional.

Juries in large counties awarded altogether $2.7 billion in compensatory and punitive damages to plaintiff winners in 1992 (table 6). The median recovery for all cases was $52,000.

[4]In civil cases, the plaintiff must prove the key *elements of the case* by a "preponderance of the evidence." This standard is less stringent than "beyond a reasonable doubt," the standard used in criminal cases.

Table 6. Final award amounts for cases with plaintiff winners in State courts in the Nation's 75 largest counties, 1992

Case type	Number of cases with a plaintiff winner (A)	Final amount awarded to plaintiff winners: Total	Median	Mean	Percent of plaintiff winner cases (column A) with final awards: Over $250,000	$1 million or more
All jury cases	5,949	$2,703,683,000	$52,000	$455,000	21.5%	7.5%
Tort cases	4,584	$1,869,699,000	$51,000	$408,000	21.2%	7.8%
Toxic substance	202	106,306,000	101,000	526,000	30.4	13.3
Automobile	2,280	502,802,000	29,000	220,000	12.7	4.0
Professional malpractice	92	97,308,000	156,000	1,057,000	38.4	13.6
Intentional tort	199	105,466,000	54,000	530,000	21.5	6.5
Other tort	393	154,032,000	65,000	391,000	23.5	10.9
Premises liability	845	196,207,000	57,000	232,000	22.0	5.2
Slander/libel	27	6,264,000	25,000	229,000	18.4	13.9
Product liability	142	103,346,000	260,000	727,000	50.5	15.4
Medical malpractice	403	598,148,000	201,000	1,484,000	47.1	24.8
Contract cases	1,322	$620,098,000	$56,000	$620,000	22.6%	6.5%
Rental/lease	85	159,734,000	71,000	1,881,000	17.7	2.4
Seller plaintiff	417	88,368,000	35,000	212,000	17.9	3.0
Buyer plaintiff	363	173,965,000	45,000	479,000	20.8	7.1
Employment	170	249,206,000	141,000	1,462,000	39.8	13.8
Fraud	173	117,209,000	70,000	678,000	26.5	9.2
Other contract	113	31,616,000	49,000	280,000	17.9	5.3
Real property cases*	43	$13,888,000	$55,000	$325,000	16.1%	4.7%

Note: Data for case type and final awards in jury trial cases were available for 95.8% of all plaintiff winners. Award data were rounded to the nearest $1,000. Final amount awarded includes both compensatory awards (reduced for contributory negligence, if applicable) and punitive damage awards.
*Eminent domain cases are not calculated among final awards because they always entail an award; the issue is how much the defendant (whose property is being condemned) will receive for the property.

Jury cases with total final awards of $1 million or more

Tort, contract, and real property cases disposed by a jury trial in the Nation's 75 largest counties during a 1-year period resulted in a total final award of $1 million or more in each of 459 cases, or 3.8% of all 12,000 jury cases. In the vast majority of these $1 million or more cases (97%) a plaintiff, rather than a defendant in a counterclaim, received the award.

Medical malpractice (23%) and automobile tort (21%) cases were the most prevalent types among cases with a jury award of $1 million or more.

The types of defendants in these large award cases differed from those in torts with smaller awards.

Medical malpractice —

- A hospital was the defendant in 72% of the $1 million-*plus* cases *compared* to 56% of the cases in which the plaintiff was awarded less than $1 million.

Automobile tort —

- Businesses (53%) and government agencies (29%) together comprised over three-fourths of the defendants in $1 million-plus cases.
- An individual was the defendant in 52% of the cases with an award under $1 million, compared to 18% of the cases in which the plaintiff was awarded $1 million or more.

About a quarter (22%) of the final awards to plaintiff winners were in excess of $250,000. Half of the plaintiff winners in product liability cases were awarded total damages over $250,000.

About 8% of plaintiff winners received final awards of $1 million. The largest proportion of these $1 million-plus awards was in medical malpractice cases (25%) followed by product liability cases (15%).

In tort cases, individual plaintiffs were just as successful whether they sued an individual (53%) or a business (54%) (table 7). In contract cases, individual plaintiffs won more often when they sued an individual (89%) rather than a business (58%).

Individual plaintiff winners received larger final award amounts when the defendant was a business rather than an individual. When a business was the defendant, the award amount exceeded $250,000 in 25% of cases. When an individual was the defendant, the award amount exceeded $250,000 in 8% of the cases.

Punitive damages

Juries included punitive damages as part of the overall award in 6% of the cases in which the plaintiff won.[5]

[5]In 25 States, before punitive damages can be awarded, the jury must find "clear and convincing evidence" and in 1 State "beyond a reasonable doubt" that the defendant's conduct was wanton, malicious, extremely or grossly negligent, or oppressive in character. Eight States require plaintiffs to remit a portion of their punitive damages award to the public treasury. Twelve States require bifurcation; that is, separate trials for compensatory and punitive damages. In nine States that require bifurcation, the award is determined by a jury and in the remaining three States, the amount is determined by a judge. Source: Thomas Koenig and Michael Rustad, "The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability," *In Justice System Journal*, 18(2): 21-44, 1993.

Punitive damages accounted for about 10% of all money awarded to plaintiffs.[6] The median punitive award was $50,000 (table 8). Twenty-four percent of punitive damage awards were over $250,000, and 12% were $1 million or more.

Punitive damages were awarded to plaintiff winners in 30% of slander/libel cases, 27% of employment cases, 21% of fraud cases, and 19% of intentional tort cases. Six percent of plaintiff winners in toxic substance cases and 2% in product liability cases were awarded punitive damages.

[6]Four States (New Hampshire, Louisiana, Nebraska, and Washington) do not permit punitive damages to be awarded and one State (Massachusetts) permits punitive damages to be awarded only when authorized by statute. In States that do allow punitive damages to be awarded, many have enacted legislation to cap punitive damages at a specific dollar amount, such as $350,000. Other States have capped punitive damages to a certain proportion of the compensatory damages. Source: Koenig and Rustad, 1993.

Role of contributory negligence

In 13% of civil cases in which a jury awarded compensatory damages to the plaintiff, the damages were reduced because the plaintiff had contributed to the negligence that led to loss or injury. The reduction totalled approximately $84 million. (This total does not include reductions in the 3 sites for which data on reduced awards were unavailable: *Fairfax, Co. Va., Alameda, Co.* Cal, and Marion, Co. Ind.)

States differ in the role played by a plaintiff's own negligence in determining whether, or the extent to which, the defendant is liable for a plaintiff's damages.

Based on these differences, States are classified below into one of four categories.*

*Whether a State was classified as modified comparative negligence, pure comparative negligence, pure contributory negligence, or mixed rule depended on general characteristics of its civil laws. If the focus were on specific types of civil cases, the classification might differ from what is shown here. States do not always use the same decision rules for each type of civil case.

Modified comparative negligence

Nine states have a modified comparative negligence rule (the "50% bar to recovery" rule) which stipulates that the plaintiff can recover damages only if he or she is less negligent than the defendant.

Arkansas	North Dakota
Colorado	Utah
Idaho	West Virginia
Kansas	Wyoming
Maine	

Eighteen states use a modified comparative negligence rule (the "51% bar to recovery" rule) in which in the plaintiff can recover damages only if he or she is not more negligent than the defendant.

Connecticut	New Hampshire
Hawaii	New Jersey
Illinois	Ohio
Indiana	Oklahoma
Iowa	Oregon
Massachusetts	Pennsylvania
Montana	Texas
Minnesota	Vermont
Nevada	Wisconsin

Source: *American Jurisprudence*, 2nd edition (1969, supp. 1995), 57B:1131-1149.

Pure comparative negligence

Thirteen states use a pure comparative negligence rule under which a plaintiff can recover damages to the extent that the defendant is responsible for the plaintiff's injuries.

Alaska	Mississippi
Arizona	Missouri
California	New Mexico
Florida	New York
Kentucky	Rhode Island
Louisiana	Washington
Michigan	

Pure contributory negligence

Six states use a pure contributory negligence rule that bars recovering damages from the defendant if the plaintiff's own negligent conduct contributed in any way to his or her own injuries.

Alabama	North Carolina
Delaware	South Carolina
Maryland	Virginia

Mixed rules

Four states have a blend of rules that do not fit into any single general category and are therefore, classified as having mixed comparative negligence rules.

Georgia	South Dakota
Nebraska	Tennessee

Nearly 55% of the punitive damage awards in the 13 toxic substance cases were over $1 million. Employment-related contract cases involving punitive damages always included an associated tort claim (for example, discrimination or harassment). Approximately $133 million in punitive damages were awarded in connection with employment-related cases. The $133 million damages awarded accounted for 50% of the total $268 million awarded for punitive damages.

Table 7. Plaintiff winner cases, and final award by selected litigant pairings and selected case types in State courts in the Nation's 75 largest counties, 1992

Selected case type and litigant pairings	Number of cases (A)	Plaintiff winner cases Number (B)	Plaintiff winner cases Percent (C=B/A)	Final amount awarded to plaintiff winners[a] Median	Final amount awarded to plaintiff winners[a] Mean	Percent of plaintiff winner cases (column B) with final awards Over $250,000	Percent of plaintiff winner cases (column B) with final awards $1 million or more
Individual v. Individual							
All jury cases[b]	3,289	1,792	54.5%	$24,000	$130,000	8.4%	2.6%
Tort cases[c]	2,979	1,580	53.0%	$22,000	$130,000	8.8%	2.6%
Auto torts	2,021	1,196	59.2	17,000	79,000	4.8	1.4
Premises liability	208	68	32.6	34,000	132,000	6.9	5.0
Product liability	0	0	0	0	0	0	0
Medical malpractice	412	142	34.5	111,000	522,000	29.6	15.6
Toxic substance	0	0	0	0	0	0	0
Contract cases[d]	265	183	69.0%	$38,000	$146,000	7.9%	.7%
Fraud	67	39	58.4	70,000	104,000	7.7	0
Seller plaintiff	67	54	79.9	20,000	272,000	10.0	2.3
Buyer plaintiff	47	39	83.6	31,000	138,000	15.8	0
Employment	3	2	69.2	29,000	26,000	0	0
Rental/lease	29	22	74.8	12,000	47,000	0	0
Individual v. Business[e]							
All jury cases	5,240	2,855	54.5%	$85,000	$460,000	24.5%	7.8%
Tort cases	4,148	2,227	53.7%	89,000	379,000	25.1%	8.0%
Auto torts	1,416	894	63.1	60,000	315,000	21.3	5.3
Premises liability	1,381	639	46.3	60,000	259,000	24.2	8.0
Product liability	302	116	38.0	260,000	753,000	51.2	16.1
Medical malpractice	45	16	34.7	200,000	857,000	31.5	18.6
Toxic substance	279	209	74.9	100,000	532,000	29.5	13.6
Contract cases	1,042	603	57.9%	$55,000	$757,000	22.1%	.7%
Fraud	152	80	52.6	57,000	722,000	24.2	8.0
Seller plaintiff	134	89	66.6	51,00	125,000	14.3	0
Buyer plaintiff	393	243	61.7	31,000	505,000	13.8	6.0
Employment	233	131	56.1	159,000	1,845,000	45.5	14.2
Rental/lease	37	24	65.5	72,000	69,000	0	0

Note: Data on litigant pairings, jury award winners, and type of cases were available for 98.9% of all cases. Data on final award amounts were available for plaintiff winners in 96.8% of individual v. individual cases and 96% of individual v. business cases. Award data were rounded to the nearest $1,000. Zero indicates no cases in the sample. Final amount awarded includes both compensatory damage (reduced for contributory negligence, if applicable) and punitive damage awards. Detail may not sum to total shown because of rounding.

[a]Plaintiff winners with missing final award amounts are excluded.
[b]All jury cases include real property cases which are not shown separately in the table.
[c]Tort cases include intentional torts, professional malpractice, slander/libel and other tort cases which are not shown separately in the table.
[d]Contract cases include mortgage foreclosure and other contract cases which are not shown separately in the table.
[e]Business litigants include "other organizations."

Table 8. Punitive damage awards for plaintiff winners in civil jury cases in State courts in the Nation's 75 largest counties, 1992

Case type	Plaintiff winner cases: Number awarded punitive damages (A)	Plaintiff winner cases: Percent receiving punitive damages	Amount of punitive damages awarded to plaintiff winners: Total	Median	Mean	Percent of plaintiff winner cases (column A) with punitive damages: Over $250,000	$1 million or more
All jury cases	364	6.9%	$267,879,000	$50,000	$736,000	23.7%	11.8%
Tort cases	190	4.0%	91,477,000	38,000	481,000	22.7%	10.1%
Automobile	55	2.4	35,535,000	25,000	641,000	19.9	7.5
Premises liability	15	1.7	1,272,000	40,000	87,000	0	0
Product liability	3	2.2	40,000	9,000	12,000	0	0
Intentional tort	38	18.5	10,926,000	25,000	286,000	13.8	8.5
Medical malpractice	13	3.1	3,120,000	199,000	245,000	31.8	0
Professional malpractice	15	15.7	6,077,000	250,000	412,000	44.0	8.5
Slander/libel	8	29.8	1,341,000	47,000	164,000	34.2	0
Toxic substance	13	6.2	25,420,000	1,692,00	1,994,000	54.7	54.7
Other tort	30	7.2	6,746,000	100,000	226,000	20.9	10.9
Contract cases	169	12.2%	169,628,000	62,000	1,003,000	24.4%	12.6%
Fraud	38	21.2	7,396,000	46,000	191,000	18.9	10.4
Seller plaintiff	24	5.6	1,221,000	22,000	51,000	0	0
Buyer plaintiff	47	12.4	27,448,000	27,000	581,000	28.6	11.1
Employment	46	26.8	132,759,000	179,000	2,875,000	42.1	26.1
Rental/lease	11	11.3	399,000	50,000	37,000	0	0
Other contract	2	1.8	365,000	145,000	182,000	44.4	0
Real property cases*	5	11.7	6,873,000	85,000	1,375,000	40.0%	40.0%

Note: Award data were rounded to the nearest $1,000. Zero indicates there were no cases in the sample. In this study cases are classified into a single case type, though cases may involve multiple claims (such as contract and tort). Under the laws in almost all States, only tort claims qualify for punitive damages. If a contract or real property case involved punitive damages, it involved a related tort claim. Punitive damage awards maybe incomplete for 4 counties: Palm Beach Co., Fl, Wayne Co., MI, Allegheny Co., PA, and Philadelphia Co., PA.
*Excludes eminent domain cases.

Compensatory and punitive damage awards for "defendants"

In cases with claims and counterclaims, the distinction between plaintiff and defendant becomes less clear. Therefore, it is possible that one party originally named as a defendant countersues the plaintiff and actually wins damages. In 1.2% of all tort, contract, and real property cases concluded by jury trial in State general jurisdiction courts in the Nation's largest 75 counties during a 1-year period ending June 30, 1992, the defendant won in a countersuit.

Defendants in tort, contract, and real property jury cases won $162 million in compensatory and punitive damages on counterclaims.

Of these counterclaim cases won by defendants, 19% were seller plaintiff, 16% auto torts, 14% buyer plaintiff, and 12% fraud.

Defendants who won on counterclaims and were awarded punitive damages comprised 4% of all cases where punitive damages were awarded. These defendants were awarded $55 million in punitive damages in jury trial cases. Two-thirds of these cases involved fraud. The largest punitive amount awarded in a counterclaim was $18 million to 11 defendants in a case involving negligence and a contract dispute.

Product liability cases: Jury verdicts and punitive damages

In State courts of general jurisdiction in the Nation's 75 largest counties, juries disposed of 360 product liability cases during a 12-month period ending June 30,1992. The 360 are about 3% of the 12,000 civil cases (tort, contract, and real property) disposed by a jury trial.

Juries decided in favor of the plaintiff in 41% of the product liability cases and awarded a total of $103 million in compensatory and punitive damages to these 142 plaintiff winners. In 3 of the 142 plaintiff winner cases, punitive damages were awarded. The total punitive damages awarded in these three cases was $40,000.

In 1991-92 juries rendered verdicts in 287 toxic substance cases in the Nation's 75 largest counties. Plaintiffs won 74% or 202 cases, receiving an average total award of over $500,000. In 13 cases punitive damages were awarded. Punitive damages totaled $26 million in the 13 cases. (The court records did not reflect whether the award was paid or whether an appeal was entered.)

The BJS survey finding that relatively few product liability jury verdicts resulted in punitive damage awards is consistent with previous findings in studies of jury verdicts. Findings from three such studies are summarized below:

- In a review of 24,000 jury verdicts in Cook County, Illinois and San Francisco County, California from 1960-1984, a RAND Corporation study identified 6 jury trials in which punitive damages were awarded in product liability cases. Source: Mark Peterson, A. S. Sarma, and M. Shanley, *Punitive Damages: Empirical Findings* (Santa Monica, CA: RAND Corporation, 1987).

- Daniels and Martin (1990) reviewed more than 25,000 jury verdicts in 47 jurisdictions from 1981-85. They found 967 product liability cases, in which 34 were awarded punitive damages. Source: Stephen Daniels and Joanne Martin, "Myth and Reality in Punitive Damages," in *Minnesota Law Review* 75/1, 1990.

- Using a variety of data collection methods, Koenig and Rustad (1993) located 355 punitive damage verdicts in product liability jury trial cases across the Nation from 1965 to 1990. Their search focused on personal injury cases and did not include cases with only economic losses. Of the 355 cases, 95 cases involved asbestos. Source: Thomas Koenig and Michael Rustad, "The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability," in *The Justice System Journal*, Volume 16/2:21-44, 1993.

In 43% of the civil jury cases which awarded punitive damages to the plaintiff, the punitive amount exceeded the compensatory amount (table 9). In 22% of cases with punitive damages, the punitive award amount was at least twice as much as the compensatory award.

Case processing time

The mean case processing time from filing of the complaint to jury verdict was 30 months and the median was 24.7 months (table 10). Toxic substance and medical malpractice cases had a mean processing time of about 3 years. Product liability cases took on average 2.5 years from the filing of the complaint to jury trial verdict.

County specific data

The volume of jury trials, percentage of plaintiff winners, final awards, and punitive damage award amounts varied across the individual State courts sampled in this project (appendix tables 2-3).

Many factors contribute to these differences including State civil justice laws and the types of cases disposed by jury trial.

Table 9. Compensatory and total award amounts for plaintiff winners who were awarded punitive damages in civil jury trials in State courts in the Nation's 75 largest counties, 1992

Case type	Number of cases with a plaintiff winner awarded punitive damages (A)	Total damage award amount			Percent of punitive damages (column A)	
		Total	Punitive	Compensatory	Greater than compensatory damage awards	At least two times greater than compensatory damage awards
All jury cases	364	$545,157,000	$267,879,000	$277,278,000	43.0%	22.2%
Tort cases	190	203,467,000	91,477,000	111,990,000	40.4%	17.0%
Automobile	55	69,905,000	35,535,000	34,370,000	39.7	16.3
Premises liability	15	2,481,000	1,272,000	1,208,000	41.0	13.7
Product liability	3	125,000	40,000	85,000	38.5	0
Intentional tort	38	22,963,000	10,926,000	12,036,000	32.4	13.4
Medical malpractice	13	13,144,000	3,120,000	10,024,000	31.8	0
Professional malpractice	15	24,365,000	6,077,000	18,288,000	33.1	33.1
Slander/libel	8	3,579,000	1,341,000	2,238,000	0	0
Toxic substance	13	36,365,000	26,420,000	11,945,000	84.9	39.6
Other tort	30	28,542,000	6,746,000	21,796,000	50.2	20.5
Contract cases	169	332,012,000	169,528,000	162,483,000	44.9%	27.5%
Fraud	38	14,997,000	7,339,000	7,658,000	52.1	34.8
Seller plaintiff	24	3,172,000	1,221,000	1,951,000	41.2	24.0
Buyer plaintiff	47	98,754,000	27,446,000	71,308,000	32.5	20.4
Employment	48	213,437,000	132,759,000	80,678,000	50.6	34.1
Rental/lease	11	875,000	399,000	476,000	56.1	18.4
Other contract	2	777,000	365,000	412,000	56.6	0
Real property cases*	5	9,678,000	6,873,000	2,805,000	80.0%	40.0%

Note: Award data were rounded to the nearest $1,000. Zero indicates no cases in the sample. Compensatory and total award amounts do not include reductions. Detail may not sum to total because of rounding. Punitive damage awards maybe incomplete for 4 counties: Palm Beach Co., Fl, Wayne Co., MI, Allegheny Co., PA, and Philadelphia Co., PA.
*Excludes eminent domain cases.

Table 10. Case processing time from filing of civil complaint to trial jury verdict in State courts in the Nation's 75 largest counties, 1992

Case type	Number of jury cases	Time from filing of complaint to jury trial verdict			
		Median (months)	Mean (months)	Percent of jury trial cases concluded	
				Less than 2 yrs.	4 yrs. or more
All jury cases	9,745	24.7	30.0	48.3%	15.7%
Tort cases	7,605	24.6	30.1	48.8%	16.2%
Auto tort	3,381	21.7	26.9	57.4	11.5
Slander/libel	68	22.4	23.2	66.8	4.3
Intentional tort	403	23.4	30.0	52.3	15.7
Premises liability	1,589	25.0	30.6	47.8	18.8
Other torts	667	25.9	30.4	42.8	14.5
Professional malpractice	154	28.0	33.5	37.2	20.6
Product liability	300	28.9	32.0	38.0	16.9
Medical malpractice	999	33.6	38.8	29.8	28.6
Toxic substance	55	36.4	37.9	34.8	26.9
Contract cases	1,927	24.8	29.6	47.6%	14.4%
Seller plaintiff	511	23.7	27.4	51.4	12.3
Fraud	279	24.5	27.0	49.6	10.0
Employment	253	24.7	30.4	47.8	15.4
Buyer plaintiff	519	25.9	30.8	46.7	14.9
Rental/lease	120	26.7	31.0	44.1	17.2
Other contract	209	28.4	33.9	39.7	21.3
Mortgage foreclosure	6	29.2	26.8	48.0	0
Real property cases	213	28.0	30.5	37.0%	13.3%
Eminent domain	148	26.8	29.1	38.4	10.8
Other real property	65	29.3	33.6	33.7	19.1

Note: Data for time to disposition were available for 80.7% of all cases.
Zero indicates no cases in the sample.

Methodology

Sample

The sample used in this project is a 2-stage stratified sample with 45 of the 75 most populous counties selected at the first stage. The 75 counties were divided into 4 strata based on aggregate civil disposition data for 1990 obtained through telephone interview with court staff in the general jurisdiction trial courts. In stratum 1 (14 counties with the largest number of civil case dispositions), every county was selected. Stratum 2 consisted of 15 counties with 12 chosen randomly. From strata 3, 10 of the 20 counties were selected. Nine of the 26 counties in stratum 4 were included.

At the second stage, for 38 of the jurisdictions, all tort, contract, and real property rights cases disposed by jury verdict between July 1, 1991, and June 30, 1992, were selected. In the other 7 jurisdictions, a random sample of about 300 cases or half the jury trial cases (whichever yielded more cases) were included in the sample. The final sample consisted of 6,504 tort, contract, and real property jury trial cases.

Sampling error

Since the data in this report came from a sample, a sampling error (standard error) is associated with each reported number. In general, if the difference between two numbers is greater than twice the standard error for that difference, there is confidence that for 95 out of 100 possible samples a real difference exists and that the apparent difference is not simply the result of using a sample rather than the entire population. All differences discussed in this report were statistically significant at or above the 95 percent confidence level.

Data recording and unobtainable information

For each sampled case, a standard coding form was manually completed by court staff on-site to record information about the litigants, case type, processing time and award amounts.

Information for which data were not available or collected included the cost of litigation for the parties involved, as well as for others, actual disbursement of awards, the type and extent of the personal injury, if any, and the number of cases that were appealed.

Final award and punitive damage amounts

Two ways of calculating averages are used to describe final award and punitive damage amounts to plaintiff winners. Means are sensitive to a few very large or small award amounts in a distribution. The median, the middle value in the range of award amounts, is not influenced by extreme values. Median final award and punitive damage amounts are nearly always smaller than corresponding means.

Civil case type definitions:

Torts — Claims arising from personal injury or property damage caused by negligent or intentional act of another person or business. Specific tort case types include : *automobile accident*; *premises liability* (injury caused by the dangerous condition of residential or commercial property); *medical malpractice* (by doctor, dentist, or medical professional); *other professional malpractice* (e.g.. by engineers, architects); *product liability* (injury or damage caused by defective products); *toxic substance* (injury caused by toxic substances); *libel/slander* (injury to reputation); *intentional tort* (e.g., vandalism, intentional personal injury); and *other negligent acts*.

Contracts — Cases which include all allegations of breach of contract. Specific case types include: *seller plaintiff* (sellers of goods or services, including lenders, seek payment of money owed to them by a buyer, including borrowers); *buyer plaintiff* (purchaser of goods or services seeks return of their money, recision of the contract, or delivery of the specified goods delivered); *mortgage contract/foreclosure* (foreclosures on real property, commercial, or residential; because the title to real property is transferred to the lender if the claim is successful it could be included under real property cases); *fraud* (financial damages incurred due to intentional or negligent misrepresentation regarding a product or company; also considered a type of tort claim, but because it arises out of commercial transactions, it was included under contracts); *employment claim* (claim involving employment or hiring process, including claims of employment discrimination; workman's compensation claims, handled primarily through administrative process, are not included); *rental/lease agreement*; and *other contract claims* (including partnership claims, stockholder claims, and subrogation issues).

Real property — Any claim regarding ownership of real property (excluding mortgage foreclosures, which are included under contracts). Specific categories used include: *eminent domain* (condemnation of real property to obtain for public use); *other real property* (any other claim regarding title to or use of real property).

The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. Jan M. Chaiken, Ph.D., is director.

BJS Special Reports address a specific topic in depth from one or more datasets that cover many topics.

Carol J. DeFrances, Steven K. Smith, Patrick A. Langan of BJS and Brian J. Ostrom, David B. Rottman, and John A. Goerdt of the National Center for State Courts (NCSC) wrote this report. Neil LaFountain, NCSC, also assisted in this project. Carma Hogue at the Bureau of the Census designed the sample. Data collection was carried out by the Bureau of the Census, the National Association of Criminal Justice Planners, and the NCSC. Jacob Perez provided statistical assistance. Tom Hester and Tina Dorsey edited the report. Marilyn Marbrook, assisted by Jayne Robinson and Yvonne Boston, administered production.

July 1995, NCJ-154346

This report is the second in a series based on data collected from the BJS Civil Justice Survey of State Courts, 1992. The first report entitled *Tort Cases in Large Counties*, NCJ-153177, is available from the BJS Clearinghouse at 1-800-732-7377.

Appendix table 1. Civil trial juries: Size and verdict rules in State courts of general jurisdiction

State/courts	Jury size	Civil juries decision rule
Alabama		
Circuit	12	Unanimous
Alaska		
Superior	12	5/6 rule
Arizona		
Superior	8	3/4 rule
Arkansas		
Circuit	12	3/4 rule
California		
Superior	12(a)	3/4 rule
Colorado		
District	6	Unanimous
Connecticut		
Superior	6	Unanimous
Delaware		
Superior	12	Unanimous
District of Columbia		
Superior	6(b)	Unanimous
Florida		
Circuit	6(c)	Unanimous
Georgia		
Superior	12	Unanimous
Hawaii		
Circuit	12(d)	5/6 rule(e)
Idaho		
District	12	3/4 rule
Illinois		
Circuit	6(f)	Unanimous
Indiana		
Superior	6	Unanimous
Circuit	6	Unanimous
Iowa		
District	8	7/8 rule or Unanimous(g)
Kansas		
District	6/12(h)	5/6 rule or Unanimous(i)
Kentucky		
Circuit	12	3/4 rule
Louisiana		
District	12(j)	5/6 rule, 9/12 rule
Maine		
Superior	8	3/4 rule
Maryland		
Circuit	12	Unanimous
Massachusetts		
Superior	12	5/6 rule
Michigan		
Circuit	6	5/6 rule
Minnesota		
District	6	5/6 rule or Unanimous
Mississippi		
Circuit	12	3/4 rule
Chancery	12	3/4 rule
Missouri		
Circuit	12	3/4 rule
Montana		
District	12(k)	2/3 rule
Nebraska		
District	12	5/6 rule or Unanimous(l)
Nevada		
District	12(m)	3/4 rule
New Hampshire		
Superior	12	Unanimous
New Jersey		
Superior	6/12	5/6 rule
New Mexico		
District	12	5/6 rule
New York		
Supreme	6	5/6 rule
County	6	5/6 rule
North Carolina		
Superior	12(n)	Unanimous(o)
North Dakota		
District	12/6	Unanimous
Ohio		
Common Pleas	12/8	3/4 rule
Oklahoma		
District	6/12(p)	3/4 rule
Oregon		
Circuit	12	3/4 rule
Pennsylvania		
Common Pleas	12	5/6 rule
Rhode Island		
Superior	12	5/6 rule
South Carolina		
Circuit	12	Unanimous
South Dakota		
Circuit	12	5/6 rule
Tennessee		
Circuit	12	Unanimous
Chancery	12	Unanimous
Texas		
District	12	5/6 rule
Utah		
District	8	3/4 rule or majority
Vermont		
Superior	12	Unanimous
District	12	Unanimous
Virginia		
Circuit	5/7(q)	Unanimous
Washington		
Superior	6(r)	5/6 rule
West Virginia		
Circuit	6	Unanimous
Wisconsin		
Circuit	6(s)	5/6 rule
Wyoming		
District	6(t)	5/6 rule
Federal Court		
District	6(u)	Unanimous

Notes: (a) Or fewer by agreement of the parties.
(b)6-member jury unless a jury of 12 is demanded.
(c)Eminent domain cases require a 12-member jury and an unanimous verdict.
(d) May stipulate that the jury consist of any number less than 12 or that a verdict on finding of a stated majority of jurors is taken as the verdict or finding of the jury.
(e)Can stipulate to 6-member with 5/6 rule.
(f)6-member jury unless 12 are requested.
(g) 7/8 rule applies after 6 hours of deliberation.
(h) 12-member jury if damages are greater than $5,000, otherwise 6.
(i) 5/6 rule applies with 12 jurors, otherwise must be unanimous.
(j) Parties may stipulate to a 6-person jury.
(k) 4-member jury if both parties agree.
(l) 5/6 rule after 6 hours of deliberation.
(m) Parties may stipulate to 4-8 jurors rather than 12.
(n,o) Except in actions in which a jury is required by statute, the parties may stipulate that the jury shall consist of any number less than 12 or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.
(p)12-member jury if damages are greater than $2,500, otherwise 6.
(q)A 12-member jury may be allowed by the judge.
(r) May demand a 12-member jury.
(s)A party may request, or the court on its own motion may require a greater number, not to exceed 12.
(t)6-member jury unless demand made for 12.
(u)6-member jury unless a jury of 12 is demanded (local rules). Even absent stipulation, if the court finds it necessary to excuse a juror, a valid verdict may be returned by the remaining 11.

Source: David B. Rottman, et al. *State Court Organization, 1993.* National Center for State Courts. NCJ-148346, January 1995

Appendix table 2. Civil jury trial cases and final award amounts, by sampled counties, 1992

County	Total number jury cases	Plaintiff winners		Final amount awarded to plaintiff winners*					Percent of plaintiff winner cases with awards of $1 million or more*
		Number of cases	Percent	Total	Median	Mean	Minimum	Maximum	
Maricopa, AZ	145	92	63.4%	$20,482,272	$30,721	$227,581	$374	$7,500,720	3.3%
Pima, AZ	78	39	50.0	8,000,926	52,821	153,870	1,740	1,450,000	5.1
Alameda, CA	89	43	48.3	10,339,420	87,300	258,486	1,500	3,673,907	5.0
Contra Costa, CA	68	30	44.1	32,413,688	110,000	1,117,713	550	15,250,000	13.8
Fresno, CA	87	47	54.0	8,607,983	52,189	148,844	1,085	1,030,000	2.2
Los Angeles, CA[a]	602	306	50.8	294,321,827	124,922	968,163	3	17,747,000	17.8
Orange, CA	281	115	40.9	37,174,204	48,500	323,254	798	8,799,440	7.8
San Bernadino, CA	75	28	37.3	8,848,190	58,412	314,480	1,207	2,000,000	9.1
San Francisco, CA	126	64	50.8	18,344,394	109,459	286,631	1,000	2,552,000	6.3
Santa Clara, CA	107	49	45.8	21,272,734	67,834	443,182	295	4,500,000	10.4
Ventura, CA	78	34	43.6	6,273,387	62,318	188,335	237	2,511,746	3.6
Fairfield, CT[b]	54	29	53.7	2,583,992	22,950	92,285	900	1,500,000	3.8
Hartford, CT[b]	61	32	52.5	2,870,990	27,964	92,613	1	525,000	0
Dade, FL	360	159	44.2	44,245,071	60,000	278,271	240	2,358,401	9.4
Orange, FL	83	52	62.7	11,272,490	31,869	234,844	810	3,807,443	8.3
Palm Beach, FL	259	166	64.1	29,364,094	54,419	187,092	386	6,626,510	2.5
Fulton, GA	120	62	51.7	14,245,946	67,149	233,540	643	2,323,701	4.9
Honolulu, HI	57	21	36.8	1,473,536	52,792	133,958	15,144	600,000	0
Cook, IL	600	347	57.8	200,992,035	62,001	578,961	100	24,143,959	11.4
DuPage, IL	82	37	45.1	4,021,306	16,068	108,684	1	2,904,228	2.7
Marion, IN	27	15	55.6	274,430	17,734	19,602	3,000	44,500	0
Jefferson, KY	99	61	61.6	6,237,480	11,300	105,720	180	3,315,973	1.7
Essex, MA	76	23	30.3	3,133,139	40,280	136,223	1,273	663,022	0
Middlesex, MA	82	28	34.1	3,318,686	50,318	144,291	4,000	817,920	0
Norfolk, MA	62	31	50.0	3,076,531	30,750	113,946	820	1,440,000	3.7
Suffolk, MA	114	40	35.1	11,592,171	100,000	297,235	700	5,000,000	2.6
Worcester, MA	53	20	37.7	1,696,665	77,000	154,242	1	685,000	0
Oakland, MI	119	55	46.2	22,310,241	90,330	437,456	250	8,600,000	7.8
Wayne, MI	242	123	50.8	64,229,338	144,231	573,476	2,500	5,506,495	18.8
Hennepin, MN	208	103	49.5	18,316,701	43,016	197,099	161	7,197,180	3.1
St. Louis, MO	235	107	45.5	6,024,365	16,000	57,375	500	950,000	0
Bergen, NJ	115	58	50.4	5,151,648	31,200	101,013	4,150	1,214,789	2.0
Essex, NJ	158	70	44.3	13,237,715	18,866	220,629	660	6,486,166	3.3
Middlesex, NJ	140	56	40.0	8,339,368	25,725	154,433	345	1,400,000	3.7
New York, NY	600	363	60.4	414,551,440	150,000	1,193,985	1,925	90,300,000	16.8
Cuyahoga, OH	266	161	60.5	25,977,594	18,225	170,905	116	6,303,755	3.3
Franklin, OH	119	65	54.6	22,467,760	25,000	345,658	100	12,941,628	4.6
Allegheny, PA	111	53	47.7	5,834,128	17,368	114,395	1	1,170,016	1.9
Philadelphia, PA	616	356	57.6	149,756,826	100,000	425,446	750	5,397,828	12.5
Bexar, TX	262	121	46.2	10,835,914	21,003	95,893	1	1,634,402	.9
Dallas, TX	261	129	49.4	241,221,539	66,180	1,914,457	550	123,389,838	11.9
Harris, TX	632	260	41.1	317,963,486	91,932	1,292,534	192	74,911,128	12.1
Fairfax, VA	161	85	52.8	10,374,068	44,903	123,501	1	3,300,000	2.4
King, WA	131	74	56.5	7,528,017	45,069	104,556	97	1,100,000	1.4
Milwaukee, WI	116	51	44.0	10,268,834	25,000	209,976	447	4,169,848	4.1

Note: For 7 counties (Los Angeles Co., CA, San Bernadino Co., CA, Dade Co., FL, Cook Co., IL, New York Co., NY, Philadelphia Co., PA, and Harris Co., TX), the percentage of plaintiff winners and final award amounts are sample estimates. Data for the remaining 38 jurisdictions are based not on samples but on complete enumerations.

*Final amount awarded to plaintiff winners excludes cases where this data was missing. Final amount awarded includes both compensatory awards (reduced for contributory negligence, if applicable) and punitive damage awards.

[a]Includes only the central district of the Los Angeles County Superior Court.
Los Angeles suburban courts are not included.

[b]The number of jury cases and final award amounts are for the Fairfield and Hartford judicial districts.

Appendix table 3. Punitive damage awards for plaintiff winners, in civil jury trials, by sampled counties, 1992

County	Number of cases	Amount awarded to plaintiff winners			
		Total	Mean	Minimum	Maximum
Maricopa, AZ	1	$50,000	$50,000	$50,000	$50,000
Pima, AZ	3	207,500	69,167	1,500	162,000
Alameda, CA	2	79,976	39,988	24,176	55,800
Contra Costa, CA	1	25,000	25,000	25,000	25,000
Fresno, CA	3	1,081,000	360,333	1,000	680,000
Los Angeles, CA[a]	36	39,742,004	1,103,945	8,001	8,000,000
Orange, CA	9	3,763,580	418,176	2,500	2,259,830
San Francisco, CA	17	5,163,742	303,750	500	1,850,000
Santa Clara, CA	2	500,000	250,000	200,000	300,000
Hartford, CT[b]	1	65,450	65,450	65,450	65,450
Dade, FL	3	1,710,000	570,000	570,000	570,000
Orange, FL	3	11,763	3,921	1,263	5,500
Palm Beach, FL	1	395	395	395	395
Fulton, GA	16	2,603,363	162,710	6,000	1,250,000
Honolulu, HI	1	150,000	150,000	150,000	150,000
Cook, IL	5	47,340	9,000	3,000	15,000
DuPage, IL	2	103,000	51,500	3,000	100,000
Jefferson, KY	8	159,142	19,893	150	50,000
Suffolk, MA	1	3,000	3,000	3,000	3,000
Wayne, MI	1	3,000	3,000	3,000	3,000
Hennepin, MN	4	127,073	31,768	2,800	58,500
St. Louis, MO	6	639,000	106,500	2,500	455,000
Bergen, NJ	3	695,000	198,333	10,000	500,000
New York, NY	9	8,429,499	940,792	25,000	2,555,000
Cuyahoga, OH	3	65,900	21,967	5,900	50,000
Franklin, OH	2	50,000	25,000	5,000	45,000
Philadelphia, PA	6	100,900	16,817	450	25,000
Bexar, TX	10	815,500	81,550	7,000	236,000
Dallas, TX	29	116,900,09	3,996,566	700	60,000,000
Harris, TX	44	38,265,000	870,114	5,000	7,200,000
Fairfax, VA	7	176,000	26,000	5,000	50,000
Milwaukee, WI	2	325,000	162,500	25,000	300,000

Note: 13 counties did not have any jury trial cases in which punitive damages were awarded.
For 6 counties (Los Angeles Co., CA, San Bernadino Co., CA, Dade Co., FL, Cook Co., IL, New York Co., NY, and Harris Co., TX) punitive damage awards are sample estimates.
Data for the remaining 26 jurisdictions are based not on samples but on complete enumerations.
In 4 counties (Palm Beach Co., FL, Wayne Co., MI, Allegheny Co., PA, and Philadelphia Co., PA) punitive damage award data may not be complete.
[a]Includes only the central district of the Los Angeles County Superior Court.
Los Angeles suburban courts are not included
[b]The number of plaintiff punitive damage award winners are for the Hartford judicial district.

JURY VERDICT RESEARCH SERIES

PERSONAL INJURY VALUATION HANDBOOK

Current Award Trends in Personal Injury 1996 Edition

FILING INSTRUCTIONS:

File: This release, No. 1.20.2, should be filed in Volume 1 behind the "CURRENT AWARD TRENDS" tab.

Discard: The "Current Award Trends in Personal Injury 1995 Edition", release No. 1.20.1, should be removed from Volume 1 at this time.

JURY VERDICT RESEARCH SERIES

LRP Publications

Yr/Iss 9534 No. 1.20.2

Incident Date to Trial Date - Median Number of Months

Year of Trial	Months
1990	41
1991	39
1992	38
1993	38
1994	41
1995	43

Filing Date to Trial Date - Median Number of Months

Year of Trial	Months
1990	27
1991	24
1992	24
1993	28
1994	29
1995	28

Settlement Statistics . . . Of the settlements rendered in premises liability cases between 1990 and 1995, 41 percent were for $50,000 or more, 29 percent were for $100,000 or more, 10 percent were for $500,000 or more, and 5 percent were for $1,000,000 or more.

Year	Settlement Median	Probability Range	Total Range	Settlement Mean
1990	$60,000	$14,500-248,750	$450-5,000,000	$245,471
1991	51,250	8,275-242,500	500-11,000,000	421,714
1992	24,000	7,500-90,000	56-7,500,000	164,189
1993	21,500	7,000-100,000	1-40,000,000	246,430
1994	30,000	9,445-128,000	1-6,500,000	196,610
1995	30,000	7,500-150,000	100-5,350,000	280,848

Products Liability

Award Trends . . . This category analyzes compensatory awards rendered in products liability cases. The analysis revealed that for the years 1990 through 1995: 84 percent of the products liability compensatory awards were for $50,000 or more, 76 percent of the awards were for $100,000 or more, 45 percent of the awards were for $500,000 or more, 30 percent of the awards were for $1,000,000 or more, and 6 percent of the awards were for $5,000,000 or more.

Year	Award Median	Probability Range	Total Range	Award Mean
1985	$550,000	$337,000-675,000	$500-15,000,000	$1,091,005
1986	296,800	222,600-445,200	300-27,599,953	1,006,821
1987	225,000	75,000-800,000	500-42,000,000	953,082
1988	434,000	104,000-1,040,261	3,700-25,000,000	1,151,594
1989	400,000	122,963-1,041,000	147-14,000,000	1,063,512
1990	315,000	100,000-1,150,000	1,932-122,000,000	1,891,455
1991	450,000	133,000-1,250,000	100-47,000,000	1,329,712
1992	401,521	102,375-1,109,250	950-21,000,000	1,215,860
1993	500,000	131,250-1,400,000	324-19,800,000	1,379,887
1994	379,685	82,647-1,701,342	400-46,000,000	2,063,609
1995	260,000	65,000-994,500	204-15,278,620	1,071,834

Most Common Injury Claims in Products Liability . . . The analysis of plaintiff verdicts in products liability cases indicates that the most frequently claimed injuries were death and asbestos-related illnesses. Death and asbestos-related illnesses cases each accounted for 15 percent of the total number of plaintiff verdicts. Finger amputations and burns each comprised 5 percent of the total

Analysis of Total Number of Punitive Damage Awards 1965-1994

Analysis prepared by Jonathan S. Massey at the request of Sen. Ernest F. Hollings April 13, 1995

Summary of Findings:

- 270 cases with known total awards of $953 million
- 109 additional cases with unknown award amounts
- $1.34 billion estimate of awards in all cases
- $3.5 million average award
- average of 13 cases per year

Mr. HOLLINGS. I turned on the TV in the office and was amused to see a series of whining and moaning and groaning with respect to punitive damages. This contract crowd is going in two different directions. Under the contract now, the welfare recipient is to show more responsibility. Under the contract, we have a family. They do not want Government in anything, but they want it in everything. They want it in the family. I would think that would be the last thing, to get into the family. But the contract crowd wants a family bill. And, of course, fundamental to the family is that we punish the child when it misbehaves. We spank the baby and teach it some discipline when it misbehaves and teach it how to do right as opposed to doing wrong.

But when it comes to large corporate America and manufacturers, there should be no spanking. All of a sudden, it costs consumers. Mr. President, whoever thought for a second that this bill is in the interests of consumers? It is the biggest fraud that ever tried to be perpetrated on this august body. Every consumer organization in the United States of any size, care, or responsibility is absolutely opposed to the bill.

And with regard to the better legal minds of the American Bar Association, the State supreme court justices and their Conference of Chief Justices of the several State supreme courts, the Conference of State legislatures, the attorneys general, oh, yes, they are going to look out for them? Uh-uh, no, they are looking out for manufacturers. Look at the section in here that exempts the manufacturer. They have all of these great provisions in here because they say they are so concerned about consumers, except when you mention manufacturers. They say, by the way, manufacturers should be exempt from this bill.

Now, come on. I will read several things about punitive damages, and I will go right to the heart of the issue. It is not saving consumers' pocketbooks and costs. This crowd knows the cost of everything and the value of nothing. The truth of the matter is on account of product liability in this country of ours, we have the safest products and we are saving our citizenry from injury, from maiming, from blindness, from being killed over and over again by the millions. Why do you think there were over 19 million car recalls in the last 10 years? We went to the Department of Transportation and we summed up all these automobile recalls. And if you think the big automobile companies—not only in the United States, but Toyota in Japan, and others—are recalling defective automobiles to save consumers money—they are doing it to save themselves money on account of product liability, because they are going to get nailed. And so to save themselves money, they save lives and injury to the consuming public. It is not the pocketbook that we are involved with here. On the contrary, it is the safety of products and the safety of our citizenry.

So let us quit bringing all of these cases, one by one, out here, and say, oh, what a terrible punitive damage verdict this is and thereby we have a national problem. Not so.

The States have handled this. And rather than going into this case or that case—I do not countenance for a second that there are not some mistakes. There are mistakes everywhere in the administration of the law. That does not call for national legislation. But, in a general sense, if you take all the product liability verdicts in the last 30 years—and this is what we asked when we saw the witness take the stand in the Commerce Committee. We asked Jonathan S. Massey, an expert who had defended punitive damages before the U.S. Supreme Court, allegedly the most experienced attorney. I said, yes, but I still get these anecdotal incidents of what we would call outrageous punitive damage findings.

I said, "Could you please go and get into the record exactly all the punitive damage verdicts for the last 30 years, since 1965, and find out just exactly how many there were, and what were the amendments and then add them all up?" With respect to that, I ask unanimous consent to have this material printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

APRIL 13, 1995.

Hon. ERNEST F. HOLLINGS,
U.S. Senate Committee on Commerce, Science and Transportation, Washington, DC.

DEAR SENATOR HOLLINGS: At the hearing on April 4, 1995 before the Consumer Affairs, Foreign Commerce, and Tourism Committee of the Committee on Commerce, Science, and Transportation on S. 565, the Product Liability Fairness Act of 1995, you asked me to compare the $3 billion in punitive damages awarded in the Pennzoil v. Texaco case with the sum of punitive damage awards in all product liability cases since 1965.

The attached pages show that punitive damage awards in products liability cases since 1965 come to a fraction of the $3 billion figure. For products liability cases in which the punitive damage award is known, the total comes to $963,073,079. There are 109 additional cases in which the punitive damage award was not reported by the court or either party, most likely because it was not large. If one were to extrapolate for those 109 cases by taking the average award in cases in which the punitive award is known—which would err on the side of the inflating punitive damage awards in products liability cases—the total of punitive damage awards in all products liability cases since 1965 would come to only $1,337,832,211—less than half the award in Pennzoil v. Texaco.

I hope this information is of assistance.

Sincerely,

JONATHAN S. MASSEY.

PRODUCT LIABILITY PUNITIVE AWARDS, 1965–PRESENT

Alabama—20 cases—$58,604,000; 9 additional cases with unknown amounts.

Alaska—2 cases—$2,520,000; 1 additional case with unknown amounts.

Arizona—6 cases—$3,362,500; 3 additional cases with unknown amounts.

Alabama—1 case—$25,000,000; 0 additional cases with unknown amounts.

Alaska—1 case—$1,000,000; 0 additional cases with unknown amounts.

Arizona—2 cases—$6,000,000; 3 additional cases with unknown amounts.

California—17 cases—$35,854,000; 9 additional cases with unknown amounts.

Florida—1 case—$1,000,000; 0 additional cases with unknown amounts.

Connecticut—1 case—$688,000; 0 additional cases with unknown amounts.

Florida—1 case—$519,000; 0 additional cases with unknown amounts.

California—4 cases—$3,618,653; 0 additional cases with unknown amounts.

Florida—1 case—$750,000; 0 additional cases with unknown amounts.

California—3 cases—$2,425,000; 0 additional cases with unknown amounts.

Colorado—3 cases—$7,350,000; 1 additional case with unknown amounts.

Connecticut—0 cases—$0; 1 additional case with unknown amounts.

Delaware—2 cases—$75,120,000; 0 additional cases with unknown amounts.

Florida—26 cases—$40,607,000; 9 additional cases with unknown amounts.

California—1 case—$30,000; 0 additional cases with unknown amounts.

Florida—2 case—$3,500,000; 0 additional cases with unknown amounts.

Georgia—10 cases—$43,378,333; 3 additional cases with unknown amounts.

Hawaii—1 case—$11,250,000; 0 additional cases with unknown amounts.

Idaho—0 cases—$0; 1 additional case with unknown amounts.

Illinois—16 cases—$44,149,827; 3 additional cases with unknown amounts.

Minnesota—1 case—$7,000,000; 0 additional cases with unknown amounts.

Illinois—3 cases—$5,000,000; 0 additional cases with unknown amounts.

Indiana—1 case—$500,000; 0 additional cases with unknown amounts.

Iowa—1 case—$50,000; 2 additional cases with unknown amounts.

Kansas—7 cases—$47,521,500; 1 additional case with unknown amounts.

Kentucky—2 cases—$6,500,000; 0 additional cases with unknown amounts.

Louisiana—2 cases—$8,171,885; 0 additional cases with unknown amounts.

Maine—3 cases—$5,112,500; 0 additional cases with unknown amounts.

Maryland—3 cases—$77,200,000; 2 additional cases with unknown amounts.

Michigan—2 cases—$400,000; 0 additional cases with unknown amounts.

Minnesota—4 cases—$10,000,000; 1 additional case with unknown amounts.

Mississippi—4 cases—$2,790,000; 1 additional case with unknown amounts.

Missouri—9 cases—$20,785,000; 1 additional case with unknown amounts.

Montana—2 cases—$1,600,000; 1 additional case with unknown amounts.

Nevada—1 case—$40,000; 1 additional case with unknown amounts.

New Jersey—4 cases—$900,000; 5 additional cases with unknown amounts.

New Mexico—4 cases—$1,715,000; 1 additional case with unknown amounts.

New York—7 cases—$6,019,000; 6 additional cases with unknown amounts.

North Carolina—2 cases—$4,500,000; 0 additional cases with unknown amounts.

Ohio—6 cases—$4,393,000; 1 additional case with unknown amounts.

Oklahoma—6 cases—$15,390,000; 1 additional case with unknown amounts.

Oregon—3 cases—$62,700,000; 0 additional cases with unknown amounts.

Pennsylvania—5 cases—$16,296,000; 8 additional cases with unknown amounts.

Rhode Island—1 case—$9,700,000; 0 additional cases with unknown amounts.

South Carolina—5 cases—$2,945,500; 4 additional cases with unknown amounts.

Rhode Island—1 case—$100,000; 0 additional cases with unknown amounts.

South Dakota—1 case—$2,500,000; 0 additional cases with unknown amounts.

Tennessee—4 cases—$4,720,000; 3 additional cases with unknown amounts.

Texas—38 cases—$217,098,000; 19 additional cases with unknown amounts.

Utah—1 case—$300,000; 0 additional cases with unknown amounts.

Virginia—2 cases—$340,000; 0 additional cases with unknown amounts.

West Virginia—3 cases—$2,433,100; 4 additional cases with unknown amounts.

Wisconsin—7 cases—$10,622,000; 4 additional cases with unknown amounts.

Florida—1 case—$2,500,000; 0 additional cases with unknown amounts.

Wisconsin—2 cases—$26,000,000; 0 additional cases with unknown amounts.

District of Columbia—1 case—$2,500,000; 0 additional cases with unknown amounts.

Grand total—270 cases—$953,073,079; 109 additional cases with unknown amounts.

Average punitive award: $3,529,900.

Extrapolated total of all awards: $1,337,832,211.

Mr. HOLLINGS. Mr. President, the pages show that punitive damage awards in product liability cases since 1965 come to a fraction of $3 billion. To be exact, they come to $1,337,832,211.

Why does this Senator say "a fraction" of $3 billion? If we go to the Pennzoil versus Texaco case, of businesses suing businesses, what do we get? We get almost a $12 billion verdict that included what? It included a finding of punitive damages in the amount of 3 billion bucks.

In other words, of all the product liability punitive damage findings in the last 30 years amounting to $1.3 billion, we have one business-against-business case of $3 billion. Or another one, since they are picking out cases, I will pick the *Exron Valdez* case, a case where Exxon was sued and they came in with a verdict of what in punitive damages? Mr. President, $3 billion.

I cannot find out the amount for businesses, there are so many of them. But it is up into the billions and billions of dollars. If this Congress was really interested in lowering the verdicts in tort cases, they would go right to the businesses suing businesses. They would go right to the automobile accident cases. They would go to all the other kinds of tort cases.

The fact is that, of all the civil findings in the United States of America, tort filings only amount to 9 percent of the total amount of civil findings; and of the 9 percent, product liability amounts to 4 percent of the 9 percent or .36 of 1 percent.

Another problem solved by the States. The Supreme Court Justices and legislatures say we handle it, and I will go right, for example, to my own State of South Carolina with respect to punitive damages.

In a recent case of the State versus Rush, but the heading would be Gamble versus Stevenson, an appeal of the Southern Bell Telephone Telegraph.

Now, I read from the opinion of the Supreme Court as follows: "In South Carolina punitive damages are allowed in the interest of society." Listen to that. We would think punitive damages was the most heinous offense that ever occurred without any relation in the world to the good it has done.

Why do we fine motorists for speeding and disobeying our motor vehicle laws in America? We fine them. Why do we fine the others for their various crimes? To make certain they do not commit them again. Similarly, with manufacturers.

Punitive damages—fine them, to make absolutely sure that they do not repeat their wrong.

They would say we cannot lose, we are making money. So why has Chrysler recalled 4 million cars to fix the back latch on the door? Not on account of the cost. They could get by with that. They would leave it there, but they know that there are chances now brought to the attention of the public that they are not only going to be verdicts against them in compensatory damages but in punitive damages. No longer can they factor it in the cost of product because of punitive damages.

This is the very element that is bringing about the safety—not taking care of the parties involved but taking care of society, generally—that is the point to be made here.

The first sentence:

In South Carolina, punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others

THE CONFERENCE OF CHIEF JUSTICES

STATEMENT ON

S. 565, THE PRODUCT LIABILITY FAIRNESS ACT OF 1995.

Submitted to the

UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

Full Committee Hearing
Monday, April 3, 1995
253 Russell SOB
9:30 A.M.

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NATIONAL CENTER FOR STATE COURTS
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Mr. Chairman and Members of the Committee, our Statement is submitted on behalf of the Conference of Chief Justices at the request of the Conference's President, the Honorable Ellen Ash Peters, Chief Justice of the Supreme Court of Connecticut.

The Conference of Chief Justices (CCJ) is the primary representative of the State courts, providing them with national leadership and a national voice. It is composed of the highest judicial officers of the 56 State, Territorial and Commonwealth court systems and the District of Columbia. CCJ represents the State courts similar to the way that the National Governors Association represents the executive branch of State governments.

This Statement is prompted by an invitation from the Senate Commerce Committee to CCJ to testify on the product liability provisions contained in S. 565, the "Product LIability Fairness Act of 1995". We are grateful for this opportunity to make our position known to the Committee. This Statement expresses CCJ's long-standing position on Federal product liability legislation, and our escalating concern about the unforeseen and sobering consequences of routine Congressional preemption of State law.

The Conference of Chief Justices welcomes needed reforms. Those reforms have been or are being passed in almost every state, however, it has long been the policy of the CCJ to oppose Federal legislation that would preempt State law governing substantive rules of tort liability. The legislation in question does not deal with Federal question jurisdiction or any Federal cause of action. It pertains, instead, to an area of law that has long been the primary responsibility of State courts. Access to the Federal courts on these issues has come only through diversity jurisdiction and, in those cases, involves application of State law.

To come quickly to the point, if the primary goal of this legislation is to provide consistency and uniformity in tort litigation, we are concerned that its effect will be the opposite. Preempting each State's existing tort law in favor of a broad Federal product

liability law will create additional complexities and unpredictability for tort litigation in both State and Federal courts, while depriving victims of defective products of carefully reasoned principles and procedures already carefully developed at the State level. The critical experience of State courts with the long process of interpretation and consistency on major points of product liability law tells us that Federal legislation is not the answer. Re-inventing tort law must occur by and through the State courts and legislatures that are best situated to determine and control the impact of reform within their own communities.

Over the last thirteen years, CCJ has confronted and challenged predetermined reform efforts for a Federal "fix" of product liability law.[1] Without dwelling on a long recitation of statistics, we believe that a few numbers from the State courts are instructive.[2] Data, routinely collected by the National Center for State Courts, indicate

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1 (1983) CCJ Resolution: opposing S.2631.
(1987) CCJ Resolution: favoring state-by-state resolution of tort reform issue.
(1988) CCJ Resolution: reaffirming opposition to broad federal preemption of state tort law and opposing *H.R. 1115*, the *Uniform Product Safety Act*.
(1988) CCJ Resolution: opposing *S.473* and *H.R. 2238*, the *General Aviation Accident Liability Standards Act*.
(1990) CCJ Congressional Testimony: opposing *S. 1400*, the *Product Liability Reform Act*, before the Senate Consumer Subcommittee of the Committee on Commerce, Science and Transportation (Feb. 22).
(1990) CCJ Congressional Testimony: opposing *S. 1400*, the *Product Liability Reform Act*, before the Senate Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary (Jul. 31).
(1991) CCJ Congressional Testimony: opposing *S. 640, the Product Liability Reform Act*, before the Senate Consumer Subcommittee of the Committee on Commerce, Science and Transportation (Sep. 12).
(1992) CCJ Congressional Testimony: opposing *S.640*, before the Senate Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary (Aug. 5).
(1993) CCJ Congressional Testimony: opposing *S.687, The Product Liability Fairness Act*, before the Senate Consumer Subcommittee of the Committee on Commerce, Science and Transportation (Sep. 23).
(1994) CCJ Congressional Testimony: opposing *S.687, The Product Liability Fairness Act*, before the Senate Judiciary Committee (Mar. 15).
(1995) CCJ Congressional Testimony: opposing *Section 103 of H.R. 10, the Common Sense Legal Reforms Act of 1995*, submitted to the House of Representatives Judiciary Committee (Feb. 13).

2 For over seventeen years, the National State Court Statistics Project, a joint effort of the Conference of State Court Administrators, the State Justice Institute, the U.S. Bureau of Justice Statistics, and the National Center for State Courts, has been the only effective mechanism for collecting and compiling

that in 1992, roughly 9% of the approximately 10 million new civil filings in State general jurisdiction courts were tort cases (1,000,000), see attached Chart 1: The Composition of Civil Filings (1992). Only about 4% of the new tort filings in State general jurisdiction courts were product liability cases (only about 40,000 products cases for the entire country in 1992), see attached Chart 2: Composition of Tort Filings (1992). Product liability cases decided at trial comprise less than 3% of all torts reaching trial.[3] Between 1986 and 1992, new non-auto tort filings (e.g. product liability, medical malpractice, defamation) remained relatively constant, falling and rising only moderately over that period, and ending in 1992 at a level just slightly above the 1986 level, see attached Chart 3: Total Non-Auto Tort Filings Trends (1986 -1992).[4]

CCJ is aware of the current allegations from some quarters of excessive legal costs, stunted product development, insurance unavailability, and American inability to compete in global markets. To the extent that these allegations are factually supported,

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statistical data on the work of State courts. The State courts' statistics, used in this Statement to describe tort filings and trends, are taken from: *State Court Caseload Statistics: Annual Report 1992* (March 1994), National Center for State Courts: Williamsburg, VA, p. 50.

3 The composition of torts decided at trial reflects numbers gathered from 27 large urban trial courts in 1989. Those numbers are consistent with 1994 preliminary (unpublished) figures reported by jurisdictions currently participating in the national Civil Trial Court Information Network (CTCN), a two-year project, funded by the U.S. Bureau of Justice Statistics and managed by the Research Division of National Center for State Courts. CTCN statistics are derived from 16 reporting jurisdictions, which together averaged a rate of 2.7% of the tort cases, excluding asbestos, being decided at trial; half of the 16 jurisdictions reported products' trial rates of less than 3%.

4 Data collected through the Administrative Office of the U.S. (Federal) Courts, excluding asbestos cases, show that, from 1985 to 1991, Federal court filings have declined almost 40%; see Galanter, Marc, *Statement on S.640*, Senate Consumer Subcommittee (Sep. 1991). Analysis of both State and Federal court civil caseloads indicate that a more significant increase in tort filings may be found in property rights cases. Within a given state, filing trends suggest that variations or "spikes" in the number of product liability filings are related to state legislative changes enacted during that period. For example, in several states, anticipating new state statutes expected to disadvantage plaintiffs, spikes reflected the hastening of plaintiffs to file under existing rules.

the remedy lies with State courts and State legislatures, which can best determine and allocate the social and economic impact of present law on their own communities.[5]

We might point out, for instance, that Arizona tort law is controlled by provisions of the Arizona Constitution (see, for instance, article 2, section 31, and article 18, sections 5-8). If *S. 565* were passed, it would invalidate these provisions of the Arizona Constitution. While this is a result that some Arizonans might desire, we must remember that these constitutional provisions were very important to the framers of the Arizona Constitution. These citizens of Arizona were recently offered a chance to amend or repeal those provisions and, in a hotly contested campaign, flatly rejected the opportunity. Thus, in addition, we submit that, as far as a State like Arizona is concerned, the people have already spoken.

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5 It is too often overlooked that there presently exists among the States a high degree of uniformity on major points of product liability, achieved over many decades through tens of thousands of cross citations of precedents in State case law and by resort to such widely accepted sources as the *Restatement of Torts*, the *Uniform Commercial Code*, and the *National Conference of Commissioners on Uniform Law*. U.S. Government Accounting Office, Product Liability: Verdicts and Case Resolution in Five States, GAO/HRD-89-99 (September 29, 1989). Looking at 21 years of product liability verdicts, researchers with the American Bar Foundation find that jury verdicts in products cases are not incoherent and unpredictable, but rather, have persistent, intelligible patterns. Their patterns of product liability cases that went to trial are quite different from the rhetoric of tort reform. The system is not described by cases involving consumer products, pharmaceutical products or recreational equipment. Instead it is a system described first by cases involving products encountered in the workplace and second by cases involving vehicle-related products. The most likely plaintiffs are male, blue-collar workers with injuries affecting their wage-earning capacity, see Daniels, Stephen, and Martin, Joanne, (1993) *Don't kill the Messenger Till You Read the Message: Products Liability Verdicts in Six California Counties, 1970-1990*, Justice System Journal V. 16, N. 2, pp. 69-95.

Thirty-nine states either do not permit punitive damages or have taken steps to reduce the frequency and size of the punitive damage awards through state-level tort reform. Following *Haslip* (111 S. CT. 1032 [1991]), even some of the nine remaining states have tightened their standards, see note 5 in Koenig, Thomas and Rustad, Michael, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform on Punitive Damages in Products Liability*, Justice System Journal V. 16, N. 2, p. 23.

U.S. Government Accounting Office, *Liability Insurance: Effects of Recent "Crisis" on Businesses and other Organizations* (1988) GAO/HRD-88-64). Wall Street Journal, *ABA Report Urges Overhaul of Insurance liability Laws and Antitrust Exemption*, (12/18/88) B1.

Arizona provides a further example of the effect of the provisions of *S. 565 Section 10* preempting State laws on joint and several liability and comparative negligence. Within the last few years, the Arizona legislature has enacted a comprehensive scheme dealing with comparative negligence and contribution among joint tortfeasors and has abolished joint and several liability in most circumstances. This legislation was the product of an intense debate in the legislature, and many of its features were the result of compromise between competing interest groups in this State. As the legislation now stands, it is a thoughtfully crafted legislative expression of the will of the people of Arizona. There is nothing to be gained in having this careful regime overturned by Federal legislation with unpredictable consequences on a national scale.

If the search is for a single settled law, the goal will not be achieved through Federal legislation. *S. 565* would replace all related State law and substitute Federal standards with novel and untested terms and concepts.[6] The new standards of *S 565* would be imposed in a single overlay upon the 56 existing State court systems as well as the Federal courts. The overlay will fit somewhat differently in each instance and will impact some States more heavily than others. But in each instance we will have, in conjunction with existing State practices and procedures for tort law, a new and contradictory system of Federal laws for product liability cases.

It follows that the Federal standards, however well articulated, will be applied in many different contexts and inevitably will be interpreted and implemented differently, not only by the State courts but also by the Federal courts.[7] Since the legislation does

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6 CCJ is not routinely opposed to all expansion of federal jurisdiction. For instance, it does not oppose legislation that would create new, but limited, access to federal courts for mass tort cases arising from a single catastrophic event.

7 The Federal Courts Study Committee (FCSC) does not specifically discuss routine product liability litigation. Its recommendations for elimination or restriction of diversity jurisdiction run counter, however, to the assumption underlying the proposed federal products liability statute.

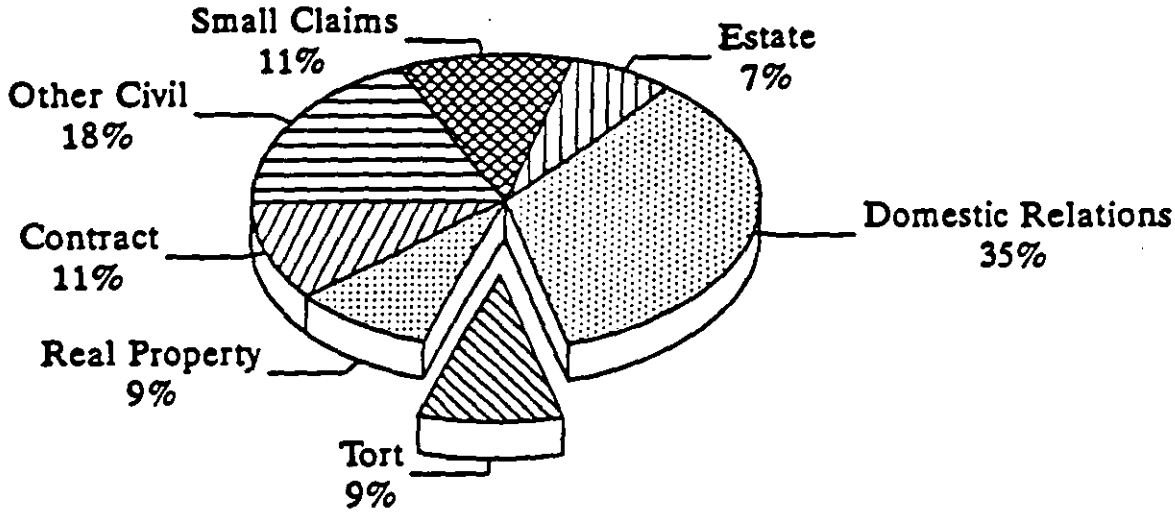
not create Federal question jurisdiction or a Federal cause of action, it would leave primary adjudication to State courts, where these cases have been traditionally tried. Access to the Federal courts will continue to come only by diversity jurisdiction.

Thus we will not only have State courts interpreting and applying a mix of State and Federal law in the same case, we will also have the Federal courts, under diversity jurisdiction, interpreting and applying the same mix. Moreover, State Supreme Courts will no longer be, as they are today, the final arbiters of their tort law. Federal statutory standards, even without Federal question jurisdiction, will make the Supreme Court of the United States the court of last resort for a new class of cases, with State and Federal questions stretching far beyond its current jurisdiction. A legal thicket is inevitable and the burden of untangling it, if it can be untangled at all, will lie only with the Supreme Court of the United States, a court that many experts feel is not only overburdened but also incapable of maintaining adequate uniformity in existing Federal law as it is variously interpreted by the 13 United States Courts of Appeals.

The negative consequences of *S. 565* for federalism are incalculable. With the proposed legislation reaching so far into substantive civil law, States will be forced to provide the judicial structure, but will not be permitted to decide the social and economic questions in the law that their courts administer. Enactment of *S. 565* would alter, in one stroke, the fundamental principles of federalism inherent in this country's tort law. CCJ firmly believes that tort reform remedies must lie with State courts and legislatures, which are most aware of and best situated to determine the social and economic impact of present law in their own communities. *S. 565* is a radical departure from our current legal regime and is neither justified by experience nor wise as a matter of policy.

CCJ thanks the members of this Committee for the invitation to express its views on *S. 565*, and will consider questions that members may have.

Chart 1
Composition of Civil Caseload Filings
General Jurisdiction Trial Courts (1992)



N = 6,152,968 civil filings.
National Center for State Courts (1994).
Based on data from 27 states having 61% of total U.S. population.

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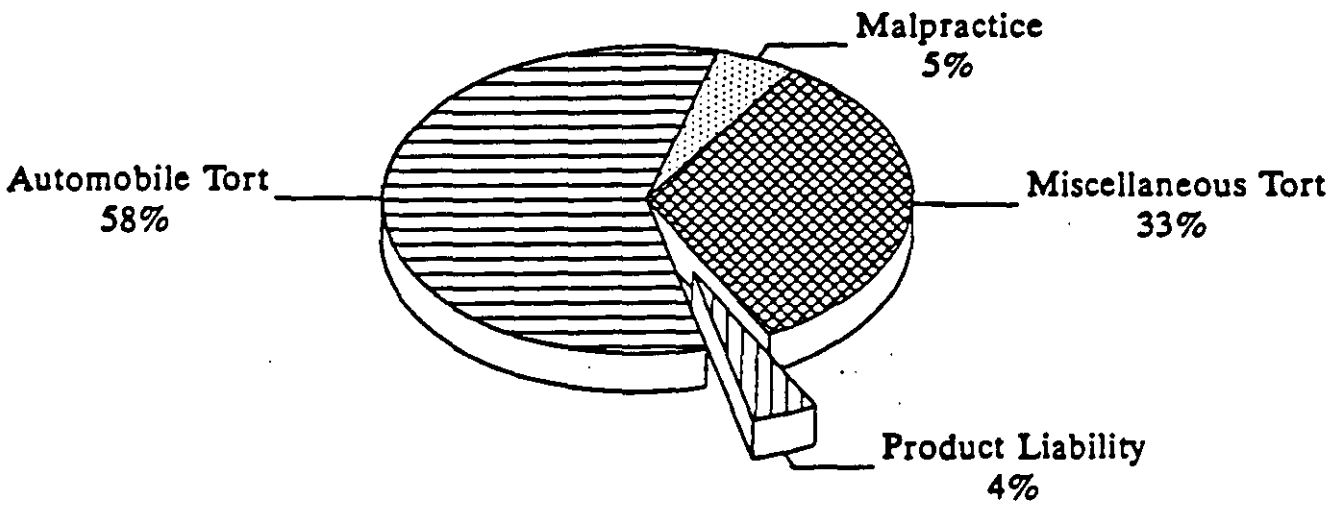
Chart 2

Composition of Tort Filings
General Jurisdiction Courts (1991)



Data from FL, CT, NV, WI.
National Center for State Courts (1991)

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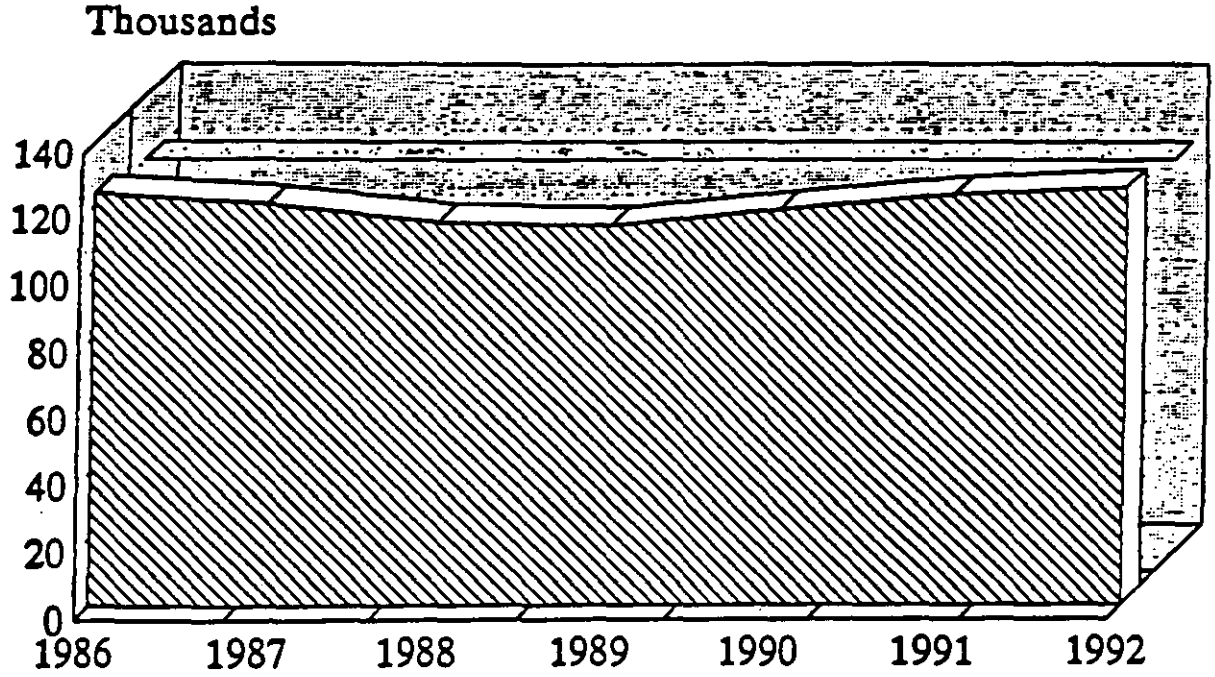
Chart 3

Total Non-Auto Tort Filings

Trend for Nine States



AZ, CA, CT, FL, HI, MD, MI, NC, TX.
National Center for State Courts (1993)

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CONFERENCE OF CHIEF JUSTICES

RESOLUTION XIV

Federal Product Liability Legislation

WHEREAS, since 1983, the Conference of Chief Justices (the Conference) has opposed "broad federal legislation" that would preempt state product liability laws. This policy has been continuously reaffirmed through Conference resolutions, testimony by Conference members, and correspondence; and

WHEREAS, if the search is for a settled system of law, congressional efforts to create and impose consistency and uniformity in tort law will have the opposite effect by creating additional complexity and unpredictability in litigation during the period required for common-law interpretation of new federal statutory definitions; and

WHEREAS, any needed reforms in tort law should occur in and through state courts and legislatures, the institutions best situated to determine and control the impact of reform within their own communities; and

WHEREAS, state product liability law has achieved substantial uniformity over a thirty-year period, largely based on the principles set forth in section 402A of the RESTATEMENT (SECOND) OF TORTS, as adopted in almost every state. The American Law Institute will issue a RESTATEMENT (THIRD) OF TORTS based on a thorough study of all the relevant legal and economic developments in the last three decades, reflecting a careful evolution of the law and an emerging consensus on fundamental principles of tort law in general and product liability law in particular; and

WHEREAS, federal preemptive legislation is both unnecessary and poses a serious threat to fundamental principles of federalism by invading the traditional and fundamental sphere of state court responsibility and by including such radical concepts as the proposition that the United States Court of Appeals should be the final arbiter of state tort law.

NOW, THEREFORE, BE IT RESOLVED that the Conference strongly opposes federal preemption of existing state product liability law, both as a measure contrary to the need for speedy and economical resolution of disputes and as an unwise and unnecessary intrusion on principles of federalism.

Adopted as proposed by the State-Federal Relations Committee of the Conference of Chief Justices at the Forty-sixth Annual Meeting in Jackson Hole, Wyoming, on August 4, 1994.

Immunity for Biomaterial Suppliers Will Jeopardize Public Health and Safety And Leave Many Victims Uncompensated

The Biomaterials Access Assurance Act of 1997 (BAAA) immunizes from liability most suppliers of "raw materials" and "components" used in the manufacture of medical implants, even if there are deadly consequences that derive from these "biomaterials." It would also allow a court to impose costs and attorney's fees against any victim who loses in court. This proposed law would endanger public health and safety, and prevent many victims from obtaining fair compensation for their injuries.

LOSS OF DETERRENCE

The tort system deters companies from producing products that harm people. Immunizing suppliers will significantly weaken this deterrence function.

- **Suppliers are often in the best position to determine the safety of their biomaterials**. Immunity from litigation will remove an important financial incentive for companies to properly research and test their products, as well as to warn manufacturers or the public if they suspect that their components are being used in an unsafe manner.

- **Suppliers sometimes know exactly when their product is being used unsafely.** Because many biomaterials suppliers know the dangers associated with their product's use, they must be relied upon to do something about it. In one California case, the vice-president of a company that sold hospitals polyethylene tubing for manufacturing heart catheters testified that the company was aware its tubing was being used in a manner that injured patients, yet acknowledged it had never questioned the use nor conducted tests to determine whether the tubing was suitable for heart catheters. *Putensen v. Clay Adams, Inc.*, 12 Cal. App. 3d 1062 (1970).

- **FDA regulation is not an adequate substitute for the deterrent function of the tort system.** Biomaterials suppliers, particularly of component parts, often assert the need for immunity based on the excuse that the FDA has already determined these devices to be safe and effective. According to a 1990 House report, more than 98% of medical devices then on the market had not gone through the FDA's full pre-market approval process for either safety or effectiveness, nor had 80% of the most dangerous devices had similar review, because of a "temporary" exemption in 1976. House Report 808, 101st. Cong., 2d. Sess., 1990, p. 14 *et seq.*

(over)

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REDUCED DISCLOSURE

The tort system also protects the public by forcing companies to disclose important internal information about defective products through the discovery process.

Discovery, whereby parties in lawsuits obtain information from each other, allows the patient to determine the facts surrounding the design, testing and manufacturing of a medical device so the proper party is held accountable. The immunity provided under the BAAA will ensure that adequate discovery never takes place, so a culpable supplier may escape exposure, a patient may never learn who is responsible for his or her injury, and neither the public nor regulators may be alerted to product dangers.

LOSS OF COMPENSATION

The tort system provides the means for victims to obtain compensation for their injuries from culpable wrongdoers. Determination of liability that is made by a judge or jury on a case-by-case basis is the fairest method to compensate victims.

- The general grant of immunity provided to companies under the BAAA is arbitrary and inflexible. Existing product liability law properly allows a judge or jury to consider on a case by case basis whether to hold a supplier liable depending upon a variety of "risk vs. utility" factors. Liability factors include: whether the device's benefits outweigh its inherent risks (e.g., brain shunts have great utility vs. risk, while cosmetic implants have comparatively low utility vs. risk), the likelihood of injury, the availability of substitute products, and the importance of risk awareness and warnings.

- The "loser pays" provision contained in the BAAA is a Draconian measure, the effect of which will be to allow culpable suppliers to entirely escape liability. Under "loser pays," even victims with very strong cases against suppliers would fear pursuing a legitimate claim, on the chance that they could lose and be economically devastated by having to pay considerable legal costs on top of substantiated medical bills.

- Under the immunity provided in the BAAA, Americans injured by silicone used in jaw or penile implants could only sue a company like Dow Corning if it were both the supplier of the silicone and the manufacturer of the device. Where it was only the silicone supplier to other manufacturers, Dow would be immune even if it were the most culpable party and did not conduct adequate testing or provide sufficient warnings. This could leave thousands of citizens uncompensated.

Medical Devices Can Be Dangerous to Your Health

Manufacturers say they need the Biomaterials Access Assurance Act of 1997 because their safe products are being threatened by litigation. However, such medical devices, including their component parts, are often dangerous or defective. They should never have been on the market.

- **Medtronic's Pacemaker Polyurethane-Insulated Leads**

  Pacemaker leads are one of two components in pacemakers. According to a 1992 General Accounting Office report, *For Some Cardiac Pacemaker Leads, the Public Health Risks are Still High,* between 1977 and 1984, 15 new Medtronic pacemakers leads were marketed, none of which had received FDA approval as "safe and effective" due to an FDA exemption. Medtronic's pacemaker lead was prone to failure from insulation or wire breakage, which could cause serious injury or death in 5 to 30 percent of pacemaker patients.

  In October, 1983, Medtronic became aware of problems with their leads but withheld this information from the FDA. Between this time and March 1984, when it ceased marketing the device after an FDA recall, nearly 2,500 units were sold. According to the GAO, "our analysis shows that the health risks associated with defective pacemaker leads are real; indeed, their failure could prove fatal."

- **TMJ Jaw Implant**

  One of the rationales for biomaterials supplier immunity legislation stems from lawsuits against DuPont, which supplied Teflon to Vitek. Vitek used Teflon to manufacture its TMJ jaw implant, a disastrous medical device.

  In 1990, biophysics professor Malcolm Skolnick testified before the Senate Commerce Committee that jaw implants manufactured by Vitek were safe but that Vitek was being driven out of the market by frivolous lawsuits. Yet a month prior to this testimony, the FDA had required Vitek to distribute a letter to oral surgeons warning of the device's tendency to fragment. The FDA later issued its most stringent recall order for the device. Statement of M. Kristen Rand, Counsel, on the Availability of Medical Devices, on Behalf of Consumers Union, Consumer Federation of America and Public Citizen, before the Regulation and Government Information Subcommittee, Government Affairs Committee, U.S. Senate, (May 20, 1994).

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The Financial Health Of Medical Device Companies:

Believe What They Tell Shareholders, Not Congress

In their news releases and congressional testimony, the medical device industry paints a "sky is falling" scenario about an impending shortage of biomaterials due to product liability litigation.

For example, in 1994, Pierre M. Galletti, President of the American Institute for Medical and Biological Engineering, testified, "The resulting crisis could bring to a halt the fabrication of implantable devices in the U.S." James S. Benson, Senior Vice President of the Health Industry Manufacturers Association, testified, "[T]he medical device industry is one of America's most competitive. That competitiveness, like the improved medical care that new technologies make possible, is very much at stake ... as we consider remedies to the shortage of biomaterials our companies face in the very near future." Subcommittee on Regulation and Government Information, Committee on Government Affairs, May 20, 1994.

In fact, the medical device industry is extremely strong, showing tremendous growth and handsome profits.

- According to a recent article in *Medical Economics*, "Stock analysts grin broadly when they discuss the likes of UroMed, EndoSonics, Optical Sensors, and other trailblazers in medical devices, a hot market that's only getting hotter." Doreen Mangan, *Medical Economics*, January 13, 1997.

- In 1995, the biotechnology industry raised $2.1 billion in 61 public offerings, a 79 percent increase from 1994, according to a Coopers & Lybrand market study. Analysts say that new products, a healthy stock market and a more favorable FDA were keys to this growth.

- *Biotechnology Newswatch* predicts that a large number of mergers, acquisitions and collaborations will make the next few years extremely profitable for medical device companies. *Biotechnology Newswatch*, 1996.

- The web home page of the Health Industry Manufacturers Association (HIMA) shows U.S. production of medical devices and diagnostic products was worth $56.7 billion in 1995, with $70.9 billion projected for 1998.

The better test may not be what they tell Congress -- but what they tell their shareholders.

The attached companies are major players who lobby for weakened product liability laws, including immunity for biomaterials suppliers. They are also some of the most profitable companies in the medical device industry.

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Corporate Profile: American Home Products

Biomedical Device Subsidiaries

Davis & Geck- *Various Sutures*
Quinton Instrument Company - *Arteriovenous Shunt*
Sherwood Medical Company - *Arteriovenous Shunt*
Storz Instrument Company - *Intraocular Lens*

The current product liability laws and availability of biomaterials have not prevented American Home Products' development and marketing of medical devices.

According to their 1995 Annual Report, American Home Products reported:

- "increased worldwide sales for [their] medical device business" and expansion of their subsidiaries in critical and chronic care products
- that their subsidiaries "manufacture and market one of the world's leading portfolios of specialized medical devices"
- "strong growth" and "major [market] share" for medical devices such as umbilical vessel catheters, naso-gastric tubes, incentive breathing exercisers and chest drainage products

American Home Products' profitability has not been adversely affected by current laws protecting patients from dangerous pharmaceuticals and faulty medical devices.

According to American Home Products' 1995 Annual Report:

- The company ranks among the top five competitors in health care products
- Pharmaceuticals and medical devices represent 65% of the company's total net sales
- Total net sales topped $13 billion, a 49% increase from 1994
- Stock price has increased 80% since 1994

- Shareholder dividends have increased for the 44th consecutive year

American Home Products has spent millions of dollars attempting to influence the legislative process.

- According to Lobbying Disclosure reports, in only the first half of 1996, American Home Products spent a total of $3.63 million to weaken federal laws that protect patients from dangerous products, prevent illegal price-fixing of prescription drugs and preserve clean air and clean water

American Home Products has spent thousands of dollars supporting congressional candidates who decide on matters of direct concern to the company.

- In the 1995-96 election cycle, American Home Products' corporate PAC made $144,512 in campaign contributions
  - -$18,000 was contributed to Senate Republicans
  - -$3,500 was contributed to Senate Democrats

- An additional $ 69,100 in campaign contributions was made by employees of American Home Products in the 1995-96 elections, including:
  - Two $10,000 contributions to the RNC made by John Stafford, the President and CEO of American Home Products
  - $55,000 from officers of the company

Corporate Profile: Baxter International

Biomedical Device Subsidiary

Baxter Healthcare Corporation - *Hydrocephalic Shunt, Cardiac Catheters & Implants*

The current product liability laws and availability of biomaterials have not prevented Baxter International's development and marketing of medical devices.

According to their current world wide web page:

- Baxter International manufactures 20 different kinds of cardiac catheters, more than 20 million of which have been sold since 1970
- Baxter's *Novacor* left ventricular assist system (LVAS) has been implanted in 500 people in the last ten years and the company estimates that the market for LVAS is 70,000 to 150,000 people per year.
- Baxter's new peritoneal dialysis system was used by more than 10,000 patients in its first year on the market and the comapny estimates that the global market for the product could reach $700 million by the end of the decade.

Baxter International's profitability has not been adversely affected by current laws protecting patients from dangerous pharmaceuticals and faulty medical devices.

According to Baxter International's 1995 Annual Report:

- Net sales topped $5 billion in 1995, an increase of 13% over 1994
- Cardiovascular products sales increased 16% over 1994
- "Sales growth of the company's cardiovascular products was strong in 1995 and 1994. Market share gains in [...]continuous cardiac output monitoring catheters were important growth contributors in 1995."

Baxter International has spent thousands of dollars attempting to influence the legislative process.

- According to Lobbying Disclosure reports, in the first half of 1996, Baxter International spent a total of $160,000 lobbying Congress to weaken federal laws that protect consumers from dangerous products, prevent illegal price-fixing of prescription drugs and preserve clean air and clean water

Baxter International has spent thousands of dollars supporting congressional candidates who decide on matters of direct concern to the company.

- In the 1995-96 election cycle, Baxter's corporate PAC made $74,887 in campaign contributions
  - -$17,300 was contributed to Senate Republicans
  - -$13,500 was contributed to Senate Democrats

- An additional $85,790 in campaign contributions was made by employees of Baxter International in the 1995-96 elections, including:
  - - $15,000 in soft money contributions to the RNC Republican National State Elections Committee
  - - $23,000 from officers of the company

Corporate Profile: Bristol-Meyers Squibb

Biomedical Device Subsidiaries

Convatec Incorporated - *Foley Catheters & Ostomy Products*
Linvatec Incorporated - *Orthopaedic Devices*
Zimmer Incorporated - *Orthopaedic Implants*

The current product liability laws and availability of biomaterials have not prevented Bristol-Meyers's development and marketing of medical devices.

According to the Bristol-Meyers 1995 Annual Report:

- Sales of orthopaedic implants represented 40% of the companies medical device business

According to their current world wide web page:

- Bristol-Meyers' subsidiary Zimmer, Inc. is "the world leader in design, manufacture and distribution of orthopaedic implants" and manufactures nineteen different orthopaedic implants

- Bristol-Meyers' subsidiary Convatec is "one of the fastest-growing Bristol-Meyers Squibb companies" and is the "leading global supplier of wound care products"

Bristol-Meyers's profitability has not been adversely affected by current laws protecting patients from dangerous pharmaceuticals and faulty medical devices.

According to Bristol-Meyers' 1995 Annual Report:

- Net sales topped $13 billion in 1995, setting a company record

- Sales of medical devices increased 13% over the previous year yielding nearly $500 million in profits for the Company

Bristol-Meyers has spent more than $1 million attempting to influence the legislative process.

- According to Lobbying Disclosure reports, in the first half of 1996, Bristol-Meyers spent at least $1,430,000 lobbying Congress to weaken federal laws that protect consumers from dangerous products, prevent illegal price-fixing

of prescription drugs and preserve clean air and clean water.

Bristol-Meyers has spent thousands of dollars supporting congressional candidates who decide on matters of direct concern to the company.

- In the 1995-96 election cycle, Bristol-Meyers's corporate PAC made $194,153 in campaign contributions
  - -$50,000 was contributed to Senate Republicans
  - -$8,600 was contributed to Senate Democrats

- An additional $181,739 in campaign contributions was made by employees of Bristol-Meyers in the 1995-96 elections, including:
  - numerous high-dollar hard and soft money contributions
    - $15,000 - RNC (2)
    - $15,000 - RNC Republican State Elections Committee
    - $10,000 - NY Salute 1996 Non-Federal Committee (2)
  - $45,250 from officers of the company

Corporate Profile: Johnson & Johnson

Biomedical Device Subsidiaries

Cordis Corporation - *Cardiovascualr Stents*
Ethicon Endo-Surgery Incorporated - *Sutures*
Ethicon Incorporated - *Sutures*
GynoPharma, Inc. - *Intrauterine Devices*
Johnson & Johnson Professional Incorporated - *Orthopaedic Devices*
Joint Medical Products Corporation - *Hip & Knee Joints*
Mitek Surgical Products Incorporated - *Suture Anchor Products*

The current product liability laws and availability of biomaterials have not prevented Johnson & Johnson from expanding its medical device business.

- On February 23, 1997, Johnson and Johnson announced its merger with Cordis Corporation, a manufacturer of cardiovascular stent systems. The merger's total value was $1.8 billion

- In 1995, Johnson & Johnson acquired numerous medical device companies:
  - Mitek Surgical Products, Inc., a manufacturer and marketer of suture anchor products for soft tissue reattachment
  -Joint Medical Products Inc., a developer and marketer of artificial hips and knee joints
  - Gyno Pharma, Inc., the exclusive licensor and marketer of the PARAGARD T380A, an intrauterine device

Johnson & Johnson's profitability has not been adversely affected by current laws protecting patients from dangerous pharmaceuticals and faulty medical devices.

According to Johnson & Johnson's 1995 Annual Report:

- Worldwide company sales increased for the 63rd consecutive year, growing $3.11 billion or 19.8% over 1994

- Sales of medical devices increased 20% to $6.7 billion in 1995

- Operating profits for medical device sales increased 30% to $1.2 billion in 1995

- Medical devices make up the largest business segment of Johnson & Johnson (36% of total sales)

Johnson & Johnson has spent more than $1 million attempting to influence the legislative process.

- According to Lobbying Disclosure reports, in the first half of 1996, Johnson & Johnson has spent at least $1,070,000 lobbying Congress to weaken federal laws that protect consumers from dangerous products, that prevent illegal price-fixing of prescription drugs and that preserve clean air and clean water.

Johnson & Johnson has spent thousands of dollars supporting congressional candidates who decide on matters of direct concern to the company.

- In the 1995-96 election cycle, Johnson & Johnson's corporate PAC made $326,819 in campaign contributions
  - -$26,500 was contributed to Senate Republicans
  - -$7,000 was contributed to Senate Democrats

- An additional $101,329 in campaign contributions was made by employees of Johnson & Johnson in the 1995-96 elections, including:
  - - $26,100 from officers of the company

Corporate Profile: Pfizer

Biomedical Device Subsidiaries

American Medical Products - *Impotence & Incontinence Implants*
Howmedica Incorporated - *Hip, Knee & Other Orthopaedic Prostheses*
Schneider (USA) Corporation - *Angioplasty Catheters, Vascular & Non-vascular Stents*
Shiley Incorporated - *Cardiac Implants*
Strato/Infusaid Corporation - *Vascular Access Devices & Implantable Pumps*

The current product liability laws and availability of biomaterialshave not prevented Pfizer's development and marketing of medical devices.

According to Pfizer's 1995 Annual Report:

- Howmedica, a subsidiary of Pfizer, manufactures twenty-seven different biomedical devices:
  - Hip products - 8
  - Endoprostheses - 4
  - Knee products - 4
  - Other joints - 2
  - Bone cement - 2
  - Cerclage systems - 1
  - IM nails - 5
  - Plates & screws - 6
  - External feration - 3
  - Spine products - 2
  - Specialty fixation - 1
- Howmedica enjoys the second largest market share in the medical device industry
- In January 1996, Pfizer acquired the Leibinger Companies, manufacturers of implantable devices used in oral and craniomaxillofacial surgery

- Sales of Pfizer's subsidiary Schneider increased 31% in 1995 "primarily due to the launch of new angioplasty and angiography catheters and strong demand for stents"

Pfizer's profitability has not been adversely affected by current laws protecting patients from dangerous pharmaceuticals and faulty medical devices.

According to Pfizer's 1995 Annual Report:

- Total net sales in Pfizer's pharmaceuticals and medical devices division topped $8.4 billion, an increase of 21% over 1994
- Pharmaceuticals and medical devices represented 84% of Pfizer's net sales in 1995

Pfizer has spent more than $1 million attempting to influence the legislative process.

- According to Lobbying Disclosure reports, in the first half of 1996, Pfizer spent at least $1,070,000 lobbying Congress to weaken federal laws that protect patients from dangerous products, prevent illegal price-fixing of prescription drugs and preserve clean air and clean water.

Pfizer has spent hundreds of thousands of dollars supporting congressional candidates who decide on matters of direct concern to the company.

- In the 1995-96 election cycle, Pfizer's corporate PAC made $423,381 in campaign contributions
  - -$51,000 was contributed to Senate Republicans
  - -$18,000 was contributed to Senate Democrats
- An additional $133,620 in campaign contributions was made by employees of Pfizer in the 1995-96 elections, including:
  - - a $20,000 soft money contribution to the RNC National State Election Committee
  - - $26,000 from officers of the company