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United States
of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 101st CONGRESS, SECOND SESSION

Vol. 136

WASHINGTON, THURSDAY, MAY 3, 1990

No. 53

Senate

THURSDAY, MAY 3, 1990

(Legislative day of Wednesday, April 18, 1990)

By Mr. GORE:

S. 2571. A bill to amend the Antarctic Conservation Act of 1978 to protect the environment of Antarctica, and for other purposes; to the Committee on Environment and Public Works.

ANTARCTIC ENVIRONMENTAL PROTECTION ACT OF 1990

Mr. GORE. Mr. President, I rise today to discuss Antarctica, an issue not frequently debated on the floor of the U.S. Senate, and that is the issue of Antarctica. It is an issue that I brought to the Senate last September, when I introduced a resolution calling on the United States to encourage immediate negotiations toward a new agreement among Antarctic Treaty Consultative Parties for the full protection of Antarctica as a global ecological reserve and land of commons. Twenty-four of my colleagues have joined as co-sponsors of that resolution, sending a clear signal to the administration that the Senate, and the American public, are ready to take the steps necessary to protect the extremely fragile and extremely important environment of Antarctica.

More importantly, Mr. President, this question represents a major opportunity to put into effect a new emerging global consensus on the necessity of imaginative, bold measures to protect the world's ecological system.

We have just concluded an international parliamentary conference on the global environment, the results of which I will report to the Senate on a later occasion.

But one of the recommendations of the delegates from 42 nations who met here in Washington for 3½ days, concluding yesterday with the signing of a declaration of environmental interdependence, was that Antarctica be protected from any minerals and mining exploration and exploitation. It is an absolutely unique environmental resource 90 percent of all the ice in the world is in Antarctica. It is a massive source of cold in the Earth's climate system.

Next to the sun and the rotation of the Earth, the Antarctic continent is the most powerful single engine driving the world's climate system, a rich

storehouse of historical climate data, and it is the place where the most serious global environmental problems—global warming and destruction of the stratospheric ozone layer—are likely to occur first and most dramatically.

Indeed, as is well known, when the hole in the ozone layer appeared above Antarctica, scientists from nations around the world conducted emergency expeditions there to find out why and to find out more about why global warming is taking place because the early warning signs are there in Antarctica as well.

It remains the most pristine continent on Earth, a place that has so far withstood for the most part the impact of this global ecological crisis.

The ice and snow of Antarctica contain 70 percent of all the fresh water on Earth, and yet the continent receives so little precipitation, it is classified as the world's largest desert. It is dark for 6 months in winter yet still receives more sunlight during its 6 months of summer than the equatorial regions receive during an entire year—light for the most part that is reflected straight back up into space because of the reflectivity of the surface made up of ice and snow.

The cold water surrounding the continent of Antarctica absorbs more carbon dioxide from the atmosphere than all the rain forests of the Earth and create the nutrient-rich bottom water for most of the world ocean of which Antarctica is the epicenter.

Last year the "Eron Valdez" disaster in Prince William Sound presented vivid, heartbreaking illustrations of the consequences of environmental disaster in a pristine wilderness. In January 1989, an Argentinian ship, the *Bahia Paraiso*, ran aground in waters off Antarctica. This incident did not attract the widespread public attention of the Valdez spill, partly because the area is so inaccessible to television cameras. It was not a drama played out on the evening news and it was smaller than the Prince William Sound catastrophe.

But it was disastrous nonetheless, destroying years of research and leaving behind an indelible stain.

Incidentally, the site of the *Bahia Paraiso* accident was also the site of the only research program in the entire world to discover the effects of increased ultraviolet radiation on the ability of plankton in the ocean to absorb CO₂ out of the atmosphere. Three years' worth of baseline data were destroyed by the oil spill and now the world's science community has to start over from scratch on what could turn out to be one of the single most important scientific questions ever investigated by human kind, a vivid example of the dangers of allowing unrestrained exploitation of the Antarctic environment.

Last year, according to the National Science Foundation, there was a leak of more than 50,000 gallons of fuel at the American base at McMurdo

Sound. The waters immediately adjacent to the base are among the most polluted in the world. PCB's and other chemicals, dumped years ago, have killed every vestige of life in albeit a small area of McMurdo Sound. But it is, generally, a vivid reminder of why we need to do better.

The bill that I am introducing today in conjunction with other legislation to be introduced today by my colleague, Senator KERRY, is called the Antarctic Environmental Protection Act of 1990. It was introduced in the House of Representatives by my friend Congressman WALTER JONES, the distinguished chairman of the House Committee on Merchant Marine and Fisheries.

Mr. President, I feel that this bill, which amends the Antarctic Conservation Act of 1978, will help to protect Antarctica's environment in ways that existing U.S. laws and institutions have not adequately provided. This bill will provide the additional environmental protection that is needed.

The bill calls for the preparation and annual update of a waste management plan for Antarctica. The plan must include, among other items, a schedule for cleaning up existing U.S. waste disposal sites and abandoned work sites.

The bill also calls for regulations prescribing waste management practices for U.S. activities in Antarctica. One practice requires that all open burning of wastes be phased out and prohibited after December 31, 1991. Another practice requires that landfills at coastal U.S. facilities be phased out and prohibited after December 31, 1991.

The bill requires implementation of a long-term program for the removal of wastes from Antarctica that occurred as a result of U.S. activities. Radioactive materials, batteries, abandoned fuel drums, chemical wastes, and wastes containing high levels of metals must be collected and removed from Antarctica for proper disposal in accordance with applicable U.S. environmental laws. All plastic wastes have to be removed from Antarctica unless they are incinerated in equipment that neutralizes all harmful air emissions.

The Coast Guard is directed to issue regulations requiring all vessels engaged in or supporting U.S. activities in Antarctica to incorporate compacting, storage, and incineration facilities to properly dispose of waste. Incinerators must also reduce all harmful emissions.

The bill addresses the issue of marine pollution in Antarctica, by making it unlawful to discharge oil or plastic into the marine environment. Food wastes, other garbage, and sewage are prohibited from being discharged within 12 nautical miles of the closest land or ice shelf. There is also language pertaining to marine pollution prevention and liability.

The Coast Guard is called on to issue regulations requiring vessels engaged in or supporting U.S. Antarctic activities, including tourist expeditions, to have contingency plans and equipment to prevent and respond to oil spills. The owner, operator, or individual in charge of a vessel engaged in or supporting U.S. Antarctica activities will be held liable for the removal of oil spilled in Antarctica and the restoration of damages to natural resources. In the event that restoration is not feasible, the person will be liable for the payment of a civil penalty, and any moneys recovered from the assessment of the civil penalty will be used by the United States to manage specially protected areas or sites of special scientific interest.

The bill also provides for monitoring Antarctica's environment, by calling for the implementation of a long-term environmental monitoring program for Antarctica. The program is to include the detection and monitoring of global environmental change, and also should monitor the impacts of waste disposal, scientific bases, and scientific programs on the Antarctic environment.

The bill calls for the creation of new specially protected areas in Antarctica. There are two new types of specially protected areas: one for sites of outstanding scientific or ecological interest and one for outstanding scenic, wilderness, or geographic value. In addition, multiple-use planning areas may be designated.

Finally, the bill makes the National Environmental Policy Act of 1969 applicable to the activities of all agencies of the Federal Government operating in Antarctica, including NSF and the State Department. The bill also requires the Secretary of State, in consultation with other interested agencies, to prepare an environmental impact statement on the Convention on the Regulation of Antarctic Mineral Activities before submitting the Convention to the Senate for its advice and consent.

Now, I want to allay any concern that this bill might force the NSF to divert funds away from science, and toward efforts to comply with the environmental protection measures called for in this bill. It is my strong view that Antarctica should always be open and freely accessible to science. I will always champion that cause, and I will always work within the Congress to fully support the research of U.S. scientists in Antarctica.

At the same time, I know from my own visit to Antarctica and from discussions with scientists on many occasions, that scientists want to protect the environment of Antarctica. After all, it is the scientists who in the first place have alerted us to the fragility and magnificence of Antarctica. But they need the means to protect Antarctica, and that is why this bill is important, because the bill calls for the

appropriation of funds to provide those means.

Mr. President, we can measure the future of the Earth in the frozen breezes of Antarctica. As we confront the global ecological crisis, it's time to change our understanding of what is possible. We can't afford to settle for less.

Antarctica is not only a valuable wilderness. It is also a point to which our global perspective ought to be pulled, because it is from Antarctica that the future of the Earth can be seen. In the words of the World Commission on Environment and Development—the Brundtland Commission—the challenge is to ensure that Antarctica is managed in the interests of all humankind, in a manner that conserves its unique environment, preserves its value for scientific research, and retains its character as a demilitarized, non-nuclear zone of peace.

The Global Environment: A National Security Issue

Keynote Address by
U.S. SEN. AL GORE, D-Tennessee
National Academy of Sciences
Forum on Global Climate Change
Washington, D.C.
May 1, 1989

Many of us have come to this gathering because of a shared belief that humankind has suddenly entered into a brand new relationship with the planet Earth, and that human civilization is, in its current pattern, causing grave and perhaps soon irreparable damage to the ecological system which supports life as we know it.

My purpose is to sound an alarm loudly and clearly -- of imminent and grave danger -- and to describe a strategy for confronting this crisis, with changes in our collective behavior and thinking which, if made, can forestall and prevent the horrendous prospect of an ecological collapse.

First, why is such an alarm necessary? Do we need a crisis before we can act?

Sometimes in human affairs a pattern is well set before its implications are felt in our daily lives. This is true both in politics and in science. When shattered glass filled the streets of Berlin on Kristallnacht, few could conceive of the holocaust to follow. But from a distance, the pattern is now clear. When the first atom was split, few could conceive of nuclear bombs. But when Einstein wrote Roosevelt, the pattern was clear.

How much information is needed by the human mind to recognize a pattern? How much more is needed by the body politic to justify action in response?

It took a long time for the world to respond to Hitler. Because of Hitler, it took only a short time for Roosevelt to respond to Einstein.

In a classic experiment often cited, a frog dropped into a pot of boiling water quickly jumps out. But the same frog, put in the water before it is slowly heated, will remain in place until it is boiled.

The meaning of a pattern is conveyed by contrast as opposed to sameness. Sameness lulls the senses and conveys an absence of danger. Gradual change sometimes resembles sameness, obscuring danger from minds which reserve their alertness for sharp contrasts. Exponential change at first resembles sameness, then gradual change, then explosive contrast.

It is often hard to recognize the shape of an exponential curve before it reaches the explosive stage. It is difficult because the contrast essential to understanding very large patterns is sometimes visible only from a distance.

If an individual or a nation is accustomed to looking at the future one year at a time, and the past in terms of a single lifetime, then many large patterns are concealed. If a political body looks at policies in the context of a single nation, then the global impacts will remain invisible.

When you consider the relationship of the human species to the planet Earth, not much change is visible in a single year, in a single nation. Yet, if you look at the entire pattern of that relationship from the emergence of the species until today, May Day 1989, a distinctive contrast in very recent times clearly conveys the danger to which we must

respond. It took ten thousand human lifetimes for the population to reach two billion. Now, in the course of a single human lifetime -- mine and yours -- it is rocketing from two billion toward ten billion, and is already halfway there.

Startling graphs showing the loss of forest land, topsoil, stratospheric ozone, and species all follow the same pattern of sudden, unprecedented acceleration in the latter half of the 20th century. And yet, so far, the pattern of our politics remains remarkably unchanged.

The earth's forests are being destroyed at the rate of one football field's worth every second, one Tennessee's worth every year. An enormous hole is opening in the ozone layer, reducing the earth's ability to protect life from deadly ultraviolet radiation. Living species die at such an unprecedented rate that more than half may disappear within our lifetimes. Chemical wastes, in growing volumes, seep downward to poison groundwater and upward to destroy the atmosphere's delicate balance. Huge quantities of carbon dioxide, methane, and chlorofluorocarbons dumped in the atmosphere are trapping heat and raising global temperatures.

In 1987, carbon dioxide levels in the atmosphere began to surge with record annual increases. Global temperatures are also climbing: 1987 was the second hottest year on record; 1988 was the hottest. Scientists now predict our current course may raise world temperatures almost five degrees Celsius in the lifetimes of people in this room. The last time there was such a shift, it was five degrees colder: New York City was under one kilometer of ice. If five degrees colder over thousands of years produces an ice age, what could five degrees warmer produce in one lifetime?

Why are these dramatic changes taking place? Because the human population is surging, because the industrial, scientific, and technological revolutions magnify the environmental impact of these increases, and because we tolerate self-destructive behavior and environmental vandalism on a global scale.

"How much information is needed by the human mind to recognize a pattern? How much more is needed by the body politic to justify action in response?"

The problem in organizing our response is that the worst effects seem far off in the future, and they are so unprecedented they seem to defy common sense. While right now, in the present, millions of people are suffering in poverty and dying of starvation, warfare, and preventable diseases. How do we deal with these immediate problems and at the same time confront the problems of the future? One of the philosophers of the environmental movement, Ivan Illich, in a recent interview, explained the sudden environmental activism of Margaret Thatcher, Mikhail Gorbachev, and other world leaders previously uninterested in the global environment by saying "what has changed is that our common sense has begun searching for a language to speak about the shadow our future throws."

Science already has such a language. Have you ever seen the picture showing how time and space are

shaped by mass, with a black hole pictured as a deep well in a grid, with the space and time around the well sloping toward it? Human political awareness is shaped by history in precisely that way. Our political awareness of the world is shaped and bent by events. Large events like World War II exert a powerful gravitational pull on every idea we have about the world around us. The Holocaust shapes every idea we have about human nature.

And just as in Einstein's theory, future events can exert the same gravitational pull on our thinking as events in the past -- even though the events in the future have not yet occurred.

Time is relative in politics as in science. The political will which made possible the mass political protests against escalating the nuclear arms race came from awareness of a downslope toward a future we did not want to see. Many felt us being pulled toward a

nuclear war that would crush human history forever into a black hole. We are now changing our course away from that downslope, we hope, and taking a new direction -- even though 99.99% of all human beings on earth have never seen, heard, or personally felt nuclear destruction. The awareness of that potential future event came from political communication, with abstract symbols, like words.

Now, throughout the world, we are witnessing the emergence of a new political will to take a different course in order to avoid the slope toward global environmental destruction. We see the catastrophe coming, we hear Rachel Carson's *Silent Spring*. The slope seemed gradual at first but now it is steep. We feel strongly pulled toward ecological collapse by the policies we are now pursuing.

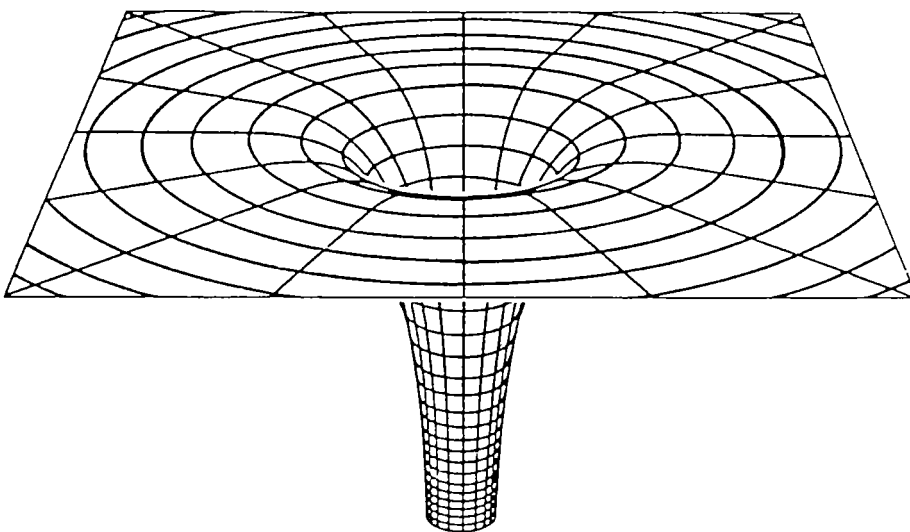
I personally became deeply involved in the effort to avoid a nuclear holocaust nine years ago because I felt the slope toward that horrendous possibility. And I tried to bring to the task the skills of my profession. I believe all this talk about the global environment as a national security issue makes a great deal of sense in political terms.

For the past 13 years, as a citizen and as a member of the United States Congress, I have had long-standing interests in both the environmental threat and in national security. As a practical matter, I have dealt with these subjects as separate intellectual accounts: involving distinct areas of public policy, each with its own completely different set of concerns and participants.

Yet, they grow more and more alike. National security comprises matters that directly and imminently menace the interests of the state, or the welfare of the people. As such, these issues command the attention of political leaders at the highest level, with a proportionate claim on the resources of government and the wealth of the nation. If society were an organism, national security would involve the instinct for survival.

To this point, the national security agenda has been dominated by issues of military security, embedded in the context of global struggle between the United States and the Soviet Union: a struggle which the protagonists have often waged through distant surrogates, but which has always harbored the risk of direct confrontation and nuclear war.

Given the changes in Soviet behavior which have begun under Gorbachev, there is growing optimism that



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Restoring Eco-librium

this long, dark period may be passing. There is also hope this will open the international agenda for other urgent matters and for the release of enormous resources, now committed to war, toward other objectives.

Many hope that the global environment will be the new Dominant Issue. They assert that a collective, international struggle for stability in the ecosystem will succeed the old pattern of national struggle for temporal power, and will justify the preemption of enormous resources, and reshape the public consciousness in support of another long, global struggle.

I am deeply in sympathy with this view, and yet as someone who has worked hard on both issues, I believe the analogy must be used very cautiously. The US-Soviet struggle has lasted almost half a century, consumed several trillions of dollars, cost us close to one hundred thousand American lives in Korea and Vietnam, and has profoundly shaped the psychological and social consciousness of our people. Much the same could be said of the Soviets, who, if anything, have endured far more than have we for the sake of their ideology.

Nothing is automatic or foreordained about the course of US-Soviet relations, no matter how many editorial writers now claim the "Cold War is Over." Nothing relieves us of our present responsibilities for defense or of the need to conduct painstaking negotiations to limit arms and reduce the risk of war. The old agenda is with us still, exacting its price in wealth, creativity and the attention of statesmen.

And yet, the environmentalists are right.

Certainly, there is strong evidence the new enemy is at least as real as the old. For the general public, the shocking images of last year's drought, or of beaches covered with medical garbage, inspired a sense of peril once sparked only by Soviet behavior. But for environmental specialists, the steady flow of data from scientific investigation of the environment -- often ambiguous, but always menacing -- is eerily equivalent to intelligence collection against the more familiar Soviet threat. The U2 spy plane, for example, now is used to monitor not missile silos but ozone depletion.

Already, we are seeing governments struggling to resolve issues whose domains go far beyond anything in our experience. Debate over the disposition of radioactive wastes, for example, involves choices that must remain valid across geological time. The species now disappearing at an unprecedented rate will never return. The global climate pattern could shift to a new equilibrium and never regain its former pattern.

In the not distant future, there will be a new "sacred agenda" in international affairs: policies that enable the rescue of the global environment. This task will one day join, and then perhaps even supplant, preventing the world's incineration through nuclear war, as the principal test of statecraft.

However, in thinking about environmentalism as a national security concern, it is important to differentiate between what would -- in military jargon -- be called the level of threat. Certain environmental problems may be important but are essentially local; others cross borders, and in effect represent theaters of operations; and still others are global and strategic in nature.

On this scale, even phenomena as important as the slow suffocation of Mexico City, the deaths of northern forests in America and Europe, or even the desertification of large areas of Africa, will likely not be regarded as full scale national security issues.

However, the greenhouse effect and stratospheric ozone depletion fit the profile of national security issues of global significance. These phenomena certainly will in time produce effects big enough to threaten international order, even at the level of war and peace. In the case of global warming,

the fact that some of the worst effects will not fully manifest themselves until the middle of the next century is offset by the fact that actions we take now will determine the extent of the damage later.

When nations perceive that they are threatened at the strategic level, they may be induced to think of drastic responses, involving sharp discontinuities from everyday approaches to policy. In military terms, this is the point when the United States begins to think of invoking nuclear weapons. The global environment may well involve responses that are, in comparative terms, just as radical. Not just business as usual, not just incremental variations but massive departures from the norm.

Nuclear war is an apocalyptic subject, and so is global environmental destruction. We are dealing here with increasingly credible forecasts of climatic dislocations, vast changes in growing cycles, inundations of coastal areas and the loss to the sea of vast territories -- some of them very heavily developed and populated. We also are dealing not only with a threat to human health, but unpredictable and potentially vast changes to all life at the surface of the earth and the seas, as the result of prolonged exposure to increased ultra-violet radiation.

What's more, despite some progress made toward limiting some sources of the problem, such as CFCs, we have to face the stark fact that we have barely scratched the surface. Even if all other elements of the problem are solved, a major threat is still posed by emissions of carbon dioxide, the exhaling breath of the industrial culture upon which our civilization rests. The implications of the latest and best studies on this matter are staggering. We must be honest about them. Essentially, they tell us that with our current pattern of tech-

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nology and production, we face a Hobson's Choice between economic growth in the near term, and massive environmental disorder as the subsequent penalty.

This central fact cuts across the face of all environmental strategies as we generally think of them. It suggests that the notion of environmentally sustainable development at present may be an oxymoron, rather than a realistic objective. It declares war, in effect, on routine life in the advanced industrial societies. And -- central to the outcome of the entire struggle to restore global environmental balance -- it declares war on the Third World.

The Third World does not have a choice about whether or not it will develop economically. If it does not develop economically, poverty, hunger and disease will consume entire populations. And long before that, whole societies will experience revolutionary political disorder. Rapid economic growth is a life-or-death imperative throughout the Third World. The peoples and governments of the Third World will not be denied that hope, no matter the longer-term costs for the global environment.

And why should they accept what we, manifestly, will not accept for ourselves? Who is so bold as to say that any nation in the developed world is prepared to abandon industrial and economic growth? Who will proclaim that any nation in the developed world will accept even serious compromises in levels of comfort, for the sake of global environmental balance? And who will apportion these sacrifices; who will then bear them?

Development, of course, is part of

the problem as well as the solution. We know that, just as we know that nuclear deterrence depends on the weapons we are trying to render obsolete.

The effort to solve the nuclear arms race has been complicated not only by simplistic stereotypes of the enemy and the threat he poses. It also has been complicated by simplistic demands for immediate unilateral disarmament, without any basis for a widely shared confidence that the original threat is no longer real.

My own belief is that perceptions must evolve simultaneously in both superpowers as technology evolves simultaneously in both countries, as conscious efforts are made to improve information about the other, about the nature of the threat, and the confidence we can summon that the threat is in fact changing and receding.

In similar fashion, the effort to solve the global environmental crisis will be complicated not only by blind assertions that more and more environmental manipulation and more and more resource extraction are essential for economic growth. It will also be complicated by the emergence of simplistic demands that development, or technology itself, must be stopped for the problem to be solved. This is a crisis of confidence which must be addressed.

This speech, if you'll permit me a personal moment, is the first time I've spoken in public on any subject in six weeks. My wife and I have been in Johns Hopkins Hospital, at the bedside of our son, who was hit by an automobile. I've been living in the world of medical science, pursuing the

goal of restoring our son to health. Ten years ago, a child with his injuries would have had several surgical interventions which doctors now realize are unwise, given the greater likelihood of the body healing itself where some injuries are concerned.

Yet, two days after the accident, when doctors were unable to stabilize internal bleeding, my wife and I naively hoped that same natural healing process would take care of that problem and make any surgery unnecessary. If the doctor had relied not on science but on us, we would have unwisely urged against an operation. But doctors have acquired sufficient knowledge to realize that the body should be allowed to heal itself when it can do so. At the same time, they know there are some instances where intervention is essential to save life.

Similarly, we must acquire sufficient knowledge of the earth's system to judge when it can heal itself, and when it is necessary for us to intervene. For example, when 40,000 children die of disease and starvation every 24 hours, we obviously must intervene. But it is past time to recognize that many of society's interventions in the environment have been and are unwise. Much ecological destruction is subsidized by governments. We need more knowledge, more experience, and the kind of sensitive judgments that modern doctors have learned to make.

The cross-cut between the imperatives of growth and the imperatives of environmental management, represents a supreme test for modern industrial civilization. The test is whether we can devise very dynamic new strategies which will accommodate economic growth within a stabilized environmental framework.

That is an extreme demand to place upon technology. There is no real assurance that such a balance can in fact be struck. Nevertheless the effort must be made. And because of the urgency, scope and even the improbability of complete success in such an endeavor, I am strongly tempted to use a military term for a metaphor. To deal with the global environment, we will need the environmental equivalent of the Strategic Defense Initiative, a Strategic Environment Initiative.

I have been an opponent of the military SDI. But even opponents of SDI recognize this effort has been

A Strategic Environment Initiative

remarkably successful in drawing together previously disconnected government programs, in stimulating the development of new technologies, and in forcing upon us a wave of intense new analysis of subjects previously thought to have been exhausted.

We need the same kind of focus and intensity, and similar levels of funding, to deal comprehensively with global warming, stratospheric ozone depletion, species loss, deforestation, ocean pollution, acid rain, air and water, and groundwater pollution, and all of the problems degrading the world's environment. In every major sector of economic activity -- energy, agriculture, manufacturing, and transportation, for example -- a Strategic Environment Initiative must identify and then spread sets of increasingly effective new technologies: some that are already well in hand; some that need further work, though well understood in principle; and some that are revolutionary ideas whose very existence is now a matter of speculation.

Let me briefly illustrate:

Energy is the lifeblood of development. Unfortunately, today's most economical technologies for converting energy resources into usable forms of power (as in burning coal to make electricity) release a plethora of pollutants. An Energy SEI should focus on producing the energy of development without compromising the environment. Chief on the near-term list of alternatives are energy efficiency and conservation; on the mid-term list, solar power, possibly new-generation nuclear power, biomass (with no extraneous pollutants and a closed carbon cycle), as well as enhanced efficiency; and long-term, nuclear fusion, as well as enhanced versions of solar, biomass, and nuclear energy, and energy efficiency.

In agriculture, we have witnessed vast growth in Third World food production through the Green Revolution, but often that growth relied on heavily subsidized fertilizers, pesticides, irrigation, and overall mechanization, sometimes giving the advantage to rich farmers over poor ones. We need a second green revolution, to address the needs of the Third World's poor: a focus on increasing productivity from small farms on marginal land, with low-input agricultural methods.

These technologies, whose components are not only technological, but financial and political, may be the key to satisfying the land hunger of the disadvantaged and the desperate who are slashing daily into the rainforest of Amazonia -- leaving behind the depleted soil of their first homesteads. It may also be the key in the battle to arrest the desertification of sub-Saharan Africa, where human need and climate stress are now operating in a deadly partnership.

Fortunately, the next wave of agricultural improvements is almost upon us -- from biotechnology. In my view, we should carefully push forward work on new crop strains with genetic encoding that allows "natural" resistance to pests, disease, and droughts; not to mention improved yield. Of course, biotechnology will not completely solve the problems that arise from inadequate distribution of food supplies -- they are most often due to a failure of politics, not crops.

In addition, new industrial processes, new materials, and increased use of recycled materials, will all become important to "sustainable" development.

Needed in the U.S. probably more than anywhere, is a Transportation SEI focusing in the near term on improving the mileage standards of our vehicles, and encouraging and enabling Americans to drive less. In the mid-term, come questions of alternative fuels, such as biomass-based liquid fuels or electricity. And in the mid- and long-terms come the inescapable need for re-examining the entire structure of our transportation sector, and its inherent demand on the personal vehicle for efficient transport.

Funds to promote these research objectives could be drawn from very modest US energy taxes, eventually perhaps even a CO₂ tax, although that is not yet politically viable. The U.S. government should organize itself to finance the export of energy-efficient systems, and of renewable energy sources. That means preferential lending arrangements through the Export - Import Bank, and Overseas Private Investment Corporation.

Encouragement for the Third World should also come in the form of attractive international credit arrangements for energy efficient and en-

vironmentally sustainable processes. Funds for this lending stream would be generated by institutions such as the World Bank, which, in the course of debt swapping, might dedicate new funds to the purchase of environmentally sounder technologies.

Finally, the United States, other developers of new technology, and international lending institutions, should establish centers of training at locations around the world, to create a core of environmentally educated planners and technicians, in order to "make the ground fertile" for sowing environmentally attractive technologies and practices; an effort not unlike that which produced agricultural research centers throughout the world during the Green Revolution.

With this SEI, we must transform science and technology to make it more efficient, consume less of the earth's natural resources, and emphasize waste minimization, recycling, and the use of renewable resources in harmony with the natural world. We must start by quickly obtaining massive quantities of information about the global processes now underway -- through, for example, the Mission to Planet Earth program of NASA.

And we also must target first the most readily identifiable and correctable sources of environmental damage. Today, for example, I have introduced a new comprehensive legislative package to effectively halt chlorofluorocarbon, carbon tetrachloride, methyl chloroform, and halon emissions, and to promote development of technologies to replace those that now rely on CFCs. Earlier this year, I introduced the World Environment Policy Act of 1989, a far-ranging bill to address virtually every aspect of the global environmental crisis, including CFCs and CO₂.

In order to accomplish our goal we also must transform global politics, shifting from short-term concerns to long-term concerns, from conflict to cooperation.

The evidence of the last six months leads me to believe we have the capacity for this change. Just as the equilibrium of an environmental system can suddenly change from one state to another, the equilibrium of one political system can suddenly change from one state to another. We politi-

“... the solutions we seek will be found in a new faith in the future of life on earth after our own, a faith in the future which justifies sacrifices in the present, a new moral courage to choose higher values in the conduct of human affairs, and a new reverence for absolute principles that can serve as guiding stars by which to map the future course of our species and our place within creation.”

cians are frequently adept at symbolic action, a pretense of change without the substance of change. And for that reason, my optimism is tempered by awareness of the power in the forces of greed and fear. But I do believe we have the capacity for what is needed -- because the challenge can now be accurately described in terms of national security.

Some may believe that the idea of the environment as a national security issue is just rhetoric. Most of us in this room, however, accept it as a statement of fact. But, we also know that just as the world has been living with the possibility of man-made disaster in the form of nuclear war, so it now lives with the growing threat of man-made disaster in the form of catastrophic environmental failure.

In many ways, it is the same basic dilemma. In each case, our survival was threatened at a basic, primal level -- the fear of death from attack by an enemy, the fear of death from running out of food. To each threat, we responded with more and more efficiency. The increasing sophistication of our technology has enabled us to confront each threat to our survival with a more powerful response. And in each case, the effort to secure our survival has instead threatened our survival.

Moreover, even if we are successful this time in meeting the needs of our survival and preserving the world environment, it probably won't be the last time we'll face this basic problem. Genetic engineering may pose the same dilemma all over again. In the effort to protect ourselves against disease, we're creating a new and more power-

ful technology that ultimately will confront us with the same historic challenge to human nature and the same hubristic relationship of our species to the limits nature has designed for us as part of the world ecological system.

As a result, it is hard to escape the conclusion that we must also transform ourselves -- or at least the way we think about ourselves, our children, and our future. This last transformation is the most essential, and yet the most difficult. If there is one cause for the prevailing pessimism about our ability to meet this unprecedented challenge, it is the belief by many that we are incapable of the change in thinking required.

And yet, there are precedents which give cause for realistic hope. Human sacrifice and slavery were both once commonplace in human societies, yet both are now obsolete. Our thinking was transformed. These changes, like most changes in global climate patterns, took place over a long period of time. But now, just as climate changes are telescoped into short periods of time, we must create in a single generation changes in human thinking of a magnitude comparable to the change that brought about the abolition of slavery. Yet once again, we must remind ourselves that the pattern of change required is visible only from a distance.

In this case, we cannot rely on science to give us a new point of view for it is partly responsible for the problem. In ways not yet fully understood, the scientific revolution itself changed the way we saw ourselves in relation to the world. We detached

ourselves from nature to examine the physical world. In a kind of Heisenberg Principle writ large, we altered -- without realizing it -- the nature of what we began to examine. The new pattern of thinking we must now create is one in which we once again see ourselves as a part of the ecological system in which we live. What we now lack is a sense of the proper location of our species in the ecosystem. We have lost our eco-librium.

How then can we gain sufficient distance from ourselves to see a pattern which contains ourselves in a larger context? My own religious faith teaches me that we are given dominion over the earth, but that we also are required to be good stewards of the earth. If we witness the destruction of half the living species God put on this earth during our lifetimes as a result of our actions, we will have failed in the responsibility of stewardship. Are those actions, because of their result, "evil"? The answer depends not upon the everyday nature of the actions, but upon our knowledge of their consequences. In an examination of Hitler's lieutenants, Hannah Arendt coined the memorable phrase "the banality of evil." The individual actions which collectively produce the world's environmental crisis are indeed banal when they are looked at one by one: the cutting of a tree, the air conditioning of a car.

"Evil," and "good" are terms not used frequently by politicians. But in my own view, this problem cannot be solved without reference to spiritual values found in every faith. For many scientists on the edge of new discoveries in cosmology and quantum physics, the reconciliation of science and religion sometimes now seems near at hand. It is a reconciliation not unlike the one we seek between man and nature.

But even without defining the problem in religious terms, it is possible to conclude that the solutions we seek will be found in a new faith in the future of life on earth after our own, a faith in the future which justifies sacrifices in the present, a new moral courage to choose higher values in the conduct of human affairs, and a new reverence for absolute principles that can serve as guiding stars by which to map the future course of our species and our place within creation. ■

United States Senate

WASHINGTON, DC 20510

July 12, 1990

Dear Colleague:

We are writing to urge you to join us as cosponsors of S. 1400, the Product Liability Reform Act. The Senate Committee on Commerce, Science, and Transportation approved this measure by a substantial margin on May 22, 1990. The Committee has devoted considerable time and resources to this issue for the last eight years, including three hearings this year. The result is S. 1400, a product liability bill that enjoys bipartisan support. This bill strikes a balance between the interests of injured persons and manufacturers and product sellers.

S. 1400 establishes uniform rules for key issues that arise in product liability actions, and procedures designed to encourage settlements which will reduce legal costs. The bill also features pro-consumer provisions such as a statute of limitations that preserves a plaintiff's claim when the injury and its cause are not discoverable until years after exposure to a product.

This legislation reflects a fair and balanced approach to establishing a federal uniform product liability rule. It will speed compensation to injured victims, protect jobs of American workers, enhance the competitive position of domestic manufacturers in world markets, and encourage the development of innovative products. The need for reform is clear, and now is the time to enact a reasonable federal product liability law.

If you wish to be a cosponsor of S. 1400 or have any questions regarding the bill, please contact Jennifer Goto of Senator Inouye's office at 4-3494 or David Meeker of Senator Kasten's office at 4-5323.

Sincerely,



Daniel K. Inouye



Robert W. Kasten, Jr.



John D. Rockefeller, IV



John C. Danforth

Remarks of
SENATOR AL GORE
Product Liability Markup
May 22, 1990

I. The Myth of Product Liability and Product Innovation

Proponents of product liability reform claim that manufacturers do not market safe products because of large judgments and insurance costs. But, the examples used by those who make this argument fail to support that position. In fact, these favorite examples are a testimony to the effectiveness of existing laws at removing from the market dangerous and defective products that pose a severe risk to consumers:

--Monsanto Asbestos Substitute--Perhaps the most egregious and misrepresented example used by those urging reform is that Monsanto was unwilling to market a "safe" substitute for asbestos. However, what is not mentioned is that EPA found reason to believe that the product caused cancer. Medical experts have concurred in this finding.

--Puritan Bennett Anesthesiology Machines--Mfgs have also pointed to the loss of allegedly safe anesthesiology machines. However, at least four deaths have been attributed to defects in Puritan-Bennett machines.

--Jeep C-J--These vehicles were marketed as being safe by American Motors before production was ceased in 1986. In fact, passenger death rates in the jeeps were five times that of large cars. The vehicles could roll over at very low speeds, and passengers were easily ejected.

II. All the evidence shows that S. 1400 is not necessary.

A. The product liability system improves product safety and is not a leading cause of U.S. competitiveness problems. A 1987 Conference Board study polled the risk managers of 232 major U.S. corporations and concluded that the product liability system has had a notable impact on the quality of products and only a minor impact on the ability of the corporation to conduct business.

B. A 1989 GAO report determined that product liability awards have not been erratic or excessive, but instead, are consistent with the degree of injury the victim suffered.

C. Courts are already placing limitations on plaintiffs' rights to recover for injuries suffered from defective products. As Cornell Law Professors Henderson and Eisenberg testified, judicial decision-making trends have shifted and now lean heavily toward defendants.

D. S. 1400 will not reduce insurance rates. The American Insurance Association testified that the bill is unlikely "to reduce insurance claim costs or improve the insurance market."

E. There is no explosion of product liability cases in the courts. From 1981-86, the growth of product liability filings unrelated to asbestos, Dalkon Shield and Bendectin averaged 4% per year -- less than the growth rate of civil filings in general (6%) and personal expenditures on goods (5%).

F. For the vast majority of American companies, product liability claims are not a recurring or significant problem. Lawrence Mann testified that case filings are episodic and appear to be associated with the product lines of particular manufacturers.

--From 1974-86, approximately 50% of all product liability cases filed in federal courts named fewer than 80 lead defendants. The other 50% involved more than 19,000 lead defendants of which 17,000 were named only once in the 12 years. Moreover, 41.7% of all cases filed were against just 34 lead defendants.

III. The FDA Provision in S. 1400 is unjustified.

A. The FDA has neither the resources nor the sufficient support from the Administration to ensure that all mfrs who receive pre-market approval for their drugs or medical devices do not engage in unconscionable behavior that injures, maims or kills.

--The Bush Administration has requested a 1991 appropriation for FDA that is approximately \$50 million less than the 1990 appropriation.

--Despite the passage of 24 laws increasing FDA's responsibilities, FDA staff fell by 1,000 from 1979-89, excluding those assigned to AIDS-related projects.

--FDA product seizures, injunctions and criminal prosecutions dropped from 582 in 1980 to 237 in 1988.

B. Pharmaceutical companies can knowingly market drugs and devices in a manner that is certain to kill or injure unwitting consumers without violating FDA rules. To name just three examples of FDA-approved

drugs or medical devices that the manufacturer continued to sell despite knowledge that the product could kill or injure

-- the Copper-7 IUD, which caused serious pelvic infections, loss of fertility and surgery to remove organs in thousands of women;

--the Bjork-Shiley Heart Valve, which has killed approximately 750 people, and continues to take between one and three lives every month;

--Zomax, which led to 14 deaths and over 400 serious allergic reactions before it was withdrawn.

C. The pharmaceutical industry is enjoying record profits. For example, in 1988, four pharmaceutical companies sold drugs that each generated sales of \$1 billion or more in a single year.

IV. S.1400 will not make product liability law uniform.

A. The provisions of S. 1400 will be interpreted by 55 different state court systems and 13 different federal circuits -- it will not establish a uniform law.

B. The result of business lobbying activities over the last decade is that tort law in the 50 states is considerably less uniform today than it was 10 years ago. To the extent that S. 1400 does not preempt state law (-- and it does so only to a very limited extent --), uniformity will not be achieved.

C. S. 1400 establishes a "uniform" law only where it would benefit mfgs and burden injured victims:

--The bill eliminates joint and several liability for noneconomic damages (pain and suffering, etc.) BUT does not ESTABLISH joint and several liability for economic damages in states that have abolished joint and several altogether.

--The bill makes it more difficult for victims to obtain punitive damages, but does not establish the right to receive punitives uniformly throughout the country (some states do not allow).

*✓ No overreliance
of no problem
Don't get into FDA*

M E M O R A N D U M

DATE: May 9, 1990

TO: Al

FROM: Katie

SUBJECT: Product Liability--Commerce Markup 5-22-90

In General:

Consumer groups have lobbied us hard on this one. Although S. 1400 is a significantly watered-down version of earlier reform proposals, they fear it could become a vehicle for more dramatic changes in the future. Because the bill does make it more difficult for plaintiffs, and because of your history on this, they are counting on your opposition. In addition, you may want to speak against the bill during markup as several Senators (Bryan, Kerry, Robb, and Bentsen) are undecided and could be influenced either way.

SEE ATTACHED TALKING POINTS

The Committee expects that the bill will pass. The votes are as follows:

Inouye, Danforth, Rockefeller, McCain, Exon, Pressler, Gorton, Burns, Ford and Lott will join Kasten; Hollings, Breaux, and Packwood will vote against; Kerry, Robb, Bryan and Bentsen are undecided (but leaning against).

Although it will pass out of Committee, the bill won't get to the floor any time soon---Judiciary and Labor are expected to request referral.

The only amendments expected will come from the bill's sponsors: (1) a change to the workman's compensation title of the bill to make it easier for an employer to join a worker's suit against a mfr; (2) a change to the provision providing a bar against punitives where a product has received pre-mkt approval from FDA that specifies that punitives are available in the event that the mfr bribed FDA; (3) an amendment to the definition of "product" to exclude natural gas services.

Substantive Analysis of the Bill's Provisions:

1. **Preemption:** The bill does not create a new federal cause of action or a new basis of jurisdiction in the

federal courts. The states are preempted, however, to the extent specific criteria are set forth in the bill:

2. **Expedited settlement procedure:** Either party may offer to settle. If an offer is made and the other party refuses and does no better at trial than it would have had it accepted the offer, it is liable for the offeror's reasonable attorneys' fees and costs. (I worry about this provision--the pressure on consumers to settle could get really heavy. On the other hand, the promise of expedited procedures could be pro-consumer--consumers who may have been deterred by the prospect of endless and expensive court battles might be encouraged to sue).

3. **Alternative Dispute Resolution:** Either party may offer to proceed under any voluntary dispute resolution procedure established under the law of the State in which the action is brought. If the offeree refuses the offer and the court determines that the refusal was unreasonable or not in good faith, it will be liable for reasonable attorney's fees and costs.

4. **Punitive Damages:** Punitives are allowed if:
(a). they are allowed under state law (most states do allow)
(b). the plaintiff proves by CLEAR AND CONVINCING evidence (this increases the burden of proof--usual state standard is preponderance) that his harm was the result of CONSCIOUS, FLAGRANT INDIFFERENCE TO SAFETY--reckless indifference will no longer be considered sufficiently culpable to merit the award of punitives.
(c). the plaintiff has also won a compensatory award

****N.B.** Punitives are not available where a drug has received FDA approval or an aircraft has received FAA approval. Given both FDA's and FAA's recent track records, this provision is particularly outrageous. It also sets a very dangerous precedent by establishing that gov't agencies are in the business of guaranteeing privately mfgr'd products.

****N.B.** If requested by the defendant, punitive damages must be considered in a proceeding separate from the compensatory proceeding; evidence relevant only to punitives is inadmissible in the compensatory hrg.

5. **Statute of Limitations**--2 years after discovery of harm AND its CAUSE. This is extremely beneficial, especially with regard to latent injuries (such as those caused by toxic substances). Consumer groups say that most states already provide this protection, however.

6. Statute of Repose--file within 25 years of time of delivery to first purchaser unless suit alleges toxic harm. This provision is pro-mfgr in the approximately half the states that currently do not have a comparable statute; it is generally pro-consumer in those states that do--10 to 12 years is the typical period for filing.

7. Product Seller Liability--No strict liability for product sellers. Unlike product mfgrs, a seller would be liable only if it had been negligent or had breached an express warranty it had made independent of any express warranty made by the mfgr. Exceptions--strict seller liability if the mfgr is not subject to service of process in any state or mfgr is judgment-proof. This provision reasonably shifts responsibility to the mfgr of the defective product; it is neutral with respect to its effect on consumers.

**N.B. Definition of Seller precludes recovery against those who do not sell the offending product in the regular course of their business (e.g. banks that give away defective consumer products as inducements to open accnts).

8. Effect of Workers' Compensation--Complicated provision; bottom line is that mfgrs benefit at the expense of employers, but the total amount recovered by the employee is not changed.

9. Joint and Several Liability--Only for economic damages; for noneconomic damages, defendants are liable only for an amount proportionate to their percentage of responsibility. This provision appears to be pro-mfgr, but may really be pro-consumer: in the last few years, about half of the states have either eliminated joint and several altogether or have enacted restrictions at least as stringent as those suggested here.

10. Contributory Fault--Complete defense if plaintiff's injury more than 50% due to his intoxication/consumption of drugs not prescribed for his use. This provision is pro-mfgr and most likely violates the equal protection clause as applied to Irish claimants.

Lobbying Activity:

1. Public Citizen, Consumer Federation of America, USPIRG, Consumers Union: Opposed to the legislation--would like you to speak against it at the markup.

2. US Chamber of Commerce/DuPont: In favor--say is reform is critical to competitiveness.

M E M O R A N D U M

DATE: May 9, 1990

TO: Carol

FROM: Katie

SUBJECT: Product Liability

In General:

Thus far, I'm not convinced that this bill is bad for consumers. But, I'm also not convinced that it does anything of significance for mfgs: there is no cap on dmgs and strict mfgs liability is retained. Overall, it seems that the changes are minor; "uniformity" is not achieved.

The silence of mfgs wrt this bill indicates that they realize it doesn't become a vehicle for more stringent measures in the future. For their part, mfgs ned that he has

Politics:

Senate Commerce had its third hearing on S. 1400, the Uniform Product Liability Law, on Thursday, May 10, 1990. Wow--what a battle--lots of name calling--Danforth: "Consumer Groups are supported by the trial lawyers association." Dr. Wolfe (director of Public Citizen): "Senator, you're a liar!" Rockefeller: "With all due respect, Senator, I know the Rockefeller foundation is a major contributor." And on and on--lots of heat; little substance.

The Committee plans to markup the bill within 2 weeks (no definite date has been set). A thirty day referral to Judiciary will then occur, if Judiciary requests.

The bill currently has 29 cosponsors. Consumer groups expect that the bill will pass out of Committee--Inouye, Danforth, Rockefeller, McCain, Exon, Pressler, Gorton, Burns, Ford and Lott will join Kasten; Hollings, Breaux, Bentsen, and Packwood will vote against; Kerry, Robb, and Bryan are undecided (but leaning against).

Substance:

1. **Preemption:** The bill does not create a new federal cause of action or a new basis of jurisdiction in the federal courts. The states are preempted, however, to the extent specific criteria are set forth in the bill:

2. **Expedited settlement procedure:** Either party may offer to settle. If an offer is made and the other party

refuses and does no better at trial than it would have had it accepted the offer, it is liable for the offeror's reasonable attorneys' fees and costs. (I worry about this provision--the pressure on consumers to settle could get really heavy. On the other hand, the promise of expedited procedures could be pro-consumer--consumers who may have been deterred by the prospect of endless and expensive court battles might be encouraged to sue).

3. **Alternative Dispute Resolution:** Either party may offer to proceed under any voluntary dispute resolution procedure established under the law of the State in which the action is brought. If the offeree refuses the offer and the court determines that the refusal was unreasonable or not in good faith, it will be liable for reasonable attorney's fees and costs.

4. **Punitive Damages:** Punitives are allowed if:

(a). they are allowed under state law (most states do allow; I don't know about TN)

(b). the plaintiff proves by CLEAR AND CONVINCING evidence (this increases the burden of proof--usual state standard is preponderance) that his harm was the result of CONSCIOUS, FLAGRANT INDIFFERENCE TO SAFETY (???usual stand is willful, wanton, malicious, reckless disregard--doesn't seem to be much difference??).

(c). the plaintiff has also won a compensatory award

****N.B.** Punitives are not available where a drug has received FDA approval or an aircraft has received FAA approval. Consumer groups are particularly outraged by this provision and have prepared a report criticizing FDA's performance. (Given FDA's recent track record on generics, this provision is bad, but probably of little practical significance--it is doubtful that a defendant who had provided all the information required by FDA could be considered to have acted in conscious and flagrant indifference to safety).

****N.B.** If requested by the defendant, punitive damages must be considered in a proceeding separate from the compensatory proceeding; evidence relevant only to punitives is inadmissible in the compensatory hrg.

5. **Statute of Limitations**--2 years after discovery of harm AND its CAUSE. This is a pro-consumer provision: most states have a 2-year provision but do not allow time for the discovery of cause.

6. **Statute of Repose**--file within 25 years of time of delivery to first purchaser unless suit alleges toxic harm. This provision is pro-mfr in the approximately half

the states that currently do not have a comparable statute; it is generally pro-consumer in those states that do--10 to 12 years is the typical period for filing.

7. **Product Seller Liability**--No strict liability for product sellers. Unlike product mfgs, a seller would be liable only if it had been negligent or had breached an express warranty it had made independent of any express warranty made by the mfg. Exceptions--strict seller liability if the mfg is not subject to service of process in any state or mfg is judgment-proof. This provision reasonably shifts responsibility to the mfg of the defective product; it is neutral with respect to its effect on consumers.

(????to what extent does this change tn law???)

****N.B.** Definition of Seller precludes recovery against those who do not sell the offending product in the regular course of their business (e.g. banks that give away defective consumer products as inducements to open accnts).

8. **Effect of Workers' Compensation**--Complicated provision; bottom line is that mfgs benefit at the expense of employers, but the total amount recovered by the employee is not changed.

????effect on tn law???

9. **Joint and Several Liability**--Only for economic damages; for noneconomic damages, defendants are liable only for an amount proportionate to their percentage of responsibility. This provision appears to be pro-mfg, but may really be pro-consumer: in the last few years, about half of the states have either eliminated joint and several altogether or have enacted restrictions at least as stringent as those suggested here.

10. **Contributory Fault**--Complete defense if plaintiff's injury more than 50% due to his intoxication/consumption of drugs not prescribed for his use. This provision is pro-mfg and most likely violates the equal protection clause as applied to Irish claimants.

Lobbying Activity:

1. Public Citizen, Consumer Federation of America, USPIRG, Consumers Union: Opposed to the legislation--we will meet with them on Mon. May 14, 1990 at 3:00.

2. US Chamber of Commerce: They have requested a mtg, but were unable to make the time we originally chose; I expect to speak to them soon.

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May 29, 1990

PHONE (615) 586-5650

The Honorable Albert Gore
United States Senator
SR 393 Russell Senate Office Bldg.
Washington,, DC 20510 4202

Dear Senator Gore:

Last Monday, May 21, I tried to call you in reference to a vote that was taking place on Tuesday. It was about S1400, Federal Product Liability Legislation.

The first time I called it was early, and I talked to the young lady on the phone. She asked who I was, and then said you would not be available all day. I asked if I could speak to one of your legislative men, and she told me Mr. Eric Anderson was the man. I asked to speak to him, and she asked me to hold a minute, which I did.

She came back, and said he was away from the phone. I left my number for him to call, but he didn't. Later I called back, and he was gone from his desk. I called back, and that time he was on the phone again, and each time she asked if she could take care of what I wanted. It ticked me off a bit to try three times to get a guy, and each time, after holding, they tell me he is away from his desk or on the phone.

Senator, I think you are trying to be a good legislative representative, but I don't believe your office is being run in any great shape. I am not fussing. I think you need to know this. If other people get the same treatment that I got, your reputation is not enhanced.

Thanks for letting me explain how I think you can be helped and help us better as our senator.

Sincerely yours,

A handwritten signature in cursive script, appearing to read 'John D. Wallace'.
John D. Wallace
President



cm

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A Simple Outline of God's Way of Salvation

A Simple Outline of
God's Way of
Salvation

The Need to Reform Personal Injury Law Leaving Scientific Disputes to Scientists

STEPHEN D. SUGARMAN

Personal injury law is staggeringly inefficient as a system of victim compensation. There is little reason to assume that it importantly curtails unreasonably dangerous conduct, yet there is good reason to conclude that it promotes socially undesirable behavior. Moreover, the tort law system ill serves the goal of individual justice, in part because it assumes that lay juries can correctly decide complex scientific issues. Several methods of replacing tort law with other compensation systems are surveyed and a specific, balanced reform package is proposed.

ON 28 FEBRUARY 1980, LYNETTE WEST, A 20-YEAR-OLD California student, collapsed on the bathroom floor (1). She was rushed to the hospital and put in the intensive care unit. She remained in "severe shock" for 18 hours, during which time she was in "very severe danger," according to the hospital. Starting the following morning, her condition sharply improved, and she was released from the hospital on 4 March. She stayed home for a week and then returned to her classes. Although her doctors were puzzled by her malady at the time, some months later, after reading reports of the federal Center for Disease Control (CDC), they concluded that Ms. West had suffered from menstrually related toxic shock syndrome (TSS).

Ms. West, who was using a vaginal tampon manufactured by Johnson & Johnson Products, Inc. (JJP), at the time of her illness, subsequently sued JJP for compensatory and punitive damages. The jury trial amounted to a battle of experts. JJP's experts argued that Ms. West had actually contracted streptococcal scarlet fever (which causes similar symptoms) and had not, as her experts claimed, suffered from TSS brought on by the tampon she was using. On this question, the jury sided with the plaintiff. During the trial it was shown that, although TSS had been identified in children in 1978, the CDC had not established a close association between TSS and tampon use until May or June of 1980—some months after Ms. West had been discharged from the hospital.

The plaintiff's counsel argued to the jury that JJP should be held strictly liable for Ms. West's injuries on the ground that JJP's tampon was a "defective product." Specifically, he contended, and the trial judge concurred, that the "consumer expectation" test, adopted by the California Supreme Court in an earlier product injury case (2), should apply here in determining whether the manufacturer should pay for the harm its product caused. Simply put, Ms. West's lawyer asserted that an ordinary consumer would not expect to "get sick from the product." Not surprisingly, the jury

agreed. Rather more surprisingly, it awarded Ms. West \$500,000 in compensatory damages. Even more spectacularly, the jury also awarded her \$10 million in punitive damages, apparently on the ground that JJP had displayed a "conscious disregard for the safety of others" (3) by failing to test the product adequately before marketing it, and by failing to reexamine the product's possible dangers after receiving complaints from consumers about infections they associated with use of JJP's tampons. To put it mildly, JJP officials were upset by the \$10.5-million award when, in their view, they could not have known about TSS at the time of Ms. West's injury.

In response to the defendant's legal motions, the trial judge decided that the jury's awards were excessive and the result of "passion and prejudice," noting that the victim had offered no proof of any wage loss or other out-of-pocket economic loss and that she had fully recovered from her illness. But he did not overturn the verdict. Rather, he ordered a new trial only if the plaintiff refused to agree to a reduction in compensatory damages to \$100,000 and punitive damages to \$1 million. Both sides appealed, and in December 1985 a California appeals court finally affirmed the trial judge's disposition. In October 1986, the U.S. Supreme Court denied JJP's request for further review.

The case's outcome is not a public matter. Probably, Ms. West accepted the \$1.1 million as a final settlement. Out of that she would pay her costs of litigation, including the fees of her expert witnesses and, most importantly, her lawyer's fee, which was likely in the range of \$300,000 to \$500,000 (4). Is *West v. JJP* a typical case? In some ways it is not. The award was unusually large, and, of course, defendants often win product liability cases (5). Nonetheless, it illustrates quite a bit about American tort law today.

Asking Lay Juries to Resolve Complex Scientific Controversies

Jurors selected at least in part for their ignorance about the topic at hand are asked to decide extremely difficult scientific issues: Was it TSS or was it scarlet fever? Could JJP have discovered TSS before the CDC did? Would it have done so through better testing and follow-up studies? Should the consumer complaints JJP received have put the company on notice that something serious was afoot? Of course, the jury is aided in this process by the testimony of experts. What that means in practice is that it must resolve a dispute between sophisticated witnesses, whose scientific credibility the jurors are unlikely to accurately appraise.

West v. JJP is hardly an isolated instance of this phenomenon. It is repeated in nearly every medical malpractice and product design defect case coming to trial, where one side says, for example, that the defendant should have located the vehicle's gas tank elsewhere or

The author is a professor of law, Boalt Hall, University of California, Berkeley, CA 94720.

should have given the patient some additional diagnostic test, and the other side claims there is no better place to put the gas tank or that nothing in the patient's work-up reasonably called for the additional test.

For some scientists, this creates a whole new area of professional practice—serving as an expert witness, either occasionally or full time. For other scientists—those whose past judgment is being questioned—the process can be highly demoralizing. They see themselves as verbally abused on the witness stand and then rebuked by jurors who, they feel, never understood the scientific issues (6).

Sometimes, a private lawsuit for money damages is cast as a titanic scientific battle that must make many scientists cringe. For example, in *Johnson v. American Cyanamid Co.* (7), the plaintiff claimed he contracted polio after his daughter received an oral dose of the Sabin vaccine. This is a small, but recognized, risk accompanying the Sabin vaccine. The plaintiff contended that his daughter should have been told about and offered the Salk vaccine, even though it was not then for sale in the United States. Both he and his doctor asserted that, if a fully informed choice had been possible, he would have selected the Salk vaccine instead. Suddenly, although the American public health and medical establishment had much earlier clearly decided that the Sabin was superior to the Salk vaccine, a Kansas courtroom became a Sabin versus Salk battleground, with Dr. Jonas Salk's son testifying in favor of his father's vaccine. And the jury sided with the Salks—or at least with the victim—awarding \$2 million in compensatory and \$8 million in punitive damages to the totally incapacitated claimant and against American Cyanamid, the then sole U.S. manufacturer of polio vaccine. The Kansas Supreme Court subsequently reversed the outcome, awarding victory to the defendant, on the ground that the product was not "defective" as a matter of law.

In other cases, determinations are made that many scientists are likely to find mystifying. As one illustration, in *Wells v. Ortho Pharmaceutical Corp.* (8), a federal judge, trying the case without a jury, concluded that the defendant's spermicidal jelly caused the plaintiff child's birth defects. The litigants had presented competing experts who cited conflicting studies. The trial judge "found the studies to be inconclusive on the ultimate issue of whether the Product caused Katie Wells' birth defects." In the face of this battle of experts, the judge concluded that the plaintiffs' experts were more credible and found in their favor. The federal court of appeal affirmed, noting that "it does not matter . . . that the medical community might require more research and evidence before conclusively resolving the question" (8).

Another troublesome area concerns scientific standards set by federal agencies. Defendants may have complied with them, but juries are sometimes permitted to reject the standards as inadequate. Courts understandably worry that an agency may be "captured" by those it regulates and so set standards that are too lax, but consider *Ferebee v. Chevron Chemical Co.* (9), where the Environmental Protection Agency (EPA) had instructed manufacturers how to label certain pesticides. A federal appeals court upheld the liability of a company that had complied with the EPA rule, saying that Maryland law had the right to denounce the warning as inadequate even though, by federal statute, states had no power to require different warnings (10).

Other examples of complicated scientific questions addressed by tort law include the well-publicized issues of whether Agent Orange injured specific soldiers who served in Vietnam, whether above-ground nuclear weapons testing injured certain personnel who were in the vicinity of the blasts, what should asbestos manufacturers and cigarette makers have known about the dangerousness of their products decades ago, and whether recognized dangers can be reasonably removed from useful products and services, such as ending the AIDS risk from blood transfusions (11).

Promoting the Wrong Conduct

Perhaps these troubling aspects of American tort law could cheerfully overlooked if the fear of tort liability promoted so desirable behavior. Although economic models can be constructed to show how legal rules channel conduct in the right direction (real world considerations muddy the picture. First, individuals, enterprises have good reasons to act carefully apart from fear of liability. These safety-promoting forces include concern for one's own safety (for example, by airplane pilots), moral inhibitions against endangering others, competitive pressures (for example, preservation of product reputation), and the vast array of administrative regulation that increasingly pervades modern life [(for example, from FDA (Food and Drug Administration) to OSHA (Occupational Safety and Health Administration) and down the alphabet)]. These forces do not prevent all unreasonably dangerous conduct, but there are reasons to be skeptical about whether tort law importantly fills the gap. Ignorance of the law is one; for example, engineers and scientists are often kept in the dark about a company's product liability litigation, in part because the lawyers consider a firm's chances of being sued and held liable to resemble the outcome of a lottery (13). Incompetence is another. Some people are awkward, stupid, or possess bad judgment and cause accidents regardless of their efforts at avoidance. At the organizational level even if top management wants to emphasize safety, this can be difficult when prevention efforts reduce profits now and pay off only in less visible lawsuits avoided in the future—when the employee responsible for a problem may have moved on to another firm.

Despite the threat of liability, some people have too much at stake to take reasonable care. These include physicians who know they are no longer competent but cannot bring themselves to give up their careers, and small manufacturers who know their main product could be made safer but who would go bankrupt if they recalled or retooled in the way required.

Finally, the purchase of liability insurance blunts the threat that carelessness will bring financial repercussions. To be sure, financial pressure can be reintroduced by the insurers through devices like deductibles, coinsurance, threats of nonrenewal, underwriting conditions, and price differentials that reflect the insured's litigation experience. But it is doubtful whether these sometimes-employed private incentives actually prod the behavior that the public wants (14). The extent, if any, to which tort law actually promotes safety is, in the end, an empirical question; unfortunately, the results of studies to date are largely inconclusive (15).

Even if tort law promoted safety a little bit, it carries with it considerable costs. It may have significant negative impacts on behavior. For example, liability concerns are said to cause competent physicians to stop delivering babies, enterprises to withdraw socially desired products from the market, and cities to close recreational facilities desired by the community (16, 17). Liability jitters may discourage firms from undertaking important research or from bringing to market beneficial inventions such as vaccines and contraceptives (18). More generally, it is argued that the existing legal system, by threatening potentially crippling liability, favors the status quo, even though, overall, new development promotes safety (19). Another cost of the liability system involves behavior undertaken only to protect the actor from litigation, such as the medically unnecessary tests doctors order from fear of unwarranted lawsuits (20).

Incurring Enormous Administrative Costs While Compensating Inconsistently

If tort law fails as a behavioral control mechanism, is it justified as a mechanism for compensating accident victims? On this score, the

current system is ludicrously inefficient. As shown in *West v. JJP*, a startling proportion of the money paid for liability insurance goes for purposes other than to compensate claimants. One recent study found that costs of litigation, primarily lawyers' fees, roughly equal what claimants receive as compensation (21). But this only begins the indictment. That study excluded brokers' fees, other marketing expenses, and other insurer overhead costs (to say nothing of insurer profits).

Moreover, only a small portion of the claimant's recovery is for actual losses. A fair portion duplicates compensation from other sources such as health insurance, disability income insurance, and other employee benefits (22). Furthermore, as much or more money is paid out for pain and suffering damages as to replace real economic losses (23). Jeffrey O'Connell, for example, estimates that only about 15% of the insurance dollar is returned to claimants to pay for actual losses (24).

Many people think it is right that accident victims receive compensation for pain and suffering. Yet, in the end, the economic burden of those damages generally falls on consumers in the higher prices they pay for products and services. For this same reason, it is naïve to think that pain and suffering damages actually punish people for their wrongdoing. As a practical matter, personal injury lawsuits are almost only brought when the defendant is an insured individual, an enterprise, or a governmental body. These pools of money, called "deep pockets" by the defense bar, are institutions, not human beings.

Even if some payment for serious pain and suffering seems justified, two aspects of the current system remain troubling. (i) In small injury cases, plaintiffs recover pain and suffering damages primarily because the defense insurer wants to settle the case to save legal expenses and to avoid the risk of a giant jury award. The claimant's lawyer knows how to exploit that wish. (ii) Some terribly injured victims are awarded enormous sums. In the spermicidal jelly birth defect case noted earlier, the plaintiff child won \$3 million for pain and suffering. But is it really the function of tort law to make some people millionaires—no matter how badly they are injured?

The idiosyncracies of personal injury law as a compensation system are well illustrated by the Bendectin saga (25). Bendectin, an antinausea drug, was prescribed to as many as 30 million pregnant women worldwide between 1957 and 1983. Some claim that Bendectin causes birth defects, and since 1977 hundreds of lawsuits have been filed against its manufacturer, Merrell Dow. Although the defendant strongly denied that Bendectin is harmful, escalating legal fees and the risk that a jury might see things differently were enough to make Merrell Dow offer to settle all claims for \$120 million. It withdrew the offer, however, when a federal appeals court ruled that the settlement could not be binding on those who wished to pursue their claims on their own. About 1200 claimants then tried their cases together in a single lawsuit. The jury found that they had not proved Bendectin was responsible for their injuries. Suddenly, claimants who under the settlement offer stood to receive an average of nearly \$100,000 each got nothing. Several individual Bendectin cases have since been tried. Most claimants have lost. But a handful have convinced their jury that Bendectin was the culprit after all. Indeed, in one case the jury awarded a single victim \$20 million in compensatory damages and \$75 million in punitive damages, although, because of continuing legal complications, it remains unclear whether any of these winning claimants will ever collect.

This may make for a fascinating story. But if you were interested in compensating children with birth defects, it is hard to imagine that you would set about doing it in this haphazard way. Note, too, as *West v. JJP* also shows, there is often a long delay between injury and recovery, and the award is normally paid out in a lump sum (a clear advantage to the lawyer), rather than in periodic payments the

way that Social Security, workers' compensation, private disability insurance, and health insurance are paid.

The cases noted above also reveal something of the "justice" of the tort system. People often obtain a far cry less than what an informed and dispassionate third party would think they deserve. What counts is one's lawyer, whether one digs up the right evidence and secures the right experts, whether the claimant is financially and psychologically able to hold out for a trial rather than settle for a smaller sum to pay bills or relieve anxiety, where the case is litigated, and who the injurer is (especially, how well insured the injurer is). Anyway, only a tiny portion of personal injury cases are tried in court; nearly all are settled by rough and ready rules of thumb in circumstances under which the negotiating talents of the attorney can play an important role.

Juries award punitive damages in a small proportion of cases, perhaps between 1 and 3% (26), and in that sense too *West v. JJP* is atypical. Moreover, punitive damage awards are often modified by trial judges (as we saw in *West*), overturned on appeal, or diminished in posttrial settlements. Nonetheless, they are sometimes enormous in amount and are awarded for conduct that many would consider at worst to be somewhat knowing negligence. Although it is easy to appreciate that a riled up jury would want to vent its outrage at a defendant, it is less clear that the fairly wide-open award of punitive damages well serves this purpose.

Pursuing Alternatives

Are there sensible alternatives? So far, the American Bar Association and its various study commissions have only endorsed proposals for minor tinkering with the system (27). Yet, bolder reforms are available. One strategy is to focus on certain troubling accidents and tailor no-fault compensation plans to each of them. For example, Virginia has recently eliminated malpractice claims relating to so-called "bad baby" cases and instead has substituted a birth-related neurological injury compensation plan, funded primarily by obstetricians and by hospitals where babies are delivered. If a child suffers severe neurological injuries connected to the birth process, the plan will provide generous compensation without requiring proof of physician negligence—but the child will be deprived of the chance to win the bonanza level of pain and suffering damages that might come with a successful tort suit (28).

The National Childhood Vaccine Injury Act of 1986 is similar (29). Children who suffer substantial adverse consequences of vaccines (the plan is aimed mainly at the side effects of the anti-pertussis vaccine) can obtain generous compensation, including up to \$250,000 for pain and suffering, from a federally created fund financed by an excise tax on the vaccines. Although this program allows families to choose a lawsuit rather than accept the compensation offered by the plan, the Act includes obstacles to discourage litigation. It is too soon to appraise how the Virginia plan and the vaccine-damaged children plan will actually function.

We have far more experience with two considerably broader compensation plans—auto no-fault insurance and workers' compensation. The latter, adopted by all of the states starting in the 1910s, generally substitutes a no-fault and employer-funded compensation scheme for personal injury lawsuits against the employer. In many respects, workers' compensation has been extremely successful, and its protections could be extended to injuries not related to work and to dependents of workers. Yet its income replacement provisions, especially for the long-term disabled worker, have never been very generous. Nor has the system been able to free itself from the involvement of lawyers, especially in those troublesome permanent partial disability cases, which, despite their small numbers, account

for a considerable portion of the money awarded (30).

The experience with auto no-fault insurance is also a mixed bag (31). First, fewer than half the states have adopted the idea, and second, only two states, Michigan and New York, have both provided substantial no-fault victim benefits and removed the bulk of the claims from the tort system. In those two states more victims get benefits, they are paid promptly, and auto insurance costs are down from what they would otherwise have been. This has occurred because legal fees and pain and suffering damages are eliminated from the smaller injury cases, with a resulting 75% or more reduction in the number of liability claims made.

One tort reform strategy would be to push Michigan and New York style auto no-fault insurance nationally. But this would still leave in the personal injury law system the scientifically more complex and currently most alarming areas of litigation, those concerning product liability, toxic materials, and medical malpractice. Although it is possible to imagine the piecemeal adoption of compensation plans in those areas, perhaps patterned after the vaccine-damaged children's plan, a bolder alternative is represented by the New Zealand solution.

In New Zealand there are no private lawsuits by accident victims (32). Victims claim generous compensation from a national agency for income replacement, medical expenses, rehabilitation costs, and other losses. Seriously injured victims obtain up to \$NZ 27,000 for serious pain and permanent impairment. The scheme is funded by contributions from employers (based loosely on the claims that employees in their industries make on the fund for both work-related and non-work-related accidents), from motorists, and from general taxes. In 1991, New Zealand will implement changes to put those disabled by illness on a par with those disabled by accident, thereby achieving the sort of equity that was envisioned at the outset.

Although we could adopt a similar scheme in the United States, it seems rather a long way off politically, even if it were a good idea. A special committee of the prestigious American Law Institute is now reexamining this entire subject, and an American Assembly (sponsored by Columbia University) devoted to tort reform is to be held in mid-1990. The findings and recommendations of both of these endeavors should be of great interest to the legal and scientific communities.

Adopting Balanced Reforms as the First Step

In the meantime, states might adopt two balanced reforms that would help victims, consumers, and business (33). First, the less serious personal injury cases could be taken out of the tort system, and medical care and wage replacement needs could instead be met through mandatory employee benefits and an improved Medicaid system. Second, the seriously injured cases could remain in the tort system, but with new rules. Successful plaintiffs would have their legal fees paid by defendants, and their own carelessness would not be held against them in determining the amount of their recovery (which is the situation in workers' compensation, for example). On the other hand, they would only be compensated for those economic losses not already covered by health insurance, routine employee benefits, and basic social insurance schemes such as Social Security and workers' compensation. Further, pain and suffering awards would be subject to a ceiling of, say, \$150,000.

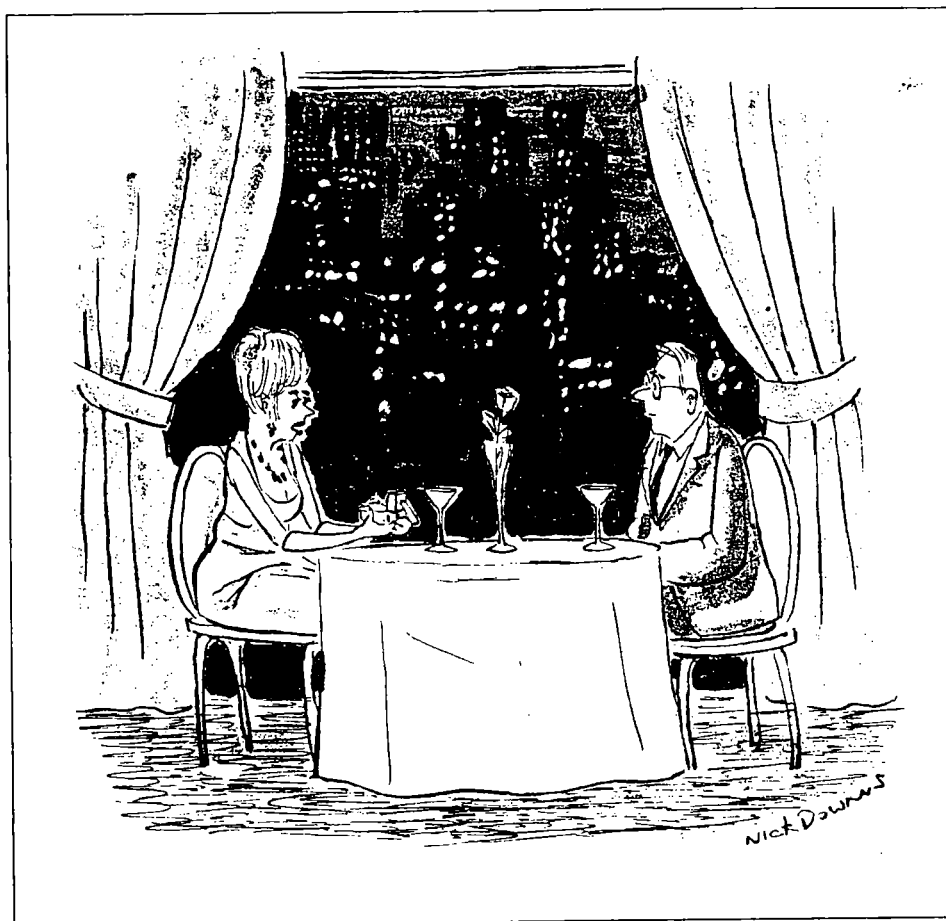
This two-part reform is not perfect, and it would not keep all scientific disputes out of the courtroom. But it would treat those who now use the tort system in a manner more fitting today's world, a world in which the real choice is which insurers and enterprises are to provide what level of compensation to accident victims of all

sorts. Lynette West should be promptly compensated for economic losses, without needing to prove the cause of her illness that anyone was at fault. But, when she apparently suffered permanent harm, having JJP pay her and her lawyer \$1.1 million approximately 7 years after the event makes no sense.

REFERENCES AND NOTES

1. The "facts" presented here are taken from *West v. Johnson & Johnson Products*, 174 Cal. App. 3d 831, 220 Cal. Rptr. 437 (1985), cert. denied, 479 U.S. (1986).
2. *Barker v. Lull Engineering Co., Inc.*, 20 Cal.3d 413, 573 P.2d 443, 143 Cal. 225 (1978). This test does not require the product manufacturer to have anything wrong, but only that there was something wrong with the product. "strict product liability" reflects the idea that the cost of product injuries should be internalized into the cost of the product even if there was nothing identifiable negligent about the manufacturer's conduct. Subsequent to *West*, the California Supreme Court adopted a different standard for certain socially important products, such as pharmaceutical drugs, where it can be shown that the danger caused the victim's injury was not reasonably knowable at the time the product was manufactured. Liability in such a case depends on proof of negligence [*Brown v. Superior Court*, 44 Cal.3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988)]. Whether the *Brown* doctrine would apply to tampons has not yet been decided.
3. California's legal standard for the award of punitive damages was subsequently tightened to require "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." The new standard also requires proof by "clear and convincing evidence." Cal. Civil Code §31 (West Supp. 1990).
4. American lawyers almost invariably handle personal injury cases for claimants on a "contingency fee" basis; the lawyer is only paid if the plaintiff collects something. Moreover, the amount of the fee is a percentage of the recovery, typically one-third to one-half depending on the nature of the case and how far the litigation goes.
5. *Product Liability: Verdicts and Case Resolutions in Five States* (U.S. General Accounting Office, Washington, DC, September 1989).
6. G. Eads and P. Reuter, *Designing Safer Products: Corporate Responses to Product Liability Law and Regulation* (RAND Corp., Santa Monica, CA, 1983), p. 133.
7. *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986), proceeding 243 Kan. 291, 758 P.2d 206 (1988).
8. *Wells v. Ortho Pharmaceutical Corp.*, 788 F.2d 741 (11th Cir. 1986), reh'g denied banc, 795 F.2d 89, cert. denied, 479 U.S. 950 (1986).
9. *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), cert. denied, 479 U.S. 1062 (1984).
10. The consequence of complying with FDA warnings has become a very controversial issue in tampon-caused TSS cases. Now that the FDA requires certain manufacturer warnings, can victims argue to juries that those warnings are inadequate? Although most courts have said "no," not all have agreed. Compare *Moore v. Kimberley-Clark Corp.*, 867 F.2d 243 (5th Cir. 1989) (reflecting a majority position) with *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987).
11. For a thoughtful analysis of the system's failure to handle well the causation issue in modern hazardous substances litigation and a call for the use of a "federal Science Panel" see T. Brennan, *Cornell Law Rev.* 73, 469 (March 1988).
12. See generally, G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale Univ. Press, New Haven, CT, 1970); W. Landes and R. Posner, *The Economic Structure of Tort Law* (Harvard Univ. Press, Cambridge, MA, 1987); and S. Shavell, *Economic Analysis of Accident Law* (Harvard Univ. Press, Cambridge, MA, 1987).
13. See (6), p. 94.
14. See generally, S. Sugarman, *Doing Away With Personal Injury Law* (Greenwood Westport, CT, 1989), pp. 12-18.
15. ———, *ibid.*, pp. 21-23. Three types of studies have been mounted. One is survey research to determine whether people have changed their conduct in response to changes in the law [J. Wiley, *South. California Law Rev.* 55, 34 (January 1982); D. Giveler, W. Bowers, C. Blitch, *Wisconsin Law Rev.* 1984 (no. 2), 443 (1984)]. A second approach is somewhat anthropological, where the researcher seeks to get inside an organization and observe how its key actors react to legal pressures [for example (6)]. A third method relies on economic techniques; alternative legal regimes are modeled and then tested with data sets that have been generated for other reasons. This approach has been primarily applied to examine the impact of auto no-fault insurance on the accident rate [E. Landes, *Law Econ.* 25, 49 (April 1982); P. Zador and A. Lund, *J. Risk Insurance* 53, 23 (June 1986)].
16. S. Carroll and N. Pace, *Assessing the Effects of Tort Reforms* (RAND Corp., Santa Monica, CA, 1987), p. 33; E. McGuire, *The Impact of Product Liability* (The Conference Board, Res. Rep. no. 908, New York, 1988); Institute of Medicine, *Medical Professional Liability and the Delivery of Obstetrical Care* (National Academy Press, Washington, DC, 1989), vol. 1, pp. 38-39, 46, 73-89.
17. G. Priest, *Yale Law J.* 96, 1565 (June 1987).
18. See generally, P. Huber, *Liability: The Legal Revolution and Its Consequences* (Basic Books, New York, 1988); C. Djerassi, *Science* 245, 356 (1989); and R. Mahoney and S. Littlejohn, *ibid.* 246, 1395 (1989).
19. P. Huber, *Columbia Law Rev.* 85, 279 (March 1985).
20. The American Medical Association estimates the annual cost of defensive medicine to be between \$15 and \$40 billion [Committee on Professional Liability, *Study of Professional Liability Costs* (American Medical Association, Chicago, IL, 1988) (mimeo); *Study of Professional Liability Problems* (American Medical Association

- Chicago, IL, 1984) (mimeo)].
21. J. Kakalik and N. Pace, *Costs and Compensation Paid in Tort Litigation* (RAND Corp., Santa Monica, CA, 1986).
 22. Tillinghast, a Towers Perrin Company, *An Analysis of Double Recovery of Damages in the State of California* (Association for California Tort Reform, Sacramento, CA, June 1989) (mimeo).
 23. See (17), p. 1554.
 24. J. O'Connell, *San Diego Law Rev.* 23 (no. 1), 17 (1986); *Minnesota Law Rev.* 60, 501 (February 1978).
 25. The story related here is taken from Sugarman [(14), pp. 44-45]. For the most recent developments, see *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988), cert. denied 110 S. Ct. 218 (1989), and *Ealy v. Richardson-Merrell, Inc.*, 1990 U.S. App. (LEXIS 3427) (awarding judgment for the defendant on the ground that expert testimony that Bendectin causes birth defects is "without scientific foundation").
 26. M. Peterson, S. Sarma, M. Shar'ry, *Punitive Damages: Empirical Findings* (RAND Corp., Santa Monica, CA, 1987).
 27. See, for example, Special Committee on the Tort Liability System, *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law* (American Bar Association, Chicago, IL, 1984); *Report of the Action Commission to Improve the Tort Liability System* (American Bar Association, Chicago, IL, 1987) (mimeo); and Commission on Mass Torts, *Report to the House of Delegates* (American Bar Association, Chicago, IL, 1989) (mimeo). White House-sponsored reform initiatives of the Reagan years were a one-sided effort to curtail victim rights that failed to recognize the need for accident victim compensation. U.S. Attorney General, Tort Policy Working Group, *Report on the Causes, Extent and Implications of the Current Crisis in Insurance Availability and Affordability* (U.S. Department of Justice, Washington, DC, 1986).
 28. For discussions of the Virginia plan, adopted in part to ensure the continued availability of medical malpractice insurance in the state, see Institute of Medicine, *Medical Professional Liability and the Delivery of Obstetrical Care*, vol. 2, *An Interdisciplinary Approach* (National Academy Press, Washington, DC, 1989).
 29. See generally, V. Schwartz and L. Mashigian, *Ohio State Law J.* 48 (no. 2), 387 (1987).
 30. J. Chelius, *Workplace Safety and Health: The Role of Workers' Compensation* (American Enterprise Institute for Public Policy Research, Washington, DC, 1977).
 31. *Compensating Auto Accident Victims: A Follow-up Report on No-Fault Auto Insurance Experiences* (U.S. Department of Transportation, Washington, DC, 1985).
 32. For descriptions and discussions of the New Zealand scheme, see G. Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (Oxford Univ. Press, Wellington, NZ, 1979); W. Hodge, *Insurance Counsel J.* 50, 222 (April 1983); Law Commission, *Personal Injury: Prevention and Recovery* (Wellington, NZ, 1988). For critical views, see J. Henderson, *Univ. Chicago Law Rev.* 48, 781 (summer 1981); and R. Miller, *Univ. Hawaii Law Rev.* 11, 1 (fall 1989).
 33. See (14), pp. 167-200.



"It may be indistinguishable from a diamond chemically, Harry - but to me, charcoal is charcoal."

PHOTOCOPY PRESERVATION

THE MYTH OF PRODUCT-LIABILITY AND PRODUCT INNOVATION

For nearly a decade, those groups supporting product liability legislation have made allegations about the number of lawsuits, the size of awards, and the cost of liability insurance. Each allegation has been without foundation.

The latest in this series of allegations offered by those who wish to perpetuate the myth of a "product-liability crisis" is that current laws stifle innovation and keep "safe" products off the market. Manufacturers, they claim, do not market safe products because of large judgments and insurance costs.

The examples used by those who make this argument fail to support that position. In fact, these favorite examples are a testimony to the effectiveness of existing laws at removing from the market dangerous and defective products that pose a severe and unacceptable risk to consumers.

- Monsanto Asbestos Substitute-- Perhaps the most egregious and misrepresented example used by those urging reform is that Monsanto was unwilling to market a "safe" substitute for asbestos. However, what is not mentioned was that EPA found reason to believe that the product caused cancer. Medical experts have concurred in this finding.
- Puritan-Bennett Anesthesiology Machines-- Manufacturers have also pointed to the loss of allegedly safe anesthesiology machines. However, at least four deaths have been attributed to defects in Puritan-Bennett machines.
- The Sturm Ruger Revolver-- Supporters of reform believe that the manufacturer of this gun was punished for making a safe product. In fact, this product was intentionally made without a common safety device, and the company knew that the gun was prone to accidental discharge and had failed numerous safety tests.
- Jeep C-J-- These vehicles were marketed as being safe by American Motors before production was ceased in 1986. In fact, passenger death rates in the jeeps were five times that of large cars. The vehicles could roll over at very low speeds, and passengers were easily ejected.
- Copper 7 IUD-- Proponents of reform claim that Searle took this product off the market despite a history of safety. In fact, Searle knew that the product caused disease and sterility at alarming rates. The company nevertheless marketed the product. After a Court forced Searle to turn over internal documents about this wanton conduct, plaintiffs began winning suits against the company.

MONSANTO ASBESTOS SUBSTITUTE

The Administration and the manufacturing community have claimed that the existing product liability system has prevented the marketing of a safe substitute for asbestos-- calcium sodium metaphosphate. Vice-President Quayle has stated that this is the "quintessential example" of the product liability system keeping safe products off the market.

Although the development and marketing of a safe substitute for asbestos would be extremely beneficial, replacing one dangerous product for another would not.

What the manufacturers failed to mention is that the Environmental Protection Agency reviewed the test data regarding calcium sodium metaphosphate and promptly wrote a letter to Monsanto stating that "the evidence . . . offers reasonable support for the conclusion that calcium sodium metaphosphate fibers can cause cancer."

The Chairman of Mr. Sinai Hospital's Department of Environmental Medicine, Dr. Phillip Landrigan -- a leading expert in occupational disease evaluated this test data and wrote:

Based on my reading of this material, I am extremely concerned about the potential carcinogenicity of sodium calcium metaphosphate. . . . [T]he rate of increased incidence of fibrosarcoma in the injected animals is comparable to the rate of increased malignancy that is observed when chrysotile (asbestos) is injected in a similar fashion. (emphasis supplied).

While all tests of this sort are subject to some uncertainty, calcium sodium metaphosphate seems a far cry from a "quintessential example" of a safe product driven unfairly from the market.

PHOTOCOPY
PRESERVATION

PURITAN BENNETT ANESTHESIOLOGY MACHINES

Anesthesia gas machines manufactured by Puritan-Bennett Co. have been called "safe" products that have been unjustly forced from the market by the existing product liability system.

In fact, with a "safety record" that includes four deaths and a pattern of corporate indifference, the removal of this product from the market is a tribute to the current system:

In 1984, a House Committee held hearings in order to examine these deaths and Puritan-Bennett's response to the incidents. These hearings revealed that:

- All four deaths occurred during routine surgery. Puritan-Bennett failed to notify the FDA after the first two deaths.
- Investigation by the FDA revealed that a valve on one of the machines had stuck, resulting in a lethal overdose. The company knew of the tendency of this type of malfunction.
- The company failed to investigate the third death aggressively, and did not notify the FDA for nine months. The company did not tell the FDA of the fourth death.
- When the FDA did investigate it found that a different valve on the Puritan-Bennett machine had malfunctioned.
- The company had received complaints about these valves and about other defective features of these machine models.

The FDA found that Puritan-Bennett failed to investigate the defects adequately, "failed to conduct adequate design review of certain critical components" and that safer available designs should have been used.

If the current product-liability system had any impact in this case, it was to help remove a deadly defective product from the marketplace and to help deter dangerous corporate behavior.

PHOTOCOPY
PRESERVATION

THE STURM RUGER "OLD MODEL" REVOLVER

Supporters of product liability reform have cited Sturm Ruger as a manufacturer treated unfairly by the current system. They claim that the case of the Sturm Ruger "Old Model" revolver represents an example of a manufacturer being punished for marketing a product that is actually safer than others on the market.

In reality, the Sturm Ruger revolver represents an example of complete disregard for consumer safety:

- The revolver was designed without a safety device to prevent accidental discharge. Such devices are routinely added to domestic firearms and are required by Federal law on all imported handguns.
- The company knew since 1968 that the handgun was prone to accidental discharge. At that time, the gun failed a standard "drop test" administered by the Bureau of Alcohol, Tobacco and Firearms.
- In-house tests demonstrated that the weapon could discharge if subjected to even a light blow on the hammer, such as hitting it on a door frame. The company changed nothing in response to these test results.
- Sturm Ruger has been receiving reports of accidental discharges resulting in serious injury or death since 1962. The model was never recalled, even though it is now subject to 20-30 suits based on accidents each year.
- In 1979, an Alaska court found that Sturm Ruger knew that the "Old Model" was defectively designed and that this defect had resulted in injuries and death, but that the company continued to market the gun in reckless disregard for the public safety. [Sturm Ruger v. Day, 594 P. 2d 38 (Ak. 1979)].

This product was not only less safe than similar products on the market, but the manufacturer knew of the dangerousness of the product. Indeed, the company continued to market it despite repeated incidents of injury and death resulting from accidental discharge.

PHOTOCOPY
PRESERVATION

THE JEEP C-J

Proponents of product liability reform like to point to the well-known American Motors Corporation (AMC) Jeep C-J line as a safe and popular product lost to consumers because of liability suits.

In fact, the Jeep C-J was neither safe nor discontinued because of liability suits.

These were extremely unsafe vehicles:

- Because of narrow width, short length, and a very high center of gravity, the C-J would very easily roll over, even at very low speeds.
- Vehicles like the C-J have occupant death rates nearly five times that of large cars. [Insurance Institute for Highway Safety, Status Report, Vol. 15, 1980].
- Rollovers occurred in the C-J during usual on-road maneuvers such as making a right hand turn, or trying to switch lanes.
- Because of inadequate restraints, a crash in a C-J resulted in death 40% more often than crashes involving passenger cars.

AMC apparently was indifferent to these safety concerns because it even ran deceptive ads suggesting that the vehicles were safer than they actually were. AMC stopped running the ads, without admitting liability, after the Federal Trade Commission issued a complaint.

If the Jeep C-J was discontinued because of liability suits, then this would again be a victory for the current system. However, at the time that the vehicle was discontinued, the Washington Post reported:

The Jeep C-J has been criticized as unsafe by consumer advocates and has been the subject of product liability lawsuits, but company spokesman Jerry Sloan said the changing demands of customers, not concerns over safety, prompted the Jeep model's demise. [November 28, 1985, page F1 (emphasis added)]

PHOTOCOPY
PRESERVATION

THE COPPER 7 I.U.D.

Proponents of product liability reform have testified that Searle took its Copper 7 IUD off the market because of unjustified "wild card" verdicts.

They claim that the Copper 7 had "a long history of safe use."

What they did not say is that:

- Searle was warned as early as 1974 that this IUD should not be inserted in women who had never had children.
- By 1975, 40% of Searle's sales were to these women.
- By 1976 Searle had evidence that these women were developing pelvic disease -- often leading to sterility -- at alarming rates.
- Nevertheless, the company continued to market to these women.

Proponents have also claimed that Searle has won all of the suits brought by these women. In fact, the women lost the early cases because Searle would not release internal evidence.

After a court order and a \$65,000 sanction, Searle was forced to release its records. It began losing these lawsuits.

Searle's intransigence illustrates the difficulty that injured plaintiffs already face against powerful corporate defendants.

**PHOTOCOPY
PRESERVATION**

March 16, 1990

THE WASHINGTON POST

Bendectin Jury Award Overturned

By Tracy Thompson
Washington Post Staff Writer

A three-judge panel on the D.C. Circuit Court of Appeals has overturned a jury in a case involving Bendectin, a drug once used to treat morning sickness in early pregnancy that has been linked to birth defects.

The decision was based on an appeals court ruling last year in another Bendectin case that found the weight of scientific testimony offered on behalf of the injured children was not enough to justify a verdict in their favor.

The ruling yesterday reversed a \$20 million jury verdict for compensatory damages awarded to the parents of 10-year-old Sekou Ealy, a District resident who was born with congenital defects of his hands and arms. His parents charged that the defects were the result of his mother's taking Bendectin during her pregnancy.

The original jury verdict in a trial held before U.S. District Judge June Green was \$95 million, including \$75

million in punitive damages, making it one of the largest jury awards ever in a products liability case. But Green set aside the punitive damage portion of the verdict, ruling that there was no evidence of "willful or outrageous conduct" by the drug's manufacturer, Merrell-Dow Inc.

"We are obviously very pleased with the result," said Michael Nussbaum, an attorney for the Cincinnati-based drug manufacturer. "We have always maintained that Bendectin . . . does not cause birth defects."

But Barry J. Nace, an attorney for the Ealy family, said his clients planned to appeal.

There have been hundreds of lawsuits filed in recent years against Merrell-Dow charging that Bendectin was the cause of birth defects. Six of the cases have ended in verdicts for injured children; of those six, four have been in the District.

Of the four plaintiffs' verdicts here, two, including the Ealys' case, have been reversed on appeal. Another case is pending before U.S. District Judge Thomas Hogan on a motion by Merrell-Dow to set aside the jury verdict.

Only one of the plaintiffs' verdicts has resulted in the final award of money: a \$750,000 verdict awarded in 1983 by a D.C. Superior Court jury to the family of Mary Oxendine. Three weeks after that verdict, the first to go against Merrell-Dow, the company took Bendectin off the market.

PHOTOCOPY
PRESERVATION

EXECUTIVE SESSION #12
101st Congress, 2nd Session
May 22, 1990

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

EXECUTIVE SESSION

Tuesday, May 22, 1990, 10:00 a.m.; Room SR-253

1. S. 2434, permits implementation of DOT anti-drug program rule for recipients of Federal mass transit assistance (Robert Holleyman, Sheryl Washington)
2. S. 2181, the Weather Balloon Launch Site Act of 1990 (Steve Palmer)
3. H.R. 3000, the Fastener Quality Act (Pat Windham, Loretta Dunn)
4. S. 1981, the Telecommunications Equipment Research and Manufacturing Competition Act of 1989 (John Windhausen, Tom Cohen)
5. S. 1025, Authorizing Appropriations for the Magnuson Fishery Conservation and Management Act (Penny Dalton, Mike Nussman)
6. S. 1400, the Product Liability Reform Act (Linda Lance, Moses Boyd)
7. S. 2180, Removal of Certain Restrictions for the Vessel Arctic Sounder (Hal Creel)
8. S. 2263, Documentation for the Vessel Captain Daryl (Hal Creel)
9. S. 2404, Documentation for the Vessel Lady Rose Anne (Hal Creel)
10. S. 2498, Documentation for the Vessel Sea Devil (Hal Creel)
11. S. 2623, Documentation for the Vessel Rose (Hal Creel)
12. S. _____, Documentation for the Vessel M/V Pumpkin (Hal Creel)
13. S. _____, Documentation for the Vessel Bounty (Hal Creel)
14. Nomination of Andrew Camp Barrett (R), of Illinois, to be a Member of the Federal Communications Commission (reappointment) (John Windhausen, Becky Kojm) *indeed on the agenda / got voted against before but now supports doing all can do to get it open air waves*
15. Nomination of Rear Admiral William J. Kime to be Commandant of the United States Coast Guard (Mike Nussman, Becky Kojm)
16. Nomination of Rear Admiral Martin H. Daniell, Jr. to be Vice Commandant of the United States Coast Guard (Mike Nussman, Becky Kojm)

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17. Nomination of Rear Admiral A. Bruce Beran to be Commander, Pacific Area, United States Coast Guard (Mike Nussman, Becky Kojm)
18. Nomination of the following officer of the United States Coast Guard Reserve for appointment to the grade of rear admiral (lower half): George R. Merrilees (Mike Nussman, Becky Kojm)
19. Nomination of Tommy G. Thompson, of Wisconsin, to be a Member of the Board of Directors of the National Railroad Passenger Corporation (Robert Holleyman, Sheryl Washington, Becky Kojm)

wide support

S. 1400 -- "PRODUCT LIABILITY REFORM ACT"

Unintentional Bill "Glitches"

1. Scope of Sovereign Immunity Defense. Section 103(c)(3) provides that nothing in the bill would waive or affect any defense of sovereign immunity asserted by the United States. However, the "United States" is not the named defendant in all cases against the Federal government (e.g., actions against TVA). In some cases, Federal agencies and Federal officials are the named defendants (perhaps the only named defendants) and are in a position to assert immunity defenses as well.

In order to ensure that such defenses can continue to be asserted, section 103(c)(3) should be amended to read as follows:

(3) waive or affect any defense of immunity asserted by the United States or its agencies or officers;

2. Federal Court Jurisdiction. In order to avoid the bill's becoming the basis for Federal court jurisdiction in cases where there otherwise would not have been such jurisdiction and, thus, adding to the burden of the Federal court system, section 104 provides that Federal district courts "shall not have jurisdiction over any civil action pursuant to this Act, based on section 1331 or 1337 of title 28, United States Code."

The difficulty with this provision is that it would have the unintended affect of throwing out of the Federal court system actions brought against TVA founded on a product liability claim. TVA, a Federal agency and instrumentality, is not subject to the Federal Tort Claims Act; and actions brought against TVA have always been brought in Federal district court (or are removed to Federal district court if initially commenced in state court). Jurisdiction over such actions is founded on sections 1331 (Federal question) and 1337 (the TVA Act is a law regulating commerce). Without the change suggested below, actions against TVA would still be generally brought in Federal court -- except one, product liability actions, which would have to be brought and pursued in state court only.

This unintended effect on TVA litigation could be corrected, and the original intent of the the section not to enlarge Federal court jurisdiction preserved, by amending section 104 to read as follows:

Sec. 104. Nothing in this Act shall be construed to create or vest jurisdiction in the district courts of the United States over any product liability action subject to this Act.

Carol: Our legislative lawyers have developed these two "refinements" to S. 1400. If you have questions, please let me know.

X Lynn Marchese (marche): TVA Gov't Council

Thanks

Ch

Chris Eckel

TVA 475-4412

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? Stevens.

Consumer Federation

Linda Lance →

Gene Kimmelman
387-6121

Victor Schwartz - telephone 5/14/90

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discovery } ① knew/should know you harmed
rules } ② " " " " + class

Neutral

workers comp - AFL-CIO signed off; Consumers happy
wholesaler/distributor -

business

① pure drugs. ② sth = you know - more from disregard.
* remember victim has been compensated.
③ burden of proof - victim - that lawyers have supported.
④ bifurcation of the trial

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J. 1400

Innovation on Trial: Punitive Damages Versus New Products

RICHARD J. MAHONEY AND STEPHEN E. LITTLEJOHN

Innovation, scientific discovery transformed into valuable products, is a powerful asset for the United States in today's global economy, but it is being put on trial by the U.S. product liability system. Strict liability and huge jury awards, bloated by the uncontrolled imposition of punitive damages, have led to a proliferation of lawsuits, which in turn has created immense legal uncertainty for innovators who want to create new products. Because a high level of legal uncertainty and scientific innovation cannot coexist, new, safe products may be kept off the market and the scope of research and development restricted. Punitive damages constitute the driving force behind this problem, and both judges and legislators should aim at bringing them under control with legal reforms.

ECONOMIC SUCCESS FOR THE UNITED STATES IN THE YEARS ahead will depend mainly on innovative thinking, especially from scientists. New knowledge, creative solutions, and innovative products—advantages in the past—are becoming the necessities of the future. "More so than in any other economy," said David J. Teece of the University of California at Berkeley, "the United States today depends critically on its ability to innovate, and to capture the benefits from innovation, for its economic prosperity" (1, p. 3).

Monsanto focused on this need for more innovation a decade ago and fundamentally shifted its strategy toward the creation of novel, higher-value products through scientific discovery. At the strategy's heart is a concentration on chemistry and biology and, importantly, their intersection in the use of biotechnology to create new pharmaceutical and agricultural products. Monsanto now spends more money annually on research and development than on capital investment—\$650 million in 1988, about 7% of sales.

Still, research and development is an inherently unpredictable enterprise in which neither the pace of discovery nor the certainty of success can be guaranteed. Nevertheless, scientific uncertainty can be managed, whereas the legal uncertainty in the nation's courtrooms caused by product liability cannot. Monsanto's policy is to produce safe products based on sound science. Yet, no set of responsible actions by the company's scientists and development people can be identified which, if undertaken today, will ensure the legal accept-

ability of their innovations tomorrow.

Some products cannot be pursued. One such product was an asbestos substitute, a safe, biodegradable, and effective reinforcing phosphate fiber called calcium sodium metaphosphate. The unpredictable potential for further expansion or misapplication of product liability laws led Monsanto to cancel the product just before commercialization (2). A whole generation of lawyers has been schooled in asbestos liability theories that could possibly be turned against this or any similar substitute.

At the time of cancellation, the phosphate fiber program director, Joseph J. Narciso, observed that "seven-figure jury awards on claims without merit are enough to send shivers down anyone's spine" (3, p. 15). The costs of litigation are so high, the uncertainty of courtroom outcomes so great, and the possibility of multimillion dollar awards so real that winning every lawsuit would still have been a Pyrrhic victory.

Monsanto's experience is not unusual. Capable of managing the uncertainties of research but not the uncertainties of law, companies have no choice but to avoid the courtroom by withdrawing products, keeping others off the market, and restricting the scope of research and development at its earliest stages. As author Peter Huber concluded, "across the board, modern tort law weighs heavily on the spirit of innovation" (4, p. 14).

The chief executive officers of the nation's leading companies summed up the impact of product liability on innovation in a 1988 survey by the Conference Board. The study showed that uncertainty over potential liability had led almost 50% of the responding companies to discontinue product lines, nearly 40% to withhold new products, including beneficial drugs, and 25% to discontinue product research. Half the chief executives polled also reported that product liability had a major impact on our international competitiveness, and 75% expected product liability problems to grow in significance (5).

Strict Liability, Punitive Damages Halt Innovation

The slowing of innovation is directly attributable to a dramatic increase in product liability lawsuits caused not by more unsafe products or injuries but by two legal developments: The shift from negligence to strict liability and a continued increase in punitive damage jury awards (6). Strict liability generates added lawsuits. It brings thousands of product manufacturers into court regardless of their attention to product safety. Then, potentially massive punitive damage jury awards create uncertainty that cannot be managed along with innovation.

"To expand liability and provide unrealistically high compensa-

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tion can "only magnify our present predicament," said George L. Priest of Yale Law School (7, p. 234). As Huber explains, the negligence standard had focused on whether the "human actor on the scene was careful, prudently trained, and properly supervised" (4, p. 157). In this context, Huber contends, lay jurors can make reasonably sensitive intuitive judgments about people. The best scientists and researchers, from whom the greatest innovations come, can easily meet this test.

However, the change to strict liability in the 1960s shifted the issue from whether human conduct was negligent to whether a product was defective in design or manufacture (8). "Jurors," says Huber, "are not experts about technology itself, and intuition here is a terrible guide . . . (because) people everywhere underestimate the risks they know well and face every day and overestimate those that are new and foreign" (4, p. 157).

The result has been a vast expansion of legal liability for America's innovators. According to one study, "each year since 1974, the volume of product-related litigation has exceeded that of the previous year, sometimes to a substantial extent; nearly four times as many suits were filed in 1986 as in 1976" (9, p. ix). These lawsuits have grown substantially faster than have filings for any other kind of federal lawsuit, and filings at the state level are "almost certainly several times greater than federal filing levels" (9, p. v).

These data usually evoke rejoinders that the increase in litigation actually only involves a few industries, and then only a few products, with the large number of asbestos suits frequently cited. On the contrary, researchers have found thousands of federal product liability defendants and thousands of products leading to liability suits, with the cases widely dispersed across different sectors of the economy (9).

Arguments that the proliferation of liability suits are somehow related to an increase in unsafe products are also not supported by facts, as no relation can be found between the two. Priest concludes that "data on deaths and injuries cast great doubt on the proposition that the liability crisis derives from an increase in the underlying accident rate" (10, p. 203) and "provide no evidence that the expansion of litigation has affected the injury or death rate" (11, p. 194).

Product-related injuries have remained constant on an index basis before and during the escalation of product liability suits (7). In certain key areas, for example, the workplace, which accounted for 60% of product liability claims in 1985 in which large sums were paid, disabling injury rates remained relatively constant and death rates began dropping steadily in 1945, well before the increase in lawsuits (10). Similarly, the general aviation accident rate has shown consistent improvement since 1946, once again beginning before the lawsuit phenomenon (12).

When coupled with strict liability, huge punitive damage awards are the greatest cause of legal uncertainty for innovators (13) and the most attractive lure for lawyers filing lawsuits. Theoretically, punitive damages are meant to punish and deter, not to provide additional compensation (14). The law already ensures adequate compensation for nearly all conceivable harm, including noneconomic damages like pain and suffering, and usually does not account for additional payments from other sources.

The award of punitive damages is an anomaly peculiar to the United States, rare in Great Britain and Canada, and virtually unknown in the world's civil law countries (15). Before 1976, they were also virtually unknown in United States product liability cases (16). Legal scholars have been able to find only three earlier cases of appellate approval of punitive damages for defective products. Now, the same scholars say punitive damages are almost commonplace with multimillion-dollar awards occurring monthly (17).

In Cook County, Illinois, for example, the average punitive

damage award between 1980 to 1984 in personal injury actions had risen to \$1,934,000. Over six times as much money was awarded in punitive damages between 1980 and 1984 as was awarded during the previous 20 years combined (18).

A legal expert has found that, between 1922 and 1959, the highest punitive damage award affirmed by a California appellate court was \$10,000. In the 1960s the record jumped to \$250,000. In the 1970s, the highest was \$740,000. By 1986, a \$3 million punitive damage award had been approved, and in 1988 California appellate courts approved awards of \$14 and \$15 million in contract cases where the only actual damages were economic (19).

One case exemplifies the problem with punitive damages. Lederle Laboratories, a pharmaceutical company, followed Food and Drug Administration (FDA) instructions to the letter in producing and marketing a polio vaccine, only to have a Kansas jury hand down an \$8 million punitive damage verdict against it. The reason: The lay jury decided that the firm should have used a less effective vaccine, essentially overruling FDA doctors, scientists, and policy-makers who had told the firm to do otherwise. The verdict was later set aside by a narrow, four-to-three decision of the Kansas Supreme Court, but the company still had to pay the legal costs of its appeal (20).

The punitive damages system makes it too easy for lawyers to mislead jurors, many of whom possess little scientific background but believe in the possibility of a risk-free society, to enrich plaintiffs and their attorneys with multimillion-dollar windfalls. Too often, witnesses that plaintiffs' lawyers bring before juries to explain complicated scientific details are, in fact, advocates of fringe theories not generally accepted by most scientific authorities (21).

Few of the traditional safeguards usually afforded defendants are available in punitive damages cases. Most states have only vague and uncertain standards of conduct, require only minimum proof, and impose few limits on huge dollar awards, thus giving juries little practical guidance. The result: Conduct for which punitive damages may be awarded is whatever a single jury says it is. Then, with few exceptions, nothing stops different juries from awarding punitive damages in huge amounts against the same defendant for the same alleged conduct.

Proponents of punitive damages argue that such awards are rare. They overlook the ripple effect just a few huge punitive damage verdicts can have in triggering a rush to the courthouse by plaintiffs' lawyers to file new claims. Thus, for one to count the number of punitive damage verdicts, declare it small, and dismiss the problem ignores the role of punitive damages in creating great uncertainty for innovators.

The U.S. Justice Department has observed that punitive damages have become a legal lottery where many plaintiffs regularly file claims (22). Even though their probability of success is small and only about 5% of all cases filed end with a verdict (23), plaintiffs' lawyers recognize that if enough such claims are filed, they may eventually hit the jackpot.

Even if plaintiffs' lawyers do not hit the jackpot, the mere possibility of doing so results in higher settlements (24). In one sample, a study reports that settlements in claims where plaintiffs sought punitive damages were nearly 150% higher than in those where plaintiffs did not seek punitive damages. In another sample, the settlements were 60% higher because of this punitive damages "shadow effect" (24).

People who favor punitive damages also argue that verdicts making such awards are usually reduced upon appeal. On the contrary, verdicts against business defendants were reported to be reduced less than were awards against individuals. Not only do business defendants have larger punitive damage awards assessed against them, but they are also likely to pay a greater portion of

those awards. In addition, among all types of actions, punitive damages in product liability cases are reduced the least (25).

Researchers have found that corporate defendants are, in fact, more likely than individuals or public agencies to be the target of punitive damages and that juries also award more money when the defendants are institutions or organizations rather than individuals—the “deep pocket” effect (26). Neatly summarizing what is happening, West Virginia Supreme Court of Appeals Justice Richard Neely, in an appeal for national standards, explains that “as a state court judge, much of my time is devoted to designing elaborate ways to make business pay for everyone else’s bad luck” (27, p. 1).

Impact Greatest in Health Care, Aviation, and Basic Research

The result of this liability expansion has been a slowing of innovation in entire fields of inquiry, especially in those having to do with health care. The American Medical Association (AMA) has concluded that “product liability issues are having a profound negative impact on the development and utilization of potentially life-saving medical technologies” (28, p. 88).

Even when high litigation products like the Dalkon Shield and Bendectin are excluded from analysis, the product liability impact on pharmaceuticals has been severe. For non-Dalkon Shield and non-Bendectin defendants between 1981 and 1986, the annual number of lawsuits filed doubled and the number of different defendants nearly doubled. The former rate is greater than the total increase of federal product liability litigation, whereas the latter rate is only exceeded by that of asbestos litigation (9). In just the past 4 years, the number of punitive damage awards in all pharmaceutical product liability cases was fifteen times greater than in the entire decade of the 1970s (29).

Ironically, pharmaceuticals are among the most cost-effective elements in health care, which is already strained by liability-induced annual payments of \$8 billion in medical malpractice insurance premiums and some \$20 billion for unnecessary tests and procedures (30).

The inhibiting effect of expanded product liability may permeate a firm’s entire decision-making process. For example, among groups of pharmaceutical industry representatives surveyed, some offered the example of the bench chemist “who simply chooses not to pursue his curiosity about pregnancy-related drugs because he knows that the firm’s senior management is unlikely to fund later and more costly stages of the development process for such a high-hazard product” (6, p. 26).

Elizabeth B. Connell, chairman of the FDA Obstetrics and Gynecology Devices Panel, says that the United States is losing its leadership role in the area of contraceptive technology, “with potentially disastrous consequences for women and men in this country and elsewhere” (31, p. 46). Now, Johnson & Johnson and American Home Products are the only U.S. companies conducting contraceptive research, and the remaining researchers are three nonprofit, publicly funded organizations with a total annual budget of \$16 million (32).

In 1983, Merrell Dow Pharmaceuticals withdrew the anti-nausea morning sickness drug Bendectin, also widely used by health care professionals and approved by the FDA. Legal bills and insurance premiums, plus other product costs, were far in excess of Bendectin’s \$12 to 13 million annual sales (33).

The outlook for future drugs is not auspicious. The AMA noted that basic biomedical research is deteriorating, and small companies involved in innovative research are delaying or foregoing product releases (28). The National Academy of Sciences has concluded that

“given the extremely high cost of vaccine-related injuries, many manufacturers may be unwilling to initiate or pursue the derivation or distribution of a vaccine to prevent AIDS [acquired immunodeficiency syndrome]” (28, p. 86). For example, Huber estimates that the “tax” imposed by liability law on childhood vaccines for insurance accounts for 95% of the price (4).

Medical equipment has been affected too. Union Carbide has foregone developing a suitcase-sized kidney dialysis unit and offering intravenous equipment (34). The sole domestic manufacturer of anesthesia gas machines, Puritan-Bennett, stopped making the devices in 1984, leaving the market to two foreign competitors (33).

Other affected industries include general aviation, where the U.S. advantage in aircraft production is eroding because of liability costs. Between 1977 and 1985, paid claims for judgments, settlements and defense increased from \$24 million to \$210 million in the general aviation industry. In 1979, that industry produced nearly 18,000 planes, but by 1986 the number had decreased to less than 1,500 planes. Overall industry employment is down 70% (12).

Some companies, while not totally withholding a product from market, may severely restrict permitted applications and users. One chemical manufacturer refused to permit a product to be used in the manufacture of aircraft landing gear, although it believed that this application would have enhanced the safety of the gear (6).

A similar phenomenon has been observed when U.S. companies or consumers seek to purchase a needed product from abroad. In one case, a U.S. lawyer had to travel to Europe in order to convince the supplier that “the legal climate in North Carolina, where the product was to be used, was not as ‘hostile’ as in states more frequently discussed in the press” (6, p. 40). In another instance, the Japanese maker of a vaccine for Japanese encephalitis withdrew the product from the U.S. market in June 1987 because of liability concerns, leaving U.S. travelers to Asia unprotected (35).

Even centers of basic research like the Lawrence Livermore Laboratory in California and the University of Wisconsin at Madison are finding it difficult to transfer useful discoveries into the marketplace because of liability concerns. Stephen M. Matthews of the Livermore Laboratory has tried unsuccessfully to generate interest in his food irradiation invention for killing insects, larvae, and parasites that infest freshly harvested fruit and vegetables. At the University of Wisconsin, patent counsel Howard W. Bremer says universities are reluctant to license patents to small companies, fearing that plaintiffs may find colleges’ deeper pockets more attractive targets for lawsuits (36).

Judges, Lawmakers Beginning to Reform Punitive Damages

State and federal courts, the Supreme Court, state legislatures, and Congress are just beginning to take action on the problems caused for innovation by the uncontrolled imposition of punitive damages. These early reforms, although encouraging, currently affect only a handful of the 50 states.

Last year, the Georgia Supreme Court ruled that a \$5 million punitive damages award, more than 100 times the amount of the compensatory damages award, violated the excessive fines clause of the Georgia Constitution (37). The California Supreme Court also refused to extend strict liability to makers of prescription drugs and limited their “market share” liability, thereby restricting exposure to punitive damages (38). Recently, the Hawaii Supreme Court ruled that an award of punitive damages requires the higher proof burden of clear and convincing evidence (39).

This year, U.S. District Court Judge H. Lee Sarokin concluded that companies sued in mass tort product liability litigation should

be punished only once for the alleged wrongful conduct, although he acknowledged in a subsequent decision that he did not have the authority to limit what other courts might do. He observed that "astronomical punitive damage awards may run counter to the public interest by inhibiting research and development of new products, including those aimed at promoting good health and curing disease." Judge Sarokin called for a reexamination of the purpose and constitutionality of punitive damage awards in his first ruling and for uniform legislation in his subsequent decision (40).

The U.S. Supreme Court has also given punitive damages greater attention, especially in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.* Although in that case the Court refused to use the Excessive Fines Clause of the Eighth Amendment to restrict punitive damages, it noted that a different outcome might result if a portion of the punitive damages were paid directly to the government (41). The Court said an inquiry into possible due process limits awaits "another day" (42, p. 4990) because this question was improperly presented before the court, but suggested that the present system of awarding punitive damages may violate the Due Process Clause.

Justices William Brennan and Thurgood Marshall seized upon this suggestion and stated that "without statutory (or at least common law) standards for the determination of how large an award of punitive damages is appropriate in the given case, juries are left largely to themselves in making this important, and potentially devastating, decision" (42, p. 4992). Justices Sandra Day O'Connor and John Paul Stevens, noting that "awards of punitive damages are skyrocketing," said, "some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market" (42, p. 4992).

In an earlier case, *Bankers Life & Casualty v. Crenshaw*, Justice Antonin Scalia and Justice O'Connor, concurring, asserted that "there is no objective standard" that limits the amount of punitive damages so "the impact of these windfall recoveries is unpredictable and potentially substantial" (43, p. 78). They continued, saying that "this grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process" (43, p. 78).

Meanwhile, lawmakers at both the federal and state levels are beginning to deal with the punitive damages problem. Laws in Alabama, Colorado, Florida, Kansas, Oklahoma, Texas, and Virginia use a variety of means to set an outer limit on punitive damages awards (44). Enactments in New Jersey, Ohio, Oregon, Utah, and Arizona provide a defense against punitive damages for products in full compliance with FDA product approval regulations (45). Certainly, this should be the case in an era when government approval for the marketing of certain products is obtained only after years of data gathering, careful scientific review, and strict adherence to government directives (46).

Permitting the division of trials involving punitive damages into two or more phases are Missouri, Utah, Georgia, Connecticut, New Jersey, Maryland, Nevada, California, Montana, and Kansas (47). In the first phase, the jury determines whether the defendant injured the plaintiff, hearing evidence only on this question. Then, in a second or third phase, the jury decides on compensatory damages and later, if the case is still open, on whether to award punitive damages.

This bifurcation or trifurcation of trials into phases keeps the jury focused on the cause of the alleged harm without being confused by often inflammatory, unrelated testimony on alleged damages. According to a Louis Harris poll (48), 80% of judges using bifurcation believe it speeds up trials while improving fairness, but not enough states use it.

Last year, in Congress, a bipartisan products liability bill (H.R.

1115) containing punitive damages reform won approval in the House Energy and Commerce Committee. This year, similar bills have been introduced in the House (H.R. 2700) and the Senate (S. 1400). Each provide for bifurcation and a defense against punitive damages for FDA-approved products.

Support for product liability reform, especially of punitive damages, comes from a wide range of groups. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) Executive Council said in 1986 that punitive damages should be "more predictable and related to the degree of injury inflicted by, and the level of culpability of, the defendant" (49, p. 5). The American Bar Association advises that punitive damages should only be supported by at least clear and convincing evidence (50). The American College of Trial Lawyers has recommended limiting punitive damage awards to \$250,000 or twice compensatory awards, whichever is greater (51).

Organizations supporting limits on punitive damages in briefs filed with the Supreme Court in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.* included the American Red Cross, the Council of Community Blood Centers, and the City of New York (52). Most important, 78% of the American people favor restricting punitive damages to flagrant negligent and malicious behavior (53).

As this cross section of U.S. society recognizes, punitive damages reform will affirm that our nation's future depends on the continued pursuit of new and useful scientific knowledge. That pursuit will be greatly enhanced by reasonable punitive damages rules which no longer stifle the forward progress of innovation.

REFERENCES AND NOTES

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Top of the News

COMMENTARY

BY WILLIAM B. GLABERSON AND CHRISTOPHER FARRELL

THE EXPLOSION IN LIABILITY LAWSUITS IS NOTHING BUT A MYTH

You know the story about the obese cardiac patient and the innocent lawn mower. News accounts say he cleared a bundle of money from Sears by shyly claiming he suffered a heart attack because it took too much energy to yank a starter cord. And what about the guy who collected \$500,000 after he was injured using his mower as a hedge-trimmer? More examples of injury-case outrages. Right?

Not so fast. Such stories are part of a growing body of folklore about "out-of-control" courts. Critics of America's liability system use the tales to prove the necessity of radical changes in tort law, the rules that govern injury claims. Behind the anecdotes, however, the hard, undramatic data don't make the case. And startling new evidence suggests that the "lawsuit crisis" may not even exist.

Consider the stories above. The foolish hedge-trimmer was a locker-room invention, concedes leading tort-reform lobbyist Victor E. Schwartz. And most versions of the Sears lawn-mower case don't tell you that the gardener, who did collect a substantial sum, was only 32. He wasn't fat. He wasn't a cardiac patient. And both Sears and the man's lawyer agree that the lawn mower's starter mechanism wasn't manufactured properly. Unfortunately, it took 15 pulls and a massive heart attack before he realized that.

MAJOR ALLY. Twisted tales like these, however, are repeated so often that they are seldom questioned. Of course, in a system that deals with hundreds of thousands of cases every year, you can find an anecdote to support any argument. But everyone seems convinced that "deep pockets" such as Sears, Roebuck & Co. have become helpless targets. The insurance industry has fostered those misperceptions with a phenomenally successful campaign that blames the "lawsuit crisis" for shocking premium increases and a paralyzing insurance shortage. The

rate hikes, however, result largely from the insurance industry's own mismanagement (BW—Mar. 10). Even so, the drive for drastic change in the tort system has recently won its most important ally: President Reagan has endorsed federal tort reform.

With the debate moving to a new level, it's crucial to look at the facts. Fundamental to the case against the tort system are five key myths that, together, seem to argue for reform. When examined, like many of the outrageous stories, they don't hold up.

"there is no reason to believe that the state courts have not witnessed a similar dramatic increase in the number of product-liability claims."

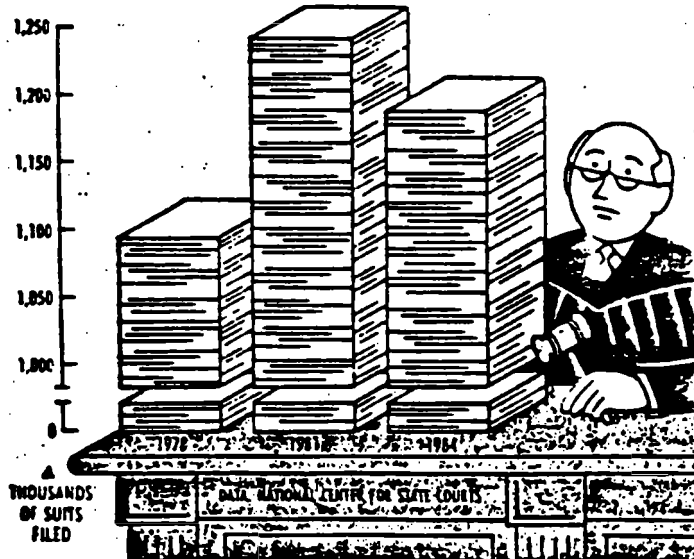
That assumption is incorrect. Long before the Willard study, there was evidence that the increase in state liability cases is just a small fraction of that at the federal level. In fact, a soon-to-be-published study by the independent National Center for State Courts indicates that concern about state-court tort cases is vastly overstated. This most complete study reveals that tort

filings were up only 10% in a six-year period ending in 1984—just two percentage points higher than the population growth rate in the 14 states that keep track of tort filings. The center's new data update a previous study often cited by tort reformers.

■ The Myth of the Litigation Explosion. It has become axiomatic that liability abuses are symptoms of a broader, mushrooming crisis. America, goes the refrain, is the most litigious society on earth, and court cases of all types are being filed at a frenzied rate. Instead, the new National Center study will reveal that civil cases stemming from business disputes have actually declined by more than 10% since 1981 (chart). The National Center's experts conclude that the crisis, if

THE LITIGATION 'CRISIS' SEEMS TO HAVE PEAKED

PERSONAL-INJURY, REAL-ESTATE, AND CONTRACT SUITS IN 21 STATES



■ The Myth of the 758% Problem. For years, business and insurance groups have been complaining that the sheer number of product-liability suits is ballooning out of control. The evidence? Turn to page 46 of the just-issued report by the Justice Dept.'s Tort Policy Working Group, chaired by Assistant Attorney General Richard K. Willard. There, for the umpteenth time, is a graph showing a 758% explosion in product-liability cases over the past decade. The graph, however, shows filings only in federal courts. Partisans on all sides concede that only a tiny percentage of liability cases are litigated there. But the Willard report repeats the pervasive misconception that

it ever existed, is over.

That surprising conclusion supports a revisionist thesis now being advanced by a few experts. University of Wisconsin Law Professor Marc S. Galanter, for example, argues that Americans are not uniquely driven to sue. The way he reads the existing data, Americans don't litigate any more than people in Canada's Ontario province, England, Australia, Denmark, or New Zealand—and they sue even less often than Yugoslavians.

■ The Myth of the Plaintiff Laughing All the Way to the Bank. Another notion suggests that all you have to do is stub your toe, sue, and you'll walk away with a million. It's true that there are

more million-dollar awards than ever. But in a nation of 240 million people, there have been only 1,642 awards of \$1 million or more in the last 14 years. And what about the gleeful winners? According to Jury Verdict Research Inc., the Ohio concern that tracks big awards, they were hardly in shape to enjoy the "spoils." In more than two-thirds of the cases, they suffered permanent paralysis, brain damage, amputations, or death.

■ **The Myth of the Tip of the Iceberg.** Would-be reformers argue that million-dollar awards are encouraging excessive awards throughout the tort system. But the big-verdict headlines are deceiving. Many are reversed by appeals courts. And the two most-cited surveys show that when mega-awards are left out, the rate of increase in damage awards is slow. Studies, moreover, show that plaintiffs win only about half of all cases. Galanter says

The data just don't justify soaring insurance rates and court reform

society has come to expect that people who suffer catastrophic injuries should be fully compensated. But he says that shift, which has occurred over the past century, is having little effect on the bulk of the personal-injury system.

■ **The Myth of the Good Old Days.** Reformist gospel declares that increasingly liberal courts are developing "no-fault" rules that hit companies with unfair liabilities. The Willard group singles out this change as "one of the most disturbing aspects of the current tort system." In reality, there's very little reason for companies to be nostalgic. Rand Corp., whose data are lauded by the Willard group, concludes that corporate defendants probably have about as much chance of winning under "no-fault" rules as under the old negligence standard.

Despite these myths, however, the world business lives in is clearly changing. Today's technology creates products that are more widely distributed—and more potentially harmful—than ever. Toxic torts, such as asbestos and chemical exposure, are creating victims in unprecedented numbers. And society's changing expectations have pushed the courts to broaden their scope. All this, unfortunately, gives the trial lawyers, the new entrepreneurs of misery, windfall profits. It also means that facts—not folklore—are needed in searching for solutions.

about Dingell's desire to force Milken to appear in a public hearing.

"I think it is totally unfair," said Steven Brill, editor-in-chief of The American Lawyer. "What is really going on is John Dingell loves publicity. When his staff isn't leaking stuff to the press, it loves to give the guy publicity [through hearings]."

"It [having Milken appear] is good for a 20-second bite on CBS. If he [Milken] were a left-winger accused of being a communist, everybody would be outraged by it. If the purpose of congressional hearings is how can we frame better legislation, I don't think

Dingell's strategy with Milken. However, because of Dingell's enormous power, they were reluctant to oppose him publicly. Meanwhile, other Democrats were supportive of Dingell and the aggressive House subcommittee's stance in this situation and others.

"This committee has a longstanding track record of being fair, and that tradition is not going to be broken in the handling of this matter," said Rep. Ron Wyden (D-Ore.). "You'll see Chairman Dingell bring great procedural fairness to this and handle this with every sensitivity that is needed so that

See MILKEN, F3, Col. 5

By Robert J. McCartney
Washington Post Foreign Service

VIENNA, April 26—Seven non-OPEC oil producers, seeking to push up world oil prices, proposed today to cut their exports by 5 percent if the Organization of Petroleum Exporting Countries also reduced its exports by 5 percent.

The proposal came as OPEC states and the independent Third World oil exporters opened an unprecedented meeting at OPEC headquarters aimed at increasing their cooperation to gain more leverage over world oil markets.

There was no immediate response to the proposal from the OPEC countries, who planned to present their views on Wednesday. But OPEC's leading producer, Saudi Arabia, and some other OPEC members oppose the proposal, OPEC sources said.

They were unwilling to accept the principle of reductions by equal percentages for both OPEC and the independent oil producers, the sources said. OPEC's total production is at least three times as high as that of the seven non-OPEC states, so such a plan would require OPEC to accept larger losses.

See OPEC, F3, Col. 1

SAMUELSON

Hard Lessons

centration is in Texas. The thrift insolvencies could cost taxpayers billions of dollars. No depositor at an insured thrift will lose a penny up to \$100,000. But that's the problem. Because deposits are insured, taxpayers may end up absorbing some of the industry's huge losses.

How huge? No one really knows. Bert Ely, a financial consultant, thinks they exceed \$50 billion and are still growing. R. Dan Brumbaugh Jr., a former top economist of the Federal Home Loan Bank Board, which regulates thrifts, guesses about \$45 billion. The Bank Board estimates its costs between \$22 billion and \$29 billion. The upper limit roughly equals the projected reserves of the Federal Savings and Loan Insurance Corp. (FSLIC) through 1990. If the costs top that, the board would need more money from Congress.

The scandal is that no one, aside from the experts and officials directly involved, is paying much attention. Let me make a small confession: back in 1985, Ely called me and we had lunch. He forecast a FSLIC crisis. Thrift losses were mounting, and FSLIC would exhaust its reserves. His predictions sounded alarmist. The economy was improving. Why shouldn't the

See SAMUELSON, F4, Col. 1

Conference Board Hardens Stance on Liability Issue

By Sharon Warren Walsh
Washington Post Staff Writer

Call it the case of the dueling reports.

In the last year, the Conference Board—the research arm of the business community—has produced a report saying that the crisis in product liability insurance had left a "relatively minor dent" on U.S. businesses. And another saying that, on second thought, the product liability crisis had a "significant impact" on American business.

Between Report I and Report II, it seems, the business leaders and lobbyists who support the Conference Board through contribu-

tions let it be known that the first study left the wrong impression, particularly at a time when they were pushing hard to change state and federal laws involving product liability.

"Predictably, there were a number of people, including some who reside in Washington, who wanted to kill the messenger," Patrick McGuire, executive director of research for the Conference Board in New York, said yesterday. Among those groups were the U.S. Chamber of Commerce, the Business Roundtable and other lobbyists for tort reform, McGuire said.

So two weeks ago—within weeks of an important congressional committee meeting

on the subject—the Conference Board announced the results of its second study at a press conference held at the headquarters of the National Association of Manufacturers, a major advocate for a federal standard of product liability. This time, the board's findings were hailed as clear evidence that business needs a federal product liability bill.

Two things changed between Report I and Report II.

One was the author. Nathan Weber, the author of the first study, no longer works for the Conference Board. Both Weber and McGuire deny that the report had anything

See INSURANCE, F4, Col. 4

Martin Marietta, BDM Report Higher Profit in Quarter

Despite the strain on the military budget, two major Washington area defense contractors—Martin Marietta Corp. and BDM International Inc.—yesterday reported higher profits during the first three months of 1988.

Fueled by a record backlog of government contracts, Martin Marietta Corp. reported earnings of \$50.9 million (96 cents per share) during the first quarter, a 15.6 percent increase over the same period last year. Revenue was \$1.3 billion compared with \$1.1 billion during the first three months of 1987.

The Bethesda-based defense firm's backlog reached a new high of \$1.1 billion.

ing the quarter. "The improvement in first-quarter results supports our expectation for further solid earnings progress in the balance of the year," said Norman R. Augustine, vice chairman and chief executive.

BDM International Inc. reported that its profit rose 16 percent in the first quarter of 1988, to \$5.3 million (44 cents per share) from \$4.6 million (39 cents) during the same period last year. The higher profit came despite a decline in revenue, to \$72.9 million from \$80 million in the same period last year.

The McLean-based professional services

porate emphasis on new marketing during the quarter as well as delays in some contracts. But President and Chief Executive Earle C. Williams noted that the company's backlog jumped 41 percent, to \$616 million.

■ Mohasco Corp. of Fairfax reported that it earned \$5.1 million (38 cents per share) in the first three months of 1987, compared with a loss of \$9.2 million in the same period last year. Results for 1987 had included a one-time after-tax loss of \$13.6 million from the sale of Mohasco's Mexican carpet subsidiary. Excluding last year's loss on the sale, 1988 first quarter sales were 10 percent

ROBERT J. SAMUELSON

It Didn't Bring Hard Lessons to Texans

than naive optimism. Generous tax writeoffs for real estate passed by Congress in 1981 (and since reduced) fed the speculative frenzy. So did deregulation of savings associations, which freed thrifts from investing most of their funds in residential housing.

What shrewd operators found in thrifts was an ultimate source of easy credit. Because federal insurance protected depositors from losses, a thrift could attract all the money it wanted by offering above-average rates on its accounts. The money could then be lent again for speculative projects. If they went bust, the government would pick up the tab. Developers (often allied with thrift owners) would already have earned fees. Some stories are astonishing. At one insolvent Texas thrift, 96 percent of the loans were delinquent. Since 1982 the loans had grown more than 1,000 percent, to \$1.3 billion.

It's hard to estimate the thrift industry's total losses for two reasons. First, no one knows the value of the buildings underlying many soured loans. The gluts in Texas are enormous. In Houston the office-vacancy rate is 32 percent. Are projects worth 70 cents on the dollar or 40 cents? Second, some thrifts—in Texas and elsewhere—that are reported solvent by normal accounting practices may not be. Loans haven't yet been written down to reflect their true value. Ely thinks 300 more thrifts may be insolvent.

This is a story of greed, stupidity, bungled regulation and, in some cases, criminality. (Yes, executives of some plundered thrifts are being

investigated. The allegations involve kickbacks, phony land sales and false financial reporting.) It would be funny if the potential price tag for taxpayers weren't so steep. The tale would also be more satisfying if it could be fitted with a happy ending. Unfortunately, there isn't any quick solution. One suggestion is to bail out FSLIC by merging it with the healthier Federal Deposit Insurance Corp., which insures commercial bank deposits. At most, this would be a stopgap because the FDIC faces its own mounting losses—many at Texas banks with their own bad real estate loans.

Put simply, this mess is likely to be around for a while. The trick is to clean it up at the lowest possible cost. The Bank Board is moving more rapidly, but the pace is slow. A plan to reorganize the Texas thrifts has yet to produce any results. If Ely and Brunabaugh are correct, the delays will raise total costs. It may be necessary to spend more now—on Bank Board staff, on money to pay off depositors—to minimize costs later. But Congress prefers to put off the problem in hope that, somehow, it will go away.

The whole affair has an air of unreality. Suppose tomorrow someone proposed spending \$10 billion or \$15 billion more for schools or the war on drugs. Everyone might applaud the goals, while saying that the price tag was unrealistically high. By inaction, Congress may be making an equivalent commitment to cover the thrift industry's losses. This is not government by choice, but by abdication.

Conference Board Shifts on Liability?

INSURANCE, From F1

to do with his leaving in January to do research and writing for another organization.

"I stand by my report," Weber said. "My decision to change jobs was my own decision." However, Weber, who is an expert in the insurance field, noted that some colleagues at the Conference Board were surprised at the reaction to his findings.

"I'm sure they were concerned," he said. "They decided it would be better to have me work on other things."

The other thing that changed was who was surveyed. Weber, in his research, had surveyed the risk managers of major U.S. corporations—the hands-on managers who know about such things as the company's insurance costs, problems getting insurance and the number of times the company has been sued.

Weber's critics complained that these risk managers did not always have the breadth of knowledge of the chief executives, who were in a better position to judge the impact of product liability on introducing new products, on competition with foreign companies—and, apparently, on pending federal legislation. When those CEOs were surveyed for the second report, they felt overwhelmingly that "the rapid growth in product liability litigation . . . has had a significant impact on corporate America."

Predictably, consumer groups have attacked the second report, just as they hailed the first.

"It's another example of the deception and misleading of the public that manufacturers have engaged in since the beginning of the so-called insurance crisis," said Michael Johnson, a policy analyst with the consumer group Public Citizen. Johnson yesterday sent a letter to members of the House Energy and Commerce Committee pointing out discrepancies in the two reports.

Victor Schwartz, a lobbyist for the pending product liability legislation and well-known legal authority on tort reform, yesterday said the second report has far more validity than the first. "If you ask somebody at a fruit stand what's the price of hot dogs, they don't know," he said, referring to the altered methodology.

The Conference Board's McGuire rejects any suggestion that his organization rolls over for lobbyists' requests. In the past, he pointed out, the board has been known to tell businesses that asked for politically tailored reports to take their funding and take a hike.

As for the product liability reports, McGuire stands by both of them.

"We've done enough research to know that if you poll two different groups, you may get diametrically opposed results," he said. "Their perception depends on how they're personally affected."

Our To help improve

PRODUCT LIABILITY:

THE CORPORATE RESPONSE

A 1987 Report by the Conference Board

The Conference Board is a nonprofit business information service whose financial support comes largely from business concerns. In 1986, the Board sent a questionnaire on product liability and insurance to risk managers of 232 major U.S. manufacturing, trade and service corporations. The firms record a minimum of \$100 million a year in sales.

The results of this survey were published in a report entitled, "Product Liability: the Corporate Response." The report reached the following conclusions:

Product Quality

"Where product liability has had a notable impact - where it has most significantly affected management decision making - has been in the quality of the products themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit." (p. 2)

Economic Effects

"For the major corporations surveyed, the pressures of product liability have hardly affected larger economic issues, such as revenues, market share, or employee retention." (p.2)

Price Increases

"Therefore, respondents were asked how much of the final prices of their products can be attributed to the cost of liability insurance. For two-thirds of the firms, the answer was one percent or less. (emphasis in original) For another 11 percent of the companies, liability insurance accounted for only 2 to 3 percent of the final price." (p. 13)

As to costs of product liability other than insurance, one executive was quoted as saying: "The only cost that consumers are really paying for is quality control." (p. 14)

Quality Control

Over a third of the firms altered the labeling information on product use, making the instructions more explicit and warning against dangers associated with improper use. Almost one-third of the firms improved the safety design of their products. Among the firms that improved product design, manufacturing processes, or labeling, 20% reported a subsequent decline in product-related accidents. (p. 14)

LOBBYING: THE BUSINESS OF WASHINGTON

These Perennials Are Lobbyists' Cash Cows

BY SHERA KAPLAN

In lobbying, nothing succeeds like stalemate.

While winning a lobbying campaign has its charms, lose-or-draw pays the rent. That's a point well-understood by the modern-day lobbyist, who profits most from political purgatory.

Nothing fattens the wallets of special-interest advocates better than a well-financed, losing fight over public policy. Today's defeat can always be touted as next year's victory.

Intra-industry fights also keep lobbyists in their Guccis. These tussles usually involve intense campaigning on both sides that invariably leads to a standoff. And in the next Congress, the battle starts over again.

Adjustments in the tax code always yield a bonanza. Preying on the fundamental emotions of fear and greed, lobbyists work either to protect a client's tax breaks or to prevent the government from taking more money from the client.

These issues may bore congressional staffers, make members of Congress wince, and be ignored by the press. But the Washington perennials bear fruit for the advocacy industry. And even the most jaded legislator, cognizant of the benefits of a steady flow of campaign contributions, honoraria, and other funds raised from concerned parties, may find no compelling reason to take these matters off the back burner.



Crowell & Moring's Victor Schwartz is the Pied Piper of tort reform. He has single-handedly engineered a subculture of the lobbying industry.

"Some people feel that members benefit politically by not resolving the problems more quickly," says Wright Andrews, a partner and lobbyist at the D.C. office of Sutherland, Asbill & Brennan.

Although these cash cows share a lengthy history, they have different features. In the all-but-lost cause, such as product-liability reform, lobbyists assure

their deep-pocket clients of the Washington axioms that it's always harder to pass legislation than to block it and that progress can only be measured in microscopic increments.

In the intra-industry split, such as the rift between stock life insurance companies and mutual-fund life insurance companies over their tax rates, advocates

take heart in the fact that, more than likely, the fight will be both vicious and evenly matched.

And regarding executives of the tobacco, trucking, and alcohol industries worried about excise taxes, their ability to spend freely for legislative advocacy has helped many lobbyists meet their mortgage payments.

Losing Is Winning

An aide to Rep. Jim Slattery (D-Kan.) calls it "the tort class from hell": another markup of another version of another product-liability bill, courtesy of Victor Schwartz.

"It went on for weeks," says Slattery's legislative director, Howard Bauleke.

Actually, Bauleke's comments somewhat understate the matter. Schwartz's crusade to revamp the nation's product-liability laws dates back to 1976, when he chaired President Gerald Ford's Federal Interagency Task Force on Product Liability.

Since then, Schwartz, a partner at D.C.'s Crowell & Moring, has become the Pied Piper of the tort reform movement. He has single-handedly engineered an entire subculture of the lobbying industry, founding the Product Liability Alliance and acting as midwife for the Product Liability Information Bureau, the Coalition for Uniform Product Liability

SEE CASH COWS, PAGE 54

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LOBBYING: THE BUSINESS OF WASHINGTON

CASH COWS FROM PAGE 53

Laws, and the Product Liability Coordinating Committee.

What all these have in common is a desire to enact a uniform federal code to replace the patchwork of state product-liability laws. Industries that are most of ten defendants in tort cases have joined, and funded, Schwartz's campaign.

"This makes the Balkans look organized," Schwartz cracks.

He can afford to be in good humor. The combined annual budget of the four groups is \$1.5 million, and Schwartz himself says he often earns anywhere from \$5,000 to \$22,000 per month on the issue.

After a decade of lobbying and millions of dollars spent, what do Schwartz and his colleagues have to show for their efforts? Nothing. Although 18 tort reform bills have been introduced in Congress, not one has reached a floor vote. (See "Tort Reform's Tortured History" below.)

Last week, the tort reform proponents scored the kind of victory that is sure to impress their clients. President George Bush gave a glancing nod to the cause in his State of the Union speech.

"Let's work together to do the will of the people," said President Bush, who then proceeded to tick off an agenda that included: "Clean air. Child care. . . . Transportation policy. Product-liability reform."

Not much, but a mention by the president never hurts. Yet the prospects for any legislation passing Congress this term remain as dismal as ever.

"Even though they have not produced any results, there's still a lot of money to be made," says Linda Lipsen, a lobbyist with the Consumers Union of the United States, one of the groups opposed to tort reform.

Lipsen calls the tort reform movement the "ultimate in designer lobbying," with business interests hiring an array of firms to find the one individual with the greatest sway over a particular lawmaker.

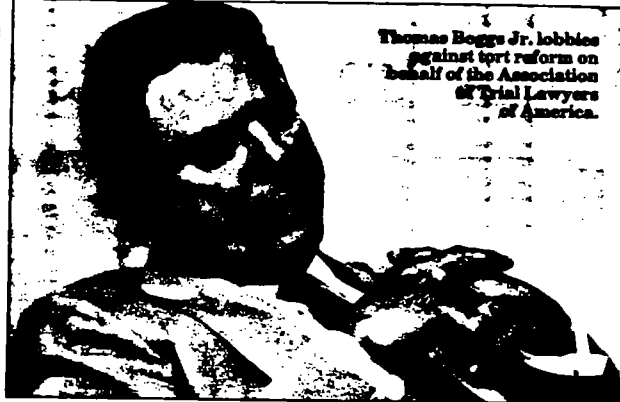
Among the former Hill and federal staffers now benefiting from the tort reform fight are Thomas Ryan, a former chief counsel to House Energy and Commerce Committee Chairman John Dingell (D-Mich.) and now a partner at D.C.'s Wunder, Ryan, Cannon & Thelen; William Mike House, a former assistant to Senate Judiciary Committee member Sen. Howell Heflin (D-Ala.) and now a partner at D.C.'s Shaw, Pitman, Potts & Trowbridge; and Alfred Coriese Jr., a former assistant executive director of the Federal Trade Commission and now a partner at the D.C. office of Chicago's Kirkland & Ellis.

This is only a partial roster, but even in the heady world of tort reform, one lobbyist's bills stand out. G. Colburn Aker, president of Aker Associates Inc., registered to lobby for the Product Liability Coordinating Committee last September at the anticipated rate of \$1,000 per day. Although Aker may be on the losing side, that per diem has to cushion the disappointment.

The opponents of tort reform also have significant firepower. The Association of Trial Lawyers of America—the leading foe to Schwartz and his allies—gave more than \$3 million to federal candidates over the last two election cycles, according to Federal Election Commission records.

Prodding the halls of Congress on the association's behalf is one of Washington's top lobbying firms, Thomas Boggs Jr. of D.C.'s Patton, Boggs & Blow, whose hourly rate is a mere \$380. The trial lawyers' in-house effort is led by Alan Parker, a former general counsel to the House Judiciary Committee.

At least Victor Schwartz keeps his arguments for tort reform sounding fresh. These days he is deploying Washington's latest buzz word—competitiveness—to bolster his attack.



Thomas Boggs Jr. lobbies against tort reform on behalf of the Association of Trial Lawyers of America.

"All of the European nations and Japan have a more predictable system which is easier to deal with when introducing new products," says Schwartz.

Acknowledging the public perception of the evolution of his argument, he adds, "In '81, it was fairness; in '87, insurance; now competitiveness—people didn't think of competitiveness then."

The action, if any, this year is expected to be in the Senate, which has scheduled hearings later this month on a tort reform bill, introduced yet again by Sen. Robert Kasten Jr. (R-Wis.). A companion bill, introduced by Rep. Thomas Luken (D-Ohio), has been referred to both the House Judiciary Committee and the House Energy and Commerce Committee.

Kasten's bill is pending before the Senate Commerce, Science, and Transportation Committee. One panel staffer

says he is largely unimpressed with the latest tort reform package, and cautions that both the Senate Judiciary Committee and the Senate Labor and Human Resources Committee are also likely to hold hearings on the proposal.

So, as tort reform heads to its usual quiet death in Congress, lobbyists like J. Patrick Rowland, director of the Coalition for Uniform Product Liability Laws, prepare their clients for yet another defeat.

"We keep telling our members that you don't pass a new law overnight," says Rowland. "We keep showing progress, . . . but it's never the bride."

The Virtues of Gridlock

Losing is not the only sure way for lobbyists to win. Another lucrative scenario is gridlock.

These legislative battles, which sides are evenly matched in political influence and money, are an advertisement.

And for the lobbyist interested in long haul, few contests can offer the rewards of the industry split. Not the rivals share about the same level of financial resources, they know each other's secrets.

The ongoing war between mutual and stock life insurance companies is in point. The 31-year controversy prompted the rise of made-to-order firms, boosted the revenues of estate shops, and provided employment for congressional staffers who co-authored of the bills in question.

It has also ensured attendance at fundraisers for House Ways and Means Committee members and their families.

The issue goes back to 1959. Congress set up a convoluted tax for life insurance companies, which sides agreed was outdated by the mid-1980s. But Congress did not repeal it until creating a temporary system that until 1984. That year Congress passed the Life Insurance Company Tax Act.

The measure sought to raise an additional \$3 billion from the insurance industry, with the mutual companies picking up 55 percent and the stock companies up 45 percent of the tax amount for the first year. (Capitol mutual life insurance companies, from premiums, and these companies owned by their policyholders; stock insurance companies raise their capital selling shares and are owned by stockholders.)

SEE CASH COWS, P. 53

Tort Reform's Tortured History

1976

President Gerald Ford creates Federal Interagency Task Force on Product Liability; Victor Schwartz named as chairman.

1977

Federal Interagency Task Force recommends making product-liability laws uniform throughout the nation.

1979

Commerce Department publishes a model Uniform Product Liability Act for implementation by the states. States demur. Effort begins to seek federal legislation to pre-empt state product liability.

Senate: No action taken.
House: Small Business Committee and Energy and Commerce Committee hold hearings. Two bills introduced; no action taken.

1980

Senate: No action taken.
House: One bill introduced; no action taken.

1981

Senate: A Commerce, Science, and Transportation subcommittee drafts a bill for public comment and receives more than 2,000 pages of responses. Committee begins revisions.
House: No action taken.

1982

Senate: Commerce subcommittee holds four days of hearings, and bill is adopted. Bill reported out of committee, but receives no action on floor.
House: No action taken.

1983

Senate: Commerce subcommittee holds two days of hearings.
House: No action taken.

1984

Senate: Commerce subcommittee holds one hearing, and bill is adopted. Bill reported out of committee, but receives no action on floor.

1985

Senate: Commerce subcommittee holds one hearing on several months later deadlines on reporting bill. More hearings held; new bill introduced.
House: No action taken.

1986

Senate: Commerce subcommittee holds two days of hearings on 1985 bill. Revised legislation proposed. Further hearings. Commerce Committee approves new bill. Sen. Ernest Hollings (D-S.C.) filibusters against the bill on the Senate floor, but closure is invoked and debate limited. Senate approves a motion to proceed to consideration of the bill but Senate leadership sets the measure aside.
House: No action taken.

1987

Senate: Commerce subcommittee holds one-day hearing on new bill. Commerce Committee, now chaired by Sen. Hollings, takes no further action.
House: Bill introduced; Commerce subcommittee holds seven days of hearings. Subcommittee meets for five days to mark up legislation and approves bill. Full committee approves bill after 10 days of consideration. Bill referred to Judiciary Committee and Education and Labor Committee.

1988

Senate: No action taken.
House: Education and Labor Committee holds one-day hearing on bill referred last year. Judiciary Committee takes no action. House adjourns without bill reaching the floor.

1989

Senate: Bill introduced and referred to Commerce Committee. No further action taken.
House: Bill introduced and referred to both Judiciary and Commerce and Energy and Commerce Committee. No further action taken.

1990

Senate: Commerce Subcommittee hearing scheduled for Feb. 22.
House: No action taken.

LOBBYING: THE BUSINESS OF WASHINGTON

CASH COWS FROM PAGE 54

Naturally, the mutuals feel they are paying too much, and propose a redistribution that would reduce their tax share. Their side received a boost from a Treasury Department report released last year, which said that \$809 of the 1984 act—the section that upped their taxes—was “cumbersome and arbitrary” and recommended repeal. The General Accounting Office agreed.

Of course, the stock insurance companies and their lobbyists disagree. “We think the mutuals are paying what they should be paying,” says William Harman Jr., a partner at D.C.’s Davis and Harman, who lobbies for stock insurance companies. Harman worked on the 1959 revisions as a Treasury staffer.

Patton, Boggs partner John Jonas, who lobbies for a coalition of mutuals, understands the seeming absurdity of having an industry divided against itself.

“Here you have two segments of an industry saying, ‘Tax the other guy more,’” notes Jonas. “From a congressional standpoint, they rarely see this inside-the-family fight. Most industries are smart enough to put up a united front.”

Such unity would disappoint a lot of Washington lobbyists though—and not a few Ways and Means staffers.

“It’s making a lot of people wealthy,” says an aide to a senior committee member. “They spend a lot of money on winning and dining us and taking us to seminars at resorts in places like Myrtle Beach and New Orleans.”

Like any other major legislative fight, coalitions play a prominent role. The stock insurance companies have organized themselves into the Stock Information Group, while the mutuals have formed the Mutual Life Insurance Company Tax Committee.

These groups don’t come cheap. The Stock Information Group spends about \$1.35 million annually, according to Harman, who lobbies for the 25-member coalition. And that figure doesn’t include the untold millions expended each year by the 2,128 individual stock insurance companies on their own in-house lobbyists.

The mutuals are also heavily armed. Their coalition spends a staggering \$5 million to \$6 million each year to make its case, according to one of its members.

Small wonder, then, that an otherwise obscure Oct. 19, 1989, hearing on the tax dispute by a Ways and Means subcommittee drew an audience of no less than 30 industry representatives—all, of course, billing for their time.

Among the firms who had people attending the hearing were: Arnold & Porter; Black, Manafort, Stone & Kelly Public Affairs; Dewey, Ballantine, Bushby, Palmer & Wood; Gold and Liebgood; Groom & Nordberg; Hogan & Hartson; O’Connor & Hannan; Sutherland, Asbill, Timmons and Co.; Williams and Jensen; and Wilmer, Cutler & Pickering.

Rep. Charles Rangel (D-N.Y.), who chairs the House Ways and Means Subcommittee on Select Revenue Measures, “laughs like everybody else about this overwhelming number of lobbyists,” says the aide to the Ways and Means member. “Every Tom, Dick, and Harry company has hired somebody.”

Even some of the soldiers in the war have come to realize that having every lobbyist in town hired by one side or the other results in diminishing returns.

“If you talk to a lot of individual members [of Congress],” says Patton, Boggs’ Jonas, “they give you the standard I’ve-got-friends-on-both-sides.”

Exercises in Excise

One way for the lobbyist to ease legislators’ fears about iking friends on both sides is to pick an issue where only one

side has any money. It also helps if the monied interest never knows when it’s going to get hit—requiring the lobbyist to be ever vigilant.

In this scenario, businesses burdened by excise taxes, also called sin taxes, emerge as the clients of choice. These industries—among them tobacco, trucking, distilled spirits, beer, and wine—have low, low-cost opponents, such as consumer groups, and they offer high-paid lobbyists year-round employment.

“Talk about cash cows,” says John Zorack, owner of the Professional Lobbying and Consulting Center. “There’s probably more money spent on tax lobbying than anything else in Congress. Every tax bill that comes out of there is like bees around the honey pot.”

One of the pots is handled by the Coalition Against Regressive Taxation (CART). Led by the staff of the American Trucking Associations, CART’s 20-member steering committee worries a lot.

Why? Hewing to the fiscal equivalent of the domino theory, CART is concerned

with all proposed sales tax hikes, whether they affect truckers or not.

“All of our industries feel vulnerable in one way or another,” says Kenneth Simonson, vice president of the American Trucking Associations and a CART lobbyist. Although CART’s annual budget is less than \$100,000, its 45 member companies use their own money to hire lobbyists for tobacco and alcohol taxes, as well as for the gasoline tax.

Not surprisingly, the tobacco and alcohol industries’ lobbyists are only too happy to pitch in.

“Our goals are really indivisible,” explains Walker Merryman, vice president of the Tobacco Institute and a CART member. “We, as well as the other members, are opposed to any increase in excise taxes at all.”

For its part, the Tobacco Institute reportedly spends \$20 million annually lobbying the government on all issues affecting tobacco interests.

The great thing for lobbyists about excise fights is their frequency. With the

government’s constant need for additional revenue and the fact that several of these industries don’t have the most savory of reputations, some lawmaker is always introducing legislation raising sin taxes.

Even if a bill stands little chance of passage, as was the case with the effort by Rep. Anthony Beilenson (D-Calif.) to hike gasoline taxes last year, CART and its consultants pull out all the stops.

One veteran of the excise wars is Jack Bonner, president of Bonner & Associates, a D.C. lobbying firm. Bonner, who works on tobacco excise matters for Philip Morris, agrees that the fights over tobacco and alcohol levies are among the most durable of Washington lobbying issues.

“Excise taxes, for instance, are perennially pushed by elected officials at the federal and state levels,” says Bonner. “The issue can get nibbled at every year.”

Such nibbling can add up to a lot of feasts for a lot of lobbyists. Comments one: “There are plenty of people who keep an issue going to keep their meters running.” □

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Bush Gives Presidential Nod To New Liability Standards

But despite new emphasis on 'competitiveness,' legislation faces stiff consumer opposition

President Bush on Jan. 31 gave a high-profile endorsement to a federal standard to govern the way consumers are compensated for injuries from dangerous products. His support has provided industry with new — albeit modest — hopes of turning around a decade of defeat on the issue in Congress.

Since 1980, manufacturers have labored in vain for a federal law to replace state statutes, which they say favor the victims of unsafe products — and stuff the coffers of trial lawyers. Business has long packaged such a law as a solution to burdensome litigation and insurance costs.

But this year, proponents have abandoned as politically unrealistic provisions they argue would result in more affordable liability insurance. They are now pushing a less drastic uniform federal standard, using the new theme of American industrial "competitiveness" as the guiding rationale.

Manufacturers say inconsistency in state liability laws and the threat of huge damage awards are stifling research and development of new products, making it harder for U.S. companies to compete worldwide.

Backers of new legislation have a long list of anecdotes about companies that have abandoned innovative products because of liability risks. "Companies tell us they are expanding their legal departments much faster than their research and development departments," said Phyllis Eisen, director of risk management for the National Association of Manufacturers. "The fear of litigation cuts back the motivation to develop new products."

Eisen and other business lobbyists say the United States needs more predictable liability laws to compete, particularly as the European Community moves toward a uniform product liability code. "A manufacturer is more likely to be willing to introduce a product in the marketplace if he knows what the rules are," said Victor



R. MICHAEL JENKINS

Bush's endorsement may boost a product liability bill sponsored by Sen. Bob Kasten, R-Wis.

Schwartz, a Washington lawyer who represents the Product Liability Alliance, a coalition of businesses supporting product liability legislation.

This theme has been picked up by the administration: Vice President Dan Quayle has called product liability legislation key to improving America's competitiveness. In his State of the Union address, Bush called for bipartisan cooperation on the issue.

Quayle has signaled the administration's support for a scaled-back proposal (S 1400) by Sen. Bob Kasten, R-Wis., that backers hope will sidestep some of the controversy that has hounded product-liability initiatives in the past.

Although Quayle has called for more radical changes in product liability laws than those included in the Kasten bill, manufacturers hope to keep the legislation free of amendments to avoid strong Democratic opposition.

The price of a weaker product liability bill, backers concede, is no guarantee that the legislation would lower the cost of liability insurance. "Companies understand this is not go-

ing to have an immediate effect on insurance rates," said Eisen. "We are going for modest reform."

Consumer Opposition

Consumer groups, backed by the powerful trial lawyers lobby, have opposed such legislation as an attack on victims' rights and have continually challenged the insurance industry's contention that product liability laws are the cause of the insurance crisis. They say rising rates stem from the industry's anti-competitive practices.

Consumer advocates also shrug off the new competitiveness angle, saying manufacturers are scrambling for a reason to avoid compensating victims. "Every Congress there is a new theme," said Gene Kimmelman, a lobbyist for the Consumer Federation of America. "They are always exposed as hot air."

Kimmelman said foreign companies that sell products in the United States have to live up to the same legal standards as domestic firms, while U.S. companies selling abroad are subject to those countries' liability laws. "They're on totally equal footing," he said.

In this year's debate, bill opponents come armed with new reports to dispute manufacturers' arguments that liability laws favor consumers and lead to unreasonable jury awards.

Among them is a September study by the General Accounting Office, which found that the size of awards in product liability suits was closely linked with the severity of injury and the amount of economic loss.

In another study of tens of thousands of product liability decisions, two Cornell University Law School professors documented a "quiet revolution," beginning in the early to mid-1980s, in which the law shifted to favor manufacturers. "What surprised me was that the data bore it out so starkly," said one of the authors, James A. Henderson Jr., who has testified in favor of product liability legislation. "Sweeping reform of the type that I was trying to push a decade ago seems questionable now."

Bipartisan Support

Bush's endorsement follows on the heels of the Reagan administration's ardent support for a federal product liability standard.

"When the Reagan administration came out for this, they came out with their own proposal," said Eisen. "I was stunned when I saw the bill — it was the kind of bill that a businessman would write in his boardroom. It put

By Alyson Pytte

Product Liability

Efforts to establish a federal standard to govern compensation for injuries from dangerous products began as liability insurance became less available and affordable. Most proposals would alter the rules by which claims

could be brought and decided in court. Each state establishes its own legal standards for such cases, and most states have adopted some reforms. Bills (S 1400, HR 2700) in the House and Senate would adopt variations.

Liability Law	Reform Proposals	Total states
State-of-the-art defense (HR 2700)	Manufacturer would not be liable if, at the time of manufacture, the product could not have been more safely designed or manufacturer could not have known and warned plaintiff of product's dangerous effect.	49
Clear and convincing evidence standard for punitive damages (HR 2700, S 1400)	Would raise the standard of proof from "preponderance" of the evidence to "clear and convincing" evidence, to assure that damages would be limited to cases that juries are certain warrant them.	15
Comparative negligence	Negligence would be measured in terms of percentage, and any award would be diminished by the percentage attributable to any person other than the defendant.	42 ¹ 30 ²
Joint and several liability (S 1400)	For all or some damages, each defendant would pay proportionally to the degree of liability or responsibility for the injury. Traditionally, each defendant could be held liable for all damages and defendants could sue each other for reimbursement.	28
Caps on awards	Awards for certain types of damages (such as non-economic, compensatory or punitive) could not exceed a set statutory limit.	10
Collateral source rule (HR 2700, S 1400)	Would allow compensation from other sources, such as workman's compensation, health insurance or government benefits, to be deducted from the damages defendants pay or to be considered by jury in determining damages.	21
Product seller liability (HR 2700, S 1400)	Would limit the liability of product seller to when seller is at fault, unless manufacturer is unable to pay or cannot be sued. Traditionally, seller could be held liable for harm to consumer even if seller did not alter or mishandle the product.	5

¹ Negligence

² Strict Liability

SOURCES: General Accounting Office, American Tort Reform Association, Consumers Union

us in the position of defending a very unrealistic vehicle."

But Eisen said Bush has departed from earlier administration support for product liability legislation in one key way: He is backing a bill that has some bipartisan support in Congress.

Kasten's legislation has gained new Democratic backers, including Senate Commerce, Science and Transportation Committee members Daniel K. Inouye, Hawaii, and John D. Rockefeller IV, W.Va. They came on board because manufacturers stopped pushing for provisions that had cost their support in the past.

The bill, for example, does not include business' long-sought-after cap on punitive damages. Punitive damages are awarded to punish companies for extreme negligence or wrongdoing, rather than to compensate consumers

for injuries.

Instead, the new Kasten legislation would toughen the burden of proof for consumers bringing product liability suits, prevent awards to people who were intoxicated or using drugs if that was the primary cause of their injury, and limit pain and suffering damages to the proportion of a manufacturer's fault. It would also impose a uniform statute of limitations allowing plaintiffs two years to file suit after discovering an injury and its cause.

Opponents of the legislation say Bush's endorsement will do little to change the political dynamics of the issue. "We'd like the president to be the consumer president," said Linda Lipsen, legislative counsel for the Consumers Union. "So we're disappointed, but we're not in despair."

Even with new Democratic sup-

port, Kasten's bill faces roadblocks in key committees. Senate Commerce Chairman Ernest F. Hollings, D-S.C., who led a filibuster against product liability legislation in 1986, is still adamantly opposed to a bill. Hollings has not ruled out another filibuster this year, although he has indicated that he will not block his panel's taking up the legislation if there is substantial support for the measure.

Consumer Subcommittee hearings on the Kasten measure are scheduled for Feb. 22.

If the legislation makes it out of committee, it will almost certainly be referred to the Judiciary Committee before going to the Senate floor. Chairman Joseph R. Biden Jr., D-Del., has not yet tipped his hand on the product liability issue.

In the House, Energy and Com-

merce Chairman John D. Dingell, D-Mich., who favors product liability legislation, has said he will stay on the sidelines until House Judiciary Chairman Jack Brooks, D-Texas, takes action on a House bill (HR 2700). An earlier Energy and Commerce-approved bill died in the Judiciary Committee under former Chairman Peter W. Rodino Jr., D-N.J. (1949-89).

Fragile Industry Coalition

With no sign of progress on the House side, business groups this year are focusing virtually all their attention on Senate action. They hope to keep the Kasten bill free of controversial amendments, not only to retain Democratic support but to hold their own fragile coalition together.

Although business groups are iron-clad in their intentions to stay united during work on product liability legislation, any number of initiatives could cost the support of particular business interests. In the 100th Congress, for example, the House Commerce panel was barely able to reject an amendment to exempt from the proposed federal liability standards products that could be harmful to a person's ability to reproduce. That provision could have cost the support of drug companies.

A similar initiative by anti-abortion groups and their allies in Congress is likely this year. Those groups want no lessening of the liability risks of abortion-inducing, or "morning after," pills for fear that will ease their introduction into the U.S. market.

More important to business groups is avoiding the defection of the insurance lobby. Insurance companies are keeping an unusually low profile on product liability legislation this Congress, but efforts to impose federal regulation on the industry could spark its opposition and doom the bill.

Schwartz says the American Insurance Association's (AIA) involvement in the Product Liability Alliance is "so minimal that I never see them."

"I think within the insurance industry there is the apprehension that they are going to be caught in a very bad squeeze," Schwartz said. "The bills can promise stability, but not a slashing of insurance costs. Yet people's expectations may be that they will result in a slash in costs."

David J. Pratt, vice president of federal affairs for the AIA, said elements necessary for long-term reductions in insurance rates are missing from the bills being considered in Congress.

The bill would not entirely do

"Every Congress there is a new theme. They are always exposed as hot air."

—Gene Kimmelman,
Consumer Federation of America

away with joint and several liability, which leaves manufacturers open to paying full damages for injuries for which they are found only partially responsible. Kasten's bill would shield manufacturers from paying full damages only for non-economic awards — those awarded for pain and suffering or emotional distress.

Another necessary ingredient for lower insurance rates, Pratt said, would be abandoning the so-called collateral source rule, which prevents defendants from telling juries about other forms of compensation a victim would receive, such as health insurance and workers' compensation. The Kasten bill would provide only that damages be reduced by the amount of workers' compensation a claimant may receive.

New Insurance Regulations?

Other members of the business coalition say no product liability bill could reduce insurance costs, because insurance rates are linked to broader economic factors. The argument that a reform bill would reduce insurance costs has been used to "sell product liability reform to Congress," said Howard W. Greene, acting director of governmental affairs for the Risk and Insurance Management Society.

For the time being, the insurance industry is quietly supporting product liability bills because it considers them better than nothing. What could turn the industry actively against the legislation, both consumer and insurance lobbyists agree, is not what is missing from the bill but what might be tacked on. "The critical question is whether there is any effort to federally regulate the insurance industry," said Barbara S. Haugen, director of federal affairs and acting executive director of the National Association of Insurance Brokers.

One possibility for such regulation is scaling back the McCarran-Ferguson Act (PL 79-15), which gave the insurance industry broad exemption

from federal antitrust laws. In 1988, the day after the Energy and Commerce Committee approved product liability legislation, House Judiciary passed a bill partially repealing the act; insurance lobbyists called the move trial-lawyer-backed retaliation for the product liability bill. (1988 *Almanac* p. 574)

Another possibility for new regulations would be language requiring the industry to report pricing and other data directly to the federal government.

Pratt of the AIA said such a provision would be a "multimillion-dollar expense" for the industry and could only result in the federal government's confirming what the insurance industry already knows — that is, that the liability legislation would lead to no real change in insurance costs for businesses.

If weak business and congressional alliances unravel, Bush's endorsement may add only token strength to the push for liability reform. Still, manufacturers show no signs of giving up. "We're playing the politics of persistence," Eisen said. ■

INSULAR AFFAIRS

House Sets Hearings On Puerto Rico

A House Interior subcommittee has scheduled new hearings on a bill (HR 3536) to allow Puerto Ricans to vote on the island's relationship to the United States, although House leaders have said nothing about pursuing legislative action this year.

Del. Ron de Lugo, D-Virgin Islands, chairman of the House Subcommittee on Insular and International Affairs and sponsor of HR 3536, has scheduled a hearing for March 2 plus three more hearings in Puerto Rico over March 9-12. The bill would allow island voters to choose among enhanced commonwealth status, statehood and independence, the same as a bill (S 712) approved last year by the Senate Energy and Natural Resources Committee.

Republicans are backing the bill as a means to Puerto Rican statehood, but Democrats are generally aligned with the island's commonwealth supporters and have been reluctant to push the bill forward. (1989 *Weekly Report* p. 3152) ■

GAO Study Questions Product Liability Crisis

By DAVID CONN

Journal of Commerce Staff

WASHINGTON — While the Bush administration has vowed to push for reform of the nation's product liability laws, a congressional investigating agency has suggested that the problem may not be as severe as claimed.

A study of product liability cases in five states by the General Accounting Office says that damage awards in general "were not erratic or excessive," as proponents of tort reform laws, including manufacturing and insurance companies, have claimed.

The GAO studied 305 cases between 1983 and 1985 in Arizona, Massachusetts, Missouri, North Dakota and South Carolina.

The report shows that "the size of compensatory awards (which include both economic and noneconomic damages) is strongly associated with injury severity and the amount of the underlying economic loss."

Further, the GAO said, previous studies showed that the total amount awarded frequently fails to cover the plaintiffs' economic losses, excluding payment for pain

and suffering and for punitive damages.

The report, called "Product Liability: Verdicts and Case Resolution in Five States," also found:

- Appeals and post-trial settlements reduced jury awards in 30% of all cases. Total awards were reduced by 43%. Payments were reduced 71% of the time in cases with awards of more than \$1 million.

- Appellate courts reversed or remanded for retrial all 12 of the punitive damage awards they ruled on.

- In about two-thirds of the cases examined, the defendants' negligence was a basis for liability, "a higher rate than had been assumed previously."

- Tort reforms proposed in bills before Congress "would have affected only a minority of cases studied."

But two proposed reforms — to reduce awards when the plaintiff is partially negligent and to reduce awards by the amount a plaintiff receives in workers compensation benefits — "would have potentially affected more awards than other reforms."

Last week, Vice President Quayle announced that the administration strongly supports the Senate bill to reform the product liability system.

"I think it's strange that the administration in Washington took a position before they read the government's study," said Russ M. Herman, president of the Association of Trial Lawyers of America.

The GAO study also noted that product liability cases drag on for years and end up costing both sides enormous amounts in attorney fees.

On average, the report said, cases took almost 2½ years from when the case was filed to the beginning of the trial. The average trial took 12 more days.

The study shows plaintiffs paid their lawyers an average of 35% of their recoveries. The median payment to plaintiffs' attorneys was \$33,000, while the comparable figure for defendants was \$20,000. Payments to defendants' attorneys were twice as high for cases that were appealed.

4/22/90

Product Liability S. 1400

chd by Bryan

co. sponsors

Surfth - v. Consumer suits
^{competitiveness}
called cost justice sys. ins "disruptive."

McAen

Mr. Mikkie - Genl Counsel - Dept of Commerce

Mostbacher & Admon v. much in favor of
bill - will enhance competitiveness.
Excessive burden on bus.

is uniformity
↑ percently } 7 ch.
bill
laws

not advocating abolition of punishment on
contingency fees that are not avoid in
other countries

GAO report
Congressional Report
Risk Management Report
Am. Bar Assn -

0.3 - 0.6 % ^{av. spend} on legal fees.

Let Chris put one of several. of ins. - not
to flow in for the system.

Hostile

seems hostile

Hollings

→ W discharges ins. costs ↑ due to litig.

Gorton -

where is comp. dead. when ins. cos.
have seen only 10% loss + W.V.

W → we selling nothing here - not in the Japan.

- award costs won't be covered - then how
help compet??

W → if I thunder costs

4 or 5 states (incl. Wash) → no punting allowed.
→ no production goods too safe.

Kasten - ~~plans~~ pro → predictability necessary
→ important, safe products being
kept off mkt.
ed. T. Benedictione.

Sanforth - @ particular problems of small bus.
Comp. Bd - $\frac{2}{3}$ of CEO's are just getting worse.
→ little guys can't self-insure.
H's → job growth will be in small bus.

issues. won't licence to small bus 'cause
afraid will be the deep pocket.

Co-sponsor Rockefeller - competitiveness
doesn't stop private divs.
consumers prevent expenditures from.

Co-sponsor McLean

Rand study { 14-16 billion awarded
16-19 " " Research costs

As take cases on cutting → Javoyan takes $\frac{1}{3}$
* Agul Orange case → not going to prison but to
Javoyan.

Co-sponsor Quander

Adm'n has no awards (the Dept has expressed support for a fault-based ptcl)
 Will have today trying on favor of strict liab.

Joseph Delucio - GAO

1908 won't have much effect on their results.

↑ type: procedures + maybe awards.

but there is a strict liab ap → GAO found most (43%) used negligence → awards are 2 orders less

wherever had judgments all either awarded or reversed

"Compensatory damages" in study = (econ + pain + exp.)
 only 1 case where compens. damages awarded

- awards wld vary significantly among states.

S. 1400 Reg 4/5/90

Mosbacher

Genetech - AIDS vaccine
John Port - suitcase-sized (home-use)
diagnosis machine.

Monsanto - asbestos
Lettermly - only producer of DPT --- price ↑
Law - Benediction < sales - 2 mill. → ! took
+ inv - 20 mill
off with despite request of 20,000
sh. to keep on.
NERO - driving aid for the handicapped
1985 - \$1400. in inv.
1986 - \$18,000. - "

EC Directive
state of the art defn - NOT in 1400
stand first
gov + several
statute
in 1400

much more pro - dependent

Gorte-OTA ① Paying the Bill: MFingr Am's Trade Deficit
② Feb. report

* many things Fed gov't can help w/

* most imp

costs

human resources

diff. tech.

partnerships: Long term Risky R&D.

* mod. risk is a prob - but not the major.

Featherstone
NAM

Brig Prob.

Dr. SKolnick

prof of Biophysics / patent atty

Surv. Impinging Research

ex. blood clot dissolving drug.

Bk. Dr. Michael Porter - Competitive Advantages of Nations
- Harvard Bus

Cortesio: J Pitt. Journal of Law & Commerce.

Mr. Kimmelman
Consumer -

helps comp → requires better/safer prods.
domestic + foreign operate under same rules here.
< 1% of gross receipts to ins > → ∴ v. low cost to society

support speedy resolution - alt. dispute resolution.
- but not 1400.

practice of medicine $\left\{ \begin{array}{l} \text{prod. lab suit if goes wrong} \\ \text{med malpractice if do nothing.} \end{array} \right.$

one set of rules - uniform std. - Kimmelman would agree - - doesn't
care if Fed or State - - just needs to be fair.

produce a new prod - in some states then the old one is
"defective"

ESOP - highly leverage - suit will be brought against different
party - a deep pocket.

move mfg overseas - we lose control over prod. specs, etc.

Kimmelman - even don't show movement of prod. overseas -
rather see foreign mfgs. coming here

Commerce Dept - Industrial Outlook Study
→ prod. jobs - a prob.

OTA study - machine tool
- aviation
- electronics
- semiconductors - no chem. or biotech ...
- prod. lab not as much as a
prob.
prod. lab is a prob.

May 10th - last
hrg -

→ * mark up shortly thereafter
before Labor Day.

Ballen
ALA

1976-88 - nearly every state legis had some tort reform

~~leg packet~~ A

it + several

collat. source

primitive dms

} good steps — but won't have much
impact on

① State of art Δ
prod liability Δ
... Δ } nothing said.

② —

③ Old preempt some more favorable state laws.
state of union
workers comp. offset
prosecution

Peter Huber

Seale Cooper 7 IVD

→ superior contraceptive.

Gerosi - Science 1989 - Contraceptives

no civ. l. fees

no punitive dms

no contingency fees

experts applied by cts.

strict liab for all factory defects — no open ended jury trials.

Kutsum — 6,000 lives / yr saved

but Huber 10K " " lost just in cancer due to liab

Prof Hager
1975 - A.U.

Uniformity → S1400 doesn't address.

innovation - maybe a problem, but S1400 does not address.

- inherent in any prod. Liab system.

* ∴ look at avg - more safe or unsafe kept off??

avg = favors safe on / unsafe off.

insurance sys really can't help 'cause for new prods don't have the actuarial data not there.

Forb
Hinter -
Nash
Consumer
Org

Agree w/ AIA - 1400 won't ↓ claim costs / insurance avail / affordability.

* competitiveness not affected by Ding insurance.

don't support amendment (McCorren / Ferguson repeal) reform

insurance industry profit cycle → ins. comp.

→ McCarran / Ferguson free this
and other exemptions.
allows price fixing.

Fla. → big \$ < collateral source
of + serious
pun. dings.

* insurance prices & regardless of ^{not} reform

* [Lands & Prosser study → pun. dings. involved in less than 3% of
prod liab suits.

§307 - innovation from liab if alcohol or drugs used.

* ask juries negligence? is -- not design questions of complex
pharmaceuticals.

AIT
85-86?
ins. crisis

do have an ins. cycle but tort sys. is an upward pressure -- i.e. but
@ a higher overall price level

these things }
w/ld help. } it + several lib
ins. costs. } state of art defense.
lt pun. drugs

lt'd to nonecom → better if extend to all drugs.

set up a pup that had
bleed flat → 5 Dem losses +
reasonable by fee

neg → con + all the the
7 permit

Mr. of Peter Kenger - 2/15/90

products lab.

- Gordy Marshall & Kennedy's office.
→ worked on this for all the time.
Peter Kenger describes up to the
position

Apr. Al got both consumer
grip/pide (no therapy)

Had an alternative compensation
system - (Hollings gotten & what left?)

5 parts

- (1) workers comp reorganization
- (2) sellers bill
- (3) statute moved in line to
statutes.

old by V. Long.
(encompasses)

→ from date person actually
discovered injury & its cause.
→ not from onset of injury

- (4) alt. dispute resolution.
mandatory mediation/arbit?
Childson tort rep & end of of
att'y's guessing what it will award.
- (5) —

words of time → but if there is it —

Δ's → limit rep of expensive drugs.

Π's side → need to encourage drugs.

→
Peter's
idea.

(42 Fio) most states - should limit

demand. Behind the figures was the sharpest decline in U.S. domestic oil production in history. Not indicated in the API's report was a significant decrease in U.S. natural gas reserves and an unquantified drop in U.S. natural gas deliverability, which is the peak production capability of U.S. gas fields.

This information suggests three possible U.S. energy crisis scenarios. The first two relate to oil. While last year's roughly 7% decline in U.S. oil production may not be matched exactly in 1990 and beyond, further decreases are probable for the foreseeable future if recent conditions and trends continue. This further supports the possibility of a 60 to 70% dependence on foreign oil by the year 2000. At existing and projected levels of imports, there will be a growing vulnerability to supply disruption by natural disaster, manmade disaster (for example, another Exxon Valdez spill), or political action.

At the current price of roughly \$22 per barrel, last year's import level would represent roughly a \$64-billion drain on the U.S. economy. In light of the indicated trends, the nation appears headed for an imported oil bill that will grow to the \$100-billion-per-year level around the year 2000. I see no U.S. goods or services available for export to balance such a loss. Therefore, another likely U.S. energy crisis probably will take the form of a gargantuan drain on the U.S. economy for oil imports.

A more immediate threat is a natural gas deliverability crisis. During the relatively mild winter of 1988-1989, there were a small number of gas curtailments to schools and factories around the United States. The recent unseasonable "cold snap" was very close to causing similar curtailments early in the 1989-1990 heating season. The subsequent swing to unusually warm weather averted a gas delivery crisis for the time being. However, there is a growing probability that widespread gas curtailments will occur as natural gas reserves continue to dwindle, which is likely because of reduced U.S. exploration and production.

The probability of at least one of these U.S. energy crisis scenarios occurring is substantial, if not certain. It is sad that we as a nation do not seem to have the will to avert such problems.

ROBERT L. HIRSCH
Vice President for Research
and Technical Services,
ARCO Oil and Gas Company,
2300 West Plano Parkway,
Plano, TX 75075

REFERENCES

1. *Oilgram News*, 18 January 1990, p. 5.

Punitive Damages and Innovation

In the article "Innovation on trial: Punitive damages versus new products" (15 Dec., p. 1395), Richard J. Mahoney and Stephen E. Littlejohn urge various reforms of rules governing punitive damages. Unfortunately, the article is not an objective or penetrating analysis of the relationship between punitive damages and innovation, and a few points may serve to illustrate its tendentious quality.

1) Mahoney and Littlejohn shrug off the fact that punitive damage awards often are reduced on appeal, asserting that, "on the contrary," the reduction in these awards is less (by an unspecified amount) for business defendants than for individuals.

2) They note that mean settlements tend to be 60 to 150% higher in cases alleging punitive damages than in other cases, and they treat this statistic as proof that punitive damages are extortionate. Yet, they do not mention the obvious hypothesis that plaintiffs are more likely to allege punitive damages in those cases in which liability is clearest. Such cases should generate higher settlements even if punitive damages were eliminated.

3) They assert, without explanation, that "[t]he law already ensures adequate compensation for nearly all conceivable harm." Evidently, their criterion for adequacy is not the economist's conception of making a wrongdoer bear the full social cost of its conduct, for existing damage rules do not compensate plaintiffs for all costs to themselves and to others and Mahoney and Littlejohn imply that insurance or other payments from collateral sources should reduce damage awards.

Manufacturers have suffered some egregiously erroneous awards in product liability cases. Compensatory as well as punitive damages for injurious, defective products are imposed wrongly on some occasions, and civil damages surely discourage some innovation; but these outcomes will persist whether the cause of action is negligence or strict liability. An intelligent prescription for reform must address the magnitude of these (and other) effects under alternative legal regimes. Mahoney and Littlejohn summarize some aspects of the limited information available on punitive damages, but their analysis of these data and their conclusions would more appropriately have been placed on the pages reserved for editorial opinions or News & Comment.

D. H. KAYE
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The article on product liability by honey and Littlejohn reflects the permissu-interpretation of the so-called liability crisis. While it is undeniably true that opportunistic lawyers and greedy plaintiffs have exacerbated the problem, they do not create it. And that is because the issue is not really one of liability; it is one of accountability.

The fact is, large businesses and the people who run them have, over the last decades, succeeded in large measure in insulating themselves from the consequences of their actions. They have immense resources (including the best lawyers) and great political clout, particularly through their financing elections. The solitary individual in our society is, at best, severely limited in his ability to hold such great and powerful organizations accountable. This weakness of the individual holds for both the marketplace and the political arena.

But there is one recourse in our society: the helpless individual, and that is the courts. The glorious principle of equality before the law diminishes the mighty organizations and raises the individual, like David, to the status of giant-killer.

It is unfortunate and, as Mahoney and Littlejohn correctly point out, ultimately injurious to the economy that respect for law and conscientious companies can be victimized. Instead of wishing away the problem, however, or engaging in ultimately vain actions like tort reform, the leaders of companies such as Monsanto would be better advised to work toward requiring higher standards of integrity and greater accountability in the American industry. That, and that alone, will resolve the crisis.

ARNOLD B. ROSEN
Chairman
Weiner Edrich B...
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New York, NY 10017

Thank you for publishing "Innovation on trial: Punitive damages versus new products." On the reasonable policy basis, manufacturers must be responsible for their products, production processes, and operations, including liability for failure of product or operations, or both, we have added the wish that business be the innocent against accidents and misfortune and punished for failure (beyond responsibility for the consequential damages). While these additions may be legitimate choices that society can make, it is noteworthy that we do not similarly hold government—a more promising candidate for spreading risks—responsible for the costs across society—responsible for misfortune or misfeasance, even its own. The consequence of loading business and in-

U.S. Lags on Birth Control Development

An NAS panel calls for changes in FDA regulation and product liability laws to get new contraceptives on the market

WOMEN IN FINLAND, Sweden, and ten other countries are being protected against pregnancy for up to 5 years by a contraceptive implanted under the skin of the upper arm. The West Germans are marketing in 40 countries an injectable contraceptive that protects for 2 months. China and Mexico both manufacture their own 1-month injectable. The French have RU 486, the abortion pill.

And U.S. couples are stuck with the old standbys: the Pill, condom, IUD, diaphragm, and surgical sterilization. Indeed, in the three decades since the Pill and IUD came on the market, no fundamentally new form of birth control has been introduced in the United States, according to a report on contraceptive development by a joint committee of the National Research Council and the Institute of Medicine.

Without a drastic change in federal policy, the United States will continue to miss out on the plethora of new contraceptive technologies now being developed, says the committee. These include contraceptive vaccines, a once-a-month pill to induce menstruation, reversible male and female sterilization, a hormone-releasing patch worn like a Band-Aid, and male contraceptives. The likelihood of any of these getting on the U.S. market before the year 2000 is negligible, says the committee.

"It's bleak, bleak," says Luigi Mastroianni, director of the division of human reproduction at the University of Pennsylvania and chairman of the joint committee. All but one major U.S. pharmaceutical company have fled the field of contraceptive research, driven out by lawsuits and an inhospitable regulatory climate. That leaves the bulk of the effort to small companies and foundations. But foundation support is dwindling as well, and the federal government has not picked up the slack. Support for training in reproductive biology is eroding. The upshot, says Mastroianni, is that "the United States is in a second-class position on contraceptive development."

The consequences of this stagnation are enormous, says the committee, which blames contraceptive failure for about 2 million unwanted pregnancies a year in the United States and for about half of the 1.5

million abortions. New, easier-to-use contraceptives would go far toward reducing that abortion rate, the committee says, which is one of the highest in the industrialized world. Another telling indictment of the status quo is that surgical sterilization, both male and female, is the most popular form of contraception in the United States.

The committee points to myriad factors that conspire to keep new contraceptives off the market. Some of it is simply economics. The ideal contraceptive, if there is such a thing, might be a vaccine, or a long-acting injection, or perhaps a "once-a-month" pill—none of which is likely to be a huge moneymaker. Without the large market that comes from frequent repeat use, there are few incentives to develop these contraceptives. And there are some powerful disincentives: the growing number of product liability suits—and some multimillion dollar awards; the peculiarities of contraceptive regulation; and the powerful anti-abortion movement, which has made pharmaceutical manufacturers leery of consumer boycotts and the federal government reluctant to

invest in contraceptive research.

Some of the blame must also be laid on the Food and Drug Administration, which has set a tougher approval standard for contraceptives than for almost any other drug, says the committee. The reason for the extra caution is that contraceptives, unlike other drugs, are used by predominantly healthy women for a long time. The committee argues that FDA should rethink how it balances benefit and risk in evaluating contraceptives—specifically, to give more weight to the benefits of contraceptive effectiveness and convenience and to factor in the risks of unwanted pregnancy.

"We are not saying FDA should unleash on the market a high-risk product but that the agency needs to be more careful that it has fully considered the benefits of contraceptives, which are unique," says committee member Richard Cooper, who was formerly chief counsel of FDA and is now with the Washington firm of Williams and Connolly. Philip Corfman, head of FDA's panel on reproductive drugs, says he welcomes the committee's recommendations and has invited the group to brief the agency.

But simplifying the regulatory maze will not be much help unless would-be contraceptive manufacturers' biggest problem—the threat of litigation—can be solved. Manufacturers have good reason to be concerned about lawsuits, the committee says. In 1986 a judge awarded more than \$5 million to a woman who alleged that a spermicidal jelly had caused birth defects in her child, despite extensive scientific evidence to the contrary. Legal skittishness over the Dalkon Shield litigation prompted three manufacturers to withdraw their FDA-approved IUDs from the U.S. market in the mid-1980s, even though the agency had not raised any questions about their safety.

To address the litigation problem, the committee proposes a new federal product liability law that would give contraceptive manufacturers a partial defense if they met all FDA requirements in designing, testing, and manufacturing a drug or device and if they provided proper warnings.

"Does it make legal sense? Yes. Do I think it will happen any day now? No," says Peter Huber, a product liability expert and senior fellow at the Manhattan Institute, a New York think tank. Congress did recently pass a law to protect manufacturers of childhood vaccines, "but vaccines are a lot less poisonous, politically, than contraceptives," says Huber. "A special clause for contraceptives would seem very difficult to get through." And without one, warns the committee, U.S. couples may be stuck awhile longer with the contraceptives of three decades ago.

■ LESLIE ROBERTS

CONTRACEPTIVE USE IN THE UNITED STATES		
Method	Estimated % use	% Accidental pregnancy in the 1st year of use
MALE STERILIZATION	14	15
FEMALE STERILIZATION	19	
COMBINED (ESTROGEN AND PROGESTIN) ORAL CONTRACEPTIVE PILL	32	3
CONDOM	17	12
DIAPHRAGM	46	2-23
NATURAL FERTILITY CONTROL (FORMS OF PERIODIC ABSTINENCE)	4	20
INTRAUTERINE DEVICE	2	6
CONTRACEPTIVE SPONGE	2	10
VAGINAL CONTRACEPTIVES (FOAMS, JELLES)	2	27

SOURCE: Broughton Black, "Contraceptive Use in the United States," *Demography*, Vol. 21, No. 1, 1984, p. 120.

Public Citizen

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Congress Watch
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215 PENNSYLVANIA AVENUE, SE □ WASHINGTON, DC 20003

**PROTECT VICTIMS' RIGHTS:
OPPOSE S.1400, THE PRODUCT LIABILITY BILL**

April 4, 1990

Dear Senator:

We are writing to urge you to oppose the "Product Liability Reform Act" (S. 1400), introduced by Senator Bob Kasten. This bill is an unjustified assault on the rights of consumers and workers. It would deny fair compensation to those victims injured by defective products, and it would reduce incentives on manufactures to make safe products.

The product liability system is critically important to American consumers. The system enables people who have been injured by a defective or dangerous product to receive compensation from the responsible manufacturers. This, in turn, encourages companies to ensure that the products they design and sell are as safe as possible. Product liability lawsuits serve to effectively warn the public about defective products and often lead manufactures to redesign, recall or remove dangerous products in the marketplace.

The Kasten bill would throw a dangerous wrench into the product liability system. It would make it significantly more difficult for those injured by unreasonably dangerous products to recover fair and adequate compensation. As a result, manufacturers would be more likely to market dangerous products, knowing that they are insulated from the harms caused by their products. The tragic result would be more injuries, more uncompensated victims, and greater overall costs to society.

For an entire decade, those of us who are concerned about the health, safety and welfare of the American public have successfully defeated similar measures to take away the rights of victims. This year, with the help of recent independent research reports on the liability system, we hope to put this issue to rest once and for all. Every major study on the product liability system issued in recent years -- by such reputable sources as the General Accounting Office, the Rand Corporation and numerous law professors -- refutes the claims of the supporters of the Kasten bill. The facts are plain: there never has been an "explosion" in liability lawsuits or awards, and product liability costs are not a significant burden for most American companies. If businesses are facing liability coverage difficulties, the problem is one of insurance, not lawsuits.

Likewise, the claim that the bill would provide nationwide uniform product liability law is unfounded. The only uniform outcome of this legislation would be to reduce the legal rights of victims injured by defective products. The bill would only supersede state laws where those laws protect consumers' interests, but would leave intact the hodgepodge of state laws where those laws favor manufacturers. That the bill's supporters look to the EEC Directive as a model of uniformity is ironic, since the Directive seeks to establish the very same consumer protections that S. 1400 would eliminate.

The Kasten bill would undercut safety incentives, deny injured people fair compensation and make the American marketplace more dangerous. Contrary to the claims of its supporters, the bill would not provide uniform laws nor would it improve the competitiveness of American industry. It would, however, provide a one-way ticket to the marketplaces of the dark ages. It is time for Congress to put aside the baseless pleas of special interests and attend to matters of real import to the American public. We strongly urge you to oppose S. 1400 and all similar anti-consumer measures.

Sincerely,

Stephanie Cooper
American Council of the Blind

Amy Isaacs
Americans for Democratic Action

Susan Howley
American Paralysis Association

Jeff Jacobs
American Public Health Association

David Bechtel
Asbestos Victims of America

Lamar Case
Brown Lung Association

Gene Kimmelman
Consumer Federation of America

Linda Lipsen
Consumers Union

Nora Cody
DES Action

Ruth Caplan
Environmental Action

Chuck Fox
Environmental Policy Institute/
Friends of the Earth

Francis Humphreys
Gray Panthers

Dr. Milton Terris
National Association for Public Health Policy

Jay Feldman
National Coalition Against the Misuse of
Pesticides

Linda Golodner
National Consumers League

Richard Porubcansky
National Spinal Cord Injury Association

Gary Cohen
National Toxics Campaign

Cindy Pearson
National Women's Health Network

Pat Reuss
National Women's Political Caucus

Pamela Gilbert
Public Citizen's Congress Watch

Elizabeth Hedlund
Public Voice

Arlene Neal
Service Employees International Union

David Gardner
Sierra Club

Andrew McGuire
Trauma Foundation

Lucinda Sikes
U.S. Public Interest Research Group

April 4, 1990
MEMORANDUM

TO: Democratic Members, Senate Commerce Committee
FROM: Linda Lance and Moses Boyd
RE: Hearing on S. 1400, Product Liability Reform Act

The Consumer Subcommittee has scheduled a hearing on S. 1400, the Product Liability Reform Act, on Thursday, April 5, 1990, at 9:30 a.m., in Room SR-253. Senator Bryan, Chairman of the Subcommittee, will preside. This is the second hearing on S. 1400. It will focus on the issue suggested by the supporters of the bill as the primary basis for its enactment: the effect of the current product liability system and S. 1400 on the competitiveness of U.S. business. The hearing also will examine a corollary of that issue: the effect of the current system and S. 1400 on the insurance system, a major element of the product liability costs of many businesses.

I. BACKGROUND

Product liability refers to the liability of a manufacturer or product seller for injuries that are caused by the product sold, and is one type of tort recognized at common law. Current product liability law has been fashioned by the states, through court decisions (common law) and, more recently, actions of the state legislatures. The general purposes of the product liability system are to compensate victims injured by defective products, and to deter the marketing of unsafe products.

Beginning in the 1970s, many businesses began to believe that product liability law had caused unnecessary problems for them, and complained of high product liability insurance premiums. In 1976, a Federal Interagency Task Force on Product Liability was created. The Task Force issued a report in 1977 which found that three causes of the problems cited by business were (1) overly subjective insurance ratemaking practices; (2) unsafe manufacturing practices; and (3) uncertainties in the tort litigation system.

The Department of Commerce, in 1978, recommended that a model product liability act be drafted for use by the states. Federal officials at that time believed that it was more appropriate for the states, rather than the federal government, to act to change the system, particularly since tort law traditionally has been left to the states. In 1979, a model law was formulated. Since then, virtually all the states have made some legislative changes to their product liability laws, but no state has enacted the entire model law.

More recently, proposals have been made to establish a federal system of product liability law. These proposals were first suggested as a way to improve the fairness of the system,

based on the belief that the system was overcompensating victims at the expense of business. In the mid-1980s, in the wake of a crisis in availability and pricing of insurance, it was argued that federal product liability law would improve the insurance situation for business.

Most recently, proponents have argued that the current proposals are necessary to improve the ability of American business to compete with foreign companies, and to remove barriers to innovation presented by the tort system. Proponents of the federal approach claim that such a system will result in more nationwide uniformity of law, and that the resulting predictability will lower the costs of litigation. They also point out that, since most business is engaged in interstate commerce, improvements in one state's law will not afford relief to the businesses of that state, since products are so often sold and used elsewhere. Finally, in recent years proponents have claimed that the current tort system adversely affects the ability of American business to compete with foreign competitors whose countries have different, and less onerous, product liability systems.

Opponents of such proposals believe that there is insufficient evidence that the problems of business are related to the tort system to justify a federal preemption of the law in an area traditionally left to the states. They note that, if any state believes that its laws are not properly serving the needs of the citizens, it can change those laws, and they point to the fact that many states have adopted such changes. They also believe that federal proposals will not necessarily result in more uniform laws since they do not provide for Federal court jurisdiction and preempt only selected portions of state law, thereby providing a partial federal overlay on differing state laws that will remain in effect. They suggest that such change could result in more litigation and confusion, because the new federal-state system will have to be interpreted by all the state and federal courts.

They also argue that increases in insurance rates are not necessarily related to the tort system, but to insurance industry investment practices and market conditions, and that federal tort laws will not reduce insurance rates. They note that both foreign and domestic companies that sell products in the United States are subject to U.S. product liability laws, so that the competitiveness argument is not persuasive. They express concern that any money saved by business under a federal system will be at the expense of injured consumers who will not be compensated for injuries due to defective products. Finally, they argue that altering legal standards for tort liability may reduce incentives for manufacturers to produce the safest possible products.

II. LEGISLATION

A. 101st Congress

S. 1400 is the only general product liability bill that is pending before the Commerce Committee. It was introduced by Senator Kasten, and is cosponsored by 9 other Committee members: Senators Inouye, Danforth, Rockefeller, McCain, Exon, Pressler, Gorton, Burns, and Lott. It makes fewer modifications to tort law than many bills introduced in prior Congresses. A bill to provide federal liability standards for the general aviation industry, S. 640, was reported by the Committee in November, 1989, and has been sequentially referred to the Judiciary Committee until April 5, 1990.

H.R. 2700, substantially similar to a bill reported by the House Energy and Commerce Committee in the 100th Congress, has been introduced by Congressman Luken. It has been referred jointly to the House Energy and Commerce and Judiciary Committees. No further action has been taken in the House on this bill.

S. 1400 contains the following major provisions:

Preemption -- Preempts state law to the extent that it provides an applicable rule of law in the area. Otherwise, state law remains in effect.

Expedited Product Liability Settlements -- Provides incentives to settlement of product liability cases, including a provision for an offer of settlement by either party before the trial of the case. If either party fails to accept the offer and the verdict is less favorable than the offer to the party that refused settlement, that party pays the attorney's fees and costs of the opposing party.

Standards of Liability for Product Sellers -- Provides that product sellers (retailers, wholesalers, and distributors) will be liable only for harm caused by their own fault, unless the manufacturer cannot be brought into court or is unable to pay a judgment. In such cases the seller may be held liable for the manufacturers' errors.

Standards of Liability for Punitive Damages -- Raises the claimant's burden of proving that punitive damages are warranted. The new standard will be "clear and convincing evidence," which is greater than the ordinary standard in civil cases ("preponderance of the evidence"), but less than the standard in criminal cases ("beyond a reasonable doubt"). It also requires a showing that the defendant engaged in conduct manifesting a "conscious, flagrant indifference" to the safety of product users. It permits the issue of punitive damages to be decided in a proceeding separate from the determination of liability.

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PHOTOCOPY
PRESERVATION

For manufacturers or sellers of drugs or medical devices, or manufacturers of aircraft, the bill provides a complete defense against punitive damages if the product was approved by the applicable government regulatory agency -- the Food and Drug Administration or the Federal Aviation Administration, respectively.

Time Limitations -- Establishes a 2-year statute of limitations in which actions may be brought after discovery of the harm, and a 25-year "statute of repose" from the time of delivery for "capital goods" (e.g., industrial machinery). After that time, any civil action for harm resulting from those goods is barred, unless the harm is a "toxic harm," or the claimant is without workers' compensation.

Workers' Compensation -- Provides that damages are reduced by any amount of workers' compensation received by the claimant; and precludes employers from seeking reimbursement for workers' compensation payments from manufacturers unless the employer was not in any way at fault in causing the harm.

Joint and Several Liability -- Eliminates joint and several liability for damages for pain and suffering (non-economic damages). Each defendant will be liable for only the portion of damages that corresponds to its percentage of the fault.

Alcohol and Drugs Defense -- Provides a complete defense to any liability action when a claimant's use of alcohol or drugs is responsible for over 50 percent of the claimant's harm.

B. Prior Congresses

Senate Committee Action

In 1982 (97th Congress), the Committee on a voice vote reported S. 2631, a product liability bill introduced by Senator Kasten. The bill was not considered by the Senate. In 1984 (98th Congress), the Committee reported S. 44 (substantially the same as S. 2631), with 5 dissenting votes. S. 44 was referred to the Labor Committee for consideration of workers' compensation issues, but no hearings were held. The 98th Congress ended without consideration of S. 44.

In the 99th Congress, S. 100 was introduced by Senator Kasten. The Committee failed by a vote of 8 to 8 to report S. 100 in May, 1985. On December 20, 1985, Senator Danforth introduced S. 1999, on which hearings were held. Provisions of S. 1999 then were included in S. 2760, an original bill ordered reported by the Committee on a vote of 10 to 7 after

several days of markup. This bill contained what is often referred to as the "core package" of provisions, many of which are included in S. 1400, as well as some additional provisions (including an expedited settlement procedure with caps on plaintiffs' damage awards). The Senate considered a motion to proceed to S. 2760 in September, 1986, which prevailed 84-13, but by agreement the bill was returned to the Senate calendar.

In the 100th Congress, several product liability measures were introduced. Senator Kasten introduced S. 666 and S. 711 (a Reagan Administration proposal that would have set fault-based standards instead of the strict liability standard now in effect in a majority of states, would have eliminated joint and several liability, and would have capped noneconomic damages at \$200,000). Both bills were referred to the Commerce Committee, and a Consumer Subcommittee hearing on product liability was held in September, 1987. No further action was taken in the Commerce Committee during the 100th Congress.

House Committee Action

The House of Representatives spent considerable time on the product liability issue in the 100th Congress, holding 7 days of hearings, 5 days of Subcommittee markup, and 10 days of Full Committee markup. The Energy and Commerce Committee reported H.R. 1115, as amended, on June 14, 1988. The bill was then referred to the House Committees on Judiciary and Education and Labor, and the 100th Congress adjourned without House floor action on the bill.

III. WITNESSES

There will be 9 witnesses appearing at the hearing, who will provide information on (1) the effect of the current product liability system on the ability of businesses to compete; (2) the effect of enactment of S. 1400 on aspects of business related to competitiveness; (3) the effect of the current system and S. 1400 on the cost and availability of insurance; and (4) the impact of product liability insurance costs and availability on competitiveness.

A. Individual Witnesses

Robert Mosbacher, Secretary of Commerce, will testify on behalf of the Administration. He is expected to express the Administration's endorsement of federal product liability legislation (proposals more stringent than S. 1400 have been endorsed by the Administration's Council on Competitiveness, headed by Vice President Quayle). He also is expected to testify that the current system is more expensive than the systems of other countries, and that it chills innovation and adversely affects the ability of American business to compete with foreign companies. He is expected to testify that providing uniform rules

of product liability for business will provide beneficial predictability.

Dr. Julie Fox Gorte, Project Director, Office of Technology Assessment (OTA), will discuss the findings of OTA's recent report, Making Things Better: Competing in Manufacturing. This report was requested by the Senate Finance and Banking Committees, and was published in February, 1990. The report analyzes the options for improving manufacturing technology, so as to improve U.S. manufacturing competitiveness. The options for government policy that were recommended as helpful in addressing the problem of competitiveness did not include changes in product liability law.

OTA is expected to testify that in the course of its study it winnowed through many issues that were suggested as handicaps to manufacturing. Product liability was not included in the list of problems ultimately studied or recommended as a policy change, because it was an issue raised only by a few industries (such as the machine tool industry). OTA is expected to testify that the problems that are most significant to competitiveness of American business are (1) capital costs; (2) the quality of human resources, (3) and technology transfer and diffusion. OTA is expected to suggest various policy options for government to explore to address these problems, but to note that no single government fix will have much of an effect, since correcting the problem of competitiveness will require the commitment of the entire nation, including that of manufacturers to solve some of their own problems.

B. Panel #1

Gene Kimmelman, Legislative Director, Consumer Federation of America, will testify in opposition to S. 1400, and to the effect that current product liability law has improved the competitiveness of American business by helping it respond to consumer demand for safe, effective products. He is expected to testify that S. 1400 will not address the real economic problems in the area, which are caused by fluctuating insurance costs unrelated to product liability, but rather will harm consumers by reducing manufacturers' incentives to produce better products.

Dr. Malcolm Skolnick, Professor of Biophysics at the University of Texas Health Science Center at Houston, who also is a patent attorney, will testify in his individual capacity and not as a representative of the University. He will testify that product liability laws have a dysfunctional effect on biomedical research and practice, and adversely affect competitiveness by placing enormous burdens on American businesses that attempt to introduce innovative biomedical products into commerce.

Harry Featherstone, President and CEO of the Will-Burt Company in Orrville, Ohio, will testify on behalf of the National Association of Manufacturers. He will testify in favor of S. 1400

as a good starting point to help U.S. manufacturers restore a balance with their foreign competitors by creating stability and certainty in the product liability system. He will testify that the current product liability system has had the effect of increasing prices, discontinuing products, and closing plants with a resultant loss of jobs. He attributes these effects mainly to the legal system, which he will testify is confusing, unfair and wasteful, and which is a competitive disadvantage that foreign companies do not face.

C. Panel #2

Deborah T. Ballen, Vice-President for Policy Development and Research of the American Insurance Association, will testify on behalf of this trade association, which represents many of the major property-casualty insurers in the country. She will testify that S. 1400 is likely to have little or no beneficial impact on insurance claim costs, because it would fail to address many of the product liability issues that are most significant, and would preempt some more favorable provisions in existing state law. She also will testify that it is very difficult to measure the impact on insurance claim costs of changes in tort law, but that in any event not all of the improvements in the last few years in price and availability of insurance are attributable to changes in the tort law that have taken place during that time.

J. Robert Hunter, President of the National Insurance Consumer Organization (NICO), an organization formed to educate consumers and undertake public policy research on insurance matters, will testify. Prior to forming NICO, Mr. Hunter was the Federal Insurance Administrator and Chief Actuary of the Federal Insurance Administration. He will testify that S. 1400 will have zero effect on insurance availability and affordability. He will further testify that when manufacturers complain about lack of competitiveness, they really are complaining about insurance costs. He will testify that the only legislative proposals before the Congress that would improve competitiveness by dealing with insurance costs are those bills that would repeal the insurance industry's antitrust exemption, which manufacturers are not supporting.

Peter Huber, a Senior Fellow at the Manhattan Institute for Policy Research, who is an engineer as well as a former law clerk to Justice Sandra O'Connor, will testify that the current liability system has not worked to enhance safety or spur technological progress. He will testify that, instead, business reacted to the actual or perceived threat of liability by withdrawing products, halting research and avoiding new product lines. Mr. Huber is the author of a book on the subject, Liability: The Legal Revolution and Its Consequences.

Professor Mark Hager, Assistant Professor of Law at the Washington College of Law of the American University, will testify that there is no solid evidence that the current product liability

system places U.S. manufacturers at a competitive disadvantage. He further will testify that S. 1400 actually could harm U.S. competitiveness by undermining the superior safety reputation of U.S. products; he will state that S. 1400 instead could attract low-safety foreign imports, currently deterred by threats of tort liability, more heavily into U.S. domestic markets. Professor Hager is the author of a law review article taking issue with Mr. Huber's publication, titled Civil Compensation and Its Discontents: A Response to Huber, 42 Stanford Law Review 539 (January 1990).

+ skeptical that this is
true competitiveness problem

Lower
Level

Competitiveness & Insurance

Witnesses

- ① Mosbacher →
- ② OTA

- report - no mention of
Fed. list in goal report!
improving competitiveness

③ someone representing mfg.

④ Jim Killman - Chairman Fed. gov.
prod safety &
combination of work &
better reg.

⑤ Am. Insurance Ass'n, ⑥ Bob Hunter
* won't raise corp. ins. rates.
→ look @ interest rates/
investment -- not @ risks.

Investment income v. premiums.
* also hasn't been affected by
reforms that have gone on.

Nat'l Fed. Consumer Ass'n.

Index

on 5.1400

- adversely affects comp'n.
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OTA

businessmen

Wilbur C. in Ohio
Univ of Texas - research director → IMR 1958
Gene Kimmelman - Consumer Fed.

acknowledging Peter Hiker
Mark Hager reburied 10.11.

