THE WHITE HOUSE

WASHINGTON

July 15, 1982

MEMORANDUM FOR THE RECORD

FROM: CRAIG L. FULLER

SUBJECT: Product Liability/CM212

During the Cabinet meeting held today, the following points with respect to product liability were agreed upon by those present and approved by the President:

1. The Administration approves in principle the enactment of Federal legislation providing uniform standards for product liability.

2. Product liability litigation should remain in the normal forums of the judicial process (e.g., no changes in jurisdiction).

3. No new Federal enforcement powers on machinery shall be created.

4. The legislation shall not change other, unrelated areas of the law (e.g., workmen's compensation, etc.)

The Cabinet Council on Commerce and Trade will continue to work on the details of the pending legislation in a manner consistent with the principles listed above.

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ECONOMIC CONSEQUENCES OF A FEDERAL PRODUCT LIABILITY ACT

July 2, 1982

I. INTRODUCTION

Logic alone compels the conclusion that a Federal statute establishing uniform legal standards for application by all courts in product liability actions would reduce the costs associated with assessing product users' rights and product sellers' obligations in product injury cases.

Uniform legal standards would reduce the need, born of the current uncertainty and lack of predictability about the law, for plaintiffs and defendants to research and brief every issue in every product liability case in an effort to define what the applicable law is. It would promote prompt settlements of just claims, since plaintiffs and defendants alike would know their respective rights and obligations. It would eliminate current incentives to constantly expand the bases of liability, but it would not diminish consumer rights. It would reduce the transaction and production costs inherent in a multiplicity of State rules, and it would stabilize (if not reduce) the costs of product liability insurance.

The elements of an economic analysis of a Federal product liability statute are discussed in Section II. Section III identifies four areas in which, according to our survey of the business community, cost savings, although not quantifiable, will result.

II. ELEMENTS OF ECONOMIC ANALYSIS OF FEDERAL PRODUCT LIABILITY LEGISLATION

A. Pending Product Liability Proposals Do Not Lend Themselves to Economic Cost-Benefit Analysis.

The major proposals currently pending for a Federal product liability statute (S. 2631, H.R. 5214) would establish a uniform set of legal rules governing the determination of product users' rights and product sellers' obligations in traditional tort actions arising out of product use. These proposals do not lend themselves to a cost-benefit analysis for several reasons.

First, they do not in any way require the expenditure of governmental funds. Therefore, there are no new costs associated with a uniform Federal law which can be balanced against benefits. Federal and State court jurisdiction in product liability cases would be unchanged under the proposals. Federal and State expenditures would not be required.[1/]

Unlike a new Federal program or a new administrative regulation, the product liability proposals would entail no expenditure of public or private funds against which their benefits could be weighed. Moreover, even if such proposals could be characterized as "quasi-regulatory" to the extent that they set standards of liability, such "quasi-regulation" would have no economic cost against which to measure its economic benefits.

Second, the proposals for legislative action seek merely to establish a uniform set of legal rules which are fair and equitable; they do not seek either to limit the number of product liability claims or to limit the damages recoverable in such claims. If the

pending proposals were designed to eliminate product liability from the legal system, it would be relatively simple to compute the costs which would be saved.[2/] The fact is, however, that such statutes are likely to have little or no impact on the number of claims brought for product-related harms.[3/] Similarly, none of the proposals would limit the damages recoverable,[4/] although data show that damage awards in product liability actions have been climbing steadily.[5/] The enactment of a uniform Federal statute would most likely have no impact on this trend.

Given these facts, the product liability proposals do not lend themselves to a traditional economic cost-benefit analysis.

B. Pending Product Liability Proposals Do Not Eliminate Product Liability Actions; They Merely Make Their Outcome More Predictable.

The pending proposals, as noted above, would not eliminate product liability. They would merely codify and clarify the bases on which liability could be imposed. It is impossible to measure the economic benefits which clear and predictable rules of law would create.[6/]

For example, S. 2631 provides a fault-based standard of liability in design defect cases. This clear statement of the applicable standard eliminates the uncertainty which currently pervades the law as a result of some court decisions which, contrary to the traditional and majority rule, have applied or have purported to apply a strict liability to standard of liability in design defect cases. There is no way to measure the economic benefits of the resulting predictability in the law.

The economic benefits will be subtle but real. Clarification and predictability of product liability law and, specifically, product sellers' obligations, will give all parties the means to assess accurately the merits of a claim. A valid claim that would otherwise go to trial could be promptly settled. Prompt settlement would certainly reduce legal and interest expense and court costs, although those savings are difficult to measure with any accuracy.

To a large extent, the Federal product liability proposals would codify the "average" or the prevailing majority rule of law on product liability issues.[7/] The economic impact of this is also difficult to measure precisely. Where the law of most states on most issues would be unaffected by the proposals, there would be no economic impact. Where the law of some states on some issues would be expanded or made more liberal[8/] or brought back into line with the prevailing rule of law,[9/] the economic impact is not quantifiable. One simply cannot say what the effect of a single change in the product liability law of a single state would be, much less what the total impact of the changes in every jurisdication would be.

Discussed below in Section III, are those areas in which cost savings, although not quantifiable, would be realized under a uniform Federal product liability statute.

C. The Decisional Data Needed to Gauge the Economic Effect of Federal Legislation on Current Law Does Not Exist.

Whether a suit ends in a jury verdict or a private settlement, the legal basis for the award of damages or the rejection or abandonment of the claim is rarely, if ever, made public. The lack of such

data makes an economic analysis of pending product liability proposals impossible.

Most product liability complaints name every possible defendant[10/] and every plausible theory of liability. The basis on which the decision to award or deny damages is rarely discernable. In the absence of data reflecting the legal bases underlying current damage awards, an analysis of the impact of specific provisions of the pending Federal product liability proposals is impossible.

Even if it were possible to pinpoint, in a four-count complaint, the count on which a jury found the defendant liable, it would be impossible to determine whether the same jury would award damages on another basis if the count originally relied upon were modified by a Federal statute.

More important, there is no data on the basis for settlement of cases. It is estimated that 95 percent of liability claims are settled or dropped before they reach the jury.[11/] While the percentage of product liability claims tried by juries is probably higher than average,[12/] the overwhelming majority of such claims never reach the trial stage. They are either abandoned or settled privately.

Private settlements rarely become part of the public record,[13/] and parties to such settlements frequently agree, as part of the overall settlement, not to discuss the amounts (if any) involved. Businesses, in particular, are reluctant, for competitive and other reasons, to divulge information on either the number of product liability claim settlements to which they are parties or the amounts involved.

Since data on the great majority of product liability claim settlements, like data on jury decisions, either does not exist or cannot be obtained, it is impossible to analyze the impact that a Federal product liability statute would have on the number and amount of such settlements.

D. Only a Portion of Product Liability Losses and Expenses Are Commercially Insured; Most Are Self-Insured.

The Insurance Services Office (ISO), the principal insurance statistical advisory and rate service organization, has estimated that between 25 and 30 percent of the $5.18 billion in liability (other than auto and medical malpractice) insurance premiums written in 1981 related to product liability. Thus, American businesses spent between $1.3 billion and $1.6 billion to commercially insure their product liability exposure in 1981.

These huge outlays, however, accounted for only a portion of the losses and expenses associated with business product liability in 1981. The balance was either uninsured or self-insured. There is no way of estimating the extent to which uninsured and self-insured product liability costs exceeded those borne by commercial insurers.

As product liability and other business insurance costs (e.g., workers' compensation, commercial automobile liability) have increased, a growing number of businesses have adopted, to varying extents, risk-funding alternatives to commercial insurance. These alternatives range from higher deductibles and self-insurance programs to wholly-owned corporate insurance companies ("captive" insurers) and combinations of these devices with commercial coverage.

The trend toward alternatives to commercial insurance, initially the product of sharply accelerating premiums, has been given additional momentum by the high interest returns available on the investment of corporate cash reserves. These returns are particularly attractive in "long-tail" exposures like product liability, where many claims are settled years after the incidents that gave rise to them.

Self-insurance is most prevalent among large corporations with extensive cash flows. Examples include the General Motors Corporation, Ford Motor Company, the leading chemical and pharmaceutical manufacturers, and others in industries generating a significant proportion of all product liability claims.

The scale of self-insurance programs is enormous. As long ago as 1976, Merck & co., a major pharmaceutical house, carried product liability coverage of $100 million excess of (above) a self-insured retention of $12.5 million per occurrence. In other words, the company's commercial insurance protection would not come into play until losses and expenses from claims arising from a particular incident exceeded $12.5 million.

Self-insurers, for competitive and other reasons, are extremely reluctant to divulge details of their product liability loss and expense experience. As a result, the majority of the business community's product liability data is, for all practical purposes, unavailable.

E. Insurance Prices Are Not Indicative of Current Product Liability Loss and Expense Experience.

The following table shows the countrywide effect of the combined rate level changes for ISO product liability bodily injury

and property damage coverages, basic and increased limits, from 1975 through the first nine months of 1981:

1975	+ 117.3 percent
1976	+ 35.7 percent
1977	+ 3.1 percent
1978	+ 0.1 percent
1979	- 1.6 percent
1980	- 0.7 percent
1981 (9 months)	- 5.8 percent

The relative stability of product liability insurance rates over the past four years is not a function of improving loss and expense experience, but rather reflects a price war among insurers precipitated by attractive returns on the investment of premiums. This competitive struggle shows no sign of abatement despite steadily worsening loss and expense ratios. Insurers continue to engage in "cash flow underwriting," in the belief that investment returns on product liability premiums will make up for the inability of those premiums to cover anticipated losses and expenses.

Even if the current price war among insurers were not artificially depressing product liability insurance rates, insurance data would be a poor barometer of current product liability experience.

First, as noted above, insured product liability exposure is but a fraction of the total exposure of American business, and, because insurance data represents the past experience of smaller businesses which cannot afford alternatives to commercial coverage, such data is not representative of the entire business community's experience.

Second, insurance data is entirely retrospective, and therefore lags behind current developments. The ISO generally uses the experience of reporting companies for the preceding five years as its data base in the development of future rates. Thus,

a dramatic increase in claim frequency or severity in the latest year would be tempered by the (perhaps better) experience of the previous four years in developing prospective rates.

Third, product liability insurance data is based on the countrywide experience of all reporting companies, and is thus useless for measuring the impact of a given State's law on the experience of companies writing product liability insurance in that State. In all other lines of insurance, rates are made on a State-by-State basis. But because products made in one State may be distributed in a second, sold in a third and used in all others, each with quite different rules governing the manufacturer's tort liability; and because legal precedents in one State may encourage the filing of suits there (rather than in the State of manufacture, distribution, sale, or injury), product liability rates for even a localized business must be based on the national experience of all insured businesses in that classification, rather than on its experience in its home State.

III. COST SAVINGS THAT WOULD RESULT FROM ENACTMENT OF A FEDERAL PRODUCT LIABILITY LAW

In the four subsections below, we set forth the broad areas in which costs to American and foreign product sellers and product users would be reduced through the enactment of a balanced and effective uniform Federal product liability law.

In certain of these areas, we have been able to calculate with reasonable certainty and precision the amount (in current dollars) of savings that a Federal statute would produce. In others, because of constraints identified in section II above, we have been compelled either to illustrate or to estimate the cost reductions involved.

We found no instances in which a Federal product liability statute would increase business costs, other than in those States in which the "average" Federal liability rules would make a product user's recovery against a product seller easier than it is under current State law.[14/] To the extent that these added costs internalize to the product seller causing the harm the economic consequences of that harm, the result would be consistent with the Federal statute's purpose, "which is to place incentives for risk prevention on those best able to implement that goal."[15/]

A. Transaction Costs.

Two of the stated goals of a Federal product liability tort law are to assure "that responsibility for harm is not placed on those who did not cause the harm,"[16/] and to "substantially reduce transaction costs without reducing the amount the injured claimant receives."[17/]

The fault-based tort system is an adversary process requiring enormous expenditures for the legal and investigative efforts needed to fairly and properly allocate responsibility. These expenditures are particularly high in determining responsibility for product-related harm. According to the 1977 ISO Product Liability Closed Claim Survey:

> For every dollar paid for claims, insurers incur in defense costs an additional 35¢ [bodily injury] and 48¢ [property damage], no matter who wins the case. By far the largest item contributing to the cost of settling claims is defense attorneys' fees, which account for about 83% of the defense costs.[18/]

In addition, winning plaintiffs must give up varying percentages, usually 33 1/3, of their recoveries in fulfillment of their contingent fee agreements with their lawyers. Thus, for every

66 2/3¢ received by successful claimants ($1.00 less 33 1/3¢), the product liability tort system expends an average of another 74.8¢ in legal and investigative costs (average of bodily injury and property damage defense costs = 41.5¢; plus 33.3¢ contingent fee).

Although, as observed above,[19] a Federal product liability statute would have little effect on the frequency with which product liability claims are brought or on the average award in such cases, it would nonetheless bring about a substantial reduction in the "transaction costs" -- legal and investigative expenses -- associated with these claims.

(1) Generally, the uniform applicability of a "black letter" (statutory) product liability law would greatly reduce the amount of legal expense that both product sellers and product users must now undertake to determine, in each jurisdiction, not only the current state of the law as applied to a particular set of facts, but also the likelihood that past precedents will continue to be applied by the courts.[20] The following excerpts from a letter to the General Counsel of the U.S. Department of Commerce from Frank A. Orban, III, senior attorney for Armstrong World Industries, Inc., a Fortune 500 manufacturer, describe the process -- and the costs -- that a uniform product liability law would ameliorate:

> Currently when a claim is made, it is frequently even unclear what the legal basis of the claim is (tort, warranty, strict liability in tort).
>
> At the present time, competent defense counsel charge on the average between $75-$150 per hour. If a claim arrives from any state other than our home state of Pennsylvania, we are effectively compelled to engage local counsel immediately since it is impossible to keep abreast of and research the complex nuances of out-of-state product liability law. Such law is scattered through a large number of state and federal court decisions....

> The cost of obtaining even a cursory evaluation of a case costs no less than $1,000 and any complex case will cost initially multiples of that figure -- just for a basic analysis under the law of the particular state involved. If conflict-of-law issues arise, such analysis may add...additional dollars to the bill.
>
> If a Federal statute existed, counsel for a corporation would be able initially to evaluate such cases at a fraction of the cost of engaging other counsel. Furthermore, the Federal statute would remove most conflict-of-laws issues. A consequence of lowering these early "transaction costs" would be that meritorious suits would be more quickly settled and non-meritorious suits would be resisted, since counsel would be less inclined to advise settling non-meritorious claims simply for their "nuisance value" under the threat of added legal costs....
>
> Reviewing my experience with previous and present firms, I would suggest that the savings in initial outside counsel fees and related overheads on a typical out-of-state claim would be from $2,000-$4,000 per claim....The savings would increase where the case moves forward to trial or where there is an especially complex case....[21/]

According to a recent estimate,[22/] approximately 109,000 product liability suits were filed in Federal and State courts in 1981. If Mr. Orban's estimate of the legal research costs that a Federal product liability statute would save in the initial stages of these suits is correct, annual cost reductions would range, at a minimum, from $218 million to $436 million.[23/]

While these savings might diminish over the years as States diverge in their interpretation of the Federal statute, the diminution would be insignificant, since divergence would likely be evolutionary,[24/] and would, of course, occur in areas of nuance rather than in central legal tenets, as it does today.

(2) Extensive transaction costs also accompany the interaction of product liability tort law and the non-fault workers' compensation system in cases involving workplace product injuries. Most States

permit employers and/or their workers' compensation insurance carriersto recover, via subrogation, workers' compensation benefits paid to a worker who recovers in a tort action against the third-party manufacturer of the product involved in the work-place accident.[25] A few States permit the third party to attempt to shift all or part of his liability back to the employer.[26]

The major pending Federal product liability proposal (S. 2631) addresses the conflict between the policies underlying workers' compensation laws and those favoring apportionment of liability under tort law in interrelated ways[27] intended to "place incentives for risk prevention on those best able to implement that goal"[28] and to "substantially reduce transaction costs without reducing the amount the injured claimant receives."[29]

It would apply principles of comparative responsibility to the assessment of liability against both claimants and third parties in workplace product accidents (section 9); allow juries to take employer fault into consideration in assessing damages against claimants and/or third parties (section 10); require deduction of workers' compensation benefits from claimants' tort recoveries; and eliminate employers' and third parties' rights of subrogation, contribution, and indemnity (section 11).

These provisions would reduce many of the costs of the tort and workers' compensation systems that derive not from their operation per se, but rather from their interaction.[30] They would reduce the extent of interaction between the systems, and hence the costs of that interaction.

Insured workers' compensation premiums in 1981 amounted to $13.4 billion.[31] Self-insurers and State funds wrote approximately

$6.6 billion in premiums (or their equivalent).[32/] Insured incurred losses amounted to nearly $9 billion,[33/] and incurred losses of self-insurers and State funds were approximately $4.4 billion.[34/]

Data from the National Council on Compensation Insurance (NCCI) and two major workers' compensation carriers[35/] show that workers' compensation subrogation recoveries from all third-party sources historically amount to approximately 1 percent of incurred losses. Thus, of $13.4 billion in incurred losses in 1981, subrogation recoveries from all sources amounted to approximately $134 million.

Although no precise data exist on the percentage of subrogation recoveries derived from product-related workplace injuries, experienced workers' compensation experts estimate that 30 percent of such recoveries are made from manufacturers whose products are involved in workplace accident litigation. Thus, product-related subrogation recoveries in 1981 were approximately $40.2 million.

Section 11 of S. 2631 would eliminate these recoveries, and thereby transfer these costs out of the insured and self-insured product liability tort system and retain them in the workers' compensation system.[36/]

It would also eliminate the transaction costs involved in these recoveries, which a major insurer, the Industrial Indemnity Company, estimates at between 12 and 14 percent of the recovered amounts. Thus, in 1981, a product liability law like S. 2631 would have eliminated between $4.8 million and $5.6 million in transaction costs associated with workers' compensation subrogation recoveries against product manufacturers.

The bill would also eliminate, in the several States that now permit them, contribution and indemnity actions by product manufacturers against employers, but we could find no reliable way to estimate the savings in transaction costs that would result from the elimination of these actions.

(3) Substantial transaction costs today are incurred by product retailers and wholesalers who have no responsibility for harms caused by the products they have sold but who are routinely named as defendants in product liability lawsuits. A Federal product liability statute which required claimants to identify with specificity the parties causing the harm, and facilitated the early dismissal of product liability claims against non-culpable defendants, would both discourage the initial naming of non-culpable parties and reduce the expense those parties must undertake in responding to such claims.

Section 8 of S. 2631 would hold non-manufacturer product sellers liable only for their own negligence or fault unless the manufacturer were judgment-proof or not subject to the court's jurisdiction. Current law in a number of States holds non-manufacturer product sellers strictly liable as if they were manufacturers.[37/] Retailers and wholesalers held liable under these circumstances must now bring contribution actions against the manufacturers actually causing the harm in order to shift liability onto culpable parties.

This shifting of liability through secondary lawsuits occurs in over 95 percent of the cases in which non-manufacturing product sellers are named as defendants, and involves substantial legal expense for both non-manufacturer and manufacturer parties.

Under section 8 of S. 2631, in the 95 percent of cases in which non-manufacturer product sellers are not actually responsible for the harm, they would save a significant proportion of the time and expense now consumed both in defending themselves in the initial action and in bringing secondary actions against culpable parties.

B. Production Costs.

Throughout our history as a Nation, both Congress and the courts have recognized that the costs imposed by individual State regulation of essentially interstate business would be an intolerable burden on interstate commerce.

For example, the need for nationwide uniformity preempted State efforts to mandate maximum train lengths[38/] and even mudguards on trucks.[39/] Although Federal legislation was not enacted to establish national standards, the Supreme Court found that an individual State could not impose unique requirements on vehicles entering its borders. The requirements, which would be economically burdensome or wasteful or which would force vehicles to circumvent a State, were found to be impediments to the free flow of commerce.

The adverse effects of individual, non-uniform requirements in the area of transportation are easy to understand, and the rationale has prompted Federal legislation in a number of other areas. For example, the Cotton Standards Act[40/] and the Grain Standards Act [41/] require compliance with uniform national classifications. The standards are designed to protect and promote commerce in the interest of producers, merchandisers, warehousers, processors, and consumers, to ensure that the products are marketed in an orderly and timely manner, and to facilitate trading.[42/]

The Tobacco Inspection Act[43/] recognized the purpose and effect of uniform standards of classification and inspection as imperative to interstate commerce. Congress noted that, without uniform standards, evaluation of tobacco was susceptible to speculation, manipulation and control causing unreasonable fluctuations in prices which would be detrimental to producers and, ultimately, consumers.[44/]

In the investment market area, the adverse or ineffective impact of varying State laws prompted the enactment of uniform Federal standards. For example, in enacting the Public Utility Holding Company Act,[45/] Congress noted that the activities involved, extending over many States, were "not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public utility companies."[46/] The Investment Company Act[47/] similarly noted that the activities in question extended over many States and that the wide geographic distribution of security holders made "difficult, if not impossible, effective State reuglation."[47/]

Further, the Consumer Product Safety Act[49/] was enacted "to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations," because control by those governments was recognized as "inadequate" and "burdensome to manufacturers."[50/] Similarly, the Cigarette Labeling and Advertising Act [51/] recognized that national standards were essential in order that "commerce and the national economy...[not be] impeded by diverse, nonuniform, confusing cigarette labeling and advertising regulations."[54/]

During the current Administration, interstate commercial considerations have in several instances required Federal preemption of State and local regulation. For example, in extending the Federal Insecticide, Fungicide and Rodenticide Act,[53/] the Congress eliminated provisions which permitted the States to require pesticide manufacturers to furnish more data than required by the Federal Government in registering a pesticide.[54/]

Similarly, the Federal Aviation Administration (FAA) has reacted to local efforts to curb airport construction, operation, or expansion, which would disrupt an integrated national air transportation system with "a tough new plan -- strong initial intervention in any discussion of airport restrictions and then litigation to stop curbs."[55/] The FAA is also "seeking legislation that will require FAA approval of any local changes in operations, thus ensuring federal preemption."[56/]

In addition, the Labor Department recently promulgated preemptive Federal regulations which require U.S. manufacturers to alert workers to the harmful effects of toxic substances through training and labeling,[57/] after the chemical manufacturing industry pointed out that "it would be a lot less costly and easier to comply with a single federal rule than with 50 different ones."[58/] A report on the Labor Department's decision noted that "(a)bout 10 States and two cities have adopted their own labeling requirements. Similar standards are being considered by about 20 more States and three cities."[59/] The report quoted "a White House official"[60/] to the effect that "'There proved to be a greater danger of all the conflicting state regulations than we had first been aware of.'"[61/]

The same economic considerations that have given rise to Federal preemption in other areas of interstate commerce compel the conclusion that Federal preemption of product liability law is essential.

The fact that the Federal action needed here affects product liability tort law does not diminish the validity of these considerations. Federal tort reform legislation is not unique. A number of Federal workers' compensation statutes were enacted to provide benefits in areas where State law was deemed inadequate.[62/] A Federal product liability act is analogous to the Federal Employers' Liability Act,[63/] which provided a uniform Federal tort law for railroad employees injured in interstate commerce.[64/]

The variations in product liability rules greatly increase the cost of designing, manufacturing, packaging, labeling, shipping and selling products in interstate commerce. Confronted with a crazy quilt of product liability laws and differing State rules on product safety, manufacturers must devote substantial resources to making sure that their products satisfy the requirements of as many States as possible. But under current conditions, there is simply no way one product can satisfy the requirements of all States.

Indeed, a recent study by Professor George L. Priest of Yale Law School suggests that developing theories of "enterprise liability" are forcing product sellers to make investments in product safety that product users could better and more cheaply make themselves:

> The most surprising implication of my study is that enterprise liability is likely to have increased the rate of product defects and the

> rate of injuries from defective products. The explanation is that whenever a rule of law requires a manufacturer to make an investment in safety that consumers would make more cheaply, the costs of safety will increase and product safety will diminish....[Defenses to product liabilty] neglect what appear from my data to be a wide range of consumer investments to increase safety....(T)hose consumers who prefer not to make such investments -- the risky, those who place high values on their time -- will still benefit from enterprise liability. The poor and the careful who must pay more than their share of losses in the price of the product will be harmed. Total consumer welfare will decline. The rate of defects and injuries will increase.[67]

The production costs implications of conflicting product liability rules are illustrated by the following excerpts from an April 22, 1982, letter to Senator Robert W. Kasten, Jr., from Wendell Lund, Legislative Counsel to the National Product Liability Council, describing five differing legal standards for product design liability under the laws of four States:

> In Cepeda v. Cumberland Engineering Co., Inc., 76 N.J. 152, 386 A.2d 816 (1978), the New Jersey high court approved the following standard for judging product designs: A product is in a defective condition unreasonably dangerous if it is so likely to be harmful that a reasonably prudent manufacturer, who had actual knowledge of its harmful character, would not place it on the market. It is not necessary to find that the defendant had knowledge of the harmful character of the product in order to determine that it was in a defective condition unreasonably dangerous." Although this standard sounds at first blush like the negligence standard of "reasonable care," it will be observed that knowledge of the risks associated with a product is presumed -- even if no one in the world could have known of the risks prior to the plaintiff's injury. Thus, manufacturers are held liable in New Jersey even for risks that are totally unforeseeable and against which no one can adequately insure.
>
> Under the New Jersey approach, the question of "defective condition unreasonably dangerous" is to be given to the jury to decide in most instances. In Pennsylvania, on the other hand,

the "unreasonably dangerous" issue is never to be given to the jury. In Azzarello v. Black Brothers Company, Inc., 391 A.2d 1020 (Pa. 1978), the Supreme Court of Pennsylvania articulated a new and different test for design cases: questions such as "when does the utility of a product outweigh the unavoidable danger it may pose?," while relevant to the decision, are never to be given to the jury to decide, but are exclusively questions of law for the judge. The confusion generated by this assignment of functions has led one product liability commentator to conclude: "Obviously, the Supreme Court of Pennsylvania has misunderstood the analysis upon which it purports to rely." Henderson, Renewed Judicial Controversy Over Defective Product Design, 63 Minn. L. Rev. 773, 799 (1979).

If the significant differences in approach to the question of unreasonable product design between New Jersey and Pennsylvania were not enough to give corporate planners gray hairs, a federal district court in Wisconsin has recently interpreted that state's law to reach the startling conclusion that "there may be recovery for the negligent design of a product even though [the design] is not unreasonably dangerous." Schuldies v. Serivce Machinery Co., 488 F. Supp. 1196 (E.D. Wis. 1978). At least New Jersey and Pennsylvania agree that "unreasonably dangerous" is a relevant concept in product design cases; but Wisconsin appears to abandon that idea altogether.

Product design standards established in California are even more confusing and "different". In Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 433, 143 Cal. Rptr. 225 (1978), the California high court gives us not one, but two standards for judging defective designs: "[I]n design defect cases, a court may properly instruct a jury that a product is defective in design if (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design."

> Thus, in four states, Cincinnati, Inc., is held to five different standards regarding the sufficiency of its product designs. What one state emphasizes as the crucial test for liability, the next state rejects as irrelevant. An issue for the jury in one state becomes an issue exclusively for the judge in the next. And an issue for the plaintiff to prove in one state becomes an issue for the defendant to disprove in the next.[66/]

As a consequence of the bewildering variety of legal standards to which it is held for the design of its long-lived machines, the company mentioned in Mr. Lund's letter to Senator Kasten, Cincinnati, Inc., has seen its product liability costs per machine mount from $200 per machine in 1970 to $11,000 per machine in 1982.[67/]

Production costs necessitated by variations in State product liability rules include legal expense necessary to keep abreast of changing case law;[68/] management time devoted to assessing the impact of these changes on product design and the adequacy of warning labels;[69/] and staff effort in tracing the involvement of a company's products.[70/] While some of these costs would not be eliminated by a Federal product liability statute, those born of frequent changes in basic rules of liability and attendant uncertainty of outcome would be.

Ironically, variations in product liability rules also curtail production costs that could lead to improvements in product safety. For example, the States differ as to whether claimants can introduce evidence of post-manufacture improvements in product safety to establish that the product in question was defective.[72/] The result of this divergence "is that manufacturers, who often do not know where items eventually will be sold, balk at making products safer, fearing that such steps will be used against them in court."[73/]

Similarly, the production costs associated with product liability can become so burdensome that they force businesses to forego the introduction of new products or to abandon the marketing of existing products.

For example, within the past few months, just two juries, one in California and the other in Indiana, have handed down judgments in football helmet injury cases that have exceeded the annual sales of the entire helmet manufacturing industry.[74/] The cumulative effect of these and earlier blockbuster judgments on the helmet manufacturing industry was described by a representative of the Sporting Goods Manufacturers Association:

> Out of the 13 football helmet manufacturers, 7 remain in business. Of these 7 only 1 company has publicly stated they will remain in the business through "thick and thin". Seventy-five severe cases relating to injuries on the football field are waiting to be tried. Profits from helmet and face mask manufacturers is no more than $1 million on gross sales of $25-35 million. The crisis is not that there are more accidents causing injury and damage. As a matter of fact, reports are to the contrary. The crisis is that the reward for injury has escalated dramatically. Results: Schools are dropping sports, manufacturers are dropping product lines (in some cases dropping out altogether), and retailers and sales agents are saying, "Wait a minute...I can lose everything just by being involved in the process?...
>
> ...At present, the risk of doing business, precludes being in business....
>
> Finally, Mr. Chairman, because of the fear of unwarranted product liability suits, liability insurance costs, and the economy's inflationary pressures, small and medium-sized businesses are hesitant to invest in new product research and development. Using the football helmet manufacturers as an example, again, many are finding that schools are reconditioning helmets in lieu of ordering new items. This slows down the overall growth of a product and its sales, while causing any new product item costs to increase. For all

businesses, this means looking at the profitability of an entire operation, or a product line if it has a multi-product line, and deciding whether it is worth continuing to produce.[75/]

C. Insurance Costs.

Insurance costs are at the same time the most visible and the least reliable measure of the product liability problem. For businesses which do not choose or cannot afford to self-insure their product liability exposure, the annual insurance premium is the only readily quantifiable measure of their product liability costs. But because of the "long-tail" nature of product liability insurance and current competitive conditions in the insurance marketplace, it is a poor barometer of the true costs of product liability.

As the table on page eight above indicates, product liability insurance rate levels have been declining, albeit slightly, for the past three years, in the teeth of indications that product liability claim frequency and severity are increasing sharply. From fiscal 1974 through fiscal 1981, product liability claims filed in Federal courts alone increased by 474 percent -- from 1,579 in 1974 to 9,071 in 1981.[77/] In addition, courts in several key States have handed down decisions with far-reaching insurance implications.[78/]

But this rising tide of claims and awards has yet to be reflected in the estimated $1.5 billion[79/] that American businesses pay for insurance specifically for product liability, for two reasons.

First, product liability is a "long-tail" line of insurance, one in which the overwhelming majority of losses occurring during

a policy period is paid in the years following the policy period rather than during the policy period itself. Critics of the insurance industry are quick to point out the low ratio of paid losses to earned premium during the policy period,[80] but slow to recognize the substantial losses that insurers know, on the basis of historical experience, to have occurred during the policy period, but which either have not been reported or have not been settled.[81]

The effect of this "long-tail" phenomenon on product liability insurance rates is an inherent lag between rates based on past experience and current losses and expenses. The minimum number of policy years of data that insurers consider statistically credible for rate making purposes is five. Thus, even the sharp acceleration in losses and expenses during 1981 was tempered substantially by the more favorable experience of the preceding four years in setting rates for 1982.[82]

Second, intense competition among insurers for premiums to invest in today's high-interest money market has widened the inherent gap between published rates and current loss and expense experience, making actual insurance prices an even less reliable indicator of current reality than they normally are. Insurers are deliberately underpricing product liability coverage in order to obtain premium dollars to invest at rates of return that they hope will be sufficient to meet anticipated losses and expenses and to show a profit. This price war seems to be continuing despite sharply deteriorating industry operating results.[83]

But while overall rate levels remain artificially depressed, individual businesses are experiencing significant increases in

their product liability insurance costs. For example, a representative of a metal fabricating machinery company told the Senate Commerce Consumer Subcommittee in March, 1982, that

> ...we have estimated that, in 1970, our total product liability insurance cost per unit was $200. For 1982, we have projected this same cost to be $11,000 per machine. Our product liability insurance cost was 3.3% of total sales in 1981 and will be approximately 7.7% of total sales of 1982.[84/]

It would be impossible to quantify the impact of a Federal product liability statute on product liability rate levels generally or on specific industry classifications by State, since, as noted above,[85/] product liability insurance rates are based on the countrywide experience of reporting insurers and are set on a national, rather than a State-by-State basis. It is our judgment, however, that largely through the reductions it would achieve in transaction costs, such a product liability statute would certainly stabilize, and, in some instances, perhaps reduce, the costs of product liability insurance.

The effect of such a statute on these costs was vividly described by a representative of a press brake manufacturer in March, 1982, testimony before the Senate Commerce Consumer Subcommittee:

> During its most recent fiscal year, my own small company and its insurers paid out $850,000 on product liability claims. But only 18% of that amount went to pay settlements to claimants. About $700,000 went for defense lawyers and other transaction costs.
>
> I firmly believe that a uniform set of balanced product liability rules would have saved our company and its insurers over 60% of the $700,000 we expended on transaction costs last year.
>
> I estimate that about $100,000 of this savings would result from uniformity, thus eliminating the current need for our lawyers to research and

> brief conflicting laws in 50 states in an effort to persuade courts to change or sustain particular rules of law.
>
> Secondly, many transaction costs will be eliminated, if the law is made more balanced and predictable. If everyone concerned -- claimants, defendants, lawyers, and judges -- knows what the rules are, many non-meritorious claims will never be brought. Over the years, we have lost only four verdicts out of the several hundred claims we have defended. We average over $30,000 in defense costs on claims that proceed all the way to trial. But we average about $5,000 in investigating and defending each claim we receive -- regardless of its eventual disposition. We settle many of these claims for relatively small amounts of money, because it costs less to settle them than it does to defend them in court. If claimants and their lawyers knew in advance they would be required to prove fault in design and warning defect cases -- and if there were a reasonable period of repose for overage products -- most of these claims would never be filed....
>
> Finally, the elimination of subrogation in workplace incidents would save us countless tens of thousands of dollars in transaction costs. More importantly, it would save untold human misery by encouraging employers to prevent accidents.
>
> The interaction between the tort and workers' compensation system has resulted in a situation in which an employer who fails to maintain a safe workplace can pass along his workers' compensation costs to a product seller through the vehicle of subrogation, regardless of employer fault. Over 80% of our claims are initiated or stimulated by the inequitable subrogation system.[86/]

Additional insurance cost savings would result from a clearer understanding of the law on the part of product users and product sellers alike, which would encourage the prompt resolution of meritorious claims and the abandonment of invalid claims, and thereby lower the frictional costs of the system.

D. International Trade.

The United States is in the process of becoming an integrated part of the global economy. The excesses of our State-by-State

product liability law are already viewed by our foreign trading partners as "non-tariff barriers" to their competition in our economy,[87] and our own producers are at a serious price disadvantage in foreign trade because of the disparity between their product liability overhead and that of their foreign competitors. The wider this disparity becomes, the less competitive American products will be in international commerce, and the worse our standard of living will become.

A single American standard of product liability would bring the United States into line with its trading partners, none of whom permit the Balkanization of product liability law by State or Province. It would also eliminate the uncertainty that foreign producers face in entering U.S. markets and stabilize American producers' product liability overhead.

American product liability insurance rates "are about 20 times what they are in Europe" and "vary between seven and 40 times what they are in Britain," according to Thomas W. Mariott, legislation manager of the Norwich Union Insurance Group of Norwich, England.[88] Mariott attributes the "hair-raising quality"[89] of American product liability law and the disparity between American and foreign product liability insurance premiums to, among other things, the following:

> In the first place, although many claims may be settled for fairly low sums the average level of damages in the United States is markedly higher than in other countries....Then there are awards of punitive damages which must be paid either by the defendant or his insurers....
>
> Again the information which a manufacturer of goods must keep and retain concerning his products is far in excess of what a manufacturer in Europe would keep....The requirements of insurance companies before they will provide insurance coverage are more onerous than in Europe and in addition the surveying services of insurers require to be paid for.

> Finally, there is the matter of court procedure. There are a number of aspects but three stand out: trial by jury, contingent fees and the meaning of defect. The first and last of these are related. As juries are judges of fact and as jurors are drawn from a wide cross section of the community and are not equipped to base their decisions on precedents known to them, the verdict of one jury when presented with certain evidence could differ markedly from that of another jury given the same facts. Likewise a jury having to decide if a given product was or was not defective may decide the issue differently from another jury given the same evidence. In other words there is a lack of consistency as between the verdicts of differing juries. For insurers uncertainty means expense.
>
> The second feature mentioned was contingent fees. It is assumed that as the existence of contingent fees is known to juries, in fixing the level of damages to be awarded, a jury will allow for this fee in determining the amount which the plaintiff will receive. This is seen as a feature which increases the level of awards.[90/]

In addition to these broad differences between foreign and American law, the variations among the laws of individual States are troubling to foreign competitors:

> ...(T)he lack of uniform product liability law in the United States also makes it more difficult for foreign manufacturers to make products that meet all U.S. products standards, Mr. Mariott said.
>
> A product that meets the differing requirements of the states will often be too highly priced to sell in other countries, he explained.
>
> A product that may be adequate for a Third World market may not be considered adequate in the United States or in a European country, he said. For example, a contraceptive manufacturer might find Third World consumers more interested in obtaining a low-cost product at a level of safety lower than what is necessary in industrialized countries.[91/]

The differences between American and foreign product liability law have deterred foreign insurers from providing product liability coverage to companies competing in American markets:

> Frequently, local insurance markets overseas are unwilling to even write products liability coverage for exports destined for the United States as they consider the proposition too risky. And when manufacturers can obtain coverage, the premiums are usually so high that some take a gamble and decide to do without the insurance altogether.
>
> ...Underwriters overseas continue to shy away from providing the cover in the United States. And, if they agree to write products liability on a worldwide basis, it very often falls short of the clients' needs.[92]

Even when they are able to obtain product liability insurance on their exports to the United Stated, foreign manufacturers must pay premiums that are often disproportionate to the amount of products they sell in the American market:

> ...Unlike U.S. manufacturers who can spread such costs over a large volume of products sold in the U.S., the foreign manufacturer may have a much smaller volume and can not be expected to socialize these costs among the consumers in his home market, since his society does not recognize the U.S. social policy considerations.[93]

For their part, American manufacturers face a considerable product liability cost disadvantage in their efforts to compete in foreign markets, and, in some cases, in American markets as well. As a general rule:

> ...(F)or certain product lines, U.S. manufacturers incur much greater insurance costs per dollar of sales than do their foreign competition. Insurers of U.S. manufacturers usually do not discount premiums meaningfully, if the American manufacturer exports abroad, since there is always the possibility that even where the injury may occur abroad, suit may be brought in the U.S. As a result of this insurance practice, each U.S. product exported abroad contains an insurance cost element that is probably greater than that of the U.S. manufacturer's foreign competition. This introduces a certain non-competitive price element.[94]

Thus, the President of the Sporting Goods Manufacturers Association complained in an April 23, 1982, letter to President Reagan that "(p)roduct liability costs of this industry is [sic] 4.2% of sales; in Japan its [sic] .5% (1/2 of 1%), which gives that nation's products a substantial advantage with obvious effects on jobs."95/

Similarly, a spokesman for the National Machine Tool Builders Association (NMTBA) pointed out to the Office of Management and Budget the "effect of product liability on...unfair competition in the area of foreign trade."96/ After noting that 30 percent of the dollars spent by American industry for machine tools in 1981 went to foreign manufacturers, and that one out of every seven of these dollars went to Japanese producers,97/ the NMTBA spokesman said:

> ...Part of the foreign machine tool manufacturers' cost is product liability insurance. As with any other costs, it is factored into the price of their respective products. Because the United States is only a partial market for them, their product liability costs are substantially less than [those of] domestic machine tool manufacturers. We still sell the bulk of our products here and must face exposure to product liability with respect to a substantial number of our products.
>
> Perhaps more importantly, our product liability insurance costs are affected by our older products. Under product liability law today in the majority of states, we are potentially responsible literally "forever" for products....While we usually win these [overage product liability] suits, they result in high legal and transaction costs....Foreign machine tool manufacturers, on the other hand, do not have these older products in this country. Therefore, their product liability insurance costs often are substantially less than ours. With total instability in our law with regard to older products, we, in effect, have a major stumbling cost block with foreign competition....

> A uniform Federal product liability law would help us in a number of ways. It would allow us to compete more effectively with foreign manufacturers in this country. Second, it would allow us to compete more effectively with foreign manufacturers abroad. From the point of view of foreign manufacturers themselves, it would also present a fairer situation than they face at present.[98]

IV. CONCLUSION

If current trends in State product liability tort law continue, the costs of the prevailing system will be the cause of its ultimate destruction.

Consumer groups and others often applaud product liability decisions which provide compensation to injured persons without regard to the absence of tortious conduct on the part of the defendants. While compensation of the injured is a worthy goal, anyone concerned about the retention of the tort system's incentives to responsible conduct on the part of product sellers should lament decisions which abandon the tort system's fault-allocation purpose in order to compensate an injured party.

Consumers in particular should be alarmed by the trend toward abandonment of the basic fault standard in the tort liability system. If the product liability system becomes a mechanism that awards common-law-level damages under procedures and standards of proof appropriate to a non-fault compensation system like workers' compensation, the business community, rather than those who purport to represent the victims of product injuries, will embrace a fault-blind, limited damages compensation system as a refuge from the costs of a tort law run amok.

If such a system were to become law, the tort system's incentives to safer manufacturing practices would disappear, since,

presumably, variations in manufacturers' commitments to safe design and quality control would be irrelevant for purposes of funding the compensation system. The absence of tort law incentives to make safety investments would in turn create demands for more bureaucratic regulation of product safety.

As the State-by-State system of tort law now operates, it creates economic incentives to constantly expand liability (i.e., compensate claimants) at the expense of the fault-allocation purpose underlying the law. For example, assume that X percent of the price of stepladders represents the cost to the manufacturer of decisions in Y States holding the firm strictly liable for the injuries of those who fell from such ladders, regardless of the claimants' misuse thereof. Since consumers in all States are already paying the X percent attributable to the judicial excesses of Y States, there is no economic incentive for judges in the remaining Z States to reject the Y States' reasoning, notwithstanding its inconsistency with Z States' precedents or the underlying purpose of tort law.

In an economy where virtually all products are distributed and sold in every State, and in which product liability insurance rates are of necessity based on countrywide experience, the State-by-State economic considerations that operate to curb judicial excesses in other areas of the law (e.g., workers' compensation, automobile liability, and medical malpractice) cannot operate to put a brake on such increasingly frequent excesses in product liability law.

A Federal product liability statute, based on the fault concept underlying tort law, would enhance economic incentives to the production of safe products and fairly balance an injured person's interest in receiving compensation for his loss with society's interest in encouraging responsible conduct on the part of product sellers and product users alike.

#

FOOTNOTES

1/ Indeed, such proposals would substanitally ease the decision-making process in State courts by providing a "black letter" basis for determining product liability. They would also reduce the number of cases filed, since a clear and predictable standard of liability would enable both plaintiffs and defendants to settle more disputes without resort to the courts.

2/ Such "savings" would, of course, have to be balanced against the costs to those who would be required to absord losses that the product liability system would ordinarily shift to those causing the losses.

3/ "The number of product-liability suits continues to soar. In the fiscal year ended June 30, 1981, 9,071 were filed in federal courts, up 17 percent from the previous fiscal year and a jump of more than 120 percent from the level in fiscal 1977. State-court suits in 1981 are estimated at 100,000 or more." -- U.S. News and World Report, June 14, 1982, at 62.

4/ Both S. 2631 and H.R. 5214 contain provisions dealing with punitive damages. Neither bill would prohibit the award of such damages, but both bills prescribe the bases on which they may be awarded.

5/ "In the area of product liability, marked increases in the number of cases, the proportion of such cases won by plaintiffs, and the size of plaintiffs' judgments all contributed to increasing judgments against product liability defendants.

"According to the [Institute for Civil Justice] survey [of more than 9,000 civil jury trials in Cook County, Illinois from 1960 to 1979], total judgments in product liability cases increased from less than $4 million in 1960-64 to $25 million in 1970-74 and to $33 million in 1975-79...." -- "Size of Jury Awards Up Sharply in '70's," Journal of Commerce, April 13, 1982.

6/ See section III A, infra.

7/ S. 2631 would follow the Restatement (Second) of Torts in establishing a strict liability standard for construction defect cases and a fault-based standard for design defect cases.

8/ The statute of repose adopted by over half the states is ten years or less for product liability claims. S. 2631 would eliminate such short repose periods. S. 2631 would permit the award of punitive damages in appropriate circumstances in all product liability claims, while some states currently do not recognize punitive damages at all or do so on limited basis.

9/ S. 2631 would prevent the use of offensive collateral estoppel in all product liability cases and, thereby, change the law of those few jurisdictions, such as Texas, which have permitted its use. S. 2631 would also prevent the use of evidence of subsequent remedial measures to prove liability and, thereby, reverse the law of a few jurisdictions, such as California and New York, which have permitted such evidence.

10/ Much of the expense associated with product liability is incurrec by defendants named in lawsuits alleging damages for which they are in no way responsible, who must respond to the allegations to avoid the possibility of default judgments.

11/ "Almost 50% of Civil Suits Failed, Rand Study Finds," Wall Street Journal, March 15, 1982.

12/ "...By the 1970s, product liability judgments comprised 24 percent of all Cook County judgments, up from 6 percent during the early 1960s." Op. cit. supra note 5.

13/ Obvious exceptions are "blockbuster" settlements of which successful counsel frequently advise the local news media.

14/ See note 8, supra, and accompanying text.

15/ Senate Committee on Commerce, Science, and Transportation, Release No. 97-158, "Section-by-Section Summary, Product Liability Act of 1982, Staff Working Draft No. 2, March 1, 1982," at 4.

16/ Ibid.

17/ Id.

18/ Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results, Highlights, at 3 (1977).

19/ See page 3, supra.

20/ Within the past three years, destabilization of the tort law has accelerated. Courts in major manufacturing States -- New York, California, New Jersey and Pennsylvania -- have abandoned long-standing precedents in decisions with ominous implications for the costs of product liability. See, e.g., Bichler v. Eli Lilly & Co., 436 N.Y.S. 2d 624, N.Y. Sup. App. Div. (1981); aff'd ___ N.Y. ___ (1982); Caprara v. Chrysler Corp. 52 N.Y. 2d 114, 417 N.E. 2d 545 (1981); Sindell v. Abbott Laboratories, et al., 163 Cal. Rptr. 132, 607 P. 2d 924; cert. den. 449 U.S. 912 (1980); Bell v. Industrial Vangas, Inc., 637 P. 2d 266 (Cal. 1981); Cepeda v. Cumberland Engineering Co., Inc., 76 N.J. 152, 385 A. 2d 816 (1978); and Azzarello v. Black Brothers Company, Inc., 391 A. 2d 1020 (Pa. 1978).

21/ Letter from Frank A. Orban, III, Esquire, Senior Attorney, Armstrong World Industries, Inc., Lancaster, Pa., to the Honorable Sherman E. Unger, Esquire, General Counsel, U.S. Department of Commerce, at 1-3 (May 19, 1982)(emphasis in original). Mr. Orban was Director of the seven-volume Legal Study for the Federal Interagency Task Force on Product Liability.

22/ See note 3, supra.

23/ The rate of increase in annual product liability claim filings is accelerating. See "Product Liability Lawsuits Double Over Three Years," Business Insurance, October 12, 1981. See also Remarks of the Honorable William French Smith, Attorney General of the United States, to the opening session of the 28th annual spring meeting of the American College of Trial Lawyers, April 5, 1982, at 1-3:

> "...The growth of litigation in the federal courts has made litigation an increasingly time-consuming and disillusioning experience for attorneys and litigants alike. The resulting burdens on the courts are gradually effecting a dramatic change in the character not only of our federal judicial system, but also of our profession and society....
>
> "...The dramatic increase in litigation in the federal courts has nearly laid low the federal judicial system itself....
>
> "It is unsurprising that expeditious resolutions of civil suits seldom occur. A recent survey found over 15,000 cases in our federal district courts that have been pending for more than three years."

24/ By way of analogy, the range of interpretation of the Uniform Commercial Code's (UCC) diverse and complex Article 2 (Sales) has proven manageable, and attorneys have few problems in dealing with UCC Article 2 claims regardless of the States in which they arise.

25/ See, generally, Weisgall, Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties, 1977 WISC. L. REV. 1035 (1977); and Murphy, Santagata, and Grad, "Allocation of Responsibility for Product-Caused Injuries in the Workplace," The Law of Product Liability: Problems and Policies, National Chamber Foundation, 1981.

26/ See, generally, Phillips, Contribution and Indemnity in Products Liability, 42 TENN. L. REV. 85 (1974). See also Lambertson v. Cincinnati Corp., ___ Minn. ___, 257 N.W. 2d 679 (1977); N.Y. CIV. PRAC. LAW § 1402 (McKinney); Dole v. Dow Chemical Co., 30 N.Y. 2d 143, 331 N.Y.S. 2d 382, 282 N.E. 2d 288 (1972); Skinner v. Reed-Prentice Division Package Machinery Co., 70 Ill. 2d 1, 374 N.E. 2d 437 (1977), cert. denied, 436 U.S. 946 (1978); N.C. GEN. STAT. § 97-10.2(e) (1975); Essick v. City of Lexington, 232 N.C. 200, 60 S.E. 2d 106 (1950); and Witt v. Jackson, 57 Cal. 2d 57, 366 P. 2d 641, 17 Cal. Rptr. 369 (1961).

27/ See §§ 9, 10, and 11, S. 2631, 97th Cong., 2d Sess. (1982).

28/ Section-by-Section Summary, Product Liability Act of 1982. U.S. Senate Committee on Commerce, Science, and Transportation, June 3, 1982, at 3.

29/ Id. at 4.

30/ See, generally, Darling-Hammond and Kneisner, The Law and Economics of Workers' Compensation, The Institute for Civil Justice, The Rand Corporation, at xvi-xvii (1981).

31/ "1981 Interwriting Results By Line of Business," Best's Insurance Management Reports, Property-Casualty Release No. 3, March 29, 1982, at 1-3.

32/ Op. cit. supra note 30 at xv, 5-6.

33/ Op. cit. supra note 31 at 1-3.

34/ While precise figures for all self-insurers are not available, the average industry-wide incurred loss ratio of 67 percent was applied to self-insured and State fund premium volume to derive an estimate of their losses. Given the non-profit status and lower overhead costs of self-insurers and State funds, the estimate of incurred losses is extremely conservative.

35/ Industrial Indemnity Co. and the United States Insurance Group. Collectively, these companies, which are subsidiaries of Crum & Forster, are the tenth-largest writers of workers' compensation in the United States.

36/ These costs would provide an incentive to greater workplace safety.

37/ See e.g., Bainter v. Lamoine LP Gas Co., 321 N.E. 2d 744 (Ill. App. 1974) and Miller v. Int'l Harvester Co., 246 N.W. 2d 298 (Iowa 1976), recognizing that sellers may be strictly liable. See e.g., Little v. Maxum, Inc., 310 F. Supp. 875 (D.D. Ill. 1970) and Canifax v. Hercules Powder Co., 46 Cal. Rptr. 552 (Cal. App. 1965), recognizing that distributors may be strictly laible even though they never had control of the product.

38/ Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

39/ Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

40/ 7 U.S.C. §§ 51 et seq.

41/ 7 U.S.C. §§ 71 et seq.

42/ 7 U.S.C. § 74.

43/ 7 U.S.C. §§ 511 et seq.

44/ 7 U.S.C. § 511a.

45/ 15 U.S.C. §§ 79a et seq.

46/ 15 U.S.C. § 79a(a).

47/ 15 U.S.C. §§ 80a-1 et seq.

48/ 15 U.S.C. §§ 80a-1(a)(5).

49/ 15 U.S.C. §§ 2051 et seq.

50/ 15 U.S.C. § 2051.

51/ 15 U.S.C. §§ 1331 et seq.

52/ 15 U.S.C. § 1331(2).

53/ 7 U.S.C. §§ 135 et seq.

54/ "Pesticide Industry Getting Way on New Law," Washington Post, March 24, 1982.

55/ "The Airports' Space Squeeze," Business Week, March 29, 1982.

56/ Ibid.

57/ "Labor Unit Offers Toxic-Substance Rule to Alert Workers Via Training, Labels," Wall Street Journal, March 18, 1982.

58/ Ibid.

59/ Id.

60/ Id.

61/ Id.

62/ E.g., 5 U.S.C. §§ 8191 et seq. (providing compensation benefits for non-Federal law enforcement officers); 30 U.S.C. §§ 901 et seq. (providing compesnation for black lung victims). The tort act called for here, however, is distinguishable from these compensation schemes in that it would require no Federal bureaucracy and no Federal monies.

63/ 45 U.S.C. §§ 51 et seq.

64/ See also 46 U.S.C. § 688 (conferring on seamen the same rights as apply to railway employees).

65/ Priest, George L., "Will Uniform Legislation Increase or Decrease the Rate of Injuries from Product Defects?," April 20, 1982, at 5-6. Professor Priest's paper was presented at a Conference on Product Liability and Tort Law Reform sponsored by the National Legal Center for the Public Interest.

66/ Letter to the Honorable Robert W. Kasten, Jr., from Wendell Lund, Esq., April 22, 1982, at 1-2.

67/ Testimony of Herbert W. Goetz, Manager, Product Safety, Cincinnati, Inc., before the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation, March 12, 1982. In 1981, Cincinnati, Inc.'s product liability insurance costs amounted to 3.1 percent of sales; in 1982, those costs will be 7.7 percent of sales.

68/ "In fact, the cost of litigation already has many industry attorneys more concerned than does the amount of the possible damage awards. In the case of Vietnam-veteran suits against the manufacturers of the herbicide Agent Orange, for instance, the cost of litigation for Dow 'is well into seven figures.'..." "The Widening Shadow of Product Liability," Chemical Week, February 3, 1982, 44, at 45.

69/ Id. at 44.

70/ Id. at 45.

71/ States have sharply differing views on whether a plaintiff must show that the defendant manufactured the product in question. The traditional view requires a plaintiff to prove that the defendant manufacturer caused the harm. E.g., Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981); Namm v. Charles E. Frosst and Co., 178 N.J. Super. 19, 427 A.2d 1121 (1981). Some courts have departed from this view. E.g., Hall v. E.I. du Pont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) (shifting to group of defendants the burden of proving causation); Bichler v. Eli Lilly & Co., 436 N.Y.2d 625, 2 Prod. L. Rptr. ¶ 8885 (1981) (plaintiff's proof that product sellers acted in "conscious parallelism" by marketing the same product at the same time subjected each to potential liability for all the harm done by the products); Sindell v. Abbott Laboratories, Inc., 26 Cal. 3d 588, 607 P.2d 924, cert. denied, 499 U.S. 912 (1980) (group of manufacturers liable for judgment in proportion to their respective shares of the market).

72/ Traditionally, the courts applied Rule 407, Fed. R. Evid., and excluded evidence of product improvements. E.g., Knight v. Otis Elevator Co., 596 F2d 84 (3d Cir. 1979); Roy v. Star Copper Inc., 584 F2d 1124 (1st Cir. 1978), cert. denied, 440 U.S. 916 (1979). Some courts have rejected this rule. E.g., Abel v. J.C. Penney Co., 488 F. Supp. 891 (D.Minn. 1980); Schuldies v. Service Machine Co., Inc., 488 F. Supp. 1196 (E.D. Wis. 1978); Caprara v. Chrysler Corp., 423 N.Y.S. 694, aff'd, 52 N.Y.2d 114, 417 N.E.2d 545 (1981).

73/ "Product Safety: A New Hot Potato for Congress," U.S. News & World Report, June 14, 1982, at 62.

74/ "Sports Equipment Firms Hit by Liability Suits," Journal of Commerce, April 19, 1982.

75/ Statement of Maria Dennison, Director of Washington Operations, Sporting Goods Manufacturers Association, submitted to the Subcommittee on the Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, March, 1982, at 2-3.

76/ Op. cit. supra note 73, at 62.

77/ "Product Liability Lawsuits Double Over Three Years," Business Insurance, October 12, 1981.

78/ See note 20, supra, and accompanying text.

79/ See page 6, supra.

80/ See, e.g., Statement of C. Thomas Bendorf on behalf of the Association of Trial Lawyers of America before the Subcommittee on the Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, June 30, 1982, at .

81/ Id. at 4-5.

82/ ISO rate levels in 1982 represent a 10.8 percent increase over those in 1981.

83/ Op. cit. supra note 68 at 46.

84/ Statement of Herbert W. Goetz, Manager of Product Safety, Cincinnati, Inc., before the Subcommittee on the Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, March 12, 1982, at 3.

85/ See page 9, supra.

86/ Statement by Emmett McCarthy, Vice President, Product Reliability, Dreis & Krump Manufacturing Company, before the Subcommittee on the Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, March 12, 1982, at 2-4.

87/ "Waxman Backs Federal Product Legislation," Journal of Commerce, April 22, 1982.

88/ "Uniform Product Liability Law Needed, British Insurers Says," Business Insurance, May 10, 1982.

89/ "Product Liability and International Trade," by Thomas W. Marriott, a paper presented at a seminar on product liability sponsored by the National Legal Center for the Public Interest, April 22, 1982, at 2.

90/ Id. at 2-3.

91/ Op. cit. supra note 88.

92/ "US Product Liability Woes Stun Foreign Exporters," Journal of Commerce, April 26, 1982.

93/ "Product Liability and International Trade and Politics," a paper presented by Frank A. Orban, III, International Counsel, Armstrong World Industries, to a product liability seminar sponsored by the National Legal Center for the Public Interest, April 21, 1982, at 3-4.

94/ Id. at 5. Footnote omitted.

95/ Letter from Howard J. Bruns, President, Sporting Goods Manufacturers Association, to the President of the United States, April 23, 1982, at 1.

96/ Letter from James H. Mack, Public Affairs Director, National Machine Tool Builders Association, to Jim J. Tozzi, Deputy Director of Information and Regulatory Affairs, Office of Management and Budget, June 10, 1982, at 1.

97/ Ibid.

98/ Id. at 1-2.

M E M O R A N D U M

FROM: Victor E. Schwartz and Sara B. Glenn

DATE: July 7, 1982

RE: S. 2631 -- Federal Product Liability Act
Hearings Before Senate Consumer Subcommittee

Senator Robert Kasten held hearings on S. 2631 on June 30 and July 1, 1982. The oral testimony presented at these hearings is summarized below. Copies of the full written testimony submitted by the witnesses are available for those who are interested.

June 30, 1982

Senator Kasten

There is a growing consensus that a Federal product liability tort reform bill is needed to bring stability and uniformity to product liability law. Such a law should be fair and reasonable, giving manufacturers clear standards of responsibility under which they can know their obligations and permitting injured plaintiffs to recover for product-related harms. There is a long history behind this effort, starting with the Uniform Product Liability Act. The testimony of a broad range of groups is welcomed.

Victor E. Schwartz,
Counsel to The Product Liability Alliance

Members of TPLA are a diverse group, including small, medium and large businesses, wholesaler-distributors, manufacturers,

retailers, insurance agents, insurers, and brokers. This diverse group is in agreement on a number of key issues addressed in S. 2631. There is a consensus that a Federal bill preempting state product liability law is warranted. There is a consensus that strict liability is the appropriate standard of responsibility in manufacturing defect cases and in breach of express warranty cases. There is agreement that the standard of responsibility in design defect and failure to warn cases should be fault-based, and that non-manufacturer product sellers should be liable only when they themselves are at fault (unless the manaufacturer actually responsible is not available). There is agreement that S. 2631 should incorporate comparative fault principles and a bar to use of defensive collateral estoppel. There is agreement that the bill should address the relationship between worker compensation and product liability, punitive damages, and the use of evidence of subsequent remedial measures. There is agreement that some fixed time limit on liability should be provided. TPLA members remain convinced that a uniform Federal law will reduce product liability costs and produce fair results.

C. Thomas Bendorf,
Association of Trial Lawyers of America

ATLA has faith in the vitality of common law and the principle of Federalism leaving tort law to the states. The diversity of tort law is a manifestation of the vitality of the system. Data show there has been an increase in product liability ver-

dicts, but no increase in the number of claims. The total losses paid in 1979 for product liability in 1979 was less than $2.00 for each person in America. People believe they should be protected against tortious products. Mr. Bendorf submitted written testimony with insurance data which he believes demonstrate the real product liability problem is not tort law. The written testimony states that wholesalers, distributors, and retailers should rarely be joined as defendants in products cases and that ATLA supports state legislation to address this issue.

Martin F. Connor, General Electric Co. for
National Electrical Manufacturers Association

A long history of public participation has preceded S. 2631 and demonstrates the need for Federal legislation and the need for certain specific reforms. Mr. Connor's written testimony discusses the need for consistency and stability in the law which the states cannot achieve. He states that Federal product liability legislation is consistent with the Constitution and principles of Federalism.

With regard to specific reforms, he outlined the history of the law and stated that strict liability for construction defects and breaches of express warranty, as proposed by S. 2631, is appropriate. Such a standard is not appropriate, however, in design and failure to warn cases, which should be evaluated on a reasonableness standard. Strict liability in these cases converts the tort system to a compensation system.

Jay Angoff,
Public Citizen's Congress Watch

A Federal product liability law should not be enacted. It would freeze the law and become outmoded and unfair. In contrast, the common law system is flexible. An attempt to codify product liability law is a monumental undertaking which cannot be done. A Federal bill would create confusion, because the states would look to their own tort law to interpret the statute. Lawyers would benefit by the confusion. Plaintiffs and defendants are equal before the court but not equal in the legislative process. Pre-emption of state law is contrary to "New Federalism." The Kasten bill contains nothing of benefit to plaintiffs. The bill is a business wishlist. Mr. Angoff's written testimony identifies 18 points which, he alleges, benefit only defendants, e.g., elimination of strict liability for design defects.

James A. Henderson, Jr.,
Boston University School of Law

There is a product liability problem due to the inability of courts to construct sensible, consistent standards for deciding design and warning cases. Uniform Federal standards are required. The standards must be fair and balanced. Existing standards which impose too much liability or irrational liability on manufacturers are paid for by the consumer. The beneficiaries of such liability are the lawyers who receive an inordinate percentage of product liability awards. The system should be made more efficient so that the victim of a product-related harm receives an equitable

percentage of the award. Professor Henderson's written testimony focuses on the standards of liability in Sections 4, 5, 6, and 7 of S. 2631, which he believes are fair and equitable and which can work with minimal costs to the consumer.

Joseph A. Page,
Georgetown University Law Center

The Kasten bill represents galloping Federalism, the likes of which has not been seen since the New Deal. The bill fails to serve any legitimate purpose. There is no product liability problem. The bill will not address any of the three causes of the so-called product liability crisis. It will not get unsafe products off the market. It will not address the rate-making problem, which continues despite the enactment of the Risk Retention Act. Federal regulation, such as reporting requirements, would assist in this regard. It will not reduce uncertainty in tort law; uncertainty in the law would continue under S. 2631 because many aspects of the bill are vague and will have to be judicially interpreted. The bill will not solve the problem of too much money going to lawyers.

William D. Ford, Colt Industries, Inc. for
The Coalition for Uniform Product Liability Law

A Federal solution to the product liability problem is necessary and, specifically, a statute of repose is very necessary. The fact that manufacturers may be held liable for an unlimited time for harms caused by their products creates a serious problem. Risks of such unlimited exposure are unmanageable. In addressing

this concern, the rights of injured persons must be balanced. A presumptive statute of repose, as set forth in Alternative B of Section 12 of the Kasten bill, does not assist manufacturers in managing risks. The increased quantum of proof does little to limit liability. Alternative A, a 25-year statute of repose, only marginally mitigates the problem. It should apply to all products and all actions rather than being limited to capital goods and to design or warning cases. It should be 10 rather than 25 years in duration. The exceptions should not be open-ended but should give rise to a longer period of repose, e.g., 15 or 20 years. As currently drafted, Alternative A is worse for product sellers than the law of 22 states which have definite repose periods. Mr. Ford's written testimony also discusses punitive damages, government standards and specifications, and the treatment of the Sindell decision.

Herbert W. Goetz, Cincinnati Inc. for
The National Product Liability Council

A Federal product liability law will provide uniformity and stability and, thereby, reduce the current confusion and costs created by the existing diversity in the law. A statute of repose is especially important to manufacturers and the economy. Given the durability of products, companies are being forced to defend products which are 40 years old, which have changed owners several times, and which have been altered, misused or not properly maintained. Manufacturers of capital goods should have a period after

which they are free of liability so that they can plan their affairs with certainty. Alternative B, proposing a presumptive statute of repose, does not provide this certainty, unless it is accompanied by an effective time bar of 15 years. Alternative A would be acceptable if the time bar were reduced to 10 years. Experience shows that 10 years is sufficient to discover faults of an unsafe design or inadequate warning. Exceptions should be made for compelling cases, such as those involving fraud. A statute of repose will assist in reducing costs of liability which are ultimately paid by the consumer.

David I. Greenberg,
Consumer Federation of America

The statute of repose is one of the most troubling, least justifiable and most damaging sections of the Kasten bill. The plaintiff's burden of proving defect and causation in cases involving old products is difficult enough. Their success rate in these cases is low. The statute of repose would apply in a small number of cases. It would unjustly shift the entire risk of harm to others and would weaken the incentive to make safe products, which is contrary to the goal of tort law. Alternative A arbitrarily establishes a 25-year bar for claims involving capital goods. It would appear that states would be free to pass a statute of repose for consumer goods. CFA would oppose such a loophole. Alternative B, applicable to all products, would raise what is already a heavy burden of proof by plaintiffs. Mr.

Greenberg's written testimony also addresses the Sindell issue, standards of liability, collateral estoppel, subsequent remedial measures, alteration/misuse defenses, government standards and punitive damages.

Charles Babcock, General Motors Corp. for National Association of Manufacturers

The concept of Federal product liability tort reform is strongly supported by NAM. The strict liability standard of liability is fair and easily understood in manufacturing defect cases. The trend to expand this concept to design defect cases has created a hopelessly confusing array of rules among the states. Mr. Babcock outlined the diverse rules of law currently applicable in design defect cases. Manufacturers are involved in a guessing game as they try to conform to these ambiguous and inconsistent rules. S. 2631 adopts a single reasonableness standard of liability which manufacturers can know and understand before their products are made. This will reduce the costs that are created by the current uncertainties in the law.

Delby C. Humphrey, Schutt Manufacturing Co. for Sporting Goods Manufacturers Association

Mr. Humphrey owns a small business which manufactures face guard masks for football helmets. A Federal product liability bill is necessary to resolve the product liability problem which threatens his company's existence. He outlined the insurance costs he has borne in the past 10 years as a result of confusion in the law of product liability and the trend toward strict lia-

bility. He described the 12 suits brought against his company since 1975, half of which were settled but which involved substantial defense costs. Liability in one case could put his company out-of-business. His company is sued even though the face guard is a component part of the helmet and is not faulty in any way. He is being sued for head and neck injuries which the face guard is not intended to protect. He is losing business to foreign manufacturers, because with product liability costs he cannot remain competitive.

July 1, 1982

Robert H. Malott, FMC Corp. for Business Roundtable

S. 2631 is a starting point for developing a fair and balanced tort reform bill which safeguards rights of users and consumers and provides clear standards of liability. Currently, manufacturers cannot know where liability begins or ends. Liability has been expanded in recent years, e.g., strict liability has been applied to design defect cases. Court decisions have developed rules which are unfairly favorable to plaintiffs, e.g., some states allow evidence of subsequent remedial measures to prove a prior product was unsafe. Manufacturers cannot predict liability exposure in a single state or a single case. Business is being forced to finance what appears to be a system of compensation divorced from traditional principles of tort law. The costs are passed on to consumers. Manufacturers are hesitant to introduce

new products. Clear standards of liability cannot be developed by the states. A Federal bill is needed. Four aspects of S. 2631 should be strengthened: (1) the time limit on liability should apply to all products; (2) limits on punitive damages should be established; (3) products which comply with Federal standards should be presumed safe; and (4) products which are built to Federal contract specifications should not expose a manufacturer to liability.

John P. Eppel,
Ford Motor Company

S. 2631 is an excellent effort at reform of product liability law. The omission of any provision dealing with Federal Government standards, however, is of concern. Currently, individual juries can impose their own notions of safety designs even though those may conflict with obligations imposed by other juries in other cases or with Federal safety standards or approvals. The design of a complex product involves sophisticated trade-offs between benefits and potential dangers. Federal agencies, such as the National Highway Traffic and Safety Admininstration (NHTSA), are created for the purpose of making those trade-off decisions in a way that will protect against unreasonable risks of harm. In setting safety standards, such agencies perform the same kind of analysis required of a jury in a design defect or warranty case. Juries are not qualified to second-guess the judgments made by a Federal agency, and second-guessing disrupts the balance struck by

the agency standard. Where a product complies with pervasive government safety regulations, there should be a complete defense to liability. Where a product complies with a regulation which is not so pervasive, compliance should be a presumption of safety and a bar to punitive damages.

Barbara K. Pequet,
National Consumer League

NCL opposes Federal product liability tort reform, because it will be harmful to consumers and to the cause of safety. S. 2631 would relieve manufacturers and product sellers of responsibility for product harms. Given the current weakening of health and safety regulations, weakening tort law cannot be tolerated. S. 2631 creates burdens of proof which ensure that the injured party will not recover. The bill introduces new concepts and terms which will be subject to varying interpretations. Thus, it will not create uniformity and predictability. It codifies the law and, therefore, will not be responsive to changing times. It eliminates strict liability in design and warning cases and establishes a negligence standard skewed in favor of the manufacturer. The bar to use of offensive collateral estoppel will increase delay and litigation. The bill will allow manufacturers to escape liability in a Sindell situation and where the statute of repose applies. The punitive damage provision is too restrictive.

David G. Owen,
University of South Carolina School of Law

Punitive damage awards in product cases are increasing in number and amount. The lack of a guiding legal principle is a threat to the litigation system. A legislative standard must be developed for the imposition of punitive damages, which are unrelated to compensating the victim and which are quasi-criminal. S. 2631 provides a good standard. The bill should, however, limit the total amount of punitive damages recoverable in a single case and the total recoverable in a series of cases. Further, the bill should provide that the punitive damage case is heard separately from the main liability case, because too often issues related solely to punitive damages comes into and prejudices the liability case.

Marianna Smith,
American University, Washington College of Law

A Federal product liability bill is neither necessary nor desirable. The common law of torts is reasonable and fair and provides for flexibility and change, unlike a statute which would freeze the law. Major industrial states have declined to enact statutes in this erea. States which have statutes have created more problems than they have solved. Uniformity would not result from a Federal statute which would be subject to varying interpretations. A Federal law would be contrary to traditional states' rights. Strict liability is not absolute liability nor is it a new concept. It makes no sense to apply a Federal statute to some

parties in a tort case and to apply state common law to other parties.

Sheila L. Birnbaum,
New York University School of Law

The product liability tort system has become costly, unpredictable and increasingly inequitable for all. The current standards for defectively designed products are most troublesome. Some states have a standard approaching absolute liability, making manufacturers insurers of their products; other states have vague standards which cannot be applied in a predictable manner. Courts are struggling with notions of strict liability or no-fault in an area which should be based on negligence. While strict liability is appropriate for mismanufactured products, in a design defect case, the issue should be and traditionally is whether the manufacturer exercised due care in designing a safe product. Plaintiffs can prove lack of due care or negligence in appropriate cases. Such a clear standard will give manufacturers guidance and incentives to design safe products.

Marshall S. Shapo,
Northwestern School of Law

Proponents of Federal product liability tort reform have not shown that there is a crisis or that existing institutions cannot cope with the problem. States are working out a national rolution to the product liability question, and product sellers are dealing with the law in a way that enhances safety. S. 2631 does not address the part of the problem attributable to the insurance

industry, which are not confronted by the Risk Retention Act. The bill is contrary to principles of Federalism. Mistakes in a Federal statute would be magnified and hard to rectify. The bill is pro-manufacturer at the expense of consumers. It would create more problems of uncertainty. The origins of S. 2631 have been hidden from the public. Proponents have not established why the uniform state law approach is not workable.

Charles I. Derr,
Machinery and Allied Products Institute

Federal legislation is needed. The current uncertainty in product liability law inhibits product development. Admissibility of evidence of subsequent remedial measures makes manufacturers hesitant to improve their products. The general rule excluding such evidence is based on sound public policy favoring product improvements. Further, the exclusionary rule recognizes that product improvements made after the individual product in question was made are irrelevant. Finally, a statute of repose should be included for all products and should be 15 years in duration.

William W. Scott, V&O Press Co., Inc., for
National Machine Tool Builders Association

Uncertainty in product liability law is a major problem for all concerned. Manufacturers cannot make informed decisions about their products. Consumers pay the costs of uncertainty in the law. A uniform product liability bill will place incentives for safety on the party best able to prevent harms. It will provide clear guidelines of responsibility. As an earlier witness,

Professor Page, had suggested, the Product Liability Task Force did identify the manufacture of unsafe products as a third cause of the problem. The Task Force addressed this aspect of the problem by developing UPLA which placed incentives for risk prevention on the party or parties most capable of avoiding a harm. S. 2631 carries out this principle.

Product sellers believe the insurance aspect of the product liability problem was addressed by the Risk Retention Act. It assures that the insurance market will be competitive and that savings under S. 2631 will be passed by insurers to their customers. TPLA and all product sellers would oppose any amendments to the bill which would place special regulatory data reporting requirements on the insurance industry. Such requirements would be costly and would produce no benefits.

Mr. Scott's written testimony discusses the standards of responsibility, the Sindell issue, comparative responsibility, the effect of workers' compensation benefits, statute of repose, subsequent remedial measures, punitive damages, and government contract specifications.