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June 3, 1982

Mr. James W. Cicconi
Special Assistant to the President
and Special Assistant to the
Chief of Staff
The White House Office
1600 Pennsylvania Avenue, N.W.
Washington, D. C. 20500

Dear Jim:

Thank you again for your help and guidance in regard to the Administration's concern about the product liability problem. I have enclosed the document that Jim and you suggested regarding questions the Administration has frequently asked about the problem, and our answers to those questions. I have also enclosed a copy of the document prepared by Armstrong Cork, Inc. showing how a uniform product liability act would help reduce legal costs -- even if the act crystallized what might be regarded as the "average" of existing law.

You have been most helpful to us in this exercise. Please call to suggest problems or other ideas you might have in regard to how we might best proceed.

With kind regards, I am,

Sincerely,

Victor

Victor E. Schwartz

Enclosures

cc: Ms. Nancy Clark Reynolds
Leslie Cheek, III, Esquire

Armstrong

May 19, 1982

Sherman Unger, Esq.
General Counsel
U.S. Department of Commerce
14th & Constitution Avenue N.W.
Washington, DC

Dear Mr. Unger:

Pursuant to your request at the April 20-21 NLCPI conference on Federal Tort Reform, I would like to provide these comments concerning the practical benefits and, in particular, cost savings accruing from a Federal product liability statute as opposed to permitting tort law to evolve in the non-uniform morass of state law.

As a Fortune 500 manufacturer, we have received a number of product liability claims from around the country. From the perspective of counsel to a corporation, the significant cost savings of a federal statute setting out the legal parameters of product liability are immediately obvious.

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. For example, Pennsylvania has some 100 appellate level strict liability in tort cases alone, in addition to county court cases which are also reported in Pennsylvania. This count does not include cases dealing with related procedural matters, nor cases dealing with actions in tresspass (negligence) and assumpsit (warranty). As you see Pennsylvania even maintains old form common law pleading! It is not feasible to maintain a complete 50 state and Federal reporter system in our offices and the nearest adequate law library is approximately 50 miles away.

The cost of obtaining even a cursory evaluation of a case costs no less than $1,000 and any complex case will cost <u>initially</u> multiples of that figure--just for a <u>basic</u> analysis under the law of the particular state involved. If conflict-of-law issues arise, such analysis may add may 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. With the current chaotic legal situation, a company is subject to "blackmail" by the initial transaction costs associated with any placement of the case with other counsel.

Where claims would proceed to trial, if a well-drafted Federal statute existed, corporate counsel would be better able to contribute to the preparation of the case for trial than is currently possible when faced with out-of-state litigation. Corporate counsel for even the smallest corporation could be in a position to work with the law set out in the federal statute as well as other counsel.

Although over time some divergent interpretations of the Federal statute would inevitably occur, such evolution would be slow. Furthermore, the divergence would, by definition, be in areas of nuance and not central legal tenants. A close look at the evolution of the Uniform Commercial Code's Article 2 on Sales illustrates the relatively manageable range of interpretation that have arisen despite the fact that Article 2 is a much more diverse and complex law than would be the product liability statute. We have no problem in dealing with UCC Article 2 claims regardless of the state in which it arises--quite the opposite of our position in the product liability area.

While discussing the UCC, it is noteworthy that it took some 20 years for it to become nationally adopted by the states. The UCC was, however, strongly supported by the Federal government and had no significant organized lobby opposing it at the state level as is the case with product liability reform. In the area of tort reform, the U.S. Commerce Department never actively lobbied in state legislatures for the UPLA nor was or is there any "blue-ribbon", non-partisan organization such as the American Law Institute to promote UPLA in the states as was the case with the UCC. Against this historical perspective federalizing product liability emerges as the only truly practical course to accomplish the goal of uniformity of legal standards in this area of the law.

In summary, the availability of a Federal statute would provide:

1. A much clearer uniform standard of liability against which individual claims could be more quickly evaluated. Therefore, bona fide claims could be settled early without incurring the significant initial "transaction costs" of engaging other counsel and possibly sparing in some instances extensive, costly in-house claims investigation.

2. Non-bona fide cases would be more readily resisted on the merits without encountering the "blackmail" of nuisance suit settlement. Ultimately, this would have an impact on the total number of weak suits that plaintiffs would be tempted to bring. Again, a clear saving of money and time.

3. On the average, one finds that it is the transaction costs which make up a large percentage of the costs born by insurers when cases are settled. These are the costs that could be contained by the existence of a Federal statute; and this fact should have impact on insurance costs, particularly where retrospective rating is practiced.

4. Reviewing my experience with my 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. Positing 100 claims per year, the minimum savings would be between a quarter and a half million dollars. The savings would increase where the case moves forward to trial or where there is an especially complex case. If you examine the total product liability costs of corporation, it is quickly obvious that in the aggregate the transaction costs are, at least, 50% of the total cost burden in a typical year, excluding, of course, any unusually high judgments.

5. Although an elusive, but nontheless a very important benefit of a well-drafted Federal statute would be in its communication value to non-lawyers. Currently, as a practical matter, it is virtually impossible to state to a businessman the rules of product liability; rather it has become an arcane field for lawyers. A concise, uniform statutory statement of the rules - a statement intelligible to a layman - should have the salutary effect of conveying to manufacturers and sellers that there are rules and that the system is not one of cynical legal roulette. Better understanding by the businessman can lead to more effective business decisions and the commitment of time and money to conform to legal standards that are, at least, intelligible to the laypersons who are responsible for the relevant product related decisions.

In conclusion, I would suggest that anyone who believes that uniform Federal rules would not save money and increase efficiency, should analyse the costs saved in interestate commercial transactions by the adoption of the Uniform Commercial Code. No lawyer with pre-UCC experience would ever advocate a return to the pre-UCC situation.

Speaking as a person who for a decade has followed product liability developments in detail on a nationwide basis (the undersigned served as Director of the 7-Volume Legal Study for the Federal Interagency Task Force on Product Liability), I challenge anyone to demonstrate that the federal statute would not produce, at least, the savings I have identified.

Sincerely yours,

Frank A. Orban, III
Senior Attorney
Legal Department
Secretary's Office

TJH

June 4, 1982

Questions and Answers prepared for Administration officials. Please review and let me know your thoughts as soon as possible.

VES

Victor E. Schwartz

<u>Questions and Answers</u>

1. Q: Would the enactment of a Federal product liability bill be antithetical to the President's program of "new federalism"?

   A: It would not be. New federalism is directed at returning programs handled by the Federal Government to the states. The enactment of a Federal product liability bill involves no programs, no Federal expenditures of money, and no Federal office. It is simply a series of rules that would be utilized by state courts in product liability cases. Moreover, it is in accord with a long standing tradition of the Federal Government to promote interstate and foreign commerce. Without uniform national rules applicable in all product liability cases, interstate and foreign commerce are seriously impeded. Relevant precedents for Federal action of this nature trace back to 1909 with the enactment of the Federal Employers Liability Act.

2. Q: Would the enactment of the bill seriously compromise states' rights?

   A: Previous Administrations, with states' rights issues in mind, tried to solve the product liability problem by drafting a model uniform product liability act for enactment by the states. However, experience has clearly shown that the states are unable to address a problem which is related to interstate commerce. Product liability legislation enacted at the state level has served only to limit the rights of injured persons to sue in that state. It has provided no benefit to product sellers or insurers.

The reason for this is twofold. First, most products (approximately 70%) are shipped out of each state -- they are not consumed or used within the state's boundaries. If they cause a harm, the resulting law suit is not governed by the product liability statute in the state of manufacture. Second, as a result of the interstate movement of products, product liability insurance rates, unlike all other forms of liability insurance, are based on countrywide data. Thus, a product liability statute in one state has little or no effect on product liability insurance ratemaking. This is one reason why the usually states' rights prone insurance industry almost uniformly supports the enactment of this legislation.

3. Q: Would the enactment of this bill be "a foot in the door" to Federal regulation of worker compensation or other areas of tort law?

A: A simple answer to this is No. Federal product liability law is not a foot in the door for other legislation. At present, worker compensation is handled by individual states, and insurance rates are set based on individual state experience. If worker compensation insurance rates are too high, an individual state can address this issue by changing its workers compensation law. As indicated above, this is <u>not</u> the case with product liability, an area in which insurance rates are based on nationwide data.

Further, the coalition favoring enactment of Federal product liability law includes all groups that traditionally have wanted to limit the growth of Federal power -- manufacturers, wholesaler-distributors, small business, retailers, insurers, insurance agents and brokers. The likelihood that these groups would unify behind the Federal regulation of insurance, the Federal regulation of worker compensation, or any other area of tort law, is virtually impossible.

4. Q: Will the enactment of this bill result in a movement by consumers or others to expand the role of the Consumer Product Safety Commission?

A: To the contrary, a uniform Federal product liability bill would provide an alternative to Federal regulation of products. The present state-by-state product liability system is erratic and unpredictable; it does not provide any clear guidelines to product sellers who desire to make and sell safe products and, therefore, does not provide an alternative to Federal regulation of products. The original study which recommended creation of the Consumer Product Safety Commission, recognized that because tort law was uneven and erratic in nature, the CPSC was needed. See Final Report, National Commission on Product Safety, p.79 (1970). This is not to suggest that the enactment of a Federal product liability law would negate the need for the Consumer Product Safety Commission. Rather, such a law would not expand the role of the CPSC. An evenhanded, consistent product liability law would give clear guidelines and precise incentives on product sellers to make and sell products which will not cause accidents.

5. Q: What economic benefits would arise from the enactment of a Federal product liability law? What data can be produced to conclusively demonstrate this fact?

A: Cost savings from the enactment of a uniform product liability law would be recognized in three areas. First, because the law would be the same in each state and would be in statutory form, the need for litigation on issues, which are currently uncertain and are argued and reargued with different results in different cases, would be substantially reduced. Every single member of The Product Liability Alliance agrees with this statement; however, none can <u>precisely</u> quantify the reduction in legal costs which would result. Time and experience under the law is necessary for this type of quantification.

Second, enactment of a uniform product liability act will lead to increased accuracy in setting rates and premiums. The law would provide predictable and certain rules of liability. The present system has no predictability and causes erratic pricing patterns by insurers. The insurance industry, however, cannot project precisely the cost savings or premium reductions a product liability bill would create. Generally, insurance data lag about five years behind the enactment of any new law. It is the professional judgment of over 95 percent of the insurance industry that a Federal product liability law will help stabilize the system and avoid erratic swings in product liability insurance rates which have been a pattern over the past decade.

6\. Q: Can you give us examples in current product liability law proposals where costs would be reduced?

A: The predictability provided in each section of the bill will reduce costs, principally transaction costs. Congress can create clear and certain rules that cannot be created by court decisions, which are subject to change, often retroactively, and which generally have no binding effect outside the state. Two examples in Senator Kasten's Staff Draft No. 2 demonstrate the way it would reduce transaction costs. First, Section 5 of the bill will hold nonmanufacturer product sellers liable for their own negligence or fault unless the manufacturer is out of business. Current law in a number of states holds the nonmanufacturer product seller strictly liable as if it were a manufacturer. The product seller then must bring a "contribution action" against the manufacturer which actually caused the harm in order to shift liability onto the manufacturer. This shifting of liability through second lawsuits occurs in over 95 percent of product seller cases. Under Staff Draft No. 2, in that 95 percent of cases where the product seller is not actually responsible for the harm, the product seller would not even be subject to suit. The seller thus avoids the time and expense of defending itself and of bringing the secondary suit against the party actually responsible.

A second example of cost savings can be found in Section 9 of Staff Draft No. 2. This section would eliminate the subrogation lien in product liability cases that arise in the workplace. Insurers have estimated that this will substantially reduce the number of product liability claims brought in the workplace (data show that while these constitute only 11 percent of the cases, they equal 42 percent of payouts). Data show that a substantial portion of product liability cases stemming from workplace injuries do not result in recoveries that are <u>greater</u> <u>than</u> the subrogation lien. Insurers experience very high transaction costs in this area with the net result that elimination of product liability subrogation lien will reduce the cost of product liability insurance for machine tool manufacturers without any substantial increase in the cost of worker compensation. We can provide you with an additional memorandum on this point.

7\. Q: If the product liability law that is enacted represents the "average" product liability law in the United States, will this save costs apart from lawyer costs that you have already mentioned?

A: As Professor David Rice of Yale Law School has observed, the current system in product liability cases places a clear disincentive on judges who want to make a rational and balanced judgment. For example, assuming the State of California's

Supreme Court holds manufacturers liable in cases where they have in no way been at fault (there are a number of cases to this affect), a court in another state who may not wish to follow California law is under a strong economic incentive to do so. This is because citizens in his state are paying the cost of the extreme product liability rules in California. They pay this cost in the price of their products. Since the citizens in his state are already paying the freight for California extreme liability rules, the court is under a great incentive to follow the California rule so his citizens have the benefit of that largesse. If a law were enacted where the rules were the same in all states, this motivation to expand, expand and expand liability would be ended. All states would be under a rational and balanced product liability system.

8. Q: Some product sellers have said a uniform product liability act would save production costs. Are those costs quantifiable?

A: Product liability costs permeate almost the entire manufacturing process from choosing the design of products and warnings about products, through the manufacturing process. Confronted with a crazy quilt of product liability laws and differing state rules on product safety, manufacturers spend an extraordinary amount of time trying to ensure that their products satisfy the requirements of as many states as possible. Because states' rules often conflict and because they may change, there is no way one product can satisfy the requirements of all states. Nevertheless, no member of The Product Liability Alliance can quantify the amount of time that will be saved by having the rules the same in all states. It is simply a matter of fact that time will be saved and that conflicting requirements will be eliminated.

9. Q: Is there a simpler way to handle product liability law apart from enacting a series of rules which would preempt the state law?

A: We wish there were. A suggestion was made under which a Federal law would make the product liability law of the state of manufacture govern. As a practical matter, this would not work. First, it would provide no rules applicable to the nonmanufacturer product sellers. Second, many manufacturers have plants in a number of states. Third, such a system might create an irrational basis for a state to keep its liability rules extremely broad or extremely narrow.

Another suggestion would establish a series of Federal standards which the states would have an opportunity to meet. A bureaucracy in the Federal government would determine whether states "measured up" to those standards. The simplest approach and the cheapest and the most effective is the one taken in Staff Draft No. 2 -- provide a series of rules that the courts can apply in product liability cases. This approach has worked with the Federal Employers Liability Act since 1909.

10. Q: Is this an effort to limit liability and therefore adverse to consumer rights?

A: The general effort is to enact a balanced and effective product liability law, not to return to the law of 1900. In fact, certain provisions of Staff Draft No. 2 would expand consumer rights in a number of states. Other provisions would eliminate decisions which have adopted a minority rule of law that is either unfair to product sellers or contrary to public policy. Legal memoranda on these topics can be provided if you wish.

Consumers will benefit in key ways under this bill. First, the bill will reduce overall product liability costs. These cost reductions will be passed on to consumers. Again, there is no way to quantify precisely these savings until the bill is enacted into law, but the savings could be substantial. Second, the bill would allow consumers to know what their rights are in product liability cases. For example, the Kasten draft makes clear that manufacturers will always be responsible for mismanufactured items or where they misstate material facts about their products and this results in injuries to consumers. At present, consumers are totally dependent on lawyers to know their rights.

11. Q: Product liability reform is obviously a legal issue. Why are so many organized bar groups against the enactment of this bill?

A: We find it interesting that the Defense Research Institute which represents the defense bar says, "Leave this issue to the states", as does the American Bar Association (which is reconsidering the issue). The American Trial Lawyers Association, which represents plaintiffs, thinks no bill is necessary and that the current confusion is a good thing. The fact is lawyers are the primary beneficiaries of the chaotic system that exists. Important cost savings will come from the reduction in legal costs. Again, this cannot be quantified until we have experience under the bill, but apparently the lawyers believe the same thing that the proponents of the bill believe -- it will reduce legal costs.

12. Q: Will our support for a Federal product liability law be strongly opposed by state governors, judges and legislators?

A: There are no indications that this will occur. In fact, evidence points the other way. Three governors have vetoed bills on the basis that state product liability laws cannot effectively solve the problem. Their view was that such laws curb consumer rights without providing any benefit to product sellers within their state. As the process continues, it would seem likely that some governors (perhaps prompted by trial lawyer organizations) will write letters of concern about a Federal product liability law, but we have no reason to believe that this will become a major issue with the governors.

At a recent (May 26, 1982) ABA Appellate Judges Conference, the issue of Federal product liability law was addressed for three hours. None of the judges present raised states' rights objections. In fact, a number of them informally expressed the view that it would be easier to have product liability law in a statutory form as a source of law in product liability cases. Some state judges are likely to write objecting to the process, but there is no evidence of mass opposition.

State legislators may feel a sense of "relief" because they have come to appreciate that the interstate and foreign commerce aspect of the problem makes it impossible for them to deal with product liability effectively.

To date, in spite of the widespread publicity that has been given to the movement for Federal product liability tort, little if any mail has been received objecting to it from state judges, state legislatures, or governors.

THE PRODUCT LIABILITY ALLIANCE
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BACKGROUND PAPER ON
PRODUCT LIABILITY INSURANCE

The Federal Interagency Task Force on Product Liability, after a two-year study of the severe product liability insurance market dislocations of 1974-76, concluded in November, 1977, that the insurance availability and affordability crisis experienced by many American businesses was the manifestation of a problem with three discrete elements: (1) overly subjective insurer rate-making practices; (2) unsafe manufacturing practices; and (3) growing uncertainty in the State laws governing product liability.

The Task Force developed proposals to address each of these elements concurrently.

To encourage safer manufacturing practices and to stabilize the legal environment, the Task Force drafted a model State statute, the Uniform Product Liability Act (UPLA), which codified the rights of persons injured by defective products and the obligations of product sellers.

With respect to insurance, the Task Force proposed the Product Liability Risk Retention Act, to facilitate business use of competitive alternatives to commercial coverage; and undertook a two-year study of product liability insurance rate-making processes.

The genesis of the Risk Retention Act was the complaint by many sellers that their product liability insurance rates (or rate increases) did not fairly or accurately reflect their loss experience or loss potential. In some cases, these complaints were justified, since product liability insurance rates generally are based on the experience of entire industries, not of individual companies within these industries.

The Risk Retention Act was designed to enable product sellers who believed they were being overcharged by their commercial product liability insurers to join together either to form their own insurance companies (called "captives") or to organize "purchasing groups" to obtain rate concessions through the purchase of group coverage in the commercial market. The theory of the Act was that potential competition from product seller captives and purchasing groups would both encourage commercial insurers to price their policies accurately and fairly and relieve market pressures in the event of a tightening of commercial insurance availability.

Initial insurance industry opposition to the Act, based on its creation of a Federal chartering authority for risk retention groups, was dissipated through revisions permitting the groups to be chartered under State law or (until January 1, 1985) in Bermuda or the Cayman Islands, and by the time the bill became law (P.L. 97-45, September 25, 1981), all semgents of the industry either supported it or did not actively oppose it.

In July, 1978, the Task Force asked the Commerce Department to undertake a study of product liability insurance ratemaking procedures, evaluating, among other things, "the appropriate Federal role in product liability insurance;" "the effectiveness of initiatives by State regulators and the insurance industry to address the problem;" and "whether the product liability premiums can more closely reflect actual product risk."

The Department's Report, issued in August of 1980, concluded that "all of our proposals can be accommodated without a Federal intrusion," and that "the present system of State regulation... can, at least theoretically, take our concerns into account." Any "Federal regulatory presence," the Department said, "would be premature."

The Report noted that "the insurance industry and State regulators are taking certain steps to improve" overly subjective ratemaking practices, but set forth "a number of recommendations for improvements in product liability ratemaking methodology" and allocated "responsibility for their implementation among ISO (the Insurance Services Office), insurers, State regulators, the NAIC (National Association of Insurance Commissioners), and State legislatures."

Many of the Report's recommendations focused on the incompleteness of the industry's product liability data base; the ISO, the principal insurance statistical advisory and rate service organization, could not separate product-related losses from other losses covered under the Comprehensive General Liability (CGL) policy, the form in which a large portion of all products coverage is sold.

But, the Report noted that "ISO has made substantial improvements over the practices that existed prior to 1974 in its collection of product liability data," and concurred with ISO's belief that, with the 1978 revisions to its Commercial

Statistical Plan (CSP), "it is collecting sufficient data to enable it to (make rates) adequately."

The Report also warned that limitations inherent in data required by the NAIC and under a variety of State statutes "render it ineffectual in drawing inferences concerning industry wide product liability insurance experience:"

> The NAIC supplement to the annual convention statement, as well as the reporting requirements of individual States, are providing an over-abundance of product liability information. Much of the information being requested is of marginal utility.
>
> The NAIC supplement is subject to a number of difficulties, one of which is its failure to match losses and expenses with appropriate periods giving rise thereto....
>
> If one is seeking to ascertain the profitability of writing product liability insurance this cannot be fully gleaned from the NAIC supplement.
>
> State reporting statutes which require nationwide experience are needlessly duplicative of the NAIC supplement. Moreover, such requirements are subject to the same limitations and criticisms as are the nationwide data on the NAIC supplement, and from the vantage point of the State regulator (appear) to be of marginal utility.
>
> Since product liability experience is generally required to be furnished on a State basis pursuant to these reports, the reported experience is subject to difficulties in connection with the allocation of experience attributable to multi-State activity. The most appropriate allocation for multi-State business would be to allocate premiums on the basis of exposures generated by activities within a State, and to include losses attributable to such exposures (regardless of where they occur). This would equate a multi-State enterprise with a business situated solely in a single State.

The Report recommended that State legislatures "repeal State product liability reporting laws, assuming the State uses the NAIC product liability supplement, as amended with recommendations proposed herein."

Finally, the Report recommended that NAIC revise its product liability reporting form to more accurately reflect the role that income from investment of premiums plays in a line of insurance in which many losses are paid years after the premium is collected. The Report observed that

> ...insurers potentially earned substantial amounts of investment income from the writing of product liability insurance which is not reflected in product liability rates; and...the product liability underwriting losses complained of may be significantly offset by the substantial amounts of investment income.

A significant number of the Report's recommendations have been adopted by both the industry and its State regulators. Moreover, many of the problems addressed by the Report have disappeared as a result of changing market conditions and competitive considerations.

Indeed, even as the Commerce Department began its study, the product liability rate increases and market restrictions of earlier years disappeared. 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

Attractive investment returns precipitated a competitive struggle for premium dollars among insurers and their reinsurers in recent years that shows no sign of abatement despite steadily worsening loss ratios. The "cash flow underwriting" phenomenon of the past two years is based on insurers' belief that in "long-tail" lines like product liability, returns on the investment of premiums will make up for the inability of those premiums to cover anticipated losses and expenses.

Given the historically cyclical nature of the insurance business, it is likely that product liability rates will move upward again at some point in the future. The current price war among insurers is artificially depressing rates and must inevitably give way to a recognition of underlying cost pressures -- inflation, increasing claim frequency, and radical changes in the tort litigation system.

Future increases, however, will not likely replicate the "panic pricing" crisis of the mid-1970's. A more complete and substantial data base exists today, giving both insurers and their regulators greater confidence in pricing product liability coverage; consequently, future rate adjustments are likely to be more gradual than those the precipitated the crisis of the 1970's.

Moreover, the availability of competitive alternatives to commercial insurance (self-insurance, risk retention groups, etc.) assures that market forces will temper any upward movement of rates that is inconsistent with actuarial experience.

Two major imponderables remain: If interest rates drop precipitously, prices in the marketplace are likely to rise.

And it is difficult to anticipate the effect that several recent court decisions (e.g., Sindell, Schiavone) will have on product liability claim frequency and/or severity. But even if interest rates drop dramatically and claim frequency and severity soar, these developments will likely be reflected gradually, rather than suddenly.

The ISO generally uses the countrywide experience of all reporting companies for 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 experience of the previous four years in developing rates for the future. Presumably the ISO trend factors would also pick up the upward trend in cost or frequency.

As the Task Force Report observed, the impact of one State's court decisions is national, rather than local. Not only is one State's experience for all companies meaningless for ratemaking purposes, even it it involves five years of data, but also, the movement of products among all the States renders any attempt to produce State-by-State product liability rates futile. A product made in one State may be sold and used in dozens of other States, each with quite different rules governing the manufacturer's tort liability. Moreover, legal precedents in one State may encourage the filing of suits there rather than in other jurisdictions. Thus, realistically, rates for even a localized business must be based on its national exposure, rather than its potential liability in its home State.

Conclusion

Any insurance system ultimately reflects the underlying costs of the legal system to whose liabilities it must respond. Improved data collection and statistical analysis, and competitive alternatives to commercial insurance, assure that product liability insurance prices will be increasingly responsive to losses and expenses. For insured and self-insured businesses alike, the amount of those losses and expenses depends on the success or failure of efforts to create better incentives for safe manufacturing practices and to restore balance to the tort litigation system.

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