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A Permanent Solution for Product Liability Crises: Uniform Federal Tort Law Standards

A PERMANENT SOLUTION FOR PRODUCT LIABILITY CRISES: UNIFORM FEDERAL TORT LAW STANDARDS

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INTRODUCTION

There is a French phrase, *Plus ca change, c'est la meme chose*, which translates: "The more things change, the more they remain the same."[1] This is indeed applicable to the most recent product liability crisis. The basic causes have changed little. The 1970s had its own product liability crisis and at that time the federal government created the Federal Interagency Task Force on Product Liability, chaired by the Department of Commerce, to examine the product liability system and the reasons for its failure.[2] After eighteen months of study, the Task Force found two basic causes of the product liability crisis that occurred in the 1976-1978 period — uncertainties and unpredictability in tort law, and overly subjective insurance pricing.[3] Other causes, such as the increase in the number and complexity of products, and product misuse, also were noted.[4]

Congress addressed the product liability insurance aspect in 1981 by passing the Federal Product Liability Risk Retention Act.[5] This Act states, in plain language, that if a small business, or group of businesses,

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1. J. BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 514 (15th ed. 1980) (quoting Alphonse Karr, *Les Guepes* (Janvier 1849)).

2. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT (1977) [hereinafter FINAL REPORT].

3. *Id.* at I-21-24, 26-29. The Task Force also identified unsafe manufacturing practices by some manufacturers as a cause of the product liability problem. The Task Force suggested the use of product liability prevention techniques in the area of manufacturers' quality control and greater economic incentives to reduce risk as means of helping to solve the problem.

4. *Id.* at I-29-31.

5. 15 U.S.C. §§ 3901-04 (1981). The Product Liability Risk Retention Act of 1981 helped to alleviate the insurance rate-making problem by permitting businesses to form self-insurance cooperatives or to band together as purchasing groups to bargain collectively for insurance rates. This legislation was designed to encourage commercial insurers

believe that the insurance pricing mechanism is unfair, they can set up their own self-insurance groups. Some businesses have done so, but most have not. The common sense explanation for the lukewarm reception to this legislation is that the uncertainties and unpredictability in our tort law remain unaddressed. Nothing has yet been done about this principal cause of the crisis, the same cause that existed a decade ago when the Task Force issued its Final Report in 1978.

I. THE UNPREDICTABILITY PROBLEM

Unpredictability lies at the heart of product liability crises. Dramatic and unpredictable changes in tort law rules have made it difficult, if not impossible, for insurers to accurately price various classes of liability insurance. Commercial general liability insurers, in particular, have had great difficulty pricing their product because the insured's risks are subject to continuous change in both scope and size.[6]

Product liability law, for the most part, is common law. It has been developed by judges and juries sitting in state courts. Thus, the rules vary from state to state, and sometimes from case to case within each state. Because the rules of liability are constantly changing, an insured's exposure to liability for damages cannot be predicted with any degree of precision. A judicial decision expanding tort law liability may subject the insured to new types of claims that could not have been brought or anticipated when the insurance policy was originally written. For example, some courts have decided that a person can bring a tort claim merely because they watched someone else being injured.[7] There is no way for an insurer to anticipate this kind of occurrence.

Constantly changing rules mean that looking at an insured's past claims experience does not give the complete picture in assessing that insured's future risks and in determining the corresponding price that must be set for liability insurance premiums. Similarly, data regarding past losses for a particular class of risks, for instance drug companies, may be insufficient for setting today's commercial liability insurance premiums for that class of policy holders. In addition to merely evaluating past losses, changes in tort law and cases involving this class and related classes of insureds must also be considered.

The common law has always been flexible and subject to change.

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to offer product liability insurance at competitive rates and to set premiums more accurately.

6. The problems in the insurance industry have generated much debate. *See, e.g., Availability and Affordability Problems in Liability Insurance: Hearing before Subcommittee on Business, Trade and Tourism of the Senate Committee on Commerce, Science and Transportation*, 99th Cong., 1st Sess. Serial no. 99-567 (1985); *Availability and Affordability of Liability Insurance: Hearing before the Senate Committee on Commerce, Science and Transportation*, 99th Cong., 2d Sess. Serial no. 99-633 (1986).

7. *See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (mother who witnessed child run down by an automobile and killed could recover for emotional distress even though the mother herself was not in physical danger); Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982) (mother watched baby gag on substance in baby food).

However, in the past, the common law moved in small steps or incrementally. Today, fundamentals can fall in a day. There are numerous examples of judicial decisions that create massive potential liability — decisions setting forth new rules which are sometimes retroactively applied.[8]

1. Strict-Strict Liability

Some courts have decided that a product manufacturer may be held liable for risks that it could not have discovered by *any* scientific means which might have been available at the time the product was made.[9] These decisions go beyond strict liability as it was developed in the 1960s and 1970s. Originally, strict liability allowed the claimant to prevail even though he or she did not prove that the defendant was negligent.[10] Nevertheless, fault remained as a basic ingredient in the lawsuit. Fault arose both in the test that led to proving the product was defective, and in permitting defendants to show that they neither knew nor could have known about the product's risk.[11] The few courts that apply "strict-strict" liability do not permit defendants to show that the risk was not knowable at the time the product was made. While the new "strict-strict" liability rule has only been adopted in a few states, it has created an area of severe instability in liability law. If manufacturers are held responsible for risks that *could not have been known* at the time of manufacture, their exposure is completely open-ended. Thus, risks that are discoverable because of new scientific technology create enormous potential liability for products manufactured years ago. And, liability for

8. When a decision adopts a new rule of liability or otherwise modifies product liability law, the new law applies to the product involved in the case — a product that may have been manufactured many years ago. The new rules apply to conduct that occurred in the past. Thus, in this sense, the rules may be retroactively applied.

9. "Strict-strict" liability, for the purposes of this article, refers to a *heightened* form of strict liability which imposes a duty on manufacturers to assume the cost of damages caused by unreasonably dangerous products. *See, e.g.*, Dart v. Wiebe Mfg. Inc., 147 Ariz. 242, 709 P.2d 876 (1985) (a strict liability design defect case in which knowledge of risks known at time of trial was imputed to a manufacturer regardless of whether the risks were knowable at the time the product was made); Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 114 (La. 1986) (holding that the manufacturer's ability to know of product's danger was irrelevant if the "product is unreasonably dangerous per se," that is, one which "a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product. . . ."); Hayes v. Ariens Co., 391 Mass. 407, 462 N.E.2d 273 (1984) (In a case alleging that the manufacturer of a snowblower breached its warranty of marketability, the court held that adequacy of warning is measured by all risks presented by the product regardless of whether manufacturer actually knew or should have known of such risks.); Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. 1984) (in a design defect case alleging that asbestos insulation material was defectively designed, the "state of the art" defense not allowed); Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974) (knowledge of risks available at time of trial was imputed to manufacturer in evaluating reasonableness of product's design or warning under strict liability theory); Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982) (a strict liability case for failure to warn of asbestos dangers in which the "state of the art" defense was not allowed).

10. *See generally* Smith, *Tort and Absolute Liability*, 30 HARV. L. REV. 241, 319, 409 (1917); HARPER, LAW OF TORTS §§ 155, 203 (1933).

11. Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777 (1983).

these risks was impossible to predict at the time insurance premiums were set and insurance contracts were signed.

In 1982, the seminal decision imposing "strict-strict" liability was handed down by the Supreme Court of New Jersey in *Beshada v. Johns-Manville Products Corp.*, a case involving asbestos litigation.[12] The court in *Beshada* held that culpability is irrelevant in strict liability cases and, thus, state-of-the-art defenses are not allowable.[13] The New Jersey court, however, engaged in a partial retreat in 1984, limiting the effect of its earlier decision.[14] Meanwhile, the Supreme Judicial Court of Massachusetts[15] and the Supreme Court of Arizona[16] had already applied the original *Beshada* decision to a snowplow and a machine tool, respectively. To the surprise of many experts, "strict-strict" liability was also recently applied in Louisiana.[17] Clearly then, "strict-strict" liability may be applied in any jurisdiction. However, even if adopted, there always remains the possibility of principle retreat, as evidenced by the Supreme Court of New Jersey. Whenever decisions of this type arise, insurance carriers must examine all *existing* reserves for pending claims and augment those reserves when appropriate. Further, carriers must reserve funds for additional future claims likely to be reported because of such decisions.

These courts have not only changed the rules of liability so that a manufacturer can be liable even for dangers that were undiscoverable at the time the product was made, but they have changed the liability rules without any alteration of tort damage rules which are based on fault. Instead, they have required unknowing manufacturers to pay damages in the same manner as those manufacturers who have acted wrongfully. The basic predicate for these decisions is that the manufacturer is "perceived" to be in a position to absorb the costs of accidents. For example, the Supreme Court of Louisiana stated:

> Of course, some losses from scientifically unknowable dangers may prove to be uninsurable for producers also. Manufacturers as a class, however, are still in a better position than consumers to analyze and take action to avoid the risk, to negotiate for broader insurance coverage, and to pass losses on in the form of price increases.[18]

The premises underlying this statement may not be true. First, many tort claimants have *already* received a substantial share of their out-

12. 90 N.J. 191, 447 A.2d 539 (1982).

13. *Id.* Accordingly, the defendant could not base its defense on the fact that the medical community was unaware of the dangers of asbestos.

14. *See* Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984) (in the typical design defect or warning case, the issue of whether the manufacturer knew, or should have known, of the dangerous propensity of its product, is *relevant*).

15. Hayes v. Ariens Co., 391 Mass. 407, 462 N.E.2d 273 (1984).

16. Dart v. Wiebe Mfg., Inc., 147 Ariz. 242, 709 P.2d 876 (1985).

17. *See* Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986) (manufacturer held liable for injuries caused by product deemed dangerous per se, even though the manufacturer could not have known of any danger).

18. *Id.* at 118-19.

of-pocket costs through workers' compensation, or health and accident insurance.[19] Second, accident insurance is a much more efficient form of spreading risks than liability insurance — more of the premiums end up in the hands of the injured party under health and accident insurance.[20] Finally, many businesses cannot afford to absorb the costs of "strict-strict" liability and cannot obtain affordable insurance in an attempt to do so.

2. Liability Without Defect

Until recently, liability has been imposed only in cases where the product was defective,[21] that is, something had to be "wrong" with the product. A recent decision, however, shows that even this rule is not inviolable.[22] The Maryland Court of Appeals recently held that a manufacturer of a "Saturday night special" handgun may be held liable for the shooting of a person in a grocery store robbery.[23] Traditionally, courts have held that a gun manufacturer may be liable only if there is a "defect" in the gun; for example, if it were mismanufactured and parts were missing or parts were assembled improperly, or if the gun did not include an effective safety device.[24] In the Maryland case, however, the court held that liability could be imposed, not because there was any defect in the gun, but because the particular type of handgun at issue (in the court's subjective view) had no legitimate purpose and the manufacturer "[knew] or ought to [have] know[n] that the chief use of the product is for criminal activity."[25] Interestingly, in a further demonstration of the legal instability of product liability law, a court in California held for the same defendant manufacturer *because there was no defect in the handgun*, the opposite ruling reached by the Maryland court.[26] The Maryland decision, imposing liability without a showing that the product was defective, created a completely new area of exposure for manufacturers. This type of extreme change in the law could not be foreseen by the insurer at the time it insures the gun manufacturer. The underlying principle of the decision could conceivably allow liquor manufacturers

19. *See* HEALTH INSURANCE ASSOCIATION OF AMERICA, SOURCE BOOK OF HEALTH INSURANCE DATA 3 (1984 update); U.S. CHAMBER OF COMMERCE, ANALYSIS OF WORKERS' COMPENSATION LAWS 1 (1985).

20. *See* Schwartz, *Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix*, 39 VAND. L. REV. 569, 573-74 (1986).

21. PROSSER AND KEETON ON THE LAW OF TORTS § 99 (W.P. Keeton 5th ed. 1984); *see also* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

22. Kelley v. R.G. Industries, Inc., 304 Md. 124, 497 A.2d 1143 (1985).

23. *Id.*

24. *See* W. KEETON, D. OWEN & J. MONTGOMERY, PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS 41 (1980); Wade, *A Conspectus of Manufacturers' Liability for Products*, 10 IND. L. REV. 755, 756-57 (1977).

25. *Kelley*, 497 A.2d at 1159.

26. *See* Moore v. R.G. Industries, Inc., 789 F.2d 1326 (9th Cir. 1986). The court in *Moore*, contrasting the decision in *Kelley*, *supra* note 22, concluded that "there [was] no indication in California law or public policy that the courts would distinguish 'Saturday night specials' from other handguns or find them of so little utility that the risk of injury outweighs their beneficial uses for recreation or protection." *Moore*, 789 F.2d at 1327.

to be liable for alcoholism, sellers of sugar liable for tooth decay, and fast food hamburger restaurants liable for fostering heart disease!

3. Liability Without Injury

A federal court in Mississippi recently permitted recovery for a former shipyard worker's medical probability of developing cancer *in the future*.[27] Not only could a claim be brought for mental stress relating to the fear of getting cancer, but a claim also could be brought for the "probability" of getting cancer in the future.[28] Both bases of recovery are a major departure from traditional tort doctrine.[29] The potential liability exposure caused by persons who *worry* about suffering an illness they *might* get in the future is limitless.

In another non-injury case, the Supreme Court of Oklahoma recently decided that a woman could recover a substantial tort judgment because she noticed an object which turned out to be a piece of "Good-n-Plenty" candy in a soda bottle.[30] Again, she merely *noticed* the piece of candy. It never touched her lips, it did not harm her, it merely made her upset.[31]

These examples of expanded liability and recovery, under "strict-strict" liability, liability without defect, and liability without injury, represent a dangerous trend. Notice that in the expansion of liability under the first category, the innocent pays. In the second example, liability can be imposed when there is no defect or anything wrong with the product. In the third example, a person can recover when he or she has no traditionally-recognized present injury. Consequently, if a court were ever to combine these rules, a person could recover tort damages even when there has been no fault, no defect, and no injury!

4. What Is Next? An Example of How One Case Could Radically Change Liability Exposure

There may be other types of tort liability that cannot even be foreseen at this time. With tort law constantly in flux, it is impossible to predict the new areas of liability which courts may create. For example, some plaintiffs' attorneys have asserted that an automobile which does not contain an air bag is defective.[32] No appellate judicial decision has

27. *See* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986) (evidence showed that the plaintiff, who currently was suffering asbestosis, had a greater than 50% chance of getting cancer), *cert. denied*, 106 S. Ct. 3339 (1986).

28. *Jackson*, 781 F.2d at 411-12.

29. *Id.* at 414-15; *see* Gale & Goyer, *Recovery for Cancerphobia and Increased Risk of Cancer*, 15 CUMB. L. REV. 723 (1985).

30. *See* Ellington v. Coca-Cola Bottling Co., 717 P.2d 109 (Okla. 1986).

31. *Id.* at 109. Plaintiff, upon noticing what she thought was a worm in her soft drink bottle, but which actually was the piece of candy, became physically ill, the complications of which resulted in "a kidney infection and other physical irregularities such as diarrhea, fever and nausea." *Id.*

32. *See, e.g.*, Vanover v. Ford Motor Co., 632 F. Supp. 1095 (E.D. Mo. 1986) (The district court granted the manufacturer's motion for partial summary judgment on two grounds: (1) the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392

upheld this theory.[33] Nevertheless, the potential liability that would be created if a series of judicial decisions held that an automobile without an air bag was defective could impose catastrophic liability damages on motor vehicle manufacturers and their insurers.

There are approximately 45,000 motor vehicle highway deaths each year.[34] Only a small fraction of these deaths are caused by defective motor vehicles.[35] Most accidents are caused by driver error such as speeding and intoxication.[36] In those cases in which an injury is attributable to a defective motor vehicle, it is usually limited to a specific model of a specific make of car manufactured by a particular motor vehicle manufacturer. Therefore, in those situations where a court determines that a particular model of car is defective, the total number of vehicles with such a defective design or component is only a small fraction of the total number of motor vehicles in use. In contrast, if courts should hold that motor vehicles without air bag systems are defective, 100 million cars would immediately be defective, resulting in the creation of potential liability for automobile manufacturers for all deaths and injuries in which air bag systems *could have*, arguably, reduced or prevented injury.

This potential liability is speculative. In assessing the liability risks of automobile manufacturers, insurance companies can only guess as to whether and when this type of liability might be applied. The absence of any past data on this type of liability and the impossibility of predicting judicial behavior makes it difficult to factor this potential liability into the exposure to liability that is considered when setting premiums.

Opponents to federal product liability legislation have pointed to this "absence of claims data" as a reason to take no action to reform the tort system.[37] But what good are claims data in an area where the future may have relatively little to do with the past? The hunt for perfect

(1982), preempted any state motor vehicle standards; and (2) under the "second collision" doctrine first announced in Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968), an automobile without a defective airbag could not be considered unreasonably dangerous.).

33. *See, e.g.*, Evers v. General Motors Corp., 770 F.2d 984 (11th Cir. 1985).

34. U.S. DEP'T OF TRANSPORTATION, COMPENSATING AUTO ACCIDENT VICTIMS 1 (1985) [hereinafter ACCIDENT VICTIMS]. The losses — in human and economic terms — are staggering. In 1982, for example, there were 46,000 motor vehicle deaths and 1.7 million disabling injuries. The economic cost to society arising from all motor vehicle accidents in 1982 totalled $41.6 billion. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 40 (1983). This amount included losses from medical expenses, insurance administration, wage loss, motor vehicle property damage, fire loss and indirect work loss. ACCIDENT VICTIMS at 4.

35. *See* NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 48 (1983). In 1982, for example, vehicle defects were cited in only eight percent of fatal motor vehicle accidents occurring in urban areas. Most of these "defects" were not of the type attributable to manufactures, but rather to inadequate owner- performed maintenance such as balding or under-inflated tires, improperly maintained brakes or non-working headlights. *Id.*

36. According to the National Safety Council, in 1982 improper driving accounted for 62.3% of all fatal highway accidents in urban areas, and 31.5% were caused by speeding. *Id.* Alcohol has been cited as a factor in more than 50% of fatal motor vehicle accidents. *Id.* at 52.

37. *See* S. REP. No. 422, 99th Cong., 1st Sess. 107-11 (1986) (minority views of Sen. Ernest F. Hollings); 132 CONG. REC. S12,756 (daily ed. September 17, 1986) (statement of Sen. Hollings).

claims data is a misplaced and misleading enterprise. Product liability tort law is not like life insurance or accident insurance in which the past tells us a good deal about what will happen in the future. Product liability laws are constantly changing, opening up new areas of potential liability. Unless the system is stabilized and reasonable uniform federal rules are enacted, we will continue to have severe instability, and insurance availability and affordability problems will not abate. That is one reason why the Federal Product Liability Retention Act, which facilitates self-insurance,[38] has not been utilized by many businesses. The uncertainties are the same for all, self-insured and commercially-insured alike. The one thing certain about the past in product liability is that hindsight alone will not predict the future.

II. FAIRNESS

The current system, in which the rules establishing a manufacturer's obligation and an injured person's right to compensation vary depending upon which state's law applies, is inherently unfair. There is one basic idea that provides the overriding rationale for a federal product liability law: product liability rules should be the same *in every state.* Products constantly move in interstate commerce. The liability of a manufacturer or product seller should be determined by the same legal standards no matter where the product is sold or where an injury occurs. Accordingly, an injured person should have the same right to recovery for harm no matter where that person resides, where the injury occurs, or where an action for damages is brought. This rationale is based on fairness, logic, simplicity and the nature of our commerce.

Because the rules vary from state to state and are continually in flux, both manufacturers and claimants spend unnecessary time, effort and resources in determining what the applicable legal rules are, and in investigating, pursuing and defending product liability claims. This difficulty in evaluating the merits of a claim not only raises the costs of litigation, but it inhibits the possibility of settlement.[39] In many cases, it is unclear what the legal standards are or should be, and this results in excessive litigation. Legal costs and managerial time diverted by manufacturers to the assessment of legal claims are passed on to consumers in the form of higher product prices.[40] Legal fees also devour judgments won by claimants successful in product liability suits.[41]

38. Product Liability Risk Retention Act of 1981, *supra* note 5, at §§ 3901-04. Under the Risk Retention Act, a group of product manufacturers and sellers can form a self-insurance group merely by being registered in one state. *Id.* at § 3901. Once chartered, the group can then operate in other states by submitting certain information to the insurance commissions of those states. *Id.* at § 3902. The Act also permits organizations, such as trade associations, to purchase liability insurance on a group basis. *Id.* at § 3903. For a brief discussion of the history and purpose of the Act see Home Warranty Corp. v. Elliot, 572 F. Supp. 1059 (D. Del. 1983).

39. *See* S. REP. No. 476, 98th Cong., 2d Sess. 7 (1984).

40. *Id.* at 8.

41. A recent study of 24,000 claims conducted by the Rand Corporation shows that for every dollar received by a plaintiff in a product liability suit, $.41 is paid immediately to

III. From Common Law, To Legislation, To Federal Legislation: Back To The Basics

Sometimes it is useful to go back to basics. For those of us who have followed the issue for the past ten years, we can sometimes miss the forest for the trees. We forget that product liability law today is formed almost exclusively by courts on a day-to-day basis.[42] Unfortunately, the courts have gone a myriad of ways in formulating product liability rules. The decisions are as diverse as the personalities of the people who occupy the bench.[43] With fifty-one sets of ever-changing rules and thousands of courts, it is no wonder that the law is muddled. While the common law worked well for many years in our country, it does not do so in the product liability area anymore. It only worked well when there was a "common morality." Decisions tended to move slowly and clung to the past. Today, as has been illustrated, there are very different views among judges about what the tort system should accomplish. On the other hand, there is a strong economic dependency in our insurance system on having some stability, and congruity of interpretation, in those rules. This dependency did not exist at common law. Consequently, it is clear that product liability law can no longer be left to the vagaries of the common law — it must be put into a legislative framework.

IV. Why Is Federal Cure Needed?

The states have not and cannot achieve uniformity of product liability law. After a careful study of the product liability problem from 1976-1978, a task force that one of the authors, Mr. Schwartz, chaired at the United States Department of Commerce, drafted a model product liability law, known as the Uniform Product Liability Act ("UPLA"). It was published on October 31, 1979, and offered to the states as a basis for action.[44]

Despite this model act and efforts to have states act in a harmonious manner, the result produced even more differences. Many states enacted their "own" version of a product liability law.[45] Unlike the experience with the Uniform Commercial Code, there has been *no harmony* in state legislation. Of equal importance is the fact that state statutes are not comprehensive and fail to address key issues that arise in product liability litigation.[46] For example, a key issue arising in product liability

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the plaintiff's attorney. The defendant spends an additional $.58 in legal costs. Thus, for every $.59 the plaintiff actually gets, lawyers get $.99. J. Kakalik, P. Ebener, W. Felstiner & M. Shanley, Costs of Asbestos Litigation (Institute for Civil Justice, July 1983).

42. *See* S. Rep. No. 476, 98th Cong., 2d Sess. 4 (1984).

43. *Id.*

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

45. State product liability legislation is compiled at 2 Prod. Liab. Rep. (CCH) 90,112-95,270.

46. *See* S. Rep. No. 422, 99th Cong., 2d Sess. 8 (1986).

cases is the manufacturer's duty to provide warnings.[47] Must the manufacturer provide warnings directed to the product user or must the warnings be given to a third party who will administer the product or supervise its use, such as a physician or employer? This is an issue that is not addressed in most state product liability statutes and, accordingly, the answer is not always clear. This kind of lack of uniformity in the law plagues the system. States are frustrated in this area because an average of over seventy percent of all products are shipped outside their state of origin.[48] Thus, an attempt by one state to resolve uncertainties in its tort litigation system can not affect the overwhelming majority of cases that are brought in other states against their home-based industries. Opponents of federal product liability legislation sometimes point to state tort reforms and say that they have not resulted in lower insurance prices. With regard to product liability, *that is exactly why* state reforms cannot solve the problem. Legislation in one particular state is not effective to help manufacturers and product sellers in that state because their products are frequently used in a number of other states. Most importantly, product liability insurance rates are set on a *nationwide* basis.[49] Thus, the insurer is required to take into account the laws of states other than the one where a particular product is manufactured.

There is no question that product liability is a matter of interstate commerce. In fact, on this basis in August of 1986, the National Governors Association voted to reverse its former position in opposition to federal product liability legislation.[50] We need legislation, and that legislation must be federal.

V. CONGRESS HAS CLEAR AUTHORITY UNDER THE COMMERCE CLAUSE TO ENACT A FEDERAL PRODUCT LIABILITY LAW

The commerce clause gives the federal government the right and responsibility to regulate and promote interstate commerce.[51] The production, distribution and sale of products clearly takes place in and affects interstate commerce. A product may be manufactured in one state and sold or distributed in another state, contain components or raw materials acquired in different states, or compete with other products in interstate commerce. Improper findings of liability and excessive awards impose a significant burden on interstate commerce. In addition, product liability insurance rates, as previously indicated,[52] are set on a national basis. In assessing an insured's potential liability, insurers must take into account a new rule extending liability in *any* state, because the insured's product may be subject to a lawsuit in that state, or

47. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 99 (W.P. Keeton 5th ed. 1984).

48. *See* 1977 CENSUS OF TRANSPORTATION, COMMODITY TRANSPORTATION SURVEY, U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, TABLE I, pp. 1-77 (1981); *see also* S. REP. NO. 422, 99th Cong., 2d Sess. 8 (1986).

49. *See* 44 Fed. Reg. 62,714, 62,716 (1979).

50. *See* Daily Report for Executives (BNA) No. 166, at A-2 (Aug. 27, 1986).

51. U.S. CONST. art. I, § 8, cl. 3.

52. *See supra* note 49 and accompanying text.

other states may follow the new rule. Thus, in this respect, product liability rules in an individual state *affect* interstate commerce and provide a justification for federal regulation.[53]

In general, federal legislation falls within Congress' commerce clause authority if there is any rational basis for the congressional determination that the regulated activity affects interstate commerce.[54] The current complex system of state common and statutory product liability laws hampers trade among the states because products are subject to varying and conflicting rules. Manufacturers who do business on an interstate basis have no clear statement of what their legal obligations are or what legal standards still apply. This very problem exemplifies the reason for the commerce clause: to permit a uniform approach to resolving issues that burden the conduct of business and trade across state lines.[55]

In the past, the national interest in protecting interstate commerce has prompted Congress to find a uniform federal solution to problems involving interstate commercial activity.[56] Congress has authority under the commerce clause to enact laws determining the liability of parties for injuries arising out of commerce, and it has enacted a number of statutes that preempt state tort law.[57] Such laws may create or abolish causes of action, add, subtract, or modify defenses for liability, and limit or expand liability.[58]

The fact that tort law traditionally has been a matter of state law does not alter Congress' authority under the commerce clause to enact a uniform product liability law. The argument that in local product liability laws the rules should be retained because the tort system traditionally has been a feature of the common law has no constitutional basis. Congress has clear authority under the commerce clause to enact a federal product liability law.

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53. *See* Fry v. United States, 421 U.S. 542, 547 (1975) ("[E]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce.").

54. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (provisions of Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 (1982), did not violate commerce clause, especially where legislative history expressed the need for uniform minimum nationwide standards).

55. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 8.1, at 261-62 (3rd ed. 1986).

56. *See, e.g.*, United States Cotton Standards Act, 7 U.S.C. §§ 51-65 (1982), Grain Standards Act, 7 U.S.C. §§ 71-87, 111, 113, 241-73, 2209 and 16 U.S.C. §§ 490, 683 (1982), Tobacco Inspection Act, 7 U.S.C. §§ 511-511q (1982) (requiring compliance with uniform national classifications); Consumer Products Safety Act, 15 U.S.C. §§ 2051-2083 and 5 U.S.C. §§ 5314, 5315 (1982) (uniform safety standards for consumer products); Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 301-92 (1982) (safety and labeling of drugs).

57. *See, e.g.*, Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1984) (imposing liability without regard to fault); Price-Anderson Act, 42 U.S.C. §§ 2012, 2014, 2039, 2073, 2210, 2233, 2239 (1973 & Supp. 1983) (limiting liability for nuclear power plant accidents); Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1972) (governing the liability of interstate railway carriers to their employees and altering state court law on available defenses).

58. S. REP. No. 476, 98th Cong., 2d Sess. 5 (1984).

VI. FEDERAL LEGISLATION WILL ACHIEVE UNIFORM RULES OF PRODUCT LIABILITY

Federal product liability legislation, Senate Bill 2760, reported to the Floor by the Senate Commerce Committee in 1986,[59] specifically provides that such legislation would not create federal question jurisdiction or jurisdiction based on an act of Congress regulating commerce.[60] In effect, the legislation leaves the resolution of product liability claims to the state courts and federal courts that currently have jurisdiction over such actions based upon diversity of citizenship. Some opponents of the legislation have argued that uniformity will not be achieved under a federal product liability act.[61] They contend that confusion and conflicting decisions will occur because state courts will have unbridled authority to interpret the act without regard to the decisions of federal courts. This contention is unfounded both as a theoretical and practical matter.[62]

Under the supremacy clause of the United States Constitution,[63] federal law overrides any conflicting provisions of state law. In interpreting federal law, state courts are guided by federal court decisions.[64] For example, in interpreting the Federal Employers' Liability Act (FELA),[65] state courts are bound to follow rulings of federal courts. The United States Supreme Court has stated that "[m]anifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act."[66]

States have recognized their obligation to follow the decisions of federal courts interpreting the FELA.[67] State courts have concurrent jurisdiction with federal district courts to entertain FELA cases, but in determining whether a plaintiff is entitled to recover in such cases, courts "look to the prevailing federal case law."[68]

The importance of this rule as it applies to a federal product liability

59. *See* Product Liability Reform Act, S. 2760, 99th Cong., 2d Sess. (1986).

60. *Id.* at § 104; *see* 28 U.S.C. §§ 1331, 1337 (1982) (federal district court jurisdiction over federal questions and acts of Congress regulating commerce, respectively).

61. *See* S. REP. No. 476, 98th Cong., 2d Sess. 73-75 (1984) (minority views of Sen. Ernest F. Hollings).

62. There is a certain irony in the fact that some representatives of the organized bar who argue this point also contend that the federal rules will make the law "rigid" and "inflexible." One might conclude that these arguments are make-weights and that advocates of these viewpoints simply do not wish to end a system that has been lucrative for the legal profession.

63. U.S. CONST. art. VI, cl. 2.

64. C. WRIGHT, THE LAW OF FEDERAL COURTS § 45 (4th ed. 1983).

65. 45 U.S.C. §§ 51-60 (1982).

66. Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 361 (1952).

67. *See, e.g.*, Kay v. Pennsylvania R.R. Co., 102 N.E.2d 855, 867 (Ohio Ct. App. 1951); Grosse v. Terminal R.R. Ass'n, 307 Ill. App. 414, 423, 29 N.E.2d 1018, 1022 (1940).

68. Moss v. Central of Georgia R.R., 135 Ga. App. 904, 905, 219 S.E.2d 593, 595 (1975), (The question of whether a worker, pursuing a claim under FELA, "is an independent contractor or employee is a problem of federal law.") *cert. denied*, 425 U.S. 907 (1976).

act can be appreciated in light of the fact that over 100 opinions on the topic of product liability are published by the federal circuit courts of appeals each year. One can assume that similar federal appellate action will occur under a federal product liability law. These opinions will supply substantial precedent and evidence for application in product liability actions brought in state courts, resulting in uniform interpretation of the act at the state court level. Federal courts will interpret and apply the federal product liability act in product liability actions brought in federal district courts. In actions which arise under federal law, the district courts and the federal courts of appeal will not be bound by state court decisions interpreting the federal product liability act.[69] State courts will look to this body of federal decision, as they do in applying other federal law, and will have substantial guidance in applying the act.

The obligation of state courts to follow federal decisions when applying federal law is the converse of the "Erie Doctrine" which requires federal courts to follow the decisions of state courts when applying state law.[70] The Supreme Court has expressly rejected the view that "courts of the States remain free to apply individualized local rules when called upon to enforce . . . [that which is expressly preempted by federal law.]"[71] Under the supremacy clause, state courts also will be obligated to apply the federal court decisions interpreting the federal product liability act. Thereby, substantial uniformity in the rules of product liability will be achieved.

Furthermore, every court applying the federal product liability act will begin from a common statutory text employing common, easily understood terms and familiar principles. Many potential ambiguities could be readily resolved by reference to the comprehensive legislative history of the act as has been the case under the Federal Rules of Evidence.[72]

The view that state courts will establish widely dissimilar interpretations of the federal product liability act also is contrary to experience under other federal laws in which state courts have heard claims arising

69. *See* Bryant v. Civiletti, 663 F.2d 286, 293 n.15 (D.C. Cir. 1981) (In a habeas corpus proceeding challenging consecutive life sentences, the federal court noted that it need not adopt a lower state court opinion concerning parole. In fact, "[f]ederal courts are not even bound by the decisions of a state supreme court setting aside a state's statute on grounds that it violated the United States Constitution."); Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1079 (D. Utah 1981) (nor is the federal district court "bound by the doctrine of *stare decisis* to follow state court interpretations of federal law," in this case a Utah Supreme Court decision), *aff'd in part, rev'd in part*, 716 F.2d 1298 (10th Cir. 1983), *aff'd on rehearing*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 107 S. Ct. 596 (1986).

70. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

71. Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962).

72. Opponents made similar arguments about "confusions" prior to adoption of the Federal Rules of Evidence. *Rules of Evidence: Hearings Before the Senate Committee on the Judiciary on Federal Rules of Evidence H.R. 5463*, 93rd Cong., 2d Sess. 80, 82, 96 (1974) (statements of James S. Schaeffer and Joseph A. Moore for Association of Trial Lawyers of America and statement of George A. Spiegelberg on behalf of American College of Trial Lawyers and Ad Hoc Association of Trial Lawyers of America, respectively). As far as we know, after a decade of operation, no one has seriously suggested repealing the statutory rules and returning to "the common law."

under those federal laws. For example, to the best of these authors' knowledge, there is no evidence today that claims brought under FELA[73] or under section 301(a) of the Labor-Management Relations Act of 1947[74] are treated much differently if they are brought in a state court. These claims are treated similarly regardless of whether they are brought in a state or federal court. Even if there is some diversity of views regarding application of a federal product liability statute, a comprehensive federal law still will be an immense improvement over the myriad of contradictory laws and standards that currently exists in the different states. Federal product liability legislation will unquestionably bring more stability than exists in the current system.

VII. WHAT CAN BE ACHIEVED WITH FEDERAL PRODUCT LIABILITY LEGISLATION?

There are several fundamental objectives that can be achieved in any federal product liability legislation. The foremost goal is to remove the unpredictability and uncertainty of the current system so as to make it more efficient in terms of manufacturers understanding their legal obligations and the scope of their liability.[75] A second goal is to eliminate the excessive legal costs resulting from the present system.

Unless underwriters can predict with some degree of certainty when and how manufacturers and product sellers will be held liable, insurer problems with the system are going to continue and fester. The rules should specify when a defendant will be liable for his failure to safely design a product and when he will be liable for his failure to warn. Under tort law, the only rational basis for such rules is fault. If one holds a manufacturer strictly or absolutely liable in the design or warning area, one creates an open-ended legal system that is unpredictable and unaffordable. This is because a person can always design a better product if he spends enough money. For example, one can make a car that floats on water. One can always provide a new warning with *hindsight* as one's guide. A manufacturer should be liable when he has failed to act in a reasonably prudent manner and either knew or should have known about the risks.[76] Rules with respect to duty to warn are particularly important — guidance is needed. Rules can spell out quickly and unequivocally who should be warned. For example, a pharmaceutical company should be required to warn a physician about prescription product risks. It may be questionable, however, whether the same pharmaceutical company should be required to give identical complex medi-

73. 45 U.S.C. §§ 51-60 (1982).

74. 29 U.S.C. § 185(a) (1982).

75. *See* REPORT OF THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, ON THE PRODUCT LIABILITY REFORM ACT, S. REP. NO. 422, 99th Cong., 2d Sess. 5 (1986).

76. *See, e.g.*, Prentis v. Yale Mfg. Co., 116 Mich. App. 466, 365 N.W.2d 176, 187 (1984) (cause for negligent design of forklift failed where jury found that "the manufacturer took reasonable care in light of any reasonably foreseeable use of the product which might cause harm or injury").

cal terminology to a patient. Today, the duty-to-warn area of law is filled with uncertainty. Legislation can create rationality and predictability.

2. Abolish the Unfair Doctrine of Joint and Several Liability

One of the major causes of unpredictability in the product liability system is the rule of "joint and several liability." Originally, this rule applied when there were two or more persons, acting in concert, who wrongfully pursued a common scheme or plan that was likely to result in injury to another.[77] In effect, joint and several liability meant that the persons who acted in concert were equally at fault and jointly responsible for the harm, and thus the injured person could recover damages from any one of them.[78] Currently, courts in many states have expanded this rule by applying it even when the defendants in the lawsuit acted independently and were not equally at fault.[79] The result is that a defendant who is minimally responsible for causing a harm may be forced to pay the entire amount of the injured person's damages.[80] An injured person may choose to sue a particular defendant who is, for example, only five percent at fault, merely because that defendant has the "deepest pocket." Meanwhile, the parties who are primarily responsible for the harm — but frequently unable to pay — get off without paying anything.

It is difficult enough for an insurer to predict the potential liability of its own insured, but it is impossible to predict the liability for *other persons* which may be assumed by its insured through the application of joint and several liability.

Common sense says that it is simply unfair to make one person pay for what another person did; nevertheless, that is exactly what the doctrine of joint and several liability does. Other than a basis for letting us find a "deep pocket," how can we justify making Peter pay for the torts of Paul? Courts today are able to and do apportion damages among plaintiffs and defendants, and among defendants, when they are suing each other. It is only logical and reasonable to limit the individual liability of a person to his *own* share of responsibility.

3. Reduce Excessive Legal Costs

The uncertainties in tort law have helped generate tremendous and unnecessary legal costs in product liability. Statistics clearly show that

77. *See generally* 3 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 10.1 (2d ed. 1986).

78. *Id.*

79. *See* S. REP. No. 422, 99th Cong., 2d Sess. 68-69 (1986). It should be noted, however, that a growing number of states have abolished the doctrine of joint and several liability through legislative action. *See, e.g.*, COLO. REV. STAT. § 13-21-111.5 (Supp. 1986); KAN. STAT. ANN. § 60-258a (1983).

80. *See* Granelli, *The Attack on Joint and Several Liability*, 71 A.B.A. J. 61 (1985). For a more detailed critique of the joint and several liability doctrine see Pressler & Schieffer, *Joint and Several Liability: A Case For Reform*, *supra* pp. 651-84.

victims are getting less than one-half of all the money spent on tort litigation, with the rest of the money going to attorneys' fees and the costs of litigation.[81] But uncertainties in tort law are not the only factors which contribute to unnecessary legal costs. There are also unreasonable and unneeded delays by some defendants' attorneys. There are frivolous and unwarranted claims brought by some plaintiffs' attorneys. The federal product liability bill contains a provision that applies strict sanctions against attorneys who bring frivolous claims or engage in unnecessary delay.[82] While this is a good start, the frivolous claims provision is unlikely to work if there are no rules or guidelines concerning when a manufacturer or product seller is to be held liable. Attorneys will be deterred from bringing frivolous claims and defenses only if they have clear rules as to standards of liability. In addition, without clear standards of liability, courts will have no guidelines to determine whether sanctions should be imposed on an attorney bringing a particular case.

VIII. THE ANTI-CONSUMER MYTH

It has been asserted that some very early versions of federal product liability legislation, in effect, "tilted the law" toward defendants.[83] That "tilt" has long since passed. The current legislation, in a number of ways, *expands* liability of manufacturers. One example which would work to the plaintiff's advantage is the statute of limitations — which begins to run at the time a person knew or should have known about a harm and its cause,[84] as contrasted with the law of some states where a claim arises as soon as a person is injured.[85]

More importantly, rules that limit recovery are *not* automatically "anti-consumer." If there are excessive costs in the system, consumers are harmed by the corresponding increases in the price of products. Today, according to some surveys, product liability accounts for over twenty percent of the price of a step ladder,[86] and approximately $80,000 of the price of a general aviation airplane.[87] In the legislative

81. A recent study by the Rand Corporation shows that a successful plaintiff in a product liability lawsuit receives approximately 45% of the total annual cost of tort litigation, with attorneys' fees, court costs and the value of the litigants' time consuming the rest. INSTITUTE FOR CIVIL JUSTICE, AN OVERVIEW OF THE FIRST SIX PROGRAM YEARS 23 (1986).

82. S. 2760, 99th Cong., 2d Sess. § 305 (1986).

83. *See Hearing Before the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation, on S. 2631*, 97th Cong., 2nd Sess. 128 (1982) (statement by David I. Greenberg, Legislative Director, Consumer Federation of America).

84. S. 2760, 99th Cong., 2d Sess. § 304(a) (1986).

85. *See, e.g.*, Garrett v. Raytheon Co., 368 So. 2d 516 (Ala. 1979) (statute of limitations began to run at time of first legal injury, that is, when one was entitled to maintain an action); Wojcik v. Almase, 451 N.E.2d 336 (Ind. Ct. App. 1983) (statute of limitations began on date defective catheter broke off in plaintiff's body, not on date its presence was discovered by x-ray); New Mexico Elec. Serv. Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976) (statue of limitations in personal injury case began to run at time of injury, not time of the negligent act).

86. FINAL REPORT, *supra* note 2, at VI-16.

87. *See* 132 CONG. REC. S13,016 (daily ed. Sept. 19, 1986) (statements of Senators Nancy L. Kassebaum and Robert Dole).

process in Washington, D.C., professional consumer groups are often seen pitted against business groups, but that picture is not a true reflection of businesses and consumers in the United States of America. We all have an interest in removing excessive costs from the tort system. A recent Louis Harris poll showed that sixty-nine percent of consumers believe the tort system has made it too easy for people to sue and win.[88] Consumers do not wish to pay inflated prices for products because some people misuse products, drive while they are intoxicated, do not follow instructions, or alter equipment, and then are hurt. It is ironic that professional consumer groups oppose reforms that would eliminate liability of manufacturers when there has been an unreasonable or unforeseeable misuse of a product.

On another point, it does not make economic sense for the tort system to pay people who have already been paid by health accident insurance. The collateral source rule, however, precludes the introduction of evidence before the jury showing that the plaintiff has already been compensated by collateral sources for the same harm.[89] This rule permits double recovery and contributes to the excessive costs of the product liability system.

Finally, the Louis Harris poll suggests that most consumers think there should be some limit on liability at least with respect to noneconomic costs (essentially, non-medical costs).[90] While the limit is arbitrary, no matter what level is set, it is even more arbitrary to leave noneconomic damages — damages that have no market value — *totally* open-ended.

In sum, the idea that any tort reform legislation is automatically anti-consumer is a myth. The current proposed federal legislation contains provisions that will benefit consumers, attempts to remove excessive costs from the product liability system — costs which eventually are passed onto consumers in the increased price of products — and attempts to restore fairness to the system.

CONCLUSION

Two major product liability crises[91] have occurred in the past decade. Their impacts are not merely grist for academic musings—they are very real. They put small businesses out of business. They blunt the introduction of new and useful products. They compromise our efforts

88. *See* 132 CONG. REC. S7,604-5 (daily ed. June 16, 1986) (statement of Sen. Robert W. Kasten) (reporting contents of Harris Survey 1986, June 9, 1986).

89. *See, e.g.*, Helfend v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 1, 465 P.2d 61, 84 Cal. Rptr. 173, 175 (1970).

90. 132 CONG. REC. S7,605. The Harris poll disclosed that 65% of those persons surveyed were in favor of a $150,000 limit on the amount that a person could collect for any injury, *provided*, that if that person needed special medical treatment they could get it free for the rest of their life no matter what the cost. *Id.* (emphasis added).

91. The two crises are the 1976-78 period which produced the FINAL REPORT, *supra* note 2, and the present one which prompted the Product Liability Reform Act, *supra* note 59.

to meet foreign competition, and they create unnecessary costs in the price of products. In sum, they have adverse impacts on *both* consumers and businesses.

The crises have had two basic forces that nudge them forward: overly subjective insurance rate-making and unpredictable tort law. Congress has partially addressed the insurance rate-making problem by facilitating self-insurance for all product sellers and manufacturers. Fortunately, Congress has now taken an active interest in the second aspect of the problem — unpredictable tort law. Although a bill progressed in the 99th Congress farther than any bills have before, the time for further study should be over. The plaintiffs' lobby has consistently opposed federal product liability legislation both in concept and in substance. While the organized plaintiff's bar attempts to couch its position in terms of the interests of consumers, evidence such as the recent Louis Harris poll shows that this plaintiffs' lobby does not accurately reflect public opinion on this issue.[92] All interested groups should join together to assure that the federal legislation is fair and balanced. To leave the system in common law chaos is simply to perpetuate unnecessary crises. The time to enact uniform federal product liability standards is now.

92. In fact, the survey showed that the public believes "that lawyers looking for big contingency fees are responsible for what is seen as the flood of liability suits." 132 CONG. REC. S7,605 (daily ed. June 16, 1986).