

The Road to Federal Product Liability Reform

Victor E. Schwartz

Mark A. Behrens

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Torts Commons](#)

Recommended Citation

Victor E. Schwartz, & Mark A. Behrens, *The Road to Federal Product Liability Reform*, 55 Md. L. Rev. 1363 (1996)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol55/iss4/11>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

THE ROAD TO FEDERAL PRODUCT LIABILITY REFORM

VICTOR E. SCHWARTZ*

MARK A. BEHRENS**

INTRODUCTION

The road toward the enactment of federal product liability reform legislation has been a long one. The effort can be traced back to an Interagency Task Force that began under President Ford in 1976 and concluded under President Carter in 1980. In late 1981, a major effort to enact federal legislation began under the leadership of former Wisconsin Republican Senator Robert Kasten.¹

For the last two Congresses, bipartisan product liability reform has been an achievable goal in the United States Senate. Yet, in both September 1992 and June 1994, a minority of members, many of whom held key Senate leadership positions, filibustered the product liability bill when supporters tried to bring it to the Floor.² Both times, proponents fell just short of the sixty votes needed to overcome the filibuster.³

In the 104th Congress, the effort to enact liability reform legislation originated in the House of Representatives with a quick and successful start. The success of the measure was due in large part to the prominence of legal reform in the House Republican "Contract with America." House Judiciary Committee Chairman Henry Hyde introduced a bill on the opening day of the 104th Congress, January 4,

* Senior Partner, Crowell & Moring, Washington, D.C.; B.A., Boston University; J.D., Columbia University. Mr. Schwartz is the drafter of the Model Uniform Product Liability Act and recently has been appointed to the Advisory Committees of the American Law Institute's RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY and RESTATEMENT OF THE LAW OF TORTS: APPORTIONMENT OF LIABILITY projects. He is co-author of JOHN WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS (9th ed. 1994) and author of VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE (3d ed. 1994). Mr. Schwartz is counsel to the Product Liability Coordinating Committee, the principal coalition of the business community on federal product liability reform, with over 800,000 members nationwide.

** Senior Associate, Crowell & Moring, Washington, D.C.; B.A., University of Wisconsin-Madison; J.D., Vanderbilt University. Mr. Behrens is co-counsel to the Product Liability Coordinating Committee.

1. See S. REP. NO. 69, 104th Cong., 1st Sess. 15 (1995).

2. See *id.* at 17.

3. See *id.*

1995.⁴ Michael Oxley, Chairman of the Subcommittee on Commerce, Trade, and Hazardous Materials of the House Commerce Committee introduced a bill on February 13, 1995.⁵ Their committees held hearings in February,⁶ and the bills were subsequently combined and reintroduced as House Bill 956, the "Common Sense Product Liability and Legal Reform Act of 1995."⁷ The House effort culminated on March 10, 1995, with the approval of House Bill 956 by a vote of 265 to 161.⁸

Several days later, on March 15, 1995, bipartisan legislation was introduced by West Virginia Democratic Senator John D. Rockefeller IV, Republican Senator Slade Gorton of Washington, and others.⁹ The Senate Committee on Commerce, Science, and Transportation's Subcommittee on Consumer Affairs, Foreign Commerce, and Tourism held hearings in April,¹⁰ and quickly reported out a bill.¹¹ On May 10, 1995, the Senate approved House Bill 956, as amended by Senate Bill 565, the "Product Liability Fairness Act of 1995," by a vote of sixty-one to thirty-seven.¹²

On March 14, 1996, members appointed by the House and Senate leadership agreed upon a conference report that resolved differences between the House and Senate bills.¹³ The Senate passed the conference report on House Bill 956, renamed the "Common Sense Product Liability and Legal Reform Act of 1996,"¹⁴ on March 21, 1996, by a vote of fifty-nine to forty.¹⁵ The House passed it on March 29, 1996, by a vote of 259 to 158.¹⁶ The conference report was sent to President Clinton on April 30, 1996, after a ceremony at the United States Capitol that included brief statements in support of the report by then Senate Majority Leader Robert Dole and House Speaker Newt

4. See Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong., 1st Sess. (1995).

5. See Common Sense Product Liability Reform Act, H.R. 917, 104th Cong., 1st Sess. (1995).

6. See H.R. REP. NO. 64, 104th Cong., 1st Sess. 7 (1995); H.R. REP. NO. 63, 104th Cong., 1st Sess. 12 (1995).

7. See Common Sense Product Liability and Legal Reform Act of 1995, H.R. 956, 104th Cong., 1st Sess. (1995).

8. See 141 CONG. REC. H3027 (daily ed. Mar. 10, 1995).

9. See Product Liability Fairness Act of 1995, S. 565, 104th Cong., 1st Sess. (1995).

10. See S. REP. NO. 69, *supra* note 1, at 14.

11. See *id.* at 15.

12. See 141 CONG. REC. S6407 (daily ed. May 10, 1995).

13. See H.R. CONF. REP. NO. 481, 104th Cong., 2d Sess. (1996).

14. *Id.*

15. See 142 CONG. REC. S2590 (daily ed. Mar. 21, 1996).

16. See 142 CONG. REC. H3204 (daily ed. Mar. 29, 1996).

Gingrich.¹⁷ President Clinton vetoed the conference report on May 2, 1996, marking the fifteenth veto of his presidency.¹⁸

This Article will briefly describe the history of the federal product liability effort. The Article then focuses on the 1995–96 legislation, and in particular the conference report on House Bill 956.¹⁹ The Article will show that the proposed federal product liability law would provide fair and balanced common-sense rules that draw upon strong mainstream academic support and are consistent with the laws of many states. Furthermore, the Article will describe ways in which the proposed legislation would benefit consumers and businesses, create jobs, improve product safety, encourage innovation, and stimulate economic growth. The Article concludes that federal liability reform should be strongly supported.

I. HISTORICAL BACKGROUND

A. *The Federal Interagency Task Force on Product Liability*

Under Presidents Ford and Carter, a Federal Interagency Task Force on Product Liability studied the problems of liability laws intensely. The Task Force made two principal recommendations. First, to achieve the goal of enabling small businesses to have a better and fairer opportunity in the liability insurance market, the Task Force recommended that federal legislation be enacted that would allow businesses to form self-insurance pools.²⁰ This would require preemption of certain state insurance regulation.²¹ The resulting legislation, the Product Liability Risk Retention Act, became law in 1981.²² It was extended to all liability coverage (with the exception of workers' compensation) in 1986.²³ The legislation helped to ensure not only competitive markets, but also that any savings from the stabilization of the tort system would flow to insureds, not to insurance companies.²⁴

17. See *Sending a Message on Product Liability*, WASH. POST, May 1, 1996, at A6.

18. See John F. Harris, *Clinton Vetoes Product Liability Measure*, WASH. POST, May 3, 1996, at A14; Neil A. Lewis, *President Vetoes Limits on Liability*, N.Y. TIMES, May 3, 1996, at A1; Warren P. Strobil, *Clinton Uses Human Props to Put a Spin on Liability Veto*, WASH. TIMES, May 3, 1996, at A5; *The Lawyers' Veto*, WALL ST. J., May 3, 1996, at A12. In order to preserve a record vote on the issue, the House attempted a veto override on May 9, 1996; it fell 23 votes short of passage.

19. H.R. CONF. REP. NO. 481, *supra* note 13.

20. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, FINAL REPORT V-19 to V-21 (1976).

21. *Id.*

22. Product Liability Risk Retention Act of 1981, Pub. L. No. 97-45, 95 Stat. 949 (codified as amended at 15 U.S.C. §§ 3901–3904 (1994)).

23. 15 U.S.C. §§ 3901–3906 (1994).

24. See *id.*

Second, the Task Force found that uncertainties in the current product liability system create unnecessary legal costs, impede interstate commerce, and stifle innovation, among other problems.²⁵ In 1978, the Task Force, after conducting an eighteen-month study, issued a report that recommended the drafting of a model uniform product liability law for use by the states. The report intimated that reforms of the system would be enacted at the federal level if the states did not enact the model law.²⁶

B. The Model Uniform Product Liability Act

A final version of the model law, known as the Model Uniform Product Liability Act,²⁷ has been the basis for legislation in about nine states. Unfortunately, the Uniform Act has not been applied uniformly. Instead, state legislatures have adopted provisions of the law in a piecemeal fashion. This trend continued into 1995 with the enactment of various liability reform laws in Illinois,²⁸ Texas,²⁹ Indiana,³⁰ North Dakota,³¹ New Jersey,³² Oregon,³³ and Wisconsin,³⁴ among other states.

C. Problems with a State-by-State Approach

One inherent problem with state product liability legislation, apart from rules that differ from state to state, is that a state cannot regulate product liability problems outside its borders. On average, over seventy percent of the goods that are manufactured in a particular state are shipped and sold out of that state.³⁵ For this reason, state tort reform legislation, while useful, often has less than a thirty percent "effectiveness" standard for that state's businesses. On the other hand, *all* of a state's citizens who sue in the state are governed by the state's product liability law. Thus, while enactment of product liability legislation in individual states can be helpful, product liability is a matter of interstate commerce.

25. See S. REP. NO. 69, *supra* note 1, at 26.

26. See 43 Fed. Reg. 14,612 (1978).

27. See Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (1979).

28. ILL. ANN. STAT. ch. 735, para. 5/2-622, -623, -1107.1, -1115.05, -1115.1, -1115.2, -1116, -1205.1, -2104, -2105, -2106, -2106.5, -2108, -2109, 5/13-213 (Smith-Hurd 1996).

29. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (West 1996).

30. IND. CODE ANN. §§ 33-1-1.5-1, -4, -9, -10, 34-4-34-4, -5, -6 (West 1996).

31. N.D. CENT. CODE §§ 28-01.3-07 to -09, 4-01 to -04 (1995).

32. N.J. STAT. ANN. §§ 2A:15-5.2, .3, .9 (West 1996).

33. OR. REV. STAT. § 18.537 (1995).

34. WIS. STAT. ANN. § 895.85 (West 1996).

35. See S. REP. NO. 69, *supra* note 1, at 26.

The Conference of State Supreme Court Justices, the National Conference of State Legislators, and other credible sources believe that the formulation of product liability law should be left solely to the states.³⁶ On the other hand, some state courts, despite their sensitivity to states' rights, believe that a federal product liability law is appropriate. These courts have recognized that federal liability legislation is the only mechanism to ensure that fair and uniform law will be applied evenly throughout the United States.³⁷

Furthermore, since 1986, the National Governors' Association (NGA) has supported a federal product liability law.³⁸ On January 31, 1995, for the third time, the NGA adopted a resolution calling for Congress to enact a uniform federal product liability law.³⁹ The NGA's most recent resolution reads in pertinent part:

The National Governors' Association recognizes that the current patchwork of U.S. product liability laws is too costly, time-consuming, unpredictable, and counter productive, resulting in severely adverse effects on American consumers, workers, competitiveness, innovation and commerce.

36. See H.R. REP. NO. 63, *supra* note 6, at 27; H.R. REP. NO. 64, *supra* note 6, at 40-41; S. REP. NO. 69, *supra* note 1, at 64-66.

37. In two separate opinions, the West Virginia Court of Appeals reflected on this issue. In *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), the court stated:

State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants. Moreover, this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill. State courts cannot weigh the appropriate trade-offs in cases concerning the *national* economy and *national* welfare when these trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum.

Id. at 905. Earlier, in *Blankenship v. General Motors Corp.*, 406 S.E.2d 781 (W. Va. 1991), the court opined:

Indeed, in some world other than the one in which we live, where this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules. Therefore, we do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.

Id. at 786.

38. See S. REP. NO. 69, *supra* note 1, at 13. As Governor of Arkansas, President Clinton twice sat on NGA committees that drafted and unanimously approved resolutions calling for federal product liability reform. See *Trial Lawyers' Triumph*, WASH. POST, Mar. 19, 1996, at A16.

39. See S. REP. NO. 69, *supra* note 1, at 13.

Clearly, a national product liability code would greatly enhance the effectiveness of interstate commerce. The Governors urge Congress to adopt a federal uniform product liability code.⁴⁰

Moreover, the strongly states' rights-oriented American Legislative Exchange Council (ALEC), the nation's largest bipartisan coalition of state legislators with over 2400 members nationwide, supports the enactment of federal product liability legislation.⁴¹ ALEC has several times called on Congress to enact a federal product liability law.⁴²

In February 1992 the Defense Research Institute (DRI), the principal national organization of defense attorneys, reversed its long-standing opposition and now supports federal product liability reform legislation.⁴³ The DRI previously supported reform on a state-by-state basis.⁴⁴

Interestingly, the Europeans began an effort to enact uniform product liability law a year or two after the U.S. Congress first looked at the subject in late 1981. In July 1985 the Council of the European Community adopted a uniform product liability directive that is now the law in thirteen European countries.⁴⁵ Amazingly, it has been easier for these diverse European countries to cede their sovereignty in this area than it has been for the U.S. Congress to agree on a uniform law for the United States. In addition to Europe's adoption of a uniform code, Japan has enacted its first product liability law, which became effective on July 1, 1995.⁴⁶

D. Legislatures Versus Courts

Some consumer advocacy groups and plaintiffs' lawyers have argued that neither Congress nor state legislatures have any business in reforming liability laws. They contend that the subject should be left to the courts. Most recently, for example, President of the Association of Trial Lawyers of America (ATLA) Larry Stewart suggested to both

40. *Id.* at 13-14.

41. *Id.* at 14.

42. *See id.*

43. *See Hearings on H.R. 1910 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 451 (1994) (statement of James S. Oliphant, President, Defense Research Institute).

44. *See id.*

45. *See Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products*, 28 O.J. EUR. COMM. 29 (No. L210) (1985).

46. *See* MINPO (Civil Code), Law No. 85 of 1994. *See generally* Mark A. Behrens & Daniel H. Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, but Access to Recovery Is Limited by Formidable Barriers*, 16 U. PA. J. INT'L BUS. L. 669 (1996).

the House and Senate Commerce Committees that product liability law should be left to the courts on a case-by-case basis.⁴⁷

Proponents of reform, however, do not advocate a complete federal "takeover" of product liability law. But in a few core areas, Congress is better suited to formulate sound national policy than courts operating in fifty-one different jurisdictions.⁴⁸ Proponents of a uniform federal product liability law believe that when courts formulate law, in general, they only have the opportunity to hear from two attorneys who are focused on the interests of their clients. In contrast, Congress has had the opportunity of hearing, as the records clearly show, from a broad spectrum of interests. Congress can formulate rules with the nation's interests in mind. Moreover, Congress has been developing product liability rules for over a decade and a half. The rules, of course, will only apply to cases filed after the date of enactment of the law.⁴⁹

Arguably, Congress has acted more deliberately than some courts have. For over two hundred years, tort law had developed very slowly in the courts, without abrupt change. In current times, however, abrupt changes are occurring more frequently.⁵⁰ In addition, when courts *make* law, their rules are formulated only *after* a case has been decided by a jury. If the same "common-law" system were used to determine speeds on highways, for example, the signs would be turned backward and the speed limit subject to change daily—rules regarding wrongdoing would be made only after a person was given a speeding ticket.

47. See *Common Sense Product Liability Reform Act: Hearings on H.R. 10 Before the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 53 (1995) (testimony of Larry S. Stewart, President, Ass'n of Trial Lawyers of America); *Common Sense Product Liability Reform Act: Hearings on H.R. 10 Before the Subcomm. on Commerce, Trade, and Hazardous Materials of the House Comm. on Commerce*, 104th Cong., 1st Sess. 25 (1995) (testimony of Larry S. Stewart, President, Ass'n of Trial Lawyers of America); *Common Sense Product Liability Reform Act: Hearings Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong., 1st Sess. (1995) (testimony of Larry S. Stewart, President, Ass'n of Trial Lawyers of America).

48. Congress gave the District of Columbia its own judicial system by enacting the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 570 (codified in scattered sections of 28 U.S.C.).

49. See S. REP. NO. 69, *supra* note 1, at 25 (discussing the effective date of Senate Bill 565).

50. See, e.g., *Simmons v. Monarch Mach. Tool Co.*, 596 N.E.2d 318, 320 n.3 (Mass. 1992) (imposing "super-strict" liability).

II. PRINCIPAL PROVISIONS OF LIABILITY REFORM LEGISLATION IN THE 104TH CONGRESS

Congress has long exercised its authority in matters of interstate commerce by enacting federal solutions to national problems.⁵¹ The liability reform legislation considered by the 104th Congress was consistent with this traditional area of activity.

A. *Fair Rules for Product Seller, Lessor, and Renter Liability*

Product sellers in about thirty states that wholesale or sell a product are potentially liable for defects that they are neither aware of nor able to discover.⁵² They are often drawn in as defendants in product liability cases. Product sellers, however, rarely pay the judgment. In more than ninety-five percent of the cases, the manufacturer bears responsibility for the harm.⁵³ The seller gets contribution or indemnification from the manufacturer, and the manufacturer ultimately pays the damages.⁵⁴

This approach generates substantial, unnecessary legal costs.⁵⁵ As a consequence, the expense incurred by small businesses is passed on to consumers in the form of higher prices.⁵⁶ A more efficient alternative is for the claimant to sue the manufacturer directly and to sue the product seller only if it was directly at fault.⁵⁷ Approximately twenty states already have changed their laws and now hold product sellers, such as wholesalers and retailers, liable in tort only if they were negli-

51. S. REP. NO. 69, *supra* note 1, at 27. The report cites the following examples: the United States Grain Standards Act in 1916, 7 U.S.C. §§ 71-87, 111, 113, 241-73, 2209 (1994) (establishing uniform national standards for grain); the United States Cotton Standards Act in 1923, 7 U.S.C. §§ 51-65 (1994) (requiring uniform classifications for judging quality or value of cotton); the Tobacco Inspection Act in 1935, 7 U.S.C. §§ 511-511r (1994) (requiring compliance with uniform national classifications); the Food, Drug, and Cosmetic Act in 1938, 21 U.S.C. §§ 301-395 (1994) (establishing standards for safety and labeling of drugs); the Consumer Product Safety Act in 1972, 15 U.S.C. §§ 2051-2084 (1994) (setting uniform safety standards for consumer products); and the General Aircraft Revitalization Act of 1994, 49 U.S.C. § 40101 (Supp. 1995) (establishing an 18-year national statute of repose for general aviation aircraft). S. REP. NO. 69, *supra* note 1, at 27 nn.99-100.

52. S. REP. NO. 69, *supra* note 1, at 31; see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 705 (5th ed. 1984).

53. S. REP. NO. 69, *supra* note 1, at 31.

54. *Id.*; see *Kelly v. Htansom Bros., Inc.* 331 A.2d 737, 740 (Pa. Super. Ct. 1974).

55. S. REP. NO. 69, *supra* note 1, at 31.

56. *Id.*

57. *Id.*

gent (for example, misassembled the product or failed to convey appropriate warnings to customers).⁵⁸

House Bill 956 would have held product sellers liable only for their own negligence or for a product's failure to conform to an express warranty made by the product seller.⁵⁹ A product seller, however, would have been held liable for the manufacturer's errors if the manufacturer could not be brought into court in any state where the action could have been brought or if the court determined that the manufacturer lacked funds to pay the judgment.⁶⁰ Thus, the provision would have ensured that an injured person could always sue either the manufacturer or the product seller.

The legislation also provided relief for companies that rent or lease products.⁶¹ These companies are subject in ten states and the District of Columbia to liability for the tortious acts of their lessees and renters, even if the rental company is not negligent and there is no defect in the product.⁶² In these minority of states, a rental company is held vicariously liable for the negligence of its customers simply because the company owns the product and has given permission for its use.⁶³

House Bill 956 provided that companies that rent or lease products would be subject to liability in a product liability action for their own negligence, but not the negligence of those beyond their control.⁶⁴

58. *Id.*; see COLO. REV. STAT. § 13-21-402 (1987); DEL. CODE ANN. tit. 18, § 7001 (1989); GA. CODE ANN. § 51-1-11.1 (Supp. 1995); IDAHO CODE § 6-1407 (1990); ILL. ANN. STAT. ch. 735, para. 5/2-621 (Smith-Hurd 1992) (formerly ILL. REV. STAT. ch. 110, para. 2-621 (1989)); IOWA CODE § 613.18 (Supp. 1995); KAN. STAT. ANN. § 60-3306 (1994); KY. REV. STAT. ANN. § 411.340 (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. § 2800.53 (West 1991); MD. CODE ANN., CTS. & JUD. PROC. § 5-311 (1982); MINN. STAT. ANN. § 544.41 (West 1988); MO. REV. STAT. § 537.762 (1988); NEB. REV. STAT. § 25-21,181 (1995); N.J. STAT. ANN. § 2A:58C-9 (West 1995); N.C. GEN. STAT. § 99B-2 (1995); N.D. CENT. CODE § 28-01.3-04 (Supp. 1995); OHIO REV. CODE ANN. § 2307.78 (Anderson 1991); S.D. CODIFIED LAWS ANN. § 20-9-9 (1995); TENN. CODE ANN. § 29-28-106 (Supp. 1995); WASH. REV. CODE ANN. § 7.72.040 (West 1992).

59. See H.R. CONF. REP. NO. 481, *supra* note 13, at 6-7.

60. *Id.* at 7.

61. S. REP. NO. 69, *supra* note 1, at 33 n.116.

62. See CAL. VEH. CODE § 17150-51 (West 1971); CONN. GEN. STAT. ANN. § 14-154a (West 1987); D.C. CODE ANN. § 40-408 (1990); FLA. STAT. ANN. § 324.021(9)(b) (Supp. 1994) (exempt leased vehicles); IDAHO CODE § 49-2417 (1994); IOWA CODE § 321.493 (1985); ME. REV. STAT. ANN. tit. 29-A, §§ 1652-1653 (West Supp. 1995); MICH. COMP. LAWS ANN. § 257.401 (West Supp. 1995); MINN. STAT. § 170.54 (1986); N.Y. VEH. & TRAF. LAW § 388 (McKinney 1986); R.I. GEN. LAWS § 31-33-6, 31-33-7 (1995).

63. S. REP. NO. 69, *supra* note 1, at 33.

64. See H.R. CONF. REP. NO. 481, *supra* note 13, § 103(c), at 7-8.

B. Barring Claims Due to a Person's Use of Illegal Drugs or Drunkenness

In about eleven states, conduct such as abusing alcohol or drugs does not preclude a person from recovering in a product liability action, even if the drug or alcohol usage was a substantial cause of the harm.⁶⁵ For many years, product liability proposals in Congress have sought to change this law. For example, House Bill 956 provided that if the principal cause of an accident is the claimant's intoxicification, he would not be able to recover.⁶⁶ The provision was based on a statute enacted in the State of Washington.⁶⁷

The alcohol/drug defense represents good public policy.⁶⁸ It lets people know that if the effects of drugs or alcohol are the principal cause of an accident, they will not recover through the product liability system.⁶⁹ The alcohol/drug defense also relieves law-abiding citizens from the burden of subsidizing others' irresponsible conduct through higher consumer prices.

C. Limiting Recovery for Those Who Misuse or Alter Products

Under the current product liability system, in some instances, defendants are required to pay for harms caused by claimants who grossly misuse products then turn to the "deep pocket" for compensation when they are injured. As a result, manufacturers and responsible consumers are unfairly punished. This system reflects bad policy, and clearly deviates from traditional notions of fairness and individual responsibility.

House Bill 956 placed responsibility for the reasonable use of products where it is most effective—on the person using the product.⁷⁰ Following the law in the majority of states,⁷¹ House Bill 956 provided that a claimant's damage award would be reduced by the amount attributable to misuse or alteration of a product if the defend-

65. S. REP. NO. 69, *supra* note 1, at 33.

66. *Id.*; see H.R. CONF. REP. NO. 481, *supra* note 13, at 8.

67. S. REP. NO. 69, *supra* note 1, at 33; see WASH. REV. CODE § 5.40.060 (West 1995).

68. S. REP. NO. 69, *supra* note 1, at 33.

69. *Id.* The majority of states have laws that do *not* permit recovery in this situation. *Id.* at 33 n.17. Five states, Alabama, Maryland, North Carolina, South Carolina, and Virginia, and the District of Columbia, continue to recognize contributory negligence as an absolute defense. *Id.* Thirty-two states have adopted some form of modified comparative fault standard: Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. *Id.*

70. H.R. CONF. REP. NO. 481, *supra* note 13, § 105(a), at 8.

71. See VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* app. b (3d ed. 1994).

ant could show that the misuse or alteration was in violation of adequate warnings or instructions, or involved a risk of harm that should have been known by an ordinary user of the product.⁷²

D. *Uniform Time Limits on Liability*

1. *Pro-Plaintiff "Discovery Rule" Statute of Limitations.*—House Bill 956 would have established a two-year statute of limitations for product liability actions that would begin to run when the claimant discovered or, in the exercise of reasonable care, should have discovered both the harm that is the subject of the action and its cause.⁷³ This provision would have opened courthouse doors to many whose right to sue would no longer depend on which state statute happened to apply to their claim.

House Bill 956 also would have alleviated the frequent hardship to the families who have lost a loved one caused by the statute of limitation periods in state wrongful death statutes. Unlike the prevailing rule in most state wrongful death statutes, which bars claims after a certain number of years following the date of the family member's death, the bill would have preserved these claims for the "discovery" period, that is, until two years after a surviving relative discovered, or in the exercise of reasonable diligence could have discovered, the cause of his loved one's death.⁷⁴

2. *Statute of Repose.*—For over a decade and a half, scores of small business owners have testified about the effect of liability for very old machine tools and durable goods. The products have been used safely for a substantial period of time and manufacturers are willing to stand behind warranties they make about how long a product will last. Nevertheless, as a result of liability from stale claims, some of these companies are, by no fault of their own, falling behind competitively because they are disadvantaged by liability rules that create an artificial preference for newer, mostly foreign, industries.⁷⁵

Principal competitors of the United States have enacted legislation recognizing that, at some point, an outer time limit on litigation is reasonable and necessary. The new "pro-consumer" Japanese product liability law and the European Community Product Liability Directive have a repose period of ten years that covers all products.⁷⁶ In the

72. See H.R. CONF. REP. NO. 481, *supra* note 13, § 105(a), at 8.

73. See *id.* § 106(a), at 9.

74. *Id.*

75. See H.R. REP. NO. 63, *supra* note 6, at 10-11; S. REP. NO. 69, *supra* note 1, at 43.

76. See H.R. REP. NO. 63, *supra* note 1, at 11; S. REP. NO. 69, *supra* note 1, at 44.

United States, a growing number of states (approximately seventeen) have enacted statutes of repose ranging from eight years to a maximum of fifteen years, with the typical repose period between ten and twelve years.⁷⁷ Recently, Congress enacted the General Aircraft Revitalization Act of 1994, which created a federal eighteen-year statute of repose for general aviation aircraft.⁷⁸

House Bill 956, which was not preemptive of state statutes, elected a fifteen-year statute of repose.⁷⁹ This is fifty percent longer than the Japanese law and the European Directive, and equal in length to the longest state statute of repose, which is currently the law in the State of Texas.⁸⁰ The provision was limited to durable goods and did not apply in cases involving a "toxic harm."⁸¹

E. Alternative Dispute Resolution

The legal system is inaccessible to many product liability claimants because of its complexity and expense. The alternative dispute resolution (ADR) procedure provision in House Bill 956⁸² would have increased access to the legal system and sped resolution of legal disputes so that money would be distributed to claimants more quickly.

77. Statutes of repose exist in the following states: ARK. CODE ANN. § 16-116-105(c) (Michie 1987) ("anticipated life" of product); COLO. REV. STAT. § 13-21-403 (1987) (10 years); CONN. GEN. STAT. § 52-577a (1991 & Supp. 1995) (10 years); GA. CODE ANN. § 51-1-11(b)(2) (1982 & Supp. 1995) (10 years); IDAHO CODE § 6-1403(2) (1990) ("useful safe life" of product); ILL. ANN. STAT. ch. 735, para. 5/13-213(b) (Smith-Hurd 1992) (12 years from date of first sale, or 10 years from date of sale to first user, whichever is shorter); IND. CODE ANN. § 33-1-1.5-5(b) (West 1996) (10 years); KAN. STAT. ANN. § 60-3303 (1994) ("useful safe life" of product); KY. REV. STAT. ANN. § 411.310(1) (Michie/Bobbs-Merrill 1992) (presumption that product is not defective if harm occurred five years after sale to first consumer or eight years after manufacture); MICH. STAT. ANN. § 27A.5805 (Callaghan 1986 & Supp. 1995) (if product in use for 10 years, plaintiff must prove prima facie case without benefit of any presumption); MINN. STAT. ANN. § 604.03 (West 1988) ("useful life" of product); NEB. REV. STAT. § 25-224 (1995) (10 years); N.D. CENT. CODE § 28-01.3-08(1) (Supp. 1995) (10 years); OR. REV. STAT. § 30.905(1) (1995) (10 years); TENN. CODE ANN. § 29-28-103(a) (1988 & Supp. 1995) (10 years); TEX. CIV. PRAC. & REM. CODE ANN. § 16.012 (West Supp. 1995) (15 years); WASH. REV. CODE ANN. § 7.72.060(1) (West 1992) ("useful safe life" of product).

78. General Aircraft Revitalization Act of 1994, Pub. L. No. 103-298, § 3, 108 Stat. 1552 (codified at 49 U.S.C. § 40101 (West Supp. 1995)). This law has resulted in production of safer aircraft and the creation of thousands of new jobs, and has not been perceived as unfair or challenged in the courts. See Geoffrey A. Campbell, *Study: Business Booms After Tort Reform Enacted*, A.B.A. J., Jan. 1996, at 28 ("The light aircraft industry is taking off as reduced liability encourages technological innovation.").

79. See H.R. CONF. REP. NO. 481, *supra* note 13, § 106(b), at 9.

80. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.012 (West Supp. 1995).

81. H.R. CONF. REP. NO. 481, *supra* note 13, § 106(b), at 9.

82. *Id.* § 107, at 9-10.

House Bill 956 allowed either party to a dispute to offer to proceed pursuant to any voluntary and nonbinding ADR procedures established in the law of the state where the action is brought or under the rules of the court in which the action is maintained.⁸³ The legislation would have required the offer to be made within sixty days after service of the initial complaint or the applicable deadline for a responsive pleading, whichever is later.⁸⁴ There would have been no penalty on a party who refuses to proceed to ADR.⁸⁵

The ADR provision would have been especially beneficial for persons with smaller claims, because they frequently are unable to afford or obtain lawyers to represent them in expensive courtroom litigation. Such plaintiffs more easily can secure attorneys to represent them in ADR proceedings, which are free of cumbersome rules of procedure and evidence and do not require the use of expensive expert witnesses.⁸⁶

F. Punitive Damages—Clear and Basic Rules for Quasi-Criminal Punishment

1. *In General.*—The U.S. Supreme Court has observed that punitive damages have “run wild” in the United States, jeopardizing fundamental constitutional rights.⁸⁷ The Court has held that the Due Process Clause of the Fourteenth Amendment imposes a substantive limit on the size of punitive damages awards.⁸⁸ It has also held that

83. *Id.*

84. *Id.*

85. *Id.*

86. William Fry, Executive Director of HALT, a nonprofit legal reform organization supported by 70,000 individual members nationwide, testified before the Consumer Affairs, Foreign Commerce, and Tourism Subcommittee of the Senate Committee on Commerce, Science, and Transportation that ADR mechanisms are “a way to lower costs, simplify procedures and achieve fairness through avoidance of technical rules of law.” S. REP. NO. 69, *supra* note 1, at 29. He said that HALT supports the use of ADR mechanisms to allow consumers to handle their own legal affairs. *See id.*

87. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *see also* *Honda Motor Corp. v. Oberg*, 114 S. Ct. 2331, 2340 (1994) (stating that punitive damages “pose an acute danger of arbitrary deprivation of property,” raising serious due process concerns).

88. *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1604 (1996); *see also* *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993); *Pacific Mut. Life Ins. Co.*, 499 U.S. at 23-24; *Oberg*, 114 S. Ct. at 2335; *see also* *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) (“[D]ue process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness”). In *Browning-Ferris*, the Court did not squarely address the issue of whether the Due Process Clause places outer limits on the size of punitive damages because the issue had not been preserved for appeal. *Id.* at 276-77; *cf.* *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 661 (8th Cir. 1995) (opinion by retired Supreme Court Justice Byron White)

the Constitution provides procedural limits on when and how punitive damages may be awarded.⁸⁹

Some opponents of punitive damage reform have obscured a very basic fact: punitive damages are *punishment*.⁹⁰ Punitive damages developed out of English law to serve as a "helper" to the criminal law, and the focus was, and should be on, conduct that was of such a publicly egregious nature that it should be subject to criminal punishment.⁹¹ They are not intended to compensate people for something they have lost; that purpose is accomplished by compensatory damages.⁹² Nevertheless, unlike the criminal law system, in many states there are virtually no standards for when punitive damages may be awarded and no clear guidelines as to their amount—good behavior is swept in with the bad.⁹³

The unpredictable nature of the current system has resulted in overdeterrence and has inhibited product innovation.⁹⁴ A Conference Board study of corporate executives reported that fear of liability suits prompted thirty-six percent of the firms studied to discontinue a product and thirty percent to withhold a new product.⁹⁵ Clearly, rational rules are needed to promote innovation and responsible manufacturing practices, while at the same time providing assurances that wrongdoers will be justly punished and deterred from future misconduct.

House Bill 956 incorporated the basic elements of any criminal law. First, it defined the "crime," or the offense that deserves punishment.⁹⁶ Second, it provided for clear standards of proof so that judges and juries can appreciate that they are imposing punishment for reprehensible conduct, and not merely negligence.⁹⁷ Finally, and

(striking down punitive damages award as "excessive, unreasonable and violative of due process").

89. In *Oberg*, 114 S. Ct. at 2341, a case involving an all-terrain vehicle that flipped over when an inebriated plaintiff tried to drive it up a hill, the Court struck down a punitive damages award on the ground that Oregon law violated due process, because it did not provide an opportunity for meaningful appellate review of the size of punitive damages awards. *Id.*

90. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 204 (1973).

91. *Id.* § 3.9, at 204-05.

92. *Id.* § 3.1, at 135-38.

93. *Id.* § 3.9, at 219-20.

94. For example, a 1992 *Science* magazine article reported that at least two companies have delayed AIDS vaccine research and another company abandoned one promising approach as a result of liability concerns. Jon Cohen, *Is Liability Slowing AIDS Vaccines?*, *SCIENCE*, Apr. 10, 1992, at 168-69.

95. See S. REP. NO. 69, *supra* note 1, at 36.

96. H.R. CONF. REP. NO. 481, *supra* note 13, § 103, at 6-8.

97. *Id.* § 108(a), at 10 (imposing a "clear and convincing evidence" standard).

most importantly, it defined the potential judgment or "sentence."⁹⁸ At present, punitive damages law fails these requirements, as evidenced by the Supreme Court's concern about punitive damages that "run wild."⁹⁹

2. *Defining When Punitive Damages May Be Awarded.*—Under House Bill 956, punitive damages would have been awarded only if the plaintiff proved by "clear and convincing evidence" that the defendant violated the standard of "conscious, flagrant indifference to the rights or safety of others."¹⁰⁰ The "clear and convincing evidence" burden of proof standard represents a "middle ground" between the burden of proof standard ordinarily used in civil cases ("preponderance of the evidence"), and the criminal law standard ("beyond a reasonable doubt").¹⁰¹ It reflects the quasi-criminal nature of punitive damages. The standard is now law by statute or decision in twenty-eight states and the District of Columbia,¹⁰² and has been recommended by each of the principal academic groups to analyze the law of punitive damages since 1979, including the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws.¹⁰³ The Supreme

98. *Id.* § 108(b), at 10 (setting out limits on punitive damage awards).

99. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991).

100. *Id.* § 108(a), at 10.

101. See H.R. CONF. REP. NO. 481, *supra* note 13, § 108(a), at 10-11.

102. ALA. CODE § 6-11-20 (1993); ALASKA STAT. § 09-17-020 (1994); CAL. CIV. CODE § 3294(a) (West 1970 & Supp. 1996); GA. CODE ANN. § 51-12-5.1(b) (Supp. 1995); IOWA CODE ANN. § 668A.1 (West 1987); KAN. STAT. ANN. § 60-3701(c) (1994); KY. REV. STAT. ANN. § 411.184(2) (Michie/Bobbs-Merrill 1991); MINN. STAT. ANN. § 549.20 (West 1988 & Supp. 1995); MISS. CODE ANN. § 11-1-65(1)(a) (Supp. 1995); MONT. CODE ANN. § 27-1-221(5) (1995); NEV. REV. STAT. ANN. § 42-005(1) (Michie Supp. 1995); N.J. STAT. ANN. § 2A:15-5.12 (West 1995); N.C. GEN. STAT. § 1D-15(b) (1995); N.D. CENT. CODE § 32-03.2-11 (Supp. 1995); OHIO REV. CODE ANN. § 2307.80(A) (Anderson 1991); OKLA. STAT. ANN. tit. 23, § 9.1 (West Supp. 1995); OR. REV. STAT. § 18.537 (1995); S.C. CODE ANN. § 15-33-135 (Law. Co-op. Supp. 1994); S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West 1995); UTAH CODE ANN. § 78-18-1 (1992); *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 681 (Ariz. 1986); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 937 (D.C. Cir. 1995); *Masaki v. General Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 362-63 (Ind. 1982); *Tuttel v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Owens-Illinois v. Zenobia*, 601 A.2d 633, 657 (Md. 1992); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 (Wis. 1980). One state, Colorado, requires proof beyond a reasonable doubt in punitive damages cases. COLO. REV. STAT. § 13-25-127(2) (1987).

103. See AMERICAN BAR ASS'N, SPECIAL COMM. ON PUNITIVE DAMAGES OF THE AM. BAR ASS'N SECTION ON LITIGATION, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 19 (Am. Bar Ass'n 1986) [hereinafter ABA REPORT]; AMERICAN COLLEGE OF TRIAL LAWYERS REP. ON PUNITIVE DAMAGES OF THE COMM. ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 15-16 (1989) [hereinafter ACTL REPORT]; 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL IN-

Court has recognized the merits of the "clear and convincing evidence" burden of proof standard in punitive damages cases.¹⁰⁴

3. *Making the Punishment Proportional to the Harm.*—Perhaps most importantly, House Bill 956 put reasonable parameters on the amount of punitive damages awarded to help assure that punishment is proportional to harm. It permitted punitive damages to be awarded against larger businesses up to the greater of two times a plaintiff's compensatory damages (economic and noneconomic loss), or \$250,000.¹⁰⁵ It also recognized that smaller businesses and organizations, as well as individuals, need special protection from excessive punitive damages. The legislation thus set forth the maximum amount of punitive damages recoverable against an individual or small business as the lesser of two times the amount awarded to the claimant for economic and noneconomic losses, or \$250,000.¹⁰⁶ Judges would have been permitted to augment the punitive damages award against a larger business up to the amount of the jury verdict by finding the "proportionate" award "insufficient to punish the egregious conduct of the defendant."¹⁰⁷ This provision was a limited measure intended to be applied only in cases when the defendant's misconduct was extraordinarily harmful and far exceeded "conscious, flagrant indifference to the safety of others."¹⁰⁸

The proportionality requirements in House Bill 956, as in the criminal law, would have helped ensure that the punishment is proportional to the harm. "Mainstream" academic groups, including the American Bar Association and the American College of Trial Lawyers, have recommended that punitive damages be awarded in proportion

JURY—REPORTERS' STUDY 248-49 (Am. Law Inst. 1991) [hereinafter ALI REPORTERS' STUDY]; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM LAW COMMISSIONERS' MODEL PUNITIVE DAMAGES ACT § 5 (approved by uniform law commissioners on July 18, 1996) [hereinafter UNIFORM LAW COMMISSIONERS' MODEL PUNITIVE DAMAGES ACT]. See generally Victor E. Schwartz & Mark A. Behrens, *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 SAN DIEGO L. REV. 263 (1993).

104. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991) (stating that "there is much to be said in favor of a State's requiring, as many do, . . . a standard of 'clear and convincing evidence'"). Ultimately, the Court rejected this higher level of proof in cases that meet constitutional scrutiny in favor of a lesser standard "buttressed . . . by the procedural and substantive protections." *Id.*

105. See H.R. CONF. REP. NO. 481, *supra* note 13, § 108(b), at 10.

106. See *id.*

107. *Id.*

108. *Id.* § 108(a), at 10.

to actual damages.¹⁰⁹ Furthermore, approximately one-quarter of the states have enacted legislation to address the problem of excessive punitive damages, most recently including Illinois, Indiana, New Jersey, North Carolina, Oklahoma, and Texas.¹¹⁰ House Bill 956 did not preempt more restrictive state laws limiting punitive damages.¹¹¹

4. *Bifurcation.*—House Bill 956 also would have made a procedural reform called “bifurcation,” which a number of states have enacted.¹¹² At either party’s request, the trial may be divided so that the proceedings on punitive damages would be separate from and subsequent to the proceedings on compensatory damages. Judicial economy is achieved by having the *same jury* determine both compensatory damages and punitive damages issues.

109. See ABA REPORT, *supra* note 103, at 64-66 (recommending that punitive damage awards in excess of three-to-one ratio to compensatory damages be considered presumptively “excessive”); ACTL REPORT, *supra* note 103, at 15 (proposing that punitive damages be awarded up to twice compensatory damages or \$250,000, whichever is greater); ALL REPORTERS’ STUDY, *supra* note 103, at 258-59 (endorsing concept of ratio coupled with alternative monetary ceiling).

110. ILL. ANN. STAT., ch. 735, para. 5/2-1115.05 (Smith-Hurd 1995) (punitive damages limited to three times amount of claimant’s economic damages); IND. CODE ANN. § 34-4-34-5 (1995) (punitive damages limited to the greater of three times actual damages or \$50,000); N.J. STAT. ANN. § 2A:15-5.14 (West 1995) (punitive damages limited to five times amount of claimant’s compensatory damages or \$350,000, whichever is greater); N.C. GEN. STAT. § 1D-25 (1995) (punitive damages limited to three times amount of claimant’s compensatory damages or \$250,000, whichever is greater); OKLA. S.B. 263 (exemplary damages may not exceed the greatest of \$500,000, twice the amount of actual damages awarded, or the increased financial benefit derived by defendant or insurer as a direct result of the injurious conduct); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West 1995) (limits punitive damages awards to \$200,000 or two times economic damages plus an amount equal to any noneconomic damages up to \$750,000). Other states have also capped punitive damage awards. See, e.g., COLO. REV. STAT. § 13-21-102(1)(a) (1995) (punitive award may not exceed compensatory damages); CONN. GEN. STAT. § 52-204b (West Supp. 1992) (punitive award permitted up to twice the compensatory damages); FLA. STAT. ANN. § 768.73(1)(a) (West Supp. 1992) (punitive damages may be awarded up to three times compensatory damages unless “clear and convincing evidence” is presented by the plaintiff to show that a higher award is not excessive); NEV. REV. STAT. § 42.005 (1991) (punitive damages awards permitted up to \$300,000 in cases in which compensatory damages are less than \$100,000 and to three times the amount of compensatory damages in cases of \$100,000 or more); N.D. CENT. CODE § 32.03.2-11(4) (1995) (permitting punitive damages up to twice compensatory damages, or \$250,000, whichever is greater); VA. CODE ANN. §§ 8.01-38.1 (Michie 1994) (punitive damages permitted up to a maximum of \$350,000).

111. See H.R. CONF. REP. NO. 481, *supra* note 13, § 108(b)(3)(D), at 11. See generally Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform Legislation Is Consistent with Virginia Law and Should Be Strongly Supported*, 4 GEO. MASON U. L. REV. 279 (1996) (discussing the burden of proof required to establish liability and the liability standard for recovery of punitive damages under H.B. 956).

112. See H.R. CONF. REP. NO. 481, *supra* note 13, § 108(c), at 11-12.

Bifurcated trials are equitable, because they prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability (for example, the net worth of a company or the wealth of a defendant). Bifurcation also helps jurors "compartmentalize" a trial, allowing them to more easily separate the burden of proof that is required for compensatory damage awards (proof by a preponderance of the evidence) from a higher burden of proof (proof by clear and convincing evidence) for punitive damages.

Recognizing these benefits, some courts have recently required bifurcation as a matter of common-law reform.¹¹³ Other states have made similar changes through court rules or legislation.¹¹⁴ This reform is supported by the American Law Institute's Reporters' Study, the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws.¹¹⁵

G. *Balanced Rules for Joint Liability*

The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages.¹¹⁶ The Senate Committee on Commerce, Science, and Transportation observed that the system is "unfair and [it] blunts incentives for safety, because it allows negligent actors to under-insure and puts full responsibility on those who may have been only marginally at fault."¹¹⁷ Thus, a jury's specific finding that a defendant is minimally at fault is overridden and the minor player in the lawsuit bears an unfair and costly burden.¹¹⁸

113. See *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994) (adopting "the requirement of bifurcated trials in punitive damages cases"); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992) (holding that "where punitive damages are sought, the court, upon motion of defendant, shall bifurcate the trial").

114. See, e.g., CAL. CIV. CODE § 3295(d) (West Supp. 1995); MINN. STAT. ANN. § 549.20 (West Supp. 1995); MISS. CODE ANN. § 11-1-65(1)(a) (Supp. 1995).

115. See ABA REPORT, *supra* note 103, at 19; ACTL REPORT, *supra* note 103, at 18-19; ALI REPORTERS' STUDY, *supra* note 103, at 255 n.41; Uniform Law Commissioners' Model Punitive Damages Act, *supra* note 103, § 11.

116. See *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197, 204 (Ill. 1983) (defining joint and several liability).

117. S. REP. NO. 69, *supra* note 1, at 45. See generally Senator Larry Pressler & Kevin V. Schieffer, *Joint and Several Liability: A Case for Reform*, 65 DENV. U. L. REV. 651 (1988) (discussing doctrine of joint and several liability and offering possible reforms).

118. *Id.*

Joint and several liability is extremely harmful to society. For example, it has caused suppliers of raw materials and component parts to refuse to supply manufacturers of medical devices. As a result, patients who need medical devices suffer. It has also caused manufacturers of protective sporting goods equipment, such as safety helmets, to withdraw products from the market or to be chilled from introducing new products.¹¹⁹ Recognizing the need for reform of this unfair doctrine, at least thirty-three states have abolished or modified the principle of joint and several liability.¹²⁰

House Bill 956 adopted a balanced approach between those who call for the abolition of joint liability and those who wish to leave it unchecked. The legislation eliminated joint liability for "noneconomic damages" (such as damages for pain and suffering or emotional distress), while permitting the states to retain full joint liability with respect to economic losses (for example, lost wages, medical expenses, and substitute domestic services).¹²¹ This means that the legislation would have held each defendant liable for noneconomic damages in an amount proportional to its percentage of fault for the harm.¹²² This "fair share" rule was based on a joint liability reform enacted in California through a ballot initiative approved by the majority of voters in 1986.¹²³ The same approach was enacted by the Nebraska legislature in 1991.¹²⁴

H. Creating Incentives for a Safe Workplace

Workers' compensation statutes have essentially two purposes: to provide an employee injured in the course of employment with a quick and inexpensive way to recover for his injury, and to maximize the incentive for employers to maintain a safe workplace.¹²⁵ In most states, however, the incentive for employers to ensure workplace safety has been substantially undermined. In these states, if an employee

119. *Id.* at 46.

120. See SCHWARTZ, *supra* note 71, app. b.

121. See H.R. CONF. REP. NO. 481, *supra* note 13, § 110(a), (b)(1), at 12.

122. The legislation provided that responsibility for a claimant's harm would be apportioned in reference to all persons responsible for the plaintiff's injury, whether or not such person was a party to the action. See *id.* § 110(b)(2), at 12. This position is sound public policy and reflects the trend in the tort law of the states. See, e.g., *DaFonte v. Up-Right, Inc.*, 828 P.2d 140, 145 (Cal. 1992) (stating that no defendant shall have joint liability for noneconomic damages); *Fabre v. Marin*, 623 So. 2d 1182, 1185-86 (Fla. 1993) (stating that "for purposes of non-economic damages a plaintiff should take each defendant as he or she finds them").

123. CAL. CIV. CODE ANN. § 1431.2 (West Supp. 1996).

124. NEB. REV. STAT. § 25-21,185.10 (1995).

125. S. REP. NO. 69, *supra* note 1, at 49.

has a successful product liability claim against a manufacturer or product seller, his employer can recover the amount of workers' compensation benefits paid to the employee from the product liability damage award, even if the employer is responsible for the injury.¹²⁶ If the employee obtains product liability damages against the manufacturer, the employer takes back the amount of workers' compensation it paid to the employee.¹²⁷ This result occurs even when the employer's negligence has been a principal cause of the accident. Workers' compensation experts have vehemently criticized this rule, because it has "set[] . . . off a flood of confusion and litigation."¹²⁸

House Bill 956 would have reversed this effect and modified state law in a very positive way by placing a private incentive on employers to keep their workplaces safe.¹²⁹ In sum, if an employer was at fault in causing a workplace injury, it would bear the costs of workers' compensation.

III. BIOMATERIALS ACCESS ASSURANCE

Each year millions of citizens depend on the availability of implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints. The availability of these devices is critically threatened, however, because suppliers have ceased supplying raw materials and component parts to medical implant manufacturers. A 1994 study by Aronoff Associates concluded that there are significant numbers of raw materials that are "at risk" of shortages in the immediate future.¹³⁰ Suppliers have found that the cost of responding to litigation related to medical implants far exceeds potential sales revenues, even though courts are not finding suppliers liable.¹³¹

House Bill 956 would have helped prevent a public health crisis by limiting the liability of biomaterials suppliers to instances of genuine fault. It would have also established a procedure to ensure that

126. *Id.* The employer assumes the employee's rights against the manufacturer by subrogation.

127. *See id.*

128. *See* ARTHUR LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 76.36 (desk ed. 1991) (discussing the California approach that deducts compensation from an employer's third-party recovery).

129. *See* H.R. CONF. REP. NO. 481, *supra* note 13, at 12-14.

130. *See* ARONOFF ASSOCS., MARKET STUDY: BIOMATERIALS SUPPLY FOR PERMANENT MEDICAL IMPLANTS (Mar. 1994).

131. *See generally* Edward M. Mansfield, *Reflections on Current Limits on Component and Raw Materials Supplier Liability and the Proposed Third Restatement*, 84 KY. L.J. 221, 235-37 (1995-96).

suppliers could avoid litigation without incurring heavy legal costs. The provision did not in any way diminish the existing liability of implantable medical device manufacturers.¹³² The provision was the subject of hearings and enjoyed strong bipartisan support.¹³³

CONCLUSION

The current product liability system in the United States is an example of what is wrong, not right, with our legal system. We need reasonable rules that will separate the bad from the good. We need a system that has predictability—that will encourage appropriate conduct. The “real” consumers of America, those who purchase and use products on a daily basis, will benefit by getting the products that they need and by no longer having to pay unfair and unreasonable “product liability taxes.” Jobs will be created. Federal product liability legislation can provide these results, while preserving a legal system that will target dangerous and defective products.

After a decade and a half of debate and learning about the subject, federal product liability legislation does carefully balance and meet these goals.

132. See H.R. CONF. REP. NO. 481, *supra* note 13, §§ 201–206, at 14–23.

133. No minority position was taken in regard to this provision of the Senate bill. See S. REP. NO. 69, *supra* note 1, at 51–52, 56–80.