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The U.S. Product Liability System: A Competitive Advantage to Foreign Manufacturers

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During the past decade, U.S. manufacturers have complained repeatedly about the competitive advantage enjoyed by their foreign competitors as a result of the U.S. product liability system. In 1984, I completed a study for the U.S. Department of Commerce which included findings that confirmed the competitive advantage. Differences between the U.S. product liability system and the product liability systems of the Western European countries and Japan result in higher product liability costs to U.S. manufacturers that are necessarily included in determining the unit price of U.S. machinery. This not only increases the cost of U.S. made products, but the fear of product liability has had a chilling effect on product development, innovation, experimentation and manufacture. The U.S. product liability system is causing U.S. made products to be less competitive in price and may ultimately cause U.S. made products to be less competitive technologically.

I. THE WORKPLACE PRODUCT LIABILITY PROBLEM IN THE UNITED STATES

The workplace product liability problem in the United States is exacerbated by the interaction of product liability and state workers compensation laws. Under present law, almost all state worker’s compensation statutes (or their court interpretation) bar recovery of indemnification from the employer by a workplace product manufacturer, no matter how negligent the employer may have been in failing to properly guard and maintain that product or in making the product unsafe as a result of altering and modifying the product or in failing to instruct and monitor employees on how to use it. This inequity is further compounded by the fact that, in most jurisdictions, the employer or the worker’s compensation insurance carrier obtains a subrogation lien on third party recoveries even though the employer may have caused or contributed to the cause of the employee’s injury. The Insurance Services

* Member of the firm of Barnes & Thornburg, Washington, D.C.

1 INT’L TRADE ADMIN., OFF. OF TRADE ADJUSTMENT ASSISTANCE, U.S. DEP’T OF COM., INTERNATIONAL STUDY OF PRODUCT LIABILITY COSTS AND SYSTEMS FOR FIVE DOMESTIC MACHINE INDUSTRIES (Nov. 1, 1984) [hereinafter INTERNATIONAL STUDY]. This study includes a review of the product liability systems in Japan, Belgium, the Federal Republic of Germany, France, Switzerland and the United Kingdom.
Office ("ISO") Study reveals that about fifty-six percent of workplace product liability bodily injury payments involve cases where the defendant manufacturer would have impleaded the employer based on fault but for the worker's compensation exclusivity rule. Thus, manufacturers of workplace products are, in effect, paying the entire cost of many industrial accidents, while employer-users of the products may be completely relieved of financial responsibility despite the fact that they may have been in a better position (or in the only position) to prevent the accident from occurring.

The worker's compensation shield decreases an employer's incentive to acquire safer machinery and generally to provide a safe workplace. Some incentive remains since worker's compensation costs will go down where there are fewer injuries. However, this is offset by the subrogation recovery from the employee's product liability award. Even if the employer is at fault in causing or contributing to the cause of the employee's injury, he may still recover through his subrogation lien all payments made pursuant to the employee's worker's compensation claim. Product related subrogation recoveries amounted to $40.2 million in 1981.

The incentives, therefore, do not reflect the fact that it is generally the employer who is knowledgeable about and dictates the product use or misuse, transmits the instructions and warnings, controls the environment in which the product is used, and frequently alters the machinery. This system provides an incentive to the employer to encourage an injured employee to bring a product liability suit against a machinery manufacturer so that even the limited financial exposure by the employer can be passed on through subrogation. "Thus, both employees' expectations of a safe workplace and manufacturers' expectations that products will be used safely in the workplace may be frustrated by an employer's lack of incentive to insure that a product is used in a safe manner." 2 The system places the primary incentive for workplace safety on the wrong party and works in opposition to the injury prevention policy of product liability law.

II. PRODUCT LIABILITY INSURANCE IN THE UNITED STATES

During the period of 1984-86, the premiums in the entire insurance market turned upward, especially in the product liability line. Reinsurers made dramatic increases in rates to insurance companies due to large losses that they had incurred. This, in turn, imposed an additional pressure on primary insurers to increase their rates. During the summer of 1984, members of the Woodworking Machinery Distributors Association ("WMDA") received increases of 500% to 1,000% with only 5 days notice prior to expiration of their policies. Members of the Food Processing Machinery and Supplies Association, the Machinery Dealers National

Association, and the Process Equipment Manufacturers Association experienced up to 500% increases; the Packaging Machinery Manufacturers Institute members experienced up to 700% increases. Further substantial increases occurred in 1985 and 1986, regardless of each company’s loss experience and the risk of the particular product involved. For example, it is estimated that the members of the Machinery Dealers National Association experienced 1000% to 1500% increases since 1984. When coupled with larger deductibles, less coverage, and forced shifts from occurrence to claims-made policies, the cost of product liability insurance for that group increased as much as thirty times.

The results of the National Machine Tool Builders’ Association Annual Product Liability Survey (dated February 2, 1987, and based on 92 returns) indicated that 23% of its members had no product liability insurance and that for those fortunate enough to find coverage, insurance premiums had risen by 55% since 1986 and had tripled since 1985. 1986 levels exceeded the peak of the mid-1970s insurance crisis; 1987 was even worse with premiums continuing to rise and the number of companies “going bare” exceeding the 1979 levels. The average premium was $235,700 (up 55% from $151,900 in 1986 and up 299% from $59,100 in 1985). Thirty-four percent had to accept large deductibles or self-retentions averaging $81,900. One respondent in four had no insurance at all (mostly because they found their carriers’ proposals to be too expensive, although some could not even get a proposal); 43% of those companies with annual sales in excess of $2.5 million had no umbrella policy to protect against catastrophic claims.

Companies in the industries studied experienced a product liability insurance crisis at least as severe as that of the 1970s. In the last three years this problem has been manifested in severe rate increases, policy restrictions, and cancellations of product liability coverage.

III. PRODUCT LIABILITY SYSTEMS IN EUROPE AND JAPAN

The International Study found that, although a product liability action may be brought in Europe and Japan against a manufacturer of workplace machinery, such actions are virtually nonexistent. This sharp contrast to the United States is primarily due to an approach to workplace product liability in these countries that is quite different from that in the United States. A worker injured in the countries studied is compensated by worker’s compensation, a social security system or the employer’s company. An injured employee typically believes that full compensation has been made as a result of receiving social security or worker’s compensation payments and thus does not seriously consider pursuing the manufacturer of the machine which caused the injury. Moreover, those countries rely primarily on the employer for workplace safety.

If the injured employee did pursue the available product liability
remedies, the employee could only hope for compensation for pain and suffering since foreign courts consider worker's compensation or social security payments as full compensation for all other damages. Although the concept of pain and suffering and the flexibility accorded U.S. juries in this respect contributes to high product liability awards in the United States, pain and suffering have gained much more limited recognition in the foreign countries studied. Awards for pain and suffering in some European countries are specifically limited by statute. Moreover, the Europeans seem to place a lower value on intangible, general damages like pain and suffering. Punitive damages are not available in these foreign jurisdictions and, therefore, the plaintiff does not have the windfall potentially available to the U.S. litigant. Therefore, damage awards and settlement costs are much lower than in the United States. These costs contribute to the substantial difference in premiums between U.S. and European insurance coverage.

The use of juries in civil trials is virtually unknown in Europe and Japan. Among Western European countries, the jury system operates in civil cases only in Ireland, where it has been found that, on average, damages awarded are four to six times higher than in England (where damages are awarded by judges). This is despite the fact that England has a considerably higher standard of living. Unlike in the United States, the product manufacturer does not face the prospect of a jury award which is enhanced by sympathy to injured plaintiffs and affected by the “deep pocket” syndrome, both of which contribute to high damage awards and inconsistent verdicts in the United States. The use of judges to determine liability and damages diminishes the potential of emotional decisions and extraordinary damage awards.

There are further disincentives in the European and Japanese systems that discourage injured parties from pursuing a product liability action against a manufacturer. Unlike in the United States, contingent fees for lawyers are illegal. Under the U.S. contingent fee system, plaintiffs do not pay fees to their attorneys unless they are successful in the lawsuit, and then only out of the proceeds collected. In the foreign countries studied, the plaintiffs will not only be required to pay for their own attorney’s fees, but if the plaintiff loses the product liability action, the legal fees and court costs of the defendant may also be paid by the plaintiff. Foreign plaintiffs’ attorneys are not motivated by the prospect of receiving one-third or more of large compensatory and punitive damage awards. Technical expertise and specialization in product liability which is so prevalent among American plaintiffs’ lawyers is not developed in Europe and Japan. Thus, it is much more difficult for European and Japanese lawyers to maintain successful product liability actions, especially in cases involving the very technical elements of design defect. Lawyers in these foreign countries keep a lower profile, are forbidden to

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3 I understand that Ireland is currently planning to abolish its jury system in civil cases.
advertise and have much less public exposure than U.S. product liability attorneys. Pre-trial discovery in the investigated foreign countries is much more limited than in the United States and class action suits are not allowed. Product safety, accident, and defect data that is widely available in the United States is much more difficult to obtain in foreign countries. In contrast to the United States, the prospect of bringing a product liability action involves a weighing of the financial risk to the plaintiff against lower damage awards and the difficulty of developing and winning the case. All of these factors create substantial disincentives for an injured party to bring a product liability action.

In addition, there is also the overriding predisposition among Europeans and Japanese against litigation, a phenomenon in stark contrast to the high level of litigation consciousness among the American population. The “deep pocket” expectation does not exist in these countries. In Japan, the injured worker would consider it improper to attempt to hold others responsible for his/her injury. Bringing a lawsuit would cause further “loss of face.”

While the member countries of the European Community are in the process of implementing its product liability directive by July 1988, this substantive change will not alter the major systemic differences outlined above. No contingent fees for lawyers, no jury decisions on liability and damages, the cost to plaintiff of attorney’s fees and those of the defendant if the plaintiff loses, low damage awards for pain and suffering, no opportunity for punitive damages, and the other limitations listed above will continue to act as disincentives to litigation in the European Community. “Imposition of liability without fault for the production of defective products in the absence of a total reorganization of European judicial operations will probably have little impact on the costs borne by industry.”

IV. DIFFERENCES IN PRODUCT LIABILITY COSTS

Due to these systemic disincentives and reluctance to litigate, the product liability remedies for workplace injuries exist in theory, but are not pursued. For all of these reasons, the International Study found that foreign competitors of U.S. machinery manufacturers have product liability insurance costs 20 to 100 times lower than those of their U.S. competitors in their respective home markets and do not have the burden of all of the other product liability related costs incurred by U.S. manufacturers.

In addition to the high cost of product liability insurance, U.S. manufacturers also incur other costs related to product liability claims, such as: deductible sums under the insurance policy; awards above the policy

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5 Id. at 814.
limits; time and costs of company personnel spent in accident investigations, document assembly and production, interrogatory responses, court testimony, etc. During our visits to manufacturing plants in the United States, we were impressed by the amount of effort and degree of care expended by manufacturers in order to assure the safety of their products. In addition to those costs, however, they incur further continuous costs for preventative measures to reduce product liability exposure. Questionnaire responses received from U.S. companies in the subject industries reveal that these risk prevention costs, exclusive of product liability insurance, range from $5,000 to $80,000 per year. Other industries have experienced similar costs. One machine tool manufacturer reported that his product liability costs per machine increased from $200 per machine in 1970 to $11,000 per machine in 1982. In 1981, that manufacturer's product liability insurance costs were 3.1% of sales. The Sporting Goods Manufacturers Association has indicated that its members' product liability costs in 1982 amounted to 4.2% of sales compared to 0.5% of sales for its Japanese competitors.

A spokesman for the National Machine Tool Builders Association, whose members have experienced import penetration of the U.S. market in excess of 40%, made the following observation:

Part of the foreign machine tool manufacturer's cost is product liability insurance. As with any other cost, it is factored into the price of their respective products. Because the United States is only a partial market for them, their product liability costs are substantially less than those of domestic machine tool manufacturers. We still sell the bulk of our products here and must face exposure to product liability with respect to a substantial number of our products. . . .

Perhaps more importantly, our product liability insurance costs are affected by our older products. Under product liability law today in the majority of states, we are potentially responsible literally "for ever" for products. . . . While we usually win these [average product liability] suits, they result in high legal and transaction costs. . . . Foreign machine tool manufacturers, on the other hand, do not have these older products in this country. Therefore their product liability insurance costs often are substantially less than ours. With total instability in our law with regard to older products, we, in effect, have a major stumbling cost block with foreign competition.

The majority of sales by the manufacturers in the subject industries are made to customers located within the United States. This is because

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6 Testimony of Herbert W. Goetz, Product Safety Manager of Cincinnati, Inc. before the Subcommittee on the Consumer, Senate Committee on Commerce, Science and Transportation (Mar. 12, 1982).
7 See letter from Howard J. Brunz, President, Sporting Goods Manufacturers Association, to the President of the United States 1 (Apr. 23, 1982).
8 Letter from James H. Mack, Public Affairs Director, National Machine Tool Builders Association, to Jim J. Tozzi, Deputy Director of Information and Regulatory Affairs, Office of Management and Budget, (June 10, 1982).
of their dominance over the past 100 years of the U.S. market, the size of
the U.S. market, and difficulties inherent in exporting. Generally speak-
ing, U.S. manufacturers dominated the domestic capital goods market
until the last ten years. They then began to experience a severe erosion in
market share brought on by foreign competitors that had begun to catch
up for a number of reasons, including technological advances and price
competition.

While foreign manufacturers have achieved substantial penetration
of the U.S. market in recent years, the volume of their products in the
U.S. market is far less than in their own domestic markets and the world
market generally. Therefore, the foreign manufacturers do not have the
high level of exposure, as a percentage of sales, to U.S. product liability
that their U.S. competitors must bear.

Furthermore, U.S. manufacturers are plagued by the long tail of po-
tential liability that accompanies machines that were sold and have been
operating in the United States for fifty years or more. Primary concerns
expressed by manufacturers in the studied U.S. industries related to
product liability experiences with these older products and to the fear of
unending future liability for these products. These older products do not
benefit from more recently developed safety devices and, in fact, were
built at a time when the manufacturers had never even heard of the con-
cept of product liability or the accompanying emphasis on “human fac-
tors engineering.” These machines have often passed through many
different users and have been modified or altered by the different owners
to suit their purposes. These problems are compounded by the difficulty
in locating these older machines and the resistance of their owners to pay
for, or accept, costly safety improvements.

In contrast, there are very few older products of foreign origin in the
United States. The newer, foreign products have been engineered with
modern safety features and, therefore, are much less likely to cause an
injury. The newer product is more likely to still be in use by the original
purchaser and, therefore, easier to locate for purposes of recommending
safety improvements. As a result of these factors, the foreign manufac-
turer faces fewer lawsuits, lower product liability overhead, and lower
product liability insurance costs for those products sold in the United
States.

The U.S. manufacturer incurs the higher cost of U.S. product lia-
ability for a higher percentage of its products, thus increasing the total unit
cost for U.S. machines as compared to foreign machines. The unending
exposure for older machinery further increases this overhead burden as
compared to the foreign manufacturers. Insurers establish product lia-
ability rates on an individual company and product basis, looking closely at
loss history and the breadth of potential exposure. The number of prod-
ucts that are exposed to product liability in the United States and pro-
spective liability for overage products will result in a higher product
liability insurance rate than that which would be charged to foreign man-

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ufacturers for the products they are selling in the United States. While foreign manufacturers will have one product liability insurance rate for the United States (and possibly Canada) and another for the rest of the world, even the coverage for the U.S. sales will cost less in comparison to that of their U.S. competitors. The rate will be lower due to the lower risk of their new machines and the absence of the long tail of liability. The overall premium will be less due to the lower volume of sales in the U.S. market. Finally, the U.S. rate can be averaged in with the lower overhead created by the "other than United States" rate, thus allowing the foreign manufacturer even more flexibility in pricing its units sold in the United States.

Many of the U.S. companies interviewed did not purchase separate policies for U.S. coverage and for foreign coverage and thus did not experience a reduction in premium to reflect sales to the export market. Some U.S. companies had purchased separate coverage for exports at a lower rate than for the U.S. coverage. However, even those companies that separately insure higher for foreign coverage incur insurance costs abroad than their foreign competitors. This is due to the fact that even where an injury occurred abroad, there is always a possibility of being sued in the United States.9

A growing concern to U.S. manufacturers is their exposure to product liability suits in the United States brought by foreign parties where the injury and purchase of the product occurred in a foreign country. There is an obvious advantage to bringing the case in the United States: the possibility that the U.S. product liability system may be applied (substantive and procedural) which will result in much higher damage awards (compensatory and punitive) with free legal service through a contingency fee arrangement. This, in turn, raises the settlement value of the claim. A commentator who studied the developments in the Bhopal case has estimated that the total award against Union Carbide would be less than $73 million if the case is heard in India, while a U.S. trial could result in compensatory damages as high as $235 million, plus potential punitive damages as high as ten times that amount, limited only by the net worth of Union Carbide.10 The prospect of such damages led Union Carbide to offer a settlement of $350 million and "the opportunity for punitive damages . . . probably led [the plaintiffs] to reject the offer."11 On April 4, 1988, an Indian appeals court judge ordered Union Carbide to pay damages of $193 million within the next two months.12

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10 Besharov, Whose Law Should Apply For Foreign Torts?, NAT'L L.J. 30 (July 20, 1987).
11 Id.
12 Union Carbide Ordered to Pay $193 Million, Wash. Post, Apr. 5, 1988, at 12. High Court Justice S.K. Seth reduced the lower court's order of $270 million for interim relief, found that more than a prima facie case had been made, and ordered the $193 million as damages, not just interim relief.
While most such cases filed in U.S. courts are dismissed based on the doctrine of inconvenient forum, some have succeeded. In Corrigan v. Shiley Corp., the California Supreme Court ruled in favor of trial in California of a wrongful death claim, even though the deceased and plaintiffs were Australian citizens, the surgery was performed in an Australian hospital by Australian doctors, and there was evidence of possible negligence of the Australian hospital and doctors. Among the considerations noted by the Court were: California's interest in regulating the foreign marketing of defective products (the allegedly defective heart valve prosthesis manufactured by the defendant); weight given to plaintiff's choice of forum; and the disadvantage manifest in removal to Australia which does not entertain substantive products liability law similar to that of California. It was decided that the case would be tried in California under its strict liability law. "The lesson to American firms doing business in other countries is clear: assume that American levels of liability can be imposed on goods and services sold abroad — and act accordingly." This lesson has been learned and reflected in the higher insurance cost for U.S. products, even when sold and used in other countries.

As U.S. companies are paying the high cost of U.S. product liability for domestic and export products and incorporating that cost in their prices, those products are becoming less competitive. U.S. companies are, in effect, exporting high levels of product accountability to countries that do not want or cannot afford it: "It handicaps U.S. firms as they compete against those of other nations — which do not carry similarly expensive liabilities. The [United States] can't make its competitors assume these liabilities, and the result will be further loss of overseas markets."

In contrast, product liability insurance rates set for foreign machines coming into the United States reflect the difficulty of bringing suit and enforcing a judgment against the foreign manufacturer. During an interview, an U.S. insurer stated that, unless the foreign manufacturer has an American operation, his experience indicates that pursuing the foreign manufacturer in a product liability suit would be fruitless. This assumption is taken into account in the underwriting considerations regarding a U.S. manufacturer who uses imported components.

In Asahi Metal Industry Co. v. Superior Court of California, the U.S. Supreme Court split on the issue of whether or not the awareness on the part of a foreign defendant that the components it manufactured, sold and delivered outside the United States would reach California in the stream of commerce constitutes sufficient minimum contacts between the defendant and California to support the exercise of jurisdiction, but
agreed that exercise of jurisdiction under the circumstances was unreasonable. A Japanese manufacturer, Asahi, sold and delivered 1,350,000 tire valve assemblies over 5 years to Cheng Shin, a Taiwan manufacturer, for use as components in finished tires, 18% of which were sold in California. Cheng Shin settled the product liability claim (tire blowout) against it and pursued an indemnity claim against Asahi, which moved to quash the service of summons on the basis that the fourteenth amendment prohibited California from exercising jurisdiction. The majority of the Court agreed that exercise of jurisdiction was unreasonable and did not comply with "traditional notions of fair play and substantial justice," but only four Justices agreed that there were insufficient minimum contacts. The holding of unreasonableness was based on the substantial burden upon Asahi to travel to California and the defend itself in a foreign legal system, and that the interests of the plaintiff and the forum in asserting jurisdiction are slight in an indemnification claim between two foreign parties regarding a transaction which took place in Taiwan. It was not demonstrated to be more convenient to litigate in California rather than Taiwan or Japan; California's legitimate interests were considerably diminished where neither party was a California resident, and the claim was about indemnification, rather than safety standards; and it was not clear that California law should govern the question. The Court was not convinced that allowing California jurisdiction would create an additional deterrent to the manufacture of unsafe components.

While the unique facts of the Asahi case may limit its usefulness as precedent, it emphasizes the importance of reasonableness and provides a helpful discussion of relevant considerations in determining reasonableness in the exercise of personal jurisdiction. While Asahi narrows U.S. court jurisdiction over foreign defendants, it leaves a blur instead of a distinct line for defining the boundaries of personal jurisdiction under a minimum contacts analysis. The opinions of five of the Justices indicate a broader application of personal jurisdiction may arise when they next address this issue. It is interesting to note that the California Manufacturers' Association filed an amicus curiae brief supporting California jurisdiction because so many California manufacturers purchase foreign made components.17

Even if the jurisdictional difficulty can be overcome, service of process and discovery are complicated by international conventions requiring translation of the pleadings into the foreign language and compliance with the procedural rules and public policy of the foreign jurisdiction. For example, the California based tire seller, co-defendant of Cheng Shin in the Asahi case, had decided not to pursue a separate case against Asahi because it was unwilling to underwrite the roughly $5,000 in translation and other expenses required to serve a foreign company under interna-

This difficulty may be alleviated somewhat by the U.S. Supreme Court decision in *Society National Industrielle Aerospatiale v. United States District Court*, which held that the Hague Evidence Convention ("the Convention") does not provide exclusive or mandatory procedures for discovery in foreign countries, and that international comity does not require in all instances that American litigants resort to the Convention procedures before initiating discovery under the Federal Rules. While the foreign defendants had submitted to the U.S. court's jurisdiction and had engaged in initial discovery in the United States, they asked for a protective order against discovery in France under the U.S. Federal Rules of Civil Procedure. The Court found that the French "blocking statute," prohibiting such discovery was not sufficient to deprive an American court of the power to order a party subject to its jurisdiction to produce evidence. The Court directed the forum court to apply "a more particularized analysis of the respective interests of the foreign nation and the requesting nation." The domestic court is to weigh the reasonableness of the discovery request, the interests of the foreign country, and the likelihood that the Convention procedures would prove effective. The four dissenting Justices concluded that the comity analysis is pre-empted by the existence of the Convention which was designed to eliminate the controversy that had arisen over the attempted application of U.S. discovery rules in other countries. Domestic courts and private litigants are not well positioned to evaluate the conflicting interests of the forum court and sovereign interests of the foreign country. Even with the weight of this recent authority, it remains questionable as to what sanctions the U.S. court would impose if the French company and French courts refused to cooperate. Even if a judgment is entered against the French company, hostile French courts may not allow it to be enforced in France.

Unless the foreign manufacturer has assets in the United States that can be identified by the plaintiff, a successful plaintiff will be faced with the difficulty of enforcing the judgment in the foreign country. At best it is difficult, and often impossible, to execute that judgment against the assets of the foreign manufacturer in its own country. Britain has resisted efforts of the United States to negotiate an enforcement of judg-

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18 Id.
20 Apparently, France had indicated it would not execute letters of request for pretrial discovery of documents, and the defendants were subject to fines if they complied with the plaintiff's discovery under the Federal Rules. The U.S. plaintiffs would not have been able to discover the subject documents if they were forced to proceed under the Convention. Blocking statutes have been enacted by civil law countries as a counter measure to U.S. discovery which is much more broad than their procedures. See Guzman, *The Interplay Between the Discovery Provisions of the Hague Evidence Convention and The Federal Rules of Civil Procedure*, 9 *Houston J. Int'l L.* 33, 340 n. 34 (1987).
ments treaty in order to avoid what it considers to be excessive product liability awards. The successful plaintiff will then have only the hope that he will somehow be able to identify assets of the defendant that may enter the United States in the future, a difficult prospect at best.

With these handicaps and the great expense in time and money that a plaintiff's attorney would have to incur in order to proceed against a foreign manufacturer, it is highly unlikely that a weak suit or a case with questionable or low damages would be initiated. Therefore, the foreign manufacturers will only face product liability actions where the case for liability is strong and the potential damages are substantial. Even in those cases, the uncertainty and delay greatly reduce the settlement value of the lawsuit. Our interviews revealed that a great number of the product liability suits brought against U.S. manufacturers are considered by them to be tenuous at best and many are clearly frivolous. Nevertheless, these actions still involve a great deal of expense for the manufacturer to extricate the company from the proceeding. For example, a number of manufacturers interviewed described suits against them for injuries caused by machines that they had not manufactured. One company explained that it cost $13,000 in one case and $18,000 in another to obtain summary judgment and dismissal from such a suit. If U.S. plaintiffs faced the same procedural difficulties in pursuing domestic manufacturers that are involved in cases against foreign manufacturers, there would be a substantial reduction of product liability actions brought against U.S. manufacturers and, therefore, reduced insurance costs and other overhead. Unfortunately, the current U.S. system confers an advantage upon foreign manufacturers which makes them less accountable than U.S. manufacturers to persons injured by their products, which results in unprotected American users of the foreign products, lower insurance costs to be included in the prices of the foreign products and loss of market share for U.S. manufacturers.

V. IMPACT ON PRODUCT REMOVAL AND DEVELOPMENT

A hidden cost of our product liability system arises in the form of stifled product development, innovation, experimentation, and manufacture of new and existing products. Inventors, developers, manufacturers and marketers have extreme fears of being sued over new products and technologies as well as existing product lines. In a 1986 survey of process equipment manufacturers, 19% of the respondents reported that they had dropped some existing product lines because the product liability risks were too high, and 16% reported that they had considered developing a new product, but decided against development due to product liability concerns. A survey conducted by Egon Zehnder International found that 57% of the top managers surveyed agreed that state-of-the-art

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22 Supra note 10.
products that would help the United States regain its competitive footing are not going forward for fear of product liability suits. Sixty-two percent believed innovation and experimentation have been constrained in recent years for fear of liability. "Given a choice, it seems that many manufacturers have chosen to stay with a proven, even mediocre product, rather than take a chance on developing something new or more advanced, and potentially more competitive." Researchers fear that new types of liability will emerge and some of the state-of-the-art applications are not going forward, such as computers with artificial intelligence. Other examples include: Harvard Medical School professors abandoned development of a new drug that would help thousands of patients who suffer blindness and facial spasms; plans to market a new process that would speed up natural decomposition of chemical wastes were dropped; driving aids for the handicapped were removed from the market; the manufacture of anesthesia gas machines was discontinued; sporting goods manufacturers ceased doing business, discontinued products or did not introduce other products; child car seat manufacturers decreased from twelve to nine. Avco Lycoming Textron dropped a five year $30 million project to develop a turbo-charged rotary engine for general aviation because it would face the prospect of even higher product liability rates from insurers who are fearful of a new technology.

In the textile machinery industry, product liability has taken its toll, forcing companies to drop lines or to go out of business. After 100 years of manufacturing rotary textile machines, Proctor & Schwartz, Inc. dropped its entire line of rotary textile machinery due to economic factors, including mounting costs (direct or indirect) of product liability. "Since that time, they [have] continued to be faced with the ever-increasing costs of defending lawsuits, some of which arise out of accidents involving machines that are seventy years old and others involving cases where the accident occurred on machines that were not manufactured by Proctor." The theory of risk spreading as a philosophic basis for strict liability does not work for companies like Proctor because the cost of product liability cannot be passed on to consumers of the product when the product is no longer being manufactured by the company. The James Hunter Machine Company, Inc. ended its 136 years of manufacturing textile machinery by filing Chapter 11 bankruptcy, "not so much because business conditions are poor, but because of a little understood, yet all too familiar concern of American manufacturers — product liability." Davis and Furber Machine Company began manufacturing textile machinery in the U.S. in 1830 and went out of business in 1982.

24 II Corporate Issues Monitor 1 (3rd Qtr. 1987).
25 Id. at 2.
27 Id. See also Oberlink, The Product Liability Monster, ADWEEK 16 (November 3, 1986).
29 Id.
"The annual cost of product liability made manufacturing new textile machinery impossible. . . . At one point Davis and Furber was one of the largest textile machinery manufacturers in the world. It no longer exists.\textsuperscript{30} U.S. textile manufacturers still need the rotary textile machine that these three former competitors had supplied in order to continue to manufacture U.S. made textiles. The lion’s share of the U.S. market for these machines is now controlled by foreign competitors.

Through the suspicious-looking glass of our product liability law, attorneys too often see the risks rather than the benefits. They advise their clients that the new development may be too risky, too new, with no precedent to follow in a broad area of technology. Their fear is that it may build in a liability of which no one is aware. This thinking leads to a status quoism that prefers staying with a proven product rather than taking a chance with something new, more advanced and more competitive. Adoption of a new, safer technology implicitly involves acknowledgment that the previous technology was not as safe as possible. There is a perception that it is safer to stay with an established product than risk lawsuits with an unknown product which may also stimulate lawsuits with respect to established product lines.

Domestic manufacturers are removing highly vulnerable, but socially and economically necessary industrial products from the U.S. market, leaving the arena to their foreign competitors to fill. This reduction in competition may lead to higher prices for the foreign machines and potential disruption in production of, and the competitiveness of, the U.S. purchaser of the foreign machine who may be left subject to the whims of foreign suppliers. The reluctance to develop and introduce new products will lead to further erosion of the U.S. competitive edge in technology. This trend undercuts our national policy of encouraging domestic manufacturers to develop high quality and technologically superior products in order to become more competitive in domestic and international markets.

VI. PERSPECTIVE OF FOREIGN MANUFACTURERS

Foreign manufacturers and insurers are generally appalled by the increasing impact on their operations of the American product liability explosion and are even offended by liability actions against them in the United States which they view as the imposition of our socioeconomic values upon them. They are further confused by the vagueness of our product liability laws and their variance in the fifty different States. Many are especially appalled by punitive damages, which they consider penal in nature and only to be imposed in the form of fines and other sanctions, not as rewards to private litigants. They believe that compensation should vary not according to degree of fault but according to degree of injury and loss.

\textsuperscript{30} Id.
Some Europeans have suggested that the U.S. product liability system amounts to a nontariff trade barrier. They have asserted that the high cost of product liability insurance and the threat of outrageous jury awards discourage some European competitors from entering the U.S. market. When the product liability insurance capacity in Europe began to shrink in the mid-1980s, it became more difficult for foreign firms (especially in France) to acquire coverage for U.S. exports. Thus, some firms decided to proceed with sales in the United States without product liability insurance on the theory of “catch me if you can.” Indeed, during our study, we were informed that sixty to seventy percent of French companies do not insure for product liability. This, of course, gives them an additional competitive advantage. It is particularly difficult for a small company with a small potential sales volume to justify the cost necessary to insure its sales against product liability in the U.S. market. In fact, the U.S. product liability system is not a trade barrier because U.S. firms, which are competing against the foreign manufacturers, are incurring even higher product liability costs for the reasons explained above.

The U.S. product liability system has had effects on international trade beyond competition in the sale of products. Some foreign investors have decided not to acquire U.S. companies because of the long tail of product liability exposure that comes with successor liability in the United States. Some foreign manufacturers that considered opening a plant in the United States have decided against it. An example was cited of one company that had actually closed several plants in the United States in order to escape further exposure to U.S. product liability laws. This, of course, has a negative impact on the U.S. economy because of a loss of jobs from the closing of the plants and the loss of potential jobs that could have been created by the opening of other plants. Such decisions are being made on the basis of actual knowledge of exposure or due to the inability to predict or have any certainty as to the potential exposure.

VII. THE NEED FOR PASSAGE OF FEDERAL PRODUCT LIABILITY REFORM LEGISLATION: H.R. 1115

While manufacturers should develop risk prevention measures in order to ameliorate product liability problems, it cannot be ignored that the single most effective measure for reducing product liability costs would be the enactment of federal legislation such as H.R. 1115, the Uniform Product Safety Act of 1987. The Federal Interagency Task Force on Product Liability concluded that a major cause of the product liability problem is the uncertainty in the tort litigation system. This conclusion was confirmed by our interviews with manufacturers and insurers in
Europe and the United States. The patchwork nature of U.S. product liability law and the attendant unpredictability of responsibility has resulted in higher than necessary insurance costs. The varying product liability legal standards in the fifty different States and the District of Columbia must be replaced by national standards to be applied uniformly by the courts throughout the country.

It is very difficult for manufacturers and insurers to plan for the amount of insurance needed or to predict the theory of recovery likely to be used since product liability laws differ significantly from State to State. These laws determine the probability and the size of the losses involved. Also of significance are the various statutes of limitations among the States, the various defenses available, and the differing forms of damages. Insurers are more hesitant to become involved in products liability risks because of these factors and also because of a trend toward greater liability and increased compensation.

Manufacturers of durable products, such as machines, present particular problems for their insurers who must set current premiums for machines that may be outdated, yet still in use. Liability for machines that often cannot even be located exacerbates the difficulties involved in estimating further losses. These indefinite liabilities gave rise to severe premium increases for capital goods manufacturers. “In 1976, these uncertainties contributed to liability premium increases of over one thousand percent. . . . To the extent there is a crisis in products liability insurance, it has been caused more by increases in claims costs.” 32 These uncertainties contributed to increased premiums in the mid-1970s among the subject industries by 500% to 5000% and the 500% to 1500% increases in premiums in the 1983-86 period.

Section 203 of H.R. 1115 establishes a strict liability standard for manufacturers in product liability cases, with some important limitations:

Where there was no practical or feasible alternative design of a product, the manufacturer will not be liable unless the product is egregiously unsafe, the user cannot reasonably be expected to know of its risks, and it has little or no usefulness.

Where the manufacturer did not and could not have known of a defect at the time the product left his control, he is not liable. If the manufacturer has reason to learn about the defect later, he must take reasonable steps to warn those who might be harmed.

Section 209 of H.R. 1115 would reduce the inequity that arises out of the interaction between the worker’s compensation and product liability systems in the United States. While the employer may retain the worker’s compensation shield to any further liability to the employee for its negligence, subrogation would be eliminated and the amount of

worker's compensation that the plaintiff will receive would be deducted from any amount that a court determines the manufacturer must pay. This reduction does not affect the amount the plaintiff currently receives, but rather takes the place of the employer's subrogation lien which currently is being deducted from the recovery of the plaintiff. An Alliance of American Insurer's survey found that worker's compensation subrogation was involved in 68.5% of job-related accidents. This provision will reduce transaction costs attendant to subrogation and place an incentive on the employer who is in the best position to assure safety and prevent injuries in the workplace. This is consistent with the injury prevention policy of product liability law.

In the case of capital goods, a statute of repose of twenty-five years after delivery to the first buyer or lessee is set forth in section 207(b) of H.R. 1115. While a shorter time period consistent with the useful safe life of a machine would be preferable, the twenty-five year period will be helpful with respect to long tail liability created by over-aged machines. The International Study reveals that of the 55 companies responding to our questionnaire, 11.8% have been producing machinery for over 100 years and that the companies responding had been producing machinery for an average of 47 years. As discussed hereinabove, these over-aged machines create a great deal of litigation and contribute heavily to insurance costs even though the manufacturer has no control over these machines and usually has no knowledge that they remain in existence. Furthermore, any defects caused by the manufacturer and any injuries caused by the machine would be discovered much earlier than twenty-five years from the date of manufacture.

Punitive damage reform is provided in section 206. To the extent permitted under state law, punitive damages may be awarded if the claimant establishes by clear and convincing evidence that the manufacturer or product seller engaged in punitive conduct. Failure to exercise reasonable care in selecting among alternative designs is not, by itself, conduct which may give rise to punitive damages. Section 206 permits bifurcation of a trial to determine separately liability and the amount of punitive damages that may be awarded.

By specifying criteria for determining responsibility and limitations on responsibility, federal product liability legislation would reduce uncertainty and ambiguity in the U.S. product liability system. The predictability of manufacturer's and seller's responsibilities will result in lowered product liability insurance premiums. Predictability will also assist in dealing with the problem of successor liability and the continuation of businesses that are failing as a result of product liability burdens. The elimination of subrogation will increase the incentive of employers to maintain a safe workplace. This would bring our product liability system closer to the European approach to the workplace problem where an incentive and responsibility is placed upon the employer as the party best able to create safety and prevent injuries in the workplace. The transac-
tion costs involved in the pursuit of subrogation would also be eliminated. A reduction in transaction costs would also result because meritorious suits will be settled more quickly due to the certainty of legal standards applicable to the case. While the plaintiff’s rights are maintained, manufacturers will benefit through lower insurance and transaction costs as well as the ability to predict their responsibility and act accordingly in producing a safer product. Consumers and buyers of products will benefit as lower product liability costs will be passed on in the form of lower prices for products. The anticompetitive conditions caused by product liability fears, which have chilled innovation and product development, will be reduced. U.S. manufacturers will become more technologically and price competitive in both domestic and international markets.

While not included in H.R. 1115, Congress should consider the legislative recommendations of Douglas Besharov: when foreign cases are tried in the United States, require that the procedural as well as the substantive law of the foreign country where the injury occurred be applied, limit discovery, damages and contingency fees to the same degree as they are available in that foreign country; enact a more far-reaching long-arm statute, giving U.S. courts jurisdiction over firms producing goods likely to reach this country or require such a manufacturer to consent to being sued here; and require goods entering this country to provide proof of sufficient funds in the United States or a certificate of insurance to cover probable injuries. While these suggestions have not been well received on Capital Hill at this time, they may be appropriate additions to a trade bill in the next Congress.

There is an immediate need for federal reform of U.S. product liability laws, both substantive and procedural. While it is not politically feasible to change the U.S. system to the extent necessary to conform it to the other systems in the rest of the world, the modest reforms currently pending in Congress can help. We must work towards decreasing the product liability cost advantages enjoyed by foreign competitors and create a federal U.S. law that is less hostile to advanced technological development.

33 Supra note 10, at 31.