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Discussion

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Discussion After the Speeches of Randolph J. Stayin and Grant Murray

QUESTION, Mr. Edwards: I have two questions. What is the prospects of a treaty on recognition of judgments between the United States and Canada? At the present time an American with a judgment against a Canadian firm or a Canadian resident looks hard to find assets as a way of enforcing the judgment in the United States.

The second question is with respect to this matter of product liability. Everyone was very careful today to try to not make judgments as to where we are going or to make some recommendations as to where they would like to see developments go. I would appreciate it if the speaker would make some comments on that matter.

I gather what we now have is a carving away of various kinds of defenses that might be used in a negligence court action, or indeed, the use of *res ipsa*, so we began to move toward strict liability without quite getting there.

ANSWER, Mr. Murray: On the question of judgements, I am not aware of any initiative that currently exists. We have had to contend with that problem within Canada because of our federated structure. The provinces finally did get together and agree to uniform reciprocal enforcing of the judgements, legislation which has been enacted in all the provinces. In Europe now there are some models that are dealing with that same issue. Consequently, I would think that there will be some opportunity to work something out between the two countries. A lot has already been done in other places to serve as a model, but I am not aware that anything has actually happened.

COMMENT, Mr. Stayin: The United States has had a great deal of difficulty negotiating an enforcement of judgment agreement with other countries, and Britain has specifically refused because of product liability. Lloyds of London has said, "Just don't do it," and that is where it is.

With respect to where we go to from here, in the study that my organization conducted, we made several recommendations and we outlined risk prevention measures that companies can implement, and actually have a risk prevention program within the company. There are a number of things that companies can do on their own to try to limit and to reduce the product liability exposure. These range from the very start of production in terms of quality control all the way to the finished machines that are out there, and trying to update warnings.

The other thing is if you have a really top notch risk prevention program in a softening market, you are in a better position to negotiate

for lower rates from insurance companies. In a tight market like we had four years ago, you might consider forming risk retention groups where basically you pull companies together who have good ratings and good experiences. The problem with this whole thing is that companies are getting hit with high product liability insurance premiums when they have had no suits against them, and they never actually been involved in a product liability case. They have a first rate product, but they are paying the premium cost because of a few others out there who are having suits brought against them.

In a market like this, you are able to do something about that. With respect to the insurance companies, that is a tough one. What do you do when you have a situation like we had the mid-1970s crisis, when the insurance rates went up 7,000%? The European reinsurers and insurance companies saw the premiums that were being payed for product liability insurance and they thought this was a fantastic market. All of a sudden there is a rush of German, Swiss, French, and English companies coming into the U.S. market. The market was flooded with equity, there was tremendous competition among U.S. companies and foreign companies for product liability insurance and we had high interest rates. Those companies went into a very competitive situation. They went for market sharing and they charged low premiums, but they felt with high interest rates, they were earning so much interest on their reserves that they could afford the low premiums. But then the interest rates went down and they were stuck with reserves that were not enough to cover their liability exposure. Now we have states regulating them, but I am not sure that a nationally regulated industry in this instance is going to be helpful. Hopefully, the insurance industry will learn from this last experience, but I do not know how else we can affect it. We are not going to change the U.S. judicial system. We are not going to get rid of the contingent fee systems. We are not going to get rid of the Federal Rules of Civil Procedure. What we might be able to do is pass a federal tort reform law. Thirty-two states have passed some form of tort reform. Some of them have ceilings on the amount of damages that can be given, some have statutory codes. There is no consistency. An insurance company has to rate on a national level on products, which is different from medical malpractice. With malpractice insurance the doctor is in one city and one state and the state law will affect liability. On a product, it goes across many state lines and you are dealing with all different kinds of state product liability laws. What the insurance companies do is rate the product on the most severe strict liability state. Everyone's rate is based on California product liability exposure since it has the most severe strict liability rule. We need a federal law that will give a uniform, consistent law across the fifty states. This means that there will be some consistency, and with that the insurance companies will be better able to predict their exposure. That is going to reduce product liability insurance premiums.

Also I am hoping that H.R. 1115, which is now pending in the Commerce Committee in the House, will be passed. That bill has been passed by the Consumer subcommittee, with a large majority vote. It is pending in the House. It would have passed already in the Commerce Committee if the drug industry and pharmaceutical industry were not holding it up based on their concept of the state-of-the-art defense. That bill provides for strict liability for construction defects, for warnings and for design defects, and has a product misuse defense. It has a statute of limitation of twenty-five years for capital goods, which is better than nothing. It should be for the useful safe life of the machine or ten years, which is in the product liability directive in the European Community. It also provides for a negligence standard for sellers of products. Not the manufacturers, but the sellers.

The product liability directive, for example, does not impose strict liability on the seller. The seller is relegated to negligence, which is basically the standard in Europe, other than France. For punitive damages, there is a bifurcated trial. You have the clear and convincing standard of evidence. In a bifurcated trial you try the case for compensatory damages before one jury and you have a separate trial, with a different jury, on punitive damages. This will help out somewhat in the punitive damage area. The statute of limitation is three years from the date that you of knew or should have known about the injury. This can help.

For the workplace, there is tremendous help in this statute. I have been working on this for some time and we have been able to get this into the bill. The workplace provision is as follows: the plaintiff's award receives a deduction from it in the amount of the workers' compensation received. The employer has no subrogation rights. The employee is not hurt by this because he does not receive that money anyway. That amount of the workers' compensation goes back to the employer today. What we are saying is that it should be taken it away from what the manufacturer pays. This will reduce the amount of subrogation stimulated claims, and a lot of cases are stimulated by subrogation incentives from the employer. This will also reduce the transaction costs that are in subrogation, and it will reduce the number of claims brought.

I think this kind of a thing can be helpful and I hope all of you that are a part of the United States and can reach the representatives and senators will press for that.

COMMENT, Mr. Murray: I just want to briefly add one thing. I do not know whether this is the right or wrong way to go, but I will predict for you what we are going to see in Canada. There is a large body opinion in Canada that there are a lot of anomalies in our present product liability law, largely due to our federated system. There is going to be a clear move to a more compensatory approach.

There will be more liability found than is found today. A lot of it will be no fault liability. The challenge is to keep the checks and balances in the litigation system that limit the amount of damages. If the

damages can be more or less stabilized, then down the road one can certainly see the possibility of it becoming truly a compensation system, and then workers' compensation and some another programs may click. That may well be the way we are heading.

COMMENT, Mr. Allen: I want to make one comment. While the focus this morning has been on product liability and the costs associated with that, companies here because of general liability situations have a lot of other insurance premiums that are very high in other areas, such as directors and officers liability insurance, and general liability insurance. We are really at a great competitive disadvantage because of that. I think, again, if something could be done to address some of those problems, it would be a far more competitive world.