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Status and Prospects of Federal Product Liability Legislation in the United States

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Passage of federal product liability legislation is needed to bring certainty to the law and to replace the current chaos in the U.S. product liability system with predictability and stability. The varying product liability legal standards in the fifty different states and the District of Columbia create a product liability system in which manufacturers are confused and unable to predict the scope of their product responsibility and liability. It is in this environment that our product liability system has become nothing more than a lottery in which plaintiffs can enter with little risk or cost because of our contingency fee system.

This confusion and fear of the unknown has stifled product development, innovation, experimentation and the manufacture of new and existing products. Manufacturers fear that a new development may introduce a liability that they are not aware of and which they may be unable to insure. This problem is not new. As far back as 1977, the Federal Interagency Task Force on Product Liability concluded that a major cause of the product liability problem is this uncertainty in the tort litigation system. Passage of a federal product liability law will lower legal costs, lower insurance costs, enhance product safety, encourage product innovation and development, and increase U.S. producers' competitiveness in domestic and foreign markets.

I. The Need for a Federal Product Liability Law

In the last twenty years, the varying state product liability laws have been subject to frequent and substantial revision, either through the common law or the enactment of statutes. In this morass of confusion, it is virtually impossible for manufacturers who sell their products throughout the United States to determine the current status of "the law" and to make products, write adequate instructions or warnings, and provide warranties based on this amorphous moving target. This unstable system

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1 U.S. DEPT. OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT at I-20, I-26 (May 1977).

2 See SENATE COMMERCE COMM., REPORT ON THE "PRODUCT LIABILITY ACT," S. 2631, S. REP. NO. 670, 98th Cong., 2d sess. 6 (1982), which stated "... a mixture of legal theories, a wide and ever-changing set of common law rules, and fundamental differences about the underlying bases of tort law itself cause uncertainties in product liability law. As a result, the legal standards applicable to a product liability claim are uncertain and unpredictable."
makes it difficult for manufacturers to predict the amount of insurance needed and whether they can get insurance at all. Similarly, it is difficult for insurers to accurately project the amount of insurance reserves needed to cover the unknown risk. For these reasons, insurance companies are forced to assume the worst and charge accordingly.

Because of the varying product liability laws and their constant revision by courts or statute, insurance companies have been unable to objectively evaluate risk and have consistently underestimated the rapidly developing exposure to strict liability for injuries caused by products. The laws determine the probability and the size of losses involved. 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 future losses. These indefinite liabilities gave rise to large premium increases for capital goods manufacturers as the U.S. industry was subjected to two insurance crises in the last fifteen years. During the period from 1974 to 1978, product liability insurance rates in the capital goods industries increased 500-5000%. Many small and medium sized businesses were unable to acquire product liability insurance coverage at all or found it unaffordable. The second crisis occurred during the period from 1984 to 1987, when many industries experienced increases of 500-1,500%. While insurance rates stabilized in 1988, it appears they are shooting up again in 1989. Companies in the process equipment industry are experiencing 300% increases, even for companies which have never had a product liability claim against them. The most recent survey of the National Machine Tool Builders Association found that 21% of its members have no product liability insurance, either because they cannot afford it or because it is not available at all. The report concluded that "they and/or their insurers could reduce their product liability costs by two-thirds through the adoption of a federal product liability statute containing subrogation reform and a twenty-five year statute of repose."3

These enormous increases in insurance costs have been caused, to a great extent, by the substantial increase in the number of product liability suits filed, excessive transaction costs and increasingly excessive damage awards. The number of product liability cases filed increased by 758% between 1974 and 1985, and increased at a compounded annual rate exceeding 17% over the last fourteen years.4 Another reason for the sharp increase in insurance rates is the presence of transaction costs in product liability suits that are extremely high and appear to be out of proportion compared to the amounts recovered. A study conducted by the Insur-

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3 NATIONAL MACHINE TOOL BUILDERS' ASSOC., 14TH ANNUAL PRODUCT LIABILITY SURVEY (March 29, 1989) [hereinafter PRODUCT LIABILITY SURVEY].

4 See BOARD OF TRUSTEES OF THE AMERICAN MEDICAL ASSOCIATION, IMPACT OF PRODUCT LIABILITY ON THE DEVELOPMENT OF NEW MEDICAL TECHNOLOGIES 1 (June 1988) (based on data from the Administrative Office of the U.S. Courts) [hereinafter AMA REP.].
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ance Services Office found that for every dollar an injured plaintiff received, insurers incurred an average of forty-two cents of expenses defending claims.\(^5\) Attorneys' expenses constituted approximately 85% of the total of allocated loss adjustment expenses. Similarly, for every dollar an injured plaintiff received, the plaintiff paid a contingency fee averaging thirty-three cents. Thus, the plaintiff received about sixty-seven cents out of every dollar of loss recovery. Adding the average defense cost to the average contingency fee, it appears that for every sixty-seven cents that an injured party received from product liability litigation, the transaction costs expended were seventy-five cents. It appears that our product liability system incurs costs to process claims that are greater than what it pays out in compensation. This inefficient means of compensating injured parties is expected to cost between $16 billion and $28 billion per year by 1990.

The uniform applicability of a federal product liability law would result in substantially lower legal costs to product manufacturers and sellers. Currently, a great deal of legal expense is incurred in determining which court has jurisdiction, in battling forum shopping and in determining both the current state of the law and guessing whether past precedent will be applied by the courts in the instant case. These legal expenses are compounded in disputes over conflict of law issues. In addition, current proposals in the federal legislation would eliminate the legal costs incurred in contribution, indemnity and subrogation actions. Similarly, the proposed fault standard for non-manufacturer product sellers will result in early dismissal of non-negligent parties and avoid contribution actions currently being brought by retailers and wholesalers against manufacturers. Finally, a uniform federal product liability law will facilitate settlement of meritorious claims by virtue of the enhanced ability to predict the outcome of litigation.

Without product liability reform at the federal level, the U.S. product liability system will continue to cause U.S.-made products to be less competitive in price in comparison to foreign producers and may ultimately cause U.S.-made products to be less competitive technologically. These issues were discussed at length in the paper I presented at the Canada-U.S. Law Institute Conference on Legal Aspects of Canada-U.S. Competitiveness in the World Context.\(^6\) 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 must be included in the unit price of U.S. machinery. For example, in Europe there are no juries in civil trials, damages are awarded by judges, contingency fees for lawyers are illegal,


punitive damages are not available and there is a cultural predisposition against litigation. Pre-trial discovery is much more limited than in the United States and class actions are not allowed. The plaintiff is not only required to pay for his own attorney's fees, but if he loses his product liability action, he may have to pay the legal fees and court costs of the defendant. Pain and suffering have gained less recognition in foreign countries, and in some it is specifically limited by statute. All of these factors create a substantial disincentive for an injured party to bring a product liability action against a manufacturer. Due to these systemic disincentives and reluctance to litigate, there is far less litigation in the European Community, even though it has adopted a product liability directive establishing uniform standards on product liability. Earlier today, Paul Oreffice noted that of the 1663 product liability suits brought against The Dow Chemical Company, only seven occurred outside the United States. For all of these reasons, the product liability insurance costs for some U.S. industries have been found to be as much as twenty to one hundred times higher than those of their foreign competitors.

Because U.S. manufacturers are subject to U.S. product liability laws when they are selling overseas as well as in the United States, U.S. product liability costs function as a tax which must be passed on to purchasers in the United States and overseas. The House Energy and Commerce Committee has concluded: "Among our trading partners, the U.S. remains the most litigious nation and U.S. products continue to bear the hidden 'tax' of product liability costs. Product liability has become an interstate — and an international — commerce concern."7

In contrast to the overt competitive impact on the price of U.S.-made products, perhaps the most insidious impact lies in the chilling effect that fear of product liability continues to have on product development and innovation. As a result, U.S. producers are dropping some of their existing product lines and deciding against development of new, cutting-edge technology.8 The number of football helmet manufacturers has declined from eighteen to two in the last thirteen years.9 The last major U.S. manufacturer of anesthesia gas equipment stopped production of that product, leaving the market to two foreign competitors.10 "Between 1965 and 1985 the number of vaccine manufacturers declined by more than half and by 1986, there was only a single supplier for vaccines against polio, rubella, measles, mumps and rabies."11

In June 1988, the American Medical Association ("AMA") House of Delegates passed a resolution endorsing federal product liability re-

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8 Id. at 204-206.
11 Bailey, Legal Mayhem, FORBES, Nov. 14, 1988, at 97.
form because of the profound negative impact of the current liability system on research and development of vaccines, contraceptives, and other medical therapies, and because product liability lawsuits are stifling the development and utilization of potentially life-saving medical technologies. The AMA found that:

Innovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance. Certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks.\(^\text{12}\)

While vaccines have had a very impressive impact on the prevalence of communicable diseases and the amount of suffering and pain prevented has been incalculable, they do have some risks. "Because of product liability concerns and an inability to obtain reasonably priced insurance, several companies, including Wyeth and Parke-Davis ceased producing childhood vaccines."\(^\text{13}\) Recently, the National Academy of Sciences found that: "Given the extremely high cost of vaccine development programs and the present concerns over liability for vaccine-related injuries, many manufacturers may be unwilling to initiate or pursue the derivation or distribution of a vaccine to prevent AIDS."\(^\text{14}\) Conclusions such as these are developing more and more momentum for a federal solution.

Fear of new product liability exposure is causing some manufacturers to stay with proven products instead of developing and introducing state-of-the-art or more competitive products. The Conference Board survey of 4000 U.S. producers in 1988 found that: "About a third of all firms surveyed — and nearly half of those reporting major impacts — have decided against introducing new products because of liability fears."\(^\text{15}\) These include Unison Industries' decision not to manufacture its newly developed state-of-the-art electronic ignition system for airplanes as well as Union Carbide's decision to stop development of a suitcase-size kidney dialysis machine and not to produce food packages for intravenous feeding.\(^\text{16}\) As domestic manufacturers remove highly vulnerable, but socially and economically necessary products from the U.S. market, they are leaving the arena to their foreign competitors. The reluctance to develop and introduce new products will lead to further erosion of the U.S. competitive edge in technology. This hidden cost to our society presents another compelling reason for federal product liability reform.

\(^{12}\) AMA Rep., supra note 4, at 1.

\(^{13}\) Id. at 7.


\(^{16}\) Id.
II. PRODUCT LIABILITY LEGISLATION AT THE STATE LEVEL IS NOT THE ANSWER

There are currently forty states which have enacted some version of product liability reform laws. These state tort reform laws are of a more limited nature than the proposed federal legislation and differ in substantial degree among themselves. Unfortunately, these state efforts have created new variances in our nation’s product liability system, resulting in even more confusion and uncertainty and an increase in the incidence of forum shopping. For example, some states have passed a statute of repose, cutting off liability for products after a given life span, but others have not. Some of these laws provide for an absolute cut-off of liability after a number of years (varying from six to twelve years), and others provide for a presumption of no responsibility after a given number of years. Some provide for a cap on the amount of damages that may be recovered, but most do not. While some provide that modification or misuse of a product is a defense, others do not. Some of these statutes are very limited in scope, others are more comprehensive. The language used for similar provisions differs, thereby opening the door for varying judicial interpretation. While state efforts have built momentum for product liability reform, there has been total failure to pass a model uniform bill.

Opponents to federal reform have argued that tort reform should not occur at the federal level, because tort law has traditionally been the province of the states. However, federal legislative history indicates that this is not true. There are a number of federal statutes which were enacted to provide benefits or settle claims where state law was deemed inadequate to compensate for personal injuries. Perhaps the first federal legislative effort in this area was the Federal Employees Liability Act,\(^\text{17}\) which was passed in 1908 in order to apply a federal tort law to determine the damages incurred by any railroad employee injured or killed in the course of employment. This was followed in 1927 by passage of the Longshoreman’s and Harbor Worker’s Compensation Act\(^\text{18}\) which provided workers compensation, as well as a federal tort law to deal with claims against ship owners. More recently, laws have been enacted which, for example, provide compensation benefits for non-federal law enforcement officers\(^\text{19}\) and compensation for black lung victims.\(^\text{20}\) Importantly, the proposed federal product liability legislation, unlike the longshore and black lung schemes, requires no massive federal bureaucracy or great expenditure of federal monies.

Since the 1960s, there has been an increasing involvement of the federal government in tort law related issues. The Crime Control and

Safe Streets Act provides a civil action against any person who intercepts a telephone conversation.\textsuperscript{21} The Consumer Product Safety Act provides a federal tort remedy for persons who are injured as a result of a knowing violation of a safety standard or rule of the Consumer Product Safety Commission.\textsuperscript{22} The Price Anderson Act provides a no fault compensation system for catastrophic accidents at nuclear power plants.\textsuperscript{23} The National Swine Flu Immunization Program establishes federal responsibility for strict liability tort claims that arose out of that program.\textsuperscript{24} The National Childhood Vaccine Injury Act of 1986 establishes a federal law and defense for vaccine injury cases.\textsuperscript{25} In addition, federal regulation of airline transportation has changed the law of trespass and nuisances regarding aircraft. Moreover, the Comprehensive Environmental Response, Compensation and Liability Act of 1980,\textsuperscript{26} which deals with the damages that arise from hazardous substances, impacts on traditional state tort law by establishing federal standards of strict liability and joint and several liability, as well as an apportionment of damages. Clearly, there is ample precedent for federal legislative activity in tort law. The tradition of state control over tort law has long given way when there is a need for national solutions to national problems. The proposed federal product liability legislation addresses what is certainly one of the most appropriate and sorely needed areas of federal attention.

Because most manufacturers sell their products throughout the United States, product liability has become a burden on interstate commerce and, therefore, reform should be enacted at the federal level, not on a state-by-state basis. Product liability insurance rates are set on the basis of a nationwide experience rather than individual state experience; variations on a state-by-state basis impact adversely on the goal of achieving affordable and stable product liability insurance rates. If the European Community can enact a uniform product liability law that would preempt the product liability laws of sovereign nations, surely the U.S. Congress can pass a federal bill which would establish standards to be applied uniformly throughout the United States.

### III. Proposed Federal Legislation

Since the current sponsors of product liability legislation in Congress are still in the process of negotiating provisions with their colleagues in order to maximize support, this analysis will focus on H.R. 1115, The Uniform Product Safety Act of 1988, which was reported by the House Energy and Commerce Committee on June 30, 1988. It is my

\textsuperscript{24} 42 U.S.C. § 247b (1982).
\textsuperscript{26} 26 U.S.C. § 1 (1982).
expectation that legislation that will be introduced in the next several months will be similar to this legislation. Drawing from the extensive hearings held on this bill, the Committee concluded that:

The present system in the United States for resolving product-related injury claims and compensating those injured by defective products is costly, time consuming and unpredictable. It creates unnecessary costs for manufacturers, product sellers and claimants alike. The system's total transaction costs have escalated sharply in recent years and now far exceed the amount of compensation paid to injured persons. These costs are eventually passed on to and paid for by consumers as a product liability "tax" on products sold in the United States.\textsuperscript{27}

Recognizing the serious burden on interstate commerce created by our current product liability system, the Committee found that establishing federal standards would correct the inequities in the system, encourage the resolution of claims, promote increased safety in the manufacture and use of products, and "foster innovation and the development of new products by reducing manufacturers' uncertainty about the risks of product liability actions."\textsuperscript{28} In drafting this legislation, the Committee reviewed the common law and statutory law in the various states and crafted the standards in H.R. 1115 to come as close as possible to what the Committee viewed as the current standards in the majority of states.

\textbf{A. Preemption of State Law}

H.R. 1115 would preempt state law on any product liability action against a manufacturer or seller for personal injury or property damage. While the bill establishes federal standards, it does not cover all aspects of product liability law or all issues and procedures which may be involved in each distinct product liability lawsuit. "If the Act does not contain a provision or rule of law governing a particular issue in a product liability action, then applicable State or Federal common or statutory law shall govern that particular issue."\textsuperscript{29} H.R. 1115 does not cover harm caused by contamination or pollution of the environment, asbestos or asbestos products, or vaccine-related injury or death to the extent it is covered by The National Childhood Vaccine Injury Act.

\textbf{B. Standard of Manufacturer Liability}

Section 203 establishes three causes of action as the only basis on which a manufacturer can be held liable in a product liability action: negligence, strict liability and intentional wrong doing. Under the negligence standard, the plaintiff must prove that the manufacturer's failure to act as a reasonably prudent person was the proximate cause of the

\textsuperscript{27} \textit{Rep. of the House Comm. on Energy and Commerce, supra} note 7, at 17.

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textit{Id.} at 28.
harm. The term "proximate cause" is defined by state common law as it is currently being interpreted and applied.

Based on section 402A of the Restatement (Second) of Torts, the strict liability section of the bill provides the standards for finding a defective condition unreasonably dangerous: construction defect, failure to conform to an express warranty, inadequate warnings or instructions or design defect. While the bill characterizes the standard for warnings and instructions as strict liability, it does incorporate a negligence standard in the conduct-related test: whether the manufacturer provided adequate warnings and instructions that a reasonably prudent person would have provided. A product would not be considered to be in defective condition or unreasonably dangerous if the cause of the harm was an inherent risk which is known by the ordinary user or consumer. For example, glass breaks and shatters; sugar causes tooth decay and is poison to diabetics. Product liability actions for harm caused by improperly designed or unavoidably unsafe drugs or medical devices would be left for determination by state law.

Subsection (c) establishes a state-of-the-art defense to design defect claims if at the time the product left the manufacturer's control the manufacturer did not know and could not have known of the design defect in light of knowledge reasonably available to experts; or if at that time there was not a feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product. In determining whether there was a feasible alternative design, the bill establishes several relevant factors to be considered: the gravity of danger and the likelihood that such danger would occur; technical feasibility of a safer alternative; financial cost of an improved design; the adverse or beneficial consequences to the product and to the consumer that would result from alternative design; and the relevant design and engineering practices at the time the product was manufactured. This defense would not apply if the product is so unsafe, compared to its usefulness, that it should not have been marketed.

The Committee took great pains to emphasize that it did not consider strict liability to be absolute liability:

To preserve the incentives in the product liability system on manufacturers to make safer products, and in recognition of the fact that the tort system is premised on the concept of "fault", it must be possible for a manufacturer to produce and market a product in such a manner that liability will not subsequently be imposed.\(^\text{30}\)

The Committee sought to address this issue by including the state-of-the-art defense and by focusing the issue of manufacturer liability on what the manufacturer could have done at the time the product left the manufacturer's control. It does not allow the hindsight application of current manufacturing technology to the manufacturer's conduct in manufactur-

\(^{30}\) Id. at 19.
ing a product ten, twenty, even one hundred years ago. This should allevi-
vate the fear of manufacturers that juries will be allowed to find liability
for an older product based on product improvements or advanced tech-
nological generations of the same product.

C. Misuse or Alteration

Another provision that will alleviate manufacturers' fears provides
for the reduction of damages by the percentage of responsibility for
claimant's harm attributable to misuse or alteration of a product. Such
misuse or alteration of a product must: 1) be in violation of, or contrary
to, the manufacturer's or product seller's express warnings or instruc-
tions, if the warnings or instructions are adequate; or 2) involve a risk of
harm which was known, or should have been known, by the ordinary
person who uses or consumes the product. This provision will be partic-
ularly helpful to manufacturers of workplace products who have no con-
trol over their products once they are sold. The purchaser often alters or
modifies the machinery to perform a task for which it was not intended,
fails to properly maintain the machine or fails to properly train the em-
ployee. The most recent survey of the National Machine Tool Builders
Association found that 81% of the claims reported by its members re-
sulted from employer fault.\footnote{See \textit{PRODUCT LIABILITY SURVEY, supra note 3, at 2.}}

This comparative responsibility standard is
intended to be a minimum standard and allows states to make misuse or
alteration a complete bar to recovery. Similarly, if state law provides an
absolute defense where the plaintiff is determined to be more than 50% 
responsible or is contributorily negligent, then this section does not
apply.

The bill also establishes a rebuttable presumption of liability for
manufacturers of firefighting equipment and clothing if the products do
not comply with Occupational Safety and Health Administration or state
standards. An absolute defense would also arise if the plaintiff was under
the influence of alcohol or any drug and, as a result of the influence of the
alcohol or drug, was more than 50% at fault for his own harm.

D. Standard of Product Seller Liability

The Committee recognized that product sellers are almost always
included as parties in lawsuits against manufacturers, even though they
may have had no responsibility for the harm caused. The liability of a
product seller is based upon the negligence standard of reasonable care
with respect to the product. The Committee stated that:

Section 204 is intended to advance fairness, safety, and efficiency. It
promotes fairness and safety by placing liability on the party who is
responsible for the claimant's harm. This section promotes efficiency
by reducing the unnecessary litigation costs of actions against product
sellers for harms caused by manufacturers.\textsuperscript{32} A product seller is also liable for any express warranty it made independent of those of the manufacturer and for any intentional wrongdoing as determined under state law. In order to encourage product sellers to deal with responsible manufacturers, the bill would also make the product seller liable as if it were the manufacturer if the manufacturer is not subject to service of process or if the claimant is unable to enforce a judgment against the manufacturer. This will alert sellers to beware of foreign manufacturers' products which are not adequately insured and where the manufacturer is not within reach of U.S. courts.

E. Punitive Damages

Punitive damages may be awarded against a manufacturer or product seller to the extent permitted under state law, but the burden of proof requires clear and convincing evidence. This more difficult burden of proof recognizes that punitive damages are penal in nature and are meant to punish quasi-criminal conduct. The parameters of what constitutes conduct subject to punitive damages is left to the state. This provision does not preempt state law, which may limit the amount of punitive damages, nor does it create any rights to punitive damages. However, the bill does provide that a failure to exercise reasonable care in selecting a product design or warning shall not constitute conduct that may give rise to punitive damages. The Committee makes it clear that courts may not award punitive damages based on conduct that is merely negligent. The bill permits bifurcation of a trial to determine separately liability for punitive damages and the amount that may be awarded, or to determine the amount of punitive damages following a determination of punitive liability. By virtue of this provision, a defendant can preclude a jury from considering evidence which is relevant only to the award of punitive damages before the defendant has been found liable for compensatory damages. The determination of liability for compensatory damages would not be tainted by evidence that is only relevant to punitive damages.\textsuperscript{33} The bill also sets out a list of relevant factors to be considered in determining the amount of punitive damages. Pre-market approval by the U.S. Food and Drug Administration or compliance with the regulations of the Secretary of Health and Human Services would be a defense against punitive damages for drugs and medical devices.

F. Workers' Compensation Offset

Section 209 would reduce the inequity that currently arises out of the interaction between the worker's compensation and product liability systems in the United States. While the employer may retain the

\textsuperscript{32} Rep. of the House Comm. on Energy and Commerce, supra note 7, at 37.

\textsuperscript{33} E.g., the company's financial condition, amount of profits earned from the sale of the product, or the incidence of prior punitive damage awards.
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 would receive would be deducted from any amount that a court determines the manufacturer must pay. Currently, the employer has the right to recapture worker's compensation benefits paid to an employee from the employee's product liability award. However, this is eliminated under this bill unless the employee’s harm was not in any way caused by the employer’s fault or a co-employee's fault. This reduction does not affect the amount the plaintiff currently receives, but rather takes the place of the employer's subrogation lien. While section 209 eliminates employers' rights to subrogation, contribution or indemnity against a manufacturer, it also prevents any third party tortfeasor from maintaining an action for indemnity or contribution against an employer. This provision will reduce transaction costs attendant to subrogation, indemnity, or contribution actions, and place an incentive on the employer who is in the best position to assure safety and prevent injuries in the workplace. It is directed at the allocation of costs of injuries that arise in the workplace and prevents employers who are at fault in causing workplace accidents from shifting their costs of worker's compensation payments onto a product manufacturer.

G. Time Limitation on Liability

H.R. 1115 establishes a two-year statute of limitations starting from the time a claimant discovered, or in the exercise of due diligence should have discovered, the harm and its cause. Unlike some state statutes, which begin to run at the time of the injury, this provision is more fair to claimants whose injuries may be latent or not discoverable for some time after the injury has occurred. Similarly, while the plaintiff may have been aware of the injury, he may be unaware of the cause for a period of years.

A twenty-five year statute of repose is provided for capital goods. It is qualified, however, by the requirement that the plaintiff has received, or would be eligible to receive, worker's compensation for the harm caused by the product and the harm does not include chronic illness. While a shorter time period, consistent with the useful safe life of a machine would be preferable, e.g. ten years, the twenty-five year period will be helpful with respect to the long-term liability created by over-aged machines. A study conducted in 1984 for the U.S. Department of Commerce found that, of the fifty-five capital goods manufacturers responding to the questionnaire, 11.8% had been producing machinery for over one-hundred years, and that the companies responding had been producing machinery for an average of forty-seven years. The over-aged

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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 defect caused by the manufacturer and any injuries caused by the defect would be discovered much earlier than twenty-five years from the date the product is delivered to its first purchaser. The Committee concluded that "litigation over twenty-five-year-old products is rarely successful but almost always very expensive."\(^{35}\) This provision would result in a substantial reduction of transaction costs and litigation, while assuring that no claimant will go uncompensated.

**H. Other Provisions**

In response to the increasing problem of frivolous actions, the bill provides for the imposition of sanctions for frivolous pleadings. "Frivolous" is defined to mean: groundless; brought in bad faith; brought for the purpose of harassment; or interposed for any improper purpose. The sanctions include striking the pleading or offending portion of the pleading, dismissal of a party, an order to pay an opposing party reasonable expenses incurred in defending against the frivolous pleadings.

In addition, the bill contains provisions for availability of information, mediation of actions and small claims procedures. It also requires the Secretary of Commerce to report on an annual basis over ten years on the effects of the bill on the cost and availability of product liability insurance, as well as to report biennially on the effect of the federal law on product liability litigation and costs, product innovation, the ability of U.S. manufacturers to compete against foreign manufacturers, and to continue in business and the number of jobs affected.

**IV. PROSPECTS FOR THE ENACTMENT OF FEDERAL PRODUCT LIABILITY LEGISLATION**

While various proposals for product liability reform have been pending in Congress since 1975, the experience of two product liability insurance crises within the last fifteen years, the increasing volume of cases being filed and the increasing costs of the inefficient U.S. system have created momentum for passage of this much needed legislation. A Lou Harris & Associates poll conducted in 1987 found that 78% of the public supports using fault as a standard for manufacturer's liability. In 1986, the White House Conference on Small Business concluded that liability problems were the number one issue facing small business and called for the support of federal product liability legislation. In that same year, the National Governors' Conference reversed its position opposing federal legislation and supported its passage because of the burden that product liability places on interstate commerce. The American Legislative Ex-

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change Council has also supported federal legislation. The U.S. business community is unanimous in its support of federal product liability reform and is working for its passage through such major trade associations as the U.S. Chamber of Commerce, the National Association of Manufacturers, the Business Round Table, the Product Liability Alliance, the Machinery and Allied Products Institute, the Special Committee for Workplace Product Liability Reform, the Pharmaceutical Manufacturers’ Association, and the National Association of Wholesaler-Distributors.

Federal legislation has found increasing support in Congress in recent years. During the 99th Congress, the Senate Commerce Committee reported a bill to the Senate floor where eighty-four Senators voted to proceed to consideration of the product liability legislation. Because this occurred in the closing days of the session, there was not sufficient time for full consideration and a vote on the merits. During the 100th Congress, the House Energy and Commerce Committee held six days of hearings during which testimony was presented by Members of Congress, judges, professors in the areas of law, business and technology, and representatives of insurance, business, legal, manufacturing, labor, public and consumer interests. The Committee voted thirty to twelve in favor of the bill. Support was bipartisan and included Members of all political ideologies and interests, even Members with consistently pro-consumer voting records. Sponsors of this legislation in both the Senate and the House are currently negotiating over the provisions of the bill in order to gain further support for its passage in the 101st Congress. Senator Ernest Hollings, Chairman of the Senate Commerce Committee, who previously opposed the bill, has indicated that he will hold hearings and a mark-up of the bill. He has publicly stated that he will not block consideration of the bill if members of his Committee want to proceed. This positive sign on the Senate side and the momentum already under way in the House Energy and Commerce Committee offers substantial encouragement to proponents of federal product liability reform. The 101st Congress will witness another pitched battle between the business community and the well-financed and aggressive trial lawyers and consumer groups.

By specifying criteria for determining responsibility and limitations on responsibility, federal product liability legislation will reduce uncertainty and ambiguity in the U.S. product liability system. The predictability of manufacturers’ and sellers’ responsibilities will result in lower product liability insurance premiums and transaction costs. The proposed legislation provides incentives for the manufacture of safer products and for safer workplaces by placing responsibility on those that are in the best position to create safety and prevent injuries. Consumers and users of products will benefit as lower product liability and transaction costs are passed on in the form of lower prices for products and as safer, more advanced products are placed in the marketplace. Anti-
competitive 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. The proposed federal product liability legislation will bring uniformity, stability and certainty to the U.S. product liability system through a fair and even-handed product liability law. This is a solution which we can all support.