

Summer 1982

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Recommended Citation

18 Idaho L. Rev. 411 (1982)

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NATIONAL PRODUCT LIABILITY LEGISLATION: IN SEARCH FOR THE BEST OF ALL POSSIBLE WORLDS

AARON TWERSKI*

I. INTRODUCTION

Product liability legislation at the federal level is upon us.¹ The erratic and sometimes idiosyncratic performance of the courts has hastened its coming. There is a deeply held and widespread belief that product liability law is unstable, unfair and unduly open-ended.²

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The author gratefully acknowledges the contribution of Shlomo Twerski, third-year student at Hofstra Law School, for his research assistance and insightful observations that have been embodied in this article.

1. Currently, two major pieces of legislation that seek to set uniform federal standards for all products liability litigation are before Congress. The PRODUCT LIABILITY ACT, S. 2631, 97th Cong., 2nd Sess., 128 CONG. REC. 6878 (1982) [hereinafter cited as Senate Bill], and the PRODUCTS LIABILITY ACT of 1982, H.R. 5214, 97th Cong., 1st Sess., 127 CONG. REC. 9529 (1981) [hereinafter cited as House Bill]. See Appendix A for full text of the Senate Bill and Appendix B for full text of the House Bill. Congress *already* enacted earlier this year the PRODUCT LIABILITY RISK RETENTION ACT of 1981, 15 U.S.C.A. §§ 3901-3904 (West 1982), facilitating the establishment by sellers of product liability risk retention groups and the purchase of product liability insurance on a group basis.

Other bills bearing on the product liability crisis have also been introduced: H.R. 970, 97th Cong., 1st Sess., 127 CONG. REC. 132 (daily ed. Jan. 20, 1981) (bill to amend the Internal Revenue Code to exempt from income tax trusts established for the payment of product liability claims); H.R. 1991, 97th Cong., 1st Sess., 127 CONG. REC. 572 (daily ed. Feb. 23, 1981) (bill to amend the Internal Revenue Code to allow deducting for contributions to product liability loss reserve accounts); H.R. 1504, 97th Cong., 1st Sess., 127 CONG. REC. 275 (daily ed. Jan. 29, 1982) (bill to provide government indemnity for suppliers of products to the government for which the suppliers become liable for loss); H.R. 5261, 97th Cong., 1st Sess., 127 CONG. REC. 9928 (daily ed. Dec. 16, 1981) (bill to provide uniform federal product liability standards). In the administrative arena, the U.S. Department of Commerce promulgated the Uniform Product Liability Act as a model products code to be adopted voluntarily by the states. See MODEL UNIFORM PRODUCT LIABILITY ACT, 44 Fed. Reg. 62,714 (1979) [hereinafter cited as UPLA].

2. See House Bill § 2; UPLA, *supra* note 1, § 101 at 62,716. The Introduction to the Preamble to the Model Uniform Product Liability Act also contains discussions of the problems existing in the products liability system. *Id.* at 62,714-16. See generally Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643

Manufacturers have come to believe that they bear enormous liability potential even though they have designed, manufactured and marketed their products to the highest standards of integrity and honesty. They point to ill-advised decisions of the highest courts of California,³ Pennsylvania,⁴ New Jersey,⁵ and Maryland⁶ as examples of rulings that are harsh if not downright punitive. The attempt to resolve many of the problems at the state level has been only moderately successful. The legislative effort in the several states has varied drastically from jurisdiction to jurisdiction.⁷ The patch-quilt

(1978); Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); Henderson, *Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C. L. REV. 625 (1978); *Product Liability: Legislative Hearings on H.R. 5571, H.R. 5258, H.R. 1061, H.R. 2891, H.R. 4204, H.R. 1675, H.R. 1676, H.R. 2964, H.R. 5626 before the subcommittee on Consumer Protection and Finance of the House Commission on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 264-65 (1979) (statement of William Herbert, representing National Association of Manufacturers); *id.* at 695 (statement of Kenneth Doss, Associate General Counsel, Field Crest Mills, Inc.); *id.* at 830-833 (statement of Tomas Russell, General Counsel, National Product Liability Council).

3. *Bell v. Industrial Vangas, Inc.* 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981) (recognizing dual capacity doctrine to allow products action against employer despite worker's compensation recovery); *Barker v. Lull Eng'g.* 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (shifting burden to defendant to prove that product was not defective); *Ault v. Int'l. Harvester*, 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974) (allowing introduction of post-accident design change).

4. *Azzarello v. Black Bros., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978) (finding "unreasonably dangerous" to be inappropriate jury instruction in products case).

5. *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982) (finding manufacturer strictly liable and accountable for knowledge not available at time of manufacture).

6. *Moran v. Faberge, Inc.*, 273 Md. 538, 332 A.2d 11 (1975) (finding manufacturer liable for injuries incurred by scenting a candle with cologne on the grounds that it must warn against such foreseeable usage).

7. A review of state products legislation shows the various enactments to differ substantially from jurisdiction to jurisdiction. Some legislatures have not passed any products-related laws, while those that have legislated in the area have done so in a variety of ways.

One route taken by the state legislatures has been to establish statutes of limitation for product liability actions, *e.g.*, ALA. CODE § 6-5-502(a)-502(b) (Supp. 1981); ARIZ. REV. STAT. ANN. § 12-551 (1982); ARK. STAT. ANN. § 34-2803 (Supp. 1981); COLO. REV. STAT. § 13-80-127.5, 127.6(a) (Supp. 1981); CONN. GEN. STAT. ANN. § 52-577a(a) (West Supp. 1982); IDAHO CODE § 6-1403(3) (Supp. 1982); ILL. REV. STAT. ch. 13, § 213(d) (1981) (ILL. ANN. STAT. ch. 83, § 22.2(b) (Smith-Hurd Supp. 1982)); IND. CODE ANN. § 34-4-20A-5 (Burns Supp. 1978); MICH. COMP. LAWS ANN. § 600-5805(9) (Supp. 1982-83); NEB. REV. STAT. § 25-224(1) (1979); N.H. REV. STAT. ANN. § 507-D:2(I) (Supp. 1979); OR. REV. STAT. § 30.905(2) (1981); TENN. CODE ANN. § 29-28-103(a) (1980); WASH. REV. CODE ANN. § 7.72.060(3) (Supp. 1982).

Statutes of repose have also been enacted by many states to limit product claims, *e.g.*, ALA. CODE § 6-5-502(a) (Supp. 1981); COLO. REV. STAT. § 13-80-127.6(1)(b)

quality of state legislation has only added to the belief that the only hope for uniformity will come at the federal level.⁸ Furthermore,

(Supp. 1981); CONN. GEN. STAT. ANN. § 52-577a(a) (West Supp. 1982); FLA. STAT. ANN. § 95.031(2) (West 1982); GA. CODE ANN. § 105-106(b)(2) (Supp. 1982); IDAHO CODE § 6-1403(2)(a) (Supp. 1982); ILL. REV. STAT. ch. 13 § 213(b) (1981) (ILL. ANN. STAT. ch. 83, § 22.2(d) (Smith-Hurd Supp. 1982)); IND. CODE ANN. § 34-4-20A-5 (Burns Supp. 1978); KAN. STAT. ANN. § 60-3303(b) (Supp. 1981); NEB. REV. STAT. § 25-224(2) (1979); N.H. REV. STAT. ANN. § 507-D:2(II) (Supp. 1979); OR. REV. STAT. § 30.905(1) (1981); R.I. GEN. LAWS § 9-1-13(b) (Supp. 1981); S.D. CODIFIED LAWS ANN. § 15-2-12.1 (Supp. 1981); TENN. CODE ANN. § 29-28-103(a) (1980); UTAH CODE ANN. § 78-15-3 (1977).

Some states recognize a defense or create a rebuttable presumption of no defect if the alleged defect results from a design that conformed to the state of the art at the time the product was first designed or sold. *E.g.*, ARIZ. REV. STAT. ANN. § 12-683(1) (1982); COLO. REV. STAT. § 13-21-403(1)(a) (Supp. 1981); IND. CODE ANN. § 34-4-20A-4(b)(4) (Burns Supp. 1978); KY. REV. STAT. § 411-310(2) (Supp. 1980); NEB. REV. STAT. § 25-21,182 (1979); N.H. REV. STAT. ANN. § 507-D:4 (Supp. 1979); TENN. CODE ANN. § 29-28-105(b) (1980).

Several states recognize a defense or create a rebuttable presumption of no defect when the design of the product or its method of manufacturing conforms to federal or state standards. *E.g.*, COLO. REV. STAT. § 13-21-403(1)(b) (Supp. 1981); KAN. STAT. ANN. § 60-3304(a) (Supp. 1981); N.C. CENT. CODE § 28-01.1-05(3) (Supp. 1981); TENN. CODE ANN. § 29-28-104 (1980); UTAH CODE ANN. § 78-15-6(3) (1977); WASH. REV. CODE ANN. § 7.72.050(2) (1982 Supp.).

Several states recognize a defense or create a rebuttable presumption of no defect when someone other than the defendant alters or modifies the product in a manner not reasonably foreseeable by the defendant and the alteration or modification is the proximate cause of the claimant's injury. *E.g.*, ARIZ. REV. STAT. ANN. § 12-683(2) (1982); CONN. GEN. STAT. ANN. § 52-572p (West Supp. 1982); IND. CODE ANN. § 34-4-20A-4(b)(3) (Burns Supp. 1978); KY. REV. STAT. § 411.320(2) (Supp. 1980); N.H. REV. STAT. ANN. § 507-D:3 (Supp. 1979); N.C. GEN. STAT. § 99B-3 (1979); N.D. CENT. CODE § 28-01.1-04 (Supp. 1981); OR. REV. STAT. § 30.915 (1981); R.I. GEN. LAWS § 9-1-32 (Supp. 1981); S.D. CODIFIED LAWS ANN. § 20-9-10 (1979); TENN. CODE ANN. § 29-28-108 (1980); UTAH CODE ANN. § 78-15-5 (1977).

Finally, several state recognize a defense for unforeseeable misuse of the product. *E.g.*, ARIZ. REV. STAT. ANN. § 12-683(3) (1982); IND. CODE ANN. § 34-4-20A-4(b) (2) (Burns Supp. 1978); N.C. GEN. STAT. § 99B-4 (1979).

8. The perception that the existing disuniformity of products law throughout the country is responsible for a number of national problems is outlined in the "Findings and Purposes" section of the House Bill;

(2) The rules of products liability law in recent years have evolved rapidly and haphazardly within and among the States such that the body of products liability law prevailing in this Nation today is unduly complex, inconsistent, uncertain, and imbalanced in principle.

(3) This uncertainty and confusion in products liability law, and the resulting unpredictability of litigation outcome, has been a principal cause of many problems of national concern, including—

- (A) increased prices of consumer and industrial products;
- (B) increased strains on the court systems, including increased costs, complexity, and frequency of litigation;
- (C) increased deterrents to innovation and to the development of potentially beneficial products which by their nature necessarily involve some danger;

neither consumers nor manufacturers can take much solace from the state legislation. In many aspects, the proposed federal legislation would favor claimants who are now subject to state legislation⁹ and state judicial decisions¹⁰ that can only be described as neanderthal.

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- (D) increased difficulty for some manufacturers in raising capital;
 - (E) increased costs and decreased availability of products liability insurance;
 - (F) increased numbers of product sellers attempting to do business without products liability insurance coverage, jeopardizing their financial stability and the availability of compensation to injured persons; and
 - (G) other increased burdens on interstate commerce, threatening employment and the economy in many diverse ways.

(4) Products liability insurance rates are set on the basis of nationwide, rather than individual State, experience because a product manufactured in one State can readily cause injury in any of the other States.

(5) A profusion of State statutes has been enacted in recent years attempting to remedy these problems. Such statutes, however, have sometimes been drafted in a crisis atmosphere without due consideration given to their many important implications. Some such statutes have curtailed unduly the rights of products liability claimants, and all have added to the complexity of and inconsistency in products liability law.

(6) Because of the national scope of the manufacture and distribution of most products, and of products liability insurance, there is little that any individual State can do to remedy these various problems of products liability law. House Bill § 2(a)(2)-(6).

A similar section is included in the MODEL UNIFORM PRODUCT LIABILITY ACT. UPLA *supra* note 1, § 101 at 62,716.

9. See, e.g., ARIZ. REV. STAT. ANN. § 12-683(1) (1982), recognizing a defense if the defect resulted from fabrication that conformed to the state of the art at the time the product was first sold by defendant. Senate Bill § 5 and House Bill § 5 allow a state of art defense for design defect cases only. IND. CODE ANN. § 34-4-20A-4(b)(6) (Burns Supp. 1978), recognizes a state of the art defense if the product was prepared in conformity with the generally recognized state of the art at the time the product was designed. "Generally recognized" state of art sounds dangerously like an industry custom defense, again a factor not embodied in Senate Bill § 5 and House Bill § 5. N.H. REV. STAT. ANN. § 507-D:3 (Supp. 1979) provides for an absolute defense of product alteration even where the product defect is concurrent cause. Senate Bill § 10(b) reduces recovery to the extent that alteration was a cause of the harm, but does not preclude recovery. House Bill §§ 5(C)(4)(A) & (B) provide that product alteration and misuse are complete defenses even where they are concurrent causes. See *infra* text accompanying notes 75-79. As such, it tracks the New Hampshire statute and does not treat claimants fairly. The statutes of repose contained in Senate Bill § 12 (twenty-five years), Alternate § 12 (ten years), and House Bill § 12 (ten years), give claimants a longer period within which to institute a products action than many of the state statutes listed *supra* note 6.

10. See, e.g., *Bemis Co., Inc. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981), *petition for cert. filed*, 51 U.S.L.W. 3024 (U.S. May 10, 1982) (No. 81-2072) (applying the patent danger rule in a design defect case). See *infra* note 39. Senate Bill § 6(d)(2)(A) and House Bill § 5(d)(3)(A) consider the obviousness of the danger with regard to the necessity of providing warnings. Although the bills do not explicitly disapprove of the patent danger rule, they appear, by negative inference, to preclude use of this defense

In other instances, the state legislative solutions do not begin to address the serious concerns of manufacturers.¹¹ The cacophony must come to an end.

The more serious question today is not whether federal legislation is called for; rather, it is which issues should be addressed at the federal level, and what should be the substantive contours of the legislation.¹² Two bills presently pending in Congress, S. 2631 (Kasten)¹³ and H.R. 5214 (Shumway),¹⁴ are far too complex. They fail to account for the fact that product liability law will depend for its administration on thousands of trial judges and tens of thousands of lawyers. To impose on the courts dozens of new and undefined terms and untold new concepts, is unwise in the extreme. These bills, if enacted, would require several decades of judicial interpretation to unravel their ambiguities. Rather than resolving the present uncertainties, a whole new class of doubts would be created to the chagrin of consumers and industry alike. Furthermore, the complex and overly-detailed provisions of the bills, governing such matters

in design defect litigation. *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979), held that the statute of limitations begins to run from the time the cause of action accrued, although plaintiff has not yet discovered the injury. Senate Bill § 12(d), Alternate § 12(c), and House Bill § 12(a) commence the statutory limitation period from the time claimant discovered, or should have discovered the harm. (The Senate Bill sections provide for a two year period from discovery of the harm; the House Bill allows a claimant three years from the discovery of the harm and its cause).

11. While several states have enacted legislation regarding punitive damages, e.g., CAL. CIV. CODE § 3295, (West 1981); CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1981); MINN. STAT. ANN. § 549.20(3) (West Supp. 1981); OR. REV. STAT. § 30.925 (1979), many states have not enacted legislation addressed to this area. Another significant problem not addressed by many state legislatures is the interaction of workmen's compensation schemes and product liability recoveries.

12. The author's position favoring national products legislation is a change from previously held opinions expressing opposition to such legislation. See Twerski & Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment* 28 DRAKE L. REV. 221, 256-57 (1978-79) [hereinafter cited as Twerski and Weinstein, *A Critique of the UPLI*]; Twerski, *Rebuilding the Citadel, The Legislative Assault on the Common Law*, 15 TRIAL (No. 11) 55 (1979).

The metamorphosis has been gradual. My research on an article on directed verdict practice, Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982) [hereinafter cited as Twerski, *Seizing the Middle Ground*], convinced me that sensible limitations must be imposed on design defect litigation. Furthermore, recent developments have made clear that the "product liability crisis" is not something conjured up by the manufacturers' lobby. It is real and deserves serious consideration. The suggestions contained herein, however, are consistent with my general objection to a full-blown codification of the law of products liability. My proposals are for directed and focused solutions to high-profile problems.

13. Senate Bill, *supra* note 1.

14. House Bill, *supra* note 1.

as product misuse,¹⁵ alteration,¹⁶ and worker's compensation,¹⁷ appear to be a massive intrusion by the federal government on the longstanding authority of states to work out the fine points of tort law. Federal legislation should address clearly perceived federal problems and no more.¹⁸ It should not rewrite the common law of torts.

15. Senate Bill § 10(a); House Bill § 5(c)(4)(A). *See infra* text accompanying notes 77-78, 127-132.

16. Senate Bill § 10(b); House Bill § 5(c)(4)(B). *See infra* text accompanying notes 77-78, 127-132.

17. Senate Bill § 11. House Bill § 10, dealing with workmen's compensation, avoids the complexities of the Senate Bill and conforms with the author's suggestion that plaintiff's recovery be reduced by the amount of worker's compensation recovery. *See infra* text accompanying notes 146-162.

18. It is difficult to surgically separate the arguments dealing with the substantive merits of the legislation and the fact that the legislation is being promulgated at the federal level. Those who oppose the legislation have also sounded the clarion for states' rights and the traditional prerogative of states to control tort litigation. *Product Liability Act: Hearings on S. 2631 Before the Senate Interstate Commerce Committee*, 97th Cong., 2nd Sess. (1982) (statement of M. Shapoll).

This author is not opposed to federal products legislation but supports the kind of legislation that will be more direct and focused. The concern is that only problems which have manifested themselves at a national level be addressed. To do otherwise would complicate the legislation and make it unwieldy.

A significant factor in the implementation of a federal products law will be the jurisdictional issue. Senate Bill § 3(d) states: "The district courts of the United States shall not have jurisdiction over any civil action arising under this Act, based on Sections 1331 or 1337 of Title 28, United States Code." House Bill § 4(b) also contains a jurisdiction-barring provision. These sections are in tune with the growing sensitivity toward the breadth of federal judicial jurisdiction. It guards against expansion of jurisdiction at a time when bills are being introduced to curtail it. *See, e.g.*, H.R. 6816, 97th Cong., 2d Sess., 128 CONG. REC. 4465 (1982) (bill to eliminate diversity of citizenship as a basis of jurisdiction of federal district courts); H.R. 2404, 97th Cong., 1st Sess., 127 Cong. Rec. 4864 (1981) (bill to eliminate diversity of citizenship as a basis of jurisdiction of federal district courts); S. 675, 97th Cong., 1st Sess., 127 Cong. Rec. 1980 (1981) (bill to establish Federal Jurisdiction Review and Revision Committee); H.R. 144, 97th Cong., 1st Sess., 127 Cong. Rec. 34 (1981) (bill to amend Title 28 of the U.S. Code to limit jurisdiction of courts established by Congress over state cases). Relegating cases arising under a federal statute to the state courts, however, allows each state to interpret the law in its own way. That fifty different interpretations of one law deal a severe blow to uniformity was recognized in *Zeffiro v. First Pa. Banking & Trust*, 623 F.2d 290 (3d Cir. 1980) *cert. denied* 50 U.S.L.W. 3947 (U.S. June 1, 1982) (No. 80-108). Additionally, the divergence among state courts can create some novel choice-of-law situations. For example, where choice-of-law rules call for application of a sister state's law, the forum state may still be justified in applying its own interpretation of the federal statute. Thus, though states may continue to differ on the substantive law of products liability through diverging interpretations of the federal law, the choice-of-law rules will be circumvented to allow application of forum law. The diversity case, still within federal jurisdiction under both the Senate and House Bills, would offer the federal court the opportunity to apply its *own* interpretation of the federal law, which could differ from that of any state connected to the case. This would then permit the accident of diversity to afford a new substantive law to the parties, a situation that had generally been eliminated by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

Finally, certain aspects of the bills are substantively unfair. There is a myth that has gained widespread currency in the recent legislative debate than what is good for consumers is bad for manufacturers and vice versa. The legislative hearings pit consumer groups against industry representatives in a highly charged adversary setting.¹⁹ Yet, the reality is that only legislation that is fair, evenly balanced and easily understood can be of benefit to anyone. Complex and ponderous legislation will grant no long-term relief to industry. Legislation that is overly restrictive of legitimate consumer rights will be interpreted out of existence by the courts, who will refuse to be instruments of injustice. Consumers, on the other hand, should reap no joy from legislation that will refuse to address the serious ills which beset the product liability system. It is consumers who finally pay the bill for poorly reasoned decisions, which penalize the good and bad alike. In the immortal words of Pogo, "We have met the enemy and he is us."

Instead of the complex labyrinth set forth in the presently pending bills, five areas of product liability law are deserving of attention in federal legislation. (1) The return to a negligence standard for most design defect and failure to warn cases is clearly in order. Manufacturers legitimately contend that predicated liability on after-acquired knowledge or yet-to-be developed technology violates basic standards of fundamental fairness. Thus, the elimination of strict liability for design and warning cases will establish, at the national level, a rule which fosters fairness, and, at the same time, will bring about adherence to an emerging consensus that liability should be fault-based.²⁰ (2) A Statute of Repose is necessary to address the concern that manufacturers are forced to defend cases of ancient vintage which create extraordinary logistic problems for the defense, and which permit juries to bring to bear present day attitudes on safety to products designed and marketed in a long bygone

19. See, e.g., *Product Liability: Legislative Hearings on H.R. 5571, H.R. 5258, H.R. 1061, H.R. 2891, H.R. 4204, H.R. 1675, H.R. 1676, H.R. 2964, and H.R. 5626 Before the Subcomm. on Consumer Protection and Finance of the House Commission on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 331 (1979) (statement of Barbara K. Requet, Legislative Director, National Consumer League); *id.* at 349 (statement of David Tocker, Consumer Federation of America); *id.* at 263 (statement of William Herbert, National Association of Manufacturers); *id.* at 219 (statement of Charles I. Den, Senior Vice President, Machinery & Allied Products Institute); *id.* at 238 (statement of James Mock, Public Affairs Director, National Machine Tool Builders Association); *id.* at 569 (statement of Thomas L. Anderson, Bicycle Manufacturers Association of America).

20. See Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); Henderson, *Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773 (1979); see *infra* text accompanying notes 170-185.

era.²¹ (3) There is a necessity for legislation to deal with punitive damages. Firm and demanding standards should be established for the imposition of liability which bears the potential of crushing losses to manufacturers.²² (4) Legislation should include provisions mandating comparative fault. In appropriate circumstances plaintiff's conduct should be considered in a product liability action.²³

In addition, there is a substantial argument to be made that some attention should be given to the interrelation between worker's compensation and product liability recovery against manufacturers.²⁴ But if this area is to be addressed, it must be done with far greater simplicity than that proposed by the present legislative efforts.²⁵ Failure to take the least intrusive solution will focus federal attention on the adequacy of state controlled worker's compensation programs. Although this may be an appropriate legislative goal,²⁶ if these two very separate problems are permitted to become intertwined, it is certain that the very special aspect of the product liability-worker's compensation interplay will be lost in the thicket.

The thesis of this article is that federal product liability legislation should be short, simple and highly focused. It should draw from recognized areas of national consensus for its standards. It should, at every juncture, take the least intrusive alternative so that it not upset the traditional role of state courts in controlling tort litigation.

Rather than undertaking a section-by-section analysis, this discussion will focus on subject matter categories. An attempt will be made, wherever possible, to relate sections of the bills to each other and thus, question not only the isolated provisions, but the internal consistency of the legislation. Discussion will be directed primarily to S. 2631 (Kasten) since it is the bill which has received the most significant attention. Comparisons between the S. 2631 and H.R. 5214 will be noted whenever possible in the margin.

21. See Henderson, *Coping With the Time Dimension of Products Liability*, 69 CALIF. L. REV. 919 (1981); see *infra* text accompanying notes 186-195.

22. See Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982); see *infra* text accompanying notes 196-203.

23. See *infra* text accompanying notes 134-145.

24. See *infra* text accompanying notes 146-161.

25. See Senate Bill §§ 10(a)(1), 11; House Bill § 10; UPLA, *supra* note 1, §§ 111(B)(2), 114 at 62,734-735, 62,740.

26. For a discussion of reforms proposed by the National Commission on State Workmen's Compensation Law, see LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 5.30 (Cum. Supp. 1981). See also *Symposium on Workmen's Compensation*, 53 J. URB. L. 755 (1976).

II. STANDARD OF CARE AND PRODUCT QUALITY

A. Construction Defect

Section 5(a) of S. 2631 provides:

A product is unreasonably dangerous in construction if, when the product left the control of the manufacturer, it deviated in a material way—

- (1) from the design specifications or performance standards of the manufacturer; or
- (2) from otherwise identical units of the same product line.²⁷

In an article commenting on a similar provision in the first draft of the Uniform Product Liability Law,²⁸ this author took the position that it was unwise to codify the standard for construction defect for two reasons. First, the adoption of a standard which judges a manufacturer by his own, rather than industry standards, could penalize the manufacturer who goes out of his way to build into his product a high safety level not mandated or followed by the industry. Consider, for example, a manufacturer of a high quality car who utilizes the finest grade of steel for springs. Assume that under very extreme conditions (e.g., hitting a large pothole at high speed) a spring fails and the car goes out of control. If the evidence were to disclose that the spring that failed did not meet the manufacturer's own internal construction standards and therefore failed, liability would attach. If the manufacturer's standard far exceeds those of the industry, it would seem unfair to impose liability merely because a manufacturer did not mandate quality control standards which would disclose deviations from his norm, when the product which came off the assembly line far exceeded the quality of competitive products. In a society of steadily rising safety standards, this problem deserves careful attention. We may ill afford simple solutions to complex problems.²⁹

27. Senate Bill § 5(a).

28. Twerski & Weinstein, *A Critique of the UPLL*, *supra* note 12, at 225-26, commenting on Draft Uniform Product Liability Law § 104(a), 44 Fed. Reg. 2,996, 2,998 (1979) [hereinafter cited as UPLL].

29. The drafters of the UPLA, in response to this comment, argued:

[T]his criticism overlooks the fact that the manufacturer's self-imposition of a higher standard will function as a shield against claims alleging liability in the more costly area of defective design. By adopting a higher standard, a manufacturer may occasionally be subject to liability under Subsection (A), while another manufacturer may not be, but the first manufacturer does not place its whole product line at risk of being found unreasonably unsafe in design.

Second, by imposing a strict liability standard for production defects and a negligence standard for design defects, the proposed legislation aggravates an already difficult situation. In the development of product safety, there may be several ways to address a safety hazard. One way may be to increase quality control to assure the integrity of a crucial part. Another may be to design a back-up safety feature (a fail-safe component). By deciding that construction defect cases are not defensible (in that strict liability applies regardless of fault), and that design defect cases are defensible (on negligence or risk-utility grounds), the bills have made a conscious decision to favor the design alternative over quality control. This may be a short-sighted approach. It is possible that increased safety can be accomplished at a lower cost by raising quality control standards, rather than by designing a fail-safe system that could engender other risks.

There are some who believe that the problem is overstated and that the Section 5(a) definition is a good, practical resolution to the problem of defining construction defect.³⁰ My own belief is that cases

Not every minor variation from a standard will result in liability; rather, the variation must be a material one causing the claimant's harm.

In point of fact, there is no practical way to define defective construction except by the manufacturer's own standards. It is an optimal area for strict liability "because societal expectations are fairly well established with regard to such defects, and a ready gauge of acceptability exists by reference to like products that are non-defective." Phillips, "The Standard for Determining Defectiveness in Products Liability," 46 "U. Cin. L. Rev." 101, 104-05 (1977). Moreover, the imposition of strict liability with regard to defective construction is fair to the product user. Under a negligence system, the claimant would have the very difficult burden of showing that a manufacturer knew or should have known about a latent defect in one of thousands of mass-produced products. UPLA, *supra* note 1, § 104 Analysis at 62,734.

The most gratifying form of criticism is that which concedes that the substance of your position is correct. The drafters' difficulty with imposing a negligence system for construction defects could be alleviated by utilizing the Wade/Keeton risk-utility test with the benefit of hindsight. *See infra* note 34. This allows the plaintiff to focus on the currently available technological information, and relieves him of the burden of ascertaining the exact state of defendant's knowledge at a specific point in time. It does, however, ask whether the product which caused the injury was in fact unreasonably dangerous (under risk-utility balancing). The drafter's characterization of the plaintiff's burden as proving a manufacturer's knowledge with regard to "one of thousands of mass-produced products" is taking their point too far. Our proposal for risk-utility balancing in construction defect cases would have a claimant focus on the adequacy, or the presence of a manufacturer's quality-control system and his knowledge with regard to such quality control, not, as the drafters envision, to demonstrate knowledge of the actual construction defect in the individual product. For full explanation of this point see Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability From Quality to Process Standards*, 55 N.Y.U. L. REV. 347, 381-83 (1980).

30. *See* UPLA, *supra* note 1, § 104 Analysis at 62,723; Henderson, *Should A "Process Defense" Be Recognized in Product Design Cases?*, 56 N.Y.U. L. REV. 585, 611-12 (1981).

will begin surfacing where defendants will argue that the simplistic definition of construction defect breeds unfairness. It is certainly strange that in legislation drafted to meet the long range concerns of manufacturers with regard to liability, this problem has received scant attention. What is more troubling, however, is the need to address the definition of construction defect at all in this legislation. There is no evidence that the judge-made law with regard to construction defects has been oppressive. Indeed, the argument is that Section 5(a) merely codifies existing rules. If that is so, then why address the problem? The only reason for doing so is that Congress has seen fit to write a code encompassing the entirety of product liability law. In doing so, they found it necessary to deal with all aspects of the product liability action; hence legislation codifying non-problem areas. If the thrust of legislation would be to legislate only with regard to clearly perceived national problem areas, there would be no need to address the construction defect question at all. The states could be left to their own devices in this area.³¹ If developing case law should reveal that the problems noted above develop, courts will be free to limit the liability of manufacturers in construction defect cases by imposing a risk-utility standard requiring that the offending product be unreasonably dangerous.³²

B. Design Defect

Sections 5(b)-(d) of S. 2631 attempt to establish guidelines for design defect litigation. These are complex sections that can only be understood by identifying the interrelationships between the subsections and by noting how other sections of the bill give meaning to its provisions.

1. *Negligence Rather Than Strict Liability*

Section 5(b) of S. 2631 begins with a clear statement that the standard to be applied in design litigation is one of negligence, *not* strict liability. It provides:

A product is unreasonably dangerous in design if, at the

31. To allow room for development of products law by the state courts, the bill's section preempting the entirety of products law from the states, Senate Bill § 3 and House Bill § 4, should be limited to those areas that are appropriate for federal preemption. The author later suggests five specific areas to which the federal legislation should be confined. See *infra* text accompanying notes 166-204.

32. Even if one were to disagree with the proposal that the quality control process be subject to risk-utility evaluation, see *supra* note 29, the manufacturer should at least be able to argue that the actual product which caused injury was in fact, "reasonably safe" because the product exceeded industry standards and was thus not defective utilizing a hindsight risk-utility analysis.

time of manufacture of the product, a reasonably prudent manufacturer in the same or similar circumstances would not have used the design that the manufacturer used.³³

The clarification on this issue is important. It sets to rest the raging issue of whether a manufacturer should be held liable for after-acquired risk information or after-acquired technology. Although there are strong and respectable arguments to be made in favor of the imputation of knowledge to the manufacturer so that the plaintiff is relieved of the onerous task of proving what a manufacturer could have known or could have done had he used reasonable care,³⁴ the reality is that most courts have been unwilling to impose strict liability in design litigation.³⁵ They simply believe it unfair to impose liability upon a manufacturer who has acted in a reasonably prudent fashion. There is considerable dicta in some cases that true strict liability will be applied, but when push has come to shove, most courts have backed off the extreme proposition that strict liability should apply in design and failure to warn cases.³⁶ The issue has been thoroughly debated, and the time has

33. Senate Bill § 5(b). See also House Bill § 5(c)(2).

34. See *Barker v. Lull Eng'g. Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225; *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539; *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 525 P.2d 1033 (1974); *Dougherty v. Hooker Chemical Corp.*, 540 F.2d 174 (3d Cir. 1976); *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809 (9th Cir. 1974); Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUM. L. REV. 294 (1979); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973). See also Henderson, *supra* note 21, at 929 n.43.

35. See e.g. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (1973), cert. denied, 419 U.S. 869 (1974); *Jones v. Hutchinson Mfg. Inc.*, 502 S.W.2d 66 (Ky. 1973); *Balido v. Improved Machinery Inc.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973); *Jonescue v. Jewel Home Shopping Service*, 16 Ill. App. 3d 339, 396 N.E.2d 312 (1973).

36. Several recent cases demonstrate that courts are schizophrenic about this question. In *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (Tex. 1980) the court was faced with the question whether it was appropriate to admit evidence of the feasibility of a safety kill switch on a boat manufactured and sold several years before the time of trial. It was undisputed that such safety switches became feasible after the sale of the boat in question. The court, in allowing the defense testimony which focused on feasibility at the time of manufacture, said:

In cases involving strict liability for defective design, liability is determined by the product's defective condition; there is no need to prove that the defendant's conduct was negligent. Considerations such as the utility and risk of the product in question and the feasibility of safer alternatives are presented according to the facts as they are proved to be, not according to the defendant's perceptions. *Id.* at 749.

In *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980), suit was brought against the manufacturer of Pitocin (a drug used to induce uterine contractions) for failing to warn that the drug was contraindicated when the fetus was in high station. The issue on appeal was whether, in an action used on strict liability, plaintiff must allege and prove that the defendant "knew or should have known" of the danger.

come to give expression to what appears to be the emerging national consensus. It is also important to remove the spectre of fear from the American business community. It is simply unacceptable to be told that the law demands from a manufacturer, that which no reasonable person could be expected to accomplish. At the extreme, strict liability means that liability attaches for risks that were unknowable until thirty years after a product was manufactured and for technology not dreamed of at the time a product was designed. It is time that the issue be laid to rest.

What follows this section, however, is a set of qualifiers that are extremely troublesome from both substantive and process perspectives.

2. *The Sound Support Standard*

Section 5(b)(1) of S. 2631 provides:

A product is not unreasonably dangerous in design unless—

In an opinion which defies logical analysis, the court concluded that to "require knowledge to be alleged and proved" does not "infuse negligence principles into strict liability." The court said:

We perceive that requiring a plaintiff to plead and prove that the defendant manufacturer knew or should have known of the danger that caused the injury, and that the defendant manufacturer failed to warn plaintiff of that danger, is a reasonable requirement, and one which focuses on the nature of the product and on the adequacy of the warning, rather than on the conduct of the manufacturer. The inquiry becomes whether the manufacturer, because of the "present state of human knowledge" (Restatement (Second) of Torts, sec. 402A, comment k (1965)), knew or should have known of the danger presented by the use or consumption of a product. Once it is established that knowledge existed in the industry of the dangerous propensity of the manufacturer's product, then the plaintiff must establish that the defendant did not warn, in an adequate manner, of the danger. *Id.* at 198.

See also dissenting opinion, *Heritage v. Pioneer Brokerage & Sales, Inc.*, 604 P.2d 1059 (Alaska 1980) (Moran, J., dissenting).

These cases are puzzling, in that they appear to adopt a negligence standard while insisting that they are faithful to strict liability theory. The emphasis in all three cases, that the focus is on the "state of the art" rather than on the "knowledge of the particular defendant," is interesting, but hardly earth-shaking. Case law has long established that a manufacturer is held to the standard of an expert in that particular industry. See F. HARPER & F. JAMES, *THE LAW OF TORTS* 1541 (1956).

Elsewhere, I have suggested that these cases are creating a test of "scientific unknowability" as a defense. Thus, the absence of negligence in not knowing may not be sufficient to absolve the defendant from liability unless the absence of knowledge is attributed to the technological community as a whole. Whatever the appropriate explanation for these cases, it is clear that the cases are seeking to locate a midpoint between negligence and strict liability. Twerski, *Seizing the Middle Ground*, *supra* note 12. See also Henderson, *Manufacturer's Liability for Defective Design: A Proposed Statutory Reform*, 56 N.C.L. REV. 625, 634-35 (1978); UPLA, *supra* note 1, § 104(8) Analysis at 62,723.

(1) the manufacturer knew or, based on knowledge which had *sound support in the scientific, technical, or medical community* for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm³⁷

To predicate liability for design defect by requiring the plaintiff to establish that the information upon which the manufacturer should have taken corrective action had "sound support" in the scientific, technical or medical community is simply wrong. It denigrates the role of risk-utility analysis, which is the theoretical base for the negligence standard which had been codified just one sentence earlier.

Should a manufacturer respond to risks that do not have sound support in the scientific community? The answer is sometimes yes. Putting aside for the moment the difficulty of establishing what standard is to be utilized for judging whether a risk does or does not have "sound support" in the technical community, it is clear that there are times when a risk may be remote and very tentatively based, yet the manufacturer should be required to design or warn against it. Consider the responsibility of a manufacturer who has preliminary indications of side effects to an otherwise useful drug or chemical compound. What if, in risk-utility parlance, the probability of harm is very low, very remote and not scientifically well established. Assume further, that there are alternative methods of manufacturing the product that would reduce or eliminate the harm entirely, or that there are other alternative products which would accomplish the same goal without the attending harm. Should a manufacturer be absolved of the responsibility of reformulating the product, or at the least to warn against a danger³⁸ because the scientific data has

37. Senate Bill § 5(b)(1) (emphasis added); *see also* Senate Bill § 6(b)(1) (failure to warn). *Cf.* House Bill § 5(d)(2) ("the manufacturer knew or in the exercise of reasonable care should have discovered such [danger or safety] information"). Though the author takes issue with the Senate Bill's "sound support" standard, the bill at least addresses the issue of a negligence standard with respect to a manufacturer's knowledge and appreciation of the risk. While House Bill § 5(c) is to be commended on its clarity regarding the role of alternative design as an element of plaintiff's case (*cf.* Senate Bill § 5(b)(2), (d); *see infra* note 58), the bill is silent on the matter of the manufacturer's negligence in failing to appreciate the risk. A literal reading of House Bill § 5(c) will render a manufacturer liable as long as plaintiff demonstrates that a better design which would have prevented plaintiff's injury was available at the time the manufacturer produced the products, *even though a reasonable manufacturer may have been ignorant of the potential harm at that time*. It is doubtful that this was the intent of the drafters of the House Bill; in any event, it is inconsistent with the Bill's standards for failure to warn in § 5(d)(2), which require a claimant to prove that a manufacturer, in the exercise of reasonable care, would have discovered the relevant danger or safety information.

38. *See infra* text accompanying notes 45-46, 72-73.

as yet not met the "sound support" standard? And what if the gravity of the potential injury imposed by this not yet scientifically established harm is so devastating that a reasonable manufacturer would take precautions against it? Should the manufacturer be absolved of responsibility from considering the risk because the risk *qua* risk is not yet scientifically supportable?

This section appears to be nothing more than the mirror image of the patent danger rule. Under the patent danger rule, a manufacturer was absolved from redesigning his product merely because the danger was open and obvious.³⁹ The defendant under this rule was absolved from balancing risk and utility in deciding whether greater safety was called for in design.⁴⁰ This rule has met with the overwhelming disapproval of the courts⁴¹ and is not embodied either in S. 2631 or H.R. 5214.⁴² Why, then, create a rule which absolves a manufacturer from acting reasonably in obtaining information which would lead a reasonable person to a risk-reduction decision?

Another troubling aspect of this section is that it appears to set different standards for a defendant who has knowledge of a risk and one who does not. The defendant who has knowledge of the danger might presumably have a duty to make the product safer even though the risk does not yet have "sound support" in the technical community. It is only the "should have known" duty which is affected by the "sound support" rule. Does this mean that a court is automatically to impose liability upon a manufacturer if he knew of a remote risk that has not yet been established in the scientific community? If so, the manufacturer is being deprived of a risk-utility defense when it should clearly be permitted. More serious, however, is the utter absurdity of creating a more harsh test for a defendant with knowledge of a risk than one who claims not to have known of the risk. It puts a premium on ignorance and penalizes a sophisticated manufacturer with good information sources. Hear no evil, see

39. *Bemis Co., Inc. v. Rubush*, 427 N.E.2d 1058; *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950); F. HARPER & F. JAMES, *supra* note 36, at § 28.5; Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARG. L. REV. 297, 309 (1977).

40. *Darling, The Patent Danger Rule: An Analysis and A Survey of its Vitality*, 29 MERCER L. REV. 583, 588-89 (1978).

41. *Campo* was reversed in *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); *accord* *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); *Palmer v. Massey-Ferguson*, 3 Wash. App. 508, 476 P.2d 713 (1970); *Mitchell v. Fruehauf Corp.*, 568 F.2d 1139 (5th Cir. 1978); *Auburn Machine Works Co. v. Jones*, 366 So. 2d 1167 (Fla. 1979); *Ulath v. City Tank Corp.*, 376 Mass. 874, 384 N.E.2d 1188 (1978). See also *Marshall, An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065 (1973); Twerski, *Old Wine in a New Flask—Restructuring Assumption of the Risk for the Products Liability Era*, 60 IOWA L. REV. 1 (1974).

42. See *supra* note 10.

no evil, is certainly a strange principle to embody in national products legislation.

The imposition of this dual standard is not only theoretically unsound, but will also create extraordinary difficulties at the trial level. The "knew or should have known" standard of tort law is not a subjective standard.⁴³ The words are generally uttered in one gulp and are intended to convey to the jury that a reasonable defendant should have had the information. What the state of anyone's knowledge is at any given moment is very difficult to establish. This is especially true in cases dealing with risk information or technological data. Thus, in tort cases where the issue of information is contested, the plaintiff presents evidence demonstrating the availability of the knowledge or its potential accessibility to the defendant. The plaintiff may introduce evidence that traces of the information were directly available to the defendant. This aids in establishing the proposition that defendant should have known about the risk. But, unless there is an attempt to make out an intentional tort or recklessness, there is no necessity to prove that the defendant subjectively had the risk information. By creating a dual standard, a premium is now placed on establishing subjective knowledge of the risk on the part of the defendant-manufacturer, since a defendant can be held liable for less reliable information (i.e., knowledge without sound support in the technical community) if he was subjectively aware of it.⁴⁴ This will complicate litigation enormously and become a fertile source for mistaken jury instructions and a breeding ground for appellate reversals on adequacy of evidence.

Finally, it should be understood that the "sound support" rule is not self-executing. In every case where the issue of risk data is at issue, the courts will be called upon to determine how much support is "sound support." Not only will this spawn countless appeals and conflicting opinions in state courts, it is bound to do so in a way which will allow for no rational resolution of the question. When one asks the question whether risk data has sound support in the scientific, technical or medical community, a multitude of answers could be forthcoming. Data could be extremely interesting and "sound" when considered by a researcher for the purpose of whether to run additional scientific tests, but not "sound" enough to be utilized for risk-reduction purposes.⁴⁵ The opposite may also be true. Risk-infor-

43. W. PROSSER, *THE LAW OF TORTS* § 31 (4th ed. 1971); but see TERRY, *LEADING PRINCIPLES OF ANGLO-AMERICAN LAW* § 200 (1884).

44. For an enlightening discussion of the negligible role subjective intent plays in tort litigation, see Henderson, *Process Constraints in Torts*, 67 CORNELL L. REV. 901 (1982).

45. See generally Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 386

mation, however fragmented, may be significant when considered in the light of millions of possible exposures to consumers, and yet be so untrustworthy as not to be given the dignity of scientific fact. Thus, the "sound support" rule fails because it assumes that technology has standards for evaluating risks.⁴⁶ But, that is the task that the law must face. Law cannot turn to technology to resolve legal questions.

It should be noted that the "sound support" rule is brought into play by S. 2631 not only for the design defect cases, but for failure to warn cases as well.⁴⁷ This means that a manufacturer would bear no responsibility to discover information regarding risks which have not been scientifically well established, even for the purpose of warning. To state the proposition is to recognize its illogicalness. No one should be given that kind of *carte blanche*.

Having leveled the critique, one must acknowledge that the suggested legislation seeks to address a very real problem. There is genuine concern that courts are permitting cases to go to juries based on very thin evidence of risk. The problem of judicial control of jury discretion in design and failure to warn cases is a serious one that will be addressed later in this paper.⁴⁸ However grievous the

(1970); Small, *Gaffing at the Thing Called Cause*, 31 TEX. L. REV. 630 (1953).

46. It is evident that Senate Bill § 5(b)(1) does not utilize a "reasonableness" (risk-utility) test in determining whether the manufacturer should have discovered the danger. The sound support standard is thus not subject to any legal test. It is free standing. Sec. 5(b) defines a product as unreasonably dangerous in design if "a reasonably prudent manufacturer. . . would not have used the design." The "reasonableness" requirement for discovery of risk-data is conspicuously absent from Sec. 5(b)(1). If the authors had intended its adoption they would have inserted it in the formulation set forth one sentence later.

The requirement of Sec. 5(b)(2) that "a means to eliminate the danger that caused the harm was within practical technological feasibility" does not mean that risk-utility balancing has been reintroduced as a modifier of Sec. 5(b)(1). There are several reasons that lead to this conclusion. First, Sec. 5(b)(1) must be established without reference to "practical technological feasibility" because it is connected with the conjunctive "and" to Sec. 5(b)(2). One does not proceed to the Sec. 5(b)(2) requirement unless Sec. 5(b)(1) has been met. Second, even the Sec. 5(b)(2) "practical technological feasibility" standard does not adopt the "reasonableness" test. Sec. 2(8) which defines "practical technological feasibility" contains many of the considerations standard to risk-utility analysis but precludes a plaintiff from establishing that the reason that a design alternative was not available to the industry was due to the defendant's negligence in failing to adequately undertake the work necessary to bring about the technology at an earlier time. This section comes perilously close to establishing custom as an absolute defense. On this point the UPLA provides a counterweight to the "practical technological feasibility" requirement by taking the position that "custom" is only evidence of non-negligence but is not binding. UPLA, *supra* note 1, §§ 107(C), (D) at 62,728.

47. Senate Bill § 6(b)(1).

48. See *infra* text accompanying notes 57-62, 67-70.

problem, the solution proposed in S. 2631 simply will not do. It is a substantive and administrative nightmare.

3. *The Unavoidably Dangerous Product*

Section 5(c) provides a special exemption for the unavoidably dangerous product:

A product is not unreasonably dangerous in design if the harm was caused by an unavoidably dangerous aspect of a product. As used in this paragraph, an "unavoidably dangerous aspect" means that aspect of a product which could not, in light of knowledge which had sound support in the scientific, technical, or medical community at the time of manufacture, have been eliminated without seriously impairing the effectiveness with which the product performs its intended function or the desirability, economic and otherwise, of the product to the person who uses or consumes it.⁴⁹

This section is designed to protect the manufacturer from liability for technological changes which could not have been accomplished at the time of manufacture. It is the analogue to the "sound support" rule for risk data discussed in the previous section. Thus, it is vulnerable to much of the criticism set forth above. However, this section, unlike its sister provision, does have a point of legal reference. It does not speak about the danger without balancing it against other factors in the negligence formula. It is only "that aspect of a product which could not, in light of knowledge which had sound support in the scientific, technical or medical community at the time of manufacture, have been eliminated *without seriously impairing the effectiveness with which the product performs its intended function or the desirability, economic and otherwise, of the product*"^{49a}

To appreciate the difficulties with this section, one must begin with the basic standard of liability set forth in section 5(b), which provides that a manufacturer is only liable for defective design if at the time of manufacture a reasonably prudent manufacturer would not have used that design. The obvious next question is, what does the "unavoidably dangerous" section add to the liability standard as already articulated? There are several possible answers. The first is that it is not intended to add anything at all, but merely to emphasize the obvious: negligence is the operative standard and "we really mean it." A good bit of S. 2631 contains that sort of repetition designed to get through to the supposedly thick skulls of the courts

49. Senate Bill § 5(c).

49a. *Id.*

that they are to take the negligence standard seriously.⁵⁰ If that were the sole interpretive possibility, the section would be comparatively harmless. However, courts are not likely to read a statute in that manner. They are likely to come across the language which enjoins a court from finding a product defective if the dangerous aspect of the product could not have been eliminated without "seriously impairing" its effectiveness, or its otherwise desirable features. This, then, amounts to something less than a negligence test. One is not required to utilize even well founded technology if to do so would seriously impair the usefulness of the product. Since this is something other than the "reasonableness" standard, it must mean that the product is exempted from liability, even if the usefulness of the product is such that it would otherwise not pass the negligence test, or that other more desirable substitutes are available. The product is isolated for special examination and is held to a special standard, not to be compared or judged against other products in the field. What possible justification can there be for this exemption?

If there is any doubt that this section establishes a lesser standard of liability, attention should be directed to Section 2(8), the definitional section of S. 2631, which defines the term "practical technological feasibility" to mean: "the technical and scientific knowledge relating to the safety of a product which, at the time of manufacture of a product, was developed, available and capable of use or implementation in the manufacture of a product, and economically feasible for use by a manufacturer."⁵¹ In section 5(d), which establishes the rules for introducing evidence of alternative design choices, there is a requirement that all such alternatives meet the test of practical technological feasibility.⁵² Section 5(c) clearly establishes a test for elimination of danger through design alternatives that is less stringent than that set forth in the "practical technological feasibility" definition.

There is yet another practical question which these sections leave unanswered. Which products are to be subjected to the lesser "unavoidably dangerous" standard set forth in section 5(c), and which will have to meet the "practical technological feasibility" standard of 5(d)? The answer, of course, is that "unavoidably dangerous" products will have to meet the 5(c) standard, and regular products will meet the 5(d) standard. However, that is bound to lead us to a

50. For example, Senate Bill § 5(b) establishes liability only if at the time of manufacture a reasonable prudent manufacturer would not have utilized the chosen design. This is followed by Sec. 5(b)(1) which establishes the "sound support" rule for knowledge and Sec. 5(b)(2) which establishes the "practical technological feasibility" rule. Sec. 5(d)(2) then expects the self-same requirements when discussing the admissibility of evidence for alternative designs.

51. Senate Bill § 2(8).

52. Senate Bill §§ 5(b)(2), 5(d)(2)(A).

perfectly circular reasoning unless there is a preconceived definition of "unavoidably dangerous" products. Since the Senate Bill defines the category in terms of the liability test and not in terms of a preconceived definition, there is no way to break the circle.

Finally, if one were inclined to create a definition of unavoidable danger, the endeavor would be a fruitless one. Admittedly there are dangers that are unavoidable, such as the risk of an allergic reaction to penicillin, but, there is no need to create a special category to absolve penicillin from liability. Given the reasonableness standard, penicillin is simply not unreasonably dangerous.⁵³ Its benefits far outweigh its known risks. It may be necessary from time to time to warn consumers about unavoidable risks, but section 5(c) does not address the failure to warn question, only design defect. Section 6 of S. 2631, which deals with failure to warn, does not, nor could it in good conscience, take the position that there is no duty to inform consumers about unavoidably dangerous aspects of a product. Thus, the so-called "unavoidably dangerous" product is either reasonably designed or one whose danger has been adequately warned against. Only wholesale confusion can be wrought by embodying the improvident Restatement (Second) of Torts section 402A(k) into national legislation.⁵⁴ It is either wrong or unnecessary. The greater likelihood is that it will not be treated as surplusage and will thus involve the courts in trying to place certain products in either one or the other category. Since the Senate Bill offers no definition, and since no logical one appears available, the courts will be off on a fool's errand. This section should be excised from the bill.

53. RESTATEMENT (SECOND) OF TORTS § 402(k) states that:

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidably high degree of risk which they involve. Such a product, properly prepared and accompanied by proper directions and warning is not defective, nor is it *unreasonably dangerous*. *Id.* (emphasis in original).

The author has always been puzzled as to why the rabies vaccine case is used as an example of an "unavoidably unsafe" product when the Restatement makes it clear that the rabies vaccine is simply not "unreasonably dangerous."

54. *Id.* The RESTATEMENT further provides that in the case of new and experimental drugs the seller is not to be held to strict liability if the product was "properly prepared and marketed . . . merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk." *Id.* at § 402A comment k.

This section is very troubling. The problem with new and experimental drugs is that they are attended with "unknown" rather than "known" risks. How then can the

4. *The Standards for Alternative Designs*

The negligence standard normally requires that a plaintiff suggest alternative safety features which would have prevented the plaintiff's injury. Both S. 2631 and H.R. 5214 address the standards plaintiffs must meet in establishing the viability of the alternative design. Section 5(d) of S. 2631 provides:

If an alternative design is offered as evidence that a product was unreasonably dangerous in design, a product is not unreasonably dangerous in design unless the claimant establishes that, at the time of the manufacture of the product—

(1) the manufacturer knew or, based on sound support in the scientific, technical, or medical community for the existence of the alternative design, should have known about the alternative design; and

(2) the alternative design would have—

(A) utilized only science and technology for which there was sound, scientific, technical, or medical support and which was within practical and technological feasibility;

(B) provided better safety with regard to the particular hazard which caused the claimant's harm and equivalent or better overall safety than the chosen design. *The overall safety of the alternative design is better than the chosen design if the hazards it eliminates are greater than any new hazards it creates for any persons and for any uses;*

(C) been *desirable*, functionally, economically, and otherwise, to the person who uses or consumes it.⁵⁷

These are very complex sections that will require considerable interpretation to give meaning to heretofore undefined terms.⁵⁸ Be-

drug have been properly marketed with advertance to the "known" risk? If the risk is known and warned against, then the product is not unreasonably dangerous. If it is not known, it can hardly be marketed so as to warn against the unknown risk. If the RESTATEMENT wished to exempt drugs from strict liability it should have said that all defective design and failure to warn drug cases are to be subject to the negligence standard.

55. Senate Bill § 5(d).

56. House Bill § 5(c).

57. Senate Bill § 5(d) (emphasis added).

58. There is considerable confusion created by two sections that appear to speak to the same issue, but have language that differ substantially. Senate Bill § 5(b)(2) requires that for a product to be unreasonably dangerous in design "a means to eliminate the danger that caused the harm was within practical technological feasibility." This would mean the plaintiff must establish an alternative design defect case. Yet Sec. 5(d) begins by stating "[i]f an alternative design is offered in evidence. . . ." If Sec.

fore subjecting them to scrutiny, it behooves us to understand why they have found their way into the Senate Bill. Why were the drafters not simply satisfied with a basic negligence definition based on risk-utility principles in design defect litigation, which clearly limited responsibility to risk-data and technology available at the time of manufacture? Arguably, the drafters were seeking to identify standards for risk-utility litigation which would permit courts to direct verdicts in close-call design defect cases where the evidence on defect is, at the very best, marginal.⁵⁹ As noted earlier, there is very real concern that cases are going to juries based on very thin evidence of defect. The policy implications of such cases are enormous. In design defect cases, defendant manufacturers are exposed to liability for every unit of a product which is in the market.⁶⁰ Courts should treat these cases with great care. The rule of thumb in run of the mill negligence litigation is when in doubt "send it to the jury." A directed verdict in a negligence case is a rare phenomenon. The societal implications of allowing the occasional slip and fall or fender-bender cases to go to a jury on thin evidence is not significant. But, to permit close-call design defect cases based on thin evidence to routinely go to juries could be disastrous to a sophisticated business community.⁶¹ This is especially true if design safety review committees, which evaluate in-house safety standards, document their decisionmaking process. Evidence of their evaluative process, which demonstrates close-call decisionmaking, would damn the manufacturer in the eyes of a jury.⁶² Their only protection lies with a judiciary that is prepared to direct verdicts in cases where the evidence is too weak to legitimately sustain a *prima facie* case.

5(b)(2) is to be followed, there is no "if" about whether it will or will not be offered into evidence. A choice between the two approaches must be made.

It appears somewhat strange that Sec. 5(b)(2), which sets the liability standard for alternative design, is less demanding than Sec. 5(d), the evidentiary standard. For example, Sec. 5(b)(2) speaks only to "practical technological feasibility" whereas Sec. 5(d)(2)(A) and (B) contains an entire litany as to minimum standards for design defect.

There is a very real question as to whether Sec. 5(d)(2)(A), which provides that a preferred alternative design would have "utilized only science and technology for which there was sound scientific, technical or medical support and which was within practical and technological feasibility," is the equivalent of Sec. 2(8). Since it utilizes its own definition for feasibility and does not use the statutory term "practical technological feasibility," it may not trigger the Sec. 2(8) standard. The term "practical and technological feasibility" would seem to stand on its own and may be taken *not* to refer to Sec. 2(8). The difference between the requirements of Sec. 5(d)(2) and Sec. 2(8) are marked. Sec. 5(d)(2) does not require, as does Sec. 2(8), that the alternative be "developed, available and capable of use or implementation in the manufacture of a product."

59. See generally, Twerski, Weinstein, Donaher & Piehler, *supra* note 29, at 374-80 and Twerski, Weinstein, Donaher, & Piehler, *In Defense of Process*, 56 N.Y.U. L. REV. 616, 617 (1980).

60. See UPLA *supra* note 1, § 104 Analysis at 62,722.

61. Twerski, *Seizing the Middle Ground*, *supra* note 12.

62. Henderson, *supra* note 30, at 606-11; Owen, *supra* note 22, at 15.

The solution to this problem, proposed by S. 2631 and H.R. 5214, is to create substantive standards to define the kinds of cases that may legitimately go to a jury. Although the goals that these sections seek to foster are admirable, it is simply not possible to write limiting standards for risk-utility litigation without affecting the liability standard in an undesirable fashion. Consider, for example, the requirement that an alternative design provide:

better safety with regard to the particular hazard which caused the claimant's harm and equivalent or better overall safety than the chosen design. The overall safety of the alternative design is better than the chosen design if the hazards it eliminates are greater than any new hazards it creates for any person and for any uses.⁶³

Note that the initial standard suggests that the alternative design provide "equivalent or better overall safety." The next sentence goes on to define "better overall safety." The term "equivalent safety" is never explained. Since the test for admissibility is fulfilled by the lower "equivalence" standard, one would have expected that it would be defined. Perhaps this is easily explained. Since, if better safety is provided for the particular hazard that caused the harm and all other safety aspects of the product remain constant, then the alternative design is clearly superior. However, as the next sentence demonstrates, that is not the only possibility. If a product creates Risks A, B & C, an alternative safety feature may eliminate risk A entirely, increase the probable risk of B, but reduce the severity of risk C. In a risk-utility calculus, the over-all *qualitative* risk of harm of the suggested alternative might be equivalent even though new risks are brought into play.

Turning to the definition of "better overall safety," we find that an alternative is better if "the hazards it eliminates are greater than any new hazard it creates for any person and for any uses." The heart of risk-utility analysis is a balance of the probability of harm, gravity of harm and burden of precaution against the harm.⁶⁴ A suggested design alternative might eliminate one very significant hazard of a serious nature but increase the probability of several lesser hazards. The trade-offs might still clearly militate in favor of the design change but not meet the statutory standard. There is no assurance that the word "greater" will be defined in a qualitative (risk-utility) sense rather than in a quantitative (absolute risk) sense. In fact, the language which follows the standard suggests a quan-

63. Senate Bill § 5(d)(2)(B).

64. RESTATEMENT (SECOND) OF TORTS §§ 292-94; *Micallef v. The Miehle Co.*, 39 N.Y.2d 376, 384 N.Y.S.2d 115, 348 N.E.2d 571; *Wilson v. Piper Aircraft*, 282 Or. 61, 577 P.2d 1322 (1978); *Suter v. San Angelo Foundry & Machine Co.*, 81 N. J. 150, 406 A.2d 140 (1979).

titative reading since it speaks of new hazards created "for any persons and for any uses." This is a strange requirement if the intent of the drafters was to balance risk and gravity, since it is certainly possible that for improbable users and uses the risk would be greater, but the remoteness of such events would lead one to discount them in evaluating the overall good of the alternative design.⁶⁵

Finally, the requirement that the alternative design be "desirable functionally, economically and otherwise, to the person who uses or consumes it" creates real problems in administering the risk-utility standard. If the statutory standard requires that the alternative design be just "as desirable" as the chosen design and that there would be no sacrifice of either function or economy to accomplish safety, this would cripple legitimate and well-founded design defect litigation. It is a rare safety device that imposes no costs. However, if that is not the intent, then we are left with an unstructured requirement that the product with the alternative safety device be "desirable." This requirement is at the same time too broad and too narrow. Without risk-utility balancing, how is one to tell whether the "desirability" criterion has been met?⁶⁶ At some

65. If the language of this section were to more closely approximate the risk aspect of risk-utility analysis it should read as follows: "The overall safety of the alternative design is better than the chosen design if the frequency and severity of all the hazards it eliminates are greater than the frequency and severity of all new hazards it creates." This proffered formulation, still falls short of the mark. Frequency and severity of injury are to be factored together to determine risk potential. It is probably for this reason that the RESTATEMENT (SECOND) OF TORTS § 293 lists factors to be considered together rather than attempting to formulate a rule since risk is more accurately expressed as the product of risk and gravity.

66. In risk-utility parlance, the "desirability" of a product goes to its utility. Thus, in weighing the probability and gravity of harm it must be balanced against its desirability. The question is not whether a particular product is desirable on an absolute scale, but rather whether some desirable features of the product are worth trading off against safety. Again, as noted earlier, the problem arises because Sec. 5(d)(2)(A), (B) and (C) are connected with the conjunction "and." This means that each item must be separately established in order to make out a *prima facie* case. See *supra* note 46.

The House Bill attempts to create more definitive standards by isolating each of the factors for separate attention. House Bill §§ 5(c)(3)(A), (B) and (C) provide:

An alternative design shall be considered better than the manufacturer's chosen design if the alternative design—

- A . was significantly safer than the chosen design. The alternative design was safer than the chosen design if the alternative design would have provided both—
 - (i) better safety than that of the chosen design as to the particular hazard which allegedly caused the claimant's harm; and
 - (ii) better overall safety than that of the chosen design. The overall safety of the alternative design is better if the hazards it eliminates are greater than any new hazards it creates for any person and for any uses;
- B . was not more expensive than the chosen design, unless the added safety

level even products with severely reduced performance capability are desirable. Surely that is not the standard that this bill seeks to accomplish. We are thus forced to revert to a desirability standard equivalent to the chosen design, or one that is not defined at all and left to the pure discretion of the trial judge. The former, as noted, would destroy design litigation; the latter is unintelligible.

It is not the purpose of this critique to suggest that the drafters have acted in bad faith or were tilting with windmills. It is clear that they were attempting to place sensible limitations on risk-utility analysis and provide guidance for courts so that courts could more effectively administer the standard. But, ultimately the attempt to do so by creating substantive limitations must fail. Risk-utility balancing requires that a multitude of factors be considered and weighed. One cannot separate out individual factors and remove them from the balancing process without impairing the entire endeavor.

What then is the answer? Are we to be left to unchecked jury discretion in all cases? There are rational alternatives worthy of consideration. In an article, entitled *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*,⁶⁷ it is suggested that directed verdict practice could be enhanced and encouraged by focusing on a broad range of policy considerations that speak to the wisdom of judicial intervention in the complex question of product

benefits of the alternative design were significantly greater than the added expense;

- C. was not less useful or desirable than the chosen design, unless the added safety benefits of the alternative design were significantly greater than the losses of usefulness or desirability;

By providing that the alternative design must be significantly safer and that its added safety benefits be significantly greater than the loss of usefulness or desirability of the chosen design, the bill establishes an enormously high barrier to recover. It is possible that an alternative design would be *significantly safer* than the chosen design, and that the added safety benefits would be *significantly greater* than the loss of usefulness of the chosen design, but that the added cost would be greater, *but not significantly greater*, than the added safety benefits. In such a case, plaintiff would not recover because he has not made out the *significantly greater* requirement for each of the three elements. Furthermore, to weigh some but not all of the risk-utility factors in Sec. 5(c)(3)(A), (B) and (C) skews the balance. Thus, for example, in Sec. 5(c)(3)(B), safety and cost are weighed, but not utility.

It is interesting to note that the "significantly greater" language has its origin in the precursor to the Senate Bill. H.R. 5626 § 5(b)(3), 96th Cong., 1st Sess., 125 CONG. REC. 9332 (1979). H.R. 5626 reflected risk-utility analysis more accurately, and provided that when all the factors are considered together, the safety factor significantly outweighs the increased cost and decreased utility. For a discussion and critique of H.R. 5626 § 5(b)(3) standard see Twerski, Weinstein, Donaher & Piehler, *In Defense of Process*, *supra* note 59, at 617.

67. Twerski, *Seizing the Middle Ground*, *supra* note 12.

design. These factors when considered together will often lead to the conclusion that product redesign by the judiciary is extremely unwise. A statutory framework that would call judicial attention to these policies could be helpful in curbing improvident design defect cases.⁶⁸

Another approach might be to address the evidentiary standard rather than the liability standard by requiring that courts find that the risk-utility case is well established. There has been considerable reluctance to establish the "clear and convincing standard" which is as demanding as the minimum standard for jury submission in design defect cases.⁶⁹ It should be remembered that what is being sought is not a mere verbalization, but a tool to place additional control in the hands of trial and appellate judges to prevent ill-founded cases from going to the jury. Perhaps the formulation of a new evidentiary standard, "clear preponderance of the evidence," which places the burden halfway between the "preponderance test" and the fraud "clear and convincing" standard, strikes the correct balance. It would send a message to the courts that design cases must be founded on solid evidence before they are given over to the vagaries of jury discretion.

The following formulation for a statute was suggested half in jest in an earlier writing.

We have strong suspicions that some awfully weak product liability cases are being sustained by trial and appellate courts. Given the serious dislocation to the industrial community and the skyrocketing effect on product costs, we believe that the time has come to assure ourselves that only the clearest kinds of design defect and failure to warn cases should be sustained. This Act empowers trial and appellate judges to do what they should have been doing in the first

68. A listing of such factors is not inappropriate for legislation and may provide guidance to the courts. See e.g., UPLA, *supra* note 1, §§ 104(B)(2)(a)-(e) at 62,721; ARK. STAT. ANN. § 34-2805 (1979).

69. Sec. 106 and 107 of the UPLL provided for a presumption of non-defectiveness when a product conformed to the "state of the art" or conformed to legislative or administrative standards. These presumptions could be rebutted by the claimant by "clear and convincing evidence that the product was defective." UPLL, *supra* note 28, § 106 at 2,998-2,999. The UPLA, which was finally promulgated by the U.S. Dept. of Commerce, backed away from the "clear and convincing" test in both areas. With regard to state of art, Sec. 106 of the UPLL was replaced by Sec. 107, which places the burden on the defendant to establish that the product met "practical technological feasibility." UPLA, *supra* note 1, § 107 at 62,728. Sec. 107 of the UPLL was replaced by Sec. 108(A), which permits the claimant to rebut the presumption of non-defectiveness by "a preponderance of the evidence." *Id.* § 108(A) at 62,730. It would appear that this was in response to arguments of consumer groups that a "clear and convincing standard" was much too onerous.

place. Verdicts should be directed unless you are convinced that a bona fide case of defect has been established.⁷⁰

The language is inelegant and not appropriate for statutory enactment, but it does express the sentiments of those disenchanted with the present situation accurately. It should be possible to draft language that expresses the sense of Congress without creating a comprehensive legislative scheme which imposes artificial restraints and limitations on the risk-utility balancing process.

5. *Failure to Warn*

The failure to warn sections include rules dealing with standards for warnings, cause-in-fact and intervening cause. The focus in this section will be on the substantive duty to warn. Discussion of the causation aspects will, for the main, be left for another section of this paper.

Section 6(b) of S. 2631 provides:

A product is unreasonably dangerous for lack of necessary warnings or instructions if the claimant establishes by a preponderance of the evidence that at the time the product was sold—

(1) the manufacturer knew or, based on "sound support" in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about *the* danger which allegedly caused the claimant's harm;

(2) the manufacturer failed to provide the warnings or instructions that a reasonably prudent manufacturer in the same or similar circumstances would have provided with respect to *the danger* which caused the harm alleged by the claimant, given the likelihood that the product would cause harm of the type alleged by the claimant and *given the seriousness of that harm*;

(3) the manufacturer failed to provide to the claimant or to another person in accordance with subsection (d)(1) such warnings or instructions which the claimant alleges would have been adequate⁷¹

In an earlier discussion I indicated that the "sound support" standard embodied in Section 6(b) was improper for the design defect standard⁷² and *a fortiori*—wrong for the failure to warn stan-

70. Twerski & Weinstein, A Critique of the UPLL, *supra* note 12, at 233.

71. Senate Bill § 6(b) (emphasis added).

72. See *supra* text accompanying notes 37-48.

dard. The discussion need not be repeated at this point. There is a need, however, to address the requirements set forth in Sections 6(b)(1) and (2) that the manufacturer should have known about "*the danger* which allegedly caused the claimant's harm" and that the manufacturer failed to provide warnings with "respect to *the danger* which caused the harm alleged by the claimant." These provisions could absolve manufacturers from liability for conduct which fair-minded persons would agree should not be immunized. Consider a drug or chemical manufacturer that fails to warn that side effects of cancer of the liver have been reported in conjunction with the use of the product. Later there is evidence that not only is cancer of the liver implicated with product use but testicular cancer as well. Should a manufacturer that has failed to warn about side effects which implicated cancer be absolved from liability because the specific form of cancer, which the plaintiff suffered was not discovered or sufficiently established to require warning?⁷³ This is especially unfair when the function of the warning was to permit the plaintiff an "informed choice" as to whether to use the product.⁷⁴

There are other substantive provisions which appear equally unfair. Section 6(d)(2) of S.2631 provides:

A product is not unreasonably dangerous for lack of warnings or instructions regarding—

(A) dangers that are obvious. As used in this clause, "dangers that are obvious" are those of which *a reasonably prudent product user or a person* identified in subsection (d)(1), if applicable, would have been aware without a warning or instruction and dangers which were a matter of common knowledge to persons in the same or similar position as the claimant;

(B) the consequences of product misuse, as defined in section 10(a)(2), or use contrary to warnings or instructions available to the user or to a person identified in subsection (d)(1), if applicable; or

(C) alterations or modifications, as defined in section 10(b)(2), of the product which do not constitute reasonably an-

73. This issue would usually be subsumed in a proximate cause analysis. The general rule is that a defendant is not absolved from liability if the plaintiff was foreseeable and the general category of harm was foreseeable and the only unforeseeable element is the manner in which the harm was brought about. PROSSER, *supra* note 43.

74. See *infra* text accompanying notes 93-96. See also Twerski, *supra* note 41, at 517-46; Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Product Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 517-521 (1976). Senate Bill § 6(b)(4) seems to recognize the "informed consent" type of warning by noting that a warning may lead the consumer to decline to use the product.

ticipated conduct on the part of the product user.⁷⁵

Section 6(2)(A) absolves a manufacturer for failure to warn of obvious dangers. Although, in general, courts have absolved manufacturers from liability in these kinds of cases,⁷⁶ it would be unwise to freeze this concept into statutory language. For example, the manufacturer of iodine of some other poisonous household chemical would be freed from the obligation of placing a "poison" label on the bottle since the danger is a matter of "common knowledge to persons in the same or similar position" of the claimant. The function of a warning is often to bring to the claimant's attention the most obvious of dangers so that the inadvertent mistake of reaching for the wrong bottle does not take place. A blanket provision immunizing defendants for failure to warn for obvious danger paints with too broad a brush.

Section 6(2)(B) and (C) must be read with section 10(a)(2) to understand their import. Section 10(a)(2) of S. 2631 provides:

(2) For purposes of this Act, misuse shall be considered to occur when a product is used for a purpose or in a manner which is not consistent with the warnings or instructions available to the user, or which is not consistent with reasonable practice of users of the product, or when a product user fails adequately to train its employee in the safe use of the product, or otherwise provide for the safe use of the product, and the lack of training or the failure otherwise to provide for the safe use of the product was a cause of the claimant's harm.⁷⁷

The meaning of these sections is not clear. If the warning was adequate in the first place then the product is not unreasonably dangerous. The claimant will simply not have met requirements as set forth in Section 6(b) for a prima facie case. One must then assume that for the purposes of Section 6(2)(B) we are dealing with an inadequate warning or instruction, i.e. one that failed to warn with sufficient clarity as to the danger involved. One now turns to section 10(a)(2) and discovers that if a product is misused in that it was used in a manner not consistent with presumably inadequate warnings, then liability is totally barred. This is so because section 10(a)(2) is to be related back to Section 6 which negates recovery entirely, and not to Section 10(a)(1) which reduces the claimant's recovery to the extent which the misuse was a cause of the harm.

75. Senate Bill § 6(d)(2). The analogue in the House Bill is §§ 5(c)(4)(A), (B), 5(d)(3)(A).

76. See, e.g., *Jamieson v. Woodward & Lothrop*, 247 F.2d 23 (D.C. Cir.) cert. denied, 355 U.S. 855 (1957); *Bojorquez v. House of Toys, Inc.*, 62 Cal. App. 3d 930, 133 Cal. Rptr. 483 (1976); *Fanning v. LeMay*, 38 Ill. 2d 209, 230, N.E.2d 182 (1967).

77. Senate Bill § 10(a)(2).

There is another and perhaps more plausible interpretation to be given to Section 6(2)(B) and that is that the statute seeks to absolve the manufacturer from warning with regard to product misuse. With regard to first part of the definition set forth Section 10(a)(2), the statute sets no standards at all since it provides that if its use was not consistent with warning or instructions available to the user, that liability will not attach. But, the very question before us is whether the warnings with regard to misuse should have been available. At the very best, this part of the statute is circular when relating it back to Section 6(2)(B). The second part of Section 10(a)(2), which defines misuse as one which "is not consistent with reasonable practice of users of the product," can be related back to section 6 in a way which does not foster illogic. This time it will foster injustice. This section would mandate that a manufacturer has no responsibility to warn about possible foreseeable misuses—the very kind of misuses which Section 10(a)(1) provides should only reduce, not eliminate, a plaintiff's recovery.

A similar critique must be leveled at the alteration—modification section set forth in Section 10(b)(2):

(2) For purposes of this Act, alteration or modification shall be considered to occur—

(A) when a person other than the manufacturer or product seller changes the design, construction, or formula of the product, or changes or removes warnings, instructions, or safety devices that accompanied or were displayed on the product; or

(B) when a product user fails to observe the routine care and maintenance necessary for a product and that failure was the cause of the claimant's harm.

(3) Ordinary wear and tear of a product shall not be considered to be alteration or modification of a product under this subsection.⁷⁸

To make sense out of these sections one must assume that Section 6(2)(C) means to say that there is no duty to warn against product alteration. Does that mean if inadequate instructions were altered or tampered with, the defendant would be absolved of liability? Continuing the analogy with the misuse section, why is there no duty ever to warn about alterations which do not "constitute reasonably anticipated conduct"? The answer would appear to be that one should not be required to warn about unforeseeable alterations. This proposition is certainly defensible, but the act does not define "reasonably anticipated conduct" in the context of foreseeabil-

78. Senate Bill § 10(b)(2).

ity. One must look to Section 2(13) to discover that "reasonably anticipated conduct" is defined to mean "conduct which would be expected of a reasonably prudent person who is likely to use the product in the same or similar circumstances."⁷⁹ The problem is that alterations are sometimes performed by some persons who cannot be characterized as "reasonably prudent," but whose conduct may be quite foreseeable. Section 6(2)(C) absolves the manufacturer totally from the responsibility of warning against such alterations. It does not merely reduce the manufacturer's contribution to the percentage of his fault as provided in Section 10(b)(1).

The drafters have either not fully understood what they have wrought or they have sought to unfairly limit liability. Again, the complexity of these sections is bound to take a heavy toll on the fair administration of a products liability system. They are certain to cause massive confusion when subjected to the crucible of the trial theatre.

III. EXPERT TESTIMONY

The role of expert testimony in product liability litigation has received considerable attention over the past decade.⁸⁰ Manufacturers have expressed concern that cases are permitted to go to juries based on expert opinion that is marginally credible at the very best.⁸¹ One of the factors which a court should consider in deciding whether to grant a directed verdict is the quality and strength of the expert opinion.⁸² This is especially true in polycentric design defect litigation.⁸³ Expert opinion should not pass muster by the mere say-so of the witness. The court must realize that im-

79. Senate Bill § 2(13).

80. See UPLL, *supra* note 28, § 117 Analysis at 3016-17; Donaher, Piehler, Twerski & Weinstein *The Technological Expert in Products Liability Litigation*, 52 TEX. L. REV. 1303 (1974); Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUG. L. REV. 425 (1974).

81. O'Donnell, *Design Litigation and the State of the Art: Terminology, Practice and Reform*, 11 AKRON L. REV. 627, 628 (1978).

82. Twerski, *Seizing the Middle Ground*, *supra* note 12 at 521.

83. Professor Henderson has identified design defect litigation as polycentric. He explains that:

[P]olycentric problems are many centered problems, in which each point for decision is related to all the others as are the strands of a spider web. If one strand is pulled, a complex pattern of readjustments will occur throughout the entire web. If another strand is pulled the relationship among all the strands will again be readjusted. Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1536 (1973).

Utilizing this definition, Professor Henderson argues that the balancing of cost, safety, esthetics, utility and productivity almost inevitably leads to polycentric decisionmaking. *Id.* at 1539-42.

portant policy is being made in these cases and subject the expert testimony to significant scrutiny.

S. 2631 attempts to resolve this problem, which requires the deft skill of a surgeon, by presenting to the trial judge a tool that has all the sophistication of a butcher's mean axe.

Section 4(b) of S. 2631 provides:

The claimant must introduce sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make the determinations specified in subsection (a). Expert opinion is not considered sufficient evidence to support a proposition of fact unless it is supported or corroborated by sound objective evidence.⁸⁴

One knowledgeable observer has labelled this section "the build your own damn car" rule for design litigation. The characterization, though a bit overdone, is essentially accurate. In order to make out a design defect case, a plaintiff must corroborate the expert's opinion by "sound objective evidence." This means that a plaintiff will be required to demonstrate the workability of an alternative design by demonstrating through actual testing that the alternative will meet practicability standards. The cost of such testing could be prohibitive. It would literally destroy the low budget design defect cases where damages are modest, and will not permit the production of a mock-up alternative model which would be subjected to testing. Indeed, it would discourage even the high budget case since the mock-up and testing might require the expenditure of huge sums of money which could be recouped only if there were a sizable recovery. This requirement is an inexorable one. It will not give way if plaintiff were able to produce five of the most reputable experts in the country to testify that the design was defective. Experts by definition are not "sound objective evidence."⁸⁵

Furthermore, who is to determine how much evidence constitutes "sound objective evidence"? Will it be the mock-up or the mock-up plus testing? Will it require testing over prolonged periods of time so that maintenance, repair and wear are tested under actual use conditions? These and similar questions will plague appellate courts for decades. Interpretations will vary from jurisdiction to jurisdiction. One can be certain that almost every design case that is litigated will face the challenge from the defendant that Section 4(b) has not been met. Discord and lack of uniformity through-

84. Senate Bill § 4(b).

85. Even more astounding is that by requiring "sound objective evidence," plaintiffs will be required to supply the supporting data even if the plaintiff's expert testimony is uncontested.

out the country will be certain to result. Only the lawyers will profit from the countless appeals and retrials that are sue to follow.

It should be noted that the issue of design defect is not the only issue to be affected by Section 4(b). By its terms, it applies to every aspect of the *prima facie* case to which expert testimony is necessary. Thus, the issue of cause-in-fact, to which experts must constantly testify, would be subject to the corroboration rule as well. I am mystified as to how but-for causation will be corroborated by "sound objective evidence." Since this aspect of the case depends on a hypothetical replay of the accident situation absent the design defect but with the new alternative design hypothetically in place,⁸⁶ it would require some replay of the events under accident conditions. Unless volunteer kamikazi pilots are to be located to indulge in such testing, there is unlikely to be sound objective evidence to corroborate this aspect of the case. From time immemorial, causation has depended on the art form of the expert, whose opinion has been subject to the test of cross-examination. The requirement of sound objective evidence to corroborate is wildly unrealistic.

The problem which this section seeks to address is a real one. There is a need to ask courts to subject expert testimony to more rigorous standards and not to permit cases based on the pure musings of an expert to support a jury finding for liability. Perhaps the standard which was suggested earlier, requiring all issues to be supported by "clear preponderance of the evidence," might be helpful. Section 4(b) as written is substantively unfair and administratively unworkable. It should not find its way into national product liability legislation.

IV. THE CAUSE-IN-FACT ISSUE

There are two cause-in-fact issues which surface with considerable regularity in product liability cases. The first asks whether defendant's product was implicated in the injury event.⁸⁷ The second asks whether the defect caused the harm.⁸⁸ The pending legislation seeks to address both of these questions. Given the nature of the legislation, which seeks to enact a comprehensive product liability

86. See generally PROSSER, *supra* note 43, § 103 at 671-72. Courts have acknowledged that cause-in-fact in product liability cases requires that plaintiff establish that but-for the defect, the injury would not have occurred. *Midwestern V.W. Corp. v. Ringley*, 503 S.W.2d 745 (Ky. 1973); *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602 (Tex. 1972); *Dawson v. Chrysler Corp.* 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Self v. General Motors*, 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974).

87. 1 HURSH & BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* § 1.41 at 125 (2d ed. 1974); PROSSER, *supra* note 43, § 103 at 671-72.

88. See *supra* note 86.

bill speaking to every aspect of product liability law, it could hardly avoid the issue of causation. As noted earlier, legislation that would direct itself to clearly perceived national problems could avoid addressing many problems for which no legislative solution is available or desirable.

A. Defendant Identification

Section 4(a)(2) of S. 2631 first addresses the cause issue by requiring that in order for a claimant to establish liability against a manufacturer, the claimant must establish by a preponderance of the evidence that the *individual product* unit, which allegedly caused the harm complained of, was manufactured by the defendant.⁸⁹

This section is designed to overrule *Sindell v. Abbott Laboratories*.⁹⁰ In this now famous case, the California Supreme Court held that manufacturers of DES would be held liable to "market share liability" if plaintiff could not establish which pharmaceutical companies' pill was ingested by the plaintiff's mother many years before. DES is alleged to cause cancer in the reproductive organs of offspring. These injuries did not manifest themselves until many years after the drugs were prescribed and ingested. Later, when the offspring sought to bring suit against the drug manufacturers, they were faced with the practical problem of establishing which drug company had manufactured the DES ingested by the mother. The *Sindell* case has been the subject of extensive comment. It is not surprising that the case has received mixed reviews.⁹¹

89. Senate Bill § 4(a)(2). The analogue in the House Bill is § 5(a)(1)(C). The House bill has no saving provision analogous to Senate Bill § 4(c).

90. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied 449 U.S. 912 (1980).

91. The *Sindell* decision was praised in Note, *Market Share Liability: A New Method of Recovery for D.E.S. Litigants*, 30 CATH. L. REV. 551 (1981); Note, *Market Share Liability: An Answer to the D.E.S. Causation Problem*, 94 HARV. L. REV. 668 (1981); Case Comment, 57 N.D. L. REV. 81 (1981); Comment, *California Expands Tort Liability under the Novel "Market Share" Theory: Sindell v. Abbott Laboratories*, 8 PEPPERDINE L. REV. 1101 (1981). The decision was not approved of in Note, *Beyond Enterprise Liability in D.E.S. Cases—Sindell*, 14 IND. L. REV. 695 (1981); Note, *Market Share Liability for D.E.S. (Diethylstilbestrol) Injury: A New High Water Mark in Tort Law*, 60 NEB. L. REV. 432 (1981); Note, *Market Share Liability—The California Roulette of Causation Eliminating the Identification Requirement*, 11 SETON HALL L. REV. 610 (1981); Note, *Manufacturers' Liability Based on a Market Share Theory: Sindell v. Abbott Laboratories*, 16 TULSA L. J. 286 (1980).

Case law has also been sharply divided. See, e.g., *Hardy v. Johns-Manville*, 509 F. Supp. 1353 (E.D. Tex. 1981) (supporting *Sindell*); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981) (disapproving of *Sindell*); *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978) (disapproving of *Sindell*). See also *Payton v. Abbott Laboratories*, 386 Mass. 540, 437 N.E.2d 171 (1982) (the court may adopt a market-share theory in some situations). Other courts have applied alternate theories in *Sindell*-type situations. See,

The legislative attempt to override *Sindell* is unfortunate. First, it paints with extremely broad strokes and includes in its sweep, cases which the drafters did not consider, and which I am certain no one is prepared to overrule. Second, the provision seeking to save *Sindell* in exceptional circumstances is substantively unfair. Third, the legislation does not begin to address the problems faced by manufacturers in the mass-disaster cases.

1. *The Overreach of the Sindell — Override Provisions*

Section 4(a)(2) requires that a plaintiff establish in every product liability case that the individual product unit which caused the harm was manufactured by the defendant. This provision overrules decisions such as *Vandermark v. Ford Motor Co.*,⁹² *Anderson v. Somberg*⁹³ and other decisions which either substantively or procedurally affect the causation issue.

In *Vandermark v. Ford Motor Co.*⁹⁴ plaintiff was injured when the brakes failed due to a defect in the master cylinder. The defendant, Ford Motor Co., contended that it should not be held liable for negligence in manufacturing the car without proof that the car was defective when it relinquished control over it. Ford contended that the car passed through two authorized Ford dealers before it was delivered to plaintiff. Justice Traynor refused to recognize the Ford defense. He reasoned:

It appears in the present case that Ford delegates the final steps in that process (the manufacturing process) to its authorized dealers that are ready to be driven away by ultimate purchasers but relies on its dealers to make the final inspections, corrections and adjustments necessary to make the cars ready for use. Since Ford, as the manufacturer of the completed product, cannot delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects, it cannot escape liability on the ground that the defect in Vandermark's car may have been caused by something one of the authorized dealers did or failed to do.⁹⁵

Thus, if one were to purchase a car with special equipment which was installed by the dealer, Ford could not escape liability. It is,

e.g., *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W. 2d 20 (1979) (alternative liability); *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982) (concerted action).

92. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

93. 67 N.J. 291, 338 A.2d 1 (1975).

94. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896.

95. *Id.* at _____, 391 P.2d at 171, 37 Cal. Rptr. at 899.

after all, a new Ford that was purchased. The buyer is entitled to the good name of Ford standing behind the product he bought. The nondelegable duty theory is hardly one that should shock the conscience of responsible manufacturers. But under the language of Section 4(a)(2), could the claimant establish that the "individual product unit which allegedly caused the harm" was manufactured by the defendant?"

*Anderson v. Somberg*⁹⁶ would suffer a similar fate. In that case, plaintiff was undergoing surgery to remove an intra-vertebra disc when the tip of a rongeur (a surgical instrument) broke off and fell into his spinal column where it could not be located. He brought action for the resulting injury, joining the surgeon, the hospital, the supplier and the manufacturer of the rongeur. The court held that the jury should be instructed that one of the defendants must be held liable and that it should decide which defendant was responsible. The decision in *Anderson v. Somberg* was a novel one. It demanded that the jury find against the defendant in the chain of distribution or use who was most likely at fault. The requirement of Section 4(a)(2), that the claimant establish by a preponderance of the evidence that "the individual product unit which caused the harm" was manufactured by the defendant, might well bar the *Anderson* result.⁹⁷

2. The Saving Provision

In order to mitigate the harshness of the clause which overrules *Sindell*, the drafters have included Section 4(c), which allows for a *Sindell* action in exceptional circumstances. It states:

If the claimant has introduced sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make all the determinations specified in subsection (a) with the exception of the determination specified in subsection (a)(2), the product liability action nevertheless may be submitted to the trier of fact for a determination of the manufacturer's liability if the claimant proves by *clear and convincing* evidence and if the court finds that—

(1) the claimant made every reasonable effort to establish the identity of the manufacturer of the product

96. 67 N.J. 291, 338 A.2d 1.

97. The *Anderson* result might also be barred by Sec. 4(a)(3) which requires that the claimant establish, by a preponderance of the evidence, that the "unreasonably dangerous aspect of the product was a proximate cause of the harm." Under *Anderson*, plaintiff is not required to establish that the defect was a cause of the harm by a preponderance of the evidence. Plaintiff need only establish that defendant is the most likely at fault defendant. This is a considerably relaxed standard of proof.

unit which allegedly caused the harm complained of;

(2) the claimant has brought the product liability action *against every manufacturer* which could have produced, made, or constructed the product unit which allegedly caused the harm complained of; and

(3) each of the manufacturers against whom the action is brought is in a *better position because of superior knowledge or information* than the claimant to establish which manufacturer actually produced, made or constructed the product unit which allegedly caused the harm complained of.⁹⁸

If this section is meant to allow for a *Sindell* action, it will be a rare case indeed when liability will attach. The section, as drafted, is patently unfair. The provision which requires that "every manufacturer which could have produced, made or constructed the product unit" be named as a defendant will, in most instances, be impossible to meet. The *Sindell* action thus becomes a mirage. Furthermore, since the *Sindell* action is premised on "market share" liability, why does it become more fair when all of the defendants are named? No defendant pays more than his percentage of the market share in any event.⁹⁹

The requirement that the defendant manufacturer be in a "better position because of superior knowledge or information than the claimant to establish which manufacturer actually produced" the product that caused the harm is also nonsensical. By inference, if both parties are equally ignorant, the plaintiff is barred from utilizing the *Sindell* theory. But the very problem in *Sindell* is that after twenty years nobody is in a "better position" to identify the

98. Senate Bill § 4(c) (emphasis added).

99. The *Sindell* opinion required plaintiff to join in the action a "substantial share" of the appropriate market. The court indicated that this may be fulfilled by naming somewhat less than 75% of the market as defendants. The court gave two justifications for this requirement: (1) the injustice of shifting the burden of proof on causation (identification of the manufacturers of the individual product unit) is diminished, as it is likely that one of the named manufacturers actually caused the injury; and (2) apportionment of damages among the defendants will more accurately reflect each defendant's actual market share. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. See Note, *Beyond Enterprise Liability in DES Cases—Sindell*, *supra* note 91, at 720-21, where the notewriter explains this second justification in light of *Sindell's* apparent apportionment of the *entire* damage award among the "substantial share" of the market who are named defendants. The notewriter illustrates this with a hypothetical wherein 80% of the market are named defendants, including X, who owned a 20% market share. The named 80% are liable for 100% of the recovery; X's 20% share of the market renders it liable for 25% of the recovery. If this is the injustice the drafters of the Senate Bill seek to eliminate, they could easily accomplish this by limiting a 20% market share defendant to 20% of the damages in each case, instead of requiring plaintiff to name 100% of the market.

manufacturer who produced the pill which caused the plaintiff's injury. It is hard to sustain a belief that this section was drafted in good faith. If there was opposition to *Sindell*, as there well might be, the drafters should have had the courage of their convictions, rather than draft a section which does not alleviate the problem.

Finally, the section as drafted makes no provision for a cause of action based on conspiracy. Thus, to take the worst case, were a group of ten manufacturers to sit down at a table and conspire to manufacture a dangerous drug and to cover-up test results which indicated problems with the drug, they could hide behind the lack of identification issue when the product subsequently caused harm. The only way to establish a cause of action even in the case of a true conspiracy would be to establish each of the findings set forth in Sections 4(c)(1)(2) and (3) by clear and convincing evidence. Thus, if only nine of the conspirators could be named, there would be no cause of action. Such an outrageous result cannot be countenanced by anyone. The most charitable conclusion one can reach with regard to this aspect of the problem is that the drafters simply did not consider this issue.

3. *The Mass-Disaster Cases*

The DES and asbestos cases raise problems with regard to the identification of the defendant who caused the harm to a particular plaintiff.¹⁰⁰ But the causation problems are only symptomatic of the larger problems that attend this kind of litigation. The real problem that manufacturers face in these kinds of cases is that they face potentially crushing liability for negligence that did not appear to be so serious at the time the conduct was undertaken. It should be noted that in the main, DES and the asbestos litigation have been negligence based.¹⁰¹ The defendants simply did not calculate that the results would be as disastrous as they actually turned out to be.

100. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924; 163 Cal. Rptr. 132, (DES); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979) (DES); *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (DES); *Payton v. Abbott Labs.*, 386 Mass. 540, 437 N.E.2d 171 (1982) (DES); *Starling v. Seaboard Coast Line Railroad Co.*, 533 F. Supp. 183 (1982) (asbestos); *Aguilar v. John-Mansville Corp.* No. 400769 (San Diego Cty. Super. Ct. Cal. Sept. 8, 1981) (California trial court refused to apply *Sindell* in an asbestos case) (order without opinion).

101. See cases cited *id.* The landmark asbestos case, *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, was clearly based on a negligence theory. The court said that in a failure to warn case, the danger must be reasonably foreseeable. In fact, the court specifically held that "[t]he requirement of foreseeability coincides with the standard of due care in negligence cases in that a seller must exercise reasonable care and foresight to discover a danger in his product and to warn users and consumers of that danger." 493 F.2d at 1088. The court specifically rejected a strict liability theory. *Id.* at n.22. For more recent popular literature on this subject see N.Y. Times, Sept. 7, 1982 at 26, Col. 1.

Thus, minor negligence led to major catastrophe. The real problem faced by these defendants is not they are being forced to pay a proportional share of the damages. The problem is that the brute dollar amounts are staggering. They far exceed that which could be calculated to be the risk normally attendant to even negligent behavior.

In industries where the imposition of liability will mean the bankruptcy of important companies, there may well be a need to legislate to provide for the individual situation.¹⁰² Given the facts of particular situations, legislation might provide for a more limited form of recovery to those injured and yet stop far short of actually forcing the industries to close their doors. Certainly there has been enough experience with alternative compensation schemes to consider creative legislative solutions to these kinds of situations.¹⁰³ I believe that the future will call for legislation addressed to the particular industry and to the special kinds of harms caused by the product. The solutions will have to be tailor-made to fit the problems. They cannot be dealt with by addressing the peripheral issue of defendant identification. If there is doubt as to the validity of this argument, consider whether the situation would be much different if there were only one drug company involved in the manufacture of DES, or one manufacturer who produced asbestos products. Assume further that the projected damages threatened to wipe out two major corporate giants that employ tens of thousands of workers. Assume also that clear cases of negligence were established against these defendants. Would the social and political problems be any different than those faced today by the several drug companies and asbestos manufacturers? In this senario the issues of strict liability and defendant identification would be absent. The problems wrought by massive litigation would be very much with us.

B. Did the Defect Cause the Harm

Section 4(a)(3) of S. 2631 addresses the question of the causal relationship between the defect and harm. For liability to attach, it is necessary that "the claimant establishes by a preponderance of the evidence that the *unreasonably dangerous aspect of the product was*

102. Following the Chapter XI filing of UNR Industries and Johns-Manville Corp., the Asbestos Compensation Coalition, a group of nine companies named as defendants in asbestos cases, appealed to Congress to enact through legislation a compensation scheme jointly financed by industry and government, and administered through existing workmen's compensation systems. 10 PSLR 514, 573-74 (1982).

103. Worker's compensation statutes and automobile no-fault statutes are examples of systems developed to deal with very specific social problems in which something less than traditional tort recovery is allowed. See generally, W. PROSSER, J. WADE & D. SCHWARTZ, CASES AND MATERIALS ON TORTS 1294-1329 (7th ed. 1982).

a proximate cause of the harm complained of by the claimant."¹⁰⁴ This requirement paraphrases good hornbook law.¹⁰⁵ Plaintiff bears the burden of proving causation. If the courts will fall back on longstanding precedent to give meaning to the statutory language, little will have been gained or lost by the enactment of this section. However, one cannot be assured that a new statutory scheme will not reopen the causation question anew. By mandating that the "unreasonably dangerous aspect" of the product be the proximate cause of the harm, the statute places emphasis on the "but-for" test. It is only by structuring a hypothetical situation in which the defect is removed from the scene, that one can determine whether that aspect of the product was the cause of the harm. Yet, it is a rather badly kept secret that the but-for test has been honored more in the breach than in its observance.¹⁰⁶ In the real world, causation is so closely tied to liability that they cannot be torn asunder.¹⁰⁷ To mandate that the but-for test be actually established by a plaintiff is sheer folly. Thus, courts will either ignore the statute, as they have ignored the common law rule that cause-in-fact be proven by a preponderance of the evidence, or plaintiffs will be barred from recovering in cases where it is entirely legitimate for them to win.

Once again, there is no evidence that proof of causation is a special problem area in product litigation. The statute thus addresses a non-problem by enacting a common law approach into what may become an ironclad rule. If the legislation were structured to address only problem areas, there need be no section with this aspect of causation.

C. Causation in Failure to Warn Cases

In an earlier section, the provisions of section 6, which dealt with standards for adequate warnings, were addressed.¹⁰⁸ Section 6 also contains a special causation provision which must be established by the plaintiff. Section 6(b)(4) requires that the claimant prove that

104. Senate Bill § 4(a)(3) (emphasis added). The analogue in the House Bill is Sec. 5(a)(1)(B).

105. PROSSER, *supra* note 43, § 103 at 672.

106. Malone, *supra* note 45; Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. OF CHI. L. REV. 69 (1975); Haft v. Lone-Palm Hotel, 3 Cal. 3d 30, 478 P.2d 465, 91 Cal. Rptr. 745 (1970); Stevens v. Parke-Davis & Co., 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973); Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206 (1971).

107. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. OF PA. L. REV. 586 (1933); Owen, *The Highly Blameworthy Manufacturer's Implications on Rules of Liability and Defense in Products Liability Actions*, 10 IND. L. REV. 769, 778-84 (1977); Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause-in-Fact*, 46 TEX. L. REV. 423 (1968).

108. See *supra* text accompanying notes 71-79.

"the warnings or instructions which the claimant alleges would have led a reasonably prudent product user either to decline to use the product or to use it in a manner so as to avoid harm of the type alleged by the claimant."¹⁰⁹

The use of the hypothetical but-for as a test for causation forces one to ask the question "whether a reasonably prudent person would have read the warning which was never given." If the warning would not have helped, then it need not have been given. Under Section 6(b)(2), only warnings that are mandated by risk-utility analysis need be provided. For a risk-reduction warning, Section 4 is surplusage.¹¹⁰

There is, however, another type of warning which merits careful attention. With regard to many products, a warning cannot function to reduce the risk level attendant to the use of a product.¹¹¹ This is especially true with regard to drugs and industrial chemicals. The function of a warning in these cases is to inform the consumer of a non-reducible risk and give him the option not to use the product. This closely parallels the doctrine of "material risk" in the law of medical malpractice.¹¹² To adopt a theory which imposes a duty to warn of such risks and then to say that recovery will be permitted if, but only if, a reasonable person would have declined to use the product, is to engage in circular reasoning. The purpose of the warning is to provide the opportunity to the consumer to make a choice. If the warning has not been given, he has been deprived of his right to choose intelligently. To then say that recovery will be denied if a reasonable person would have chosen to use the product, makes a mockery of the warning duty. The function of the warning is to give the plaintiff the right to be unreasonable if he so desires. Thus, a plaintiff fully informed of the risk of polio vaccination may decide to make a foolish choice and not take the vaccine. That is the consumer's right. As long as his right to informed choice has been effected, it should be no defense that a reasonable person, given the

109. Senate Bill § 6(b)(4). House Bill § 5(d)(5) requires that the "claimant . . . would have avoided the harm if such warnings . . . had been provided."

110. If it is intended to truly focus on the hypothetical question with a focus on the claimant and not the reasonable person as suggested by House Bill § 5(d)(5), then we create the problem which caused several courts to create a rebuttable presumption that a warning, if given, would have been followed. See, e.g., *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602; *Nissen Trampoline Co. v. Terre Haute First Nat. Bank*, ____ Ind. App. ____, 332 N.E.2d 820 (1975), *rev'd on other grounds*, 265 Ind. 457, 358 N.E.2d 974 (1976); *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir. 1074).

111. See Twerski, Weinstein, Donaher & Piehler, *supra* note 74, at 517-21; Twerski & Weinstein, *A Critique of the UPLL*, *supra* note 12, at 235.

112. See *Canterbury v. Spence*, 464 F.2d 772, 790-91 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *Cobbs v. Grant*, 8 Cal. 3d 229, 245-46, 502 P.2d 1, 11-12, 104 Cal. Repr. 505, 515-16 (1972); Goldstein, *For Harold Laswell: Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain*, 84 Yale L.J. 683, 691 (1975).

risk information, would have chosen to encounter the risk. If the plaintiff never was given the information, he was deprived of his right to choose. A far better test is that articulated by the Washington Court of Appeals in *Miller v. Kennedy*,¹¹³ in which the court, in the context of a medical malpractice case, defined the duty of a doctor to disclose risks in the following manner:

The scope of the duty to disclose information concerning the treatment proposed, other treatments and the risk of each course of action and of no treatment at all is measured by the patient's need to know. The inquiry as to each item of information which the doctor knows or should know about the patient's physical condition is "Would the patient as a human being consider this item in choosing his or her course of treatment?"¹¹⁴

This test can easily be paraphrased to meet the product liability situation. Once it has been established that a warning is mandated, the question should be whether a reasonable consumer would want the information before deciding to utilize the product. It should be noted that this test applies only to those warnings whose function is merely to inform the consumer about non-reducible risks. In those instances where the function of a warning is to affect consumer behavior in his utilization of the product, we must revert to a cause-in-fact analysis. However, cause-in-fact should not be frozen into hard legislative language. It is too complex an issue. It requires the flexibility of common law case-by-case analysis to determine whether, given the underlying substantive goals which the law seeks to protect, the causation issue should be stretched or retracted.

V. WARNINGS TO WHOM - SHIFTING DUTY

The Kasten bill directs its attention to the question as to who should bear responsibility for relaying warning information. As drafted, it adds little protection for defendant-manufacturers. In fact, a good argument can be made that it actually derogates from defenses available to defendant-manufacturers at common law. Section 6(d)(1) of S. 2631 provides:

A product is *not unreasonably dangerous* for lack of *necessary* or postmanufacture warnings or instructions if those warnings or instructions were provided to—

113. 11 Wash. App. 272, 522 P.2d 852 (1974) *aff'd*, 85 Wash. 2d 151, 530 P.2d 334 (1975).

114. *Id.* at 282, 522 P.2d at 860. Later in the opinion the court said that it would require proof that "a reasonable, prudent patient probably would not have consented to the treatment when informed of the material risk. . . ." *Id.* at 290, 522 P.2d at 864. The two tests are irreconcilable. The latter test is very much like Senate Bill § 6(b)(4).

(A) a person, including an employer, who could *reasonably have been expected to assure* that action would be taken to avoid the harm or that the risk of harm would be explained to the actual product user;

(B) the using or supervising expert, where the product involved is one which may be *legally used* only by or under the supervision of a class of experts. For purposes of this clause, warnings or instructions are considered provided to the using or supervising expert where the manufacturer employed means reasonably calculated to make them available to the expert, and this does not require actual, personal notice to the expert.¹¹⁵

If Section 6(d)(1)(A) was intended to overrule cases where the defendant has given warning to an employer who has failed to pass the warning on to employees, then it has failed in its intended purpose. The key statutory words are "been expected to assure." The problem that courts have faced in the employment cases is that employers who sit under the protection of worker's compensation often have little incentive to "assure" that safety features be installed, or that employees be warned against specific risks.¹¹⁶ Where worker productivity comes in conflict with safety, the employer is often prone to opt for productivity as the more desirable choice. Thus, courts that found against manufacturers in the past will not be intimidated by the language in Section 6(d)(1).¹¹⁷

There is an argument that by negative inference the statute has cut back on the shifting duty defense. It should be noted that the shifting duty argument, which cuts off liability if a third person (including an employer) "would have been reasonably expected to assure that action would be taken to avoid the harm," is set forth only to negate a failure to warn claim.¹¹⁸ No similar provision is found in the design defect section.¹¹⁹ There is good reason not to make the shifting duty an automatic defense to a design defect case. If the defendant should have designed the safety into the product at the time of manufacture, then it should not be absolved of responsibility merely because a third person also failed to take protective action. However, there are cases in which it is entirely appropriate to

115. Senate Bill § 6(d)(1) (emphasis added).

116. See UPLA, *supra* note 1, § 174 Analysis at 67,240-41.

117. House Bill § 5(d)(4)(A)(iii) would accomplish the desired goal more effectively.

118. Senate Bill § 6(d)(1).

119. *Id.* at § 5(b). The general requirement embodied in Sec. 4(a)(3), that the defect be the proximate cause of the harm, might cut off liability in the case of an intervening superseding cause. But, that does not alter the reality that the specific shifting duty provision is specifically provided for only in the warning section.

raise the shifting duty argument even when design defect has been clearly established. In *Ford Motor Co. v. Wagoner*,¹²⁰ the defendant was relieved from liability for having defectively designed the hood latch on its automobiles. Ford offered to replace the latches free of charge to owners of the automobile. The owner declined to have the car repaired. When the hood flew up and injured a subsequent owner, Ford was relieved from liability. This is an eminently sensible result. At some point the duty for an existing danger may shift to another responsible party. It would appear that by including a shifting duty defense in the failure to warn section, and excluding it from the design section, the inference to be drawn is that it is not an appropriate defense to a design action. That would be an unfortunate interpretation of the statute.

Section 6(d)(1)(B), which establishes a shifting duty defense when warnings or instruction are provided to a supervising expert,¹²¹ is yet another example of the proliferation of new and heretofore undefined terms. When is an expert an expert? The caveat that the product involved be one, which may be legally used only by or under the supervision of a class of experts, is not helpful. Where are we to turn to explain the term "legally uses"? Is it the penal law, the state safety codes, OSHA, administrative regulations, or the common law of torts?

The attempt to reduce the concept of shifting duty or the transfer of responsibility to simple statutory language is bound to fail. The authors of the Restatement (Second) of Torts, when faced with the problem of articulating a rule for shifting duty, recognized that no simple formulation was available. In Section 452, comment f, they said:

The circumstances may be such that the court will find that all duty and responsibility for the prevention of the harm has passed to the third person. *It is apparently impossible to state any comprehensive rule as to when such a decision will be made.* Various factors will enter into it. Among them are the degree of danger and the magnitude of the risk of harm, the character and position of the third person who is to take the responsibility, his knowledge of the danger and the likelihood that he will or will not exercise proper care, his relation to the plaintiff or to the defendant, the lapse of time, and perhaps other considerations. The most that can be stated here is that when, by reason of the interplay of such factors, the court finds that full responsibility for con-

120. 183 Tenn. 392, 192 S.W.2d 840, 842 (1946). See also *Rekab, Inc., v. Frank Hrubetz & Co.*, 261 Md. 141, 274 A.2d 107 (1971).

121. Senate Bill § 6(d)(1)(B).

trol of the situation and prevention of the threatened harm has passed to the third person his failure to act is then a superseding cause, which will relieve the original actor of liability.¹²²

Again, the drafter of S. 2631 would have been well advised to leave this area to the common law. The sections as drafted lend themselves to interpretive abuse.

VI. THE DUAL JOINT - TORTFEASOR STANDARD

S. 2631 has some very strange provisions affecting joint-tortfeasor liability. Section 9 establishes a general rule of comparative responsibility to be applied not only between the claimant and defendant-manufacturer, but to affect third party defendants as well.¹²³ It then mandates that judgment be entered against each party "determined to be liable in proportion to the degree of responsibility."¹²⁴ Section 9(d) provides, however, that the joint-tortfeasor theory is not entirely eliminated. If, within one year after the judgment is entered it is determined that part of the obligation is uncollectable, the amount that is uncollectable is reallocated to the other parties and the claimant according to the respective percentages of their responsibility.¹²⁵ Although this section cuts back somewhat on joint-tortfeasor liability by delaying the recovery in the case of uncollectable judgments for one year by reallocating the amount that was uncollectable to all parties including the plaintiff (whose recovery was already reduced by the percentage of his fault), it basically retains the structure of joint-tortfeasor liability.

Sections 10(a) and (b) are much more radical.¹²⁶ In the case of product misuse or product alteration (or modification), the claimant's recovery is reduced to the extent that the misuse or alteration was a "cause of the harm." Unlike Section 9, no provisions are made for the case of uncollectible judgments or legally immunized defendants. The reduction is absolute.

To test the workings of the statute it will be helpful to construct two simple hypothetical cases and observe how the statute would resolve them. One must remember that the statute operates to reduce the claimant's recovery in cases when the misuse or alteration is foreseeable by the defendant-manufacturer. In cases where such conduct is unforeseeable, the statute appears to provide for a total ex-

122. RESTATEMENT (SECOND) OF TORTS § 452 comment (f) (emphasis added).

123. Senate Bill §§ 9(a), (b).

124. *Id.* at 9(c).

125. *Id.* at § 9(d).

126. *Id.* at §§ 10(a), (b).

emption for the manufacturer. Sections 10(a) and (b) provide that the "trier of fact may determine that the harm caused by the product occurred solely because of misuse of the product."¹²⁷

Now for the hypotheticals:

A) Sam Jones is a pedestrian crossing the street while observing all traffic regulations. Jack Smith, while speeding 15 mph over the limit, makes a left-hand turn and strikes Sam Jones. Smith is driving a 1980 Ford Galaxy. In 1980 Ford had a problem with motor mounts on its Galaxy model. The problem later warranted a recall by Ford. Evidence establishes that the Smith-Jones accident was caused by the combination of speeding and loss of control of the car by the driver due to the motor mounts that failed because they were not properly fastened.

B) Sam Jones is a pedestrian crossing the street while observing all traffic regulations. Jack Smith strikes Jones when making a left-hand turn into the crosswalk. Smith is driving a 1980 Ford at the time of the accident. In 1980 Ford had a problem with motor mounts on its Galaxy model. This problem later warranted a recall by Ford. Smith had felt some rumbling while driving and had sought as a do-it-yourselfer to tighten the bolts. However, while attempting repair, he negligently switched the ratchet to loosen rather than tighten the bolts. The accident occurred because driver Smith lost control of his car when the motor mounts gave way.

I believe that the application of Sections 10(a) and (b) to these hypothetical cases would result in the plaintiff retaining Ford as a joint-tortfeasor in Case A, but not in Case B. Thus, in Case A, if a jury were to find Smith 60% at fault for speeding and Ford 40% at fault for the defective motor mounts, Ford would retain traditional joint-tortfeasor liability. If Smith were to carry minimal \$10,000-20,000 automobile insurance coverage, Jones would be able to turn to Ford after 1 year to recover for the remainder of his injuries not caused by Smith. It is not likely that speeding 15 mph over the limit would be construed as product misuse as defined in Section 10(a)(2).

Case B, however, would be very different. Smith's attempted tightening of defectively attached motor mounts could amount to either product misuse under Section 10(a)(2) or product alteration

127. *Id.* It is assumed that this refers to the general tort rule that cuts off liability when the injury was unforeseeable. See discussion in Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 431-32 (1978).

under Section 10(b)(2). Assuming the same 60%-40% fault apportionment, this would mean that Ford is liable only for its 40% even though Smith's alteration *was brought about in part by Ford's negligence and was foreseeable*. Given the likelihood that Smith's conduct (negligent alteration) is generally not an insured-for event, the practical ramification of Sections 10(a) and (b) is that the claimant bears 60% of the loss. Putting aside the questionable justice of depriving the plaintiff of a faulty joint-tortfeasor as a fully liable defendant, the differing treatment provided by Sections 9 and 10 to those who cause accidents while using products is puzzling. What limit of logic supports the continuance of the joint-tortfeasor doctrine when the product user's misconduct (*i.e.*, speeding) is *not product related*, but negates the joint-tortfeasor doctrine when the conduct is *product related*? If anything, common sense would dictate the very opposite result. Here again, we find more than sloppy draftsmanship at work. By attempting to regulate every aspect of the product liability action, and by seeking to work out its interactions with other aspects of tort law, the drafters simply trip over themselves.

The problem raised by the hypothetical cases is even more serious than set forth above. By establishing a two-track system, *i.e.*, one that maintains and one that abolishes joint-tortfeasor liability, the drafters have made it a matter of considerable consequence as to whether a defendant's conduct qualifies as misuse or alteration under Sections 10(a)(2) and 10(b)(2), or whether it comes under the more general Section 9 comparative responsibility rule. A brief glance at the language of Sections 10(a)(2) and 10(b)(2) should convince anyone that years of appellate litigation lie ahead before it is determined which conduct qualifies for which section. Returning to Case A, driving 15 mph over the speed limit should not qualify as product misuse within the meaning of section 10(a)(2). But what about driving 25 mph over the speed limit? Does that conduct constitute use of a product in a manner "which is not consistent with reasonable practice of users of the product"?¹²⁸

Finally, both Sections 10(a)(1) and 10(b)(1) demand that in the case of misuse or alteration the claimant's recovery be reduced to the extent that the misuse or alteration was a "cause of the harm." One can reduce recovery by *fault* apportionment, but it approaches sophistry to say that damages are to be apportioned by "comparative cause."

Assume an accident takes place because an employer negligently altered the switch on a plastic molding machine that should have had a safety guard to prevent accidental exposure by employees to the point of operation of the machine. Who caused the accident? Any

128. Senate Bill § 10(a)(2).

first-year law student worth his or her salt would answer, "both the employer and the defendant-manufacturer." Each was the cause in fact of the harm. But come now, who really caused it? Again the answer is both. Had the employer not altered the switch, the accident would have been avoided. Had the defendant-manufacturer properly designed the machine, the safety guard would have prevented the plaintiff's hands from becoming caught in the machine. The causation label adds nothing to the analysis.

There is an explanation which may give meaning to "comparative cause," but it is so fatally flawed that it dare not be indulged in with any seriousness. Consider the following hypothetical:

An intoxicated motocyclist traveling 65 mph crosses the center line of the highway and runs into a truck going 65 mph. Considering the weight, speed, and direction of each vehicle, it is scientifically determined that the truck contributed 95 percent of the force involved. If damages are apportioned on this basis, the motocyclist's estate would receive 95 percent of the damages.¹²⁹

Returning to our hypothetical case of the plastic molding machine, how much of the injury was "caused" by the design defect and how much was caused by the altered switch? Surely, the answer is not to be determined by comparing the weight of the switch and the weight of the press.

If one were to include in the fault apportionment many of the factors which are normally considered in the proximate cause formulation, some sense could be made out of a "cause" apportionment.¹³⁰ There is, however, no reason to believe that the statute as written embodies a sophisticated proximate cause analysis.¹³¹ Certainly, a few poorly reasoned decisions which have spoken in terms of comparative cause are not sufficient grounds to serve as a predicate for a nationally binding statute for a yet undefined doctrine.

A. Comparative Responsibility

As noted earlier, Section 9 adopts an across the board defense of

129. For a similar analysis, see SCHWARTZ, *COMPARATIVE NEGLIGENCE* 276 (1974).

130. See, e.g., Uniform Comparative Fault Act § 2(b) (1977); UPLA, *supra* note 1, § 111(B)(3) and Analysis at 62,736.

131. The omission of the language contained in both the UPLA and the Uniform Comparative Fault Act would lead to the conclusion that the authors did not intend the proximate cause analysis.

comparative fault for product liability actions. There has been more than enough discussion about the wisdom of applying the comparative fault principles to strict products liability.¹³² The argument that it calls for comparing "apples" and "oranges" is not persuasive. The thrust of the comparative fault doctrine has been to place some of the responsibility on the plaintiff for his own contribution to his injuries.¹³³ It calls for a rough sense of justice. This can be accomplished by focusing on plaintiff's conduct and reducing recovery by a percentage deemed by the jury to be adequate to reflect his contri-

132. *General Motors v. Hopkins*, 548 S.W.2d 344 (Tex. 1977); *Murry v. Fairbanks Morse*, 610 F.2d 149 (3d Cir. 1979); *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977); *Sun Valley Airlines Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976).

133. See, *Brewster, Comparative Negligence in Strict Liability Cases*, 42 J. AIR L. & COM. 107 (1976); *Carestia, The Interaction of Comparative Negligence and Strict Products Liability—Where are We?*, 47 INS. COUNSEL J. 53 (1980); *Epstein, Plaintiffs Conduct in Products Liability Actions: Comparative Negligence, Automatic Division and Multiple Parties*, 45 J. AIR L. & COM. 87 (1979); *Feinberg, The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts, 2d (Can Oil and Water Mix?)*, 42 INS. COUNSEL J. 39 (1975); *Fischer, Products Liability—Applicability of Comparative Negligence*, 43 MO. L. REV. 431 (1978) [hereinafter cited as *Fischer, Products Liability*]; *Fischer, Products Liability—Applicability of Comparative Negligence to Misuse and Assumption of the Risk*, 43 MO. L. REV. 643 (1978); *Fisher, Nugent & Lewis, Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655 (1974); *Fleming, The Supreme Court of California, 1974-1975—Forward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976); *Freedman, The Comparative Negligence Doctrine Under Strict Liability: Defendant's Conduct Becomes Another "Proximate Cause" of Injury, Damage or Loss*, 1975 INS. L. J. 468; *Levine, Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627 (1968); *Maleson, Negligence is Dead but its Doctrines Rule Us from the Grave: A Proposal to Limit Defendant's Responsibility in Strict Products Liability Actions Without Resorting to Proximate Cause*, 51 TEMP. L.Q. 1 (1978); *McNichols, The Kirkland v. General Motors Manufacturers' Products Liability Doctrine—What's in a Name?*, 27 OKLA. L. REV. 347 (1974); *Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972); *Phillips, The Standard for Determining Defectiveness in Products Liability*, 46 CIN. L. REV. 101 (1977); *Schwartz, Contributory Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978); *Schwartz, Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); *Vetri, Products Liability: The Developing Framework for Analysis*, 54 OR. L. REV. 293 (1975); *Wade, Crawford & Ryder, Comparative Fault in Tennessee Tort Actions: Past, Present and Future*, 41 TENN. L. REV. 423 (1974); *Walkowiak, Reconsidering Plaintiff's Fault in Products Liability Litigation: The Proposed Conscious Design Choice Exceptions*, 33 VAND. L. REV. 651 (1980); *Westra, Restructuring the Defenses to Strict Products Liability—An Alternative to Comparative Negligence*, 19 SANTA CLARA L. REV. 355 (1979); *Note, Comparative Negligence Collides with Strict Liability: Will Tort Law Ever be the Same?*, 19 WASHBURN L. J. 76 (1979); *Note, Daly v. General Motors Corp.: Principles of Comparative Fault Applied to Strict Products Liability*, 67 CALIF. L. REV. 936 (1979); *Case Comment, Products Liability—Misconduct by the Plaintiff Will Reduce or Eliminate Damages Recoverable from a Seller or Manufacturer Under Strict Liability—Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843 (N.H. 1978), 13 SUFFOLK U.L. REV. 1558 (1979).

bution to the injury.¹³⁴ Another approach to the problem is to assess the percentage of fault attributable to the defendant by equating the seriousness of product defect with fault. A more serious defect would call for a higher percentage of fault. A less serious defect would demand a lesser fault apportionment.¹³⁵

In an article written shortly before his death, Professor Wayne Thode, one of the great tort professors of our time, sharply criticized this formulation and suggested an alternate approach.¹³⁶ He argued that the fault comparison was inappropriate because plaintiff's conduct could not be measured against product defectiveness.¹³⁷ He finds the "comparative causation" doctrine discussed earlier, to be a nonsensical doctrine. He correctly observes that "[O]ne reason why comparing cause is not rational is that there is no norm for causation. All the trier of fact can do is try to find out what in fact happened. Cause cannot be qualified so how can it be compared?"¹³⁸ Instead Thode suggests that we adopt a doctrine of "comparative risks." He contends that:

The risk that the defendant's conduct in putting out a defective product has created to the plaintiff and to others of a similar group in the zone of danger can be compared with the risks created by the plaintiff's faulty conduct to himself and to others within the zone of danger created by his conduct. The likelihood of injury, the seriousness of the potential injury and the number of persons placed in danger by the party's conduct are all elements to be considered in making the risk allocation.¹³⁹

Although there are slight differences in theory between the Thode approach and my proposal that defect be equated with fault, those differences do not appear to be of great moment.¹⁴⁰ Enough has been said to demonstrate that the theoretical difficulties in adopting a comparative fault principle for product liability actions are not of great moment. In fact, the reversion to a negligence theory for design and failure to warn cases moots the theoretical problems

134. Twerski, *supra* note 39, at 326-29.

135. *Id.* See also *Murray v. Fairbanks Morse*, 610 F.2d 149.

136. Thode, *Some Thoughts on the Use of Comparisons in Product Liability Cases*, 1981 UTAH L. REV. 3 (1981).

137. *Id.* at 4-6.

138. *Id.* at 8.

139. *Id.* at 9.

140. My suggestion that defect be equated with fault is admittedly flawed. Very minor negligence could create a very serious defect and vice versa. Nonetheless, if fault is not considered personal, but rather product-oriented, my suggestion and that of the late Professor Thode are close enough to be "kissing cousins."

since these cases are no longer based on strict liability, but are fault-based.¹⁴¹

What is disconcerting about an inexorable directive to courts to apply comparative fault to all product liability actions, is that it will reduce recovery in cases where fair-minded persons would agree that recovery should not be reduced. By removing discretion from courts to deal with these cases, the proposed bill demands unjust results. It has elsewhere been suggested that in the following hypothetical cases comparative fault should not be applied.¹⁴² This argument is made whether the underlying theory for recovery is strict liability or negligence:

(A) Plaintiff was driving on the highway in his 1976 XYZ model car. He was speeding at twenty miles per hour over the limit. He lost control of the auto and collided with the median strip retainer. Due to a defectively designed door latch plaintiff was thrown from the car and suffered serious injuries. His injuries would have been minor had the door latch held.

(B) Plaintiff was injured when a poorly beaded tire on his car blew out. At the time of the accident plaintiff was speeding twenty miles per hour over the limit. The evidence is such that had plaintiff been driving at the appropriate speed limit he would have been able to bring his car under control and could have avoided impact with another car.

(C) Plaintiff was an experienced factory worker who at the time of the accident was helping operate a machine designed to break glass and stack glass strips. He was working on the west side of the machine while his supervisor operated the controls on the east side of the machine. As he continued to operate the machine, plaintiff noticed that glass appeared to be jamming the machine, and he became concerned that the machine was being damaged. To thwart this possibility plaintiff attempted to remove a piece of glass with his hand, but his glove caught in the machinery, and he was injured. There was evidence presented in the case that the glass cutting machine was defective in that it did not contain adequate safety features such as off-on switches on both sides of the machine, or a barrier or guard to keep individuals from putting their extremities into the machine.

It is evident that in certain cases the contributory negligence defense is inappropriate, whether it be clothed as a complete bar or as comparative negligence. Hypothetical (A) places the question in

141. Senate Bill §§ 5(b), 6(b).

142. Twerski, *supra* note 134, at 341.

very sharp focus. In that case a speeding plaintiff was thrown from a car, which was designed with a defective door latch, when the car collided with a median strip retainer. Should the fact that plaintiff was contributorily negligent in bringing about the collision through his speeding reduce his recovery?¹⁴³ In a second collision case where plaintiff seeks to recover for injuries which were aggravated by the defendant's failure to properly design the vehicle, it should be unthinkable to reduce plaintiff's recovery by the percentage of his fault for the original collision. If the judgment is made that the design of the vehicle was in fact unreasonable, it is because the defendant has a duty to design against the possible effects of collisions. This takes in the possibility of collisions which are brought about through the plaintiff's fault and those in which he has been faultless. It is simply not reasonable to conclude that defendant's design modifications to make the auto crashworthy are for the benefit of only faultless plaintiffs. We know otherwise. To either exculpate the defendant, or to permit the reduction of total damages based on the fact that plaintiff had also been at fault, is to demean the very process in which we determined that defendant's design was substandard.

Hypothetical (B) should be analyzed in a similar vein. Admittedly, in this case plaintiff's speeding has contributed to the harm. Had plaintiff been traveling at the appropriate speed limit, he would have been able to bring his car under control. The car did, however, go out of control due to a defect in the tire. If, for example, plaintiff was traveling 65 miles per hour in a 45 mile per hour zone, should his recovery be reduced in an action brought against the tire manufacturer? The defendant had a clear duty to make a tire that was beaded properly and that could operate under normal driving conditions. While plaintiff's conduct is negligent vis-a-vis the world at large, it is not negligent to the defendant tire manufacturer. This is a case where the application of the comparative fault principle would reduce plaintiff's recovery even though he had a legitimate right to demand that the product meet expected performance levels.

Hypothetical (C), where plaintiff has his hand cut off by the

143. For a negative answer to the hypothetical see *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 275 N.W.2d 233 (1979). It is interesting that the drafters of the UPLA agreed that comparative fault should not reduce recovery in this kind of case. UPLA, *supra* note 1, § 111 Analysis at 62,735. The reasoning of the drafters of the UPLA is decidedly wrong although they come up with the right result. They argue that the negligent driving is not the proximate cause of the enhanced injuries. This is sheer nonsense. It is highly foreseeable to a negligent driver that a car may not be well-built or sufficiently designed for second-collision protection. The reason for negating comparative fault in these cases has little to do with causation. It has much to do with the common sense observation that safety features should be there to protect negligent and non-negligent drivers alike.

unguarded cutting edge of a glass cutting machine, presents a more difficult question as to the appropriateness of comparative fault. Here it is clear that plaintiff is, in a sense, pitting his wits against the machine. He hopes to release the jamming of the machine and to prevent further damage to the machinery. The real question is whether a guard at the point of operation should have been introduced to reduce the chance that a dedicated employee, afraid that an expensive piece of equipment will be damaged, will risk injury to himself? If the answer to that question is in the affirmative, it is difficult to justify reducing plaintiff's verdict, when he is injured by absence of the very mechanism which should have protected him in the first place.

There is good reason to settle the theoretical issue in favor of the applicability of comparative fault to product liability litigation.¹⁴⁴ There is no reason to strip the courts of discretion by mandating its application to all fact patterns. The statute should mandate comparative fault as a general principle, but allow courts to refuse to apply it when to do so would be contrary to their sense of "fairness and justice" under the particular facts of the case. The most recent attempt to particularize the categories of plaintiff's conduct to be included or excluded from comparative fault does not give encouragement that the task can be accomplished. The drafters of the UPLA, after exhaustive efforts, came up with a plethora of categories and some very unappetizing results.¹⁴⁵ Both extremes should be avoided. A national products liability act should not mandate comparative negligence in *all* product liability actions, nor should it attempt excessive particularization by defining categories of plaintiff's conduct. It should set forth an operating principle and leave to the good sense of the courts the discretion to exempt those cases in which the comparative fault principle should not apply. Such a statute would in practice accomplish comparative fault for the vast majority of product cases and yet would retain discretion for exceptional cases. This approach is far less intrusive on traditional state prerogatives in controlling tort litigation because it allows courts to exercise some discretion when dealing with rather special fact patterns.

VII. WORKER'S COMPENSATION

The interaction between worker's compensation and the present liability system must be derived from several sections of S. 2631. Section 11(a) speaks to the issue:

144. See *supra* text accompanying notes 134-41.

145. UPLA, *supra* note 1, § 112 and Analysis at 62, 736-37. See Twerski & Weinstein, *A Critique of the UPLL*, *supra* note 12, at 249.

(a) In any product liability action in which damages are sought for harm for which the person injured is entitled to compensation under any State or Federal workers compensation law, the damages shall be reduced by the sum of (1) the amount paid as worker compensation benefits for that harm; and (2) the present value of all worker compensation benefits to which the employee is or would be entitled for the harm. If a person eligible to file a claim for worker compensation benefits has not filed such a claim, the trier of fact shall determine at the time of trial the amount of worker compensation benefits to which the claimant would be entitled in the future or the amount to which the claimant would have been entitled if the claimant had filed a worker compensation claim.

(b) Unless the manufacturer or product seller has expressly agreed to indemnify or hold an employer harmless for harm to an employee caused by a product—

(1) the employer shall have no right of subrogation, contribution, implied indemnity or lien against the manufacturer or product seller if the harm is one for which a product liability action may be brought under this Act; and

(2) the worker compensation insurance carrier of the employer shall have no right of subrogation against the manufacturer or product seller.¹⁴⁶

By eliminating the employer subrogation lien, the Senate Bill strikes at one of the aspects of the present system which manufacturers claim to be most unfair.¹⁴⁷ According to a 1977 Insurance Services Office study, employer negligence is implicated in 56.3% of all employment related product liability claims.¹⁴⁸ Manufacturers

146. Senate Bill § 11. See also House Bill § 10. This approach has been enacted in CONN. STAT. ANN. § 52-572(r) (Supp. 1982). It has been advocated by Professor Richard Epstein in *Coordination of Workers' Compensation Benefits with Tort Damages*, 13 FORUM 464-79 (1978) and the American Insurance Association, *Product Liability Legislation Package* at 65-66 (1977). It is also included in UPLA, *supra* note 1, § 114 at 62,740. The UPLA approach changed from that recommended in the draft UPLL which permitted contribution "where the employer's failure to comply with any statutory or common law duty" contributed to the claimants injury. Such contribution was not to exceed the amount of the worker compensation. UPLL, *supra* note 28, § 113 at 3001. The UPLL approach has support in case law. See *Santistoven v. Dow Chemical Co.*, 506 F.2d 1216, 1220 (9th Cir. 1974); *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1974).

147. 8 *Final Report of the Federal Interagency Task Force on Product Liability* 89-99 (1977); American Insurance Association, *supra* note 146, at 64-74.

148. Insurance Services Office, *Product Liability Closed Claim Survey: A Technical Analysis of Survey Results Report 10* at 64-66. The conclusion that negligence was involved in this percentage of claims is based on responses to the following question: "Would the insured have impleaded the employer but for the Sole

rightfully argue that the subrogation lien often permits the most guilty party to walk away from the injury scot free. By providing that the worker's compensation recovery reduces any compensation award by a like amount and that no subrogation lien exists on behalf of the employer, the Senate Bill permits the plaintiff to retain the *very same benefits* he now enjoys, and at the same time shifts part of the cost from the manufacturer to the employer where it rightfully belongs. Admittedly, the employers will not recover from the manufacturer in a subrogation action where the employer was not negligent. This shifts some of the costs to the worker's compensation system which may not rightfully belong there.¹⁴⁹

When one considers the possible alternatives available to resolve the problem, the Section 11 solution, if it were only unencumbered by the Sections 10(a)(1) and 10(b)(1) qualifications, would strike a good balance. The present situation is intolerable. The no-fault worker's compensation system bears no responsibility whatsoever for employers' faulty conduct. By permitting the subrogation lien in favor of the employer, it does more than protect the worker's compensation system from tort recovery. It protects worker's compensation from itself. It does so by invading the tort recovery system without having to pay allegiance to the principles of the system from which it seeks recovery. The tort system would not allow the third party action without inquiry into the fault of the parties *inter se*.¹⁵⁰ The blanket employer subrogation lien is not founded on the principle of worker's compensation (pay out with no fault), nor that of the tort (fault) system. Perhaps it is based on the "Robin Hood" principle, but even that assumption would require some objective data to support it.

It might be argued that the proposed statute would accomplish "mirror image" injustice.¹⁵¹ The fault-based defendant would be shifting partial liability for an injury, which is entirely the fault of the manufacturer, to the no-fault system. But, a moment's reflection will reveal that this situation breeds little injustice. The worker's compensation system, which was established to provide limited recovery

Remedy Rule?" The answer to this question, which by inference leads to the conclusion that probably employer fault was involved, resulted in 50.1% affirmative and 49.9% negative answers. When the question was phrased to reflect the % of claims with reference to total dollars paid out, the breakdown was 56.3% affirmative and 43.7% negative. The disparity is explained in that the insured is somewhat more likely to have impleaded the employer, but for the Sole Remedy Rule, in the bigger cases. This indication was corroborated by the fact that the average payment was about 29% larger in cases when the answer to the question set forth above was in the affirmative. See *id.* at 67, Table 10-2.

149. But see American Insurance Association, *supra* note 146, at 66-67.

150. PROSSER, *supra* note 43, at § 50.

151. See Davis, *The Interaction of Workers' Compensation and Products Liability*, 15 TRIAL 31, 33 (1979).

for a work related injury, would, in fact, be paying for a work-related injury. To deny the employer who was truly not at fault his third-party action, may be somewhat unfair. But, it does not violate basic principles of fairness to recognize that when a no-fault system operates side-by-side with a fault system, it is best to permit each system to work separately.¹⁵² There are methods available to assure that only the truly non-negligent employer is granted the full subrogation lien and that the negligent employer be deprived of that portion of the subrogation lien which represents the employer's fault contribution.¹⁵³ But, these methods would require that fault be tried and apportioned between the employer and manufacturer to assure that the employer does not receive more than his equitable share back in the contribution action. Such an approach would not only increase transaction costs, it would also present difficult apportionment questions for jury resolution in the workplace setting where fault apportionment may be more difficult to accomplish.¹⁵⁴

Finally, it should be noted that those who could be expected to oppose the abolition of the subrogation lien (the workers compensation insurers) have led the fight for this portion of the statute.¹⁵⁵ Subrogation practice against product manufacturers constitutes a very small part of a huge worker's compensation system. The transaction costs imposed on worker's compensation insurers who have party status thrust on them, if they are to have a hand in proving fault or defect on the part of the manufacturer, is substantial. Thus, the American Insurance Association has taken the position that the sacrifice of the worker's compensation lien, if coupled with the assurance that the worker's compensation system cannot be invaded by a contribution action from manufacturers,¹⁵⁶ is in line with its own interests.

152. This debate is of ancient vintage. See James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941). The argument in favor of the James position is stronger when contribution is being sought across two different liability systems.

153. See American Insurance Association, *supra* note 146, at 72-74; UPLL, *supra* note 28, § 113 at 3001.

154. *Id.*

155. As long as Iowa Power & Light Co. v. Abild Construction Co., 259 Iowa 314, 114 N.W.2d 303 (1966) (IPALCO) is the governing rule, the employer bears no liability providing the employer retains subrogation or reimbursement rights. See Davis, *Third Party Tortfeasors' Rights Where Compensation Covered Employers are Negligent—Where Do Dole and Sunspan Lead*, 4 HOFSTRA L. REV. 571, 592 (Appendix I indicates that the majority of states follow IPALCO).

156. It should be noted that Senate Bill, § 11(C) would prohibit the comparative fault contribution action allowed by *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972) and *Skinner v. Reed-Prentice Division, Inc.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977).

This proposal would respond to the outcry of manufacturers. It would not cost claimants one farthing.¹⁵⁷ The only group that could conceivably be opposed to this proposal are the worker's compensation insurers. However, for reasons of economy they are also strongly in favor of its adoption. If all are in favor and none are opposed, Section 11 should be as popular as apple pie and as respectable as motherhood. There is no good reason for its elimination from the Senate Bill.¹⁵⁸ It is a low profile solution to a rather high profile problem—the very kind of legislation that should be enacted at the national level.¹⁵⁹

The problem with Section 11 is not Section 11; it is Sections 10(a)(1) and 10(b)(1). They provide in the case of misuse, alteration or modification of the product "by the employer of the claimant or by any co-employee of the claimant" that "damages shall be reduced by (A) the amount determined under Section 11(a), if that section is applicable; or (B) the percentage of responsibility apportioned to the employer or employee, whichever is greater."¹⁶⁰ This formulation will free the manufacturer from joint-tortfeasor liability and will in most cases require an innocent plaintiff to bear a significant part of the loss caused by the joint negligence of the employer and the manufacturer.

The argument is made that the *quid pro quo* for a no-fault worker's compensation system was limited recovery. Thus, when the percentage of fault is ascertained, it is not unjust to deprive the employee of that percentage of the claim which reflects the employer's contribution to the injury.¹⁶¹ The short answer to this argument is that what we are dealing with in Sections 10(a)(1) and 10(b)(1) is *not* the employer's limited liability, but that of the defendant-manufacturer. The employee struck no bargain with him, and there is no good reason to deprive the plaintiff of a defendant with joint-tortfeasor liability.

Putting aside the fairness question, the practical problems attending the implementation of Sections 10(a) and (b) are overwhelming.

157. *But see* Davis, *supra* note 155, at 60.

158. I do not mean to denigrate from the strong arguments made against the proposal by Professor Clifford Davis. *See* Davis, *supra* notes 151 and 157. The point made here is that the institutional defendants who could be expected to oppose a solution which permits them to shed their present liabilities have opted for a change which increases their liability.

159. The position taken by the Reagan administration endorses the principle of federal products liability legislation but opposes any provisions that would effect such firmly entrenched state programs as workers' compensation. Memorandum from Craig L. Fuller (July 15, 1982) (available from the Dep't of Commerce) (cabinet discussion on federal products liability legislation).

160. Senate Bill §§ 10(a)(1), 10(b)(1).

161. *See* UPLA, *supra* note 1, § 114 and Analysis at 62,741.

As noted earlier, Section 9 and Sections 10(a) and (b) create a two-track system which differentiate product misuse and alteration from other forms of negligent conduct.¹⁶⁷ In the case of the former, joint-tortfeasor liability is eliminated; in the latter it is retained. Thus, every employment injury case will demand judicial interpretation of the conduct to detect whether it meets one category or the other.

Another logistic problem that will be encountered concerns the relationship between plaintiff-fault and the severed joint-tortfeasor. Consider a case where plaintiff is 30% at fault, the employer 40% at fault and the defendant-manufacturer 30% at fault. Under Section 9, plaintiff's recovery will "reduce any damages awarded to the claimant in an amount proportionate to the responsibility of the claimant."¹⁶⁸ But, consider that the defendant-manufacturer is now only 30% at fault. Thus, the claimant has an award against the manufacturer for only 30% of the total damages. Since the claimant's damages must be reduced by 30%, because that is the percentage of his fault, the plaintiff may presumably recover nothing from the defendant-manufacturer!¹⁶⁴ Was this the intent of the drafters?

Even if a more moderate interpretation is adopted in which plaintiff's recovery is reduced by a percentage, which is a pro rata share of plaintiff's fault as compared with the defendant's fault,¹⁶⁵ the reality is that plaintiff's recovery against a severed joint-tortfeasor will be reduced to account for the comparative fault doctrine. Was this interaction between Section 9 and Sections 10(a) and 10(b) considered by the authors of the bill?

Finally, Congress will not pass legislation destroying joint-tortfeasor liability in the employment setting without assuring itself that claimants will not be left with the burden of a significant percentage of the loss. In those states where worker's compensation recovery is more generous, the likelihood of employees carrying a significant percentage of their loss is sharply reduced. In those states whose provisions are less than adequate, the danger is great that employees will carry this burden. For Congress to act, it would first have to satisfy itself as to the adequacy of the various worker's compensation systems. More likely, there would be pressure to set minimum standards that would apply to all states. It is unlikely that

162. See *supra* text accompanying notes 123-32.

163. Senate Bill § 9(a).

164. If Sec. 9 is interpreted to reflect the total damages as a percentage figure equaling 100% then plaintiff will have his damage reduced by 30% of the total. This would net him zero recovery.

165. Thus, defendant's 30% would be translated into a dollar figure and plaintiff would recover 70% of the defendant's assessed damages. Those damages are only 21% of the total damages incurred.

in this age of "new federalism," Congress will act to provide for minimum state worker's compensation standards. Thus, for manufacturers to "shoot for the moon" on this issue is to insure that Congress will take no action at all. Again, a more modest and less sensationalist approach to this problem is far more likely to succeed. The French adage that "a little less would be a whole lot more" applies accurately to this situation.

VIII. THE OUTLINE FOR SENSIBLE FEDERAL LEGISLATION

As indicated throughout this Article, S. 2631 and H.R. 5214 are far too complex. By proposing to deal with the entirety of tort law as it affects product liability litigation, the bills have created enormous interpretative problems. It is simply not possible to compress the entirety of the law of torts into 15-20 pages of legislation. Furthermore, the proposed legislation would radically differentiate product liability law from the remainder of tort law.¹⁶⁶ This would mean that two systems of law would deal differently with problems that are similar in nature. One cannot introduce such schizophrenia into a legal system without putting in question the integrity of either one or the other system. If, for example, joint-tortfeasor liability is to be eliminated based on the theory of proportional fault there is no good reason to protect only manufacturers.¹⁶⁷ Other

166. Different standards would be applied for products liability in contradistinction to normal tort law in such areas as:

- a. sufficiency of expert testimony, Senate Bill § 4(c);
- b. collateral estoppel Senate Bill § 4(d)(1);
- c. reasonable conduct to discover risk information, Senate Bill § 5(b)(1);
- d. the establishment of custom as defense, Senate Bill §§ 2(8), 5(b)(2);
- e. special standards for risk-utility analysis, Senate Bill § 5(c)(2);
- f. limitation of the proximate cause doctrine in failure to warn cases, Senate Bill § 6(b)(2);
- g. elimination of failure to warn for foreseeable misconduct, Senate Bill § 6(d)(2);
- h. limiting the joint-tortfeasor doctrine by delaying recovery until uncollectibility is established, Senate Bill § 9(d);
- i. reducing plaintiff's recovery from the remaining tortfeasor by reallocating to account for his fault in the case of an uncollectible judgment against one tortfeasor, Senate Bill § 9(d);
- j. eliminating joint-tortfeasor recovery when misconduct is "misuse or alteration" but not other conduct, Senate Bill §§ 10(a)(1), 10(b)(1);
- k. reducing recovery by percentage of "cause" rather than fault, Senate Bill §§ 10(a)(1), 10(b)(1);
- l. eliminating joint-tortfeasor liability in the case of employer misconduct when that conduct constitutes misuse or alteration, Senate Bill §§ 10(a)(1), 10(b)(1);
- m. statutes of repose, Senate Bill § 12; and
- n. limitation of punitive damages, Senate bill § 13.

167. See *supra* text accompanying notes 123-132. Several states have abolished

defendants in nonproduct cases should be entitled to similar protection. If there are to be special rules developed for issues arising from advanced technology,¹⁶⁸ then not only product manufacturers, but the medical and engineering professions should be the beneficiaries of such rules as well. The law of torts should not be rendered into a bag of rules which has the consistency of chop-suey.

The solution then, is not to rewrite the law of torts, but to target specific problem areas that are peculiar to product liability litigation and to seek to resolve them as simply as possible so that we do not create layer upon layer of textual complexity that will inevitably confuse the law for the foreseeable future. If this tack were followed, the preemption provisions of the legislation would not speak to the entirety of products litigation, but only to those issues which are directly covered by the Act.¹⁶⁹ What subjects should be covered by legislation? The introduction set forth the basic structure for federal legislation in this area. The following paragraphs will expand on that brief outline and delineate the scope of the proposed legislation.

A. Design Defect and Failure to Warn - Negligence Not Strict Liability

Federal legislation should clearly provide that in cases of design defect and failure to warn, a manufacturer is liable if at the time of manufacture or at some later time it failed to act as a "reasonably prudent manufacturer in the same or similar circumstances."¹⁷⁰ The negligence standard is well known to the courts. It is based on foresight not hindsight.¹⁷¹ There is no necessity to create an intricate web of rules dealing with "unavoidably dangerous" products, technological feasibility, etc. There is no question that the intent of the legislation is to eliminate strict liability from design and failure to warn cases.¹⁷² The legislation should provide that the burden of

the joint-tortfeasor doctrine after adoption of the comparative fault principle. *See, e.g.,* KAN. STAT. ANN. § 60-258(a) (1976); NEV. REV. STAT. § 41.141 (1979).

168. Senate Bill §§ 5(b)(2), 2(8), 4(b).

169. This would require a restructuring of the preemption provision, Senate Bill § 3.

170. Senate Bill § 5(b) would suffice if it would conclude at the end of the first sentence. It would be better, however, to frame the language in simple negligence—conduct language, rather than focus on the "unreasonably dangerous" nature of the product.

171. RESTATEMENT (SECOND) OF TORTS § 398; *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629; *Dean v. General Motors Corp.*, 301 F. Supp. 187 (E.D. La. 1969).

172. If negligence would be the exclusive doctrine for design and failure to warn cases there would be no need to include a provision governing subsequent remedial

proof in such cases is on the claimant.¹⁷³ By the enactment of these provisions, cases such as *Barker v. Lull Engineering Co.*,¹⁷⁴ *Azzerello v. Black Bros.*,¹⁷⁵ *Phillips v. Kimwood*,¹⁷⁶ and *Beshada v. Johns-Manville Prod. Corp.*,¹⁷⁷ would be overruled.

The negligence test would establish negligence, not consumer expectations, as the operative rule for design and warning cases. There are potential problems with eliminating the consumer expectation test from design litigation. Recent cases such as *Leichthamer v. American Motors Corp.*¹⁷⁸ demonstrate that the "consumer expectation" theory has considerable utility and substantive validity.¹⁷⁹ However, utopian justice should give way to a simple and easily understandable standard. A simple across the board negligence test for design and failure to warn cases which will clarify the law seems desirable even if more finely tuned doctrine must be sacrificed. Similarly, simplicity would be fostered if legislation would not speak at all to the "production defect" question.¹⁸⁰ That subject is not the object of controversy and does not need legislative reform.

As this paper is going to press, the business community is reeling from the announcement that Johns-Manville has filed for Chapter XI reorganization as a result of the asbestos litigation.¹⁸¹

measures. Senate Bill § 14. The common law rule which prohibits the introduction of subsequent repair evidence would govern as it does in all negligence cases. This would permit a court to admit subsequent repair evidence in production defect cases. See *Caprara v. Chrysler Corp.* 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981). Although, this author has challenged the wisdom of *Caprara*, see, Twerski, *Post-Accident Design Modification Evidence in a Manufacturing Defect Setting: Strict Liability and Beyond*, 4 J. OF PROD. LIABILITY 143 (1981), there are no grounds for freezing the subsequent repair rule into statutory language, thus limiting the legitimate flexibility of courts.

173. Perhaps the most improvident judicial pronouncement on burden of proof was the ruling of *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225. See Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773 (1979).

174. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

175. 480 Pa. 547, 391 A.2d 1020 (1978).

176. 269 Or. 581, 525 P.2d 1033 (1974).

177. 90 N.J. 191, 447 A.2d 539 (1982).

178. 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

179. In *Leichthamer* the manufacturer of a Jeep vehicle that pitched forward and overturned while descending a hill was held liable for second collision injuries when the roll-bar collapsed. A significant aspect of the court's reasoning was its reliance on a consumer expectation test. The court found that advertising encouraged driving down steep hills and the ability of the car to maneuver rough terrain safely. It is clear that the majority predicated liability on the consumer expectation theory and did not require risk-utility evidence to establish defect. Cf. Keeton, *supra* note 34.

180. See *supra* text accompanying notes 27-32.

181. N.Y. Times, *supra* note 101.

Newspaper stories have made special note of the decision of the New Jersey Supreme Court in *Beshada v. Johns-Manville Prod. Corp.*¹⁸² which applied a true strict-liability standard to a failure-to-warn asbestos case. That a manufacturer can be held liable even though it neither knew nor had reason to know of the danger is a proposition that has met with incredulity by the general populace. The *Beshada* holding probably had little actual effect on the Johns-Manville litigation. Most of the cases had been established on negligence grounds.¹⁸³ Nonetheless, it is clear that there exists a national consensus that liability in design and warning cases should be fault-based. Federal legislation is clearly appropriate on this issue.

Much more troubling is whether the "reasonableness" standard should be given further definition by attempting to formulate rules to limit the discretion of courts as to the kinds of cases that should be sent to a jury. As noted earlier, the standards offered in the proposed legislation are flawed and subject to substantial misinterpretation.¹⁸⁴ Although it would be best to accomplish jury control by utilizing an evidentiary standard, a standard which accurately reflects risk-utility analysis and suggests to the courts that they have a primary responsibility to satisfy themselves that the evidence has addressed the crucial factors in a truly credible fashion is acceptable. However, risk-utility standards which isolate single factors for examination and make satisfaction of that particular factor a *sine qua non* for recovery are not acceptable.¹⁸⁵

B. Statutes of Repose

Federal legislation should include a statute of repose. It has been argued that the old product cases constitute a very small part of the total liability picture and are therefore not a significant factor in the present crisis.¹⁸⁶ However, when they do arise, the cases breed great resentment on the part of manufacturers. These cases are often accompanied by product misuse, abuse, lack of adequate repair and substantial alteration. In addition, these cases often reflect changing societal standards with regard to safety.¹⁸⁷ Thus, even if the legal standard applied is negligence, as a practical matter,

182. 90 N.J. 191, 447 A.2d 539 (1982).

183. See cases cited *supra* note 101.

184. See *supra* text accompanying notes 57-70.

185. See *supra* notes 46, 58, 66 and text accompanying notes 57-70 for suggestions that would give courts greater control over the directed verdict issue.

186. See UPLL, *supra* note 28, § 109 Analysis at 3008-09.

187. See Henderson, *Coping With the Time Dimension*, 69 CALIF. L. REV. 919 (1981); Twerski, *Rebuilding the Citadel: The Legislative Assault on the Common Law*, *supra* note 12, at 58.

juries cannot divest themselves of their present attitudes and wind their mental clocks back in time. In actuality they apply a modified strict liability standard.

A 20 year statute of repose which applies to both capital and consumer goods is preferable. The statute should include an exception identical to that set forth in Section 12(b) which states that the statute of repose is not applied if:

- (1) the manufacturer or product seller intentionally misrepresented facts about the product or fraudulently concealed information about the product, and that conduct was a substantial cause of the harm;
- (2) the harm of the claimant was caused by the cumulative effect of prolonged exposure to a defective product; or
- (3) the harm caused within the period referred to in subsection (a) (the 20 year repose period), did not manifest itself until the expiration of that period.¹⁸⁸

There are those who would argue for a longer period with regard to capital goods due to their known longevity. The way to deal with this problem may be to add a section which focuses on the representations about longevity and product life made by the manufacturer.¹⁸⁹ Even Section 2-725(2) of the Uniform Commercial Code (U.C.C.)¹⁹⁰ specifically excepts from the operation of the statute of limitation, a warranty which "explicitly extends to future performance." Manufacturers should not be able to market longevity and hide from their marketing representations when a liability claim arises.

It should be noted that the statute as presently written extends the statute of repose for express and implied warranty action from four years under Section 2-725(1) of the U.C.C.,¹⁹¹ to either 25 years (or ten years under the alternative to section 12 in S. 2631). This was probably not intended by the drafters and demonstrates once again the high cost that attends a total preemption provision.

188. Senate Bill § 12(b).

189. The problem in this area is that the law of express warranty tends to deal with explicit representations. Manufacturers are not prone to make specific representations about longevity, rather they rely on "code" words to convey to consumers that their products are well nigh indestructible. There is certainly a keen awareness that a thriving market exists in used-capital machinery, and that its resale value is a significant factor in its original purchase price. On the other hand, there is a real unfairness in holding a manufacturer liable for a machine that has been to hell and back. Thus, the suggestion is that the 20 year statute of repose govern unless the manufacturer has, through marketing, affirmatively led consumers to believe that it has a longer lifespan.

190. U.C.C. § 2-725(2).

191. *Id.* at § 2-725(1).

The proposed statute of repose should cover consumer goods as well. It is a rare consumer good that functions past 20 years. It would simplify matters to implement a single statute of limitations and avoid definitional problems.

Section 12(d) of S. 2631 limits the cause of action to no more than two years from the time the claimant discovered, or with due diligence should have discovered, the harm.¹⁹² This provision is in line with many state statutes.¹⁹³ A discovery statute will aid consumers in those jurisdictions in which the statute of limitations begins running from the time that the harm occurred.¹⁹⁴ The two-year provision is shorter than some state provisions¹⁹⁵ but is clearly reasonable. Shortening the statute of limitations is a small sacrifice to make for a uniform discovery statute.

C. Punitive Damages

Section 13 of S. 2631 sets forth vigorous standards for the imposition of punitive damages.¹⁹⁶ Punitive damage awards that are unjustified threaten the entire structure of product liability litigation. As Professor Owen has so cogently argued, the process of risk-utility balancing requires the manufacturer to address risk and utility factors and to consciously balance them.¹⁹⁷ If any time a jury disagrees with the balance that is struck and a manufacturer is exposed to punitive damages, then we shall drive the balancing process underground. Furthermore, it is simply unfair to defendant-manufacturers to ask them to balance safety, utility, esthetics and cost, and then to censure them with punitive damages merely because we disagree with their assessment. It is altogether too easy, after the fact, to dredge up an in-house memorandum in which cost factors are honestly considered, and utilize it as "smoking gun" evidence of the defendants' evil intent. The argument that the manufacturer "traded your life for a dollar in profit" has great jury appeal.¹⁹⁸ Courts must exercise heavy control in this emotion laden area precisely because

192. Senate Bill § 12(d). House Bill § 12(a) provides for a three year statute of limitations.

193. See, e.g. ILL. REV. STAT. ch. 13, § 213(d) (ILL. ANN. STAT. ch. 83, § 22.2(b)) (two years). Other states provide for a slightly longer period. See *infra* note 195.

194. See, e.g., ARK. STAT. ANN. § 34-2803; NEB. REV. STAT. § 25-224(1); OR. REV. STAT. § 30.905(1); TENN. CODE ANN. § 29-28-103(a). See also *Thornton v. Roosevelt Hospital*, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920.

195. See, e.g., CONN. GEN. STAT. ANN. § 52-577a(a) (three years); N.H. REV. STAT. ANN. § 507-D:2(I) (three years); WASH. REV. CODE ANN. § 7.72.060(3) (three years).

196. Senate Bill § 13.

197. See Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, *supra* note 22, at 16-19.

198. *Id.* at 12-16.

the issues which support punitive damages are so closely allied to the issues which support legitimate or close to legitimate risk-utility decision making.

Some careful thought should be given to the provisions on punitive damages set forth in H.R. 5214.¹⁹⁹ Sections 11(d) and (e) of that bill provide for a cap on punitive damages not to exceed \$1 million dollars for any one claimant or \$5 million dollars for all claims.²⁰⁰ The single claim cap is very reasonable. The \$5 million dollar (or 5% of net worth) cap permits punitive damages up to the amount of litigation expenses, including reasonable attorney fees.²⁰¹ As a practical matter, this would allow for punitive damages somewhat in excess of one-third in most personal injury cases.²⁰² It is hard to characterize limitations on punitive damages as unfair. Since by definition compensatory damages have already been awarded to the claimant, all that one can say is that the reduced punitive damage means that the defendant will not be punished with sufficient severity. That presupposes, however, that punitive damages are a measured response to culpability. Ofttimes, flagrant behavior will escape any sanction simply because damage has not ensued, while behavior less serious will have devastating consequences. Given the almost hit and miss quality that attends punitive damages there is no good reason for opposing the capping provision suggested by H.R. 5214. There is some unfairness in permitting the first several plaintiffs to recover up to \$1 million dollars in punitive damages and limiting later claimants to their litigation expenses. But, this might be justified in that the enterprennural risk of early claimants who must break new ground is worthy of an extra bonus.

In short, the risk of crushing liability as a result of punitive damages is too great. It threatens the business community with the

199. House Bill § 11.

200. House Bill §§ 11(d) and (e) provide:

- (d) The amount of punitive damages that may be recovered by one claimant may not exceed, but may be less than, twice the amount of actual damages the claimant is determined to have suffered, but in no event shall an award of punitive damages exceed \$1 million for any one claimant.
- (e) If the product seller proves that it has previously paid or been finally adjudicated liable for punitive damages and fines totaling the lesser of \$5,000,000 or 5 per centum of its net worth, its liability for punitive damages shall not exceed the lesser of—
 - (1) claimant's litigation expenses, including reasonable attorneys' fees; or
 - (2) the amount determined under subsection (d).

201. *Id.*

202. In most personal injury cases the contingent fee is one-third of the damages awarded. If one included out-of-pocket disbursements, the figure could exceed one-third by a considerable amount.

legal equivalent of an atom bomb. It places the entire product liability system in jeopardy of runaway unregulated verdicts. It deserves a clear-cut federal solution.

D. Comparative Responsibility

In an earlier section it was suggested that comparative fault be established as the norm, subject to exceptions to be formulated by the courts.²⁰³ The discussion set forth above explains the rationale for permitting the courts to exercise some discretion in this area.

E. Worker's Compensation

An earlier section expresses dissatisfaction with the way S. 2631 has dealt with this problem and sets forth the suggestion that the legislation be limited to the items in Section 11.²⁰⁴ It would provide for an easily understandable rule which would meet the interests of all the major constituencies.

IX. CONCLUSION

Despite the considerable length of this article, it does not provide a complete analysis of all sections of S. 2631. A work, again the length of this paper, would be necessary to accomplish that goal. My purpose has been to demonstrate that a comprehensive product liability code which speaks to all aspects of the cause of action is unwise and unworkable. Proponents of federal legislation will have to choose between legislation that directs itself to those pressing issues which are most amenable to simple legislative correction and the more ambitious and complex legislation. Complex legislation will ultimately cause so much confusion that businessmen and consumers will rue the day it was passed. For the short run it would behoove those who seek to foster the interests of the business community to ask themselves whether their efforts should be directed toward supporting legislation which, because of its complexity and substantive unfairness, has little chance of being enacted into law. Thier efforts would be better directed in helping fashion sharply focused legislation that would alleviate the truly vexing problems that attend product liability litigation.

Editor's Note: S. 2631 [S. Rep. No. 97-670] was reported out of the Committee on Commerce, Science, and Transportation on December 1, 1982. Although the bill was modified somewhat to soften or eliminate some of the harsh provisions present in the original draft, the Bill, in essence, remains a product liability code. The substance of the author's critique remains, in our opinion, essentially unchanged.

203. See *supra* text accompanying notes 132-45.

204. See *supra* text accompanying notes 146-63.

Appendix A

97th CONGRESS
2D SESSION

S.2631

To regulate interstate commerce by providing for a uniform product liability law,
and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 16 (legislative day, JUNE 8), 1982

MR. KASTEN (for himself, Mr. LUGAR, Mr. INOUE, Mr. ABDNOR, Mr. PERCY, Mr. GARN, Mr. STAFFORD, and Mr. GLENN) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Product Liability Act".

DEFINITIONS

SEC. 2. As used in this Act—

(1) "claimant" means any person who brings a product liability action, and if such an action is brought through or on behalf of an estate, the term includes the claimant's decedent, or if such an action is brought through or on behalf of a minor, the term includes the claimant's parent or guardian;

(2) "clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; the level of proof required to satisfy this standard is

more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt;

(3) "commerce" means trade, traffic, commerce or transportation (A) between a place in a State and any place outside of that State; or (B) which affects trade, commerce, or transportation described in clause (A);

(4) "express warranty" means any affirmation of fact, promise, or description relating to a product;

(5) "harm" means (A) physical damage to property other than the product itself; (B) personal physical injury, illness, or death of the claimant; or (C) mental anguish or emotional harm of the claimant caused by the claimant's personal physical injury, illness or death; "harm" does not include commercial loss;

(6) "manufacturer" means (A) any person who is engaged in a business to produce, make, or construct any product (or component part of a product), including a product seller, distributor, or retailer of products with respect to any product to the extent that such a product seller, distributor, or retailer produces, makes, or constructs the product before that product seller, distributor, or retailer sells the product; or (B) any product seller not described in clause (A) which holds itself out as a manufacturer to the user of the product;

(7) "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity);

(8) "practical technological feasibility" means the technical and scientific knowledge relating to the safety of a product which, at the time of manufacture of a product, was developed, available and capable of use or implementation in the manufacture of a product, and economically feasible for use by a manufacturer;

(9) "preponderance of the evidence" is that measure or degree of proof which, by the weight, credit, and value of the aggregate evidence on either side, establishes that it is more probable than not that a fact occurred or did not occur;

(10) "product" means any object, substance, or raw material which is capable of delivery itself, or as an assembled whole or as a component part and is produced for introduction into trade or commerce; "product" does not include human tissue or organs;

(11) "product seller" means a person who, in the course of a business conducted for that purpose, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce; but does not include—

(A) a seller of real property;

(B) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or

(C) any person who—

(i) acts in only a financial capacity with respect to the sale of a product; and

(ii) leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor;

(12) "product user" means any person, including the claimant's employer, who owns, operates, or has control of a product;

(13) "reasonably anticipated conduct" means the conduct which would be expected of a reasonably prudent person who is likely to use the product in the same or similar circumstances; and

(14) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

PREEMPTION OF OTHER LAWS

SEC. 3.(a) Any civil action brought against a manufacturer or product seller for harm caused by a product is a product liability action. This Act governs any civil action for harm caused by a product, including any action which before the effective date of this Act would have been based on: (1) strict or absolute liability in tort; (2) negligence or gross negligence; (3) breach of express or implied warranty; (4) failure to discharge a duty to warn or instruct; or (5) any other theory that is the basis for an award for damages for harm caused by a product.

(b) No person may recover for any loss or damage caused by a product except to the extent that the loss or damage constitutes harm. A civil action for loss or damage caused to a product itself or for commercial loss is not a product liability action, and shall be governed by applicable commercial or contract law.

(c) This Act supersedes any State law regarding matters governed by this Act.

(d) The district courts of the United States shall not have jurisdiction over any civil action arising under this Act, based on sections 1331 or 1337 of title 28, United States Code.

RESPONSIBILITY OF MANUFACTURERS

SEC. 4(a) In any product liability action, a manufacturer is liable to a claimant if—

(1) The claimant establishes by a preponderance of the evidence that—

(A) the product was unreasonably dangerous in construction, as defined in section 5(a);

(B) the product was unreasonably dangerous in design, as defined in section 5(b);

(C) the product was unreasonably dangerous because the manufacturer failed to provide adequate warnings or instructions about a danger connected with the product or about the proper use of the product, as defined in section 6; or

(D) the product was unreasonably dangerous because the product did not conform to an express warranty made by the manufacturer with respect to the product, as defined in section 7;

(2) the claimant establishes by a preponderance of the evidence that the individual product unit which allegedly caused the harm complained of was manufactured by the defendant; and

(3) the claimant establishes by a preponderance of the evidence that the unreasonably dangerous aspect of the product was a proximate cause of the harm complained of by the claimant.

(b) The claimant must introduce sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make the determinations specified in subsection (a). Expert opinion is not considered sufficient evidence to support a proposition of fact unless it is supported or corroborated by sound objective evidence.

(c) If the claimant has introduced sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make all the determinations specified in subsection (a) with the exception of the determination specified in subsection (a)(2), the product liability action nevertheless may be submitted to the trier of fact for a determination of the manufacturer's liability if the claimant proves by clear and convincing evidence and if the court finds that—

(1) the claimant made every reasonable effort to establish the identity of the manufacturer of the product unit which allegedly caused the harm complained of;

(2) the claimant has brought the product liability action against every manufacturer which could have produced, made, or constructed the product unit which allegedly caused the harm

complained of; and

(3) each of the manufacturers against whom the action is brought is in a better position because of superior knowledge or information than the claimant to establish which manufacturer actually produced, made, or constructed the product unit which allegedly caused the harm complained of.

(d)(1) A claimant may not establish any fact necessary to make the determinations described in subsection (a) by showing that the identical issue of fact was determined adversely to the manufacturer in another action by another claimant unless both actions were based on harm caused by the same event in which two or more persons were harmed.

(2) A manufacturer may not establish any fact necessary to make the determinations described in subsection (a) by showing that the identical issue of fact was determined adversely to another claimant in another action against that manufacturer unless both actions were based on harm caused by the same event in which two or more person were harmed.

PRODUCT DESIGN AND CONSTRUCTION

SEC. 5. (a) A product is unreasonably dangerous in construction if, when the product left the control of the manufacturer, it deviated in a material way—

(1) from the design specification or performance standards of the manufacturer; or

(2) from otherwise identical units of the same product line.

(b) A product is unreasonably dangerous in design if, at the time of manufacture of the product, a reasonably prudent manufacturer in the same or similar circumstances would not have used the design that the manufacturer used. A product is not unreasonably dangerous in design unless—

(1) the manufacturer knew or, based on knowledge which has sound support in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm; and

(2) a means to eliminate the danger that caused the harm was within practical technological feasibility.

(c) A product is not unreasonably dangerous in design if the harm was caused by an unavoidably dangerous aspect of a product. As used in this paragraph, an "unavoidably dangerous aspect" means that aspect of a product which could not in light of knowledge which had sound support in the scientific, technical, or

medical community at the time of manufacture, *have been eliminated* without seriously impairing the effectiveness with which the product performs its intended function or the desirability, economic and otherwise, of the product to the person who uses or consumes it.

(d) If an alternative design is offered as evidence that a product was unreasonably dangerous in design, a product is not unreasonably dangerous in design unless the claimant establishes that, at the time of the manufacture of the product—

(1) the manufacturer knew or, based on sound support in the scientific, technical, or medical community for the existence of the alternative design, should have known about the alternative design; and

(2) the alternative design would have—

(A) utilized only science and technology for which there was sound scientific, technical or medical support and which was within practical and technological feasibility;

(B) provided better safety with regard to the particular hazard which caused the claimant's harm and equivalent or better overall safety than the chosen design. The overall safety of the alternative design is better than the chosen design if the hazards it eliminates are greater than any new hazards it creates for any persons and for any uses and

(C) been desirable, functionally, economically, and otherwise, to the person who uses or consumes it.

PRODUCT WARNINGS OR INSTRUCTIONS

SEC. 6. (a) A product is unreasonably dangerous because of the failure of the manufacturer to provide warnings or instructions about a danger connected with the product or about the proper use of the product if—

(1) necessary warnings or instructions were not provided, under subsection (b); or

(2) postmanufacture warnings or instructions were not provided, under subsection (c).

(b) A product is unreasonably dangerous for lack of necessary warnings or instructions if the claimant establishes by a preponderance of the evidence that at the time the product was sold—

(1) the manufacturer knew or, based on sound support in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have

known about the danger which allegedly caused the claimant's harm;

(2) the manufacturer failed to provide the warnings or instructions that a reasonably prudent manufacturer in the same or similar circumstances would have provided with respect to the danger which caused the harm alleged by the claimant, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of that harm;

(3) the manufacturer failed to provide to the claimant or to another person in accordance with subsection (d)(1) such warnings or instructions which the claimant alleges would have been adequate; and

(4) the warnings or instructions which the claimant alleges would have been adequate, if provided, would have led a reasonably prudent product user either to decline to use the product or to use it in a manner so as to avoid harm of the type alleged by the claimant.

(c)(1) A product is unreasonably dangerous for lack of postmanufacture warnings or instructions if the claimant establishes by a preponderance of the evidence that—

(A) after the product was manufactured, the manufacturer knew or, based on sound support in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm; and

(B) postmanufacture warnings or instructions would have been provided by a reasonably prudent manufacturer in the same or similar circumstances, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of that harm.

(2) A product is not unreasonably dangerous under this paragraph if the manufacturer made reasonable efforts to provide postmanufacture warnings or instructions to a product user or to another person, in accordance with subsection (d)(1).

(d)(1) A product is not unreasonably dangerous for lack of necessary or postmanufacture warnings or instructions if those warnings or instructions were provided to—

(A) a person, including an employer, who could reasonably have been expected to assure that action would be taken to avoid the harm or that the risk of harm would be explained to the actual product user;

(B) the using or supervising expert, where the product in-

volved is one which may be *legally used* only by or under the supervision of a class of *experts*. For purposes of this clause, warnings or instructions are considered provided to the using or supervising expert where the manufacturer employed means reasonably calculated to make them available to the expert, and this does not require actual, personal notice to the expert; or

(C) the manufacturer's immediate buyer—

(i) where the product was sold as a component or material to be incorporated into another product and the claimant was exposed to the component or material after it was incorporated or converted into another product;

(ii) where the product was used in a workplace and there was no practical feasible means of transmitting warnings or instructions directly to the claimant; or

(iii) where the claimant was not an employee of the manufacturer's immediate buyer and there was no practical or feasible means of transmitting the warnings or instructions to the claimant.

(2) A product is not unreasonably dangerous for lack of warnings or instructions regarding—

(A) dangers that are obvious. As used in this clause, "dangers that are obvious" are those of which a reasonably prudent product user or a person identified in subsection (d)(1), if applicable, would have been aware without a warning or instruction and dangers which were a matter of common knowledge to persons in the same or similar position as the claimant;

(B) the consequences of product misuse, as defined in section 10(a)(2), or use contrary to warnings or instructions available to the user or to a person identified in subsection (d)(1), if applicable; or

(C) alterations or modifications, as defined in section 10(b)(2), of the product which do not constitute reasonably anticipated conduct on the part of the product user.

PRODUCT FAILURE TO CONFORM TO EXPRESS WARRANTY

SEC. 7. (a) A product is unreasonably dangerous because it did not conform to an express warranty if—

(1) the manufacturer made an express warranty about a material fact relating to the safe performance of the product;

(2) this express warranty proved to be untrue; and

(3) the failure of the product to conform to the warranty caused the harm.

As used in this subsection, "material fact" means any specific characteristic or quality of the product, but does not include a general opinion about, or general praise of, the product or its quality.

(b) A product may be unreasonably dangerous for failure to conform to an express warranty although the manufacturer did not engage in negligent or fraudulent conduct in making the express warranty.

RESPONSIBILITY OF PRODUCT SELLERS

SEC. 8. (a) In any product liability action, a product seller is liable to a claimant, if—

(1) the claimant establishes by a preponderance of the evidence that the individual product unit which allegedly caused the harm complained of was sold by the defendant and was a proximate cause of the harm complained of by the claimant; and

(2) the claimant establishes by a preponderance of the evidence that the product seller failed to exercise reasonable care with respect to the product.

(b) In any product liability action, a product seller is liable to a claimant if—

(1) the product seller made an express warranty, independent of any express warranty made by a manufacturer as to the same product, about a material fact directly relating to the safe performance of the product;

(2) this express warranty proved to be untrue; and

(3) the failure of the product to conform to the warranty caused the harm.

(c) The claimant must introduce sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make the determinations specified in subsections (a) and (b). Expert opinion is not considered sufficient evidence to support a proposition of fact unless it is supported or corroborated by sound objective evidence.

(d)(1) A claimant may not establish any fact necessary to make the determinations described in subsection (a) and (b) by showing that the identical issue of fact was determined adversely to the product seller in another action brought by another claimant, unless both actions were based on harm caused by the same event in which two or more persons were harmed.

(2) A product seller may not establish any fact necessary to make the determinations described in subsections (a) and (b) by showing that the identical issue of fact was determined adversely to another claimant in another action against that product seller unless

both actions were based on harm caused by the same event in which two or more persons were harmed.

(e)(1) In determining whether a product seller is subject to liability under subsections (a) and (b), the trier of fact may consider the effect of the conduct of the seller with respect to the construction, inspection, or condition of the product, and any failure of the seller to transmit adequate warnings or instructions about the dangers and proper use of the product.

(2) A product seller is under no obligation to open a prepackaged product to inspect it, and is not liable under this section for failure to open such a product.

(f) A product seller is liable for harm to the claimant caused by a product in the same manner as the manufacturer of the product if—

(1) the manufacturer is not subject to service of process under the laws of the State in which the action is brought; or

(2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

COMPARATIVE RESPONSIBILITY

SEC. 9. (a) Comparative responsibility of the claimant shall not bar recovery in a product liability action, but shall reduce any damages awarded to the claimant in an amount proportionate to the responsibility of the claimant. For purposes of this section, "comparative responsibility" means, with respect to a claimant, conduct of the claimant involving negligence, contributory negligence or assumption of risk.

(b) In any product liability action involving a claim of comparative responsibility, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories (or, if there is no jury, the court shall make findings) indicating (A) the amount of damages each claimant would be entitled to recover if comparative responsibility were disregarded and (B) the percentage of total responsibility for the claimant's harm to be allocated to each claimant, to each defendant, to any third-party defendant, and to any other person, including an employer or coemployee. For purposes of this paragraph, the court may determine that two or more persons are to be treated as a single person.

(c) The court shall determine the award of damages to each claimant in accordance with the findings made under subsection (b), and shall enter judgment against each party determined to be liable in proportion to the degree of responsibility.

(d) If a claimant has not been able to collect on a judgment in a product liability action, and if the claimant makes a motion within 1

year after the judgment is entered, the court shall determine whether any part of the obligation allocated to a person who is a party to the action is not collectable from such a person. Any amount of obligation which the court determines is uncollectable from that person shall be reallocated to the other persons who are parties to the action and to whom responsibility was allocated and to the claimant according to the respective percentages of their responsibility, as determined under subsection (b).

MISUSE OR ALTERATION

SEC. 10. (a)(1) If a manufacturer or product seller proves by a preponderance of the evidence that misuse of a product by any person other than the manufacturer or product seller has caused the claimant's harm, the claimant's damages shall be reduced or apportioned to the extent that the misuse was a cause of the harm. If misuse by the employer of the claimant or by any coemployee of the claimant was a cause of the harm, damages shall be reduced by (A) the amount determined under section 11(a), if that section is applicable; or (B) the percentage of responsibility apportioned to the employer or coemployee, whichever is greater. Under this subsection, the trier of fact may determine that the harm caused by the product occurred solely because of misuse of the product.

(2) For purposes of this Act, misuse shall be considered to occur when a product is used for a purpose or in a manner which is not consistent with the warnings or instructions available to the user, or which is not consistent with reasonable practice of users of the product, or when a product user fails adequately to train its employee in the safe use of the product, or otherwise provide for the safe use of the product, and that lack of training or the failure otherwise to provide for the safe use of the product was a cause of the claimant's harm.

(b)(1) If a manufacturer or product seller proves by a preponderance of the evidence that an alteration or modification of the product by any person other than the manufacturer or product seller has caused the claimant's harm, the damages of the claimant shall be reduced or apportioned to the extent that the alteration or modification was a cause of the harm. If alteration or modification by the employer of the claimant or by any coemployee of the claimant was a cause of the harm, damages shall be reduced by (A) the amount determined under section 11(a), if that section is applicable; or (B) the percentage of responsibility apportioned to the employer or coemployee, whichever is greater. Under this subsection, the trier of fact may determine that the harm arose solely because of the product alteration or modification. Reduction or apportionment under this subsection shall not be made if—

(A) the alteration or modification was in accordance with instructions or specifications of the manufacturer or product seller;

(B) the alteration or modification was made with the express consent of the manufacturer or product seller; or

(C) the alteration or modification was reasonable anticipated conduct, and the manufacturer or product seller failed to provide adequate warnings or instructions with respect to that alteration or modification.

(2) For purposes of this Act, alteration or modification shall be considered to occur-

(A) when a person other than the manufacturer or product seller changes the design, construction, or formula of the product, or changes or removes warnings, instructions, or safety devices that accompanied or were displayed on the product; or

(B) when a product user fails to observe the routine care and maintenance necessary for a product and that failure was the cause of the claimant's harm.

(3) Ordinary wear and tear of a product shall not be considered to be alteration or modification of a product under this subsection.

EFFECT OF WORKER COMPENSATION BENEFITS

SEC. 11. (a) In any product liability action in which damages are sought for harm for which the person injured is entitled to compensation under any State or Federal worker compensation law, the damages shall be reduced by the sum of (1) the amount paid as worker compensation benefits for that harm; and (2) the present value of all worker compensation benefits to which the employee is or would be entitled for the harm. If a person eligible to file a claim for worker compensation benefits has not filed such a claim, the trier of fact shall determine at the time of trial the amount of worker compensation benefits to which the claimant would be entitled in the future or the amount to which the claimant would have been entitled if the claimant had filed a worker compensation claim.

(b) Unless the manufacturer or product seller has expressly agreed to indemnify or hold an employer harmless for harm to an employee caused by a product—

(1) the employer shall have no right of subrogation, contribution, implied indemnity or lien against the manufacturer or product seller if the harm is one for which a product liability action may be brought under this Act; and

(2) the worker compensation insurance carrier of the employer shall have no right of subrogation against the manufac-

turer or product seller.

(c) In any product liability action in which damages are sought for harm for which the person injured is entitled to compensation under any State or Federal worker compensation law, no third party tortfeasor may maintain any action for implied indemnity or contribution against the employer or any coemployee of the person who was injured.

(d) No person entitled to file a claim for benefits pursuant to applicable State or Federal worker compensation laws or who would have been entitled to file such a claim, or any other person whose claim would be derivative from such a claim, shall be allowed to recover in a product liability action against a present or former employer or worker compensation insurer of the employer or any coemployee for harm caused by a product.

TIME LIMITATION ON LIABILITY

SEC. 12. (a)(1) If any product is a capital good, no claim alleging unsafe design as provided in section 5(b), or failure to give adequate warnings or instructions as provided in section 6(a), may be brought for harm caused by such a product more than 25 years from the date of delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or using the product as a component in the manufacture of another product.

(2) As used in this subsection, "capital good" means any product, other than a motor vehicle, or any component of any such product, if it is also of a character subject to allowance for depreciation under the Internal Revenue Code of 1954, as amended, and was—

(A) used in a trade or business;

(B) held for the production of income; or

(C) sold, leased, or donated to a governmental or private entity for the production of goods, for training, for demonstration, or other similar purposes.

(b) Subsection (a) is not applicable if—

(1) the manufacturer or product seller intentionally misrepresented facts about the product or fraudulently concealed information about the product, and that conduct was a substantial cause of the claimant's harm;

(2) the harm of the claimant was caused by the cumulative effect of prolonged exposure to a defective product; or

(3) the harm, caused within the period referred to in subsection (a), did not manifest itself until after the expiration of that period.

(c) Nothing in subsection (a) shall affect the right of any person who is subject to liability for harm under this Act to seek and obtain contribution or indemnity from any other person who is responsible for that harm.

(d) No claim under this Act may be brought more than 2 years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm.

ALTERNATIVE SECTION FOR TIME LIMITATION ON LIABILITY

SEC. 12. (a)(1) In any product liability action, there is a presumption that the harm of a claimant was not caused because the product involved was unreasonably dangerous because of its design, or unreasonably dangerous because of the failure to provide adequate warning or instructions, if the harm was caused after the end of the longer of the following periods:

(A) The 10-year period beginning at the time of delivery of the product to its first purchaser or lessee who was not engaged in the business of either selling such product or using the product as a component part of another product.

(B) The period (if any) during which the product seller warrants that the product can be safely utilized.

(2) The presumption under this subsection may be rebutted only by clear and convincing evidence.

(b) The presumption under subsection (a) does not apply if—

(1) the manufacturer or product seller intentionally misrepresented facts about the product or fraudulently concealed information about the product, and that conduct was a substantial cause of the claimant's harm;

(2) the harm of the claimant was caused by the cumulative effect of prolonged exposure to an unreasonably dangerous product; or

(3) the harm, caused within the period referred to in subsection (a), did not manifest itself until after the expiration of that period.

(c) No claim under this Act may be brought more than 2 years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm.

PUNITIVE DAMAGES

SEC. 13. (a)(1) Punitive damages may be awarded to any claimant

who establishes by clear and convincing evidence that the harm suffered was the result of the reckless disregard of the manufacturer or product seller for the safety of product users, consumers, or persons who might be harmed by the product. Punitive damages may not be awarded in the absence of a compensatory award.

(2) As used in this subsection, "reckless disregard" means conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by a product and constituting an extreme departure from accepted practice. A negligent choice among alternative product designs or warnings, when made in the ordinary course of business, does not by itself constitute "reckless disregard".

(b) The trier of fact, in determining under subsection (a) whether punitive damages should be awarded, shall consider—

(1) the manufacturer's or product seller's awareness of the likelihood that serious harm would arise from the sale or manufacture of a product;

(2) the conduct of the manufacturer or product seller upon discovery that the product caused harm or was related to harm caused to users or others, including whether upon confirmation of the problem the manufacturer or product seller took appropriate steps to reduce the risk of harm;

(3) the duration of the conduct and any concealment of it by the manufacturer or product seller; and

(4) whether the harm suffered by the claimant was partly the result of the claimant's own negligent conduct.

(c) If the trier of fact determines under subsection (a) that punitive damages should be awarded to a claimant, the court shall determine the amount of those damages. In making the determination, the court shall consider—

(1) all relevant evidence relating to the factors set forth in subsection (b);

(2) the profitability of the conduct to the manufacturer or product seller; and

(3) the total effect of other punishment imposed upon the manufacturer or product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of other penalties to which the manufacturer or product seller has been or may be subjected.

(d) Notwithstanding the provisions of section 14, a manufacturer or product seller may introduce relevant evidence of post-manufacturing improvements in defense of punitive damages.

SUBSEQUENT REMEDIAL MEASURES

SEC. 14. (a) Evidence of measures taken after an event, which if taken previously would have made the event less likely to occur, is not admissible to prove liability under this Act in connection with the event.

(b) This section does not require the exclusion of evidence of subsequent measures in a design defect case if offered to impeach a witness for the manufacturer or product seller who has expressly denied the feasibility of such a measure.

SEPARABILITY CLAUSE

SEC. 15. If any provision of this Act or the application of it to any person or circumstance is held invalid, the remainder of this Act and the application of the provision to any other person or circumstance shall not be affected by that invalidation.

EFFECTIVE DATE

SEC. 16. (a) This Act shall be effective 60 days after the date of its enactment, and shall apply to all product liability actions commenced on or after that date, including any action in which the harm or the conduct which caused the harm occurred before the effective date.

(b) If any provision of this Act would (1) shorten the period within which a claimant may bring a product liability action, or (2) shorten the period during which a manufacturer is exposed to liability under this Act, the claimant may, notwithstanding the otherwise applicable time period, bring any such action within 1 year after the effective date of this Act.

Appendix B

97TH CONGRESS
1ST SESSION

H.R. 5214

To provide for a uniform products liability law.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 14, 1981

Mr. SHUMWAY introduced the following bill; which was referred to the Committee on Energy and Commerce

A BILL

To provide for a uniform products liability law.

Be it in enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SEC. 1. SHORT TITLE

This Act may be cited as the "Products Liability Act of 1982".

SEC. 2. FINDINGS AND PURPOSES

(a) The Congress finds that:

(1) The manufacture and distribution of goods in interstate commerce, and the insurance of liability therefor, is to a large extent a national activity which affects national interests in a variety of important ways.

(2) The rules of products liability law in recent years have evolved rapidly and haphazardly within and among the States such that the body of products liability law prevailing in this Nation today is unduly complex, inconsistent, uncertain, and imbalanced in principle.

(3) This uncertainty and confusion in products liability law, and the resulting unpredictability of litigation outcome, has been a principal cause of many problems of national concern, including—

- (A) increased prices of consumer and industrial products;
- (B) increased strains on the court systems, including in-

creased costs, complexity, and frequency of litigation;

(C) increased deterrents to innovation and to the development of potentially beneficial products which by their nature necessarily involve some danger;

(D) increased difficulty for some manufacturers in raising capital;

(E) increased costs and decreased availability of products liability insurance;

(F) increased numbers of product sellers attempting to do business without products liability insurance coverage, jeopardizing their financial stability and the availability of compensation to injured persons; and

(G) other increased burdens on interstate commerce, threatening employment and the economy in many diverse ways.

(4) Products liability insurance rates are set on the basis of nationwide, rather than individual State, experience because a product manufactured in one State can readily cause injury in any of the other States.

(5) A profusion of State statutes has been enacted in recent years attempting to remedy these problems. Such statutes, however, have sometimes been drafted in a crisis atmosphere without due consideration given to their many important implications. Some such statutes have curtailed unduly the rights of products liability claimants, and all have added to the complexity of and inconsistency in products liability law.

(6) Because of the national scope of the manufacture and distribution of most products, and of products liability insurance, there is little that any individual State can do to remedy these various problems of product liability law.

(b) The purpose of this Act is to facilitate the fair, prompt, and efficient resolution of cases and controversies involving products liability which arise in the various States and affect commerce by—

(1) establishing certain uniform principles which provide a fair balance between the interests of product users and product sellers;

(2) assuring that persons injured by unnecessarily dangerous products will be adequately compensated for their injuries;

(3) relieving commerce of the adverse effects created by the existing confusion and uncertainty concerning the legal rights and obligations of product users and product sellers;

(4) making products liability insurance more widely available and affordable, and providing greater stability in rates and premiums; and

(5) expediting the payment and litigation of products liability claims and helping to enhance fairness, predictability, and efficiency in the administration of such claims in the legal system.

SEC. 3. DEFINITIONS.

For purposes of this Act:

(1) The term "commerce" means trade, traffic, commerce, or transportation (A) between a place in a State and any place outside of the State, or (B) which affects trade, traffic, commerce, or transportation described in clause (A).

(2) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Panama Canal Zone, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

(3) The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any Federal, State, or local governmental entity.

(4) The term "product" means any object which is capable of delivery either as an assembled whole or as a component part and is produced for introduction into trade or commerce. Such term does not include human tissue, organs, or human blood and its components.

(5) The term "products liability action" means any claim or action brought by a claimant against a product seller for harm caused by a product. Such term includes, but is not limited to, any action previously based on strict liability in tort; negligence; breach of express or implied warranty; misrepresentation, concealment, or non-disclosure, whether intentional, negligent, or innocent; manufacturer's liability; products liability; or any other substantive legal theory in tort, contract, or otherwise.

(6) The term "claimant" means any person who claims to have suffered harm from a product and who asserts a products liability action. If such an action is asserted through or on behalf of an estate or other representative, the term includes the estate or other representative in addition to the person harmed.

(7) The term "harm" means (A) damage to property other than the product itself; (B) personal physical injuries, illness, or death; or (C) pain or mental harm resulting from such personal physical in-

juries, illness, or death. The term "harm" does not include commercial loss.

(8) The term "manufacturer" means—

(A) any person who is engaged in a business to design, produce, make, assemble, fabricate, construct, or remanufacture any product (or component part thereof); or

(B) any product seller not described under subparagraph (A) selling products under its own trademark or name, or holding itself out as a manufacturer to the user of the product. Any product seller who acts primarily as a wholesaler, distributor, or retailer of products may be a manufacturer with respect to a given product to the extent that such seller plays a significant role in designing, producing, making, assembling, fabricating, constructing, altering, modifying, or remanufacturing the aspect of the product which injures the claimant; but it does not include one who merely distributes a product and in the course thereof assembles, services, or otherwise prepares the product as authorized by the person who manufactures or produces the product.

(9)(A) The term "product seller" means, except as provided under subparagraph (B)—

(i) any manufacturer; or

(ii) any person who, in the course of a business conducted for that purpose, sells, wholesales, distributes, retails, leases, installs, prepares, packages, labels, markets, repairs, maintains, assembles, or otherwise is involved in placing a product in the stream of commerce.

(B) the term "product seller" does not include—

(i) a seller of real property, unless and to the extent that such person is engaged in the mass production and sale of standardized dwellings;

(ii) a provider of professional services who uses or sells products within the legally authorized scope of his or her professional practice;

(iii) any person who (A) acts in only a financial capacity with respect to the sale of a product, and (B) is not in the business of manufacturing, wholesaling, distributing, or retailing products.

(10) The term "representation" means any explicit statement, affirmation of fact, promise, or description relating to a product.

(11) The term "feasible" means practicable within the technical and scientific knowledge which is available, adequately demonstrated, and economically feasible for use by a product seller at the time of manufacture of a product.

(12) The term "preponderance of the evidence" means that measure or degree of proof which, by the weight, credit, and value of the aggregate evidence on either side, establishes that it is more probable than not that a fact occurred or did not occur.

(13) The term "clear and convincing evidence" means that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. The level of proof required to satisfy this standard is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt.

SEC. 4. PREEMPTION OF OTHER LAWS AND JURISDICTION.

(a) This Act supersedes any other Federal or State law regarding matters governed by this Act to the extent that such is inconsistent with this Act. Except as provided in this Act, there shall be no recovery for harm or damage of any type caused by a product, other than for commercial loss or damage to the product itself.

(b) Notwithstanding any other law, a claimant may bring a products liability action under this Act—

- (1) in any court of competent jurisdiction in any State; or
- (2) in an appropriate district court of the United States, but only if—

(A) the United States or any agency or officer of the Federal Government is a party; or

(B) diversity jurisdiction exists.

SEC. 5. BASIC STANDARDS OF RESPONSIBILITY FOR MANUFACTURERS.

(a)(1) In any products liability action brought against a manufacturer for harm allegedly caused by a product, the manufacturer shall be liable to a claimant only if the claimant proves by a preponderance of the evidence—

(A) that the product was unreasonably dangerous—

- (i) in construction, under subsection (b);
- (ii) in design, under subsection (c), and that the manufacturer was negligent in selling the product in such condition;
- (iii) because the manufacturer failed to provide adequate warnings or instructions, under subsection (d), and that the manufacturer was negligent in failing to provide such information; or

(iv) because the product did not conform to a representa-

tion made by the manufacturer with respect to the product, under subsection (e);

(B) that the unreasonably dangerous aspect of such product was the proximate cause of the harm complained of by the claimant; and

(C) that the particular product unit which allegedly harmed the claimant was manufactured by the defendant.

(2) Neither the claimant nor the manufacturer may prove any fact or issue by showing that the same fact or issue was raised, litigated, and determined adversely to such other party in another action unless they were adverse parties to each other in the other action and had the opportunity and reason fully to contest the fact or issue therein.

(b) A product shall be considered unreasonably dangerous in construction only if it is determined that, when the product left the control of the manufacturer, the product deviated in a material way—

(1) from the design specifications or performance standards of the manufacturer; or

(2) from otherwise identical units of the same product line.

(c)(1) Except as provided in paragraph (4), a product shall be considered unreasonably dangerous in design only if it is determined that the manufacturer failed to adopt an alternative design that—

(A) was available to the manufacturer when the product was designed, under paragraph (2);

(B) was on balance better than the chosen design, under paragraph (3); and

(C) would have prevented the claimant's harm.

(2) An alternative design shall be considered available to the manufacturer when the product was designed if the alternative design was known at that time or in the exercise of reasonable care should have been known by the manufacturer to exist and to be feasible for use in the product by the manufacturer.

(3) An alternative design shall be considered better than the manufacturer's chosen design if the alternative design—

(A) was significantly safer than the chosen design. The alternative design was safer than the chosen design if the alternative design would have provided both—

(i) better safety than that of the chosen design as to the particular hazard which allegedly caused the claimant's harm; and

(ii) better overall safety than that of the chosen design.

The overall safety of the alternative design is better if the hazards it eliminates are greater than any new hazards it creates for any persons and for any uses;

(B) was not more expensive than the chosen design, unless the added safety benefits of the alternative design were significantly greater than the added expense;

(C) was not less useful or desirable than the chosen design, unless the added safety benefits of the alternative design were significantly greater than the losses of usefulness or desirability; and

(D) was not in violation of any statute, regulation or mandatory safety standard of Federal or State government.

(4) A product shall not be considered unreasonably dangerous in design where the claimant's harm resulted from—

(A) a manner of use of the product other than that which would be reasonably expected of an ordinary person who is likely to use the product; or

(B) an alteration or modification of the product other than that which would be reasonably expected of an ordinary person who is likely to use the product.

(d)(1) A product shall be considered unreasonably dangerous because of the failure of the manufacturer to provide adequate warnings of danger or instructions on safe use only if it is determined that such danger or safety information—

(A) was available to the manufacturer, under paragraph (2);

(B) was reasonably necessary, under paragraph (3);

(C) was not provided effectively to an appropriate person, under paragraph (4); and

(D) would have prevented the claimant's harm, under paragraph (5).

(2) Danger or safety information shall be considered available to the manufacturer—

(A) when the product was sold, if the manufacturer knew or in the exercise of reasonable care should have discovered such information by that time; or

(B) after the product was sold, if the manufacturer knew or in the exercise of reasonable care should have discovered such information in time to avoid the claimant's harm.

(3) Warnings and instructions shall be considered reasonably necessary if they (A) concern dangers which are significant, and (B) provide information which would be useful to persons likely to use

the product. Such information is not reasonably necessary with respect to dangers—

(A) that were obvious or known to the user or to another in a position to act on his behalf or for his protection, including the user's physician, employer, or other person in control of the product;

(B) that appeared trivial at the time, considering the remoteness of the risk, the triviality of the expected harm, and the likelihood that users would disregard warnings and instructions on more important risks if provided with an excess of information;

(C) associated with manners of use of the product other than those that would be reasonably expected of an ordinary person who is likely to use the product; or

(D) associated with alterations or modifications of the product other than those that would be reasonably expected of an ordinary person who is likely to use the product.

(4)(A) Except as provided below, any necessary warnings and instructions shall be provided directly and effectively to the user if feasible and if a manufacturer in the exercise of reasonable care would do so in view of the hazards involved and the risk that the user would not otherwise receive or comprehend the information. Such information shall be considered effectively provided if it is conveyed in a manner likely to catch the attention of and be understood by the person to whom it is provided. Such information need not be provided directly to the user if—

(i) the manufacturer provided such warnings or instructions to a person who was reasonably expected to pass them on to the actual product user or to another who was reasonably expected to take action to avoid the harm:

(ii) the product involved is one that may legally be used only by or under the supervision of a class of experts, and such warnings or instructions were provided to the using or supervisory expert;

(iii) the product was used in a workplace, and such warnings or instructions were provided to the employer of the claimant, or to the person having possession or custody of the product, because there was no feasible means of transmitting them directly to the claimant; or

(iv)(I) the product was sold as a component part, in bulk, or as a raw material to be incorporated or converted into another product; and

(II) such warnings or instructions were provided to the

manufacturer's immediate vendee.

(B) In the event that it is determined that danger or safety information was available to the manufacturer in accordance with paragraph (2)(B), the manufacturer shall not be liable if it made reasonable efforts to provide effectively such information to an appropriate person under subparagraph (A).

(5) The failure to provide adequate warnings or instructions shall be considered to have caused the claimant's harm if it is determined that the claimant or a person acting on his behalf would have taken action which would have avoided the harm if such warnings or instructions had been provided.

(e)(1) A product shall be considered unreasonably dangerous because it did not conform to a representation only if it is determined that—

(A) the claimant, or a person acting on the claimant's behalf, relied on a representation made by the manufacturer or its agent about a material fact concerning the product; and

(B) the representation was untrue

(2) For purposes of this subsection, the term "material fact" means any specific characteristic or quality of the product. Such term does not include a general opinion about, or praise of, the product.

(3) A product seller may be subject to liability under this subsection although it did not engage in negligent or fraudulent conduct in making the representation.

SEC. 6. STANDARDS OF RESPONSIBILITY FOR PRODUCT SELLERS OTHER THAN MANUFACTURERS.

(a)(1) Except as provided in subsections (b), (c), and (d), in any products liability action brought against a product seller other than a manufacturer for harm allegedly caused by a product, such seller shall be liable to a claimant only if the claimant proves by a preponderance of the evidence—

(A) that such product seller failed to exercise reasonable care with respect to the product; and

(B) that such failure was the proximate cause of the harm.

(2) A seller other than a manufacturer shall not be subject to liability under this subsection if each seller—

(A) did not know at the time it sold the product of the danger that harmed the claimant; or

(B) did not have both reason and a reasonable opportunity to

inspect the product in a manner which would have revealed the existence of that danger.

(b) A product seller other than a manufacturer who makes a representation about any material fact concerning a product shall be subject to liability for harm to the claimant caused by the product in the same manner as the manufacturer under subsection 5(e).

(c) A product seller other than the manufacturer shall be subject to liability without regard to fault for harm to the claimant caused by defects arising in the product while the product is under its control or under the control of a prior product seller other than the manufacturer.

(d) A product seller other than a manufacturer shall be subject to liability for harm to the claimant caused by a product where the manufacturer would have been liable under section 5, if—

(1) the manufacturer cannot be located or probably is not subject to service of process under the laws of the claimant's domicile or other jurisdiction where claimant brings suit; or

(2) the court determines that it is probable that the claimant will be unable to enforce a judgment against the manufacturer.

(e) Neither the claimant nor a product seller other than a manufacturer may prove any fact or issue by showing that the same fact or issue was raised, litigated, and determined adversely to such other party in another action unless they were adverse parties in the other action and had the opportunity and reason fully to contest the fact or issue therein.

SEC. 7. RELEVANCE OF GOVERNMENT STANDARDS AND CONTRACT SPECIFICATIONS.

(a) In any products liability action for harm allegedly caused by a product—

(1) if the claimant proves by a preponderance of the evidence that the aspect of the product or its use of which the claimant complains failed to comply with applicable mandatory Federal or State government safety standards existing at the time of manufacture and pertaining directly to that aspect of the product or its use, the claimant shall be deemed to have satisfied the proof requirements of section 5(a)(1)(A) or 6(a)(1)(A) with respect to such aspect of the product or its use unless the product seller proves by clear and convincing evidence that its failure to comply with such standards was a reasonably prudent course of conduct under the circumstances; and

(2) if the product seller proves by a preponderance of the evidence that the aspect of the product or its use of which the

claimant complains complied with applicable mandatory Federal or State government safety standards existing at the time of manufacture or thereafter and pertaining directly to that aspect of the product or its use, the claimant shall be deemed to have failed to satisfy the proof requirements of section 5(a)(1)(a) or 6(a)(1)(A) with respect to such aspect of the product or its use unless the claimant proves by clear and convincing evidence that such standards were unsound.

(b) In any products liability action for harm allegedly caused by a product—

(1) if the claimant proves by a preponderance of the evidence that the aspect of the product or its use of which the claimant complains failed to comply with applicable mandatory contract specifications of a Federal, State, or local government pertaining directly to that aspect of the product or its use, the claimant shall be deemed to have satisfied the proof requirements of section 5(a)(1)(A) or 6(a)(1)(A); and

(2) if the product seller proves by a preponderance of the evidence that the aspect of the product or its use of which the claimant complains complied with applicable mandatory contract specifications of a Federal, State, or local government pertaining directly to that aspect of the product or its use, the claimant shall be deemed to have failed to satisfy the proof requirements of section 5(a)(1)(A) or 6(a)(1)(A).

(c) For purposes of this section, the phrase “the aspect of the product or its use of which the claimant complains” shall include any failure to warn or instruct.

SEC. 8. EVIDENCE OF POSTMANUFACTURING IMPROVEMENTS.

No evidence shall be admissible in any products liability action, except as provided in section 11(f), of any alteration, modification, improvement, repair, change in or discontinuance of the manufacture, construction, design, formula, standards, preparation, processing, assembly, testing, listing, certifying, warning, instruction, marketing, advertising, packaging, or labeling of a product, whether made by the defendant or any other person after the date of manufacture of the product, except as relevant in a design case to impeach a witness for the product seller who expressly denies the feasibility of such improvement.

SEC. 9. COMPARATIVE RESPONSIBILITY.

(a) All products liability actions under this Act shall be governed

by the principles of comparative responsibility. Except as otherwise provided in subsection (b)(4), the comparative responsibility attributed to the claimant shall not bar the claimant's recovery but shall reduce the amount of compensatory damages awarded to the claimant to the extent proportionate to the responsibility attributed to the claimant.

(b)(1) In all such actions involving comparative responsibility, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories (or, if there is no jury, the court shall make findings) specifying—

(A) the amount of damages the claimant has suffered in harm; and

(B) the separate percentages of the total responsibility attributable to all parties, including the claimant and any non parties responsible for the harm in any way.

(2) In determining and allocating responsibility under this section, the trier of fact shall consider, on a comparative basis, the nature of the conduct of each person responsible for the harm of the claimant and the extent of the proximate causal relation between such conduct and the damages claimed. A person's responsibility for the claimant's harm shall be based upon the principles of liability in this Act, the person's knowledge of the risk, and whether the person's creation of the risk or actions toward the product were unreasonable.

(3) In the case of responsibility of the employer of the claimant or any coemployee of the claimant for the claimant's harm, damages shall be reduced—

(A) in accordance with section 10(a) if such section is applicable; or

(B) in accordance with this section if the amount of damages apportioned to such employer or coemployee hereunder is greater than the amount under subparagraph (A).

(4) If one person's responsibility for the claimant's harm was trivial as compared to the responsibility of one or more other persons, the responsibility of such other person or persons shall be deemed the sole proximate cause of the claimant's harm, and the first person shall have no legal responsibility therefor.

(c)(1) The court shall determine the amount of damages to be awarded to each claimant in accordance with the findings and rulings made under subsection (b), and shall enter judgment in accordance with such findings and rulings against each party determined to be liable.

(2) In any case in which a party is responsible for a distinct harm

or in which there exists some other reasonable basis for apportioning the responsibility for harm caused by a party on an individual basis, damages shall be apportioned severally.

(3) Upon motion made by a claimant not more than one year after judgment against a joint tortfeasor in any products liability action has been entered and appeals have been exhausted, the court may determine whether any part of such joint tortfeasor's obligation is not collectible from such person. Any amount of obligation which the court determines is uncollectible from that tortfeasor shall be reallocated as an obligation to be paid by the other joint tortfeasors involved in the action according to the respective percentages of their responsibility as determined under subsection (b).

SEC. 10. EFFECT OF WORKERS' COMPENSATION BENEFITS.

(a) In the case of any products liability action in which damages are sought for an injury for which the person injured is entitled to compensation under any State or Federal workers' compensation law, any award of such damages shall be reduced by the sum of (1) the amount paid as workers' compensation benefits for such injury, and (2) the present value of all future workers' compensation benefits payable to the employee for such injury.

(b) Unless the product seller has expressly agreed to indemnify or hold harmless an employer for harm to an employee caused by a product, neither the employer nor its workers' compensation insurance carrier shall have any right of subrogation, contribution, indemnity, or lien against the product seller.

(c) If final judgment in a products liability action brought by an employee under this Act has been entered before there has been a determination made with respect to the entitlement of the employee to workers' compensation benefits under State or Federal law, the product seller may bring an action after the date such final judgment is entered—

(1) for reduction of such judgment (in accordance with subsection (a)) by the amount of the workers' compensation benefits to which such employee is subsequently determined to be entitled; or

(2) for recoupment from the employee of the amount of the workers' compensation benefits to which such employee is subsequently determined to be entitled if the product seller had already paid to the employee, in satisfaction of such judgment under this Act, an amount which includes in whole or in part the amount of such workers' compensation benefits.

(d) In any products liability action in which damages are sought for harm for which the person injured is entitled to compensation

under any State or Federal workers' compensation law, no third party tortfeasor may maintain any action for indemnity or contribution against the employer of the person who was injured.

SEC. 11. PUNITIVE DAMAGES.

(a) Following a determination of the product seller's liability for actual damages and the amount thereof, and following a determination of all posttrial motions thereon, punitive damages may be sought by a claimant upon motion to the court. If such damages have been properly pleaded, are awardable under State law, and are not otherwise inappropriate as a matter of law, the court, sitting without a jury, shall thereupon take evidence relevant to liability for and the amount of such damages.

(b) A product seller shall be liable for punitive damages only if the court determines that in selling the product in violation of section 5 or 6—

(1) the product seller acted with a flagrant indifference to consumer safety; and

(2) the violation of section 5 or 6 was an extreme departure from accepted practice.

(c) If the court determines that the product seller should be liable for punitive damages, it shall base its determination of the amount of such damages, subject to the limitations in subsections (d) and (e), upon a consideration of the following—

(1) the likelihood that serious harm would arise from the misconduct of the product seller;

(2) the extent of the product seller's awareness of the likelihood that such harm would arise;

(3) the profitability of the misconduct to the product seller;

(4) the duration of the misconduct and any concealment thereof by the product seller;

(5) the attitude and conduct of the executive officers of the product seller upon discovery of the misconduct, including whether or not the misconduct was thereupon promptly terminated;

(6) the financial condition of the product seller;

(7) the total effect of other punishment imposed and likely to be imposed upon the product seller as a result of the misconduct, including any compensatory and punitive damage awards to persons similarly situated to the claimant and any criminal penalties to which the product seller has been or may be subjected; and

(8) whether the harm suffered by the claimant was also the result of the claimant's own reckless disregard for personal safety.

(d) The amount of punitive damages that may be recovered by one claimant may not exceed, but may be less than, twice the amount of actual damages the claimant is determined to have suffered, but in no event shall an award of punitive damages exceed \$1 million for any one claimant.

(e) If the product seller proves that it has previously paid or been finally adjudicated liable for punitive damages and fines totaling the lesser of \$5,000,000 or 5 per centum of its net worth, its liability for punitive damages shall not exceed the lesser of—

(1) claimant's litigation expenses, including reasonable attorneys' fees; or

(2) the amount determined under subsection (d).

(f) Notwithstanding the provisions of section 8, a product seller may introduce relevant evidence of postmanufacturing improvements in defense of punitive damages.

SEC. 12. PERIODS OF LIMITATION AND REPOSE FOR PRODUCTS LIABILITY ACTIONS.

(a) Any claim under this Act must be brought within three years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm and its cause.

(b) Notwithstanding subsection (a), no products liability action may be commenced more than ten years after the product seller sold the particular product that caused the claimant's harm, except as provided in subsections (c) and (d) of this section, unless such seller expressly represented in writing that it could be used safely for a longer period. If a longer period was so represented, an action must be commenced within three years from the earlier of—

(1) the end of such period represented; or

(2) the period provided in subsection (a).

(c) An action may be commenced within fifteen years after the sale, but not thereafter, if—

(1) the claimant's harm is caused within ten years after the product is sold but does not manifest itself until thereafter; or

(2) the claimant's harm is proven by clear and convincing evidence to have been caused by an intentional misrepresentation of a product seller.

(d) Nothing in this section shall affect the right of any person

subject to liability for harm under this Act to seek and obtain contribution or indemnity from any other person responsible for such harm.

SEC. 13. SEVERANCE CLAUSE.

If any part of this Act shall be adjudged by any court to be invalid, such judgment shall not affect, impair or invalidate any other part of this Act but shall instead be confined in its effect to the specific part of this Act found to be invalid.

SEC. 14. EFFECTIVE DATE.

This Act shall be effective and applied to actions commenced on or after January 1, 1983.