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**PRODUCTS LIABILITY: A LEGAL OVERVIEW**

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**CONTENTS**

SUMMARY

ISSUE DEFINITION

BACKGROUND AND ANALYSIS

Glossary

LEGISLATION

CONGRESSIONAL HEARINGS, REPORTS, AND DOCUMENTS

FOR ADDITIONAL READING

## PRODUCTS LIABILITY: A LEGAL OVERVIEW

SUMMARY

Products liability refers to the liability of a manufacturer or seller for injury caused by his product to the person or property of a buyer or third party. Legal developments in recent years, particularly the adoption of strict tort liability, have made it substantially easier for persons injured by defective products to recover damages. Advocates for consumers and plaintiffs view these developments as necessary to ensure adequate compensation for injured workers and consumers and to furnish an incentive for the manufacture of safe products. Manufacturers, on the other hand, contend that many products liability judgments are unwarranted or excessive and that national uniformity in products liability law is needed. Therefore, they favor replacing the fifty State products liability laws with one Federal law.

## ISSUE DEFINITION

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## BACKGROUND AND ANALYSIS

Products liability, which is primarily a matter of State law, is generally predicated on negligence, breach of warranty, or strict tort liability. To establish liability on the grounds of negligence, a plaintiff must prove that a defendant breached a duty to him to exercise due care, and that such breach was the proximate cause of his injuries. To establish liability under the breach of warranty or strict tort liability theories, a plaintiff need prove only that the defendant sold a defective product and that the defectiveness was the proximate cause of the plaintiff's injuries. Due care on the part of the defendant is ordinarily immaterial. Breach of warranty is an action based on contract, and, in some States, recovery is limited by traditional contract principles such as the lack of either privity of contract or notice by the injured party. Strict tort liability is not limited by these principles; its purpose is "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves" (Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (1963)).

The Federal Interagency Task Force on Products Liability, under the direction of the Department of Commerce, in its Final Report issued Nov. 1, 1977, concluded that, contrary to claims made by insurance companies and industry, there is no products liability insurance crisis. However, the Task Force found that the cost of product liability insurance rose dramatically since 1974, making it more difficult for some small firms to obtain adequate insurance coverage. The major causes of the dramatic rise in rates, the Task Force found, were irrational premium setting procedures by insurance companies, the manufacture of products that are not as safe as current technologies would allow, and uncertainties as to how personal injury litigation is conducted.

On Apr. 6, 1978, the Department of Commerce released an Options Paper on Product Liability and Accident Compensation Issues, 43 Fed. Reg. 14612. It included a model bill entitled, "Product Liability Self-Insurance Act of 1978." On Sept. 11, 1978, the Department published a summary of over 300 comments submitted to it on its Options Paper (43

Fed. Reg. 40438). H.R. 1678 of the 96th Congress closely follows the Department's model bill.

On July 20, 1978, the Carter Administration unveiled its program to deal with product liability problems. The proposals generally followed those suggested by the Department of Commerce in its Options Paper, except that a tax deduction for setting aside self-insurance funds was not among the recommendations. Instead, the Government adopted a recommendation by the Department of the Treasury to extend the carryback period for net operating losses attributable to product liability from 3 to 10 years. The Administration also directed that a model uniform product liability law be prepared to add stability to products liability law, which varies from State to State. Legislation to implement the Administration's recommendation to allow an additional carryback was introduced in the 95th Congress as S. 3489. It was substantially enacted as Section 371 of the Revenue Act of 1978 (P.L. 95-600), which permits businesses to carry losses from product liability back ten years instead of three, as well as forward the usual seven. In addition, Section 371 allows businesses to set aside reasonable amounts of after-tax income as a reserve against future liability claims without triggering a penalty tax. These changes took effect Oct. 1, 1979.

The Department of Commerce subsequently published a Model Uniform Product Liability Act. See 44 Fed. Reg. 2996 (Jan. 12, 1979) for the draft version and 44 Fed. Reg. 62714 (Oct. 31, 1979) for the final version. Although intended for enactment by the States, the draft version was introduced in the 96th Congress as H.R. 1676, and the final version was introduced as H.R. 5976 (both by Representative LaFalce). Hearings on the two versions were held, respectively, by the House Small Business Subcommittee on General Oversight and Minority Enterprise on Feb. 27, 1979, and by the House Commerce Subcommittee on Consumer Protection and Finance on Oct. 25, 1979. The model act is comprehensive, covering a broad range of product liability issues.

On Aug. 16, 1979, the Department of Commerce announced the approval by the White House of a legislative proposal to allow business groups to create their own insurance cooperatives. Entitled the "Product Liability Risk Retention Act of 1979," the draft bill would have allowed groups of product sellers -- groups of 20 companies or more -- to pool all or a portion of their product liability and completed operations risk exposure in a federally-approved cooperative. A version of it passed the House as H.R. 6152, 96th Congress; the Senate failed to act upon the proposal. The Product Liability Risk Retention Act of 1981 was, however, enacted by the 97th Congress (P.L. 97-45) and amended by the 98th (P.L. 98-193). It preempts State laws which in the past made risk retention groups impractical.

In October, 1985, Attorney General Meese established the Tort Policy Working Group, which consisted of representatives of ten Federal agencies and the White House. In February, 1986, the group issued its report: "Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis of Insurance Availability and Affordability." The report made eight recommendations, including the elimination of joint and several liability and of the collateral source

rule, a \$100,000 cap on non-economic damages, and a 25% cap on the first \$100,000 in lawyer's contingent fees. In March, 1987, the Tort Policy Working Group issued another report: "An Update on the Liability Crisis."

Consumer representatives and plaintiffs' attorneys are generally opposed to limiting injured parties' rights and remedies in products liability suits; they consider the present system necessary to provide incentives for the manufacture of safe products and to ensure adequate compensation for injured workers and consumers. Insurance companies and product manufacturers, on the other hand, hoping to reduce the amount currently paid as the result of products liability suits, have suggested a number of reforms of the tort system of recovery. These suggested reforms include provisions to

- (1) Enact statutes of repose. All States have statutes of limitations for product liability actions; these prohibit injured parties from suing more than a specified number of years -- often two -- after an injury occurs or is discovered. In the last several years over 20 States have enacted statutes of repose; these prohibit injured parties from suing more than a specified number of years -- often ten -- after the product is first sold. Manufacturers favor statutes of repose because they preclude recovery where products are old; consumers oppose them because they result in suits being barred before injuries even occur.
- (2) Allow compliance with government safety standards to be a defense for manufacturers in products liability actions. Under State law, compliance with government safety standards usually is not a defense because such standards are only minimums and do not necessarily reflect the highest state of the art. However, under State law, compliance with government contract specifications sometimes is permitted as a defense. To allow compliance with government standards to be a defense arguably would remove an incentive for manufacturers to discover safer ways to design their products.
- (3) Allow compliance with industry safety standards to be a defense for manufacturers in products liability actions. Most States currently allow the state of the art defense. This allows manufacturers to avoid liability when their products were designed in accordance with the highest state of the art that was practically and technologically feasible at the time of manufacture. Manufacturers would prefer to avoid liability when their products conform to industry practice, even if the practice does not reflect the highest state of the art.
- (4) Limit punitive damages. Punitive damages are damages that are added to compensatory damages to punish manufacturers who act with reckless disregard for the safety of product users. They occasionally are in the millions of dollars. Suggested limitations have been to allow only the first

plaintiff who sues concerning a particular defective product to recover punitive damages, or to limit a plaintiff's punitive damages to the amount of compensatory damages he is awarded.

Another proposal, not necessarily favored by manufacturers, is to institute a no-fault system, similar to workers' compensation, under which manufacturers would be liable regardless of whether their products were defective, but their liability would be limited to a specific amount per injury. Jeffrey O'Connell, a leading proponent of this concept, suggests that, with or without enabling legislation, manufacturers be permitted to contract to be liable on a no-fault basis for injuries caused by their products. Unions representing employees could agree to such a contract in exchange for other benefits for their members, and individual consumers could also elect to accept no-fault plans.

A factor to be considered by the courts in many products liability cases is workers' compensation laws, which exist in all fifty States and entitle workers to automatic payment from their employers for injuries suffered on the job. An employer must pay regardless of whether he was at fault; in exchange for assuming this burden the worker's recovery is limited to specified amounts and the employer is made immune from suits by the employee. Thus, if a worker is injured by a defective machine, he may recover his workers' compensation benefits from his employer and thereafter may not sue his employer. Nothing, however, prevents him from suing a third party, such as the manufacturer of the machine; if he can prove that the machine was defective when sold, he can recover damages from the manufacturer. (In most States, he will have to reimburse his employer out of the proceeds.) In most States, where a manufacturer and an employer are both partially at fault in causing an accident, if the worker receives his workers' compensation benefits and sues the manufacturer, the manufacturer cannot sue the employer to force the employer to pay a share of the damages beyond the workers' compensation benefits. To allow such suits would destroy the essential bargain behind workers' compensation by making an employer liable for unlimited tort damages in addition to his limited workers' compensation no-fault damages. However, not to allow such suits subjects a manufacturer, partially at fault, to full liability that he would not have to bear except that the other parties happened to be under a workers' compensation act. Manufacturers generally would like the right to sue negligent employers who have paid workers' compensation benefits to be made national. Some Federal bills have proposed a compromise solution. They would not allow manufacturers to sue employers, but they would reduce manufacturers' liability by the amount of workers' compensation benefits (and the employee would not have to reimburse his employer out of the damages recovered from the manufacturer).

### Glossary

The extent to which each of the following concepts is applicable in particular products liability lawsuits depends upon the relevant State law.

**Alteration of product.** A possible contributing cause to an injury that may be performed by a plaintiff or a third party, such as a plaintiff's employer; it may reduce or eliminate a defendant's liability.

**Assumption of risk.** A form of contributory fault by a plaintiff; it may reduce or eliminate a defendant's liability.

**Breach of warranty.** A basis for liability that does not require the plaintiff to prove that the defendant was negligent, but does permit the defendant to raise certain contract law defenses to avoid liability.

**Collateral source rule.** The rule that a plaintiff's damages will not be reduced by amounts he recovered from sources other than the defendant, such as health insurance benefits.

**Comparative negligence.** The rule that plaintiff's recovery will be reduced in proportion to the degree that his own negligence (or other fault) was responsible for his injury. In its modified form, recovery is barred if the plaintiff's responsibility exceeds a specific degree, such as 50%.

**Contributory negligence.** Negligence (or other fault) on the part of the plaintiff that is wholly or partially responsible for his injury. In a few States, any degree of contributory negligence will totally bar recovery.

**Design defect.** A defect resulting from a product that, although manufactured as it had been designed, was not designed as safely as it should have been.

**Economic damages.** Out-of-pocket expenses incurred by the plaintiff, such as medical bills or loss of income.

**Failure to warn.** A defect consisting of the defendant's failure to provide adequate warnings or instructions regarding the use of its product.

**Government contract defense.** A rule enabling a defendant whose product complied with government contract specifications to avoid liability or to establish a presumption that its product was not defective.

**Government standards defense.** A rule in a few States enabling a defendant whose product complied with government safety standards to avoid liability or to establish a presumption that its product was not defective.



**Joint and several liability.** The rule that all defendants who contribute to causing a plaintiff's injury may be held liable for the total damages.

**Lawyers' contingent fees.** Fees payable only upon recovery of damages, based upon a percentage of the recovery.

**Manufacturing defect.** A defect resulting from a product's not having been manufactured as it had been designed.

**Market share liability.** Liability for a portion of a plaintiff's damages based on a defendant's market share of the injury-causing product; a few cases have held market share liability applicable where a plaintiff cannot prove that a particular defendant manufactured the injury-causing product.

**Misuse of product.** A form of contributory fault by a plaintiff; it may reduce or eliminate a defendant's liability.

**Negligence.** Breach of a duty to exercise due care; it is the traditional non-international tort standard in cases not based upon strict liability.

**No-fault recovery.** Recovery permitted in the absence of fault; if adopted in the product liability context it would permit recovery in the absence not only of negligence but in the absence of a product defect.

**Non-economic damages.** Damages payable for items other than out-of-pocket expenses, such as pain and suffering or punitive damages.

**Patent danger rule.** The rule that a manufacturer is not liable for an injury caused by a design defect if the danger should have been obvious to the product user.

**Periodic payments of future damages.** Payments by a defendant for a plaintiff's future expenses on a periodic basis rather than in a lump sum.

**Post-manufacturing improvements.** Improvements in a product's design that occur after an injury and which plaintiffs seek to introduce in court as evidence that an injury-causing product was defective.

**Punitive damages.** Damages awarded, in addition to economic damages and other non-economic damages, to punish a defendant for willful or wanton conduct.

**Restatement (Second) of Torts.** A statement of tort law written by legal scholars; section 402 A, which provides for strict tort liability for injuries caused by defective products, has been adopted by most States.

**State of the art defense.** The defense that permits a defendant to avoid liability in a design defect case if at the time of manufacture there was no safer design available, or in a failure to warn case if at

the time of manufacture there was no way the defendant could have known of the danger he failed to warn against.

**Statute of limitations.** A statute specifying the number of years after injury occurs, or is discovered, or its cause is discovered, within which suit must be filed.

**Statute of repose.** A statute specifying the number of years after a product is first sold or distributed within which suit must be filed.

**Strict tort liability.** Liability established if a plaintiff proves that a product defect caused an injury; the plaintiff need not prove that the defendant was negligent.

**Useful life limitation.** A period of time set forth by statute after which a product's useful life is deemed over and suit is barred or a presumption that the product was not defective is created; this is similar to a statute of repose.

**Workers' compensation.** Statutes in every State providing for limited no-fault compensation against employers by workers injured on the job. Receipt of such compensation ordinarily precludes a worker from suing his employer; it does not preclude him from using a product manufacturer.

## LEGISLATION

### 100th Congress

#### **H.R. 430 (Roth, T.)**

Sets forth uniform national standards for products liability cases. Makes negligence the sole test for all defective design and failure-to-warn product liability actions. Introduced Jan. 6, 1987; referred to more than one committee.

#### **H.R. 635 (Dannemeyer)**

Contains provisions to regulate interstate commerce by providing for a uniform product liability law. Introduced Jan. 21, 1987; referred to more than one committee.

#### **H.R. 798 (Latta)**

Creates Federal products liability standards. Introduced Jan. 28, 1987; referred to more than one committee.

#### **H.R. 1115 (Richardson et al.)**

Amends the Consumer Product Safety Act to establish Federal products liability standards. Introduced Feb. 18, 1987; referred to Committee on Energy and Commerce.

#### **H.R. 1599 (McKinney)**

Creates Federal products liability standards. Introduced Mar. 12, 1987; referred to Committees on Judiciary, and Energy and Commerce.

**H.R. 1936 (Shumway)**

Creates Federal products liability standards. Introduced Apr. 2, 1987; referred to more than one committee.

**S. 426 (Pell)**

Provides limitations on tort actions. Introduced Jan. 29, 1987; referred to Committee on Commerce, Science, and Transportation.

**S. 473 (Kassebaum)**

Contains provisions to regulate interstate commerce by providing for uniform standards of liability for harm arising out of general aviation accidents. Introduced Feb. 4, 1987; referred to Committee on Commerce, Science, and Transportation.

**S. 539 (Dole et al.), S. 711 (Kasten), H.R. 1155 (Michel et al.)**

Introduced on behalf of the Administration. These bills all include the Product Liability Reform Act of 1987. S. 539 introduced Feb. 19, 1987. S. 711 introduced Mar. 11, 1987; referred to Committee on Commerce, Science, and Transportation. H.R. 1155 introduced Feb. 19, 1987; referred to more than one committee.

**S. 554 (McConnell)**

Contains provisions for greater certainty in the availability and cost of liability insurance, elimination of abuses in the tort system, and for other purposes. Introduced Feb. 19, 1987; referred to Committee on the Judiciary.

**S. 666 (Kasten et al.)**

Provides for regulation of interstate commerce providing for a uniform product liability law, and for other purposes. Introduced Mar. 6, 1987; referred to Committee on Commerce, Science, and Transportation.

**S. 687 (Danforth et al.)**

Provides for regulation of interstate commerce by providing for a uniform product liability law, and for other purposes. Introduced Mar. 6, 1987; referred to Committee on the Judiciary.

**S. 688 (Danforth)**

Provides for regulation of interstate commerce by providing for a uniform product liability law, and for other purposes. Introduced Mar. 6, 1987; referred to Committee on the Judiciary.

**95th - 99th Congresses**

The only law enacted by the 95th Congress pertaining to products liability was the Revenue Act of 1978 (P.L. 95-600), Section 371 of which permits businesses to carry losses from products liability back ten years instead of three, as well as forward the usual seven. Section 371 also allows businesses to set liability claims without triggering a penalty tax. These changes took effect Oct. 1, 1979. No products liability legislation was enacted by the 96th Congress. The 97th Congress enacted

P.L. 97-45, the Product Liability Risk Retention Act of 1981. The 98th Congress enacted P.L. 98-193, a clarification of the Product Liability Risk Retention Act of 1981.

The 99th Congress enacted the Risk Retention Amendments of 1986, P.L. 99-563, which expanded the scope of the Product Liability Risk Retention Act of 1981 to enable risk retention groups and purchasing groups to provide all types of liability insurance, not only products liability insurance. The 99th Congress also enacted the Childhood Vaccine Injury Act of 1986, P.L. 99-660. It will take effect only after Congress enacts a mechanism to fund it. It will require most persons suffering vaccine-related injuries, prior to filing a tort action, to seek no-fault compensation through a compensation program established by the Act. Under the program, compensation for pain and suffering will be limited to \$250,000. A party not satisfied with the compensation awarded under the program could file a tort action under State law, but subject to some limitations.

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