Product Liability Reform in the United States: An Economist's View of the Kasten Bill

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I. Summary

The Product Liability Act proposed by Senator Kasten (the Kasten bill) would be a major reform of product liability law in the United States. It would replace all federal and state statutes as well as common law dealing with product liability and replace them with a uniform federal statute to be administered by state courts, not federal courts. The scope of the bill is remarkably broad: any civil action for harm caused by a product that presently would be based on strict liability, negligence, breach of express or implied warranty, failure to warn or instruct, or any other theory that would lead to an award of damages for harm by a product, would come under the Act if it becomes law. It is therefore a fundamental reform and worthy of the closest scrutiny.

This paper is an attempt to give the bill that scrutiny. The first section summarizes the paper. The second section is introductory; it briefly states the recent history of product liability law and attempts at its reform, and outlines the Kasten bill. The third section develops the analytical framework or point of view. The fourth section is an analysis of the major provisions of the bill, dealing with the responsibilities of the manufacturer for defects of design and
construction, for breach of warranty, and for failure to warn or instruct. The fifth section deals with a number of issues raised by the bill which may be logically subsidiary but are likely to be important nonetheless.

My overall evaluation of the bill and of the issues that it raises is that such a bill is warranted, though not for the reasons usually raised. The usual reasons are a reduction of insurance premiums and a reduction of uncertainty for manufacturers. My own view is that while insurance premiums will likely be reduced, a more important effect is a reduction of the cost of operating the entire system, because the system will be invoked less frequently. Still, the substantive rules will be at least as consistent with efficient precautions as the present system. While a unification of disparate state rules will reduce uncertainty somewhat, I feel that the uncertainties inherent in any ex post review of precaution decisions by courts will continue to outweigh that generated by differences in laws.

II. Recent History of Product Liability Law and Outline of the Kasten Bill

The historic development of product liability law is too rich and complex to describe here. The central issue in the development of the law is the question of strict liability versus negligence. When and under what circumstances is it sufficient for a plaintiff to allege that the product or the conduct of the defendant caused him harm, and when must the plaintiff go further and show that the harm caused could have been prevented by the defendant's exercise of reasonable care? The modern history of product liability law has been that of the expansion of the scope of strict liability.

The recent history of product liability reform over the last ten years is to a large extent a response to the increases in both frequency and amount of product liability judgments. A few years back there appeared to be what many called a crisis in product liability where product liability insurance losses increased greatly, premiums went up sharply, sometimes so much so that some firms chose to go without insurance. Also there were a number of cases reported that seemed to push the extent of the liability of manufacturers beyond the pale. The states responded with a variety of statutes, and the federal government responded in a number of ways. In 1975 the Commerce Department developed the Uniform Product Liability Act, intended for uniform adoption by the states. In fact no states adopted it in its entirety. In
1981 Congress passed the Risk Retention Act of 1981 which permitted manufacturers in the same industry to band together to form risk retention groups and self insure as a way to get around the difficulties and high cost of product liability insurance.

Strong pressure from manufacturers and insurers to roll back some of the expanded role of strict liability as well as related doctrine led to widespread support for Senator Kasten's efforts for reform. Prior to the bill presently being analysed there were two staff drafts. There have been substantial changes from the first draft to the present bill, most of them significant improvements. In order to keep this paper to a reasonable size, we focus entirely on the bill itself and not at all on the earlier drafts.

A short description of the bill. The central provisions of the bill, found in Section 4, deal with the responsibility of manufacturers when a defective product causes injury to a claimant. They provide that a manufacturer is liable to a claimant if the claimant establishes by a preponderance of the evidence that

(i) the product was unreasonably dangerous in construction [as defined in Section 5(a)],

(ii) the product was unreasonably dangerous in design [as defined in Section 5(b)],

(iii) 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],

(iv) 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].

There are a number of other provisions of the bill, both substantive and procedural, that are important. The bill provides that expert opinion is not considered sufficient evidence to support a proposition of fact unless it is supported or corroborated by sound objective evidence [Section 4(b)];

partially overturns the doctrine of "market share" liability which held firms liable in proportion to their market share when it was impossible to identify the supplier of a harmful product [Section 4(c)];

limits collateral estoppel by preventing the use of previous decisions to determine issues of fact [Section 4(d)];

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provides a clear statement of the "state of the art" defense which holds manufacturers responsible only for contemporary technology, not later developments [Section 5 (b, c, and d)];

makes distributors and sellers liable only for their own fault except when the manufacturer is unavailable for suit or is judgment-proof whereupon the seller may be responsible for the harms attributable to the manufacturer [Section 8];

reduces damages proportional to responsibility of others for the harm [Section 9];

reduces damages to the extent that misuse or alteration were responsible for the harm [Section 10];

reduces damages by the present value of worker compensation payments to which the claimant is entitled [Section 11];

limits the time during which an action may be brought [Section 12];

makes "reckless disregard for the safety of product users" the standard for punitive damages, the amount of which is to be determined by the judge [Section 13];

 prevents evidence of corrective measures taken after an injury from being used in court to prove liability [Section 14].

III. Method of Analysis

In its classical form an economic analysis of a proposed legal change like the Kasten bill would carefully compare the proposal with the existing law, suggest hypotheses based on economic theory and practice, and test them against empirical data. Several facts work together to prevent a classical analysis here. First, the law that the Kasten bill would replace is extremely diverse and difficult to identify. It is indeed one of the major purposes of the bill to provide a uniform product liability law for the country as a whole. Presently, the law is so complex that a large part of the income of the product liability bar is earned by informing clients of what the law is that the client is subject to. It would be impossible to be complete in identifying the present law of product liability in a study like this one. Therefore we shall be restricted to informal and impressionistic descriptions of present law, in the same way that all other commentators on the bill and on products liability in general are restricted.

Second, there is no significant body of publicly
available empirical data against which one can test the many available hypotheses about the effects of the Kasten bill. There are anecdotes galore about improbable accidents, but there is no body of data available.

The only statistical data that are directly relevant are those being collected by Professor George Priest at Yale Law School, with the assistance of the Rand Corporation. However, they are not yet ready for analysis. He has gathered data on all jury trials in Cook County, Illinois for about a decade. Insofar as the law in Cook County has developed and changed over that period, the data may someday be able to tell us what effect those changes in the law have had. But in the meantime readily testable theoretical propositions have not been developed. Therefore we are driven to the conclusion that

neither is there a body of data available that shows the need for tort reform.

nor

is there a body of data available that shows that tort reform is unneeded.

Like all other contributions to the discussion of product liability reform, this paper is limited to non-statistical forms of analysis. Still, our discussion is distinctly economic. It focusses on the impact of the law on real economic decisions, decisions on how carefully to build on behalf of others and decisions on how careful to be on one's own behalf. Precautions are costly, but they determine how many accidents the society will have. One can spend too much or too little on them either as an individual or as a society. We look at the law of product liability as a system of incentives for decentralized decisions about precautions. Our analysis is focussed on whether or not the proposed changes will lead to better or worse decisions.

The accident system. People and societies have always responded to the likelihood of harmful accidents. For lack of a better term we shall call this collection of responses the accident system. We mean to include actions by individuals and manufacturers, insurance companies and governments.

The accident system works in two arenas which we might call the real arena and the financial arena. The real arena encompasses decisions about precautions made by manufacturers and consumers. Those decisions determine the frequency and magnitude of accidents. The financial arena includes the courts, which determine who is responsible for paying for damages, and the insurance industry. As a result of prior marketplace transactions the insurance market determines
whether or not accident victims will be indemnified and whether or not losers of lawsuits will be indemnified. Players in the real arena keep their eye on what is going on in the financial arena because the incentives to take precautions are affected by insurance and by liability rules.

Several basic activities in an accident system are worth analysing: precautions are taken, accidents occur, sanctions are imposed, and transfer payments are made. There can be too few or too many of each: too few precautions or too many accidents, etc. Changes in legal rules, such as the changes proposed in the Kasten bill, will affect each of these parts. Indeed, the purpose of a change would be precisely to change some or all of these outcomes. But it is a melancholy fact of social systems that furthering one goal will usually cause other goals to be set back.

By and large, the literature on law and economics has dealt with the real incentives that result from various possible liability rules, abstracting from the effects of insurance. On the other hand, extensive writings on the economics of insurance abstract from liability rules. Here we shall try to bring the two together.

The properties of the accident system that are important to monitor are:

1. the total cost of accidents and precautions

2. the extent to which victims are indemnified for their losses

3. the certainly and sufficiency of sanctions for inadequate care.

4. the cost of running the legal system itself.

Both accidents and precautions are costly. Societies can have too many accidents or too many precautions; these are matters for balance. Precautions by one party can usually be substituted for precautions by another; these also are matters for balance. There is a right amount and type of precaution to be taken by potential victims as well as by manufacturers. In the ancient cases of agricultural fires caused by sparks from passing trains, the railroads should have installed spark arrestors of an effectiveness that just balanced the cost of an increase in effectiveness with the value of the resulting decrease in the likelihood of fire. At the same time, farmers along the tracks should have removed their flammable products to such a distance that the cost of moving them farther just offset the reduction in expected costs of fires. For modern automobile travel, drivers, manufacturers, road designers and road maintainers should all take appropriate precautions against accidents, neither too many precautions nor too few.
All else being equal, we would like all victims of misfortune or accident to be compensated or indemnified. People are averse to risk. A well-known result of the economics of uncertainty is that insurance is valuable: that is, under reasonable circumstances, when actuarially fair insurance is available, risk-averse people insure against hazards as fully as possible.

The victim does not care who pays the compensation, whether it comes from his insurance company, the defendant, or the defendant's insurance company. All else being equal, the more completely people are indemnified for accidents, the better the system is meeting people's needs. We stress here the economic or efficiency basis for indemnification. In fact, the economic justification is difficult to distinguish from ethical or justice-based notions in favor of indemnification of accident victims. Certainly judicial decisions commonly stress the importance of the compensation function of tort law.

The next basic property of the accident system is the certainty and adequacy of sanctions for those who take insufficient precautions. By sanction we mean a payment, imposed by the legal system or by an increase in insurance premium or by being unable to collect from someone else for damages. In a perfectly ordered society, all those who took insufficient precautions, either on their own behalf or on the behalf of others, would be surely sanctioned in proportion to the insufficiency of their precautions. Those who were only slightly incautious would pay only a slight amount, and those who were reckless would pay a large amount. This is a result of a basic but not often analyzed canon of fairness or equity: people in almost the same situation should be treated almost equally. "Let the punishment fit the crime." The other important aspect of this characteristic is captured by the word "surely." As between sanctions applied with certainty and sanctions applied probabilistically, we generally prefer sanctions that are applied with certainty. When two people have done the same thing, but one is sanctioned and one is not, something is unfair.

The preference for certainty in sanctions is probably related to the economics of risk aversion: for a given amount of retribution from equally situated wrongdoers, it is preferable to divide the amount equally rather than to allocate it by lottery.

The final important property of the accident system is the cost of running the system itself, the cost of transactions.

We cannot speak directly about the properties of the actual system and its real alternatives for the simple reason that there are no systematically collected data about these properties nor has there been a well-developed analytical
framework within which to analyze the data. But some results about abstract accident systems are suggestive about the problems at hand.

First, it is well known that if the accident system is a simple abstract version of the traditional common law rule (the rule of negligence with a contributory negligence defense), then the incentives are proper for the real arena to be efficient, that is, all parties have the incentive to take the proper amount of precaution, so that the expected total cost of the system is minimized. From the point of view of the total cost of accidents, the system cannot be improved upon. However, the costs of those accidents that do occur will be borne by victims since defendants have correct incentives to be non-negligent. They will not be indemnified by the defendant. Therefore the system does not indemnify well.

From the point of view of the certainty of sanctions, the system does not do well either. Sanctions are probabilistic, not certain. Even if one is negligent, most of the time one gets away with it, because accidents themselves are infrequent. Then, when an accident does occur, the sanction will not depend on the amount of negligence, only on whether or not there was negligence. The rule and hence the system is quite insensitive to the amount of negligence after the fact. (Note that before the accident happens, in the planning stages, the degree of negligence does make a difference. The more negligent one is, the more likely it is that there will be an accident and then a loss.) It is this aspect of the rule that has probably been the cause of most of the legal doctrinal development whereby exceptions to the rule have been carved out. Juries seem to act as if they valued highly the treatment of almost equally situated people almost equally. They often seem to find the probabilistic justice of the straight negligence, contributory negligence rule too harsh.

Clear thinking about liability rule reform requires a clear understanding of the purposes of tort liability. Traditionally, commentators have identified two major purposes of liability rules. First, liability rules provide incentives for parties to take precautions. Second, they compensate victims for losses from accidents. For both purposes they are seriously flawed instruments. A good incentive requires a clear signal: "You will be spanked if you are not home five minutes after the street lights go on." The child may or may not come home on time, but certainly the incentive is clear and unambiguous. In contrast, a potential defendant, making design decisions about the strength of a cross beam, say, has a signal like this: "If you do not make that cross beam strong enough so that when it breaks for whatever reason,

and someone is hurt,

and they decide to sue you,
and you do not settle,
and on the basis of unknown evidence,
aided by the testimony of unknown experts,
against an unknown plaintiff,
represented by unknown attorneys,
an unknown jury
in an unknown jurisdiction
before an unknown judge
decides that your decision about the cross beam is not what a "reasonably prudent manufacturer under similar circumstances" would have done,
you,
and perhaps your insurance company,
will have to pay damages,
of an unknown amount,
depending on unknown facts,
calculated in an unknown way,
subject to review for unknown reasons."

Even though this incentive is so attenuated by the system, it is no less real. To make the cross beam stronger increases costs to the manufacturer now. The only benefits to the manufacturer are a reduction in the value of one's reputation. If this incentive were totally without effect, we would expect manufacturers to reduce the strength of the cross beam as much as possible. If it were so overwhelming as to cause manufacturers to panic, then all cross beams would be as thick and strong as possible. Fortunately, as a practical matter, they are neither.

For compensating victims, the instrument of tort law is also inept. Certainly the great preponderance of accident victims do not successfully sue someone, and when they do the transaction costs are staggering. It is very expensive indeed to transfer a dollar from one party to another through legal
proceedings. Insurance companies do the job much better indeed. System design should encourage the use of insurance companies wherever possible, rather than depend on the vagaries of tort law.

It is obvious that a central consideration in the economic consequences of the product liability system is the cost of operating the system itself. The products liability industry is very large. Years back a billion dollars a year was used as the estimate of the cost of running the system. Changes in the system which reduce the cost of the system therefore have great potential benefit. Costs of the system can be reduced by either invoking the system less often, or by making it less expensive when it is invoked.

There are two ways to reduce the costs of the system. First, the number of transactions can be reduced. The clearer and more widely understood and accepted is a rule, the more likely is settlement rather than costly litigation. The more the doctrine is to let victims bear the costs of accidents, the fewer cases there are.

The problems of uncertainty that derive from facing a variety of laws are easy to overstate. Differences between jurisdictions account for only a part of the uncertainty. Uncertainty about what negligence means in a particular set of facts is certainly a large part of the problem and it will not be solved by a Federal solution. It is useful to remember, too that uniformity is not worth much if it means uniformly bad. Therefore it is inappropriate to first agree in principle that a uniform statute is desirable and then negotiate on the content of the statute. There are some uniform statutes that are not worth having.

The other way to reduce transaction costs is to improve the process for each case. From this perspective, per se rules and bright line standards are attractive. However, as any lawyer knows well, the problem with per se rules and bright line standards is that they are often wrong; sometimes the bright line is not in the middle of the road.
Federalism. There are three possible methods of legal change in the area of tort liability. The first and most traditional is common law development by judges. The second is legislation by the states. The third is federal legislation, such as that proposed by Kasten and analysed here. From the point of view of the substance of the law, the same results could be reached by any of the three routes. In the past there have been state and federal statutes that have altered aspects of product liability law. In principle and in practice, there is nothing to prevent either courts or state legislatures from generating law that would be equivalent to the proposals in the Kasten bill. The federalism issue goes to the relative merits of the available processes for reaching these substantive legal results?

There are serious arguments in favor of each of the three processes: common law courts, state statutes, and federal statutes. Let us review them briefly.

Much has been written recently about the efficiency of the common law. The essence of this work is that common law development can be efficiency-seeking even though no party or judge cares about efficiency or even knows what efficiency means. If inefficient rules are more likely to be litigated than efficient rules and hence more likely to be changed, then there will be an evolutionary tendency in the system toward efficiency. Later work such as Rubin's latest paper points out that many of the same forces that work toward efficiency in common law litigation should be present in lobbying as well. The distinctions are no longer so clear.

Landes and Posner, among others, have vigorously argued that "the common law is the best explained as if the judges who created the law through decisions operating as precedents in subsequent cases were trying to promote efficient resource allocation." Certainly, common law judges could have reached on their own the results that the Kasten bill reached. The fact that they have not should therefore give one pause. To argue for the Kasten bill is to first argue that the Kasten bill is substantively efficient and then that either the common law will not reach an efficient solution to product liability law or that it will take too long to get there.

Why have courts not reached these results? The obvious possibility of course is that the proposed statute is inefficient and would never be reached by any efficiency-seeking institution. Implicit in the serious advocacy of a federal statute is a theory of the development of the common law that is at variance with the efficiency theory of Posner and Landes. If Posner and Landes were to take their view to its limits then the best thing to do would be to repeal all the statutes and keep legislatures out of the way of the courts. Serious advocates of the Kasten bill should not be granted the luxury of leaving their views on the workings of
the common law system implicit. They should be asked to articulate them explicitly. One possible view less inconsistent with the view that common law development is efficient is that courts might be going in the right direction, but they are going too slow. We cannot afford to wait for these very slow, encumbered processes to work themselves out.

If the model code were adopted by the states, there would be no particular benefit to a federal statute. The states could have adopted the model code. Why didn't they?

Richard Posner, in a paper on product liability written for Lexecon before he joined the court suggested that there is a bias in the state legislatures in favor of plaintiffs. The argument is straightforward as far as it goes. It points out that virtually all of the plaintiffs under a product liability statute are state residents and hence constituents whereas the defendant manufacturers will usually be out of state. For the average state only one in fifty will be instate. As a result the legislature would be inclined to be generous toward plaintiffs even more than would be efficient.

There is an important contrary pressure that offsets the effect mentioned by Posner, that is assumed away in his analysis. Let us assume that a legislature did as he suggests and did it in a big way. To illustrate the point let the product liability in this state after the legislation be ten times as generous as before instate or as in the other states. Let the expected liability increase from $1000 to $10,000 on a machine produced competitively that would cost $10,000 if there were no liability. Thus out of state the price would be $11,000 as it would have been instate prior to the legislation. With this new legislation a price of $11,000 instate would lead to a $9,000 loss. Either the seller would no longer sell instate or he would have to raise his price to $10,000 instate, while he could leave it at $11,000 out of state. Because of the working of the market the interests at stake are not plaintiffs versus defendant sellers, but rather plaintiffs versus all instate buyers. The legislation would make products more expensive instate, an effect that manufacturers would try to make clear to constituents and provide an offsetting pressure to that brought by plaintiffs.

IV. The Responsibility of Manufacturers

A. For Construction Defects. Manufacturers are liable if

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. [Section 5(a)].

Let us look first at the second part of the provision, the part dealing with material differences from otherwise identical units of the same product line. There is a great deal in a few short words. Packed in a thimble, this is the law of quality control. These words should be engraved on the wall of the office of every quality control engineer in the country. Now the draftsmen seemed to have an implicit model of production or construction, on which they fit a sensible law. The implicit model was that of a production line where the phrase, "run of the mill" makes sense. There are large numbers of products produced and they usually differ from one another by very little. In that context, manufacturers are held liable for products that are not run of the mill. However, there are other types of production, production where there are significant differences among units as an ordinary matter. In those cases sorting is an essential part of the production process. These different units are then typically sorted or graded according to some standard, either chosen by the manufacturer or given to him. Processes where purity is important are often of this kind, and so are processes with important animal or vegetable components.

A very simple example that illustrates the point, even though the analogy is stretched, is the sorting of stones by size when they are packed. The size of stones is uniformly distributed say from one to five inches in diameter. It is standard practice to roll the stones down a chute which has holes of increasing size in it. At a two inch hole, all stones smaller than two inches will fall through, and all larger stones will continue to roll. In this way the stones are sorted depending on the size of the holes. In principle, the producer can sort as finely as he wishes, with costs increasing with fineness, and he can disclose more or less, but greater disclosure costs more. He can also describe the distribution of stones in each bin in different ways: he can describe the stones from two to three inches conservatively as "greater than 2 inches," or expansively as "up to 3 inches," or describe the mean "average 2.5 inches."

To fit this production process into a product liability context, however artificially, let us assume that occasionally someone will get hurt if the stone is too small for their particular purpose.

What then are the responsibilities of the producer under this bill? Often it makes good economic sense to avoid all the costs of sorting and pass on the problem and the resultant savings to the customer. But under the provisions of the bill, can he decide to be simple and cheap and not sort at all while simply describing his wares as stones? If he did and
someone were hurt by one of his stones would he be liable for the stone having deviated in a material way from otherwise identical units of the same manufacture? Is there any way that he could have adequately disclosed or warned in order to be free of liability? The statute does not make that clear. As a result it would have to be litigated, at great expense.

Another possibility is that he chooses to sort into one inch grades, since for the overwhelming majority of customers, a variation of up to an inch is immaterial. But along comes someone for whom a quarter of an inch variation turns out to be critical. Is the manufacturer liable to that person without regard to whatever he discloses, or can he save the day by labeling conservatively?

This provision appears to put the limits of the defendant's liability into his own hands, since he controls the design specifications and performance standards of his own products. If a product met the standards or specifications of the manufacturer, but there was still an injury, the manufacturer should not be held liable. It would appear possible for the manufacturer to set specifications and standards freely but be required to meet whatever standards he set. By putting the definition of "defect" into the hands of the manufacturer, the bill allows the manufacturer to limit his responsibility. Under the bill it appears that he could choose not to be simply an insurer of product failures.

If the manufacturer chooses to set and meet standards that are higher than industry standards, then he would be held to those higher standards. One can have little difficulty with holding someone to high standards which he has freely chosen and most likely are reflected in higher than standard prices. By the same token, if the manufacturer chooses to set standards that are lower than industry standards he should only be held to those lower standards, especially when customers have benefitted from the lower standards and lower costs by having to pay a lower price. Manufacturers and consumers both can benefit from the diversity that deviating from industry averages allows. We can be confident that when a manufacturer improves on industry standards he will find a way to communicate his improvement to his customers.

If he manufactures to a standard lower than industry standards, then in order to be protected by those lower standards from liability he must take responsibility to inform his customers of those lower standards. Otherwise, the system would find itself in the awkward position of condoning the passing off of inferior goods as industry standard. In the case where the manufacturer chooses a lower than average standard of design or performance there important difficulties and complications.

The first potential problem with this part of the bill is
that limiting liability to design specifications or performance standards is contrary to the mainstream of judicial thinking on these matters, the theory of enterprise liability, as well as contrary to one of the oft-stated purposes of tort law, to compensate accident victims. Courts may simply interpret the statute away from what appears to be its plain language, and find ways to ignore these limitations. Of course, insofar as that is the case, the statute will have failed its purpose.

Another potential problem comes from the interaction of provisions for construction defects and provisions for design defects. Consider a manufacturer who carefully chooses a design which is more dangerous than industry standards but is significantly cheaper, intending to appeal to a particular subset of the market who can best handle the danger. When there is a failure, even one fully contemplated in the design standard, a potential plaintiff will be inclined to try to show that the design was negligent. The plaintiff could show that other prudent manufacturers did not produce the design, that the manufacturer knew about the danger, and that there was a practical and feasible means to eliminate the danger, i.e., follow industry standards.

One final complication is that there may be a contradiction with the provision that says that the product is defective in construction if it deviates in a material way from otherwise identical units in the same product line. Which provision would control if the performance standards admitted of possible but infrequent variations in the product which made the particular item materially different from otherwise identical units of the same product line? Could a manufacturer protect himself from occasional failures, or would courts and juries be inclined to hold him accountable anyway? If so, the careful language would be a waste and manufacturers would find themselves acting as insurers.

This reading of the bill's treatment of design specifications and performance standards results in their being very close substitutes for, and to some extent playing the role of, warranties. In Section 7 of the bill deals directly with express warranties. There if the manufacturer made an express warranty about safety on which the plaintiff relied, but which was untrue, then the manufacturer can be found liable. It appears that the role of the warranty in the bill is quite parallel to design specifications and performance standards.

When the manufacturer is silent about his design specifications and performance standards, the bill, though its "reasonably prudent manufacturer" language holds him to industry standards. This seems to be entirely appropriate, because it reduces the cost to customers of having to verify the quality of product that a manufacturer is building. The language is a legal analog to management by exception. Unless
there is some explicit statement to the contrary, the consumer is justified in assuming that a particular product is no better or worse than industry standards. If manufacturers want to build something better or worse than the standards of the industry, then they must apprise their customers of the fact. The legal system will not protect them in any efforts to pass off inferior goods.

There is another view of these matters. This view would rely entirely on the discipline of the market, saying that a reduction of the quality of a product will have market effects; the firm's reputation will be harmed when its customers learn of the problem. When customers cannot tell the quality of a product by simple inspection, but have to rely on reputation, then the firm can charge a premium for alleged quality which it stands to lose if its quality is lower in fact than the premium would merit. If that is the case then the premium itself provides the correct incentive in the firm to provide appropriate quality. Whatever the empirical relevance of this model, and one can question it, it liability issue before us can be restated in terms of that model as "what effect would changes in the liability rule have on the magnitude of the premium available because of the uninformed consumer?" Within the model the criterion for a good rule would be that rule which caused the premium to be the lowest. There is no reason to believe that a no fault rule would have the lowest premium.

B. Design Defects. The standard for design defects is basically a negligence standard, the test being whether or not "at the time of manufacture a reasonably prudent manufacturer in the same or similar circumstances" would have used the design that the manufacturer used. The essence of a negligence standard, for our purposes, is the question of whether or not there exists a precaution that the manufacturer could have taken, should have taken, and did not take. "Should have taken" means that all things considered, the benefits of the precaution outweigh the costs.

The bill contains a number of explicit requirements that a plaintiff must meet in order to show a defect in design. These requirements may sometimes go well beyond the essential negligence standard. For example, in a particular industry there may be alternative, safer designs which, like Topsy, have just grown, without benefit of "substantial scientific, technical, or medical support." There are many safety decisions which can and should be made without the aid of the paraphernalia of science or technology. But the proposed standard would prevent courts from taking cognizance of these down home alternatives. On the other hand, one must recognize that the requirement realistically reduces the propensity of plaintiffs to come up with home brew alternatives that are totally without substance.
C. Disclosure of potential hazards. The disclosure of potential hazards is an important precaution which plays a critical role in any system of accident prevention and accident prevention law. First, under the Kasten bill disclosure would appear to provide an affirmative defense for a manufacturer. If the manufacturer provided a clear warning of the particular hazard, then he could try to make a case under Section 6(d) (2) (A) that he is not liable because a reasonably prudent product user would have recognized the hazard as obvious, if the warning was obvious. If the warning were well broadcast, then he could claim that the hazard was matter of common knowledge to persons in the same or similar circumstances as the claimant. Some provision like this is appropriate precisely because it will often be the case that the most efficient precaution for a hazard is not to get rid of the hazard, but to warn users of its existence. Often the best resource to use as a precaution is the good sense of the user.

Failure to provide a warning is a separate cause of action under the bill. The bill provides that a manufacturer is liable for failing to provide warnings or instructions about a danger connected with the product.

There is a large potential for mischief in failure to warn cases, a potential which seems to have been mitigated by careful draftsmanship here. The mischief can come about in the argument about whether or not the warning was adequate. The temptation for plaintiff's counsel is to argue that since the warning did not prevent the accident, the warning was clearly inadequate. Warnings can always be bigger, better, and more vigorous. The best defense, and the appropriate issue is to consider the overall cost and effectiveness of the warning itself.

This way that the Kasten bill handles this problem is to explicitly mention what a reasonably prudent manufacturer would do given the likelihood that the product would cause harm of the type alleged ... and given the seriousness of the harm. [6(c)(1)(B)] This language calls fairly explicitly for analysis of the costs and benefits of the warning, which would presumably vindicate the lack of a frivolous warning. I believe the bill would be strengthened if language were added parallel to Section 5(b)(2)(D), suggesting that plaintiffs bear the burden of proposing alternative warnings that meet the same criteria that alternative designs have met. Nothing focuses a litigator's mind better than having to come up with a real live alternative, rather than just taking potshots. Where there are legitimate causes of failures to warn, the burden of proposing an alternative would not be severe.
Whenever there is a known defect or known possibility of a defect, one of the potentially available actions by the manufacturer is to warn the customer of the actual or potential defect. Therefore almost any defect case can be turned into a warning case. This was in fact the development of product defect cases at the Federal Trade Commission over the last few years. Cases that started out as negligent construction or design cases ended up as negligent non-disclosure cases. There the idea is that a manufacturer can sell virtually any product he wants if it is adequately labeled. A Ford Pinto with piston-scuffing may be materially inferior if sold as a Ford Pinto and perfectly satisfactory if sold as a Ford Pinto with piston-scuffing.

When the harm is a failure to warn then the damage measure ought also to fit the harm. The damage from a failure to warn will be different from the damage from a defective product in general, with the damage from a defective product as a upper bound.

V. Other Issues
State of the art defense. One of the clearest efforts of the draftsmen of the bill is to provide the defendant, in as unambiguous a fashion as possible, with a state of the art defense. That is, defendants shall no longer be held accountable for not providing precautions which were not available at the time of manufacture. That may be sensible in a strict liability context, but it is out of place in a contractarian and negligence framework.

The arguments opposed to the state of the art defense, which were ingenious, have been couched in terms of the "risk of technological change." The courts have been asked who was better able to bear the risk of technological change, the victim of the accident or the defendant. It was a short step in some cases to argue that the defendant was better able to bear the risk, so he should pay. This argument runs entirely to the compensation or insurance function rather than to incentives. A state of the art defense is entirely appropriate when the purpose of the law is to provide proper incentives to parties to take correct precautions.
**Expert evidence.** Section 4(a) (3) (b) provides that "expert opinion is not considered sufficient evidence to support a proposition of fact unless it is supported or corroborated by sound objective evidence." Although this is an improvement over earlier staff drafts which required "substantial" corroborating objective evidence, this provision may well have bizarre effects. The purpose of any evidentiary rules should be to encourage the bringing forth of good evidence and the keeping out of bad evidence. This provision and its predecessors are a response to expert testimony, usually brought by plaintiffs, which was bad evidence, mere speculation. However, in cases where alternative designs or warnings are presented as evidence of a product being unreasonably unsafe, and where those designs or warnings are not in widespread use, the only available source of information about their cost and effectiveness will be expert witnesses.

It is the essence of these cases (and of all tort cases) that the court is asked to compare what actually happened with what would have happened if only the defendant had done something he did not do, namely take some precaution. There usually will be plenty of "sound objective" evidence about what actually happened, but for evidence about what did not happen one must conjecture. That is the nature of the beast. Of course the best source of good conjecture is a good expert.

Our problems start with semantics. The ancient language of the law describes a (necessary) counterfactual proposition as a proposition of fact! Why? Because it is not a proposition of law. When people are required to corroborate propositions about what did not happen with "sound objective evidence" silliness is certain. What is not clear is which of the many available problems will occur. Sometimes good evidence about the counterfactual will be left out; sometimes the sound objective evidence will corroborate something else; and sometimes the requirement will just raise the cost.

One can expect that this procedural change will have a significant substantive effect, but that effect will be difficult to identify precisely. Still it is likely to be a source of real mischief. Plaintiffs and defendants should bring forth good evidence, from whatever source, so that courts have the basis to make good decisions. Certainly expert testimony should not be inconsistent with sound objective evidence. But courts know that already. Courts have been dealing with expert testimony for a long time. It is necessary to the process. There may well be appropriate procedural changes that will improve the courts use of experts, but this is not it. This bill's approach is to prevent a claimant or manufacturer from determining a fact by showing that the identical issue of fact was determined adversely to the other party in another action unless both actions were based on the same event [Section 4(d)].
Responsibility of distributors. Our legal system is profoundly one-on-one in its structure. It is designed to deal with two parties, one ending up the winner and the other the loser. In a simple economy most transactions are truly one-on-one; anyone not party to the transaction is usually quite unimportant to the transaction. Modern economies do not work that way. Consumer transaction has usually been an incredibly complex tree of transactions. Consumer electronics, for example, start as sand on a beach which is made into silicon from which a chip is made. Design, manufacture, assembly, and merchandising at every level are often totally separate, often done in different countries.

Bad decisions anywhere in the tree have the potential to harm consumers. It is the goal of a legal system like ours to properly sort through that complex tree of transactions when there is a harm in order to find the party most likely to have neglected appropriate precautions, and haul him into court. Not only is it important to bring the right party into court, it is also important to make sure that the wrong parties are not brought to court, for the simple reason that defending oneself in court is a very expensive proposition, even if one is innocent.

It is presently a common plaintiff's strategy to try to join as many parts of the transaction tree as possible to the action, and leave them with the responsibility of separating themselves. This is a costly business, and it is the purpose of this section of the bill to reduce it without making it impossible to sue a seller when he is negligent. The structure of the bill tells plaintiffs that as they go up the tree they should keep ignoring parties to the transaction until they either find someone negligent or until they find a "manufacturer." Obviously, there will be difficulties whenever one tries to force a very complicated tree-like set of relations into a very simple one-on-one legal system that was designed to handle cases with one plaintiff and one defendant.

A negligence based system is much better at accepting the complexities of modern manufacturing and distribution than is a strict liability system. A negligence system basically causes the plaintiff to sort through the transaction tree until he finds someone who neglected to take a precaution that he should have taken. A strict liability system causes the plaintiff to sort till he finds the first party large enough to pay the bill and hold him strictly liable.

It is quite consistent with the thrust of the rest of the bill that negligence should be the standard for wholesalers, retailers, and other product sellers who are not manufacturers. The purpose of Section 8 is to force plaintiffs to go as far back in the chain of production as is
necessary to find the party that is at fault.

Comparative responsibility doctrine. More problematic is the provision for comparative responsibility, which reduces the damages awarded the claimant in an amount proportionate to the responsibility of the claimant. Under an ordinary negligence or contributory negligence rule, the fact finder has a simple binary choice to make: did the party meet the standard of care or not? It is a yes or no decision. Under the comparative responsibility doctrine the decision is no longer binary, it is quantitative. Not yes or no, but how much? This greatly increases the difficulty of the decision to be made in the court. The problem is compounded by the fact that there is no guidance on how to make a principled decision about comparative negligence. There are no convenient principles which provide the relevant metric. Perhaps this is just a way for the jury to fudge, but it invites fudging on everybody else's part, too.

Misuse or alteration. Section 10 of the bill provides that whenever there has been misuse by anyone other than the manufacturer which caused the harm, then the damages from the manufacturer shall be reduced or apportioned to the extent the misuse was a cause of the harm. Now since Section 9 reduces damages whenever there is negligence, contributory negligence, or assumption of the risk by the plaintiff, this companion section would seem to simply serve the purpose of codifying and clarifying that what it calls misuse or alteration is a form of contributory negligence. Certainly courts could have reached that result without the codification in a negligence setting, though not easily in a strict liability setting.

Interaction with workman's compensation. The interaction between two totally different systems with quite different goals is bound to be difficult. The Kasten bill deals with the interaction by putting worker compensation first. It would reduce the damages to which an injured person is entitled by the amount of worker compensation paid plus the present value of all worker compensation benefits to which the worker would be entitled. Furthermore, employers or insurers would have no subrogation rights against the manufacturer. The effect of this is to reduce the value of suits by the amount of the compensation, and thereby reduce the number of lawsuits substantially. First it will remove those suits for less than the amount of compensation. Second, it will reduce the likelihood that it will be brought. Finally, it will reduce the rewards to plaintiff's attorneys for any given proportional fee. In the other direction, by decreasing the cost of the suit it would increase the likelihood of
settlement by the manufacturer.

The major benefit of the change is to reduce the cost of the indemnification, probably substantially. The problems are that manufacturers' incentives may be attenuated. The bill does not bar suits by compensated workers; it reduces any damage warded by the amount of the compensation. Now many feel that worker compensation is too low. This bill will not exacerbate this; if anything, it will alleviate it. Workers will be able to supplement their compensation when products were clearly defective.

Time limitations. The present bill has two alternative forms of time limitations, one which bars actions after twenty-five years and one making a rebuttable presumption that the product was not unreasonably dangerous after ten years. Both do not apply if there was intentional misrepresentation or if the harm was the result of cumulative exposure. Both of these alternatives are rough justice measures which reflect the inability of a legal system to right ancient wrongs. Memories fade, witnesses die, papers get shredded, corporations go under. I would choose the second limitation because it is likely to stop more of these ancient cases which are very likely to be badly handled by the system. I would even favor having both provisions in order to get some measure of finality for these issues.

Partial overturn of the "market share" liability rule. Section 4(c) deals with cases where the plaintiff cannot prove which manufacturer made the offending product. This is a response to the Sindell decision in California, holding all manufacturers of a particular drug liable in proportion to their market share.

It is unlikely the issue would arise in a design context because one would have to show that the design was negligent for a number of manufacturers, which would be difficult indeed. Sindell would be treated as a design defect use under the bill and it would likely be impossible to show that the entire industry was negligent in designing the drug. Sindell is repealed by the substance of the bill, not its procedural rules. Construction defects that cannot be traced to a particular manufacturer would seem to be rather rare.

As it is presently written, the bill requires both that the action be brought against every manufacturer who could have made it, and each has better information than the
claimant to establish who made it. One can easily imagine a case where a few manufacturers had less information than the claimant, but most had more. Then it would appear that the action must fail, for no good reason.

Uncertainty and Data collection. The lack of systematic statistical data about the workings of the legal system has a number of profound consequences. First, insurance rating of products is very subjective. The better the data, the better the estimates of risk would be, and the more competition there would be for each risk. Second, jurisprudence and hence law reform suffers. Profound questions of public policy are decided by rhetorical force or the weight of the interests involved, without benefit of facts. This lack of facts has important consequences for the federalism debate.

This bill will have an effect on insurance rates. Since the bill increases the array of defenses available to the defendant and it tends to lower awards, there will be fewer cases and lower average awards. As a result, the costs to defendants will go down. So the business of product liability insurance will become less costly. Eventually these lower costs will be reflected in premiums. However, the relationship between the effects of the bill and premiums is not simple and direct, many other things enter into the setting of premiums. First, since objective data without risks is so scarce, premium setting is very subjective. The bill will not change that. Insurance companies in the course of their business build up larger reserves which are available for investment. Fluctuations in investment earnings will cause premiums to fluctuate. As a result there is a lot of noise in rate-making and the effects of the bill will be difficult to measure, even after the fact.

The great virtue of decentralizing decisions to the states is the potential for learning from the federalist experiment. If one state chooses wisely and another poorly, then these outcomes of the experiment inform all the states in the future and they can also follow the better examples. But for the federalist experiment to make sense we must be able to find out who chose wisely and who did not. Without the information about the outcomes the experiment is labeled. It is certainly an appropriate role of the Federal government to gather information about the outcomes of the experiment, to analyze that information, and to publish it. Based on that general argument I would suggest that it applies particularly well to the issue at hand.

Whatever the merits of the proposed statute, and I think there are many, I would argue that there should be a Federal requirement for reporting relevant data about product liability cases to the Federal government for it to collect,
analyze, and disseminate. The appropriate analogy is with the National Income Accounts which were started in 1929.
1. See Modern Product Liability Law by Richard Epstein for a thoughtful and detailed analytical view of that development.

2. See for example, Products Liability at a Glance--1982, a wall chart prepared by the University of Miami Law and Economics Center, that characterizes the products liability law of 51 jurisdictions according to 77 categories. See also the Commerce Clearing House Products Liability Reporter for complete coverage of the area.

3. A preliminary effort by Richard Higgins using extremely aggregated data, while interesting, is not persuasive. He used non-transport accident death rates in 1960 and 1970 as an admittedly distant proxy for product-related accident frequency. He used dummy variables for strict liability and vertical privity in implied warranty cases by state as well as personal income and percent of the population with more than four years of college. Richard Higgins, "Producers' Liability and Product-Related Accidents," 7 Journal of Legal Studies 1978. Professor George Assaf of American University has carefully analyzed Higgins' work and has found his results not to be reproducible. Assaf's paper is in preparation.


5. See Guido Calabresi, The Cost of Accidents, which is the classic work which first addressed the economics of accidents, pointing to the important possibilities for substitution among types of costs. It is the precursor of most modern work in the economics of torts.


7. Let us note briefly that there is some subtle linguistic problem raised by the language "otherwise identical." All things deviate from otherwise identical units. It is not clear where this notion begins and ends. It should be rephrased but I am at a loss to find better alternate language.

9. See *In the matter of Ford Motor Company*, FTC Docket 9105, Complaint and Consent.
CONGRESSIONAL RECORD — SENATE
June 16, 1982
This status quo is undesirable for all concerned—the claimant, the product seller or manufacturer, the insurer, and the consuming public. Recognizing this, some States have attempted to legislate certainty and stability in product liability law. Unfortunately, these State efforts have proven to be inadequate in resolving the problem of uncertainty. No State statute defines the basic rules of liability in a product-related case. Further, no two States have enacted the same statute. As a result, product sellers marketing goods nationally still have the problem of insuring against suits which may arise in any jurisdiction, all of which have different rules. A single State cannot respond effectively to a product that is distributed in a nationwide marketplace.

I believe that there is a growing consensus that Federal product liability legislation is needed to bring uniformity and certainty to the law and to stabilize what has become a serious burden on interstate commerce. In addressing this problem, I have developed a uniform product liability bill which I believe is fair and reasonable, and which protects the interests of consumers, insurers, manufacturers, and product sellers. Consumers should have the right to recover if injured by faulty products. Manufacturers should have clear standards of responsibility under which they can know their obligations. I believe that this legislation will achieve these ends and will also reduce the legal costs associated with product liability claims which are ultimately borne by consumers.

The proposal has had a long and careful history, beginning with the development of the Uniform Product Liability Act by the Department of Commerce in 1975. That act was developed with substantial input from the public. Then, in the 96th Congress extensive hearings were held in the House on the topic. Out of those hearings evolved H.R. 7921, 96th Congress, 2d session, which was a Federal Uniform Product Liability Act. In April 1981, I asked the staff of the Consumer Subcommittee to begin with H.R. 7921 and prepare a staff draft for our consideration in the Commerce Committee. That draft was issued for public comment on October 15 of last year. We received over 2,000 pages of public comment and made substantial revisions in the draft, taking into consideration concerns of both consumers and product sellers. In March of this year, the subcommittee held 2 days of intensive hearings on the need to reform product liability law. The hearings were further enhanced by the submission of the subcommittee's product liability and enhanced my belief that this problem can only be addressed through a Federal law.

Mr. President, I ask unanimous consent to have printed in the Record my product liability legislation and an accompanying section-by-section analysis.

S. 2631—PRODUCT LIABILITY ACT
Mr. KASTEN. Mr. President, today I am introducing legislation to create uniform product liability law throughout the United States.

I am pleased to have Senators LUGAR, INOUYE, ARNOLD, PERY, GARN, STAPPED, and GLENN as cosponsors of this legislation.

The product liability problem reached crisis proportions in the mid-1970's and it continues today. The uncertainty and instability in product liability law has become a major problem not only for manufacturers and product sellers, but also for consumers. Conflicting product liability rules have made it extraordinarily difficult for consumers to know their legal rights and for manufacturers and product sellers to know their obligations. This has created expensive and burdensome legal costs which are passed on to consumers. The uncertainty has also created instability in the insurance market, which has been subject to sharp swings in cost. I believe that the product liability problem has created a serious burden on interstate commerce and that Federal legislation is needed to address the source of the problem.

In 1977, a Federal Interagency task force on product liability identified two key reasons for the product liability crisis.

First, product liability insurance rates were being established on an overly subjective basis, with the result that rates for some product sellers and manufacturers skyrocketed 300 percent and more. In fact, some companies, unable to secure affordable insurance, were forced to "go bare." The adverse effects of that are obvious—a valid claim may be unrecoverable and a single judgment may force a company out of business. In response to this, Congress enacted the Risk Retention Act of 1981. That act, which I sponsored, provides product sellers and manufacturers alternatives to commercial product liability insurance through the creation of risk retention or self-insurance groups or through purchasing groups, which may buy commercial insurance at favorable group rates. By providing a competitive alternative to commercial insurance, the act helps assure all of us that insurance rates and premiums will be set on a fair and equitable basis.

The second cause of the product liability problem identified by the task force was uncertainty in the tort litigation system. This problem continues unabated today and, in fact, it has gotten worse. The law in the area of product liability generally is created by judges. As a result, the law varies from State to State and within one State from court to court. The law is constantly evolving from case to case. In addition, the number of product liability claims has risen dramatically in recent years. Just a few years ago, in 1975, there were fewer than 3,000 product liability claims filed in the Federal courts. This past year, over 9,000 claims were filed. That is more than a 300-percent increase in just over a 5-year period. Given the instability in the litigation system, claimants cannot know their rights; and product sellers, manufacturers, and insurers cannot know their obligations. There is clearly a need to stabilize this area of the law.

The inability to define the rules governing the responsibilities of product sellers and manufacturers has undesirable consequences. Insurers, unable to predict the potential risks of their insureds, set high product liability insurance rates. Product sellers have less incentive to develop new products or to improve the safety of old ones. The chaos in the law results in confusion over what rules apply in each case, with accompanying legal costs which can be exorbitant. One estimate is that 77 cents is spent in legal costs for every 66 cents an injured claimant receives.
CONGRESSIONAL RECORD—SENATE

S. 2631
June 16, 1982

There being no objection, the material was ordered to be printed in the Record, as follows:

S. 2631
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 alleged facts or circumstances, and the proof required to satisfy this standard is more than that required under preponderance of the evidence, but less than that required under clear and convincing evidence;
(3) "commerce" means trade, traffic, communication, or transportation (A) between a place in a State and any other place of this State, or (B) in the importation, exportation, or transportation of a product, 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 injury, including the death of a person; or (C) mental anguish or emotional harm of the kind caused by the product's personal physical injury, illness or death; and "harm" does not include commercial loss;
(6) "manufacturer" means (A) any person who is engaged in a business to produce, make, design, market, sell, or distribute a 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 person is an enterprise, a business, or any other legal entity engaged in such activities, or (B) any person who is not a manufacturer or distributor of the product which holds itself out as a manufacturer to the user of the product;
(7) "person" means any individual, corporation, partnership, association, firm, business, society, joint stock company, or any other entity (including any governmental entity);
(8) "partial technological feasibility" means the technical and scientific knowledge relating to the safety of a product which, if a product, was developed, available and capable of use or implementation in the manufacture of a product, and economically feasible for incorporation into the product; and
(9) "preponderance of the evidence" is that measure or degree of proof which, by the weight, credibility, and value of the evidence, is greater than the weight, credibility, and value of the evidence to the contrary, that it is more probable than not that a fact occurred or did not occur;
(10) "product" means any object, substance, material, ingredient, component, or part which is capable of being 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 deals in placing product in the stream of commerce; but does not include—
(A) a seller of real property;
(B) a professional service 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;
(C) any person who—
(i) acts in only a financial capacity with respect to the sale of a product; and
(ii) leas(est) 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 is brought on or after the effective date of this Act and which has 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 such person is a party to the contract causing the harm. For example, if a manufacturer contracts with another to provide product safety, the contracting party may sue for breach of contract and recover from the manufacturer the loss caused by the product itself or for commercial loss for a product liability action, and shall be governed by applicable commercial or contract law in any such actions against the manufacturer unless both actions were based on harm caused by the same event in which two or more persons were harmed.
(c) A manufacturer may not recover any damages against another person for an action against that manufacturer unless both actions were based on harm caused by the same event in which two or more persons were harmed.

PRODUCT DESIGN AND CONSTRUCTION

Sec. 5. (a) A product is unreasonably dangerous if it is designed in a manner that increases the risk or likelihood of harm to persons or property when the product is properly used, or if 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.
(b) A product is unreasonably dangerous in design if, at the time of manufacture or sale of the product, the manufacturer knew or had reason to know that the design of the product was unreasonably dangerous and that it would cause the product to be dangerous and that it would cause the product to be unreasonably dangerous and that it would cause the product to be unreasonably dangerous and that it would cause the product to be unreasonably dangerous.
(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 unavoidable 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 some 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.

(a) 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 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 product 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, or, if such was not possible, at least 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 to otherwise instruct about a product defect known or reasonably should have known about the danger which allegedly caused the claimant’s harm;

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

(2) 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 reasonable person in the same or similar circumstances would have provided with respect to the danger to which the harm alleged by the claimant was caused by the product, given the seriousness of the harm alleged by the claimant; and

(3) the warnings or instructions which the claimant alleges would have been adequate, if provided, would have led a reasonably prudent person 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)(X1) 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 allegedly caused the claimant’s harm, should have known about the danger which allegedly caused the claimant’s harm; and

(B) postmanufacture warnings or instructions are not 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 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) the product user or to another person in accordance with subsection (d)(1); or

(b) a person, including an employee, who could reasonably have been expected to assure that the product 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 supervised by an expert or a class of experts. For purposes of this clause, warnings or instructions are considered provided to the using or supervising expert when the expert was 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 work environment and there was no practical feasible means of transmitting warnings or instructions directly to the claimant; or

(iii) where the manufacturer was not an employee of the manufacturer’s immediate buyer and there was no practical and 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 are of common knowledge to persons in the same or similar position to 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 consumer as defined in subsection (d)(1), if applicable; or

(C) alterations or modifications, as defined in section 10(b)(2), of the product which materially affect product 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 whether the characteristic or quality of the product, but does not include a general opinion about, or general praise of, the product or its quality.

(4) 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.

CONSIDERATION OF PRODUCT LIABILITY

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

(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 proximate cause of the harm complained of by the claimant; and

(2) the claimant establishes that the product seller failed to exercise reasonable care with respect to the product.

(b) In any product liability action, a product seller is not liable 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 unless it is supported or corroborated by sound objective evidence.

(d)(X1) A claimant may not establish any fact necessary to make the determinations described in subsection (c) by showing that the identical issue of fact was determined adversely to another claimant in another action against the same seller. The product seller was based on harm caused by the same event in which two or more persons were harmed.

(e)(X1) In determining whether a product is unreasonably dangerous under subsections (a) and (b), the trier of fact may consider the effect of the conduct of the seller with respect to the construction, manufacture, and sale of the product and any failure of the seller to transmit adequate warnings or instructions about the dangers and proper use of the product involved in the claim. The 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.

(4) 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 damage occurred; and

(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 for recognized or product liability action, but shall reduce any damages awarded to the claimant in an amount proportionate to the responsibility of the manufacturer or producer for damages. Under this subsection, "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 have recovered if the manufacturer or producer was not responsible, (B) the percentage of total responsibility for the product's harm to be allocated to each claimant, defendant, to any defendant, to any party defendant, and to any other person, including an employer or coemployee. For purposes of this paragraph, the court may determine that the 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 provisions of subsection (b), and enter judgment against each party determined to be liable in proportion to the degree of responsibility.

(d) If not being 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 is not collectable from that person shall be reallocated to the other persons who are parties to the action and to whom responsibility was allocated or to the plaintiff 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 in 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 the amount determined under subsection 9(a), if that section is applicable; or (B) the percentage or responsibility apportioned to the employer or coemployee shall be based upon the respective percentages of their responsibility, as determined under subsection (b).

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

(a) If 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 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 (b) the value of such 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 employee is entitled, and the amount of the claimant's harm that would have been entitled if the claimant had filed a worker compensation claim.

(b) If a manufacturer or product seller has expressly agreed to indemnify or hold an employer harmless for harm to an employer or employee, the product liability action or worker compensation claim may be brought under this Act and

(1) the employer shall have no right of subrogation, contribution, implied indemnity or lien against the manufacturer or product seller

(2) the worker compensation insurance carrier of the employer shall have no right of subrogation against the manufacturer 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, any third party tortfeasor may maintain any action for implied indemnity or contribution against the employer or any coemployee of the person whose claim would be derivative from such a claim shall be permitted to recover in a product liability action against a person or former employer of the person whose claim would be derivative from such a claim, unless 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 after 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 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

(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 or through gross negligence or recklessness made 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 claimant's harm was caused by the product when the product was involved was reasonably dangerous because of its design, or unreasonably dangerous because of the failure to give warning or instructions, if the harm was caused after the end 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.
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(B) The period (if any) during which the product seller warrants that the product can be safely used.
(2) The presumption under this subsection may be rebutted only by clear and convincing evidence.
(a) The presumption under subsection (a) does not apply if—
(1) the manufacturer or product seller intentionally misrepresented facts about the product, or the product, or the conduct, including 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 protracted exposure to an unreasonably dangerous product; or
(3) the claimant, 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 the conduct 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 the 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 of 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) whether punitive damages should be awarded to a claimant, the court shall determine the amount of those damages. In making that determination, the court shall consider:
(1) all relevant evidence relating to the factors set forth in subsection (b);
(2) the extent of conduct to the manufacturer or product seller; and
(3) the total effect of other punishment imposed upon the manufacturer or product seller. In determining 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.
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No claim may be brought more than 2 years from the time the claimant discovered or should have discovered the harm.

Section 9—Comparative Responsibility

Under this section, the comparative responsibility of third parties and of the claimant due to contributory negligence or assumption of risk may not bar, but reduces compensatory damages awarded to the claimant by an amount proportionate to the claimant's responsibility. This section is similar to the principle of joint tortfeasors.

Section 10—Misuse or Alteration

Under this section, if a product seller establishes by a preponderance of the evidence that a misuse or alteration of a product caused the claimant's harm, damages shall be reduced or apportioned to the extent that the misuse or alteration was a cause of the harm. Alteration which will not lead to a reduction in damages if it was in accordance with seller instructions; if it was performed with the seller's consent; or if it was reasonably anticipated and the seller failed to provide a warning against that alteration. This section ensures that responsibility for harm is not placed on those who did not cause the harm. In doing so, it places incentives for risk prevention on those best able to do so.

Section 11—Effect of Worker Compensation Benefits

Under this section, damages shall be reduced by the amount paid to the claimant under any state or federal worker compensation law and the present value of any such benefits to which the claimant will be entitled in the future. Unless the product seller has expressly agreed to indemnify an employer, the employer would have no right of subrogation, contribution, indemnity or lien against the seller, and the worker compensation insurance carrier of the employer shall have no right of subrogation against the product seller. This provision will substantially reduce transaction costs without reducing the amount the injured claimant receives.

Section 12—Time Limitation on Liability

If a product is a capital good, no claim alleging unsafe design or failure to warn in a product liability action may be brought for harm caused by the product more than 25 years after delivery to the first buyer or lessee not engaged in the business of selling and leasing the product or using the product as a component in the manufacture of another product. Capital good is defined as a product used in trade or business or held for the production of income.

As an alternative proposal, the bill includes a provision, applicable to all products, that a presumption of non-liability exists in a rebuttable presumption of non-liability that a product is not unreasonably dangerous after a 10-year period of time. This rebuttable presumption may be overcome by the claimant if he shows by clear and convincing evidence that the product is unreasonably dangerous.

These limitations on liability are not applicable if (1) the product seller intentionally or negligently misrepresented or fraudulently concealed information about the product; (2) the claimant's harm was caused by the cumulative effect of prolonged exposure to the product; or (3) the harm did not manifest itself until after the time limitation. Thus, claims for certain harms, such as harms from drugs, which do not manifest themselves until many years after product use, would not be barred by these sections.

Section 13—Provisional Product Liability Reform Act of 1982

We clearly have a product liability problem in this country. All across the Nation, product liability insurance rates and transaction costs continue their steady climb. The mere threat of litigation has generated within the business community a reluctance to develop new products. And a confusing, widely divergent, and frequently changing body of State laws leaves consumers and manufacturers alike with no clear understanding of their rights and responsibilities.

Who benefits from this state of affairs? Not manufacturers or product sellers, who must do business while the rules of the road in product liability change all around them, often with bewildering speed. Afn certainly not consumers, who ultimately pay all of the insurance costs and legal fees, who are being denied access to new and better products, and whose right to recover for an injury can shift dramatically, depending upon the chance circumstance of where they live or happen to be at the time of injury.

Mr. President, the product liability problem is clearly national in scope. It requires a national solution; in this case, a uniform Federal products liability law. The legislation we are introducing today is a very large step toward the enactment of such a law. It has not been easy to reach this point. Interest in product liability reform runs very high, and far too many groups are only willing to sacri-