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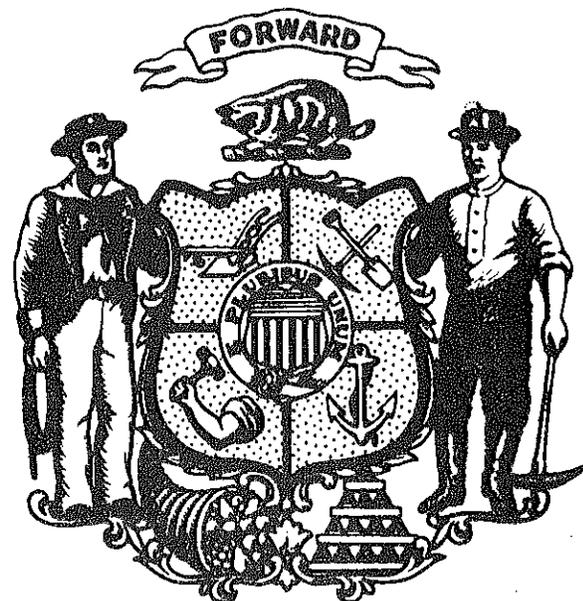
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PRODUCT LIABILITY

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PRODUCT LIABILITY

I. INTRODUCTION

Product Liability Defined

The concept of product liability refers to the legal responsibility — by the manufacturer or marketer of a product — for any bodily injury or property damage caused by that product. Product liability insurance coverage is purchased to protect against claims by users of the product who sue in court for redress of such injury or damage, alleging the product was unsafe or defective.

Background

Is There a "Crisis"?

Whether or not a product liability "crisis" now exists is a matter of dispute. It is a controversial area in which several powerful special interest groups are involved. Allegations concerning panic pricing of product liability insurance and attempts to stampede legislative action have been made.

There seems to be a consensus that product liability is a very complex issue of serious proportions for which no single or simple solution exists. It is reasonable to expect that present day problems will not improve of their own accord. It is more likely that current trends will continue and conditions will probably get worse. "Crisis" talk could become a self-fulfilling prophecy.

The Problem: What Is Known?

Just what is known with some degree of certainty about the product liability problem? The following points are suggested for consideration.

Product liability used to be one of the more profitable lines of insurance. Evaluating its present status is difficult because of poor data and misinformation.

Product liability suits began mushrooming in the early 1960's. Although difficult to document statistically with hard data, investigators report that there has been an increase in the number of product liability case filings, the size of individual claims, the amount of damages juries have awarded, and the cost of insurance protection. In addition to those against manufacturers, lawsuits against suppliers of component parts, wholesalers, and retailers are also increasing. Work-related actions are expanding.

For certain businesses, product liability costs have risen sharply. The effects, however, are uneven. Particularly hard hit are smaller firms and companies in certain high risk fields. For some, insurance protection may be either unaffordable or unavailable.

The most seriously affected producers are in such areas as machine tools and other industrial equipment, medical and electronic devices, sporting goods, industrial chemicals, pharmaceuticals, paints and coatings, and automotive parts. It should be noted that machinery is Wisconsin's industry group with the highest total value added by manufacturing. The list of industry groups important to Wisconsin's economy also includes other high product liability risk areas, such as transportation equipment, electrical equipment, and chemicals.

While producers of durable or capital goods and high risk consumer products have always been particularly vulnerable to product liability actions, there is a growing number of case filings by ordinary consumers who are injured by home appliances and other common household goods.

The rationale for shifting the burden of the costs of product-related injuries to the producer is that:

- 1) The manufacturer can spread the costs of this risk by including it in the price of the product.
- 2) The manufacturer is in the best position of the involved parties to prevent such injuries and these costs provide an incentive for action.

Product-related injuries will always occur because of several factors. Product safety is only one of many considerations a manufacturer or marketer must weigh. There are practical limits as to how safe a product can be made, beyond which it becomes too expensive, complicated or difficult to use. Even with a product well designed from the standpoint of safety, it is not possible to achieve a "zero defect" production operation. Finally, a producer cannot control how a product is used, or abused, once it is marketed.

Legislation relating to product liability has been introduced in virtually all state legislatures — including Wisconsin — and in Congress.

Prepared by Dick Pazen, Research Analyst

Scope of this Report

This report is intended to serve as an introductory overview of the product liability controversy. Based on a review of available literature, it describes the most frequently mentioned alleged causes and consequences of the product liability problem, some of the most popular reform measures that have been advocated, and the legislative response.

For a more thorough examination of the subject, the reports of the federal Interagency Task Force on Product Liability and the various Congressional hearings are recommended (see Section VIII, "Sources").

II. CAUSES

No single cause for the product liability problem has been isolated. Numerous interrelated factors are commonly cited in the literature as being significant contributing elements. Nine of the most frequently mentioned are:

- 1) The growing number and complexity of products.
- 2) An increased awareness and assertiveness on the part of consumers.
- 3) The litigation explosion.
- 4) Attorneys as part of the problem, particularly the contingency fee system.
- 5) The uncertainty of changing law because of judicial interpretations.
- 6) Publicity that raises unrealistic expectations.
- 7) The time element of long-term liability in risk exposure.
- 8) A growing involvement of workplace accidents and the worker's compensation system.
- 9) Deficiencies in rate-making procedures.

Each of the nine factors is briefly discussed below.

Products

Products that are unsafe because of design or manufacturing defects continue to be produced and marketed for several reasons. First, there are practical limits as to how safe products can or should be made. Moreover, the number, variety and technical complexity of products is continually increasing. Public and private resources devoted to product liability loss prevention procedures may be inadequate. Consumers are also holding products to higher standards of performance. Another aspect is the intentional misuse of products by consumers through failure to maintain, "home" modifications, improper use or simple carelessness.

Consumer Movement

The growth of consumerism has heightened public awareness of respective rights and responsibilities of buyer and seller in the marketplace concerning the manufacture and sale of safe products. Experiences with hazardous products, products of shoddy construction, repair difficulties and impersonal treatment have resulted in consumer anger and frustration. These feelings, when coupled with a growing knowledge of legal remedies, have resulted in a new assertiveness that frequently manifests itself in product liability lawsuits. Changing consumer attitudes are also said to have encouraged a sharp increase in the amount of damages allowed by judges and juries.

Litigation Explosion

Society is becoming more litigious. This social change is closely associated with the growing consumer orientation previously mentioned. The "sue somebody" syndrome has resulted in more people suing for larger amounts. Multiple claims may be generated by a single incident. Easier access to the courts — including class action suits — has contributed to the trend. So has what has been described as a psychology of universal entitlement, whereby everyone seems to feel they ought to be reimbursed for every loss they suffer.

Attorneys

Part of the product liability litigation explosion is blamed on the legal profession. The number of lawyers is proliferating. Under the present contingency fee system, and with increasing damage awards and out-of-court settlements, product liability has become a lucrative area of law practice. It is attracting greater numbers of attorneys who specialize in it, developing sophisticated skills in selecting, preparing and presenting cases. Some shrinkage in previously profitable law business because of simplified probate, divorce law reform and no-fault automobile insurance is advanced as another factor in the shift to product liability.

Judicial Interpretation

In recent years, judicial interpretations have altered the conceptual basis of major aspects of product liability law. The evolving nature of product liability has introduced a large measure of uncertainty into formerly stable legal theory. Various state courts have provided individual

interpretations of changes in tort law and contract law as they pertain to product liability, involving the elimination of privity of contract, applying the doctrines of strict liability (under the American Law Institute's *Restatement (second) of Torts*, Section 402A), negligence, and warranty (expressed or implied), and determining such matters as what constitutes "liability", "contribution", "defect", "unreasonably dangerous" and "duty to warn".

These changes are said to have significantly refined and broadened the scope of product liability at the expense of defendants in such actions, with the judicial climate now overbalanced in favor of the plaintiff. The lack of greater predictability of legal trends in product liability law is considered a prime factor in causing problems for all concerned — producers of products, insurance carriers, consumers and government. More reasonable, practical and uniform legal standards for determining responsibility and assessing damages are urged in place of the uncertainty that now prevails.

Publicity

The prominent exposure given by communications media to product liability cases involving spectacularly large amounts of money has the effect of setting artificially high standards for all future cases. Litigants, juries and judges are claimed to be conditioned by the publicity. Reporting on a few extravagant awards raises expectations that make negotiated out-of-court settlements — where most product liability cases are resolved — more difficult and sets the tone for higher jury awards.

Long-Term Liability

The time element is a factor in product liability that is a continual worry to producers and insurers. With the passage of time, accumulated age as well as owner abuse and misuse take their toll on products. Manufacturers are sometimes held liable for defects that in some cases do not appear until long after the product was first marketed and which may have subsequently passed through several hands. Insurance protection must anticipate this open-ended risk exposure.

Worker's Compensation System

Inadequate state worker's compensation systems have fostered an increase in product liability lawsuits. Originally designed as a no-fault system for quickly compensating workers for on-the-job injuries, worker's compensation appears not to be working as intended. State systems vary widely, but generally low and uneven benefits prevail. The system is no longer seen as the sole provider of recovery. Injured workers refuse to settle for simply collecting worker's compensation benefits. In increasing numbers they are bringing action against the original manufacturers of products involved in job accidents — such as suppliers of machine tools or industrial chemicals — for additional compensation. Participation in the worker's compensation system exempts an employer from being sued by an injured employee or by the original product manufacturer, even if the employer was negligent.

Employees have the opportunity to augment worker's compensation benefits with damages recovered through a product liability suit, usually at little cost because of the lawyer contingency fee approach. The worker's compensation insurance carrier of an employer similarly attempts to recoup its costs through legal action against the original product manufacturer. The net effect is that the original manufacturer sometimes must bear almost the entire cost of workplace injuries. Other inequities aside, these circumstances serve to reduce economic and political pressures to improve the worker's compensation system and to reduce incentives for employers to provide safer workplaces.

Rate-making

The normally complex insurance rate-making process is a special problem in product liability. Ideally, premiums ought to reflect actual risk factors such as the number of products extant, expected incidence of injuries and their probable cost, industry group claims and loss experience, and an underwriter's financial position. Product liability rate-making appears to fall far short of this ideal. In effect, premiums for product liability coverage are considered "best guesses" based on quite subjective estimates of risk. Some insureds may be paying too much, others too little. One reason for imprecision is the evolving nature of product liability. Changing judicial interpretations have introduced a large measure of instability and unpredictability into the rating equation, making it hard to judge long-term potential risk exposure.

A second factor is the lack of a reliable statistical data base by which to justify rates. Circumstances that hamper the insurance industry in setting product liability rates also inhibit the effectiveness of state agencies that regulate these rates. States traditionally have had exclusive jurisdiction in monitoring insurance rates.

Unlike other forms of liability insurance (automobiles, for example), product liability rates generally are not geographically defined. Because of the unavailability of necessary statewide data and the interstate nature of product marketing, a national base is used instead.

III. CONSEQUENCES

Among the various consequences of product liability problems mentioned in published material are those relating to:

- 1) Direct and indirect costs, both economic and social.
- 2) The chilling effect on production and product development.
- 3) Court congestion.
- 4) The public interest.

Costs

Product liability has added to the costs of doing business. These costs must either be passed on to the consumer or be allowed to cut into profit margins. Either alternative is particularly threatening to the continued viability of small businesses because of the difficulty of maintaining their competitive position in the marketplace.

Although the steep increase in the cost of product liability insurance is an obvious factor, insurance premiums are only a part of the total cost picture. Other costs include attorney fees, product design changes, safety measures, quality control efforts, recalls, and damage to reputation in litigation (even when the defense is successful).

For some high risk companies, insurance coverage may not be available at all, or only at prohibitive rates. Insurance underwriters are becoming more selective in the kinds of business they will accept. Policy provisions for high deductibles, limitations on liability and more exclusions from coverage again work to the disadvantage of smaller firms burdened with the cost of uncovered claims. If a business cannot afford to purchase protection or to become a self-insurer, the option is "going bare" — without any insurance — and risk being ruined by an unfavorable product liability claim.

As more companies choose to operate without sufficient coverage because insurance is unavailable or unaffordable, some consumers may find they are unable to recover just compensation for injuries caused by defective products. Meanwhile, the costs of insurance, added production overhead, and the payment of inflated product liability settlements and court judgements are ultimately absorbed in some manner by all consumers.

Finally, if product liability problems contribute to the failure of a business, the impact of its demise spreads through the economy via diminished competition, unemployment and other social costs.

Production

Product liability difficulties may not only result in higher prices for consumers, but may also produce other undesirable results. As companies become more cautious, product liability affects the marketplace. Innovation in the development of useful new products or the improvement of existing products and production techniques is inhibited. Some existing products and services may be discontinued, leaving the consumer with fewer choices. Eliminated products may be replaced by foreign imports, to the economic detriment of the domestic industries and labor force. Furthermore, consumers may experience increased difficulty in attempts to recover for injuries resulting from foreign products.

Courts

The increasing number of product liability suits contributes to already overburdened court calendars, adding to congestion and backlogs. It presents the judicial system with yet another new class of cases to which it must devote time and effort. Typically, product liability cases tend to be quite complex and may remain in the litigation process for years, even if ultimately settled out of court.

There is a lack of good data on the impact of product liability on the courts. According to an estimate by the American Insurance Association, however, Wisconsin has made it into the "top ten" among states ranked in order of the number of product liability claims; a list that also includes five neighboring midwestern states: New York, California, Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania, Texas and Wisconsin.

Public Interest

To inject a positive note, some people think the consequences of current product liability difficulties will ultimately be beneficial to society; the problem is not really a problem at all. The trend toward rising numbers of product liability actions and higher damage awards is viewed by persons who see the "problem" in terms of safety and consumer rights as being in the long-term best interests of the public.

Legal action, or the threat of it, is regarded as a necessary incentive to bring about improved, safer products and working places. Plaintiffs still must prove injury-causing products to be dangerous or defective. The claimed end result will be fewer injuries and deaths, just compensation for those who are hurt, and an eventual leveling off of claims as safety receives greater emphasis in product design, manufacture and distribution.

IV. PROPOSED REMEDIES

Background

This section deals with suggestions that have been made by those who want to change the present system for handling product liability. Although it would be almost impossible to list all of the many proposed remedies that have been offered to "improve" or "reform" the system, those most frequently mentioned are included in this section.

Some of the proposals are clearly designed as stop-gap measures to provide prompt relief, particularly in the area of insurance availability and cost for smaller firms. Other proposals are more comprehensive, involving fundamental changes with less immediate impact. Many of the proposals are closely related and, indeed, are thought to work better when combined with others in an integrated approach.

Generally speaking, these product liability proposals have been developed by manufacturers and insurers, the two groups most affected. An organized drive to secure new legislation has been aimed at all state legislatures and Congress.

Among other things, the suggested remedial actions are designed to inhibit bringing suit in court, impose new time limitations, allow defendants in product liability actions specific defenses that would make it more difficult to recover damages, and restrict the amount of money a plaintiff may recover.

Opposition to these proposals has come primarily from trial lawyers and consumer organizations. Because their actions could have serious and widespread ramifications, legislators have been cautioned by opponents against precipitous action in carving out new public policy in the product liability area. The proposals raise a wide variety of technical, practical and legal questions. Some involve constitutional issues that would probably be challenged if implemented. Human rights is another aspect opponents to change emphasize. The proposals are said to exhibit a disregard for the interests of workers and consumers injured or killed by unsafe products.

The most popular proposed remedies for the product liability problem relate to statute of limitations, strengthening defenses, restricting recovery, split trials, periodic payments, expert testimony, attorney's fees, insurance mechanisms, reporting requirements, prevention techniques, arbitration, worker's compensation, and no-fault.

Statute of Limitations

In most states, an existing statute of limitations establishes a maximum allowable interval between the time of injury (or when the injury should reasonably have been discovered) and the initiation of a lawsuit. From a product liability standpoint, this results in an open-ended liability risk exposure that might last for decades. In place of this approach, it is proposed that the time limitation be based on the time a product is manufactured or first enters the stream of commerce; that is, a fixed period of time which begins expiring when the product is originally sold for use or consumption. Most often suggested is a limitation utilizing a time span of six to ten years between the time a product leaves the immediate control of its manufacturer and a defect-caused injury. Exemptions could be made for certain products that have a potential for long term problems, such as pharmaceuticals.

An alternative approach to modifying the statute of limitations would dispense with fixed limits. Instead, a flexible limit for different products correlated to the anticipated useful safe life of that product would be used. A formal disclaimer would specify the number of years of liability. All other objections aside, an obvious problem is the difficulty of predetermining and recording a reasonable time frame of safe use for every product.

Strengthening Defenses

Several proposals that would strengthen the defendant's position in court have been suggested, the most common of which concern compliance with state-of-the-art, standards, and product alteration or misuse.

State-of-the-Art

Allow "state-of-the-art" as a legal defense, which would preclude the use of hindsight to retroactively apply current standards and procedures to products produced years ago. It provides that product liability must be considered in the context of the knowledge and technological capabilities which customarily prevailed when the product was designed, produced, tested and marketed. Evidence of subsequent changes in product design, manufacture or testing would be excluded.

Compliance with Standards

Allow introduction of evidence that a product complied with prevailing applicable standards when it was produced. Such evidence is to be recognized as a legal defense in a liability suit alleging that the product was unsafe or defective. The relevant standards respecting health, safety, design, manufacture

and testing of a product would be regulations promulgated by government — state or federal — or perhaps industry group standards.

Product Alteration or Misuse

Establish subsequent alteration or misuse of the product as a legal defense in a liability suit. A product may pass through many hands after its initial sale. In some cases products have been modified to render them less safe, improperly maintained, or used in ways not intended or sanctioned by the producer.

Restrictions on Recovery

Several approaches aimed at restricting recovery in some manner from defendants in product liability actions have been advanced. They relate to general damages, punitive damages, collateral sources, comparative responsibility and the *ad damnum* clause.

General Damages

Eliminate, or limit to reasonable levels, awards for general damages, the so-called "pain and suffering" damages involving intangible, noneconomic losses. Maximum ceilings on awards for general damages could be established, or such awards could be tied directly to economic losses: 1) as a percentage of real economic costs, 2) as a fixed limit based on type of injury, or 3) through a fixed threshold limit whereby recovery of general damages would not be allowed unless economic losses exceeded a specified dollar amount — a technique identified with the no-fault approach.

Punitive Damages

Eliminate or limit punitive damages that are awarded to the plaintiff in addition to compensatory damages. In theory, these awards punish the wrong-doer and serve as a deterrent to others. Having a judge assess punitive damages, rather than a jury, is one suggested alternative to curb excessively costly awards. Utilizing separate jury trials to establish liability and assess damages is another suggestion (see "Split Trials" later in this section). Punitive damage awards are sometimes excluded from product liability insurance coverage.

Collateral Sources

Allow compensation or benefits received from collateral sources to be used in evidence, and modify damage awards by deducting some or all of the expenses paid via some other method, such as government-provided benefits or private insurance. This would eliminate double recovery windfalls.

Comparative Responsibility

Take into account comparative responsibility by apportioning both fault and damages among the involved parties. Damage awards would be reduced to reflect the extent to which the plaintiff contributed fault. In work-related cases, a manufacturer would be allowed to attribute a portion of its liability to a negligent employer, with the burden being shared according to the degree of relative responsibility.

Ad Damnum Clause

Eliminate the *ad damnum* clause. The *ad damnum* clause in pleading product liability suits contains a statement by the plaintiff's attorney of the money lost and damages which are being claimed. Asking the jury for a specific dollar amount is viewed as a good legal strategy for inflating the eventual settlement through the power of suggestion. By eliminating the *ad damnum* clause, judgement would be based on the known jurisdictional limits of the court and the facts presented.

Split Trials

Require split jury trials in product liability cases; that is, one to establish liability and, if needed, a second to assess compensatory and possibly punitive damages. The idea is to separate the often emotionally charged liability determination aspect from a jury's damage award decision.

Periodic Payments

Require that the larger settlements in serious injury cases be in the form of periodic payments or annuities, rather than a one-time lump sum. These installment payments could include interest on the unpaid balance. Such an approach would more closely reflect the actual loss, prevent windfalls to heirs, and possibly allow for the development of a system whereby courts keep cases open for subsequent alterations in damage awards based on changes in the plaintiff's condition.

Expert Testimony

Regulate expert testimony that is often the crucial factor in product liability cases. Some suggested alternatives to the existing system of selection by the contending parties include: 1) utilization of

impartial experts appointed by the court, either on its own or on a motion by one of the involved parties, 2) pre-trial screening of the qualifications of expert witnesses, and 3) licensing of product liability expert witnesses.

Attorneys' Fees

Attorneys' fees constitute a sizable portion of product liability costs. While preventive consultations and court defense costs are an important element, the primary factor aggravating the situation is the contingency fee system, whereby the plaintiff's lawyer collects one-third or more off the top of any settlement if the case is won, and nothing if it is lost. This approach is seen as contributing to inflated claims and undeserving nuisance suits. It is suggested that the system be modified — by statute, judicial review or some other mechanism — so as to penalize frivolous lawsuits and to provide an equitable basis for reasonable attorney compensation, such as graduated fee schedules, percentage limitations or flat rates.

Insurance Mechanisms

Various state and federal actions involving product liability insurance mechanisms have been proposed. They are designed to bring a measure of quick relief by attempting to solve the immediate problems of insurance availability and cost. The description of some of these proposals which follows is from the Georgia General Assembly, *Report of the Senate Product Liability Study Committee*, January 1978.

Mandatory Insurance

“Legislation would require that all manufacturers, distributors, and sellers who put products into the stream of commerce, carry products liability insurance of certain limits.

Unsatisfied Judgment Funds

“An unsatisfied judgment fund is a public fund which is available to injured plaintiffs who cannot collect on an otherwise enforceable judgment. These funds would be limited to a certain dollar limit and to injuries resulting from a particular risk. If a fund was enacted, the source for funding the fund would most likely be the state treasury.

Assigned Risk Plans

“Assigned risk plans are designed to provide insurance for persons or manufacturers who have been rejected by the voluntary market. The person sent to an assigned risk plan is placed in a pool and, from this pool, is assigned to an individual carrier. Each carrier assumes only the risks assigned to it.

Joint Underwriting Associations (JUA)

“A JUA is an organization of all insurers writing certain kinds of insurance on a state level. JUA's are usually created by law and are a response to a situation of either insurance unavailability or availability at prohibitively high prices. Each member of the association is required to 'participate' by bearing a portion of the operating expenses and losses sustained. They pool the premiums and spread the losses evenly.

State-Operated Funds

“By means of state-operated funds, some states could create an insurance market for those risks that have been rejected by at least two insurers. Funds would be taken from insurers that are providing product liability insurance in the state. In addition, some portion of the funds could be derived from the state treasury.

Federal Insurance

“A 'pooling mechanism' could be created through federal insurance. The federal government becomes the insurer and makes insurance available to certain high risk insureds. Losses would be paid by this federal insurer out of premiums collected, as well as out of general revenues.

Federal Reinsurance

“A program would be established in which the federal government bears some losses [through a reinsurance program] to encourage private insurance companies to write coverage in high risk areas.

Federally Chartered Insurance

“This proposal would call for the federal government to issue charters to corporations for the purpose of carrying on the business of insurance and would take over this charter

function currently being done by state governments. The primary reason for federal charters would be to allow the federal government to use the charter (the revocation of it) as a threat to gain the active participation of all companies in various programs and to increase the 'social responsibility' of all insurance corporations.

Captive Insurance Companies

"These companies are established by a single manufacturer or a group to insure risks of that concern or group. There are three major objectives of captive insurance companies:

- (1) To insure hard-to-place or uninsurable risks.
- (2) To effect savings in premiums and taxes.
- (3) To develop profits in areas of both direct insurance and reinsurance."

Reporting Requirements

Establish state or federal information reporting requirements for the providers of product liability insurance to supply data periodically concerning the total amount of revenue from premiums; number of policies written; number of policies cancelled, nonrenewed or refused; number of claims closed; total amount expended to settle or discharge closed claims; investment income; and other pertinent information.

Prevention Techniques

A variety of proposals involve specific governmental actions to encourage the prevention of product liability problems, such as:

- 1) Requiring manufacturers to emphasize product safety programs, perhaps as a condition for participation in government-sponsored insurance plans. Items in such a program might include: a) rigorous quality control and testing; b) industry minimum standards; c) procedures for determining product injury potential, including anticipated misuse; d) review of product advertising and operating instructions for accuracy, clarity and completeness; e) systematic information feedback on product injuries to promote remedial action; and f) permanent coding of significant product components as to place and date of manufacture.
- 2) Requiring insurers to build differentials into their product liability rates.
- 3) Requiring insurers to assist in loss prevention activities of manufacturers.
- 4) Government collection of product liability injury data and dissemination to manufacturers and insurers.
- 5) Requiring manufactures to correct defects in existing products or retrofit products with safety devices developed as their need becomes known through experience (similar to the automobile recall program).
- 6) Requiring more stringent warnings to consumers on products, including the reasonably safe life expectancy of the product, but not necessarily those hazards that are trivial or obvious.

Arbitration

Provide a system for diverting some product liability cases — both large and small — into out-of-court arbitration procedures, either mandatory or by voluntary agreement among contesting parties. Arbitration results could be either binding or nonbinding. The idea is to attempt to create a mechanism for resolving disputes expeditiously without going to court. Instead of the traditional jury, a select arbitration panel would supply a knowledgeable forum for an objective review of the issues of liability and damages, arriving at a reasonable determination based on the merits of the case. Matters would be resolved in a more predictable fashion, in less costly, more informal proceedings. Some court congestion would be alleviated. The preferred approach is mandatory, nonbinding arbitration, with provisions for judicial review. Disincentives to automatic review appeals by the losing party would be build into the process.

Worker's Compensation

A large proportion of product liability actions, involving a substantial amount of total damage awards, arises from workplace accidents which also involve the worker's compensation system. Worker's compensation provides certain fixed benefits to workers without regard to fault. Employers are granted immunity from suit because of their support of the worker's compensation system, but this immunity does not extend to other involved parties who are not financial contributors to the system.

Some suggested reforms for shifting and allocating the costs of job-related accidents relate to: 1) contribution and indemnity as applied in the workplace, 2) prohibition or modification of subrogation by worker's compensation carriers, 3) legitimization of "hold harmless" clauses, and 4) making worker's compensation the sole source of recovery.

Contribution and Indemnity

Modify contribution and indemnification rules to permit contribution claims to be made by producers of industrial products who are defendants in product liability suits, based on the relative responsibility of negligent employers whose actions contribute to a product-related workplace injury.

Subrogation

Prohibit or modify subrogation rights of worker's compensation insurance carriers. Subrogation is the right of a party to sue, or otherwise be reimbursed by, a third party who is primarily answerable for a wrong. It enables the worker's compensation carrier to recoup some or all compensation costs paid to an injured worker from the original producer of the industrial product involved in the accident, even though employer negligence contributed to the injury in question.

"Hold Harmless" Agreements

Legitimize clauses inserted in agreements in which the buyer in a transaction requests that a product be delivered without safety features or stipulates responsibility for alteration, failure to maintain properly or to school employees in safe operations. "Hold harmless" agreements are an attempt to circumvent rules barring contribution actions which sellers of products would like to see given more validity through: 1) legislation or rules that would authorize their use and clarify terms, and 2) their recognition by product liability insurers in determining premium rates.

Worker's Compensation as an Exclusive Remedy

Modify existing worker's compensation laws to absorb product liability cases, making worker's compensation the sole source of recovery for product-related workplace injuries. The employer, via the firm's worker's compensation insurance carrier, would be liable for all on-the-job accidents. Third party suits by the injured employe or the employer's workers compensation carrier would be prohibited. Clearly, this would create a complete no-fault system for work accidents.

It is also clear that a significant increase in worker's compensation death and injury benefits would be necessary, providing a full range of hospital, medical and income continuation benefits. Methods would have to be devised by which manufacturers involved in supplying products to affected employers would contribute to the employer's worker's compensation insurance costs, such as: 1) a pre-accident rate based on the number, cost and potential risk of products sold in a state; or 2) through a post-accident arbitration procedure.

No-Fault

Apart from altering the worker's compensation system to make it the sole source of recovery for working place accidents, a variety of other proposals for a comprehensive no-fault compensation approach encompassing the entire consumer product injury field have been advanced. Jeffrey O'Connell, in *Ending Insult to Injury: No-Fault Insurance for Products and Services*, advocates putting most liability insurance — including product liability — on a first party (no-fault) basis. Abandoning the present fault system, which its detractors say ill serves everyone involved with the exception of the legal profession, is said to have many advantages. Injured persons would be entitled to be fully compensated for all economic losses in a speedy, direct, certain and cost-effective manner. A great deal of expensive, time-consuming litigation would be eliminated.

Similar to the no-fault automobile insurance plans now operating in several states, in product liability certain limits on the right to sue would be imposed in return for compensating all accident victims. The various no-fault product liability compensation plans differ significantly. According to the *Final Report* of the federal Interagency Task Force on Product Liability, most plans probably share the following six elements:

- "1) Persons injured by a product who were protected by the system would have a right to recover damages regardless of their fault.
- 2) The collateral source rule, to some extent, will not apply.
- 3) Recovery for pain and suffering is abolished.
- 4) Persons injured by products would recover at least their out-of-pocket medical costs. They would also recover their actual loss of earnings or a percentage thereof.
- 5) Persons entitled to benefit from the system would, at least to the extent of the system's protection, be barred from suit against the manufacturer of the product.
- 6) The tort-litigation system returns when damages reach a certain level or when an injury of a certain type occurs."

A highly controversial proposal, no-fault has great appeal as an alternative to the existing tort litigation system, but it has also been characterized as a practical impossibility.

Model Legislation

There is no lack of model legislation in the area of product liability. Manufacturing and insurance industry organizations are one source. A clearinghouse for information on product liability legislation in other states has been established by the National Conference of State Legislatures. The U.S. Department of Commerce has been directed by the President to prepare a model uniform product liability law that can be enacted by the states.

The Council of State Governments' 1978 *Suggested State Legislation* contains two model laws pertaining to product liability. One — Product Liability Tort Reform Act — is a comprehensive approach based on a Kansas bill. It is intended to lower awards, reduce unnecessary lawsuits and prevent duplicate payments to injured persons. Specifically, a statute of limitations is provided, punitive damages and attorney contingency fees are eliminated, limits are placed on general damages, and evidence of collateral payments is allowed.

The second model law — Product Liability Insurance Placement Facility Act — establishes a compulsory, joint underwriting association to guarantee the availability of product liability insurance by forcing insurance companies to participate in the association as a condition of doing business in the state. It is based on Massachusetts legislation.

V. LEGISLATION IN OTHER STATES

Product liability legislation was introduced in virtually all state legislatures in 1977. The state-by-state nationwide drive for new legislation initiated by affected interest groups accounts for the similarity of content of many of these proposals, with perhaps the simplest and most common proposal being a statute of limitations on product liability exposure.

At least seven states enacted some sort of substantive product liability law in 1977, while the legislatures in several other states opted for ordering an interim study of the problem. Utah, Colorado and Oregon passed the most comprehensive laws. A National Conference of State Legislatures publication, *State Legislative Report: Product Liability*, summarized these three laws:

Utah

"The Utah legislation (SB 158) contains several major reforms. It sets a two-part statute of limitations with a range of six years from the 'date of initial purchase' (of the product) to ten years from the date of manufacture, and contains an 'ad damnum' clause prohibiting dollar amounts for damages being stated in suits. It says that manufacturers shall not be held liable when a substantial contributing cause of injury or property damage was an alteration or modification of the product and that no products shall be considered to be defective unless such defective condition made the product unreasonably dangerous and existed at the time of original sale. There is a rebuttable presumption that a product is free from defect if it was designed and manufactured in conformance with government standards existing at the time of manufacture.

Colorado

"Colorado's law (HB 1536) sets a statute of limitations that runs three years from the date of injury and stipulates that actions based on strict liability can only be brought against a 'manufacturer' as defined in the law. There is a rebuttable presumption that a product is not defective if it conforms with governmental standards and the state of the art in manufacture at the time of original sale, and if it survived 10 years of troublefree use. On the other hand, there is a rebuttable presumption that the product was defective if its manufacture did not conform to government standards. Improvement in the state of the art subsequent to the manufacture of a product is not admissible evidence at a trial other than to show duty to warn. Another provision requires the state insurance commissioner to report annually to the legislature on changes in product liability insurance rates.

Oregon

"The Oregon statute (HB 3039) contains three major provisions: (1) a 'disputable' presumption that a product as manufactured and sold or leased is not unreasonably dangerous for its intended use; (2) a two-part statute of limitations of two years from the date of injury to no later than eight years from the date the product was first purchased; (3) alteration or modification of a product shall be a defense for the manufacturer when such was made without consent of the manufacturer or not in conformance to manufacturer's instructions, when it was a substantial contributing factor to the personal injury, death or property damage, and when it was not reasonably foreseeable."

The same NCSL report summarized several other state product liability laws enacted in 1977 that were of a less comprehensive nature (in Connecticut, Texas, Kansas, Minnesota and, once again, Colorado):

Other State Laws

"There were a handful of bills of less comprehensive nature passed in 1977 pertaining to product liability. Connecticut's new law (SB 810) stipulates that contributory or comparative negligence shall not bar recovery in suits based on strict liability except in cases where a plaintiff misused a product or used a product known to be defective. Texas legislation (SB 809) codifies common law by saying that lack of privity of contract between an injured party and a manufacturer shall not be a defense for manufacturers named in product liability suits. Kansas (HB 2410) and Minnesota (SB 583) both passed legislation requiring insurers to submit annual reports on their product liability underwriting and claims experience. Colorado adopted another measure (SB 22) requiring insurers to give thirty-days notice to its insured of any intent to cancel, fail to renew, or decrease coverage for certain liability policies, including product liability."

VI. LEGISLATION IN WISCONSIN

Current Wisconsin Law

Where is Wisconsin's current law on product liability to be found? This is one of those terribly difficult "simple" questions. One — or even several — statute provisions cannot be cited as Wisconsin's product liability law; it is far too complex a matter.

Product liability involves scattered provisions from a variety of disparate areas of the law, including:

- 1) Court-related — those sections which govern bringing legal actions, court practices and procedures, regulations of attorneys and similar aspects;
- 2) Insurance code — sections pertaining to rate-making, state insurance regulation, self-insurance and "captive" insurance companies;
- 3) Commercial code — sections relating to sales, contracts, warranty and the like; and
- 4) Worker's compensation.

Moreover, product liability litigation is based on case law to a large degree — so-called "judge-made" law. For instance, the doctrine of strict liability in tort, a recent and controversial evolution of product liability law, was first adopted in Wisconsin in the case of *Dippel v. Sciano* (37 Wis. 2d 443 (1967)).

An aid to understanding Wisconsin's product liability law is the bill analysis of each of the various proposals introduced in the 1977 Wisconsin Legislature provided in the section that follows ("1977-78 Legislation"). Each analysis, whether it creates new law or amends existing statutes, describes in layman's terms what is being changed.

For a more detailed discussion of Wisconsin's law as it pertains to product liability, a recent publication by the Wisconsin Legislative Council is suggested: Research Bulletin 78-3, "Product Liability: An Overview", May 1978 (see Parts II and III). While disavowing any claim to comprehensiveness, it does present a general introductory summary of selected elements of Wisconsin's law on this topic.

1977-78 Legislation

At least 25 bills and one joint resolution were introduced in the 1977-78 session of the Wisconsin Legislature that pertain more or less directly to product liability: 1977 Senate Bills 431 to 450, 453 and 742; 1977 Assembly Bills 622, 673 and 1055; and 1977 Assembly Joint Resolution 16.

All of these measures were pending further legislative action in their house of origin on March 31, 1978, when they automatically failed to pass pursuant to 1977 Assembly Joint Resolution 12, the session schedule. With only two exceptions (SB-453 and SB-742), each had a public hearing.

Support for the proposals came from insurance industry organizations such as the Wisconsin Insurance Alliance. In fact, twenty of the bills were introduced at the request of the Independent Insurance Agents of Wisconsin or the American Insurance Association. The Wisconsin Manufacturers and Commerce Association also supported the legislation. Organized opposition came from the Wisconsin Academy of Trial Lawyers, the Center for Public Representation, and some labor unions.

A few of the bills were quite comprehensive measures, while the remainder dealt with only one or two aspects of product liability. This legislation ran the gamut of suggested product liability changes, including: statute of limitations, state-of-the-art, alteration or abuse, warnings and instructions, conformity with standards, general damages, punitive damages, contributory negligence, collateral sources, *ad damnum* clause, installment payment of damages, contingency fees, nuisance suits, legal clarification of liability, and third party liability under worker's compensation. 1977 AJR 16 called for an interim study.

What follows below is a brief description of each bill introduced in the 1977 Wisconsin Legislature proposing changes in product liability law.

1977 Senate Bill 431

(See also: SB-438)

State-of-the-art — This bill creates two state-of-the-art defenses to product liability actions involving design or testing defects. "State-of-the-art" is defined as the prevailing methods, standards, research and techniques, including product design or testing procedures in substantial use in the defendant's trade or business or in a similar trade or business.

Under current law evidence of conformity to industry practices is generally admissible and considered in the defendant's favor. This bill would make such evidence an absolute defense.

1977 Senate Bill 432

(See also: SB-438; AB-662 and 673)

Exclusion of evidence — This bill excludes certain evidence in a product liability action.

Currently, evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct; such evidence may be admissible for other purposes, such as proving ownership, control or the feasibility of precautionary measures, if controverted.

Under this bill, in a product liability action evidence of alteration, modification, improvement, repair, change or discontinuance of a product is not admissible for any purpose.

1977 Senate Bill 433

(See also: SB-437, 448 and 742; AB-662 and 673)

Warnings and instructions — This bill reduces a manufacturer's or seller's liability for inadequate warnings and instructions in a product liability action. Under current law, a plaintiff must prove that the failure to provide adequate warnings or instructions was the proximate cause or a substantial factor of the injuries or damages. Under this bill, a plaintiff must prove that the product was the immediate physical and producing cause of the injuries or damages, that the plaintiff would not have used the product in the manner it was used if there were adequate warnings or instructions and that an alternative use or no use would have avoided or reduced the injury or damages.

Under the current common law theory of negligence, the manufacturer or seller of a product has a duty to exercise ordinary care in providing adequate warnings and instructions. Similarly, under the theory of strict liability a product may be considered defective if there is a failure to provide adequate warnings and instructions. This bill requires manufactures to warn of material risks which are known or discoverable under the existing state of the art; however, sellers other than manufacturers have a duty only to provide warnings and instruction which they have received.

Under both negligence and strict liability theories, a manufacturer or seller may reduce or eliminate his or her liability for inadequate warnings or instructions by establishing that the plaintiff did not use ordinary care to protect against known or readily apparent dangers. Under this bill there is no duty to warn of open and obvious risks and warnings and instructions are adequate if they would put a user of ordinary skill and judgment on notice of the risks involved.

Finally, this bill provides that the plaintiff has the burden of proving each and all elements of a cause of action by a preponderance of the evidence.

1977 Senate Bill 434

(See also: SB-441 and 742; AB-662, 673 and 1055)

Alteration or modification — This bill restricts liability in a product liability action when a product is altered or modified. "Altered or modified" includes most changes except those made in accordance with specifications or instructions or which occur with ordinary wear and tear.

Currently, a product must be reasonably used for the purpose for which it was intended, and abuse or alteration of a product may relieve or limit liability. Under this bill, a defendant is liable only for the injury, death or damage that would have occurred if the product had not been modified.

1977 Senate Bill 435

(See also: SB-440, 444 and 742; AB-662 and 673)

Statute of limitations — This bill revises the statute of limitations for a product liability action. In most product liability actions, the statute of limitations is currently 3 years from the date of injury.

Under this bill, the statute of limitations is 3 years after the injury is or should be discovered or 8 years after the manufacturer sells or parts with possession and control of the product. The statute of limitations is longer for a lessor, bailor or licensor who uses, possesses or controls the product or who has certain legal duties with respect to the product. The statute of limitations is also extended for a

defendant who has a duty to recall, repair, inspect, or issue warnings or has a similar duty which arises after the defendant sells or parts with possession and control of the product.

These limitations are extended 90 days for an action for indemnity or contribution. Finally, these limitations are not applicable in actions based on fraud, misrepresentation, concealment or nondisclosure, in written contracts with a different limitation, and in most actions under the uniform commercial code.

1977 Senate Bill 436

(See also: SB-445 and 742; AB-662 and 673)

Punitive damages — This bill restricts punitive and exemplary damages in a product liability action.

Currently, punitive and exemplary damages may be awarded in cases where there is wilful, wanton, malicious or similar misconduct. Under this bill, the plaintiff must prove that the defendant personally acted out of hatred or spite directed toward the plaintiff or knowingly acted in flagrant and gross disregard of the public health and safety.

This bill protects an employer from punitive or exemplary damages for the misconduct of an employe unless the employer authorized or knew and acquiesced or consented to the conduct.

The bill also changes the burden of proof. Normally, proof of a "preponderance of the evidence" is required in a civil case; this bill requires a plaintiff to prove each and all elements in a product liability action by "clear and convincing evidence".

This bill requires the trier of fact to separately state the amount of punitive and exemplary damages awarded.

Finally, this bill limits such damages to an amount equal to twice the special and general damages.

1977 Senate Bill 437

(See also: SB-433, 448 and 742; AB-662 and 673)

Duty to warn — This bill limits the duty of a manufacturer or seller to warn concerning the use of a product. This duty does not extend to warnings concerning open or obvious hazards, to warnings which a reasonable person would take for his or her safety and the safety of others considering the activity, training, experience, education and knowledge of the person or to similar situations.

1977 Senate Bill 438

(See also: SB-431 and 432; AB-662 and 673)

State-of-the-art — This bill creates a defense and excludes certain evidence in a defective product action. The bill creates a "state-of-the-art" defense. No manufacturer or seller of a defective product is liable to any person for personal injury, death or property damage if the product was designed, manufactured and tested in conformity with the generally recognized state-of-the-art existing at the time the product was produced.

This bill also excludes certain evidence. Evidence of subsequent advancement or changes in the design, manufacture or testing of the product or similar products are not admissible for any purpose.

1977 Senate Bill 439

(See also: SB-443)

Costs in groundless suit — Under this proposal, if a court, upon judgment, determines that an action, special proceedings, counterclaim or cross complaint is without any legal or factual basis, the court will be required to award full recovery of court costs and attorney fees to the prevailing party. The costs and fees may be assessed fully against either the unsuccessful party or his or her attorney or assessed to require partial payment by both the party and the attorney.

1977 Senate Bill 440

(See also: SB-435, 444 and 742; AB-662 and 673)

Statute of limitations — This bill establishes a six-year statute of limitations for an action against a seller of a product based on a theory of strict liability or warranty. The six-year limitation begins to run when the product is first sold.

1977 Senate Bill 441

(See also: SB-434 and 742; AB-662, 673 and 1055)

Alteration, modification or deterioration — This bill establishes two defenses to an action based on a defective product. First, it is a defense if the product was altered or modified in a manner which was not intended by the manufacturer and if the injury would not have occurred but for the alteration or modification. Second, it is a defense if the product had deteriorated because of the failure of the owner

or user to properly maintain, service or repair the product, if the deterioration altered the purpose or use of the product, and if the injury would not have occurred but for the deterioration.

1977 Senate Bill 442

Periodic payments — This bill requires periodic or instalment payment of money judgments of \$25,000 or more in product liability actions on the motion of either party showing good cause. The judgment must include details of the payment schedule and provide for 7% interest on the unpaid balance. The court may modify these details on the motion of either party showing good cause, but the total amount may not be modified.

1977 Senate Bill 443

(See also: SB-439)

Costs in groundless suit — Under this proposal, if a court, upon judgment, determines that a product liability action is without any legal or factual basis, the court will be required to award full recovery of court costs and attorney fees to the prevailing party. The costs and fees may be assessed fully against either the unsuccessful party or his or her attorney or assessed to require partial payment by both the party and the attorney.

This proposal also provides that claims for damages in a product liability action may not include expenses which are paid or will be paid by an insurance company or other person whom the claimant is not obligated to reimburse.

1977 Senate Bill 444

(See also: SB-435, 440 and 742; AB-662 and 673)

Statute of limitations — This bill attempts to revise the statute of limitations for an action for damages allegedly caused by a product. First, such actions must be brought within six years after the product was first sold or delivered by the manufacturer. Second, the action must be brought within two years after the injury occurred or was reasonably ascertainable.

1977 Senate Bill 445

(See also: SB-436 and 742; AB-662, 673 and 1055)

Punitive damages — This bill changes the burden of proof and places limits on punitive damages in a product liability action. The plaintiff must prove the defendant's wilful and wanton misconduct beyond a reasonable doubt to recover punitive damages, which may not exceed 30% of the judgment for other damages.

1977 Senate Bill 446

(See also: AB-662 and 673)

Limitations on general damages — This bill limits damages for pain and suffering and loss of society and companionship in a product liability action to no more than 200% of the judgment for other damages.

1977 Senate Bill 447

(See also: AB-662)

Contingency fees and pleadings — This bill affects pleadings and contingent fee arrangements in product liability actions. No pleading in such actions shall set forth a demand for damages in a specific dollar amount except as necessary to establish jurisdictional requirements. Contingent fees in product liability actions are also limited. The maximum fee ranges from 33% of the first \$25,000 recovered to 10% of any amount over \$100,000.

1977 Senate Bill 448

(See also: SB-437, 443 and 742; AB-662 and 673)

Warnings and contributory negligence — This bill codifies the requirement that the plaintiff has the burden of proof of establishing that the failure to warn or properly instruct concerning the use of the product was the proximate cause of the injury or damage in a strict liability action. Similarly, a defense of contributory negligence is established if there is an adequate and explicit warning, the product was misused or there was a failure to use a safety device.

1977 Senate Bill 449

(See also: SB-450, 453 and 742)

Worker's compensation — Under present law, an employe or representative of an employe who accepts worker's compensation benefits and an employer or employer's insurer who pays worker's

compensation benefits may each maintain an action against a third party who may be liable for damages as the result of an employment-connected injury or death. If both parties desire to sue, their action is joined together and the parties then split any recovery obtained according to a statutory formula which is approved by a county or circuit judge or by the Department of Industry, Labor and Human Relations.

Under this bill, an employe or representative of an employe may still bring an action against certain third parties who may be liable for medical and hospital expenses, loss of earnings and other monetary losses, but the recovery by the employe or representative may not duplicate what has been or will be paid under worker's compensation (that is, only the excess may be recovered). When the recovery is made, that portion which duplicates the worker's compensation benefits is paid to the employer or the employer's insurer, less recovery expenses.

An employe or employe's representative may no longer sue a fellow employe; a contractor, an employe of a contractor, subcontractor, or employe of a subcontractor of the employer or of anyone for whom the employer is a contractor or subcontractor; or any manufacturer, seller, lessor or provider of any product used by the employer in the employer's business in most normal work situations, except when injury or death is caused by intentional, unprovoked physical aggression.

1977 Senate Bill 450

(See also: SB-449, 453 and 742)

Worker's compensation — This bill is the same as 1977 SB 449 (see above).

1977 Senate Bill 453

(See also: SB-449, 450 and 742)

Worker's compensation — Under present law, an employe or representative of an employe who accepts worker's compensation benefits and an employer or employer's insurer who pays worker's compensation benefits may each maintain an action against a third party who may be liable for damages as the result of an employment-connected injury or death except in certain malpractice actions. If both parties desire to sue, their action is joined together and the parties then split any recovery obtained according to a statutory formula which is approved by a county or circuit judge or by the Department of Industry, Labor and Human Relations.

Under this bill, an employer or employer's insurer may not maintain a product liability action against a third party. An employe or employe's representative may still bring a product liability action against a third party but the recovery may not duplicate what has been or will be paid under worker's compensation; the third party in such a case may not maintain an action for indemnity or contribution against the employer or employer's insurer.

1977 Senate Bill 742

(See also: SB-434, 435, 436, 437, 440, 441, 443, 444, 445, 448, 449, 450 and 453; AB-662, 673 and 1055)

Comprehensive reform bill — Under current law a consumer may recover for damages and injuries caused by defective products under several possible doctrines: strict liability in tort, ordinary negligence, implied warranty or express warranty. Under the doctrine of strict liability in tort, the plaintiff must prove: "(1) that the product was in defective condition when it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause (a substantial factor) of the plaintiff's injuries or damages, (4) that the seller engaged in the business of selling such product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller, and (5) that the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he sold it." (*Dippel v. Sciano*, 37 Wis. 2d 443 at p. 460 (1967)) The court explains that from "...the plaintiff's point of view the most beneficial aspect of the rule is that it relieves him of proving specific acts of negligence and protects him from the defenses of notice of breach, disclaimer, and lack of privity in the implied warranty concepts of sales and contracts." (*Dippel* at p. 460)

This bill restricts the rights of a consumer to recover for damages caused by a defective product in a product liability action. "Product liability action" is broadly defined to include actions based on any doctrine although actions brought by state and federal regulatory agencies are excluded.

First, this bill changes the statute of limitations. Currently, the statute of limitations for most products liability actions is 3 years from the date of the injury. Under this bill the statute of limitations is 2 years from the date of the injury or the date the injury should have been discovered or 10 years after the date of the first sale of delivery of the product, whichever is earliest. Special exceptions are provided if there is an express warranty or a subsequent duty with regard to the product.

Second, this bill attempts to restrict the manufacturer's liability for damages caused by faulty product formula or design. In addition to other requirements a plaintiff must prove that a safer alternative formula or design was used by other manufacturers or was known by the manufacturer of the

product. A defendant is not liable if the damage resulted from the failure to use a safety device under certain circumstances.

Third, this bill reduces the obligation of a seller and manufacturer to warn of hazards associated with products. A seller who is not a manufacturer is rebuttably presumed to have given adequate warnings and instructions if he or she transmitted all written warnings and instructions to the consumer. A manufacturer or seller is not liable unless the warnings and instructions failed to provide a person with ordinary skill and judgment with reasonable notice of the product's properties or significant identifiable hazards and if proper warnings and instructions would have caused the plaintiff to have altered his or her conduct and avoided or reduced the damages. Special provisions apply to subsequently discovered hazards.

Fourth, this bill changes the alteration defense. For example, under current law it is a defense to a strict liability action that the product was not used for the purpose for which it was intended. Under this bill, this defense applies to all actions and applies to all alterations, modifications or changes in the product unless the change was made in accordance with recommendations, warnings or express consent of the defendant. The bill also has a similar provision for misuse of a product.

Fifth, this bill revises punitive damages. Currently, punitive damages are allowed only where there is malicious, outrageous or wanton disregard of personal rights. Under this bill a plaintiff must prove beyond a reasonable doubt that the defendant acted with actual malice or intentional and reckless disregard for the safety of others. Punitive damages may not exceed three times the compensatory damages awarded.

Sixth, this bill specifies that a plaintiff's award shall be reduced by the amount of any insurance proceeds or worker's or unemployment compensation proceeds.

Seventh, this bill allows the admission of evidence of remarriage of the decedent's spouse for the purpose of reducing damages.

Eighth, this bill requires a judge to instruct a jury concerning the plaintiff's tax liabilities for any monetary judgment.

Finally, this bill limits a defendant's liability under a subrogated claim.

1977 Assembly Bill 662

(See also: SB-432, 434, 435, 436, 437, 438, 440, 441, 443, 444, 445, 446, 447, 448 and 742; AB-673 and 1055)

Comprehensive reform bill — This bill restricts contingent attorney fees and revises product liability. Contingent fees are required to be "fair and reasonable" and maximum limits are set. Factors to be considered include things such as time and labor required, experience and knowledge of the attorney and the complexity of the problems. The maximum fee is established on a sliding scale ranging from a maximum of 50% on the first \$1,000 to a maximum of 10% of any amount over \$100,000 received upon judgment or settlement. A contingent fee agreement is not privileged and may be modified by the court.

The bill also revises liability for products in a defective condition. "Defective condition" includes both a defect in the plan, design, manufacture, inspection or testing of a product and a failure to warn or properly instruct concerning the use of the product. A manufacturer or seller is liable for damage caused by the product if the product is unreasonably dangerous for its intended use and if the product was in a defective condition when it left the control of the manufacturer or seller regardless of whether a contractual relationship existed or whether due care was exercised. The statute of limitations is two years after the injury is first sustained, discovered or should have been discovered for such actions. Defenses are established if there was conformity with industry practices, conformity to safety standards, conformity with the state of the art, modification of the product or adequate warnings. Limitations are established for damages for pain and suffering and punitive or exemplary damages, and a defendant can recover costs and attorney fees for certain unjust or unsuccessful punitive or exemplary damage claims. Finally, this bill restricts the admissibility of evidence to show advancements or changes in the plan, design, manufacture or testing of a product which occur subsequent to the production of the product in question.

1977 Assembly Bill 673

(See also: SB-432, 434, 436, 437, 438, 441, 443, 445, 446 and 742; AB-662 and 1055)

Comprehensive reform bill — This bill revises liability for a product in a defective condition. "Defective condition" includes both a defect in the plan, design, manufacture, inspection or testing of a product and a failure to warn or properly instruct concerning the use of the product. A manufacturer or seller is liable for damage caused by a product if the product was in a defective condition when it left the control of the manufacturer or seller, the product was unreasonably dangerous for its intended use, the product was the cause of the injuries or damages, the manufacturer or seller was engaged in the business

of selling such a product and the product was expected to and did reach the buyer or consumer without a substantial change in its condition. The statute of limitations for such actions is two years after the injury is sustained or becomes ascertainable.

Defenses are established if the product was altered or conforms to industry practices and safety standards, if the product's expected life was exceeded, or if adequate warning was provided. Punitive or exemplary damages are limited to \$20,000 and the manufacturer's or seller's wilful and wanton misconduct must be proved beyond a reasonable doubt. Damages for pain and suffering are also limited; no more than \$100,000 may be recovered in a wrongful death action and no more than \$50,000 in an action for personal injury. Finally, this bill restricts the admissibility of evidence to show advancements or changes in the plan, design, manufacture or testing of a product which occur subsequent to the production of the product in question.

1977 Assembly Bill 1055

(See also: SB-434, 441, 445 and 742; AB-662 and 673)

Burden of proof and defenses — Generally under current law a consumer may attempt to recover for damages or injuries caused by a defective product under four possible doctrines: strict liability in tort, ordinary negligence, express warranty or implied warranty. This bill codifies the plaintiff's burden in a strict liability action; the plaintiff must prove (1) that the product was in a defective condition when it left the control of the manufacturer or seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause of the injuries or damages, (4) that the seller or manufacturer was engaged in the business of selling such a product, and (5) the product was one which the seller expected to and did reach the consumer without substantial change in the condition it was in when sold. Defenses to a product liability action include (1) modification of the product, (2) misuse, and (3) the expected life of the product was exceeded.

1977 Assembly Joint Resolution 16

Interim study — This resolution directs the Legislative Council to study problems relating to product liability, recommend any necessary legislation and report its findings to the legislature at the commencement of the 1979 session.

An Interim Study

In November 1977, on its own motion, the Wisconsin Legislative Council created a Special Committee on Product Liability. Its membership, announced in March 1978, includes 8 legislators and 14 citizen members.

The appointment announcement noted that there have been a number of piecemeal attempts to deal with various aspects of the tort liability system as it relates to the insurance system. This special committee is to study the product liability problem within the broader context of the general fairness of the system of assessing tort liability and of the traditional insurance response to that system. Its specific charge is to conduct "...a comprehensive review of problems of insurance availability, cost and benefit distribution and the relationship of this mechanism to the insurance regulatory system and the tort liability system."

Recommendations developed by the special committee are to be reported to the Legislative Council prior to the convening of the 1979 Legislature. If the council approves of these recommendations, it may introduce appropriate legislation in the 1979 session.

The charge to the council's special committee appears to reflect a view that is becoming more popular. It is often observed that current problems with product liability resemble the recent medical malpractice crisis. On reflection, it seems that attention has been shifted of late from one liability "crisis" to another — automobile insurance, government liability, professional malpractice, and now product-related liability. Perhaps these "crises", which occur in different areas for what seem to be many of the same reasons, ought to be viewed as symptomatic of a deeper, broader problem.

Past practice has been to focus on specifics. Now it is commonly advocated that legislative bodies adopt a larger view. Rather than tinkering with component parts of the liability system, reform proposals should be studied as a part of the overall problem of insurance and compensation in the tort liability system.

The "tort liability system" is the entire legal and administrative process by which one person's liability for harm to the person or property of another is established and compensation determined, including insurance protection mechanisms. It may be time to consider that basic changes in society might require fundamental changes in the tort liability system as a whole.

A Nonlegislative Response

Wisconsin is among the states that have initiated a nonlegislative response to the problem of product liability insurance cost and availability by establishing a voluntary placement mechanism. Known as the Market Assistance Program (MAP), Wisconsin's plan was formed at the request of the

Commissioner of Insurance in February 1977. It is a voluntary, cooperative effort of insurance companies and agents, and should not be confused with mandatory risk-sharing plans created under Chapter 619 of the Wisconsin Statutes.

A business having difficulty finding product liability coverage at acceptable rates enters the program by supplying certain data on an application form provided through a local agent. For a small fee to offset processing costs, MAP attempts to find a willing insurer to offer affordable coverage not available to the firm through normal channels.

The four basic features of Wisconsin's MAP are:

- 1) It is a voluntary industry committee.
- 2) It acts only on referral from a local insurance agent.
- 3) It is not a guaranteed placement facility.
- 4) It is intended to be a temporary organization to provide some relief while the legislature seeks more permanent solutions.

VII. FEDERAL ASPECT

State v. Federal Action

The federal aspect is a critical issue in any consideration of product liability. Actions by the legislatures, insurance regulatory agencies or courts of individual states simply may not be as effective in ameliorating the product liability situation as action at the federal level. There are two basic reasons why this is said to be the case. First is the interstate nature of product liability problems. Second is the need for uniformity.

Most products are distributed in interstate commerce; that is, their potential market is broader than any single state. A closely related point is that, unlike most other types of liability insurance, product liability rates are set nationally. Because they are generally based on national experience, these rates reflect the highest level of liability risk. The lack of a reliable state data base is given as the main reason for this situation.

As a consequence of these two factors, the impact of remedial efforts made in any individual state concerning product liability would probably have a minimal effect. There is an additional aspect. A resident of a state in which actions had been taken that made it more difficult to recover damages via a product liability suit would be disadvantaged. A resident of that state injured by a product manufactured in the state would be restricted, while a person injured by the same unsafe product in another state would not be similarly handicapped. This, however, reflects different treatment among the states on many matters.

Uniformity is also at issue. Part of the reason product liability is creating problems is attributed to the existing diversity of state laws and court interpretations. Meeting the need for greater uniformity through a state-by-state approach to product liability reform legislation is a difficult prospect. Yet, securing uniform action by most — if not all — states appears to be the only viable alternative to federal preemption of the field. Achieving this kind of a concerted state effort would be a longer and harder proposition than securing federal action.

Proponents of federal action hold to the rationale that product liability problems, and therefore solutions, transcend state boundaries.

Opponents of federal action say it would result in further incursions by the Federal Government into areas that have traditionally been state prerogatives. In the case of product liability, it involves insurance regulation, the tort litigation system, and worker's compensation. Opponents allege that federal action would erode state sovereignty, and point out that action by individual states allows for experimentation, innovation and a chance to learn from the experience of other jurisdictions.

95th Congress

Product liability legislation has been introduced in both houses of the 95th Congress. Public hearings on some of these measures have been held by Senate and House committees. Proposed legislation includes: 1) various insurance mechanisms such as federal reinsurance and federal chartering of captive insurance companies; 2) product liability related tax relief; 3) tort reform which establishes standards of responsibility and clarifies liability; 4) worker's compensation system changes; 5) federal product testing and certification; 6) strengthening and expanding both the Occupational Safety and Health Administration (OSHA) and the Consumer Product Safety Commission; and 7) creation of a Federal Insurance Commission with the power to regulate all aspects of the insurance industry.

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