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272-3958
April 29, 1985
NEMA Products Liability Committee

PLAINTIFF'S EXHIBIT WH-441

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On Tuesday, April 23, 1985, the quarterly meeting of the NEMA Products Liability Committee (PLC) was held. As it was at the last meeting, the predominant discussion centered about Congressional action on uniform products liability legislation. A new subject which is starting to emerge at NEMA is a review of technical committee work with relation to products liability consequences.

1. Uniform Product Liability Legislation

Martin F. Conner, a General Electric Washington representative and a member of NEMA-PLC, has been following this subject closely on a day-to-day basis and has made several observations about the present proposals and the advocates on each side of the question. First, he predicts that no products liability bill will be passed in any form without a compensation clause being included. Second, the large manufacturers do not appear to be "playing to the crowd" and their public image is that of being the "bad guys." The trial lawyers, major opponents to the legislation, are coming across as the "good guys." The manufacturers must work to change their image.

Senate Bill S-100 is still in the Commerce Committee and due for a committee vote on May 16. There is speculation that if Robert Kasten cannot count the necessary votes he will postpone the markup. The Commerce Committee has 14 votes to be cast and at present only six can be counted as sure votes for. Eight votes are needed to pass out of the Committee.

There is presently one other Senate Bill being considered and another that is being drafted and should be presented shortly.

The Dodd Amendment to S-100 is the other bill presently being considered. This amendment is written as a complete replacement to the Kasten Bill and is strongly anti-trial lawyer. Senator Dodd has stated four purposes for his amendment:

First, to provide a faster system of assured but limited compensation of economic losses of innocent people injured by unsafe products;

Second, by placing limitations on damages in the compensation system, to encourage the production of useful new products by responsible manufacturers who take all possible precautions to produce a safe product;

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Third, to retain the tort system to punish negligent manufacturers and to help determine carelessness by other manufacturers; and

Fourth, to reduce the overhead costs associated with the present lawsuit system and thus, hopefully, reduce the costs of consumer goods.

The Dodd Amendment (Attachment 1) provides a claimant with two alternatives when seeking compensation for his injuries. First, he can seek a no fault remedy, but would be limited to his net economic loss (total out-of-pocket costs less all reimbursements including Workman's Compensation). Second, the claimant can file under a fault based negligence action and can be awarded excess compensatory damages. There would be no strict liability option available. The claimant must make a choice when he is filing. There is a possibility that the Dodd Amendment may be aimed only at the chemical and pharmaceutical industries.

The Gorton Bill which is presently being redrafted after an initial survey starts off with some premises:

1. Senate Bill S-100 is a defective product.
2. The federal government cannot tell the state courts that they can only use a fault based system.
3. The federal government cannot force the states to outlaw the use of strict liability.
4. If strict liability was outlawed, the courts would redefine the meaning of negligence to more closely resemble strict liability.

Under these premises, the Gorton Bill would allow the states to apply either standard, but would look at the measure of damages for the control. If the lawsuit was filed under a strict liability claim, then the claimant would be limited to only net economic loss recovery. If the lawsuit was filed under a negligence standard, then excess compensatory recovery would be possible. The bill would also contain a clause that it would be more attractive to bring a strict liability case in federal court than in state court.

Senator Danforth, Chairman of the Senate Commerce Committee, has said that hearings will be held on all the bills even if S-100 is passed out of Committee to the Senate floor.

2. <u>NEMA-PLC Review of NEMA Technical Committee Work</u>

At the last Products Liability Committee meeting, a label which Underwriters Laboratory (UL) was approving for attachment to flexible extension cords was sent to the PLC for review. The Committee consensus was that the label tried to say too much and that there was exposure from what may have been left off since the do's and don'ts were so comprehensive (Attachment 2).

This recommendation was returned to the Codes and Standards Committee. But since the PLC was brought into it at the eleventh hour on the label, UL decided not to change it. The UL label originated in a NEMA technical committee.

This episode raised the consciousness of the Committee as to what the technical groups were doing and the lack of examination as to the results from a liability standpoint. A review of the technical group activities has been undertaken by NEMA but as of yet the authority and method of review has not been decided. This subject will be covered in more depth in future meetings.

3. ANSI Precautionary Labeling Standards

Since approximately 1980, American National Standards, Inc. (ANSI) has been working toward a standard on precautionary labeling. The Secretariat of the group had been the National Bureau of Standards (NBS), but due to financial problems NEMA has agreed to share the Secretariat duties. Under NBS the standard had progressed very slowly. Now that NEMA has become involved, efforts are being made to put some more emphasis on the adoption of the standard.

The ANSI Z535 Draft Standard now consists of five parts:

Z535.1 Safety Color Code
Z535.2 Specification for Safety Signs (Hazard Alerting Devices)
Z535.3 Criteria for Safety Symbols
Z535.4 Specification for Product Safety Signs and Labels
Z535.5 Specification for Accident Prevention Tags

The NEMA Joint Sections Committee is having a meeting on May 20 to provide guidance to NEMA's representative to the ANSI Standards Committee. Even though NEMA has only a single vote on the Committee, the NEMA vote sways other voting members.

Even though this set of standards has been in work for over five years, some fundamental questions have yet to be resolved. The issue of whether two levels of warning or three levels of warning is best is probably the most sensitive and the one to generate the most debate. An informal poll taken of the PLC showed the Committee split on the issue. The present draft of the standard calls for three levels of warning (DANGER, WARNING and CAUTION) which supports Westinghouse's direction which was established several years ago. I will be attending the meeting as a member of the JSC and will report back. Mr. R. O. Whitt from the Westinghouse Beaver plant is also on the Committee so Westinghouse is well represented.

Finally, the NEMA-PLC has agreed to sponsor a products liability seminar during the first quarter of 1986. The consensus of the Committee is leaning toward a seminar on reduction of product liability exposure through prevention oriented safety programs. The program would concentrate on the engineering function as the source of many safety problems.

Donald E. Ayers
Donald E. Ayers
Director, Product Safety
Environmental Affairs

DEA/mj

Attachments

"Tuss" McLaughry Award for service to others; the award for Distinguished Service to Higher Education from the Council for the Advancement and Support of Higher Education (CASE); the Charles E. Wilson Memorial Award of Religion in American Life; and, the Family Service Corp., Award.

Dr. Holland served his community, his Government, and his fellow citizens will. He and his accomplishments will inspire others to dedicate their lives to public service.

We all will dearly miss Dr. Holland. I wish to convey my deepest sympathy to his wife, Laura, and his four children.

I now ask unanimous consent that Dr. Holland's obituary, which appeared in the January 4, 1985 New York Times, be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

JEROME HOLLAND, FORMER U.S. ENVOY

EDUCATOR AND RIGHTS ADVOCATE SERVED AS THE AMBASSADOR TO SWEDEN IN 1970–72

(By Joan Cook)

Dr. Jerome H. Holland, an educator, civil-rights advocate and former United States Ambassador to Sweden, died of cancer yesterday at New York Hospital. He was 69 years old and lived in Bronxville, N.Y.

Dr. Holland was president of Hampton Institute, a college in Hampton, Va., from 1960 to 1970 and before that headed another predominantly black institution, Delaware State College, for seven years.

A strong believer in education and job training as the keys to advancement for American blacks, he encouraged them to push for economic gains by working within the system.

APPOINTED BY NIXON

Dr. Holland was named Ambassador to Sweden by President Richard M. Nixon in January 1970 and remained in that post until 1972. On his return to the United States, he became the first black to serve on the board of the New York Stock Exchange.

He also was a director of several corporations, including the American Telephone and Telegraph Company, the Chrysler Corporation, Federated Department Stores, General Foods Corporation, Manufacturers Hanover Corporation and its subsidiary, Manufacturers Hanover Trust Company, and Union Carbide.

Jerome Heartwell Holland was born in Auburn, N.Y., one of 13 children of Robert and Viola Bagby Holland. He began working for his father, a gardener and handyman, at the age of 8 and quickly decided that schooling was the quickest exit from poverty.

In 1939 he graduated with honors from Cornell University, where he had twice been named to All-America football teams as an end. He received a master's degree in sociology from Cornell in 1941 and a doctorate from the University of Pennsylvania in 1950. In 1965 he was elected to the National Football Hall of Fame.

HONORED BY CORNELL

Dr. Holland was a presidential councilor and trustee emeritus of Cornell. This year Cornell named its International Living Center in his honor for his contributions to higher education and international understanding.

Dr. Holland also was chairman of the board of governors of the American Red Cross and a member of the board of directors of the National Urban League and the United Negro College Fund. He wrote many articles on economic and social conditions among American blacks and was the author of a book, "Black Opportunity."

He is survived by his wife, the former Laura Mitchell; two sons, Jerome H. 3d, of Syracuse, and Joseph, of Manhattan, and two daughters, Pamela Holland Curry of Detroit and Lucy of Manhattan.

A private funeral service will be held in Auburn. ●

AMENDMENTS SUBMITTED

PRODUCT LIABILITY ACT

DODD AMENDMENT NO. 16

(Referred to the Committee on Commerce, Science, and Transportation)

Mr. DODD submitted an amendment intended to be proposed by him to the bill (S. 100) to regulate interstate commerce by providing for a uniform product liability law, and for other purposes; as follows:

Strike all after the enacting clause and insert in lieu thereof the following:

TITLE I

SHORT TITLE

SEC. 101. This Act may be cited as the "Product Manufacturers' Responsibility Act of 1985".

FINDINGS AND PURPOSE

SEC. 102. (a) The Congress finds and declares that—

(1) hundreds of millions of consumer products are sold in interstate commerce each year;

(2) there are enormous variations from State to State with respect to what constitutes a safe product and what warnings dangerous products must carry;

(3) these variations among State laws and the uneven application of such laws in individual cases reduce the incentives for manufacturers to produce safe products; and

(4) the lack of uniformity among State laws and the uneven application of such laws deny persons injured by consumer products substantially similar benefits and quality of treatment throughout the United States.

(b) It is therefore the purpose of the Congress in this Act to—

(1) eliminate burdens on manufacturers of consumer products and on persons injured by such products by establishing uniform standards of product safety as an alternative to the present system; and

(2) improve manufacturer incentives for making safe consumer products by providing a system of speedy and certain recovery for all innocent persons injured by unsafe products.

DEFINITIONS

SEC. 103. As used in this Act, the term—

(1) "claimant" means (A) any person who submits a product liability claim or brings a product liability action on his or her own behalf; (B) the representative of such a deceased person, if the product liability claim is submitted, or the product liability action is brought, through or on behalf of an estate; and (C) the person's parent or guardian, if such a claim is submitted, or such an action is brought, through or on behalf of a minor;

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

(3) "exercise reasonable prudence" is conduct of an ordinary person or class of persons, in the same or similar circumstances, exercising the care, attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own interests and the interests of others;

(4) "injury" means—

(A) bodily harm to an individual caused by a product and that individual's illness, disease, or death resulting from that bodily harm; and

(B) actual damage to real or personal property other than the product itself;

(5) "manufacturer" means (A) any person who is engaged in a business to design or formulate and to produce, create, make, or construct any product (or component part of a product), or any person who is engaged in a business to produce, create, make, or construct any product (or component part of a product); (B) a product seller with respect to all aspects of a product (or component part of a product) which are created or affected when, before placing the product in the stream of commerce, the product seller designs or formulates and produces, creates, makes, or constructs an aspect of a product (or component part of a product) made by another, or produces, creates, makes, or constructs an aspect of a product (or component part of a product) made by another; or (C) any product seller not described in clause (B) which holds itself out as a manufacturer to the user of the product;

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

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

(8) "product" means any object, substance, mixture, or raw material in a gaseous, liquid, or solid state which is capable of delivery itself, or as an assembled whole in a mixed or combined state or as a component part or ingredient, which is produced for introduction into trade or commerce, which has intrinsic economic value, and which is intended for sale or lease to persons for commercial or personal use, except that the term does not include human tissue, blood or organs;

(9) "product seller" means a person who in the course of a business conducted for that purpose, sells, distributes, leases, packages, or otherwise places a product in the stream of commerce; but does not include—

(A) a seller or lessor of real property;

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

(C) any person who—

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

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

(10) "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.

Attachment #1

injury. The claimant shall cooperate with the manufacturer in its investigation of the circumstances of the injury and of the damages claimed as a result of such injury.

PAYMENT OR REJECTION OF CLAIM

SEC. 203. (a) A manufacturer shall, within 75 days after a claim is received under section 202, determine whether it is liable for the injury complained of by the claimant.

(b)(1) If the manufacturer determines that it is liable for such injury, the manufacturer shall promptly make payment to the claimant for all damages payable pursuant to section 205 that have arisen to date from that injury, or enter into a binding agreement with the claimant for disposition of the claim.

(2) No agreement entered into under this subsection may preclude a claimant from recovering reasonable charges for reasonably needed and used or anticipated medical and rehabilitation services which exceed the amount agreed to be paid for such services in such agreement if the injury which is the cause of such charges was the result of the earlier injury which was the basis for such agreement, and occurred within three years after the date of such agreement. Any claimant who satisfies the requirements of this paragraph may submit to the manufacturer a claim for such charges, in accordance with the provisions of this title.

(c) If the manufacturer determines that it is not liable for such injury, the manufacturer may reject such claim, and shall give the claimant written notice of the rejection and the reasons for such rejection within 75 days after the date of receipt of the claim.

RIGHTS IN CASE OF REJECTION OF CLAIM

SEC. 204. (a) If a manufacturer rejects a claim submitted under section 202 solely because of a dispute over the amount of economic loss, the manufacturer shall pay the undisputed portion within 75 days. Thereafter, either the manufacturer or the claimant may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive. No official or court of the United States shall have power or jurisdiction to review any such findings and determination, except where there is alleged fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator and where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. The parties to the arbitration shall share equally in the payment of the fee and expenses of the arbitrator. The right to initiate binding arbitration under this subsection shall be a claimant's exclusive remedy where a manufacturer rejects a claim under this title solely because of a dispute over the amount of economic loss.

(b) If a manufacturer rejects a claim submitted under section 202 for any reason other than a dispute over the amount of economic loss, the manufacturer shall notify the claimant of his or her right to bring a civil action under this section, and the claimant may bring such an action to enforce the claimant's rights for all damages payable pursuant to section 205 that have arisen to date from that injury. Such an action must be brought within three years of the time the claimant discovered or, in exercising reasonable prudence, should have discovered the injury and its cause, except that any such action of a person under legal disability may be commenced within two years after the disability ceases. If the commencement of the action is stayed or enjoined, the running of the statute of limitations under this subsection shall be suspended for the period of the stay or injunction. The period of time during which a manufacturer is determining under section 203(a) whether the manufacturer is liable for the injury for which a claimant seeks recovery under this title is excluded in the computation of such three-year or two-year period.

(c) In any action brought under this section, the manufacturer is responsible to the claimant if the claimant establishes by a preponderance of the evidence that the manufacturer is responsible for the claimant's economic harm, in accordance with the standards set forth in sections 201 (a) and (b).

(d) Where a claim has been submitted under section 203(b)(2), and a manufacturer rejects the claim for any reason other than a dispute over the amount of reasonable charges for reasonably needed and used or anticipated medical and rehabilitation services, the manufacturer shall notify the claimant of his or her right to bring a civil action under this section, and the claimant may bring such an action to enforce the claimant's rights for all such charges. Such an action must be brought within three years of the date of such agreement.

(e) A claimant may bring an action under this section—

(1) in an appropriate court of the State in which the injury occurred, where the claimant resides, or where the manufacturer resides, and such action shall be governed by the provisions of this Act; or

(2) in the district court of the United States for the district in which the claimant resides or in which the injury occurred, in accordance with section 1332 of title 28, United States Code.

(f) If the claimant meets the requirements of subsection (c), the court shall enter an order enforcing the claimant's rights under this Act and shall also award reasonable attorney's fees and costs and interest on the amount of the payment equal to two percent per month for each month after the 75-day period specified in section 203(a) that the payment remains unpaid.

MANUFACTURER'S LIABILITY

SEC. 205. A manufacturer is liable only for economic harm, minus the total of the compensation paid or payable to the claimant by reason of the same damage to real or personal property or the same physical injury, illness or death from any other source, including any such compensation paid or payable under any governmental program or employee benefit plan, or pursuant to any private insurance policy or program or any prepaid medical benefit plan. Where the injury occurs in a situation that might entitle the claimant to workers compensation benefits, and it is not clear whether such benefits will be paid within the time for payment by the manufacturer specified under this title or what such benefits will be, the manufacturer shall pay all the claimant's economic harm, including that loss which might be reimbursable under workers compensation. The manufacturer shall then have a right, notwithstanding any other provision of law, to recover the amount of such benefits from the person who is obligated to pay or provide them, or from the claimant who actually received them.

FURTHER RESPONSIBILITY OF MANUFACTURER

SEC. 206. (a) If, after submitting a claim to a manufacturer under section 202, a claimant incurs further economic harm, the claimant may submit to that manufacturer additional claims for economic harm. Any additional claim shall include the information specified in section 202 regarding that further economic harm. The manufacturer shall, within 45 days after receipt of the additional claim, determine whether it is liable for the economic harm described in the claim and, if it determines that it is liable for such economic harm, promptly make payment to the claimant for all damages payable under section 205.

(b) If a manufacturer rejects a claim under this section solely because of a dispute over the amount of such economic harm, the manufacturer shall pay the undisputed portion within 75 days. Thereafter, either the manufacturer or the claimant may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive. No official or court of the United States shall have power or jurisdiction to review any such findings and determination, except where there is alleged fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator and where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. The parties to the arbitration shall share equally in the payment of the fee and expenses of the arbitrator. The right to initiate binding arbitration under this subsection shall be a claimant's exclusive remedy where a manufacturer rejects a claim under this section solely because of a dispute over the amount of economic loss.

(c) If a manufacturer rejects the claim for any reason other than a dispute over the amount of such economic harm, the manufacturer shall notify the claimant of his or her right to bring a civil action under this section, and the claimant may bring such an action to enforce the claimant's rights to recover for such economic harm.

(d) In any action brought under this section, the manufacturer is responsible to the claimant if the claimant establishes by a preponderance of the evidence that the manufacturer is responsible for the claimant's economic harm, in accordance with the standards set forth in section 201(a) and (b).

(e) A claimant must bring any civil action to recover damages under this section within three years after the date of the manufacturer's final payment for economic harm, except that any such action of a person under legal disability may be commenced within two years after the disability ceases. If the commencement of the action is stayed or enjoined, the running of the statute of limitations under this subsection shall be suspended for the period of the stay or injunction. The period of time during which a manufacturer is determining under this section whether the manufacturer is liable for the economic harm for which a claimant seeks to recover under this section is excluded in the computation of such three-year or two-year period.

(f) A claimant may bring an action under this section—

(1) in an appropriate court of the State in which the injury occurred, where the claimant resides, or where the manufacturer resides, and such action shall be governed by the provisions of this Act; or

The amendment is the product of many months' work and extensive consultations with all involved parties, starting last summer when S. 44, the Product Liability Act, was scheduled for action on the Senate floor. At the time, I carefully studied the arguments of both the proponents and the opponents of S. 44 and concluded that both sides missed the mark.

First, I was not convinced by the proponents' arguments that the bill would have the effects they wanted. While one can make good arguments for uniform rules so that manufacturers who sell in 50 States will know what the rules will be everywhere, I don't think that uniform rules would have produced the results the supporters hoped for—fewer awards in bizarre accident cases and lower transaction cost. Judges and juries can and do stretch most factual situations to fit any legal rules when they are sympathetic to the plight of the injured party. There is no reason to believe that the provisions of S. 44 would have changed those reactions. Moreover, transaction costs would have remained high because they are the result of having to use the legal system to settle cases, not because lawyers have to spend a lot of time researching the law. Most trial attorneys spend the vast bulk of their time taking depositions and preparing the factual side of their cases. That would not change were S. 44 enacted.

Even if S. 44 had been enacted and achieved all of its objectives, it would have done little if anything to help people injured by products. That is the crux of my quarrel with both sides. Whatever the merits of the opponents' arguments, they have failed to offer a better alternative to the tort lawsuit to victims. The tort system is a very poor compensation system. It fails to pay a significant number of people we would all consider worthy of compensation; it grossly overpays people with small losses and sadly underpays those with the most serious losses; it takes too long to pay the people it does pay; and it is highly inefficient, paying more to lawyers and insurance companies than to victims.

Let me be more specific about the deficiencies of the tort system. In 1977, the Insurance Services Office produced a volume entitled "Product Liability Closed Claims Survey: A Technical Analysis of Survey Results," based on data from 24,452 survey forms from 23 major insurers about claims they processed between July 1, 1976, and March 15, 1977. This data is very revealing.

First, it shows that one-third of all claims were closed with no payment. While it is impossible to tell from the data how many of these people were "innocent" victims who most of us would think deserve a recovery, it is clear that many of these people would fit into the following categories of innocent victims: First, people who cannot identify the maker of the product (as, for example, where there is a long latency period before the injury manifests itself); second, people who are injured by a product where the manufacturer was not negligent, in States that do not apply a strict liability standard (or, in strict liability States, where the product's value to society is found to be greater than its risks); third, people who are injured by "unavoidably unsafe" products, a defense based upon the utility of the product to society as a whole, regardless of its effect on particular individuals (as in the DPT vaccine cases); and fourth, people whose negligence has made a minimal contribution to the injury, in the States that maintain the defense of contributory negligence.

Second, the pattern of recovery for those who prevail finds the amount of recovery as a percentage of the loss going down as economic losses rise. For example, the people with the greatest percentage recovery were those with economic losses between $1 and $1,000, who recovered an average of 482 percent of economic loss (the amount over 100 percent being for noneconomic damages). Technically, the highest recovery belongs to the second largest category of prevailing victims, those with no economic losses. Since this group's recovery averaged $804 a person, their percentage recovery was infinity.

Part of the reason for such high recoveries at such low levels of loss lies in the nuisance value of a claim, where it is cheaper for a company to pay a small amount in a questionable case than it is to fight the claim. Nevertheless, the survey did find that losses up to $100,000 were compensated on the average at more than 100 percent of economic loss.

After $100,000 of losses, the picture changes dramatically. People with losses over $100,000—those most demonstrably in need of compensation—were 2 percent of the victims, but they incurred 78 percent of the losses. On the other hand, they received only 32 percent of the payments. The disparity between losses and recoveries was most dramatic for the 10 people whose losses exceeded $1 million. Their net recovery, after subtracting their attorneys' fees, was only 6 percent. The following table, based on the ISO data, less one-third for attorneys' fees where losses exceed $2,000, gives a breakdown of losses and recoveries for all people who did recover (except for those with no losses):

Economic losses and recoveries for product liability injuries

Economic loss range	*Percentage recovery*
$1 to $1,000	482
$1,001 to $2,000	372
$2,001 to $3,000	239
$3,001 to $4,000	225
$4,001 to $5,000	316
$5,001 to $7,500	220
$7,501 to $10,000	186
$10,001 to $15,000	171
$15,001 to $20,000	161
$20,001 to $25,000	156
$25,001 to $50,000	134
$50,001 to $100,000	176
$100,001 to $200,000	43
$200,001 to $300,000	55
$300,001 to $400,000	39
$400,001 to $500,000	20
$500,001 to $750,000	11
$750,001 to $1,000,000	72
$1,000,000 to Up	6

Almost as disturbing was the ISO finding that it took 5 years to pay the claim for the average dollar amount involved. For people who have inadequate other resources to pay for their medical and rehabilitation losses and their work losses—which is most of us—it is an unconscionably long time. Moreover, studies have shown that when rehabilitation has to be delayed, the degree of recovery is less than when the problem can be treated immediately.

Finally, the ISO data revealed that the tort lawsuit system is highly inefficient, paying lawyers almost as much as victims, before even taking into account the considerable overhead costs of insurers.

For all the reasons just discussed, the tort system is a poor compensation system. Because of its uncertainty and unpredictability, it is also of questionable value in deterring the production of unsafe products. Unfortunately, both sides of this debate so far have focused on how to tinker with the tort system to produce better results for their interests. I think they have missed the major point, the lawsuit system itself is the problem.

The amendment I am submitting today is designed to carry out four purposes:

First, to provide a faster system of assured but limited compensation of economic losses of innocent people injured by unsafe products;

Second, by placing limitations on damages in the compensation system, to encourage the production of useful new products by responsible manufacturers who take all possible precautions to produce a safe product;

Third, to retain the tort system to punish negligent manufacturers and to help determine carelessness by other manufacturers; and

Fourth, to reduce the overhead costs associated with the present lawsuit system and thus, hopefully, reduce the costs of consumer goods.

The legislation seeks to achieve these goals by giving injured persons a choice between seeking recovery for their economic losses in a speedy claims system with a lower standard of proof for recovery and seeking full tort damages—economic, noneconomic and, where appropriate, punitive—in a tort system in which they would have to prove that the manufacturer was negligent in producing the product.

In the claims system, a person injured by a product would simply file a claim for economic damages—medical and rehabilitation expenses as well as work loss, replacement services loss,

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and the significant variations from State to State as to what constitutes a safe product and what warnings dangerous products must carry. The findings also state that these variations and the uneven application of these laws both reduce incentives for manufacturers to produce safe products and deny people with similar injuries substantially similar benefits.

Section 102 cites the purposes of the Act: (1) to establish uniform standards for safe products and for recovery for injuries from unsafe products as an alternative to the present system and (2) to improve manufacturer incentives for producing safe products by providing a system of speedy and certain recovery for all innocent persons injured by unsafe products.

Section 103, Definitions, sets forth the meaning of definitions relevant to the operation of the legislation.

Section 104, Responsibility for Injury Caused by a Product, contains provisions dealing with the exclusivity of the remedies set forth in this Act, the nature of the choice between the alternative remedies, and the duty of manufacturers and attorneys to inform victims of these choices and the ramifications of each choice.

Subsection (a) sets forth the general proposition that the provisions of this Act are the sole bases for recovery for an injury caused by a product. There are two exceptions. First, a victim could seek recovery from some other source that is obligated to pay for his or her injury, such as a private health plan, workers compensation or Social Security. Second, the Act would not apply to disputes between businesses where there is no personal injury, such as where a machine sold by Company A to Company B misoperates and damages Company B's property.

Subsection (b) says that a person injured by a product shall have alternative systems through which to seek recovery: one, a claims process against a manufacturer and, two, a lawsuit. This subsection further states that if a person files a claim under Title II and then receives payment from the manufacturer (or files a lawsuit to force payment where the manufacturer refuses to pay the claim), the person may not thereafter file an action for damages from the same injury, illness or death under the lawsuit alternative contained in Title III.

The subsection also provides that if a person files a product liability action under Title III, that person may not thereafter file a claim for damages from the same injury, illness or death under the claims alternative contained in Title II.

In effect, a person injured by a product may seek recovery from one system or another but may not play both ends against the middle. If he or she files a lawsuit, then that person must accept the consequences of the decision. The person may not thereafter opt into the claims system if things are not going well in the lawsuit. On the other hand, a person is not locked into the claims system until payment is actually made, the point at which the injured person gets what he or she bargained for by entering the claims system. If such payment is not forthcoming, the person may choose either to seek economic and noneconomic damages (and, where appropriate, punitive damages) in a tort lawsuit pursuant to the provisions of Title III or seek the lesser economic damages authorized through the claims system in Title II where the injured person's standard of proof would be substantially lower. Once that choice is made, the injured person would be locked into the system chosen.

Subsection (c) sets forth the information manufacturers and attorneys must give injured persons when they go to one or the other to seek damages. In essence, manufacturers and attorneys would be required to give the injured person the information that they might not wish to volunteer on their own. This information is designed to be sufficient to enable a person to understand the elements of the two options and the consequences of choosing one or the other.

Section 105, Relationship to Other law, deals with how this law would interact with other laws. Subsection (a) provides that the Act shall not apply where recovery is permitted under any Federal law, other than the Federal Employees Compensation Act, the Longshoremen's and Harbor Workers' Compensation Act and any governmental program or employee benefit plan. The last two exceptions are designed to avoid the anomalous result of denying recovery to people who could secure such things as Social Security Disability Insurance benefits because of an injury caused by a product.

Subsection (b) provides that this Act shall not apply where an environmental protection law provides for recovery from injuries, where there is a right to such recovery under the common law of a State, or where any law provides a recovery from a release into the environment or the threat of release into the environment, of a toxic substance or waste, hazardous substance or material, hazardous waste or other contaminant or pollutant.

Section 106, Effective Date, provides that this Act shall take effect six months after the date of enactment.

TITLE II

Section 201, Responsibility of a Manufacturer upon Submission of a Claim, sets forth the situations in which a manufacturer is liable to an injured person in the claims system. In general, the concept is that as between an "innocent" victim and an "innocent" manufacturer, the manufacturer should bear the loss, to the extent of paying compensation for otherwise uncompensated economic losses. Thus, the manufacturer's conduct, in terms of the degree of care in manufacture, is irrelevant, but the injured person's conduct is relevant to the extent that it relates to that person's "innocence."

Specifically, subsection (a) provides that a claimant is entitled to recover damages if the manufacturer's product was "unsafe and the unsafe aspect of the product was a proximate cause of the claimant's injury." The subsection goes on to define a product as "unsafe" if it "causes the claimant's harm while the product is being used in a manner and for a purpose which was in fact anticipated by the manufacturer or which occurs so commonly among product users that the manufacturer may be assumed to have anticipated such use." In part, it is designed to hold the manufacturer liable not only where a person was injured under circumstances that the manufacturer actually foresaw but also where the use of the product was so common that one can impute knowledge of the manufacturer. Thus, for example, a manufacturer would be liable not only where a defective toy injured a child who was using it in a proper manner but also where the child was throwing it against the wall. On the other hand, the manufacturer would not be liable if a 47 year old attorney dropped the toy from the top of a tree and its fall injured a young child below.

In addition, it is designed to reach nonnegligent conduct of a manufacturer when the injury arises from a hazard that wasn't known or knowable when the product was made but the product caused the injury while it was being used in the fashion actually anticipated or that could reasonably have been anticipated by the manufacturer. For example, it also would cover illnesses that occurred in the workplace where materials used in the workplace proved to be carcinogenic.

The subsection provides for four exceptions to the general rule. Exception number (i) relates to the nature of the product. There would be no recovery when the injury was caused by an "open and obvious danger" of the product. This exception is intended to address situations where the danger is an inherent characteristic of the product that would be recognized by the ordinary persons who uses or consumes the product. Thus, a person injured by cutting himself on a sharp knifeblade or while under the influence of alcohol would not be able to recover from the manufacturer of the knife or the alcohol. This defense would not apply to products in the workplace. Further, this doctrine is to be distinguished from the patent danger rule, where the danger is not inherent. This exclusion does not apply in that situation.

The other three exceptions all deal with the injured person's conduct. Thus, an injured person cannot recover if his or her injury (ii) was caused by an alteration or modification of the product by the claimant; (iii) was the result of the claimant's assumption of the risk (where a person knows of a danger but takes the risk anyway, as contrasted with where a risk is assumed but there is no real option, as, for example, where a person drives on a flat tire in order to get out of the desert, only to have the car crash because of the flat tire. That is not an "unreasonable" use of the product that would result in a denial of recovery), and (iv) was caused by what is tantamount to gross negligence on the part of the victim. There is no societal reason for compensating such conduct.

Subsection (b) deals with claims situations where the injured person cannot identify the manufacturer. In that situation, the person may submit a claim to any manufacturer of a product that is "functionally identical to and interchangeable with" the product which caused the claimant's harm. In turn, that manufacturer may seek to recover from other manufacturers of such a product who sold their products at the time and in the market in which the product which caused the claimant's injury was purchased. This provision addresses one of the biggest problems with today's tort system, the lack of redress for a victim who cannot identify the maker of the product that injured him.

Section 202, Submission of a Claim, describes the information an injured person must submit to a manufacturer in order to file a formal claim. The required information should be enough for a manufacturer to determine whether its product caused the injury and the amount of damages involved.

Section 203, Payment or Rejection of a Claim, gives the manufacturer 75 days to determine whether it is responsible for the injury and, if so, to pay the claimant's economic losses or enter into an agreement with the claimant to dispose of the claim. Should the parties make an agreement, it would be binding except for any medical losses not anticipated in the agreement that arise from the same injury or illness during the three years after the injury. This exception is consistent with the objective of making people whole. If a manufacturer rejects a claim, he must notify the claimant within 75 days and indicate the reasons for the rejection.

Section 204, Rights in Case of Rejection of a Claim, sets forth the legal procedures