COMMENT

FEDERAL PRODUCT LIABILITY REFORM: A COMPARISON OF S. 2760 AND THE SYSTEM IN THE UNITED KINGDOM

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1. INTRODUCTION

The current state of product liability laws in the United States has become the subject of widespread public debate and calls for reform.1 The media have largely focused on the perceived liability insurance crisis,2 but many other aspects of the product liability system have added

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2 The perceived liability insurance crisis has received widespread media coverage, including the cover story in Time magazine. Church, Sorry, Your Policy Is Canceled, Time, Mar. 24, 1986, at 16, 26 (quoting Congressman Thomas Luken (D-Ohio): “Probably no recent issue has snowballed so quickly.”). However, the scope of the crisis is unclear: “Depending on whose accountant you listen to, the insurance industry . . . lost $5.5 billion or made $1.7 billion [in 1985].” Blakey, In Antitrust, Tort and RICO Reform, Obvious Goals Cover Up Deep Issues, NAT’L L.J., Oct. 13, 1986, at 26. Furthermore, the crisis is attributed to a variety of causes. The insurance industry generally blames “a runaway legal system.” Wayne, Insurance Industry Under Fire, N.Y. Times, June 9, 1986, at D1, col. 2; see also Nickel, Back to Basics on Insurance Reform, Philadelphia Inquirer, May 20, 1986, at 11A, col. 1. Consumer advocates assert that “the fundamental cause [of the crisis is] the sharp ups and downs of the insurance industry’s profit cycle.” Hunter, Taming the Latest Insurance ‘Crisis’, N.Y. Times, Apr. 13, 1986, at F3, col. 1; or, more specifically, “th[e] price wars of the early 1980’s . . . .” Wayne, supra, at D1, col. 2. A third view attributes the crisis to both “the insurance industry’s business cycle . . . [and] the surge in costs associated with the tort liability system.” Birnbaum, Tort Reform Proposals Analyzed, NAT’L L.J., June
to the controversy.\textsuperscript{3} State sovereignty over tort laws has resulted in fifty sets of rules, and the injustices created by this situation are one cause for concern.\textsuperscript{4} A related problem is the uncertainty and the accompanying costs associated with "[t]he present system of state common law legal development and piecemeal state statutory reform . . . ."\textsuperscript{5} Yet another major criticism focuses on the contingency fee contracts under which product-liability lawyers traditionally operate and on the resultant large fees that lawyers receive when their clients obtain large awards.\textsuperscript{6} The high transaction costs associated with the legal system

\textsuperscript{3} See, e.g., Working Group, supra note 2, at 16-17 n.1 (state regulation of insurance); Church, supra note 2, at 20 (increase in number of suits, size of jury awards, and frivolous suits); Green, A Lawyer Faces Risks in Deciding To Take on Costly Damage Suits, Wall St. J., May 23, 1986, at 1, col. 1 (contingency fee arrangements for plaintiffs' lawyers); Wermiel, The Costs of Lawsuits, Growing Ever Larger, Disrupt the Economy, Wall St. J., May 16, 1986, at 1, col. 6 (increasing costs of damage awards).


\textsuperscript{5} Reed & Watkins, Product Liability Tort Reform: The Case for Federal Action, 63 Neb. L. Rev. 389, 394 (1984). The authors further state: "[T]he system] exacts high costs from manufacturers, other sellers, insurers, and customers alike. These costs . . . in great measure . . . reflect the price of uncertainty, rather than the cost of compensating injured plaintiffs." (footnote omitted) Id. (Section III of this article provides a detailed analysis of the effects of the uncertainty of the tort litigation system on insurers, manufacturers, and consumers.) In testimony on S. 1999, Secretary of Commerce Baldrige stated: "Another reason for the need for reform is the patchwork of different State product liability laws which makes [sic] it difficult for businessmen to determine which legal standard will apply to them or whether a particular standard will remain constant." Product Liability Reform Proposals: Hearings Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 2d Sess. 7 (May 20, 1986) [hereinafter May Hearings on S. 1999] (statement of Secretary of Commerce Baldrige).

have also sparked cries for reform.\(^7\) The size of judgments,\(^8\) the differences in the size of awards for similar injuries,\(^9\) and the delay that often

\(^7\) "[T]he nation's tort liability system will cost $199 billion to handle bodily injury claims over the next four years." Nolan, Liability Costs to Top US Deficit, J. Com., Apr. 24, 1986, at 1A, col. 3 (citing study by the C.V. Starr Center for Applied Economics at New York University). These costs include fees paid to lawyers and expert witnesses; court costs; income foregone by jurors, witnesses, and litigants; and expenses incurred in adjusting and processing claims forms. Id. In all, "for every dollar paid in awards and settlements, between 25 and 34 cents was spent to administer the system." Id. at 14A. State and federal government expenditures for processing civil cases in 1981 were estimated to be $2.2 billion. J. Kakalik & R. Ross, Costs of the Civil Justice System xx (1983).

\(^8\) In 1975, there were 12 million-dollar awards in personal injury cases (9 in product liability cases), but by 1984 that number had jumped to 157 (86 in product liability cases). Working Group, supra note 2, at 36-39 (citing Jury Verdict Research, Inc., Injury Valuation: Current Award Trends No. 304 (1986)). During this same period, average product liability jury awards rose from $393,580 to $1,850,452. Id. at 36. One recent cartoon shows the judge asking the jury foreman, "Excuse me, did the jury say they were awarding the plaintiff 2.5 million or 2.5 billion dollars?" Wash. Post, Feb. 15, 1986, at A27, col. 2 (emphasis in original). In 1984, insurers and plaintiff companies paid $66.5 billion in claims and lawyers' fees; this amounted to 1.76% of the gross national product. Wermiel, supra note 3, at 1, col. 6. But see Consumer Group Releases Study Showing Moderate Increase in Jury Awards, [Jan.-June] 14 Prod. Safety & Liab. Rep. (BNA) No. 23, at 381 (June 6, 1986) (citing study by the Consumer Federation of America) ("Recent changes in average jury awards . . . mirror increases in average wages, medical costs, life expectancy and population growth."). It should be noted that most claims are settled without trial: one trial lawyer estimated that 90% of cases are settled. Green, supra note 3, at 12, col. 2. Similarly, another trial lawyer stated that only four percent of cases "go to jury verdict." Face the Nation, supra note 1, at 13. The monetary trends in settlements have not been studied thoroughly. "Although many practitioners assume that trends in jury verdicts are reflected in settlements, to date there has been no systematic analysis of settlement trends that would allow us to confirm or contradict this assumption." Product Liability Voluntary Claims and Uniform Standards Act: Hearings on S. 1999 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 1st Sess. 82 (1986) [hereinafter Product Liability Act Hearings] (statement of Deborah R. Hensler, Institute for Civil Justice, Rand Corp.).

\(^9\) Trials often produce "very dissimilar awards for very similar injuries." O'Connell, A 'Neo No-Fault' Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers, 73 CALIF. L. REV. 898, 900 (1985). The Institute for Civil Justice at the Rand Corporation concluded that the amount of money litigants could expect to win or pay out depended not only on the injuries involved and the cause of action but also on the litigants' personal characteristics. For example, in lawsuits involving similar claims by plaintiffs who sustained comparable injuries, business de-
occurs before injured parties are actually compensated have stirred criticism. The increase in punitive damage awards comes at a time when the basic rationale for imposing punitive damages has been questioned. With regard to insurance, the difficulty or inability of some industries to obtain product liability insurance and the costs that they incur when they do obtain insurance has been another source of concern. Furthermore, some products are no longer available or the defendants were assessed larger damages than individual defendants. The race of the litigant also appeared to affect jury awards. Product Liability Act Hearings, supra note 8, at 82 (statement of Hensler). A related problem is that "the tort system grossly over-pays people with small losses, while underpaying people with the most serious losses." Product Liability Reform Act, S. Rep. No. 2760, 99th Cong., 2d Sess. 30 (1986) [hereinafter S. Rep. 2760]. In general, compensation more than covered losses when the claimant's economic loss was less than $100,000 but failed to cover even economic loss when the loss exceeded $100,000. Insurance Services Office, Product Liability Closed Claim Survey: A Technical Analysis of Survey Results 38 (1977).

See S. Rep. 2760, supra note 9, at 3-4; Statement of Sen. Dodd, supra note 6; see also Isikoff, Lawyers, Not Victims, supra note 6. The problems of delay are not alleviated in cases that are settled: "[M]ost settlement negotiations get serious only a week or so before trial is scheduled to begin." Green, supra note 3, at 12, col. 1. Under the traditional tort system, it takes an average of five years to receive payment for a claim. Product Liability Act Amendments: Hearings Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 1st Sess. 6 (1985) [hereinafter Product Liability Act Amendments] (statement of Sen. Dodd).

See S. Rep. 2760, supra note 9, at 49 ("[P]unitive damage awards have been increasing both in size and in number in the past ten years."); Twerski, A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution, 18 U. Mich. J.L. Ref. 575, 610-14 (1985) (and sources cited therein); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982); Birnbaum & Wheeler, Products Liability, Nat'l L.J., Nov. 17, 1986, at 40 ("Now, hardly a month goes by without a report of a punitive damages verdict exceeding $1 million against a manufacturer, and appellate courts regularly affirm punitive awards in excess of $1 million in product liability cases.") (citations omitted). That companies can be forced to pay punitive damages repeatedly for the same wrongful conduct has produced particular criticism. Product Liability Act, S. Rep. No. 44, 98th Cong., 2d Sess. 57 (1984). To remedy this situation, S. 44 would have allowed punitive damages to be assessed only once for each instance of alleged reckless conduct. See infra note 57 and accompanying text for a more detailed discussion of S. 44. This limit on repeated awards of punitive damages was "[p]erhaps the most controversial provision of S. 44." Cohen, Legal Analysis of the "Product Liability Act" (S. 100, 99th Congress) As Introduced, Congressional Research Service, Library of Congress 41 (Feb. 12, 1985). This provision was deleted from subsequent bills considered by the Subcommittee on the Consumer. Id.

The Tort Policy Working Group report provides extensive figures on recent insurance premium increases by type of insurance and by sector of the economy, but it does not produce overall averages. Working Group, supra note 2, at 6-13. Insurance premiums for businesses in Philadelphia, for example, rose by an average of 172% in 1985. Fish, Poll Finds Insurers Escape Blame for Crisis, Philadelphia Inquirer, Mar. 26, 1986, at 1G, col. 2. By comparison, during the insurance crisis of the 1970s, product liability insurance premiums rose by an estimated average of 280% between 1971 and 1976. Interagency Task Force on Prod. Liab., Final Report III-11 (1977) [hereinafter Final Report]. Examples abound of firms that have been forced to close
range of product offerings is limited because of the costs or unavailability of liability insurance.\footnote{Vaccines present a particularly poignant tale. The benefits of immunization programs (in terms of lives saved, suffering avoided, and increased national wealth through reduced costs of treatment) are well documented. Boffey, \textit{Vaccine Liability Threatens Supplies}, N.Y. Times, June 26, 1984, at C1, C13, col. 1 (quoting American Medical Association Report: "Of all the armaments of medicine, vaccines offer the greatest potential benefit to the greatest number of persons."). \textit{See generally \textit{Guide for Adult Immunization} (T. Eickhoff ed. 1985). Based on recent trends, however, "it appears that the tort system's vagaries will ultimately drive mass immunization programs out of the private sector altogether." Huber, \textit{Safety and the Second Best: The Hazards of Public Risk Management in the Courts}, 85 Colum. L. Rev. 277, 289 (1985). As a result of increased liability costs, prices of vaccines are skyrocketing. Murphy, \textit{A Comeback for Whooping Cough}, Time, June 30, 1986, at 78 (the price of the whooping cough vaccine rose from $0.45 in 1982 to $11.40 in 1985, with $8.00 of the cost being placed in a "liability reserve"). Nineteen vaccines are produced by only one domestic manufacturer. \textit{The Cost of Ignoring Vaccine Victims}, N.Y. Times, Oct. 15, 1984, at A18, col. 1. "The chief worry is that in cases where there is only a single manufacturer of a vaccine, the supply could be disrupted by an unexpected manufacturing problem, a bad batch of vaccine, a strike by employees, or a decision by the last manufacturer to abandon the market." Boffey, \textit{Vaccine Liability}, supra, at C13, col. 1. "And there is every reason to fear that innovation in the development, mass-production, and distribution of new safer vaccines [would] be thoroughly stifled" and that research geared toward producing new vaccines would decrease. Huber, \textit{supra}, at 289-90, 290 n.62. Other specific examples of products and services endangered by escalating liability insurance premiums include drug capsules, Kronholm, \textit{Insurance Firms May Determine the Future of Capsules}, Philadelphia Inquirer, Mar. 22, 1986, at 8D, col. 1; birth-control devices, Galen, \textit{Birth Control Options Limited by Litigation}, Nat'l L.J., Oct. 20, 1986, at 1; day-care centers and biotechnology firms, Working Group, \textit{supra} note 2, at 10-11. Congress did, however, address the vaccine issue in 1986. National Childhood Vaccine Act of 1986, Pub. L. No. 99-660, 1987 U.S. Code Cong. & Admin. News 3755. This measure established a "no-fault compensation system for the families of children injured by vaccines." \textit{Major Provisions of Nine-Part Omnibus Health Bill}, Cong. Q., Nov. 22, 1986, at 2952.}}
trade deficits. These considerations have led commentators to advocate a variety of reforms, including abolishing tort law actions for personal injuries, instituting changes at the state level, adopting limited federal legislation addressing only the most critical issues, and implementing a sweeping federal product liability law.

This Comment focuses on one proposed solution, the Product Liability Reform Act, S. 2760, on which the Senate Committee on Commerce, Science, and Transportation reported favorably to the full Senate in June 1986. Section 2 presents an overview of the current state of the law of product liability in the United States. Section 3 covers the provisions of the Product Liability Reform Act and analyzes whether these provisions will alleviate the problems that they are designed to correct. Section 4 analyzes the state of product liability law in the United Kingdom and the trends occurring there. Finally, Section 5 compares and contrasts the Product Liability Reform Act with the system in the United Kingdom.

Although the rationale underlying the proposals contained in the...
Product Liability Reform Act is sound and the need for reform in the United States is great, the measures incorporated in this Act address only a few of the faults of the current system. This Act fails to supply the comprehensive reform that is needed to alleviate the current problems and to create a system that avoids these numerous pitfalls. Therefore, the Product Liability Reform Act should be rejected, and efforts should be renewed in the 100th Congress to draft and adopt a comprehensive federal reform of the product liability system.

2. PRODUCT LIABILITY OVERVIEW

Product liability laws have evolved dramatically in the United States over the past twenty years. Originally, American courts adopted the doctrine of *caveat emptor* and only recognized the liability of the seller of a product in instances of fraud. The law gradually evolved so that both implied and express warranty theories of recovery were recognized. Only in 1916 did the theory of negligence begin to gain broad acceptance by American courts in the product liability context. By 1966, every American jurisdiction had accepted this theory. However, before Mississippi became the fiftieth state to adopt the doctrine of negligence, the California courts had already adopted the theory of strict liability, holding that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." In 1965, the Restatement (Second) of Torts incorporated this concept. A 1978 report found that thirty-six states had

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22 Id.
24 Mississippi was the last state to adopt the theory of negligence in the context of product liability. State Stove Mfg. Co. v. Hodges, 189 So.2d 113 (Miss. 1966); see Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946); see also Restatement (Second) of Torts § 395 comment a (1965) (stating that the theory of negligence has been "all but universally accepted by the American courts").
26 Restatement (Second) of Torts § 402A (1965). This section states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product,
adopted the strict liability doctrine while only three had expressly rejected it,\(^2\) and a leading treatise stated that in 1984 "nearly all states have adopted some version of [strict liability]."\(^2\) Thus, product liability law, which is based largely on case law,\(^2\) now provides a claimant with three alternative theories on which to base a claim: negligence in tort, breach of warranty, and strict liability in tort.

In practice, these alternative theories are not always clearly distinguishable. Courts have utilized more than one theory in the same case,\(^3\) producing confusion and uncertainty.\(^3\) The confusion stemming from these alternatives has led some commentators to advocate relying on only one theory.\(^3\)

Furthermore, state courts have employed differing standards to interpret each of these theories. For example, although proof of a "defect" is a prerequisite for applying the strict liability doctrine, "the only consensus regarding the present meaning of 'defect' is that there is no consensus."\(^3\) Therefore, although the Restatement required that a product be defective and unreasonably dangerous, the California Supreme Court rejected the latter prong, holding "that to require an injured plaintiff to prove not only that the product contained a defect but also that such defect made the product unreasonably dangerous to the user or consumer would place a considerably greater burden upon him than that articulated in Greenman."\(^3\) Some courts have followed the

and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

"[I]n many respects [the Restatement] did not restate the law of strict products liability so much as state it." Reed & Watkins, supra note 5, at 399 (emphasis in original).

\(^2\) Reed & Watkins, supra note 5, at 398 n. 38 (citing REPORT OF THE SENATE PRODS. LIAB. STUDY COMM., GA. GEN. ASSEMBLY 4 (1978)).

\(^2\) W. Keeton, supra note 21, at 694.

\(^2\) Reed & Watkins, supra note 5, at 391; Schwartz & Bares, supra note 4, at 353.

\(^3\) See, e.g., Oldham's Farm Sausage Co. v. Salco, Inc., 633 S.W.2d 177 (Mo. App. 1982) (plaintiff recovered on a combination of strict liability in tort and express and implied warranties); see also W. Keeton, supra note 21, at 694.

\(^3\) Twerski, supra note 11, at 580-99.


\(^3\) Reed & Watkins, supra note 5, at 399; see also Sherman, Legislative Responses to Judicial Activism in Strict Liability: Reform or Reaction?, 44 BROOKLYN L. REV. 359, 362-63 (1978).

\(^3\) Cronin v. J.B.E. Olson Corp., 8 Cal.3d 121, 134-35, 501 P.2d 1153, 1163, 104 Cal. Rptr. 433, 443 (1972); cf. Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 432, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978) ("[A] product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of
California formulation while other courts have favored the Restatement approach.

The distinctions regarding other product liability concepts, such as what constitutes a design defect and the extent of a manufacturer's duty to warn, add to the differences that exist among the states. Furthermore, new developments indicate that product liability laws are still undergoing change.

One such evolving area of the law concerns the liability of producers of harmful products that are produced in a generic form by several firms. Plaintiffs often were unable to identify the manufacturer of the particular product that caused their harm and, therefore, were precluded from obtaining damages. Sindell v. Abbott Laboratories is widely recognized as a landmark case in this area. In Sindell, the California Supreme Court expressly rejected the more limiting alternative.
tive liability doctrine and instead imposed liability under the market-share theory. The *Sindell* court, however, refused to apply two other theories under which liability could have been imposed: concert of action and enterprise liability. No consensus, however, has emerged in this area: since *Sindell*, various courts have reached conflicting conclusions regarding the relevant theories. Thus, manufacturers of harmful generic products are subjected to liability only in some states. Even in those states, the extent of their liability differs because the conflicting theories affect cases disparately. This situation creates inequities for similarly situated plaintiffs. Furthermore, it adversely affects manufacturers because they are unable to evaluate the extent of their liability and thus their potential costs.

Thus, states have adopted differing theories for imposing liability and even differing rules for applying these theories. These various laws impose a myriad of rules on national manufacturers. When this multitude of rules is viewed in combination with the problems of delay, uncertainty, large awards, high transaction costs, and the insurance cri-

42 See, e.g., Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948) (holding that, when both possible tortfeasors are before the court but the court is unable to determine which party is at fault, both parties can be held jointly and severally liable).
43 26 Cal.3d at 607-10, 607 P.2d at 933-35, 163 Cal. Rptr. at 141-43. The concert of action theory requires that the tortfeasors act together; under this doctrine, each party is liable for the entire amount. *Id.* The enterprise theory applies when the parties act as one firm when committing the tort. *Id.*
sis, the true magnitude of the problems inherent in the current product liability system in the United States becomes apparent in terms of inequities among plaintiffs and economic inefficiencies.

Many commentators believe that these problems cannot be solved at the state level because reforms independently enacted by various states would not address the problem of different product liability laws among the states. Nor does the Uniform Product Liability Act present the solution to the problem. This uniform law has not eliminated the differing standards because, as of 1984, only four states had adopted any of the sections of the Uniform Act and none had enacted the Uniform Act in its entirety. Furthermore, because state courts are independent, they are likely to put their own gloss on such a statute, just as they interpret other product liability doctrines differently. Thus, many commentators are strongly urging Congress to enact a federal product liability statute.

3. CONGRESSIONAL RESPONSE AND THE PRODUCT LIABILITY REFORM ACT

3.1. Historical Perspective

In 1976, in response to the product liability insurance crisis of the mid-1970s, the Ford Administration created the Federal Interagency Task Force on Product Liability, chaired by the Commerce Department. In 1978, a second task force, the Task Force on Product Liability -
ity and Accident Compensation, recommended that a federal product liability law be drafted. The Carter Administration rejected this proposal and countered with the proposed Model Uniform Product Liability Act. Few states, however, have adopted the provisions of the Uniform Act.

As a result of the recommendations of these task forces and also the states' lack of response to the Uniform Act, pressure again mounted for federal action in the 1980s, and legislation was introduced in Congress to create a federal product liability law. The Senate Committee on Commerce, Science, and Transportation [hereinafter Committee] approved product liability bills in both the 97th and 98th Congresses (S. 2631 and S. 44, respectively), but Congress adjourned each time without any action having been taken by the full Senate. In 1985, product liability bill S. 100 failed to gain the approval of the Committee. Despite the similarities between S. 100 and S. 44, the Committee approved S. 44 but rejected S. 100; observers felt that the failure of S. 100 may have been due, in large part, to the perception that the bill was too favorable to manufacturers.

Subsequent to the failure of S. 100, several amendments in the form of substitute bills were introduced, and a series of hearings were held by the Subcommittee on the Consumer. In October 1985, the

53 Id.
54 See supra notes 48-49 and accompanying text.
55 See Reed & Watkins, supra note 5; Hollings, supra note 12.
57 In 1982, S. 2631 was passed unanimously by the Senate Committee on Commerce, Science, and Transportation. S. REP. NO. 670, 97th Cong., 2d Sess. (1982). This bill was reintroduced in the 98th Congress and was labeled S. 44. After a series of amendments, the bill was reported out of committee by a vote of 11-5. S. REP. NO. 476, 98th Cong., 2d Sess. (1984) [hereinafter S. REP. 476]. Because of the pressure of other pending legislation, the bill again failed to receive the attention of the entire Senate.
58 S. 100 was "substantially the same as S. 44." S. REP. 2760, supra note 9, at 9. The changes between S. 44 and S. 100 primarily related to the punitive damages provisions.
59 The bill died in the Committee on May 16, 1985, when the vote to recommend the bill to the full Senate was tied 8-8. S. REP. 2760, supra note 9, at 11.
60 Interview with Andrew Koppelman, Staff Member of the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation in Wash., D.C. (Feb. 12, 1986) (hereinafter Remarks of Koppelman). See generally Hollings, supra note 12 (discussing problems with product liability legislation that does not provide adequately for the interests of consumers and workers).
61 On March 19, 1985 and May 14, 1985, respectively, Sens. Dodd and Gorton introduced amendments in the nature of substitutes to S. 100 (although they were com-
Attorney General established the Tort Policy Working Group, an interagency group consisting of representatives of ten agencies and the White House.62 The Working Group issued its report and recommendations in February 1986.63 Finally, on June 3, 1986, the Committee began to markup a new federal product liability bill.64

At the opening of the markup session, Sen. Danforth stated that he had become "'less ambitious' in recent months" regarding the scope

Complete substitutes for the bill, they were labeled amendments) that would establish an alternative, expedited claim system; these amendments were labeled S. Amend. No. 16 and S. Amend. No. 100, respectively. Cohen, Products Liability Bills: Comparison of S. 100 and H.R. 2568, 99th Congress, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS No. 85-899A, at 1, n.1 (July 16, 1985). Based on these two amendments, the Committee Staff drafted two bills on the subject. Staff Working Draft #1, July 15, 1985, 99th Cong., 1st Sess.; Staff Working Draft #2, Nov. 27, 1985, 99th Cong, 1st Sess. Senator Danforth discussed the second draft on the Senate floor on December 20, 1985. Statement of Sen. Danforth, supra note 4. The draft was mistakenly designated as a new bill and labeled S. 1999; to avoid confusion (Remarks of Koppelman, supra note 60), Sen. Danforth allowed the bill's mistaken designation to remain but stressed that the "text is still in the drafting stages . . . ." 131 CONG. REC. S18,410 (daily ed. Dec. 30, 1985) (statement of Sen. Danforth). (S. 1999 was co-sponsored by Sen. Dodd, 132 CONG. REC. S1193 (daily ed. Feb. 6, 1986) (statement of Sen. Dodd); and Sen. Kassebaum, 132 CONG. REC. S858 (daily ed. Feb. 3, 1986); S. 1999 is printed at 131 CONG. REC. S18,410 (daily ed. Dec. 30, 1985). One of the innovative aspects of S. 1999 was its powerful expedited claim system, set forth in Title II of the bill. The hearings before the Subcommittee on the Consumer of the Committee on Commerce, Science, and Transportation on February 27, 1986 and March 11, 1986, however, revealed little political support for this provision. Product Liability Act Hearings, supra note 8; Interview with Andrew Koppelman, Staff Member of the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation in Wash., D.C. (Aug. 21, 1986) [hereinafter Remarks of Koppelman II]. Accordingly, three different amendments, each in the form of substitute bills, were introduced by Sens. Kasten, Danforth, and Gorton: (1) Sen. Kasten's amendment to S. 100 was labeled S. Amend. No. 1814, 132 CONG. REC. S5106 (daily ed. Apr. 30, 1986), and incorporated many of the recommendations of the Tort Policy Working Group (see Working Group, supra note 2); (2) Sen. Danforth's amendment replaced the expedited claim system with an expedited settlement system (this amendment to S. 1999 was co-sponsored by Sen. Dodd and was labeled S. Amend. 1951, 132 CONG. REC. S5106 (daily ed. May 12, 1986); and (3) Sen. Gorton's amendment to S. 1999 was labeled S. Amend. No. 1968, 132 CONG. REC. S6232 (daily ed. May 20, 1986). The subcommittee held further hearings on these various proposals on May 19 and 20, 1986. May Hearings on S. 1999, supra note 5.

Working Group, supra note 2, at 1.

The Working Group concluded that little "can or should be done" by any government regarding the economic factors underlying the liability insurance crisis. Working Group, supra note 2, at 60. The Working Group did, however, issue eight tort law reform proposals: (1) retain fault as the basis for liability; (2) base causation findings only on credible evidence and opinions; (3) eliminate joint and several liability; (4) impose limits on non-economic damages; (5) permit future economic damage awards to be paid periodically; (6) reduce awards by the amount received for the same injury by the claimant from collateral sources; (7) impose a schedule on contingency fees; and (8) develop alternative dispute resolution mechanisms. Id. at 60-75.

S. Rep. 2760, supra note 9, at 12.
of reforms that he considered to be possible. Sen. Hollings, the Committee's ranking minority member and a leading opponent of efforts to enact federal product liability reforms, contended that Congress was "not the proper entity to solve the problem" and that there was no reason to send out a "lynching party" for the current litigation system.

After six contentious markup sessions during the month of June, the Committee approved a federal product liability bill (later known as S. 2760) by a vote of 10 to 7 on June 26, 1986.

On September 17, 1986, the Product Liability Reform Act was debated on the Senate floor. Procedural maneuverings prevented any substantive action on the measure. On September 22, 1986, Sen. Kasten announced a "bipartisan compromise" to eliminate the most controversial provision contained in S. 2760, caps on damage awards.
ther parliamentary maneuvering occurred on September 25, 1986, and both proponents and opponents of S. 2760 claimed victory. Ultimately, Congress adjourned for the third straight session before the full Senate could act on a product liability reform measure on which the Committee had reported favorably.

3.2. The Provisions of the Product Liability Reform Act

The Product Liability Reform Act, S. 2760, consists of four titles. Title I establishes the framework within which the Act is to be interpreted and provides for the total preemption of state laws “to the extent that this Act establishes a rule of law applicable to any such recovery.” By limiting the jurisdiction of the federal courts to cases involving diversity of citizenship, the Act neither expands the jurisdic-

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72 Bill Gets Wide Support, supra note 71.

73 Id. at 682. Sen. Kasten claimed that senators opposing the amended bill “don’t want to stand up and be counted” and that “there are at least 70 votes in favor of the [amended] bill.” An aide to Sen. Hollings described the bill’s supporters’ procedural votes as tactical moves designed to avoid revealing the supporters’ identity and strength. Victory for supporters of the bill was claimed by the staff of the Subcommittee on the Consumer. Telephone Interview with Andrew Koppelman, Staff Member of the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation (Oct. 20, 1986) [hereinafter Remarks of Koppelman III] (it was “clear that the votes were there to get some sort of bill through” the Senate).

74 Similarly, although many states enacted reforms in 1986 (see Barron, supra note 1; Kristof, supra note 1), the drive for state tort law reforms slowed toward the end of the summer. Hilder, Insurers’ Push to Limit Civil Damage Awards Begins to Slow Down, Wall St. J., Aug. 1, 1986, at 1, col. 6. Movement for tort reform resurfaced in 1987. Strasser, 1987 Focus on States: Both Sides Brace for Tort Battle, NAT’L L.J., Feb. 16, 1987, at 1, col. 3 (“Civil justice reform . . . has become a burning political issue, and one that is about to ignite again as legislators around the country return to their state capitals for a new round of lawmaking.”).


76 Id. § 103(b). Other provisions of Title I include:

(a) This Act governs any civil action brought against a manufacturer or product seller, on any theory, for harm caused by a product. A civil action brought against a manufacturer or product seller for loss or damage to a product itself or for commercial loss is not subject to this Act . . . .

(b) This Act supersedes any State law regarding recovery for harm caused by a product only to the extent that this Act establishes a rule of law applicable to any such recovery. Any issue arising under this Act that is not governed by any such rule of law shall be governed by applicable State of [sic] Federal law. . . .

(e) This Act shall be construed and applied after consideration of its legislative history to promote uniformity of law in the various jurisdictions.

Id. § 103(a),(b), & (e).

Thus, “[a]ny issue arising in an action governed by this legislation that is not governed by a rule of law established by the legislation shall be governed by applicable State common and statutory law.” S. Rep. 2760, supra note 9, at 28.

77 S. 2760 § 104: “The district courts of the United States shall not have jurisdic-
Title I also provides definitions for specific statutory language. Title II of the Act creates an expedited product liability claims procedure. No new liability standard is created; rather, this procedure is designed (1) to encourage early settlements in order to reduce litigation and thereby alleviate the "present system's huge transactions costs" and (2) to provide victims of product-related accidents "greater certainty of recovery" and "a fairer level of compensation more quickly."

Under this procedure, a claimant may include a settlement offer in the complaint that is limited to the claimant's full net economic loss.

Any claimant may, in addition to any claim for relief made in accordance with State law, include in such claimant's complaint an offer of settlement. For the purposes of this title, an offer of settlement shall be limited to a claim for payment of the claimant's net economic loss ... and any dignitary loss.

"Net economic loss" includes:

(A) reasonable expenses incurred for reasonably needed and used medical and rehabilitation care and services;
(B) lost income ... reduced by any income earned from substitute work actually performed by the claimant or by income the claimant would have earned in available appropriate work which the claimant was capable of performing but unreasonably failed to undertake;
(C) reasonable expenses incurred in obtaining ordinary and necessary services in lieu of those the claimant would have performed, not for income, but for the the benefit of the claimant or the claimant's immediate family ... ;
(D) lost earnings of a deceased person who suffered fatal harm ... which earnings ... would have been contributed to claimants ... ; and
(E) reasonable expenses incurred by the claimant in preparation and submission of an offer of settlement or a response pursuant to section 201 ... including a reasonable attorney's fee, less the total amount of collateral benefits paid or payable to the claimaint by reason of the same harm[.]
and $100,000 for any dignitary loss. If the complaint does not include such an offer, any defendant may make a settlement offer with similar restrictions. Once a settlement offer is made and accepted, all of the litigation is dismissed; the court, however, retains jurisdiction to resolve any residual disputes regarding the claimant's net economic loss.

Id. § 102(a)(11).

However, lost income under subsection (a)(11)(B) is reduced by any applicable federal, state, and local income taxes as well as by Social Security and payroll taxes applicable to such income, if these taxes do not apply to compensation received under S. 2760. Id. § 102(b)(1).

“Dignitary loss” is defined as:

noneconomic loss resulting from harm caused by a product, compensable under State law, in the amount of $100,000, and consisting of pain and suffering or mental anguish associated with (A) the death of a parent, child or spouse; (B) serious and permanent disfigurement; (C) loss of a limb or organ; or (D) serious and permanent impairment of a bodily function.

Id. § 102(a)(6).

Any defendant in such an action may make an offer of settlement for the claimant’s net economic loss and any dignitary loss within ninety days after service of the claimant’s complaint, or within the time permitted for the responsive pleading except that if such pleading includes a motion to dismiss the defendant may make such an offer to the claimant within ten days after the court’s determination regarding such motion.

The recipient of a settlement offer must respond in writing within 90 days after the date such offer is made. Id. § 201(d)(2). This time period may be extended in order for the court to resolve disputes concerning the validity of the inclusion or exclusion of dignitary loss. Id. § 201(d)(3). The court must rule as a matter of law on such matters within 15 days. Id. If the court finds the offer invalid, a new offer can be made within 10 days, and the recipient again has 90 days within which to respond. Id. If the court, however, finds the offer to be valid, “there shall be a period of ten days in addition to the applicable time period under this section in which the recipient may respond . . .” Id. § 201(d)(3). The Committee Report expressed the belief that such disputes “will only arise in a small fraction of product liability cases, because in most cases it is obvious whether the claimant has suffered dignitary loss . . . . Usually there should be no dispute as to whether a claimant’s injuries fit this description.” S. REP. 2760, supra note 9, at 33. This time period may also be extended by a court order to permit discovery:

Any such order shall contain a schedule for discovery of evidence material to the issues of the circumstances of the harm and the appropriate amount of relief, and shall not extend such period for more than ninety days. Any such action shall be accompanied by a supporting affidavit of the moving party setting forth the reasons why such extension is necessary to promote the interests of justice and stating that the information likely to be discovered is material and is not, after reasonable inquiry, otherwise available to the moving party.

S. 2760 § 201(e).

Failure to respond to a settlement offer within the applicable period constitutes a rejection. Id. § 201(f).

Id. § 202. The parties may, however, “agree to be bound by determinations made pursuant to any voluntary alternative dispute resolution procedures.” Id. §
The Act employs both incentives and punitive measures to encourage parties to utilize these expedited procedures. If a defendant rejects a settlement offer and if a verdict equal to or greater than the value of the offer is subsequently entered against the defendant, the defendant then becomes liable for the claimant’s reasonable attorney’s fees and costs.\(^6\) Similarly, if the plaintiff rejects the defendant’s offer and the defendant is found liable, the defendant’s liability shall be capped at: (1) claimant’s net economic loss for claimant’s economic loss, (2) $250,000 for non-economic losses in cases of dignitary loss, and (3) the lesser of twice the claimant’s economic loss or $50,000 where dignitary loss is not appropriate.\(^7\) Punitive damages, however, are not capped.\(^8\)

Title II mandates that under such expedited settlements “net economic loss shall be paid periodically as costs are incurred.”\(^9\) Finally,
reimbursement rules for parties to a Title II settlement are established.\textsuperscript{90}

Title III of the Act establishes a federal product liability law.\textsuperscript{91} To

the claimant from receiving payment for any additional economic losses with respect to such harm "[i]f a period of five years has elapsed after the most recent claim for payment is made with respect to the harm at issue."\textsuperscript{90} $\textsuperscript{90}$ Id. § 206.

By way of comparison, S. 1999 would have created an expedited product liability claims procedure. Under this procedure, a person harmed by a product could submit a claim. This claim procedure would have been exclusive, i.e., a claimant could not simultaneously pursue this procedure and a lawsuit. The manufacturer's liability would have been limited to the "claimant's net economic loss resulting from such harm." S. 1999, 99th Cong., 1st Sess. (1985). Under § 205, the manufacturer would be liable if:

(1) the product, when it left the control of the manufacturer, was unreasonably dangerous; and (2) the unreasonably dangerous aspect of the product was the proximate cause of the claimant's harm while the product was being used in a manner and for a purpose intended by the manufacturer or which could be reasonably anticipated by the manufacturer. . . .\textsuperscript{90} $\textsuperscript{90}$ Id. § 205.

Upon receipt of a claim, the manufacturer would have had 90 days in which to acknowledge or dispute its liability. If the manufacturer did not contest liability, it had (i) to pay the claimant the amount claimed, (ii) to pay the claimant a "mutually acceptable" amount, or (iii) to pay the uncontested amount and notify the claimant of the procedure for contesting the disputed sum.

Under S. 1999, if the claimant was not paid in full and wished to pursue the full claim, the claimant had to initiate binding arbitration within 90 days. This procedure represented the claimant's exclusive remedy in cases in which the only dispute concerned the amount of the claimant's net economic loss. The Act established guidelines designed to make the proceedings "expeditious, informal, and reasonably inexpensive in cost." $\textsuperscript{90}$ Id. § 207(b)(1). This arbitration was enforceable in court and only reviewable by a court if there were allegations of "fraud, misrepresentation, or similar misconduct by one of the parties . . . or the arbitrator." $\textsuperscript{90}$ Id. § 207(b)(2). The manufacturer would be liable for reasonable attorneys' fees incurred in connection with the arbitration if the claimant were the "substantially prevailing party." $\textsuperscript{90}$ Id. § 207(e). The manufacturer had to pay the fee and expenses of the arbitrator unless the manufacturer was the "substantially prevailing party," in which case the manufacturer "shall be entitled to recover from the claimant all such sums paid to the arbitrator." $\textsuperscript{90}$ Id. § 207(e).

In cases where the manufacturer denied liability, S. 1999 would have established a different system than S. 2760. The claimant could bring a civil action limited "to [the issues] raised by the claimant and set forth in such notice." $\textsuperscript{90}$ Id. § 208(a). The issues were to be tried by the court, i.e., without a jury, and expedited in every way. $\textsuperscript{90}$ Id. Such claims could be brought in state court in the state in which the harm occurred or in which the claimant resides or in federal court pursuant to diversity. To have the court enter an order directing arbitration to determine the amount of the net economic loss and awarding attorneys' fees, the claimant had to establish only "by a preponderance of the evidence" that the manufacturer failed to respond to his claim as required or that the manufacturer was liable under the standards set forth in Section 205. $\textsuperscript{90}$ Id. § 208(d).

$\textsuperscript{91}$ These provisions in S. 2760 are very similar to those contained in S. 1999, which in turn are very similar to those in S. 100 and S. 44, except that S. 2760 does not include standards for manufacturer liability. Under S. 1999, to recover against a manufacturer, a claimant must prove by a "preponderance of the evidence" that the product was the proximate cause of the harm and either that (1) the manufacturer was negligent in constructing the product, in designing or formulating the product, or in providing warnings or instructions; or that (2) the product did not conform to an ex-
further the objective of improving the efficiency of the system, the Act restricts seller liability to instances in which (1) the seller fails to exercise reasonable care, (2) the product fails to conform to an express warranty made by the seller, or (3) the manufacturer is not subject to service or the claimant could not enforce a judgment against the manufacturer. In all other cases, the claimant's sole recourse is against the manufacturer. The Act does not establish uniform standards for manufacturer's liability, leaving claims against manufacturers governed by state law.

The Act establishes uniform standards for awarding punitive damages. These new strict standards combine a "high standard of press warranty. However, the manufacturer of a product that complies with all "standards, conditions, or specifications" established by Congress or a federal agency is not considered to have been negligent unless the claimant establishes that "a person exercising reasonable care could and would have taken additional precautions." S. 1999 § 302. The rationale for this approach is that product sellers are often sued in cases where the manufacturer is ultimately responsible. In such cases, sellers are forced to defend the suits and to seek indemnity from the manufacturers. Sellers are generally successful in shifting the costs to the manufacturers. S. REP. 2760, supra note 9, at 46 (sellers account for less than five percent of product liability payments). However, significant transaction costs are involved. The further argument that "indemnity does not reimburse product sellers for loss of good will or reputation" (Id.) is of little relevance: the product seller loses good will when the customer is harmed, not when a jury imposes liability. The standard of proof against product sellers other than manufacturers mandated by S. 2760 is "a preponderance of the evidence." S. 2760 § 302. This phrase is defined as "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." Id. § 102(a)(14). "This standard of proof is that used most often in civil litigation." S. REP. 2760, supra note 9, at 26. The extent of manufacturers' liability was not an isolated issue. Rather, this issue was tied to proposed limitations on claimants' recoveries. See Product Liability Act Amendments, supra note 10, at 12-16 (statement of Sen. Gorton). The compromise reached by the Committee was to maintain the current system of having product liability suits against manufacturers governed by state law. S. 2760 § 301. The bill's provisions dealing with issues such as admissibility of evidence and punitive damages do, however, apply to such suits. Id. §§ 303, 310.

At present, the general standard for awarding punitive damages is that the defendant must have acted with aggravation, outrage, or willfulness. See W. KEETON, supra note 21, at 9-10. Punitive damages may be awarded when the claimant establishes that the harm was "the result of conduct manifesting a manufacturer's or product seller's conscious, flagrant indifference to the safety of those persons who might be harmed by a product. A failure to exercise reasonable care in choosing among alternative product designs, formulations, instructions or warnings is not of itself such conduct." Id. § 303(a). Manufacturers and sellers of aircraft, drugs, and medical devices, whose products have been certified or approved by the Federal Aviation Administration or the Food and Drug Administration, respectively, are not, however, subject to punitive damages unless the manufacturer withheld or misrepresented material information. Id. § 303(c). For a discussion of punitive damage awards against aircraft manufacturers, see Allen, Controlling the Growth of Punitive Damages in Products Liability.
culpability . . . far in excess of mere negligence, or even gross negligence. A greater level of proof. This combination is designed to ensure that punitive damages are assessed only where appropriate . . . [and only when] the defendant's conduct was truly reprehensible. In addition to addressing concerns about the rationale for and the increase in punitive damage awards, these stricter standards are designed to encourage settlements by decreasing the number of punitive damage claims, claims which tend to discourage settlements because they provide the claimant with the possibility of being granted a major award. The Act does not specify any criteria to be used in determining the amount of punitive damages to be awarded.

88 S. Rep. 2760, supra note 9, at 50.
89 S. 2760 § 303(a). The level of proof required to justify assessing punitive damages is "clear and convincing evidence." The phrase "clear and convincing evidence" is defined as:
that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; the level of proof required to satisfy such standard is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt.

Id. § 102(a)(2).

90 S. Rep. 2760, supra note 9, at 51, 50; see also Owen, supra note 11, at 38 ("A plaintiff usually should be entitled to a directed verdict on defectiveness, or close thereto, before the punitive damages issue is properly before the jury at all.").

92 S. Rep. 2760, supra note 9, at 49.
93 Twerski, supra note 11, at 612 ("It is close to impossible to negotiate sensibly with a plaintiff who believes that he can shoot for the moon.").
94 In previous measures considered by the Committee, such criteria were provided. In S. 1999, these criteria included:
(1) all relevant evidence relating to the factors [to be considered in determining whether to award punitive damages];
(2) the profitability of the conduct to the manufacturer . . . ; and
(3) the total effect of other punishment imposed upon the manufacturer . . . as a result of misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of other penalties to which the manufacturer . . . has been or may be subjected.

S. 1999 § 305(b).
The third factor illustrates a major difference between S. 44 and S. 100. Under S. 44, a manufacturer could only be subjected to one award of punitive damages. S. 44,
To further the objective of creating uniform standards in product liability cases, Title III codifies rules pertaining to the offsetting of workers' compensation benefits and the admissibility of evidence. In addition, the bill creates a complete defense for actions in which the claimant was under the influence of alcohol or any drug; establishes a two-year statute of limitations and a twenty-five-year statute of re-

98th Cong., 1st Sess. § 13 (1983). In S. 100, however, previous awards were merely to be considered in determining the size of a subsequent punitive award. S. 100, 99th Cong., 1st Sess. § 12 (1985). In S. 2760, this provision was deleted, and no reference is made at all to previous awards.

In any civil action subject to this title in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, any damages awarded shall be reduced by the sum of the amount paid as workers' compensation benefits for such harm and the present value of all workers' compensation benefits to which the employee is or would be entitled for such harm.

The employer's subrogation lien is eliminated in section 307(c). This measure is designed to "clarify[ ] the relationship between the workers' compensation system and the product liability system with rules that keep these systems separate, minimize legal costs, and promote safety." S. REP. 2760, supra note 9, at 64.

The most significant provision in this section is the prohibition on the admissibility to prove liability of "[evidence] of measures taken after an event, which if taken previously would have made the event less likely to occur . . . ." Id. § 310(b).

(a) In any civil action subject to this Act in which all defendants are manufacturers or product sellers, a manufacturer or product seller may assert in complete defense of such action that the claimant was under the influence of intoxicating alcohol or any drug and that such condition was more than 50 per centum responsible for such claimant's harm.

(b) In any civil action subject to this Act in which not all defendants are manufacturers or product sellers and the trier of fact determines that no liability exists against those defendants who are not manufacturers or product sellers, the court shall enter a judgment notwithstanding the verdict in favor of any defendant which is a manufacturer or product seller if it is proved that the claimant was under the influence of intoxicating alcohol or any drug and that such condition was more than 50 per centum responsible for such claimant's harm.

(c)(1) For purposes of this section, the determination of whether a person was under the influence of intoxicating alcohol shall be made pursuant to applicable State law.

(2) As used in this section, the term "drug" means any non-over-the-counter drug which has not been prescribed by a physician for use by the claimant.

This section follows recent tort legislation enacted in Washington. WASH. REV. CODE ANN. § 5.40.060 (1987). The very strong public policy underlying this rule "justifies preemption of conflicting state laws." S. REP. 2760, supra note 9, at 78. "A person who impairs his or her ability to act safely should not be able to shift the cost of such risks on the manufacturer or seller . . . and ultimately onto society itself." Id. at 77.
FEDERAL PRODUCT LIABILITY REFORM

3.3. Analysis of the Product Liability Reform Act

The stated purpose of the Product Liability Reform Act is to "reduce transactions costs and provide greater certainty as to the rights and responsibilities of all those involved in product liability dis-

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108 S. 2760 § 304. The two-year statute of limitations runs from when "the claimant discovered or, in the exercise of reasonable care, should have discovered the harm and its cause." Id. § 304(a). The statute of repose establishes the period during which the manufacturer or product seller remains responsible for harms caused by the product it produced or sold. The 25-year period applies to cases in which the product is a capital good; toxic harms, however, are specifically excluded from this limitation. Id. § 304(b)(1). For non-capital goods, section 304(b)(2)(A) limits manufacturer and seller responsibility to the period of the "product's useful safe life" instead of establishing a definite statute of repose. A rebuttable presumption is established that this period ends 10 years after delivery of the product. "Such presumption may be rebutted by a preponderance of the evidence." Id. § 304(b)(2)(C). "A product has exceeded its useful safe life if... it is no longer reasonable to expect that the product would operate without malfunction or increased risk of harm." S. REP. 2760, supra note 9, at 59. Motor vehicles, vessels, aircraft, or railroads "used primarily to transport passengers for hire" are excluded from these provisions. S. 2760 § 304(b)(3).

109 S. 2760 § 308:

(a) In any product liability action, the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to such defendant in direct proportion to such defendant's percentage of responsibility . . . .

(b) For purposes of this section, the trier of fact shall determine the proportion of responsibility of each party for the claimant's harm.

(c) As used in this section, the term—

(1) "noneconomic damages" means subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation; the term does not include objectively verifiable monetary losses . . . .

This section is based on Proposition 51, which California voters approved on June 3, 1986; the law took effect immediately. S. REP. 2760, supra note 9, at 69 & n.224. "This section is a compromise. It... limit[s] the application of joint and several liability to situations where it is defensible on public policy grounds—where a person's economic loss would otherwise be uncompensated. This distinction between economic and non-economic loss is consistent with the underlying policy of joint and several liability to make the injured party whole." Id. at 68.

Title III also provides standards regarding counsel's liability for excessive costs (§ 305—imposing sanctions similar to those available under Rule 11 of the Federal Rules of Civil Procedure), record retention (§ 306), and forum non conveniens (§ 309 — reflecting existing law).

110 S. 2760 § 401.
When measured by its own objectives, S. 2760 fails because it does not provide the comprehensive reform that would correct the various shortcomings of the present system. Rather, S. 2760 encompasses a series of compromises addressing isolated aspects of the product liability system. Such a hodgepodge of reforms would not “reduce transactions costs and provide greater certainty.” Indeed, it is quite possible that enactment of S. 2760 would instead aggravate the present situation by creating new problems. Therefore, the Product Liability Reform Act should be rejected, and efforts should be renewed in the 100th Congress to draft and adopt a comprehensive federal reform of the product liability system in the United States.

One glaring shortcoming of the Product Liability Reform Act is its failure to establish uniform standards for manufacturer liability. The failure of the Committee to draft such standards is not an insignifi-

111 S. REP. 2760, supra note 9, at 2.
112 For example, S. 2760 fails to provide standards for manufacturer liability (see supra note 95 and accompanying text); to establish criteria for determining the amount of punitive damages (see supra note 104 and accompanying text); or even to address other product liability issues such as the extent of a manufacturer’s duty to warn (see supra note 38), the definition of what constitutes a defect (see supra note 37), or the propriety of new theories of liability, including the market-share doctrine (see supra notes 39-44 and accompanying text).
113 See supra notes 1-14 and accompanying text.
114 See, e.g., supra note 95. The Product Liability Reform Act was favorably recommended by the Committee by a vote of 10 to 7. However, several senators who voted to recommend the measure to the full Senate voiced serious reservations about provisions contained in the bill. See S. REP. 2760, supra note 9, at 99-100 (Additional Views of Mr. Rockefeller) (expressing dissatisfaction with imposing caps on pain and suffering recoveries at $250,000). One senator who voted to recommend the bill specifically noted his intent to introduce amendments on the Senate floor. See id. at 96-97 (Additional Views of Mr. Pressler) (noting his belief that stronger joint and several liability provisions than contained in section 308 are needed).
115 See, e.g., S. 44; S. 1999.
116 The general concept of a federal product liability statute will not be addressed in this comment because this issue has already received considerable coverage in the law review literature. See, e.g., Elfin, supra note 39; Reed & Watkins, supra note 5; Schwartz & Bares, supra note 4; Comment, The Proposed Federal Product Liability Act: The Substantive Impact of S. 100 on Establishing a Cause of Action for Product-Caused Injury in Illinois, 18 J. MARSHALL L. REV. 659 (1985); see also Cohen, Legal Analysis of the ‘Product Liability Act’ (S. 100, 99th Congress) as Introduced, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS No. 85-587A (Feb. 12, 1985).
117 See supra note 95 and accompanying text. Now that the intense political pressure for product liability reform has slackened (see Hilder, supra note 74; Strasser, supra note 74), Congress can address this issue with a greater degree of objectivity and long-range perspective.
118 Provision Rejected, supra note 67. The amendment proposed by Sen. Kasten would establish the following standards: strict liability would be the applicable standard in manufacturing defect and express warranty cases; proof of negligence would be required to impose liability in claims involving design defect and warnings; and defenses based on obvious or known dangers, misuse or alteration, and state-of-the-art
cant oversight, given that manufacturers currently bear ninety-five percent of product liability payments.\textsuperscript{119} By not addressing this issue, S. 2760 leaves manufacturer standards under the jurisdiction of state law\textsuperscript{120} and therefore perpetuates the consequent variety of doctrines and judicial interpretations.

The Act also leaves unresolved the problem of conflicting standards in areas of product liability law such as a manufacturer's duty to warn and the definition of design defect.\textsuperscript{121} Preserving the status quo in this area of the law fails to provide the certainty that is the goal of this legislation. Episodes in which claimants (or manufacturers), who are identical in all respects except the state in which their lawsuits are filed, receive very different verdicts will continue under this proposed regime.\textsuperscript{122}

Similarly, the Product Liability Reform Act does not settle the conflicts that rage regarding evolving doctrines of law, such as determining under which, if any, theories the manufacturers of harmful generic products can be held liable. Once again, this lack of uniformity adversely affects manufacturers who are unable to anticipate their liability costs. Furthermore, the Act fails to alleviate the apparent injustice of very disparate treatment by various state courts of claimants who file suit in different states but who are injured by products that are produced and distributed nationally.

The Product Liability Reform Act would, however, affect manufacturers through its other provisions, such as those affecting joint and several liability, punitive damages, and admissibility of evidence. The overall impact of these interrelated new standards on the myriad of existing state laws is hard to predict. This uncertainty clearly runs against the intent of the Act. Similarly, passage of a federal bill lacking manufacturer standards could increase the uncertainty inherent in the system as parties affected by product liability laws anticipate future

\textsuperscript{119} INSURANCE SERVICES OFFICE, supra note 9, at 35.

\textsuperscript{120} An amendment offered by Sen. Kasten to apply a "reasonable person" negligence standard in cases involving design defects and warnings was defeated by the Committee during its markup session. Provision Rejected, supra, note 67. For a discussion of the conflicting standards currently utilized by various state courts, see supra notes 37-38 and accompanying text.

\textsuperscript{121} See supra notes 37-38 and accompanying text.

\textsuperscript{122} See supra note 4 and accompanying text. For a discussion of the manner in which the tort laws and limits on recovery of various states could produce widely divergent awards for plaintiffs similarly situated in all respects except the state in which they can file their lawsuits with regard to a particular episode in which many individuals were hurt or killed (though not in a product liability context), see Coyle, "Finger-Pointing" Likely Between Two Rail Systems, NAT'L L.J., Jan. 19, 1987, at 3, col. 3.
congressional action that would correct this omission. Reform geared at "provid[ing] greater certainty as to rights and responsibilities of all those involved in product liability disputes" must contain uniform manufacturer standards. Manufacturer's standards constitute an essential aspect of any federal product liability bill.

An objective of Title II of the Product Liability Reform Act is to provide "[v]ictims of product-related injuries . . . a fairer level of compensation . . . ." In practice, however, the Title II provisions of S. 2760 would conflict with the stated objective. In particular, the caps on non-economic losses that apply if a defendant offers to settle would limit the recovery of those most seriously harmed, those who currently are already undercompensated.

The fairness of imposing such caps received considerable attention during the Committee debates. The poignant statement by Sen. Inouye summarized the fairness argument:

A woman who used the Dalkon Shield has almost no economic loss, but how can you tell her that the $150,000 is sufficient compensation if she cannot give birth to any child as a result of the Shield. I do not know how much it is worth, but I can tell you it is worth more than $150,000.

Then what do you tell a quadriplegic who is unable to sleep with his lady, who is unable to play ball with his son? $150,000 is enough?

. . . .

What do you do? What price tag do you put on that? This much I know: $150,000 is not enough.

Because a ceiling would be placed on their liability, manufacturers

\[\text{(125) S. REP. 2760, supra note 9, at 31.}\]
\[\text{(124) See supra note 87 and accompanying text. These caps are designed to provide the incentives necessary to induce defendants to compensate severely impaired claimants promptly. Furthermore, the caps would apply only if the defendant compensates the claimant for all the economic losses suffered by claimant, a result not achieved by the current product liability system. See supra notes 9-10 and accompanying text. Providing the proper incentives to induce defendants to settle promptly is one of the major problems faced in formulating an effective product liability reform measure. See infra notes 141-42 and accompanying text.}\]
\[\text{(123) See supra note 9 and accompanying text.}\]
\[\text{(122) See, e.g., S. REP. 2760, supra note 9, at 98-124 (Additional Views of Mr. Stevens, Additional Views of Mr. Rockefeller, Minority Views of Mr. Gorton, Minority Views of Mr. Inouye, Minority Views of Mr. Gore); see also Bill Approved, supra note 67. Several states, however, including Florida, have instituted such caps. Wayne, Florida Insurers Assail Premium Rollback Bill, N.Y. Times, June 10, 1986, at D2, col. 1; see Barron, supra note 1; Kristof, supra note 1.}\]
\[\text{(121) Sen. Inouye, testimony at markup session, transcript pp. 206-07.}\]
and product sellers would have the largest incentives to settle the most egregious cases.\textsuperscript{128} This would further limit the compensation that the most severely harmed would receive, an especially perverse result in light of the fact that this group is already undercompensated.\textsuperscript{129} Thus, the caps imposed by S. 2760 do not further the objectives of a rational, comprehensive product liability reform measure.

The inadequate handling of punitive damages in the Product Liability Reform Act also prevents the Act from meeting its objectives of providing greater certainty and reducing transaction costs. Although the Act does begin to remedy the current situation\textsuperscript{130} by establishing uniform standards for imposing punitive damages — that in many cases toughen the requirements for granting such awards\textsuperscript{131}—the Act neither provides the necessary certainty nor minimizes transaction costs.

The existing rules regarding punitive damage awards impede the settlement of cases.\textsuperscript{132} Although the standards contained in S. 2760 would help to alleviate the present problems, these measures do not go far enough. Under these new provisions, claimants and manufacturers would be given little guidance in settling punitive damage claims because no uniform standards for determining the size of such awards would be established. Limiting the number of punitive damage awards that could be imposed on a manufacturer for each defective product, as was done in S. 44, might not provide the necessary incentives in terms of deterrence or punishment. Furthermore, such a proposal might not create sufficient incentives for lawyers to handle cases because an initial small award, or several small awards, might preclude further awards.\textsuperscript{133} However, a provision requiring the trier of fact to consider past public fines and punitive damage awards in determining the size of the punitive damage award would strike the appropriate balance. Damage awards would not be capped so that the deterrence, punishment, and incentive aspects would be achieved because significant damage awards could still be meted out in appropriate circumstances. In addition, a greater degree of certainty would prevail because of the known standards, thereby presenting both plaintiffs and defendants better and more relevant information on which to base settlement negotiations.

Thus, various provisions in S. 2760 contradict the objectives of the

\textsuperscript{128} S. REP. 2760, supra note 9, at 101 (Minority Views of Mr. Gorton).
\textsuperscript{129} See supra note 9 and accompanying text.
\textsuperscript{130} See supra note 11 and accompanying text.
\textsuperscript{131} See supra notes 97-104 and accompanying text.
\textsuperscript{132} See supra note 103 and accompanying text.
\textsuperscript{133} But see S. REP. 476, supra note 57, at 55-72.
Act. Instead, a comprehensive federal product liability measure is needed. Such reform should include an alternative claims procedure that would be more equitable, would provide claimants with the option of participating, and would establish uniform federal product liability standards.

A voluntary alternative claims procedure, similar to the no-fault system proposed in S. 1999, should be adopted by Congress in conjunction with comprehensive federal product liability standards.\(^{184}\) Such a system would not change the incentives and deterrents inherent in the present tort litigation framework, which are designed to ensure that products entering the marketplace are as safe as feasible. In fact, such a system would lead to the introduction of new products — products that might otherwise be held off the market — because this system would minimize uncertainty regarding potential product liability for new products and thus would lower costs and consequently would raise expected profits for manufacturers.\(^{185}\)

Claimants who were harmed by a product would be given the option, but would not be required, to seek the amount of their net economic loss in an expedited manner from the manufacturer; alternatively, they would be permitted to pursue their claims under the provisions of the federal product liability act. The prospect of obtaining the amount of the net economic loss in an expedited settlement — as opposed to the average five years that it takes to receive payment under the traditional system\(^{186}\) — without the trauma of protracted litigation would lure some claimants\(^{187}\) to this alternative system. Manufacturers would be encouraged to utilize this expedited system rather than to contest liability through litigation because they would be provided the opportunity to settle claims quickly for the amount of the plaintiff's net economic loss. Under the expedited system, they thereby could relieve themselves of the obligation to litigate the claim, litigation in which they often spend more on legal fees than the amount of the net economic loss of the plaintiff.\(^{188}\)

Tangible incentives would be needed to encourage defendants to

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\(^{184}\) Alternative dispute resolution procedures, such as arbitration programs annexed to state trial courts, have proven effective in other litigation contexts. *Product Liability Act Hearings, supra* note 8, at 85 (statement of Hensler). This comment will propose an alternative system but does not address the particular standards that a federal product liability bill should include.

\(^{185}\) Statement of Sen. Danforth, *supra* note 4, at S18,321.

\(^{186}\) See *supra* note 10 and accompanying text.

\(^{187}\) See *infra* paragraph following note 144.

\(^{188}\) See *supra* note 6.
utilize this alternative system.\textsuperscript{139} Cases in which defendants reject settlement offers would be handled under the federal uniform product liability standards; in these cases, however, the burden of persuasion would shift to the defendant once the plaintiff established a prima facie case. Furthermore, successful claimants would be entitled to recover court costs and attorneys’ fees.\textsuperscript{140} Such a system would not lower the incentives and deterrents that help ensure that manufacturers produce safe products, i.e., deterrence from producing unsafe goods. The fault and punitive damages provisions in the federal product liability statute would still impose deterrence.\textsuperscript{141}

The crucial aspect of such a system would be the voluntary nature

\textsuperscript{139} O’Connell, Offers That Can’t Be Refused: Foreclosure of Personal Injury Claims by Defendants’ Prompt Tender of Claimants’ Net Economic Losses, 77 Nw. U.L. Rev. 589, 602 (1982).

\textsuperscript{140} Id. at 602-04. The proposed system provides incentives for parties to settle claims but does not compel settlement. \textit{Cf. id.} (granting the defendant the power to compel the claimant to accept a settlement for net economic loss). Given the bias that such a system would have toward manufacturers’ seeking to settle only the most egregious cases (see \textit{supra} note 128 and accompanying text) and the concerns expressed regarding the lowering the deterrents that help ensure that manufacturers produce safe products (see \textit{infra} note 141 and accompanying text), granting neither party the power to force a settlement is preferable. Obviously, the key to such a system’s functioning effectively is creating incentives sufficient to induce both sides to settle claims for the claimant’s net economic loss.

\textsuperscript{141} Product Liability Act Amendments, supra note 10, at 10 (statement of Sen. Dodd) (the expedited claims system would increase the deterrence aspect because the “greater certainty of recovery in the claims system” would provide a greater effect than the current system where larger rewards are possible but are unpredictable). Critics contend that the current system does not shape defendants’ behavior because “by the time a product case is litigated the design of the product is likely to be so changed that the case result is largely irrelevant.” O’Connell, \textit{Products and Services: No Fault Without Legislation}, 62 A.B.A. J. 343, 344 (1976). Nor does no-fault undercut deterrence. No-fault automobile insurance statutes and the workers’ compensation system are generally cited in support of this proposition. \textit{Id.} “[N]o one [has been] able to demonstrate convincingly that no-fault undercuts deterrence . . . . As long as we internalize substantial amounts of economic loss generated by economic activity, we achieve whatever deterrence we are going to achieve.” \textit{Product Liability Act Amendments, supra} note 10, at 65 (statement of Prof. O’Connell); see also \textit{id.} at 83-89 (statement of Prof. Priest).

The neutral or even positive effect of the no-fault provisions on defendants’ conduct has, however, been questioned. \textit{See, e.g.}, Reutter, \textit{The Shame of Workmen’s Compensation}, 230 \textit{The Nation} 298 (1980). One commentator contends that workers’ compensation systems “[allow] industry to monetize human pain and suffering and translate that cost into passed on insurance premiums.” \textit{Product Liability Act Amendments, supra} note 10, at 95 (statement of Prof. Popper). Thus, the incentive for claimants to opt for a quick settlement will lead to lower settlements and less incentive for manufacturers to be concerned about the safety of their products. \textit{Id.} at 91. Another view is that, although the threat of numerous claims might provide responsible manufacturers with sufficient incentives to produce safe products, “the marginal, fly-by-night manufacturer might be encouraged by the absence of restraints against irresponsible [conduct]” not to take necessary precautions. Ford, \textit{The Fault with “No Fault”}, 61 A.B.A. J. 1071, 1072 (1975).
of its provisions; each claimant would have the option of relying on the traditional tort litigation system or of utilizing this new procedure. By providing an option that a significant number of claimants would consider preferable, such a system would constitute important reform.

The voluntary nature of the expedited claim system would amelio-

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Prof. O'Connell's ideas have sparked a variety of reviews. Some commentators responded with scathing criticism of his work. See, e.g., Corboy, The Expanding Universe of Jeffrey O'Connell: Backing into a Brave New World, 1976 U. ILL. L.F. 74; Ford, supra note 141. Others felt that Prof. O'Connell had raised some interesting ideas but that his recommendations had some major shortcomings. See, e.g., Keeton, Book Review, 13 HARV. J. ON LEGIS. 429 (1976) (reviewing J. O'CONNELL, ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES (1975)). And some responded favorably to his ideas. See, e.g., Schwartz, Products Liability and No-Fault Insurance: Can One Live Without the Other?, 12 FORUM 130 (1976).

In 1983, Prof. O'Connell, recognizing "the difficulties of extending pure no-fault principles to nonindustrial and nonauto accidents . . . [and] the practical, political, and theoretical problems of totally abolishing personal injury tort law and moving to across-the-board no-fault payment," proposed "as a partial solution, a means of allowing defendants to foreclose personal injury claims by promptly tendering claimants' net economic loss . . . beyond claimants' own collateral sources of insurance." O'Connell, supra note 139, at 631, 590. Prof. O'Connell has been a major supporter of federal product liability reform. Although he did not endorse S. 1999 at the hearings on that bill, Prof. O'Connell testified, "We ought to make it easier . . . for injured people to be paid promptly for their economic loss . . . without litigating their own or others' fault . . ." Product Liability Act Hearings, supra note 8, at 77 (statement of Prof. O'Connell).

143 Although it is hard to predict the number or percentage of potential plaintiffs who would forego litigation in order to rely on the expedited claim system, one commentator estimated that 25% would utilize the alternative system contained in S. 1999. Product Liability Act Amendments, supra note 10, at 80 (statement of Prof. Keeton). It could be argued, as Prof. Keeton does, that this is only a small number of claimants and thus not a significant change from the status quo. Id. However, the reverse argument can also be made, i.e., that providing an alternative to 25% of the claimants constitutes a major reform.

144 The provisions requiring lawyers to disclose to clients their various options and the probable consequences of each would help to ensure that claimants would be making informed decisions when they select the avenue by which to pursue their claims. See, e.g., S. 1999 § 105; see also supra note 79.
rate any negative consequences that might arise with regard to the deterrence and incentive aspects of the tort system. Incentives would still exist for plaintiffs (and lawyers) to litigate cases that potentially could produce large verdicts (and the consequential large fees for the attorneys involved). Such a system would insure that not all claims are settled merely for the claimant's net economic loss and that companies would still have to be wary of the possibility of being assessed large damage awards (including punitive awards) if they produce unsafe products.

Another benefit resulting from such a system would be the alleviation of some of the burden on the court systems. Relieving the courts of a quarter of the product liability cases, as one scholar estimated, would represent a significant improvement. Cases in which the manufacturer denies liability and the claimant brings a civil action pursuant to the federal statute would continue to reside in state courts. Such cases would not be shifted to the federal courts because federal jurisdiction would not be created under a federal statutory cause of action but would only be possible under diversity of citizenship.

The combination of a federal product liability statute establishing comprehensive uniform standards and a voluntary alternative claims provision would bring about badly needed reform of the product liability system currently existing in the United States. The 100th Congress should adopt such legislation.

4. PRODUCT LIABILITY IN THE UNITED KINGDOM

Product liability laws in numerous countries besides the United

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145 In 1983, 9,221 product liability actions were filed in federal district courts, and it is estimated that 45,000 to 90,000 are filed each year in state courts. Letter from Leland Beck, Administrative Office of the United States Courts, to Sen. Robert Kasten (Dec. 7, 1983), cited in Schwartz & Bares, supra note 4, at 359 n.37.
146 See supra note 143.
147 See, e.g., S. 1999 § 208.
148 See, e.g., S. 2760 § 104; S. 1999 § 208(b); see also supra notes 77-78 and accompanying text. I would further argue that this may well be giving the already overburdened federal courts too great an involvement. Relieving the federal courts of jurisdiction in diversity cases would further alleviate this problem, but such a solution may be politically infeasible and is beyond the scope of a product liability reform bill.
149 The fact that the Democratic Party regained control of the Senate during the 100th Congress dims the chances of the Senate's passing a federal product liability measure. Senator Hollings, "an adamant opponent" of such a measure, will become the new chairman of the Senate Committee on Commerce, Science, and Transportation, the Committee that acted favorably on previous product liability bills. "The outlook, even with a Republican Senate, was difficult. Now it's even more remote . . . ." Administration Faces New Judiciary Committee, NAT'L L.J., Nov. 17, 1986, at 5, 7 (quoting James Gattuso); see also Fuerbringer, Hollings Has Plans for Commerce, N.Y. Times, Nov. 18, 1986, at A29, col. 4.
States are being subjected to pressures for change. For example, in July 1985, the Council of Ministers of the European Economic Community adopted a Directive on Liability for Defective Products. Other examples of legislation affecting product liability include West Germany's imposition of stricter liability on pharmaceutical manufacturers and New Zealand's no-fault compensation system. Focusing on Europe, one commentator noted that "across Europe [there are] unmistakable moves towards stricter liability, but overall [there is] a range of solutions as varied as the countries themselves...."


A different situation prevails in Japan. Product liability laws in Japan are being subjected to pressure from Japan's trading partners who feel that Japan's product liability system serves as a trade barrier. Cohen & Martin, *Western Ideology, Japanese Safety Regulation and International Trade*, 19 U. BRIT. COLUM. L. REV. 315 (1985). Despite these pressures, "[t]he most important factors that will determine the future of this area of law in Japan are not found in the formal legal system but in the social conditions which determine when and how that legal system is used.... [S]ignificant pressures to change the law have not yet developed." Ottley & Ottley, *supra* note 150, at 31, 59.

The differences in the legal systems between common law countries, such as the United Kingdom (where laws tend to evolve through judicial decisions with little, if any, legislation on the subject), and civil law countries, such as West Germany (where legal change tends to occur through legislation and the power of judges to change legal doctrines is constrained), explain some of the differences between West Germany and the United Kingdom. Differences in national outlook and the overall legal/historical/cultural environments also are of great explanatory value. See generally notes 210-13 and accompanying text (discussing the lack of adoption of no-fault product liability schemes by other countries).

In the United Kingdom, the phrase “product liability” is not utilized; rather claims are based on the rubrics of “sale of goods” and “negligence.” As these classifications indicate, English law distinguishes between claims based on contract and those based on tort. Whether liability can be imposed in contract claims depends on the terms of the contract that exists between the parties; however, to establish liability in tort claims, the plaintiff must show that the defendant owed him a duty of care and that that duty was violated.

In suits governed by the laws of contract, liability will be imposed only when the terms of the contract between the parties are breached. The doctrine of privity of contract, which makes the seller or manufacturer liable only to the party with whom the direct contractual agreement exists, further limits the ability of people injured by a product to recover. Although the doctrine of privity has not been altered, “recent legislation has aided the consumer somewhat.” Sellers are now prevented by the Sale of Goods (Implied Terms) Act of 1973 from excluding implied warranties, such as merchantable quality and fitness for a particular purpose, from consumer contracts. The Unfair Contract Terms Act of 1977 further limits the contractual exclusions on which merchants can insist. Similarly, buyers are permit-

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155 The product liability system (and the legal system generally) in the United Kingdom must be distinguished from its political system. Politically, England, Scotland, Wales, and Northern Ireland constitute the United Kingdom; the English legal system operates only in England and Wales. See Boger, supra note 154, at 15. This comment focuses on English law.

156 Boger, supra note 154, at 15.
157 Dodson, The United Kingdom, in II PRODUCTS LIABILITY, supra note 150.
158 Daniels v. R. White & Sons, Ltd., [1938] 4 All E.R. 258 (K.B.) (husband and wife sued manufacturer and seller of lemonade that contained acid; the contract claim against seller could only be pressed by the husband because he was the one who actually purchased the lemonade; lacking proof of negligence, the wife was left with no remedy at law).

159 Donoghue v. Stevenson, [1932] App.Cas. 562 (appellant suffered injury by drinking ginger beer from a bottle that contained the remains of a snail; the House of Lords held that the manufacturer owed a duty of care to persons likely to come in contact with the product; in this particular case, however, the plaintiffs were unable to prove negligence).

160 Dodson, supra note 157, at 6. “In contract, liability is strict. Although negligence on the part of a party to a contract may be a breach of contract, negligence is not the criterion on which liability is based; the question is whether or not the Defendant kept his promise rather than whether he was negligent.” Id. at 7.

161 Daniels, [1938] 4 All E.R. 258; see generally Orban, supra note 152, at 360-61; Dodson, supra note 157, at 6-7 (both articles discuss limitations of contract law in recovery).

ted to proceed under a theory of breach of implied warranty by the Sale of Goods Act of 1979.\textsuperscript{166} Although these reforms have helped plaintiffs, English contract law still favors the seller over the consumer due to the restrictive aspects of the privity doctrine.\textsuperscript{166}

In suits governed by the laws of tort, the "duties imposed by law must of their nature be less stringent than those imposed by contract."\textsuperscript{167} The key issue in tort cases is the breach of a legal duty to exercise reasonable care.\textsuperscript{168} In the seminal case of Donoghue v. Stevenson,\textsuperscript{169} the House of Lords held:

[A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with knowledge that the absence of reasonable care in preparation or putting up of the product will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.\textsuperscript{170}

Still, the plaintiff bears the burden of showing negligence,\textsuperscript{171} and this often becomes a difficult task.\textsuperscript{172}

\textsuperscript{166} Sale of Goods Act, 1979, ch. 54, § 53.
\textsuperscript{167} Maddox, supra note 162, at 513.
\textsuperscript{168} Whincup, supra note 14, at 524 (paraphrasing Donoghue v. Stevenson).
\textsuperscript{169} ["T]he duty owed to the consumer, or the ultimate purchaser, by the manufacturer is not to ensure that his goods are perfect. All he has to do is to take reasonable care to see that no injury is done to the consumer or ultimate purchaser. In other words, his duty is to take reasonable care to see that there exists no defect that is likely to cause such injury," Daniels v. R. White & Sons, Ltd., [1938] 4 All E.R. 258, 261; Lambert v. Lewis, [1980] 1 All E.R. 978 (C.A.), rev'd, [1981] 1 All E.R. 1185 (H.L.). See Samuel, Responsibility for Injury Caused by a Defective Coupling, 132 NEW L.J. 833 (1982) (discussing the case of Lambert v. Lewis). "The tort of negligence has . . . three inter-related elements; first, a legal duty on the part of the Defendant to exercise care, secondly a breach of that duty, and thirdly, damage to the Plaintiff caused by the breach of duty." Dodson, supra note 157, at 8.
\textsuperscript{170} [1932] App.Cas. 562.
\textsuperscript{171} Id. at 599.
\textsuperscript{172} See Orban, supra note 152, at 362; Boger, supra note 154, at 18.
\textsuperscript{173} Allen v. Distillers Co., [1974] 2 All E.R. 365 (all allegations of negligence were withdrawn during settlement in thalidomide case); see Dodson, supra note 157, at 8; Orban, supra note 152, at 361. This task is further complicated by the fact that establishing negligence depends on the relationship among five factors: the likelihood of accident, its seriousness should it occur, the obviousness of the danger, the cost of preventing the risk, and the risk inherent in the good. Whincup, supra note 14, at 524 (citing Morris v. Hartlepool Stean. Navigokin., [1956] 1 All E.R. 385 (H.L.). No definitive standards exist for weighing the various factors; "[i]t is virtually impossible to predict how a judge will assess or balance these factors one against the other in a particular case." Id. Thus, the plaintiff's obligation to prove negligence "may be an extremely difficult burden to discharge." Id.
The courts, however, will at times infer negligence from the existence of defects.\(^{178}\) Thus, in the extreme case of *Grant v. Australian Knitting Mills*,\(^{174}\) a plaintiff prevailed who alleged that he contracted dermatitis from chemicals contained in undergarments; the manufacturer was unable to rebut the presumption of negligence even though this was the first adverse reaction in over one million garments and the plaintiff did not prove that the manufacturer was responsible for the presence of chemicals in the garments.\(^{175}\)

Recovery under a tort claim is further hindered by the failure of the English legal system to recognize the principle of strict liability.\(^{176}\) Despite the adoption of this principle by the House of Lords in *Rylands v. Fletcher*\(^{177}\) (1868) in the context of unnatural use of land, English courts have refused to apply this doctrine in the product liability context.\(^{178}\)

The differences between tort and contract actions extend to the measure of damages that are recoverable. In contract claims, "full damages including pure economic loss, are recoverable"\(^{179}\) whereas in tort claims recovery is limited to the extent of "full foreseeable damages to person and property, medical [expenses], lost earnings, [an amount for] pain and suffering, but economic loss normally [is permitted] only when

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\(^{178}\) This general doctrine is referred to as *res ipsa loquitor.* "Once a plaintiff demonstrates that a product was defective and caused him injury, the doctrine of *res ipsa loquitor* acts to raise an inference from the circumstantial evidence that the manufacturer was negligent. The doctrine has been applied usually to benefit the consumer." Maddox, *supra* note 162, at 513.


\(^{175}\) See Orban, *supra* note 152, at 361 (stating that *Grant* applies "[t]he rebuttable presumption . . . perhaps in its most liberal form"); Boger, *supra* note 154, at 19 (stating that *Grant* represents "the most liberal illustration of this principle"). *But see* Daniels v. R. White & Sons, Ltd., [1938] 4 All E.R. 258, 260-61 (K.B.) In *Daniels*, the court refused to utilize the presumption of negligence even though a bottle of lemonade contained carbolic acid: "It is not sufficient to say that carbolic acid is not found in bottles of lemonade unless someone has blundered. The plaintiff must go further, and must prove that the carbolic acid has got into the bottle because the defendant has not taken reasonable care to keep it out." The *Daniels* court quoted approvingly from Donoghue v. Stevenson: "There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim, *res ipsa loquitor.* Negligence must be both averred and proved." *Donoghue*, 1932 App. Cas. at 622. However, "The Daniels case . . . appears to be a distinct minority view." Maddox, *supra* note 162, at 514 (citing Plummer, *Products Liability in Britain*, 9 ANGLO-AM. L. REV. 65, 69 (1980)).

\(^{177}\) See Orban, *supra* note 152, at 359; Dodson, *supra* note 157, at 8.


\(^{179}\) Other European countries, including France, Belgium, and Luxembourg, have adopted the rule of strict liability. Hollenshead & Conway, *supra* note 150, at 52. *See generally* Maddox, *supra* note 162 (discussing product liability laws in Europe). In the United States, strict liability is, of course, the accepted standard. *See supra* notes 25-28 and accompanying text.

\(^{174}\) Boger, *supra* note 154, at 20.
there is physical damage.\textsuperscript{180}

Damages under the English system are designed "to make good financial loss only," and awards of punitive damages are unusual.\textsuperscript{181} This emphasis on compensation has tended to restrict the size of the damage awards.\textsuperscript{182} In general, damage awards in England are considerably smaller than those in the United States.\textsuperscript{183} Damages are assessed in a lump sum, and periodic payments are not permitted.\textsuperscript{184}

This static view of product liability ignores the domestic and international pressures on the English legal system and the trends within the system. Both the Scottish and English Law Commissions have endorsed the principles of strict liability.\textsuperscript{185} Similarly, the Royal Commission on Civil Liability and Compensation for Personal Injury has recommended the adoption of the doctrine of strict liability.\textsuperscript{186} Since the reports of these Commissions were published, however, "there has been little change."\textsuperscript{187}

The English system has also faced international pressure as a result of attempts to harmonize international product liability laws and to reduce unfair trade competition.\textsuperscript{188} The focus of these efforts in Europe has been the European Economic Community Directive on Product Liability,\textsuperscript{189} which mandates the adoption of a strict liability standard.

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180 & Orban, supra note 152, at 364. \\
181 & Dodson, supra note 157, at 38. \\
182 & See Orban, supra note 152, at 393 legislation (noting tendency of European lawyers “to focus on ‘compensation’ as the sole purpose of product liability litigation”). \\
183 & Orban, supra note 152, at 393 n.169 (as of 1978, the largest British personal injury award was £ 132,970). \\
184 & Dodson, supra note 157, at 38. \\
185 & Liability for Defective Products, 1977, CMND. No. 6831, cited in Dodson, supra note 157, at 5 n.3, 60 n.53 and accompanying text. \\
186 & Royal Commission on Civil Liability and Compensation for Personal Injury (Pearson Report), 1978, CMND. No. 7054, ch. 22, cited in Dodson, supra note 157, at 5 n.4 and accompanying text. \\
187 & See Dodson, supra note 157, at 8. \\
189 & 28 O.J. EUR. COMM. (No. L 210) 29 (1985). Among the mandatory provisions of this Directive are: strict liability for producers (Articles 1 and 4); joint and several liability “without prejudice to the provisions of national law concerning the rights of contribution or recourse” (Article 5); a defective product defined as a product that “does not provide the safety which a person is entitled to expect, taking all circumstances into account, including (a) the presentation of the product, (b) the use to which it could reasonably be expected that the product would be put, and (c) the time when the product was put into circulation” (Article 6(1)); subsequent improvements not proving that the product was defective (Article 6(2)); statute of limitations of three years (Article 10); statute of repose of 10 years (Article 11); producer defenses including “compliance of the product with mandatory regulations issued by the public authorities” and “the state of scientific and technical knowledge at the time when [the producer] put the product into circulation was not such as to enable the existence of the defect to be discovered” (“the state-of-the-art defense”) (Article 7(d) and (e)). Individ-
After nine years of deliberations, the Council of Ministers finally adopted the Directive on July 25, 1985; notification of the Directive was made six days later. The United Kingdom must modify its laws to conform with the Directive within three years. The United Kingdom does, however, retain the right to choose the manner of implementation and to remove certain defenses. These factors led one commentator to conclude that "the Directive, as it stands to be implemented into [the United Kingdom], does not represent much of an advance on the present position for consumers . . . ."

Despite uncertainty regarding the extent to which these pressures will produce significant reform, the current trend is toward favoring the consumer whenever a "legitimate interpretation of the law" warrants such a position. The system has moved toward strict liability in tort. Even prior to the adoption of the European Economic Community Directive, there was speculation that both judges and Parliament would implement changes to facilitate recovery by those injured by defective products. Such developments would move English law closer
to the general trend occurring in other European countries.¹⁹⁹

Notwithstanding these current trends, the United Kingdom is still described as having the "most unyieldingly traditionalist . . . legal system" in Europe.²⁰⁰ One commentator noted that "[d]espite the reforms in United Kingdom law that have taken place over the last few years, a manufacturer still has a distinct advantage over an injured party in a products liability action [both in tort and contract]."²⁰¹

Thus, the English system establishes rules that are very different from those in existence in the United States. These two systems would still differ considerably were strict liability introduced in the United Kingdom. For example, damage awards would still continue to be smaller in the United Kingdom because awards would probably still be determined under the present tort (rather than contract) system, compensation would be emphasized, punitive damages would seldom be granted, and damages would continue to be awarded by the judge rather than by a jury.

These differences between U.K. law and both the current system in the United States and the provisions contained in S. 2760 are substantial. It is worth analyzing these differences in order to determine what, if any, aspects of the English system should be incorporated into the U.S. legal regime.

5. A Comparison of the Provisions of S. 2760 With the System in the United Kingdom

The mere fact that U.K. law differs from U.S. law regarding the recoveries available to a claimant injured by a defective product illustrates that there are alternatives to the U.S. product liability system. Various industrialized countries have adopted different product liability schemes.²⁰² Each of these solutions represents the result of the complex interplay of that country's own national culture, legal system, and economy.²⁰³

A comparison of the trends occurring in the United States and the United Kingdom furthers the analysis. Over the past twenty years, virtually every state in the United States has adopted the doctrine of strict

¹⁹⁹ See generally Whincup, supra note 14, at 521-22 ("Most legal systems agree that compensation for economic loss is not recoverable in tort unless that loss arises out of and is attached to a claim for personal injury or damage to property.").
²⁰⁰ Id. at 537.
²⁰¹ Id. at 537.
²⁰² Boger, supra note 154, at 40.
²⁰³ See Dodson, supra note 157.
²⁰⁴ Id. at 8.
liability. The areas of contention now center on the propriety of imposing liability through the use of the doctrines of market-share liability and concert of action, on the appropriateness of capping the size of awards, and on the usefulness of federal statutory reform that would supersede state law. In the United Kingdom, the trend is toward imposing liability on manufacturers in a wider scope of cases, and the battle is centered on whether or not to institute the doctrine of strict liability.

An analysis of the U.K. and U.S. product liability laws must incorporate several aspects of the overall legal/judicial/cultural environment in the United States that differ from those in the United Kingdom. One author has identified nine “key characteristics of the American legal-judicial system which increase the size and frequency of awards.” These characteristics and their English counterparts are:

1. Lawyers’ contingency fees are allowed in the United States whereas they are prohibited in the United Kingdom.
2. Workers’ compensation payments in the United States are low relative to civil damage awards; in the United Kingdom, there is less of a discrepancy in this regard.
3. The technical expertise of the plaintiff’s bar in the United States is greater than that found in the United Kingdom.
4. The liberal discovery rules operating in the United States do not exist in Europe (and only to a limited extent in the United Kingdom).
5. Public distribution by government and private sources of safety and accident records critical to developing cases is prevalent in the United States; such a system does not exist in the United Kingdom.
6. Juries are utilized in civil lawsuits in the United States, and this tends to raise the size of awards; in the United Kingdom, awards are determined by the judge.
7. “Consumer awareness” is high in the United States; in the United Kingdom, it is lower.
8. American lawyers tend to view product liability litigation as a device for legal and industrial reform; English attorneys focus on “compensation” for injured claimants as

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204 See supra notes 27-28 and accompanying text.
205 See Church, supra note 2, at 25, 26.
206 See Orban, supra note 152, at 392; Hollenshead & Conway, supra note 150, at 52.
207 Orban, supra note 152, at 392, 393.
the sole purpose of product liability law.

9. Punitive damage awards are available and are regularly awarded in the United States; such awards are rare in the English system.

These nine characteristics tend to distort direct comparisons between the United States and the United Kingdom. Failure to consider these critical aspects of the two systems will invariably lead to conclusions that do not capture fully the essence of the problem.

Any comparison must also recognize that the legal rules regarding product liability in the United Kingdom evolved within its overall environment. For example, the absence of strict liability must be viewed in the context of a country that has implemented national health insurance. Similarly, the smaller awards reflect the absence of contingency fees for attorneys and the lower per capita income.

This intricate interrelationship among the various aspects of the system requires that care be exercised in suggesting the introduction of elements from one country into the legal system of another country. Similarly, if one country were to adopt the entire legal system of another, such an experiment would, in all probability, prove ineffective because legal systems do not operate in a vacuum but rather within the context of the overall national culture and outlook. Thus, an identical legal system might operate very differently in two different nations.

Useful insights can, however, be gleaned from such a comparison. For example, such a comparison reveals that the United States is much stricter than the United Kingdom in holding manufacturers liable to claimants injured by defective products.208

Other issues relevant to the provisions contained in the Product Liability Reform Act that are highlighted by the comparison with the English system include:

* recovery for pain and suffering are allowed in the United Kingdom under the tort theory; no limits on such recoveries are imposed although award sizes do tend to be considerably smaller than in the United States;209

* the English system, with its emphasis on compensation for the injured claimant, does not utilize punitive damages; and

* the evolution of the English system has been gradual, even during periods when many organizations and commis-

208 In fact, "[t]he United States has been the world leader in imposing liability on manufacturers of defective products." Boger, supra note 154, at 2.

209 See supra notes 81-85 and accompanying text; cf. S. 2760 § 201.
sions have recommended reforms; for example, the European Economic Community Directive, which mandates the adoption of a strict liability standard, need only be adopted within three years and provides the English government with a variety of alternatives to minimize the impact of this measure.

This comparison further indicates that the alternative claims procedure system advocated in this Comment does not have a counterpart in the United Kingdom. In fact, the only nation that has adopted a system that incorporates a no-fault scheme in the product liability context is New Zealand.\(^{210}\) No significant conclusions should, however, be drawn from the fact that no country has adopted such a system. This uniqueness does not imply that such a system is inherently flawed. The United States has long been the leader in the field of product liability and, therefore, currently faces problems that other nations do not. This voluntary alternative claims system might be the appropriate system for the United States at this time and a system that will become suitable for other countries only in the future.

The English system highlights the fact that the American product liability system is trying to accomplish two objectives: compensate the injured party and deter manufacturers from producing dangerous products.\(^{211}\) Whereas the English system is primarily concerned with the issue of compensation, the American system strives to accomplish both goals simultaneously. The alternative claims system suggested in this Comment would better segregate the two functions and thus allow each aspect to be analyzed independently and more objectively, without other factors distorting the analysis.

The issue of compensation is at the heart of the alternative claims proposal. By concentrating on reimbursing injured parties in a more certain and expedited manner, this proposed system would tend to resemble the interrelated workings of the English products liability, workers' compensation, and national health insurance systems. It should be noted, however, that the English system differs substantially from the alternative claims system proposed in this Comment.\(^{212}\) For

\(^{210}\) O'Connell, \textit{supra} note 139, at 597 n.43 ("In New Zealand, a government insurance entity pays both unlimited medical expenses and limited wage loss from accidental injuries. Tort liability is concomitantly abolished."); Whincup, \textit{supra} note 14, at 540 ("all claims for damages for personal injuries . . . have been abolished [and have been replaced with] a state-run insurance system. . . ."); see also \textit{supra} note 153.

\(^{211}\) \textit{See also Product Liability Act Amendments, supra} note 10, at 83-89 (statement of Prof. Priest). The proposals presented in this comment are designed to segregate the insurance and incentive objectives of tort law.

\(^{212}\) \textit{See supra} notes 134-48 and accompanying text.
example, pain and suffering are compensable under tort law in the English system, whereas they are excluded under the definition of "net economic loss" that is utilized in the alternative claims system and contained in both S. 1999 and S. 2760.

Finally, the English system highlights another important aspect of the American system: judges in both countries have a great deal of flexibility in working within the system to ensure that justice is done in a particular case; this flexibility allows judges to implement changes when the product liability system lags behind changing technological and economic conditions. This flexibility also permits experimentation with new systems without the fear that a new system will produce gross miscarriages of justice. The legal systems in both countries evolve with changing conditions. Therefore, legislators should consider carefully any proposed reforms but should not let fear of possible ill consequences totally paralyze the legislative process and thus stifle innovation.

6. Conclusion

The perceived shortcomings of the product liability system in the United States have sparked calls for reform. One such measure, S. 2760, incorporates both a federal product liability law and an expedited settlement procedure. This Act fails to achieve the comprehensive reforms needed to alleviate the problems inherent in the current system. Instead, Congress should combine a comprehensive federal product liability law with an alternative "no-fault" system. Although such an alternative system has not been implemented in any other country, the potential benefits of such a package are substantial. As one commentator noted, "federal product liability reform would exemplify one of federalism's most fundamental tenets: national problems warrant federal action."\(213\) The United States has long been a leader in the area of product liability. The argument that such a system has not yet been tried by other countries is not a valid reason for rejecting the combination of federal product liability standards coupled with an alternative claims system. This package would alleviate many of the ills plaguing the current product liability system in the United States and would produce a more rational, efficient, and equitable system.

\(213\) Reed & Watkins, supra note 5, at 472.