A PROPOSAL FOR MAKING PRODUCT LIABILITY FAIR, EFFICIENT AND PREDICTABLE

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Today, the headlines have disappeared. *Time* magazine no longer trumpets, "Sorry America, Your Insurance Has Been Canceled."[1] The huge availability problems of 1986 seem largely to have disappeared, to be replaced by insurance policies with higher deductibles, lower total coverage and inclusion of attorneys' fees within the policy limits—often for several times the price in 1981.

Of course, not everyone can afford the new coverage. Across the country, businesses are thinking long and hard about whether they can afford the insurance to introduce new products. Some public parks have closed, and small community swimming pools are trying to decide whether they can afford the increased cost of liability insurance. In short, the liability crisis of 1986 has disappeared and has been replaced by much quieter scenes of desperation.

Just as the liability crisis has quieted in the country, so has it quieted in Congress. After the excitement of the 99th Congress, when the full Senate considered a radically different solution[2]—based upon creating incentives for the parties to settle claims[3]—Congress once again is confronted with proposals to tinker with the rules of the tort system.[4] The main bill under consideration in the House of Representatives, H.R. 1115, calls for a return to fault-based standards, for narrowing joint and several liability, and for making it more difficult to recover punitive damages.[5]

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1. Church, *Sorry, Your Policy is Canceled,* Time, Mar. 24, 1986, at 16.
2. S. 2760, 99th Cong., 2d Sess. (1986).
3. S. 2760 was reported from the Senate Committee on Commerce, Science and Transportation on Aug. 14, 1986. (132 CONG. REC. S11742 (daily ed. Aug. 14, 1986)). The bill was considered on the Senate Floor on Sept. 17, 22, 23 and 25, 1986. *See generally* S. REP. No. 422, 99th Cong., 2d Sess. (1986). After several favorable procedural votes, the bill was withdrawn because it was clear there was inadequate time left in the session to reach a final vote, given the threat of a filibuster. 132 CONG. REC. S13709-12 (1986).
4. The major product liability bills before consideration of S. 2760 and its predecessors in the 99th Congress (Senate Amendment No. 16 to S. 100, Senate Amendment No. 100 to S. 1999), were tort reform bills. The major bills seriously considered by congressional committees were H.R. 7000 in the 96th Congress, S. 2631 in the 97th Congress, S. 44 in the 98th Congress, and S. 100 earlier in the 99th Congress. *See* H.R. 7000, 96th Cong., 2d Sess., 126 CONG. REC. S 6878 (daily ed. June 16, 1986); S. 2631, 97th Cong., 2d Sess., 128 CONG. REC. S6846 (daily ed. June 16, 1982); S. 44, 98th Cong., 1st Sess., 131 CONG. REC. S71 (daily ed. Jan. 26, 1983); S. 100, 99th Cong., 1st Sess., 131 CONG. REC. S71 (daily ed. Jan. 3, 1985); H.R. 1115, 100th Cong., 1st Sess., 133 CONG. REC. H708 (daily ed. Feb. 18, 1987).
5. The bill also contains provisions dealing with workers' compensation offset and provides defenses for drunken driving defendants and manufacturers in compliance with government standards.

Although bills providing alternatives to litigation for resolving product liability claims have been introduced in the Senate,[6] no Senate committee has plans for considering them.

For the time being, it appears as though the only product liability legislation Congress is likely to consider in the 100th Congress is "tort reform" legislation. Unfortunately, any such legislation, even if enacted, would not solve the problems with product liability law. Before outlining the kind of legislation that would benefit all parties, this article will discuss how the country got into its present problems and how the Senate has tried to address those problems.

THE TORT SYSTEM: ROUND TRIP FROM STRICT LIABILITY TO FAULT LIABILITY BACK TO STRICT LIABILITY

During the past 150 years, the tort system has come almost full circle in its treatment of injured persons. In the horse-and-buggy days that preceded the Industrial Revolution, when accidents were relatively few and most injuries were minor, an accident victim was able to recover compensation from the person who caused the injury without having to prove that the responsible person was at fault. In short, the law was strict liability.

In the 19th century, with the advent of the Industrial Revolution, strict liability gave way to fault liability. The change reflected the concern

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The less ambitious nature of the bill compared with its predecessor tort reform proposals reflects largely strategic considerations—getting the bill referred solely to the House Energy and Commerce Committee, rather than jointly referred to the Commerce Committee and the Judiciary Committee.

6. S. 688, 100th Cong., 1st Sess., 133 CONG. REC. S2860 (1987), introduced by Sen. Danforth, contains the settlement provisions of S. 2760, 99th Cong., 2d Sess., 132 CONG. REC. S11742 (1986). Unlike S. 2760, it was referred to the Judiciary Committee, although the committee has yet to conduct hearings. S. 666, 100th Cong., 1st Sess., 133 CONG. REC. S2823 (1987), introduced by Sen. Kasten and others, contains a settlement system based on Rule 68 of the Federal Rules of Civil Procedure. Briefly, it permits the parties to make offers to settle claims and, if there is no agreement, to bet on the outcome in the trial. There need be no basis whatsoever for any particular offer, but if it is turned down and the court awards more than the offer, the prevailing party gets a bonus. If it awards less, the party is penalized. It is difficult to see how such a system is likely to produce similar awards for similarly injured people.

The Federal Rules provide:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof, and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn, and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

FED. R. CIV. P. 68.

that a strict liability system would be so expensive it would inhibit the development of socially useful but more dangerous products. Proponents of the fault system argued that it would encourage safety because manufacturers would try harder to avoid causing injuries, and potential victims would be more careful because they knew they could not recover if their behavior in any way contributed to the injury.

The original fault-based tort system was harsh for injured people. With its rigid requirements for identification, proof of fault and proof of the absence of contributing fault on the part of the plaintiff, relatively few plaintiffs were able to recover. A twenty-six volume 1971 Department of Transportation study of the liability system for auto accident cases found that fifty-two percent of seriously or fatally injured persons received nothing from the tort system.[7]

Just as the introduction of the tort system was based on the circumstances and mores of that time, so, too, are the recent changes in the law, court decisions and jury verdicts that have brought the tort system closer and closer to a strict liability system. In large part, the changes flow from the fact that people whose products or activities have a tendency to injure others—from manufacturers to doctors to drivers of automobiles—could ill afford to bear the full extent of the losses themselves and so have purchased insurance to spread the risk. Plaintiffs' lawyers are aware that most people have insurance and, therefore, sue more often. Judges and juries are similarly aware of the insurance and have found ways to restrict the harsh requirements of the tort system in order to compensate more plaintiffs.[8]

Unquestionably, the success of the trial bar in easing the burdens on plaintiffs has improved the situation for victims. Plaintiffs' lawyers have successfully championed the movement from contributory negligence[9] to various forms of comparative negligence,[10] abolition of host/guest statutes,

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7. DEP'T OF TRANSPORTATION, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 36 (1971). The summary volume of the study, which assessed the fault system of the late 1960s for auto accident cases, also concluded it "ill serves the accident victim, the insuring public and society; [i]t is inefficient, overly costly, incomplete and slow; [and] [i]t allocates benefits poorly, discourages rehabilitation and overburdens the courts and the legal system." *Id.* at 100.

8. Insurance has also played a role in improving the plaintiff's position. The advent of widespread health insurance and greater disability insurance has enabled plaintiffs to be able to wait longer to settle cases, thereby increasing their leverage to get larger settlements. Although this result is good for victims, obviously it increases costs for defendants. This is not necessarily a bad result, but it raises the larger question of whether there are more efficient ways to assure that deserving victims receive more adequate and appropriate compensation.

9. Contributory negligence is a defense to a negligence action. It is defined as conduct on the part of the plaintiff which is below the standard to which he is legally required to conform for his own protection and which is a contributing cause which cooperates with the negligence of the defendant in causing the plaintiff's harm. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 451-52 (5th ed. 1984).

10. There are basically three types of comparative negligence systems: pure, modified and slight-gross.

Under a system of pure comparative negligence, a plaintiff's contributory negligence does not operate to bar his recovery altogether, but it does serve to reduce the amount of damages owed by defendants in proportion to the amount of negligence attributable to the plaintiff. *Id.* 471-72.

Under a system of modified comparative negligence, a plaintiff's contributory negligence does

adoption of strict liability doctrines, broadening of joint and several liability, adoption of enterprise liability and market share liability, and compensation for "fear of injury." These changes[11] have made the tort system fairer for victims, but at considerable cost to manufacturers and with an unpredictability of future responsibilities that makes insurers wary of insuring businesses or, at a minimum, results in far higher premiums.

In many jurisdictions, the manufacturers' complaint that the tort system has been turned into a compensation system, with tort damages, appears to be justified. Nevertheless, the tort system remains a bad deal for injured people. A significant number of innocent victims still go uncompensated, there are long delays before recovery, people with similar injuries incurred in similar ways receive radically different recoveries, and the transaction costs for delivering the benefits that the system does deliver are very high.

If the tort system ill serves manufacturers and victims, would reform help either or both? Probably not. Consider the manufacturers' objectives—to eliminate recoveries where the manufacturer has not been negligent, to reduce awards where it has been, and to reduce transaction costs, by enacting uniform rules for product liability cases. It probably would be impossible to reduce the number of awards in bizarre accident cases because judges and juries can and do stretch factual situations to fit legal rules when they are sympathetic to the plight of the injured party. There is no reason to believe that the provisions of any tort reform bill would change those responses and the opportunities the tort system provides for granting recoveries.[12]

Moreover, tort reform legislation probably would not reduce transaction costs because they are the result of having to use the legal system to settle cases, not because lawyers spend much time researching the law. To the contrary, most trial attorneys spend the bulk of their time preparing the factual side of their cases. That would not change if Congress enacted legislation requiring use of a fault standard.

DEFICIENCIES OF THE TORT SYSTEM FOR VICTIMS

Obviously, the objectives of the proponents of tort reform legislation have not been able to make it easier for victims to recover. The corollary of that proposition is not, however, that injured people should be satisfied

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not bar recovery so long as it remains below a specified proportion of the total fault—for example 50%. *Id.* at 473-74.

Only two states (Nebraska and South Dakota) currently use a slight-gross system of comparative negligence. Under this system, the plaintiff's contributory negligence is a bar to recovery unless his negligence is "slight" and the defendant's negligence by comparison is "gross." If a plaintiff meets this threshold criterion, he or she is allowed to collect damages, but the amount will be reduced by the proportion of the total negligence that is attributable to the plaintiff. *Id.* at 474.

11. For further discussion of these principles, *see, e.g.*, Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982); Jackson v. Coast Paint and Lacquer Co., 499 F.2d 809 (9th Cir. 1974); Freund v. Cellofilm Properties Inc., 87 N.J. 229, 432 A.2d 925 (1981); Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974); Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 Mo. L. REV. 579, 586-87 (1980).

12. For a discussion about why tort reform proposals would not reduce the size of awards, see *infra* notes 30-41 and accompanying text.

with the present system. They stand to benefit as much or more than manufacturers from legislation to create alternatives to the tort system.

The deficiencies of the tort system in product liability cases are numerous. The system fails to pay a significant number of people all would consider worthy of compensation; it grossly overpays people with small losses and sadly underpays those with the most serious losses; it takes too long to pay the people it does pay; it is highly inefficient, often paying more to lawyers and insurance companies than to victims.

1. The Possibility of Nonrecovery

A survey of 24,452 claims by the Insurance Services Office in 1977 showed that one-third of all claims were closed with no payment.[13] Although it is impossible to tell from the data how many of these people were "innocent" victims, it is clear that many would fit into the following categories of innocent injured persons:

(1) people who cannot identify the maker of the product (this situation usually occurs where there is a long latency period before the injury or where the product is generic);

(2) people who are injured by a product when the manufacturer was not negligent, in states that do not apply a strict liability standard, and even in many strict liability jurisdictions when they employ a risk-utility analysis of the product;

(3) people injured by "unavoidably unsafe" products, a defense based upon the utility of the product to society as a whole, regardless of its effect on particular individuals (as in the DPT vaccine cases);

(4) people whose negligence made a minimal contribution to the injury, in states that maintain the defense of contributory negligence.

2. Disparity Between Losses and Recovery

Those who prevail find the amount of recovery as a percentage of economic losses goes down as those losses rise. For example, the people in the Insurance Services Office study with the greatest economic loss recovery were those with economic losses from $1 to $1,000, who recovered an average of 482% of economic loss (the amount above 100% being for noneconomic damages).[14] Technically, the highest recovery belongs to the

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13. INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIMS SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 1977, at 11 [hereinafter cited as CLOSED CLAIMS SURVEY].
14. The distribution of plaintiff's economic loss, as adjusted to reflect net compensation, reads as follows:

Economic loss range	Percentage recovery
$1 to $1,000	482
$1,001 to $2,000	372
$2,001 to $3,000	239
$3,001 to $4,000	225
$4,001 to $5,000	318
$5,001 to $7,500	220
$7,501 to $10,000	186
$10,001 to $15,000	171

second-largest category of prevailing victims, those with no economic losses. Because this group's recovery exceeded $0—the average was $804 a person—the percentage recovery was infinity.

Part of the reason for such high recoveries at such low levels of loss lies in the nuisance value of a claim, where it is cheaper for a company to pay a small amount in a questionable case than it is to fight the claim. Nevertheless, the survey found that losses up to $100,000 were compensated on the average at more than 100% of economic loss.[15]

After $100,000 of losses, the picture changes dramatically. People with losses of more than $100,000—those most demonstrably in need of compensation and most of those with the worst pain and suffering—were two percent of the victims, but they incurred seventy-eight percent of the losses. On the other hand, they received only thirty-two percent of the payments. The disparity between losses and recoveries was most dramatic for plaintiffs whose losses exceeded $1 million. Their net recovery, after subtracting attorneys' fees, was only six percent.[16]

Although no other closed-claims surveys on product liability have been conducted since 1977, and the climate for such lawsuits has changed during the last decade, additional data support the fact that people with relatively small economic losses are overpaid, and those with the most serious losses are underpaid. One recent study examined the files of 500 plaintiffs whose combined economic loss and attorneys' fees totalled more than $140 million.[17] The study shows that, after attorneys' fees are subtracted from gross recoveries, this group recovered, on average, ninety-one percent of past and projected future economic losses.[18] As in the

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$15,001 to $20,000	161
$20,001 to $25,000	156
$25,001 to $50,000	134
$50,001 to $100,000	176
$100,001 to $200,000	43
$200,001 to $300,000	55
$300,001 to $400,000	39
$400,001 to $500,000	20
$500,001 to $750,000	11
$750,001 to $1 million	72
$1 million and up	6

See CLOSED CLAIMS SURVEY, *supra* note 13, at 383 (Chart titled Distribution of Economic Loss—BI (untrended)).

The inconsistency of the $750,000 to $1 million figure derives from the fact that there were only two recoveries in that category. It is worth noting that the figures in this chart reflect only the average recovery of people who recovered something. Obviously, the average compensation for injured people would be lower if the survey included all victims, including those who recovered nothing. *See id.*

The final percentages were reached by dividing total payments by the number of injured parties and comparing it to the total economic loss divided by the number of injured parties. All gross recovery figures, except for those in the $1 to $1,000 range, were reduced by one-third to arrive at a net compensation figure. *See id.*

15. *See id.*
16. *See id.*
17. *See* ALLIANCE OF AMERICAN INSURERS & AMERICAN INSURANCE ASS'N, A STUDY OF LARGE PRODUCT LIABILITY CLAIMS CLOSED IN 1985 at 18-19.
18. *Id.* at 18-19 (the author has subtracted one-third from the gross recoveries as a conservative estimate of attorneys' fees and other legal costs).

earlier study, the more serious cases had the lowest percentage recoveries. Specifically, people with economic losses of more than $100,000 but less than $200,000 recovered an average of 151% of their losses,[19] and people with losses of more than $200,000 but less than $500,000 recovered ninety-five percent.[20] In sharp contrast, those with losses of more than $500,000 but less than $1 million recovered sixty-seven percent of their losses,[21] and those with losses of $1 million or more recovered a net of only thirty-nine percent.[22] Interestingly, despite the concern about more product liability cases and higher verdicts, these figures parallel data compiled by the Alliance of American Insurers in 1975 and 1979. Thus, it is not unreasonable to assume that another closed-claims study of product liability claims would produce data similar to the 1977 Insurance Services Office data.

3. Disparity of Recovery in Similar Cases

Despite the compelling nature of the closed-claim figures, they disguise another problem—a tremendous disparity of recoveries among claimants with similar losses. Although the Insurance Services Office charts do not reveal the circumstances surrounding each case, the facts indicate that about half the people with economic losses of more than $10,000 recovered less than their economic losses, and the other half recovered more than their losses. The substantial under- and over-recoveries support the thesis that similarly situated people are receiving dramatically different treatment under the tort system.[23]

Almost as disturbing is the fact that it often takes five years to pay the claim for the average dollar amount involved.[24] Because people often have inadequate resources to pay for their medical and rehabilitation costs and their work losses, such delays in payment are unconscionable. Moreover, studies have shown that when rehabilitation has to be delayed, the degree of recovery achieved is less than when the problem can be treated immediately.[25]

Other studies reveal that people with lower incomes and lower educational levels recover far less than their middle-class counterparts because they have less access to attorneys, cannot afford to wait as long to recover and *often are not good witnesses.*[26]

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19. *Id.* at 18.
20. *Id.*
21. *Id.*
22. *Id.*
23. *See* CLOSED CLAIMS SURVEY, *supra* note 13, at 383.
24. *See id.* at 79.
25. *Federal Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings on H.R. 6601, H.R. 7476, H.R. 1597, H.R. 2300, H.R. 2508, H.R. 5149 before the Subcomm. on Consumer Protection and Finance and House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 594 (1977) (statement of Leonard Bender, M.D., on behalf of the American Congress of Rehabilitation Medicine and the American Academy of Physical Medicine and Rehabilitation).
26. *See, e.g.*, 1 U.S. DEP'T OF TRANSP., ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES 52-53 (1970).

4. Excessive Legal Fees

The fourth disturbing fact that Insurance Services Office data revealed is that the tort system is highly inefficient, paying attorneys for both sides slightly less than the net compensation provided to victims, before taking into account the overhead costs of insurers.[27] Similarly, a recent study found that net compensation to victims through the tort system totalled between $13 billion and $16 billion in 1985, while transaction costs—including plaintiffs' attorneys' fees, defense legal fees, public expenditures and the time of litigants—were between $15 billion and $19 billion.[28] The fact that attorneys make so much money from the system is not a criticism of attorneys; it is the logical result of a system that requires attorneys for resolution.

For all these reasons, the tort system provides inadequate compensation to injured persons. Moreover, because of its uncertainty and unpredictability, it is also questionable whether it deters the production of unsafe products.[29] Unfortunately, except for the 99th Congress, debaters have focused on changing the tort system to produce better results for their interests. They miss the major point—the legal system itself is the problem.

THE 99TH CONGRESS: EFFORTS TO CREATE ALTERNATIVES TO THE TORT SYSTEM

In order to provide a starting point for the creation of a speedy and equitable alternative to the tort system for product liability cases, on March 19, 1985, the author introduced Senate Amendment No. 16 to S. 100, the Product Manufacturers' Responsibility Act of 1985. It was not designed to change the objectives of the tort system—compensation, punishment and the creation of incentives to produce safer products. Instead, the Amendment was designed to achieve those same objectives more fairly and efficiently.[30]

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27. *See* CLOSED CLAIMS SURVEY, *supra* note 13, at 90-91 (as defense costs to plaintiff's fees).
28. J. KAKALIK AND N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION IX (1986).
29. It is difficult for companies to know what level of safety must be built into products to avoid liability suits when the same conduct can produce different results in different jurisdictions. Further, lawsuits for the same injuries from the same conduct involving the same product can produce radically different results, depending upon the lawyers, the judge and the jury in any given case. Although the tort system's very unpredictability may create some incentives for safety, it is difficult to tell just what message such uncertainty sends to manufacturers. A study of 10 companies that tried to monitor product liability developments and factor the result into their products found that even in such sensitized companies, the information about verdicts was not well transmitted to the people who designed the products. Moreover, even when the designers fully understood the results of court cases, there was often little or nothing they could learn from them to apply to their own designs. *See* P. REUTER AND G. EADS, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION (1985).
30. *Product Liability Act Amendments, 1985: Hearing on S. 100 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science and Transportation,* 99th Cong., 1st Sess. 7 (1985) [hereinafter cited as *Hearing*] (statement of Sen. Dodd). The Amendment had four basic purposes:
    1. to provide a faster system of assured but limited compensation of the economic losses of

Operation of a Tort System Alternative

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

The proposed system could be viewed, in the words of Yale Law School Dean Guido Calabresi, as a "dog with two tails."[31] The claims system would be the source of recovery for most people—although there would be two residual lawsuit systems. One tail would be a traditional tort system for those who did not wish to pursue compensation through the claims system. The second tail would be a legal system to enforce payment under the claims system where the manufacturer refused to pay on a bona fide claim.

The claims system would be similar to the present strict liability system, except that it would be carried out without attorneys, and recovery would be limited to economic damages.[32] It would not consider the conduct of the manufacturer. An injured person could recover economic damages—medical and rehabilitation expenses, as well as work loss, replacement services loss and loss due to death—directly from the manufacturer within seventy-five days if the person were injured by an unsafe product,[33] one that caused the claimant's harm while being used in a manner and for a purpose that was anticipated by the manufacturer or that occurs so commonly among product users that the manufacturer may be assumed to have anticipated such use.

The Amendment would have denied injured persons recovery in four situations, all of which were designed to cover cases where the injured person was in the best position to avoid injury. Thus, a person would not have recovered where:

* recognizable and obvious dangers caused the injury, such as those caused by sharp knives, alcohol or tobacco;
* the claimant's alteration or modification of the product caused the injury;
* the injury resulted from claimant's assumption of the risk; and
* the injury resulted from the gross negligence of the injured person.[34]

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innocent people injured by unsafe products;

2. to encourage the production of useful new products by responsible manufacturers by placing limitations on damages in the claims system;

3. to retain the tort system to punish negligent manufacturers and to help deter carelessness by other manufacturers; and

4. to reduce the overhead costs associated with the present lawsuit system so that more of the system's dollars could be used to compensate victims and perhaps even reduce the costs of consumer goods.

31. *Id.*
32. *Id.* at 8.
33. *Id.*
34. *Id.*

This standard was designed to afford recovery to "innocent" persons injured by products, regardless of the degree of care taken by the manufacturer. Thus, as between two innocent parties—the injured person and the manufacturer—the manufacturer should bear the loss. There are two reasons for this policy—the manufacturer is in the better position to avoid the loss and the manufacturer is better able to absorb the loss.[35] The injured person going into the claims system would forego his or her chance to hit the jackpot in the tort lottery system for the greater certainty of being made economically whole more quickly in the claims system.

Speedy recovery is crucial to injured persons, particularly the severely injured. By guaranteeing payment to innocent persons through the claims system within seventy-five days, the Amendment would have enabled people to have the economic wherewithal to get on with their lives.

Disputes Under the Claims System

The next issue that a claims system must handle is what to do when there are disputes about the cause or amount of an injury. The Amendment's system would have levied sufficient penalties on the manufacturer who failed to pay to encourage payment in legitimate cases and probably even in some questionable cases.[36] The penalties, however, would be low enough to encourage a manufacturer to dispute a claim when it legitimately disputes responsibility.

Under the system, a manufacturer would have three choices after receiving a claim. First, it could pay the claim, which means paying the injured person for net economic loss.[37] Second, a manufacturer could admit responsibility for the injury but dispute the appropriateness of the expenses. In that case, the matter would be given to an arbitrator to decide.[38] Third, a manufacturer might dispute responsibility for the injury In that case, the injured person could sue the manufacturer, either through a traditional tort lawsuit or under the claims system.[39]

Under the claims system, an injured person who satisfies the standards discussed previously would be entitled to net economic loss, a two percent per month interest penalty (to discourage manufacturers from delaying payment in order to earn interest) and a reasonable attorney's fee. The manufacturer also would have to pay its own attorneys' fees.[40] This is the system now successfully used in no-fault automobile insurance states.

In sum, under the claims system individuals would have secured several advantages over today's tort system, including greater certainty of recovery for "innocent" victims, speedy and timely recovery, and recovery

35. *Id.*
36. *Id.*
37. Net economic loss is the amount of loss less entitlements from other sources for the same injury, such as private health insurance and worker's compensation. *See id.* at 8-9.
38. *Id.* at 9.
39. *Id.*
40. *Id.*

according to their losses, even where those losses exceed $1 million.[41]

Retention of the Tort Remedy Option

Under the Amendment, an injured person still could choose to sue in the tort system, either initially or before a claim is paid. Once a person filed a tort lawsuit, however, the person could not use the claims system.[42] The Amendment's tort system was limited. The most significant features would have prohibited the application of strict liability in design defect and failure-to-warn cases[43] and applied a fair statute of limitations for injuries that have long latency periods.[44]

With a separate claims system to assure compensation, the residual tort system should focus more on punishment and deterrence.[45] That means that it should be difficult to get into the tort system, and those who are there should believe that the manufacturers' conduct was truly negligent or worse. At the same time, it should be easier for the injured person to make the case in that system, which might necessitate some changes in rules of discovery and record keeping.[46]

This approach would present incentives for safety. Of course, the Amendment would have retained the tort system for those who wished to sue negligent manufacturers. But the tort system has limitations as a deterrent system today because of its very unpredictability. The greater certainty of recovery in the claims system also would provide strong incentives for safety. Any manufacturer that has to pay many claims, even for smaller amounts, would be at a distinct competitive disadvantage relative to its safer competitors. Thus, the greater certainty of payment under the claims system, coupled with the unpredictability of the tort system, would provide stronger incentives for safety than exist today.

In sum, Senate Amendment No. 16 was designed to provide faster, more certain and more equitable compensation for injured persons, greater incentives for product safety, and greater predictability and lower system costs for manufacturers than either the present tort system or any of the proposals to reform it.

EVOLUTION OF THE CLAIMS SYSTEM

After Senate Amendment No. 16 was introduced, Congress spent eight months debating the virtues and vices of the system, plus those of a similar system in Senate Amendment No. 100, introduced by Sen.

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41. The Amendment was not particularly suited for injuries where causation was difficult to prove, for example, illnesses with long latency periods or injuries caused by pharmaceuticals. The problem with the latter group is that almost all drugs are necessarily accompanied by side effects. To the extent that such side effects are clearly warned against, and those warnings are understood by the injured person, it may not make sense to hold the manufacturer liable. *See id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 10.
46. *See id.*

Gorton.[47] Particular focus was on the standard for compensation under the claims system.[48] The result of this debate was S. 1999,[49] introduced by Sen. Danforth in November 1985, and co-sponsored by Sen. Kassebaum and me. S. 1999 retained the concept of giving the consumer a choice between a speedy claims system for economic loss and a fault-based tort system for full tort damages, but it also made several major changes. It revised the "trigger" or standard for entry into the claims system[50] and added provisions dealing with compensation for injuries in situations involving long latency periods,[51] the payment of attorneys' fees as part of economic loss,[52] manufacturers' record keeping of problems associated with their products,[53] tighter restrictions on the recovery of punitive damages,[54] and several additional changes in the residual tort system.

S. 1999 failed largely because of differences over the standard for compensation in the claims system. The business community feared the standard might greatly increase the number of claimants and so argued for the inclusion of more tort defenses. Their inclusion, even if all parties had agreed, would have defeated the objective of a simple, easily understandable trigger. Much litigation would have been required to resolve its meaning. On the other hand, consumer groups feared that the trigger would not compensate enough people. In the end, the effort to devise a different standard for compensation in the alternative claims system was abandoned.

Supporters of alternative claims systems then tried to devise a system using economic incentives to produce results that would be similar to those sought in Senate Amendment No. 16 and S. 1999. The result was S. 2760, the Product Liability Reform Act.[55] The basic concept of S. 2760 was that in a court proceeding, either the plaintiff or the defendant could offer to settle the case for a specific amount—net economic loss for small cases and net economic loss, plus $100,000 in very serious injury and death cases[56]—and if the other party refused, then the refusing party could be subject to penalties in the tort suit.[57] Thus, if a manufacturer

47. *See id.* at 12 (statement of Sen. Gorton).
48. These efforts were conducted primarily by a group of consumer, labor and business representatives and Senate staff under the auspices of Sen. Danforth, then Chairman of the Senate Commerce, Science and Transportation Committee. *See id.* at 12-16.
49. S. 1999, 99th Cong., 1st Sess. (1985), also known as the Product Liability Voluntary Claims and Uniform Standards Act.
50. *See Hearing, supra* note 30, at 19-20, 38-39.
51. *See id.* at 39.
52. *See id.* at 20-23.
53. *Id.* at 9-10.
54. *Id.* at 22-23 and 27-31.
55. Actually, the initial result was Senate Amendment No. 1951 to S. 1999, introduced by Sen. Danforth and Sen. Dodd on May 12, 1986. In certain respects, this Amendment outlined a more comprehensive alternative claims system than S. 2760. For example, the Amendment contained detailed provisions for settling claims and provisions insuring that manufacturers would have enough information to make a rational decision on whether or not to settle. For the full text of the Product Liability Reform Act, *see* PROD. SAFETY & LIAB. REP. (BNA) No. 26, at 456-64 (June 27, 1986).
56. *See* S. REP. No. 442, 99th Cong., 2d Sess. 13-19 (1986).
57. *Id.* at 19-22.

refused a settlement offer only to have the court award an amount equal to or greater than the current value of the claimant's offer, the court would have been required to increase the award by the amount of the plaintiff's attorneys' fees and costs, up to a maximum of $100,000.[58] If, on the other hand, the claimant rejected a qualifying offer from the manufacturer and the court then awarded an amount equal to or less than the manufacturer's offer, there would be caps imposed on the plaintiff's recovery.[59]

The bill had some shortcomings: (1) it did not contain a standard for compensation of innocent victims; (2) all actions had to be initiated through a court proceeding, which would have increased transaction costs unnecessarily; (3) the limitations on recoveries through the use of caps, although fair in the average case, would produce unfair results in some cases; and (4) the bill did not require injured people to give manufacturers enough information to make reasoned decisions about whether to make a settlement offer. Nonetheless, it was the best hope for significant change in the 99th Congress.[60]

THE FUTURE OF FEDERAL PRODUCT LIABILTY LEGISLATION

With no apparent interest in product liability alternative compensation bills in either the Senate Commerce or the Senate Judiciary Committee, and with the House Energy and Commerce Committee examining tort reform bills once again, this is a good time to step back and examine what needs to be done to create a product liability system that would better serve all parties to tort litigation.

First, the current federal tort reform bill[61] and the noneconomic damages cap legislation being considered by the states[62] are not the answer. Obviously, such bills are not designed to help claimants overcome their legitimate quarrels with the tort system. It seems equally obvious that the tort reform proposals being considered would have, at most, a marginally favorable effect on manufacturers' costs. Once again, if the proponents of tort reform are correct in their view that the tort system has become far more expensive because judges and juries side with injured people with few resources, rather than manufacturers with greater resources and insurance, then requiring a plaintiff to establish fault in order to recover will not remove the problems that produced today's difficulties.

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58. *Id.* at 18-22.
59. *See* Product Liability Reform Act § 204. For small injuries, the cap would have been net economic loss plus two times economic loss up to a maximum of $50,000. For the seriously injured, those suffering "dignitary loss," the cap would have been net economic loss plus a maximum of $250,000.
60. S. 2760 was reported from the Commerce Committee on June 26, 1986, and reached the Senate floor in September 1986. After several days of debate, however, it was pulled because there were insufficient votes to cut off a threatened filibuster. *See supra* note 3 and accompanying text.
61. H.R. 1115, 100th Cong., 1st Sess., 133 CONG. REC. H708 (daily ed. Feb. 18, 1987).
62. CAL. CIV. CODE § 1431 (West 1987) (in personal injury, property damage or wrongful death actions, liability for each defendant is several for non-economic damages).

Joint and several liability provisions may be of some utility, but they, too, have some problems. First, nothing would prevent a sympathetic jury from assigning a greater percentage of fault to the "deep pocket" to compensate for the new law. Second, the joint and several provisions still would apply to economic losses, with several liability attaching only to noneconomic losses. Inasmuch as the data show compensation in serious injury cases rarely approaches full compensation of economic losses,[63] let alone noneconomic losses, the joint and several liability reform may be of limited utility to deep pockets. For the same reasons, the various state laws imposing caps on noneconomic damages are likely to be of little help to manufacturers and insurers.[64]

If tort reform proposals are unlikely to have a significant effect on manufacturers' costs and would do nothing to solve the equally serious problems of injured people, what should be done to reform the product liability system? We need not look too far for the answer. It lies in the work that was done in 1985 and 1986.[65] There appeared to be general agreement among the parties, with the exception of the trial bar, that there should be an alternative claims system and that offers from the parties could replace development of a different standard for recovery in the claims system. There also was agreement that an offer of net economic loss was the appropriate offer in all cases except those involving death and serious injuries, although there remains disagreement about whether $100,000 constitutes an appropriate noneconomic damages offer in such cases.[66]

The bill failed in the Senate largely because of its use of caps as a means of encouraging people to settle cases. Although there are different, and perhaps fairer, ways to set caps, it might be more fruitful to look for alternative incentives to encourage settlements. If manufacturers are most afraid of the application of non-fault-based standards, the availability of a fault-based standard could be used as the incentive to encourage

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63. *See supra* note 14 and accompanying text.

64. The only proposal that would have had a significant effect was the Reagan Administration's proposal to cap all noneconomic damages—including those for punitive damages—at $100,000. When the Senate Commerce Committee marked up the bill that was to become S. 2760, not even the staunchest supporters of the manufacturers' position were willing to offer the proposal as an amendment.

65. *See supra* notes 30-60 and accompanying text.

66. The average payment in serious injury cases does not match the level of economic loss and takes about five years to collect. *See supra* note 24 and accompanying text. Thus, a good argument can be made that timely payment for economic loss with no payment for noneconomic loss would represent a better system than the present one. Although there is no magic total cost figure for any new system, it is politically unlikely to prevail unless the new system is no more expensive than the old one. Inasmuch as more people would be compensated under an alternative claims system, and the funds would come from payments beyond economic loss in the present system and from lower attorneys' fees, what level, if any, of noneconomic damages payment would be justified in the claims system? It is important to remember that the use of incentives other than caps to encourage settlement weakens the argument for paying noneconomic damages in the claims system. An injured person can always choose to sue for full tort damages. The figures set for compensation in the claims system must be affordable within the overall context of the new system, and they must not be so high that they discourage manufacturers from making offers.

manufacturers to make settlement offers. For example, when a claimant rejects a settlement offer, the individual should not be allowed to recover in a tort suit unless he or she could establish that the manufacturer's negligence caused the injury. The offer would thus foreclose the applicability of absolute or strict liability standards. It might also be worth considering increasing the standard of proof to "clear and convincing" and the standard of liability to gross negligence. Should the plaintiff turn down a fair offer to make him or her economically whole (plus an amount for noneconomic damages well above the average amount recovered in serious injury cases), then the plaintiff should truly be required to demonstrate bad conduct by the manufacturer in order to recover full tort damages.

Imposing any penalty on defendants for failing to accept settlement offers would be a lesser concern, because manufacturers are afraid of the tort system. The threat of litigation should be sufficient to get defendants to pay where it is clearly their fault or the case is close, and any penalty would be superfluous.[67]

In sum, a person injured by a product would have two choices. First, the person could file a claim against the manufacturer for net economic loss and, in the case of a serious and permanent injury, net economic loss plus $100,000 to $250,000. If the manufacturer agreed to pay, then the manufacturer would be obligated to pay all such losses. The manufacturer would not be permitted to discharge its obligation by offering a specific amount; the manufacturer would have to agree to pay "net economic loss."

Alternatively, the injured person could file a suit seeking all tort damages permissible under state law. Here, the manufacturer could use information obtained during discovery to decide whether to make an offer to pay net economic loss. If such an offer were made and refused, the plaintiff would have to meet a fault standard to prevail.[68]

THE NEED FOR CHANGE

Although a change from caps to a fault-based standard might be the key to workable and fair legislation, time has shown that no side has the political power to impose its will on others. Thus, there probably will be major federal product liability legislation only when manufacturers, insurers, labor and consumers recognize the problems with the present system and actively seek new legislation.

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67. The premise that judges and juries misapply the fault standard to compensate victims would not apply in a system where the victim has been offered and has turned down a fair settlement. To assure that the jury would be aware of the offer, the legislation could require the court to inform the jury of settlement offers rejected by the injured person.

68. A number of the other tort changes from S. 2760 probably should be made. These changes could be part of the residual tort system for all cases or triggered if the manufacturer makes a conforming offer and the claimant turns it down. Senate Amendment No. 1951 follows an in-between course. Most of the tort changes are applicable to all lawsuits. Some of the changes, however, such as those in the joint and several liability, apply only if the manufacturer made an appropriate offer.

Manufacturers and insurers are convinced, obviously, that changes are needed. Although their first choice would be tort reform, they showed during the 99th Congress that they are prepared to accept an alternative claims system if changes are made in the tort system.[69]

Consumer and labor representatives, however, are not convinced that federal legislation is in their best interest. The first concern for many is whether the tort system really does treat injured people poorly. In the 99th Congress, they often questioned whether the Insurance Services Office data was still valid in the mid-1980s.[70] Perhaps the recent insurance data reaffirming the plight of the average victim will heighten concern about the tort system's ability to compensate people injured by products.[71] Increases in the cost of particular products and the failure to introduce technologically feasible but uninsurable products might also sensitize the consumer community. Labor will have a particular interest if insurance costs result in lost jobs as products are not produced and if federal legislation can address the problems of long-latency illnesses more effectively than state worker compensation laws.

If these or other factors eventually convince consumer and labor representatives they have as much to gain as manufacturers and insurers from changing the present product liability system, then the next issue will be what shape the legislation should take. To date, they have opposed all tort reform bills, and there is no reason to expect that stance to change, since such bills do not address the problems injured people face in the tort system.

Consumer and labor representatives have participated in numerous meetings on proposals to create alternative claims systems. Although they have been suspicious about such systems, they have not expressed opposition to the concept. If they resolve their doubts about how badly the tort system treats injured people, then the next key step they will have to take will be to stop rejecting alternatives because they can identify a few situations that will not be resolved in the way they think they should be. Instead, they could look at the aggregate advantages of a new system—in terms of compensation for more innocent injured people, faster compensation, similar compensation for similarly injured people and assured compensation for those who need it the most, the seriously injured.

CONCLUSION

In the final analysis, major product liability legislation will be passed only when all parties stop measuring new proposals against their view of perfection and instead measure them against the highly imperfect tort system. If and when that time is reached, the work Sen. Danforth and I

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69. A minority of manufacturers actually supported an alternative claims system as a key improvement to the present system.
70. *See supra* note 13 and accompanying text.
71. *See supra* notes 13-28 and accompanying text.

have done, with some modifications, will provide the framework for a new product liability system.