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PART VIII

DEPARTMENT OF COMMERCE

Office of the Secretary

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DRAFT UNIFORM PRODUCT LIABILITY LAW

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INTRODUCTION

The Department of Commerce is seeking public comment on the Draft Model product Liability Law which follows. On the basis of the public comment the draft law will be revised. That work product will be reviewed by the Administration and a final version will be published as a model law for use by the states.

BACKGROUND OF THE DRAFT LAW

The Department chaired an 18-month interagency study on the topic of product liability. The Task Force's Final Report was published on November 1, 1977.

On the basis of that report, representatives from the Office of Management and Budget and the Domestic Policy Staff of the White House asked the Department of Commerce to prepare an options paper regarding what action, if any, the Federal Government should take to address the product liability problem. That paper was published in the FEDERAL REGISTER On April 6, 1978 (43 FR 14612 (1978)). A synthesis of the public comment on the options paper was published in the FEDERAL REGISTER on September 11, 1978 (43 FR 40438 (1978)).

On July 20, 1978, the Administration announced its program to address the product liability problem. Its short-range measure, a tax proposal, was enacted into law (Revenue Act of 1978, Pub. L. No. 95-600, § 371).

A principal long-range measure was a model uniform product liability law. The model law is intended to balance the interests of product users and sellers and to provide uniformity in the major areas of tort law that may affect product liability insurance rate-making.

SOURCES OF THE LAW

The model law is based, in part, on the work products of the Interagency Task Force on Product Liability, including its Final Report, its Legal Study, its Industry Study, and its Insurance Study.[1] Also, a thorough review was conducted of all major case law and law review literature that had been published since the time of the Task Force's Legal Study.

As will be apparent from the Law's section-by-section analysis, attention was given to:

(1) Findings of the extensive Product Liability Closed Claim Survey conducted by the Insurance Services Office in 1976-1977;

(2) All product liability legislation that has been enacted at the state level plus major proposals that had been before state legislatures in the past two years;

(3) Congressional hearings on product liability and the Report of the House Subcommittee on Capital, Investment and Business Opportunties of the Committee on Small Business (see Report No. 95-997 (Congressman John LaFalce, Chairman)); and

(4) Privately drafted model product liability legislation.

A bibliography of some of the major resources considered by the Department is set forth in Appendix A.

CRITERIA FOR THE LAW

Aside from the principal goal of balancing the interests of product users and sellers, six criteria were utilized in evaluating provisions of the model code:[2]

(1) *Ensure the availability of "affordable" product liability insurance with adequate coverage to product sellers that engage in reasonably safe design and quality control practices.*

This consideration suggests that the law should attempt to create a situation in which "affordable" product liability insurance is available to manufacturers that follow reasonably safe manufacturing practices. It should not, however, be modified in order to provide such insurance to manufacturers who are unwilling or unable to follow reasonably safe manufacturing practices.

(2) *Ensure that a person injured by an unreasonably unsafe product receives reasonable compensation for his or her injury.*

Many proposed alterations in product liability law are primarily justified by the fact that they contain "cost-saving devices" for product liability insurers or their insureds. This consideration would balance this projected "cost saving" against the responsibility of product sellers for providing reasonable compensation to persons harmed by unreasonably unsafe products.

(3) *Place the incentive for risk prevention on the party or parties who are best able to accomplish that goal.*

Part of the product liability problem has, in part, been caused by unsafe manufacturing practices. Obviously, it is in the interest of all groups affected by the product liability problem to reduce the number of accidents caused by products. The Task Force study showed that product liability law can help bring about this goal. The threat of tort law liability and product liability judgments has prompted manufacturers to make a greater effort to produce safe products. Nevertheless, existing state product liability law does not place the incentive for risk prevention on the party or parties who can best implement that goal.

The placement of an incentive for risk prevention is not an easy task. At least two factors helped determine where it should be located. One is based on pure economics—which party can prevent the risk at lowest cost. Economic analysis of preliminary drafts of this law were helpful in that regard.

A second factor focused on who is in the best practical position to prevent a product-related injury. This factor may point to another party. Sometimes a product seller may be in a better practical position to implement a risk prevention technique although a product user could do so at a lesser cost.

(4) *Expedite the reparations process from the time of injury to the time the claim is paid.*

Delays in the reparations process do not serve any social interest. A seriously injured claimant can ill afford to endure long delays between the time of his injury and the time he is paid. Therefore, the law has placed emphasis on arbitration and other means that will help expedite the reparations process.

(5) *Minimize the sum of accident costs, prevention costs, and transaction costs.*

This goal, while worthwhile, is not easy to fulfill within the tort-litigation system. For example, one can minimize "transaction costs" by abolishing trial by jury; however, this would be at the expense of other societal values which are particularly important in product liability cases, such as the need for the individualized judgment of cases and the experience of ordinary persons in making those judgments. Nevertheless, this consideration is significant enough to weigh in formulating the draft law.

(6) *The remedy is comparatively specific and concrete in nature and format.*

Many product liability proposals that appear sound when stated in a broad and general manner break down when one focuses on the practicality of their implementation. In drafting the law, practicality, as well as conciseness and clarity of language, were important goals. The law was drafted as

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[1] The Task Force's reports are available from the National Technical Information Service, Springfield, Virginia 22161. Reference should be made to the appropriate accession number, and a check made payable to NTIS in the proper amount should be enclosed. Final Report: Accession Number PB 273-220, price $20.00; Legal study: PB 263-601, price $31.25 (Volume I is an Executive Summary and may be ordered separately—PB 265-450, price $6.50); Industry Study: PB 265-542 price $21.25; Insurance Study: PB 263-600, price $9.00.

[2] A more extensive discussion of these criteria appears in the Task Force Report, pp. VII-29.

a guideline for courts, not as a detailed legal contract between product seller and user.

Other considerations were utilized in the process of formulating each of the sections. They are high-lighted in the section-by-section analysis that accompanies the law. Again, permeating the discussion of all remedies is the concern that the provision is fair to all of the many groups that have an interest in the product liability problem.

Finally, it is important to understand the basic philosophy that underlies the model product liability law. Product liability law is a branch of the law of torts. The function of tort law is to shift the cost of an accident from a claimant to a defendant when that person is deemed "responsible" for the claimant's injuries. This responsibility should be defined in terms that everyone can understand. It should indicate why a particular individual product seller should bear the cost of that injury.

Tort law is not a compensation system similar to Social Security or Worker Compensation. A product seller is not being asked to pay merely because his product caused an injury. If that were the case, it would be far more efficient and less expensive to make purchasers of products third-party beneficiaries of product sellers' insurance policies and provide a limited damage recovery, as is the case with other compensation systems. In sum, product liability law should impose liability only where it is fair to deem the product seller responsible for an injury.

REQUEST FOR COMMENT

We would appreciate your comments and regret that we may be unable to provide individual acknowledgements to each communication. Out time will be reserved for giving close attention to your suggestions and observations. Comment should be addressed to Victor Schwartz, Chairman, Task Force on Product Liability and Accident Compensation, Room 5027, U.S. Department of Commerce, Washington, DC 20230. Because of the need for prompt action in this matter, comments must be forwarded within 45 days. We anticipate publishing a final version in June 1979.

C. L. HASLAM,
General Counsel.
VICTOR E. SCHWARTZ,
Chairman, Task Force on Product Liability and Accident Compensation.

OUTLINE: DRAFT UNIFORM PRODUCT LIABILITY ACT

UNIFORM PRODUCT LIABILITY ACT

PREAMBLE

This Act sets forth uniform standards for state product liability tort law. It does not cover all issues that may be litigated in product liability cases; rather, it focuses on those where the need for uniform rules is the greatest. The purpose of these uniform rules is to eliminate existing confusion and uncertainty on the part of both product users and product sellers about their respective legal rights and obligations. Improving the level of certainty as to how state product liability law will deal with claims for injuries caused by allegedly defective products should also, over time, promote greater availability and affordability in product liability insurance and greater stability in rates and premiums.

SEC. 100. SHORT TITLE

This Act shall be known and may be cited as the "Uniform Product Liability Act."

SEC. 101. FINDINGS

(a) Sharply rising product liability insurance premiums have created serious problems in interstate commerce resulting in:

(1) Increased prices of consumer and industrial products;

(2) Disincentives to develop high-risk but potentially beneficial products;

(3) Businesses going without product liability insurance coverage, thus jeopardizing the availabiltiy of compensation to injured persons; and

(4) Panic "reform" efforts that would unreasonably curtail the rights of product users.

(b) One cause of these problems is that product liability law is frought with uncertainty; the rules vary from jurisdiction to jurisdiction and are in a constant state of flux, thus militating against predictability of litigation outcome.

(c) Insurers have cited uncertainty in product liability law and litigation outcome as a justification for setting rates and premiums that, in fact, may not reflect actual product risk.

(d) Product liability insurance rates are set on the basis of a countrywide, not an individual state, experience. Thus, individual states can do little to solve the problem because a product manufactured in one state can readily cause injury in any one of the other 49 states or the District of Columbia.

(e) Uncertainty in product liability law and litigation outcome is added to litigation costs and may put an additional strain on the judicial system.

(f) Recently enacted state product liability legislation has widened already existing disparities in the law.

SEC. 102. DEFINITIONS

(1) *Product Seller.*

"Product seller" means any person or entity, including a manufacturer, wholesaler, distributor, or retailer, who is engaged in the business of selling such products, whether the sale is resale, or for use or consumption. The term "product seller" also includes lessors or bailors of products who are en-

gaged in the business of leasing or bailment of products.

(2) *Product Liability Claim.*

"Product liability claim" includes all claims or actions brought for personal injury, death, or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of any product. It includes, but is not limited to, all actions based on the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or under any other substantive legal theory in tort or contract.

(3) *Claimant.*

"Claimant" means a person asserting a legal cause of action or claim and, if the claim is asserted on behalf of an estate, claimant includes claimant's decedent. Claimants include product users, consumers, and bystanders who are harmed by defective products.

(4) *Harm.*

"Harm" includes damage to property and personal physical injuries including emotional harm. It includes damage to the product itself. Damage caused by loss of use of a product is not included, but a claim may be allowed if the seller expressly warranted this protection and this warranty was intended to extend to claimant.

(5) *Manufacturer.*

"Manufacturer" includes product sellers who design, assemble, fabricate, construct, process, package, or otherwise prepare a product or component part of a product prior to its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

(6) *Reasonably Anticipated Conduct.*

"Reasonably anticipated conduct" means conduct which would be expected of an ordinary prudent person who is likely to use the product.

(7) *Clear and Convincing Evidence.*

"Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established.

SEC. 103. SCOPE OF THIS ACT

(a) A product liability claim provided by this Act shall be in lieu of all existing claims against product sellers (including actions in negligence, strict liability, and warranty) for harms caused by a product.

(b) A claim may be asserted successfully under this Act even though the claimant did not buy the product from or enter into any contractual relationship with the product seller.

(c) The previously existing applicable state law of product liability is modified only to the extent set forth in this Act.

SEC. 104. THE BASIC STANDARDS OF RESPONSIBILITY

A product seller may be subject to liability for harm caused to a claimant who proves by a preponderance of the evidence that one or more of the following conditions apply: the product was defective in construction (Subdivision 104A); the product was defective in design (Subdivision 104B); or the product was defective in that adequate warnings or instructions were not provided (Subdivision 104C).

104(A) *The Product Was Defective in Construction.*

The harm was caused because the product was not made in accordance with the product seller's own design or manufacturing standards. In determining whether the product was defective, the trier of fact may consider the product seller's specifications for the product, and any differences in the product from otherwise identical units of the same product line.

104(B) *The Product Was Defective in Design.*

The harm was caused because the product was defective in design. In determining whether the product was defective, the trier of fact shall consider whether an alternative design should have been utilized, in light of:

(1) The likelihood at the time of manufacture that the product would cause the harm suffered by the claimant;

(2) The seriousness of that harm;

(3) The technological feasibility of manufacturing a product designed so as to have prevented claimant's harm;

(4) The relative costs of producing, distributing, and selling such an alternative design; and

(5) The new or additional harms that may result from such an alternative design.

104(C) *The Product Was Defective Because Adequate Warnings or Instructions Were Not Provided.*

The harm was caused because the product seller failed to provide adequate warnings or instructions about the dangers and proper use of the product.

(1) In determining whether adequate instructions or warnings were provided, the trier of fact shall consider:

(a) The likelihood at the time of manufacture that the product would cause the harm suffered by the claimant;

(b) The seriousness of that harm;

(c) The product seller's ability to anticipate at the time of manufacture that the expected product user would be aware of the product risk, and the nature of the potential harm; and

(d) The technological feasibility and cost of warnings and instructions.

(2) In claims based on Section 104(C), the claimant shall prove that if adequate warnings or instructions had been provided, a reasonably prudent person would not have suffered the harm.

(3) A product seller may not be considered to have provided adequate warnings or instructions unless they were devised to communicate with the person(s) best able to take precautions against the potential harm.

SEC. 105. UNAVOIDABLY UNSAFE ASPECTS OF PRODUCTS

(a) An unavoidably unsafe aspect of a product is that aspect incapable of being made safe in light of the state of scientific and technological knowledge at the time of manufacture.

(b) A product seller may be subject to liability for failing to provide an adequate warning or instruction about an unavoidably unsafe aspect of the seller's product, if the factors set forth in Section 104, subdivision (C) indicate that such warnings or instructions should have been given. This obligation to warn or instruct may arise after the time the product is manufactured.

(c) If Section 104(C) is not applicable, the product seller shall not be subject to liability for harm caused by an unavoidably unsafe aspect of a product unless the seller has expressly warranted by words or actions that the product is free of such unsafe aspects.

SEC. 106. RELEVANCE OF THE "STATE OF THE ART" AND INDUSTRY CUSTOM

(a) For the purposes of this section, "state of the art" means the safety, technical, mechanical, and scientific knowledge in existence and reasonably feasible for use at the time of manufacture.

(b) Evidence of changes in a product design, in the "state of the art," or in the custom of the product seller's industry occurring after the product was manufactured is not admissible for the purpose of proving that the product was defective in design under Section 104(B), or that a warning or instruction should have accompanied the product at the time of manufacture under Section 104(C). The evidence may be admitted for other purposes if its probative value outweighs its prejudicial effect.

(c) Evidence of custom in the product seller's industry is generally admissible. The product seller's compliance or non-compliance with custom may be considered by the trier of fact in determining whether a product was defective in design under Section 104(C), or whether there was a failure to warn or instruct adequately under Section 104(C).

(d) Evidence that a product conformed to the "state of the art" at the time of manufacture, raises a presumption that the product was not defective within the meaning of Sections 104(B) and (C). This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Section 104 (B) and (C), the product was defective.

(e) A product seller may by a motion request the court to determine whether the injury-causing aspect of the product conformed to a non-governmental safety standard having the following characteristics:

(1) It was developed through careful, thorough product testing and a formal product safety evaluation;

(2) Consumer as well as manufacturer interests were considered in formulating the standard;

(3) It was considered more than a minimum safety standard at the time of its development; and

(4) The standard was up-to-date in light of the technological and scientific knowledge reasonably available at the time the product was manufactured.

If the court makes such a determination in the affirmative, it shall instruct the trier of fact to presume that the product was not defective. This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Sections 104(B) and (C), the product was defective.

SEC. 107. RELEVANCE OF COMPLIANCE WITH LEGISLATIVE OR ADMINISTRATIVE STANDARDS

(a) A product seller may by a motion request the court to determine whether the injury-causing aspect of the product conformed to an administrative or legislative standard having the following characteristics:

(1) It was developed as a result of careful, thorough product testing and a formal product safety evaluation;

(2) Consumer as well as manufacturer interests were considered in formulating the standard;

(3) The agency responsible for enforcement of the standard considered it to be more than a minimum safety standard at the time of its promulgation; and

(4) The standard was up-to-date in light of the technological and scientific knowledge reasonably available at the time the product was manufactured.

(b) If the court makes such a determination in the affirmative, it shall instruct the trier of fact to presume that the product was not defective. This presumption may be rebutted by clear and convincing evidence that in light of the factors set forth in Section 104 (B) and (C), the product was defective.

SEC. 108. NOTICE OF POSSIBLE CLAIM REQUIRED

(a) An attorney who anticipates filing a claim under this Act shall present a notice of this claim stating the time, place and circumstances of events giving rise to the claim along with an estimate of compensation or other relief to be sought.

(b) This notice shall be given within six months of the date of entering into an attorney-client relationship with the claimant in regard to the claim. For the purposes of this Act, such a relationship arises when the attorney, or any member or associate of the attorney's firm, agrees to serve the claimant's interests in regard to the anticipated claim. Notice shall be given to all persons or entities against whom the claim is likely to be made.

(c) Any product seller who receives notice pursuant to subsection (a) promptly shall furnish claimant's attorney with the names and addresses of all persons the product seller knows to be in the chain of manufacture and distribution, if requested to do so by the attorney at the time the notice is given. Any product seller who fails to furnish such information shall be subject to liability as provided for in subsection (e).

(d) A claimant who delays entering into an attorney-client relationship to delay unreasonably the notice required by subsection (a) shall be subject to liability as provided in subsection (e).

(e) Any person who suffers monetary loss because of the failure of a claimant or his attorney or of a product seller in the chain of manufacture and distribution to comply with the requirements of this section may recover damages, costs, and reasonable attorneys' fees from that party. Failure to comply with the requirements of this section does not affect the validity of any claim or defense under this Act.

SEC. 109. LENGTH OF TIME PRODUCT SELLERS ARE SUBJECT TO LIABILITY FOR HARM CAUSED BY THEIR PRODUCTS

(A) Useful Safe Life.

(1) A product seller may be liable to a claimant for harm caused by the seller's product during the useful safe life of that product. "Useful safe life" refers to the time during which the product reasonably can be expected to perform in a safe manner. In determining whether a product's useful safe life has expired, the trier of fact may consider:

(a) The effect on the product of wear and tear or deterioration from natural causes;

(b) The effect of climatic and other local conditions in which the product was used;

(c) The policy of the user and similar users as to repairs, renewals and replacements;

(d) Representations, instructions and warnings made by the product seller about the product's useful safe life; and

(e) Any modification or alteration of the product by a user or third party.

(2) A product seller shall not be liable for injuries or damage caused by a product beyond its useful safe life unless the seller has so expressly warranted.

(B) Statutes of Repose.

(1) Workplace Injuries.

(a) A claimant entitled to compensation under a state worker compensation statute may bring a product liability claim under this Act for harm that occurs within ten (10) years after delivery of the completed product to its first purchaser or lessee who was not engaged in the business of selling products of that type.

Where this Act precludes a worker from bringing a claim because of subdivision (1)(a), but the worker can prove, by the preponderance of evidence, that the product causing the injury was unsafe, the worker may bring a claim against the workplace employer. If possible, the claim should be brought in a worker compensation proceeding, and shall include all loss of wages that otherwise would not be compensated under the applicable worker compensation statute.

(c) Where this Act precludes a worker's beneficiaries under an applicable wrongful death statute from bringing a wrongful death claim because of subdivision (1)(a), but they can prove, by a preponderance of evidence, that the product that caused the worker's death was unsafe, they may bring a claim against the workplace employer. If possible, the claim must be brought in a Worker Compensation proceeding, and shall include pecuniary losses that would not have otherwise been compensated under the applicable worker compensation statute.

(d) An employer who is subject to liability under either subsection (1) (b) or (c) shall have the right to seek contribution from the product seller in an arbitration proceeding under Section 116 of this Act. Contribution shall be limited to the extent that the product seller is responsible for the harm incurred under the principles of Section 104 of this Act. The final judgment in

that proceeding shall not be subject to trial *de novo*, but shall be treated as a final judgment of a trial court.

(2) Non-Workplace Injuries.

For product liability claims not included in subdivision (B) that involve harms occurring more than ten (10) years after delivery of the completed product to its first purchaser or lessee who was not engaged in the business of selling products of that type, the presumption is that the product has been utilized beyond its useful safe life as established by subdivision (A). This presumption may be rebutted by clear and convincing evidence.

(3) Limitations on Statutes of Repose.

(a) Where a product seller expressly warrants or promises that the seller's product can be utilized safely for a period longer than ten (10) years, the period of repose shall be extended according to these warranties or promises.

(b) The ten (10) year period of repose established in Section 109(B) does not apply if the product seller intentionally misrepresents a product, or fraudulently conceals information about it, where that conduct was a substantial cause of the claimant's harm.

(c) Nothing contained in Section 109(B) shall affect the right of any person found liable under this Act to seek and obtain contribution or indemnity from any other person who is responsible for harm under this Act.

(d) The ten (10) year period of repose established in Section 109(B) does not apply if the harm was caused by prolonged exposure to a defective product, or if an injury-causing aspect of the product existing at the time it was sold did not manifest itself until ten years after the time of its first use.

(C) Statute of Limitations.

All claims under this Act shall be brought within three years of the time the claimant discovered, or in the exercise of due diligence should have discovered, the facts giving rise to the claim.

SEC. 110. RELEVANCE OF THIRD-PARTY ALTERATION OR MODIFICATION OF A PRODUCT

(a) A product seller shall not be liable for harm that would not have occurred but for the fact that his product was altered or modified by a third party unless:

(1) The alteration or modification was in accordance with the product seller's instructions or specifications;

(2) The alteration or modification was made with the express consent of the product seller; or

(3) The alteration or modification was the result of conduct that reasonably should have been anticipated by the product seller.

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested or intended by the product seller. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear.

SEC. 111. RELEVANCE OF CONDUCT ON THE PART OF PRODUCT LIABILITY CLAIMANTS

(a) General Rule.

In any claim under this Act, the comparative responsibility of, or attributed to, the claimant, shall not bar recovery but shall diminish the award of compensatory damages proportionately, according to the measure of responsibility attributed to the claimant.

(b) Apportionment of Damages.

In any claim involving comparative responsibility, the court, unless otherwise requested by all parties, shall instruct the jury to give answers to special interrogatories, or the court shall make its own findings if there is no jury, indicating—

(1) The amount of damages each claimant would have received if comparative responsibility were disregarded, and

(2) The percentage of responsibility allocated to each party, including the claimant, as compared with the combined responsibility of all parties to the action. For this purpose, the court may decide that it is appropriate to treat two or more persons as a single party.

(3) In determining the percentage of responsibility, the trier of fact shall consider, on a comparative basis, both the nature and quality of the conduct of the party.

(4) The court shall determine the award for each claimant according to these findings and shall enter judgment against parties liable on the basis of the common law joint and several liability of joint tortfeasors. The judgment shall also specify the proportionate amount of damages allocated against each party liable, according to the percentage of responsibility established for that party.

(5) Upon a motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is still to be subject to contribution and to any continuing liability to the claimant on the judgment.

(c) Conduct Affecting Claimant's Responsibility.

(1) Failure to Discover a Defective Condition.

(i) A claimant is not required to have inspected the product for defective condition. Failure to have done so does not render the claimant responsible for the harm caused.

(ii) Where a claimant using a product is injured by a defective condition that would have been apparent to an ordinary prudent person, the claimant's damages are subject to reduction according to the principles of subsections (a) and (b).

(2) Using a Product With a Known Defective Condition.

(i) A claimant who knew about a product's defective condition, but who voluntarily and unreasonably used the product, shall be held solely responsible for injuries caused by that defective condition.

(ii) In circumstances where a claimant knew about a product's defective condition and voluntarily used the product, but where the reasonableness of doing so was uncertain, claimant's, damages shall be subject to reduction according to the principles of subsections (a) and (b).

(3) Misuse of a Product.

(i) Where a claimant has misused a product by using it in a manner that the product seller could not have reasonably anticipated, the claimant's damages shall be reduced according to the principles of subsections (a) and (b).

(ii) Where the injury would not have occurred but for the misuse defined in subsection (3)(i), the product is not defective for purposes of liability under this Act.

SEC. 112. MULTIPLE DEFENDANTS: CONTRIBUTION AND IMPLIED INDEMNITY

(a) Rights of contribution and implied indemnity among multiple defendants shall be determined by reference to the principles of Section 111 (a & b).

(b) If the proportionate responsibility of the parties to a claim for contribution has been established previously by the court, as provided in Section 111, a party paying more than its share of the obligation, upon motion, may recover judgment for contribution.

(c) If the proportionate responsibility of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(d) Contribution is available to a person who enters into a settlement with a claimant only: (1) if the liability of the person against whom contribution is sought has been extinguished, and (2) to the extent that the

amount paid in settlement was reasonable.

(e) If a judgment has been rendered, the action for contribution must be brought within one (1) year after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have: (1) discharged by payment the common liability within the period of the statute of limitations or repose applicable to the claimant's right of action against him and commenced the action for contribution within one year after payment, or (2) agreed while action was pending to discharge the common liability and, within one year after the agreement, have paid the liability and brought an action for contribution.

SEC. 113. THE RELATIONSHIP BETWEEN PRODUCT LIABILITY AND WORKER COMPENSATION

In the case of any claim brought under this Act by or on behalf of a person who has been or will be compensated for injuries under a state worker compensation law, where an employer's failure to comply with any statutory or common law duty relating to workplace safety contributed to the claimant's injuries, the employer shall be subject to a contribution claim as provided in Section 112 of this Act for a sum not to exceed the amount of the worker compensation lien.

SEC. 114. THE INDIVIDUAL RESPONSIBILITY OF PRODUCT SELLERS OTHER THAN MANUFACTURERS AS COMPARED TO OTHER PRODUCT SELLERS

(a) Manufacturers shall be responsible for defective conditions in their products according to the provisions of this Act. In the absence of express warrantees to the contrary, other product sellers shall not be subject to liability in circumstances where they do not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition.

(b) The duty limitation of subsection (a) shall not apply, however, if:

(1) The manufacturer is not subject to service of process in the claimant's own state;

(2) The manufacturer has been judicially declared insolvent;

(3) The court determines that the claimant would have appreciable difficulty enforcing a judgment against the product manufacturer.

SEC. 115. SANCTIONS AGAINST THE BRINGING OF FRIVOLOUS CLAIMS AND DEFENSES

(a) After final judgment has been entered under this Act, either party, by motion, may seek reimbursement for reasonable attorneys' fees and other costs that would not have been expended but for the fact that the opposing party pursued a claim or defense that was frivolous.

(b) For the purposes of this Act, a claim or defense is considered frivolous if the court determines that it was without any reasonable legal or factual basis.

(c) If the court decides in favor of a party seeking redress under this section, it shall do so on the basis of clear and convincing evidence. In all motions under this section, the court shall make and publish its findings of fact.

(d) The motion provided for in subsection (a) may be filed and the claim assessed against the person who was responsible for the frivolous nature of the claim or defense.

(e) In situations where a claimant has been represented on a contingent fee basis and no legal costs have been or will be incurred by that claimant, the attorney for claimant may recover reasonable attorneys' fees based on the amount of time expended in opposing a frivolous defense.

(f) Claims for damages under this section shall not include expenses of persons not parties to the action.

SEC. 116. ARBITRATION

(a) Applicability.

In any claim brought under this Act where the amount in dispute is less than $30,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial, either party may by a motion institute a pre-trial arbitration proceeding.

(b) Rules Governing.

(1) The substantive rules of a Section 116 arbitration proceeding shall be those contained in this Act as well as those in applicable state law.

(2) The procedural rules of a Section 116 arbitration proceeding shall be those contained in this section. If this section does not address a particular issue, guidance may be obtained from the the Uniform Arbitration Act.

(3) A legislatively designated state agency may formulate additional procedural rules under this Act.

(c) Arbitrators.

(1) Unless the parties agree otherwise, the arbitration shall be conducted by three persons, one of whom shall be either an active member of the state bar or a retired judge of a court of record in the state, one shall be an individual who possesses expertise in the subject matter area that is in dispute, and one shall be a lay person.

(2) Arbitrators shall be selected in accordance with applicable state law in a manner which will assure fairness and lack of bias.

(d) Arbitrators' Powers.

(1) Arbitrators to whom claims are referred pursuant to Section 116 shall have the power within the territorial jurisdiction of the court, to conduct arbitration hearings and make awards consistent with the provisions of this Act.

(2) State laws applicable to subpoenas for attendance of witnesses and the production of documentary evidence shall apply in procedures conducted under this chapter. Arbitrators shall have the power to administer oaths and affirmations.

(e) Commencement.

The arbitration hearings shall commence not later than 30 days after the claim is referred to arbitration, unless for good cause shown the court shall extend the period. Hearings shall be concluded promptly. The court may order the time and places of the arbitration.

(f) Evidence.

(1) The Federal Rules of Evidence [or designated state evidence code] may be used as guides to the admissibility of evidence in an arbitration hearing.

(2) Strict adherence to the rules of evidence, apart from relevant state rules of privileges, is not required.

(g) Transcript of Proceeding.

A party may have a recording and transcript made of the arbitration hearing at its own expense. A party that has had a transcript or tape recording made shall furnish a copy of the transcript or tape recording at cost to any other party upon request.

(h) Arbitration Award and Judgment.

The arbitration award shall be filed with the court promptly after the hearing is concluded and shall be entered as the judgment of the court after the time for requesting a trial *de novo* has expired, unless a party demands a trial *de novo* before the court pursuant to subsection (i). The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be subject to appeal.

(i) Trial *De Novo*.

(1) Within 20 days after the filing of an arbitration award with the court, any party may demand a trial *de novo* in that court.

(2) Upon demand for a trial *de novo*, the action shall be placed on the calendar of the court and treated for all purposes as if it had not been referred to arbitration. Any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(3) At the trial *de novo*, the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any matter concerning the conduct of

the arbitration proceeding, except that the testimony given at the arbitration hearing may be used for impeachment purposes at a trial *de novo*.

(4) A party who has demanded a trial *de novo* but fails to obtain a judgment in the trial court, exclusive of interest and cost, more favorable than the arbitration award, shall be assessed the cost of the arbitration proceeding, including the amount of the arbitration fees, and—

(i) If this party is a claimant and the arbitration award is in its favor, the party shall pay to the court an amount equivalent to interest on the arbitration award from the time it was filed; or

(ii) If this party is a product seller, it shall pay interest to the claimant on the arbitration award from the time it was filed.

SEC. 117. EXPERT TESTIMONY

(a) Appointment.

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he or she consents to act. An expert witness appointed by the court shall be informed of his or her duties in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. An expert witness so appointed shall advise the parties of any findings; shall be available for deposition by any party; and may be called to testify by the court or any party. The court appointed expert witness shall be subject to cross-examination by each party, including a party calling that expert as a witness.

(b) Compensation.

(1) Expert witnesses appointed by the court are entitled to reasonable compensation in whatever amount the court may allow. The court, in its discretion, may tax the costs of such expert on one party or apportion them between both parties in the same manner as other costs.

(2) In exercising this discretion, the court may consider:

(i) Which party won the case;

(ii) Whether the amount of damages recovered in the action bore a reasonable relationship to the amount sought by the claimant or conceded to be appropriate by the product seller.

(c) Disclosure of Appointment.

In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court has appointed the expert witness.

(d) Parties' Experts of Own Selection.

Nothing in this section limits the parties in calling expert witnesses of their own selection.

(e) Pre-Trial Evaluation of Experts.

The court in its discretion may conduct a hearing to determine the qualification of proposed expert witnesses. The court may order a hearing on its own motion or on the motion of either party.

(1) Need for Pre-Trial Evaluation.

In determining whether to grant such a motion, the court shall consider:

(i) The complexity of the issues in the case; and

(ii) Whether the hearing would deter the presentation of witnesses who are not qualified as experts on the specific issues.

(2) Factors in Evaluation.

If the court decides to hold such a hearing, it shall consider:

(i) The scope of the proposed witness' background and skills;

(ii) The formal and self-education the proposed witness has undertaken relevant to the instant case or similar cases; and

(iii) The proposed witness' potential bias.

(3) Findings of Fact.

In making a determination that a proposed expert witness is or is not qualified, the court shall state its findings of fact.

SEC. 118. NON-PECUNIARY DAMAGES

(a) Non-pecuniary damages, including "pain and suffering," shall be determined by the trier of fact. The court shall have the power to review such damage awards.

(b) In cases where the claimant has not suffered permanent serious disfigurement, permanent impairment of bodily function, or permanent mental illness as a result of the product-related harm, non-pecuniary damages shall be limited to $25,000.

SEC. 119. THE COLLATERAL SOURCE RULE

In any claim brought under this Act, the claimant's recovery shall be diminished by any amount he or she has received or will receive in compensation for the same damages from a public source. This provision shall also apply to parties who may be subrogated to the claimant's rights under this Act.

SEC. 120. PUNITIVE DAMAGES

(a) Punitive damages may be awarded if the claimant shows by clear and convincing evidence that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers, or bystanders who might be injured by the product.

(b) If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of those damages. In making this determination, the court shall consider:

(1) The likelihood at the time of manufacture that a serious harm would arise from the product seller's misconduct;

(2) The degree of the product seller's awareness of that likelihood;

(3) The profitability of the misconduct to the product seller;

(4) The duration of the misconduct and any concealment of it by the product seller;

(5) The attitude and conduct of the product seller upon discovery of the misconduct;

(6) The financial condition of the product seller; and

(7) The total effect of other punishment imposed or likely to be imposed upon the product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to claimant and the severity of criminal penalties to which the product seller has been or may be subjected.

SEC. 121. EFFECTIVE DATE

This Act shall be effective with regard to all claims accruing on or after September 1, 1979.

ANALYSIS

PREAMBLE

The importance this Act places in increasing the degree of certainty in the product liability litigation process is tempered by the recognition that even with a nationwide adoption of a uniform code, its application may vary from state to state on some issues. The goal is to promote a greater degree of certainty than the present system.

ANALYSIS

SEC. 100. SHORT TITLE

This is the customary "short title" provision. It may be placed wherever state legislative practice dictates. If a state legislature introduces parts of the Uniform Product Liability Act as separate measures, the short title should be adjusted accordingly.

ANALYSIS

SEC. 101. FINDINGS

Chapter VI and VII of the "Final Report" of the Interagency Task Force on Product Liability (Task Force Report) provide support for most of the findings made here. Additional support comes from the Report of the Subcommittee on Capital, Investment and Business Opportunities, "Product Liability Insurance," 95th Cong., 2d Sess., Report No. 95-977

(1978) (Subcommittee Report). Among other things, this Report called for clarification and simplification of "present tort law relating to product liability for formulating Federal standards to be adopted by the States * * *" (Subcommittee Report, at 76).

Individual state studies on product liability conducted in Missouri (Report of the Senate Select Committee on Product Liability, 1977); Illinois (Judiciary I Subcommittee on Product Liability: Report and Recommendations—Part 1, undated); Georgia (Report of the Senate Products Liability Study Committee, 1978); Maine (Governor's Task Force, 1978); Michigan (Department of Commerce Task Force on Product Liability Insurance, 1978); and Wisconsin (Product Liability, An Overview, Wisconsin Legislative Council Staff, 1978) provide additional support for individual findings.

The Maine and Georgia reports emphasize that individual state tort reforms can do little to affect the product liability problem. Governor Grasso's message vetoing a product liability tort bill passed by the Connecticut legislature in 1978 emphasized that individual state tort action will not stabilize product liability insurance rates.

More specific references to the findings appear in the following citations keyed to the various findings:

(a)(1) Task Force Report at VI-27-28, V-19.

(2) Task Force Report at VI-28-32.

(3) Task Force Report at VI-2-26.

(4) Options Paper on Product Liability and Accident Compensation Issues, 43 FR 14612-4 (1978); Georgia Report Appendix B; Johnson Products Liability "Reform": A Hazard to Consumers, 56 N. "Carol L. Rev." 677 (1978); Comment, "State Legislative Restrictions on Product Liability Actions," 29 "Mercer L. Rev." 619 (1978). *See* Product Liability Legislation, Federal-State Reports, Inc. (1977-1978).

(b) Task Force Report at I-26-28, VII-15-17; Subcommittee Report at 72; Michigan Report at p. 6 (1978).

(c) Task Force Insurance Study (citing uncertainty); Task Force Report at V-48-49 (relationship of premium to risk).

(d) Task Force Report at I-28; Maine Report at 23.

(e) Task Force Report at VII-214-216; *see* ISO Product Closed Claim Survey at 118-130.

(f) *See* Federal State Product Liability Legislation; Federal State Reports (1977-1978); Product Liability Trends at 97-98, 104-05, 157-58 (1978); Business Insurance, p. 22 (12/25/78); *see also* Wisconsin Report at 29-37 (describing twenty-five separate bills on product liability introduced in one legislative session).

ANALYSIS

SEC. 102. DEFINITIONS.

(1) *"Product seller"* includes all parties in the regular commercial distribution chain. It does not include the occasional private seller. This is in accord with the "Restatement (Second) of Torts." The term also includes lessors and bailors of products, in accord with the majority of case law decisions that have addressed that issue. *See* Annot. 52, "A.L.R." 3d 121 (1973),

The Act does not address several definitional problems of "product seller." First, it does not address the problem of the product seller engaged in a service. *See* "Newmark v. Gimbel's, Inc.," 54 N.J. 585, 258 A.2d 697 (1969). It is suggested that a party be considered a product seller where a sale of a product is a principal part of the transaction and where the essence of the relationship between the buyer and seller is *not* the furnishing of professional skill or services. *See* Annot., 29 "A.L.R." 3d 1425 (1970).

Second, the Act does not address the potential product liability problems of the seller of real property. It is suggested that it is only appropriate to apply product liability standards to builder-vendors who engage in the mass production and sale of homes. *See* "Schipper v. Levitt & Sons, Inc.," 44 N.J. 70, 207 A.2d 314 (1965); *But see* "Wright v. Creative Corp.," 30 Colo. App. 575, 498 P.2d 1179 (1972) (rejecting "Schipper").

Finally, the Act does not indicate whether a commercial seller of used products is subject to liability under this Act. This issue is left for resolution as a matter of individual state policy. *See* "Peterson v. Lou Bachrodt Chevrolet Co.," 61 Ill.2d 17, 329 N.E.2d 785 (1975).

(2) *"Product Liability Claim."* One key purpose of this act is to consolidate product liability actions that traditionally have been separated under theories of negligence, warranty, and strict liability. This approach was suggested by the Task Force "Legal Study" as well as the report of the Subcommittee on Capital, Investment and Business Opportunities. While an argument may be made that negligence theory is qualitatively different from strict liability and, therefore, should be preserved, product liability theory and practice has become an entity in and of itself and can only be stabilized if there is one, and not a multiplicity of causes of action.

"Product liability claim" embraces express as well as implied warranties.

(3) *"Claimant."* Both living persons and those claiming through or on behalf of an estate are included within the meaning of the word "claimant." This would include both wrongful death and survival actions.

Although the "Restatement (Second) of Torts" left open the question of whether bystanders should be included within the compass of strict liability claims, subsequent case law has been almost uniform that bystanders should be included. *See* "Giberson v. Ford Motor Co.," 504 S.W.2d 8 (Mo. 1974) (collecting cases). *See also*, Annot., 33 "A.L.R." 3d 415 (1970). The definition follows this line of decisions.

Bystanders include rescuers who come upon the scene. *See* "Guarino v. Mine safety Appliance Co.," 25 N.Y. 2d 460, 255 N.E. 2d 173 (1969).

(4) *"Harm."* The "Restatement" provision included physical harm to persons and property. This Act also includes emotional harm, but only as an element of parasitic damages, *e.g.*, when a person has also been harmed physically. The Act leaves open the question of whether an individual may recover for emotional harm alone under a product liability theory; this issue is left to common law development.

The Act also includes damage to the product itself. *See* "Gherna v. Ford Motor Co.," 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966). Some courts consider this an economic loss and relegate the claimant to whatever rights he or she has under the sales provision of the Uniform Commerical Code. *See* "Hawkins Construction Co. v. Matthews Co., Inc.," 190 Neb. 546, 209 N.W.2d 643 (1973).

Apart from a very limited express warranty claim, the Act does not include damages for consequential economic losses. Most courts have been in accord with "Seely v. White Motor Co.," 63 Cal. 2d 9, 45 Cal. Rptr. 17 (1965) on this issue and have left the claimant with whatever rights he or she has under the Uniform Commerical Code. *See* "Brown v. Western Farmers Assn.," 268 Or. 470, 521 P.2d 537 (1974); "Eli Lilly and Co. v. Casey," 472, S.W.2d 598 (Tex. Civ. App. 1971); "Paul O'Leary Lumber Corp. v. Mill Equipment, Inc.," 448 F.2d 536 (5th Cir. 1971).

The insurance costs of extending consequential economic losses beyond parties to a contract would be enormous. It is much cheaper and more efficient for the product purchaser to obtain insurance against consequential economic losses caused by business stoppage. Also, most courts believe that a commercial purchaser should be charged with the risk that his product will not match his economic expectations unless the manufacturer agrees it will. *See*. Note, "Economic Loss in Products Liability Jurisprudence," 66 "Colum. L. Rev." 917 (1966). However, a claimant can recov-

er for consequential economic losses under an express warranty theory. *See* "Seely v. White Motor Co.," *supra*.

(5) *"Manufacturer."* This definition is based on one in Arizona's product liability law. *See* "Ariz. Rev. Stat. Ann." § 12-681 (1) (1978). Its greatest import within this act is in regard to the responsibility of a manufacturer for defective products as contrasted with other product sellers. *See* Section 114.

(6) *"Reasonably Anticipated Conduct."* The definition is based in part on Arizona product liability law. *See* "Ariz. Rev. Stat. Ann." § 12-681(4) (1978). The meaning of "reasonably anticipated" should be contrasted with "foreseeable." Almost any kind of misconduct with regard to products can be foreseeable—especially if the trier of fact is permitted to use hindsight, *e.g.*, that a soda bottle will be used for a hammer, that someone will attempt to drive a land vehicle on water, that perfume will be poured on a candle in order to scent it. *See* "Moran v. Faberge, Inc.," 273 Md. 538, 332 A.2d 11 (1975).

The approach taken places incentives for risk prevention on product sellers, while also ensuring that the price of products is not affected by the liability insurance costs that would spring from providing coverage for abnormal product use.

(7) *"Clear and Convincing Evidence."* Proof that is clear and convincing carries with it not only the power to persuade the mind as to its probable truth or correctness of fact; it has an additional element of clinching such truth. The term is understood best in context. It requires more proof than the mere preponderance of evidence (the ordinary standard under this Act), but does not require proof beyond a reasonable doubt. *See e.g.*, "Aiello v. Knoll Golf Club," 64 N.J. Super. 156, 165 A.2d 531 (1960); "Cross v. Ledford," 161 Ohio St. 469, 120 N.E.2d 118 (1954); "Brown v. Warner," 78 S.D. 647, 107 N.W.2d 1 (1961).

ANALYSIS

SEC. 103. SCOPE OF THIS ACT

(a) The Act consolidates all product liability recovery theories into one. The approach taken is in accord with the Task Force "Legal Study." While some have argued that for trial tactics purposes it is useful to retain the negligence cause of action as distinct from strict liability, a claimant's attorney can retain the essence of this utility by showing the basic wrongfulness of the product seller's conduct under Section 104.

(b) The Act is in accord with the "Restatement (Second) of Torts" in that it is unnecessary for the claimant to be in contractual privity with the product seller. *See* "Restatement (Second) of Torts" § 402A, Comment c.

(c) The Act and its accompanying commentary do not purport to be an exhaustive compilation of the entire subject of product liability law; rather, they focus on subject matter areas that the Task Force Report suggested have created the most problems and are of major importance.

The interstices of the Act will be filled by statutory or common law additions of the individual states. Some of these interstitial issues will be pointed out in the section-by-section commentary; others will be discovered in the course of litigation under the Act.

ANALYSIS

SEC. 104. BASIC STANDARDS OF RESPONSIBILITY

Perhaps no single product liability issue has generated more controversy than the question of defining the basic standard of responsibility to which product sellers are to be held. Much of this controversy appears to have sprung from the fact that the authors of § 402A of the "Restatement (Second) of Torts" were focusing on problems relating to product mismanufacture or defects in construction; they were not directly concerned with problems relating to defects in design or to the duty to warn. *See* Wade, "On the Nature of Strict Tort Liability for Products," 44 "Miss. L. J." 825, 830-32 (1973).

Courts continue to struggle to articulate the standards of responsibility of product sellers. A multiplicity of approaches have been offered. *See e.g.*, "Barker v. Lull Engineering Co., Inc.," 20 Cal. 3d 413, 143 Cal. Rptr. 225 (1978); "Cepeda v. Cumberland Engineering Co. Inc.," 76 N.J. 152, 386 A.2d 816 (1978); "Phillips v. Kimwood Machine Co.," 269 Ore. 485, 525 P.2d 1033 (1974).

The approach taken in Section 104 is to distinguish cases based on defects in construction, defects in design, and defects caused by a failure to instruct or warn. Each type of case calls for a particular type of treatment. For this reason, this Act does not have a "single" definition of the term "defect," nor does it attempt to resolve the debate over whether a product liability claimant should have to prove that the product was "unreasonably" dangerous. *Compare* "Barker v. Lull Engineering Co., Inc.," *supra*, and "Byrns v. Riddell, Inc.," 113 Ariz. 264, 550 P.2d 1065 (1976). Instead, Section 104 takes an approach which avoids terminological difficulties by focusing on practical considerations that courts and juries have looked to in deciding product liability cases.

This approach should not lead to problems of characterization. The claimant's pleading should indicate the theory on which he or she is proceeding within the framework of Section 104, subdivisions A, B, and C.

A product may be defective in more than one way. Furthermore, there is an important linkage between the duty to warn and defective design. In appropriate cases, a product may be found not to be defective in design if the product seller has given adequate warning about the alleged hazard. *See, e.g.*, "Wagner v. Larsen," 257 Iowa 1202, 136 N.W.2d 312 (1965); "Penn v. Inferno Mfg. Corp.," 199 So.2d 210 (La. App.), *aff'd*, 251 La. 27, 202 So.2d 649 (1967). There are limits to this possibility, however, since a product seller will not be shielded from liability for a poorly designed product, simply by indicating that the product "may be hazardous."

The following commentary discusses each subdivision of Section 104 in turn. First:

(A) *The Product Was Defective in Construction.* The history of imposing strict liability for defects in the construction of products goes back as far as 1913 when sellers of food were first held liable for failure to produce a product reasonably fit for its intended use. *See* "Masetti v. Armour & Co.," 75 Wash. 622, 135 P.633 (1913); Prosser, "The Assault Upon the Citadel," 69 "Yale L.J." 1099 (1960).

Subdivision (A) imposes pure strict liability on the product seller in accordance with Section 402A of the "Restatement (Second) of Torts." This has been an evolving area of strict liability intended to protect the consumer. As Comment c to the "Restatement" states, the seller "has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured [by the product]." Furthermore, "the public has the right to and does expect, in case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods * * *" *Id.*

In the course of its study, the Interagency Task Force on Product Liability found that many product sellers can absorb the financial impact of strict liability based on defects in construction. *See* Task Force Report, at VII-17. The product seller as a distributor of many products absorbs the costs of injuries caused by such a defect (even though having exercised all reasonable care) as part of a responsibility inextricably connected with the modern merchandising of products.

Second:

(B) *The Product Was Defective in Design.* As compared to the situation with respect to defect in construction, no court yet has imposed true strict or absolute liability on product sellers for defects in design appreciating, no doubt, the unlimited liability potential

inherent in such cases where it is almost always possible to design a product more safely. Rather, the courts have balanced a variety of factors in determining whether a particular product is defective in design. *See, e.g.*, "Barker v. Lull Engineering Co., Inc.," *supra;* "Cepeda v. Cumberland Engineering Co. Inc.," *supra;* "Schell v. AMF, Inc.," 567 F.2D 1259 (3d Cir. 1977).

There are several possible ways to limit the unlimited liability potential of design defect cases. One is to create a limited damage compensation system—private or governmental—analogous to worker compensation. Another is to continue to base liability on the individual's moral responsibility under the tort system. Subdivision (B) takes the latter course and places the burden on the claimant to show that in light of a balance of practical, objective factors, the product seller should bear the full cost of the injury and have the responsibility for attempting to distribute that cost through product pricing. Basic principles of tort law suggest that the claimant should carry the burden of proof on this issue. *See* Kalven, Jr., "Torts: The Quest for Appropriate Standards," 53 "Calif. L. Rev." 189 (1965). *But see* "Barker v. Lull Engineering Co., Inc.," *supra.*

The factors listed in this subdivision for the trier of fact to consider have been derived from a very wide variety of sources. *See, e.g.*, "Barker v. Lull Engineering Co. Ltd.," *supra. See also* Vetri, "Products Liability: Developing a Framework for Analysis," 54 "Ore. L. Rev." 293, 310 (1975); Henderson, Jr., "Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication," 73 "Colum. L. Rev." 1531 (1973); Keeton, "Product Liability and the Meaning of Defect," 5 "St. Mary's L. J." 30 (1973); Wade, "On the Nature of Strict Tort Liability for Products," 44 "Miss. L. J." 825 (1973). The factors selected also have been reviewed from an economic perspective.

Factor (1) addresses the problem of judging design cases by hindsight, a significant and justifible concern of product sellers. By focusing on the time of manufacture, Section 104(B) provides an incentive to product sellers to reduce risks, both by design testing and by warning of potential hazards.

Factor (2) raises the possibility that if at the time of manufacture there is the possibility of a very serious harm, the product seller's obligation to take steps to avoid it increases.

Factor (3) overlaps the Act's consideration of the "state of the art" in Section 106. The trier of fact should consider the scientific and technological knowledge available to the product seller at the time of manufacture as well as the custom in the industry.

Factor (4) recognizes that increased costs associated with an alternative design may play a part in deciding whether it is feasible to pursue. Courts occasionally have indicated that it is appropriate for the trier of fact to consider whether because of increased costs of an alternative design, "it would still be reasonable to market the product despite the danger." "Lynd v. Rockwell Manufacturing Co.," 276 Or. 341, 554 P.2d 1000, 1006 (1976).

Factor (5) indicates that if a weighing of considerations, (1)-(4) suggests that an alternative design should have been pursued, it still is appropriate for the trier of fact to consider any new or additional harms that would arise if this alternative design were chosen.

Thus, Subdivision (B) does not set out an algebraic formula as to how each of these factors should be weighed. Certainly, as factors (1) and (2) increase, the trier of fact is more likely to find that the product was defective. On the other hand, it must balance these factors against (3), (4), and (5).

Two factors relied on by some courts in design cases were not included in the Section 104(B) balancing process. First is the "utility" of the product to the user or to society in general. Economic analysis suggests that this element would render the balancing test totally subjective and unworkable. Tested by its "utility," a whole-grain health food cereal conceivably might be subject to a lower standard of responsibility than one that was heavily sugar-coated (less "useful" to society as a whole). On the other hand, if the trier of fact focused on the subjective "value to the user," it might come to the opposite conclusion. The approach of Section 104(B) is to focus the trier of fact on how the product was made and what its dangers are, rather than making macroeconomic judgments about its value to society or to certain individuals.

The second factor not included in the Section 104(B) balancing process is a "consumer expectation" test. The reasons for this are rooted in both economics and practicality. As Professor Wade, Reporter for the "Restatement (Second) of Torts," has stated:

> [T]he consumer would not know what to expect, because he would have no idea how safe the product could be made.

Wade, *supra*, 44 "Miss. L.J." at 829. Again, the notion of consumer expectations suffers from an "overkill" of subjectivity. Each trier of fact is likely to have a different understanding of abstract consumer expectations. Section 104(B) leaves consumer expectations aside and focuses the trier of fact on what design alternatives were possible as a practical matter.

Third:

(C) *The Product Was Defective Because Appropriate Warnings or Instructions Were Not Provided.* A product seller may be held liable under this subdivision even though the product was not found to be defective in design or construction. Even where lack of scientific knowledge or cost factors precludes the use of an alternative design, the product seller still may be required to provide a warning about the product's hazards or to instruct about the product's use. *See* "Brown v. North Am. Mfg. Co," 576 P.2d 711 (Mont. 1978).

As the Task Force Report noted, rules relating to a product seller's duty to warn have changed drastically in recent years, and are unclear in some jurisdictions. *See* Task Force Report, at VII-18. Product sellers want to be informed about the scope of their duty. Nevertheless, practical problems make it impossible to develop a general rule that will inform the product seller—in advance of manufacture—precisely how to instruct or warn about a particular product. On the other hand, some general guidelines can be provided.

Subdivision (C) (1) lists practical factors that a trier of fact shall weigh in determining whether a particular product warning or instruction was adequate. The trier of fact should focus on both instructions and warnings; all representations about a product must be considered in evaluating whether the duty to warn has been discharged. *See* "McCormack v. Hankscraft Co.," 278 Minn. 322, 154 N.W.2d 488 (1967).

Factor (a) is similar to subsection (1) of subdivision (B). The trier of fact is to consider the likelihood that the harm against which the warning is directed will occur. Where the harm is more likely, the duty is greater.

Factor (b) is similar to subsection (2) of subdivision (B). The more serious the anticipated harm, the greater the duty to warn. *See* "Davis v. Wyeth Laboratories, Inc.," 399 F.2d 121 (9th Cir. 1968).

Factor (c) is of special importance. It recognizes that warnings are not made in a vacuum. The product seller must construct warnings and instructions in light of the training, experience, education and knowledge of those who are likely to avail themselves of those warnings or instructions. *See* "Halvorson v. American Hoist & Derrick Co.," 307 Minn. 48, 240 N.W.2d 303 (1976); *compare* "Ford Motor Co. v. Rodgers," 337 So.2d 736 (Ala. 1976); *See also* "Greiner v. Volkswagenwerk Aktiengesellschaft," 429 F.Supp. 495 (E.D.Pa. 1977).

This factor also allows the trier of fact to judge whether the danger was so obvious as not to require a warning. Some courts have followed the much criticized "patent danger" rule that shields the product seller from an obligation to warn about obvious hazards. Numerous jurisdictions have rejected the rule. *See, e.g.* "Byrns v. Riddell, Inc.," 113 Az. 264, 550 P.2d 1065 (1976); "Casey v. Gifford Wood Co.," 61 Mich. App. 208, 232 N.W.2d 360 (1975); "Brown v. North Am. Mfg. Co.," *supra.* In situations where it is inexpensive and easy to do so, it may be appropriate to warn about an obvious danger that is highly likely to cause very serious injuries. *See* Marschall, "An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products," 48 "N.Y.U.L. Rev." 1065 (1973).

A product seller should be able to assume that the ordinary product user is familiar with obvious hazards—that knives cut, that alcohol burns, that it is dangerous to drive automobiles at high speeds.

Factor (d), the technological feasibility and cost of a warning, may not be significant in many cases because warnings are often relatively inexpensive to provide. However, in some situations, it may not be feasible technologically to provide a warning, or at least the type of warning that claimant suggests should have been provided.

Subsection (2) provides that a claimant must show that if adequate warnings had been given, it is more probable than not that the injury would not have occurred. In other words, a claimant must show that the failure to provide an appropriate warning was a cause of his or her harm. In this regard the claimant can show that if the warning had been given, either the product would have been used without incident, or it would not have been used at all. The later situation is likely to arise with pharmaceuticals. The test stated in subsection (2) is an objective one which looks toward the conduct of the reasonably prudent person. *Cf.* "Cobbs v. Grant," 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505, (1972) (informed consent).

Subsection (3) indicates that the warnings or instructions should be devised so as to communicate with the person best able to take suitable precautions. The product seller's duty to warn does not go beyond the technological and other information available at the time of manufacture. This is in accord with the overwhelming majority of court decisions. *See* "Robbins v. Farmers Union Grain Terminal Assn.," 552 F.2d 788 (8th Cir. 1977).

ANALYSIS

SEC. 105. UNAVOIDABLY UNSAFE ASPECTS OF PRODUCTS

Section 105 follows the "Restatement (Second) of Torts" with respect to "products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." *See* "Restatement (Second) of Torts" § 402A, Comment k; *see also* "N.H.Rev. Stat. Ann." § 507-D:4 (1978).

With the exception of one Illinois decision ("Cunningham v. MacNeal Memorial Hospital," 47 Ill. 2d 443, 266 N.E.2d 897 (1970)), subsequently overruled by "Ill. Ann. Stat." ch. 91 §§ 181-84 (1971 as amended), this approach has been followed by the common law courts throughout the United States. *See, e.g.*, "Moore v. Underwood Memorial Hospital," 147 N.J. Super. 252, 371 A.2d 105 (1977) (serum hepatitus contracted from blood supplied); "Dalke v. Upjohn Co.," 555 F.2d 245, (9th Cir. 1977) (tooth discoloration from tetracycline); "Chambers v. G. D. Searle & Co.," 441 F. Supp. 377 (D. Md. 1975) (stroke allegedly from birth control pills); "Coffer v. Standard Brands, Inc.," 30 N.C. App. 134, 226 S.E.2d 534 (1976) (shell in nuts); "Hines v. St. Joseph's Hospital," 86 N.M. 763, 527 P.2d 1075 (1974) (blood transfusion).

Subsection (a) sets the time from which to judge the state of scientific and technological knowledge as the point when the product leaves the manufacturer's control. *See* "Cochran v. Brooke," 243 Or. 89, 409 P.2d 904 (1966).

Subsection (b) makes clear that a product seller may be subject to liability for failure to provide an adequate warning about an unavoidably unsafe aspect of a product. There are certain hazards, particularly in the pharmaceutical field, which are known or can be discovered through the exercise of reasonable care even though they cannot be avoided. *See* "Dalke v. Upjohn Co.," *supra;* "Chambers v. G. D. Searle & Co.," *supra;* "Toole v. Richardson-Merrell, Inc.," 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

The factual question underlying the legal issue of whether warnings or instructions were adequate is whether product sellers meet their duty to promulgate warnings and instructions commensurate with their *actual* knowledge gained from research and adverse reaction reports and their constructive knowledge as measured by scientific literature and other available means of communication. *See* "Dalke v. Upjohn Co.," *supra,* at 248; "McEwen v. Ortho Pharmaceutical Corp.," 270 Or. 375, 528 P.2d 522, 528-29 (1974). *Contra,* "Bruce v. Martin-Marietta Corp.," 544 F.2d 442 (10th Cir. 1976).

Subsection (b) also supports the concept of continuing obligation to warn and instruct based on new information about an unavoidably unsafe aspect of a product, discovered *after* it has been manufactured. *See* "Love v. Wolf," 226 Cal. App.2d. 378, 38 Cal. Rptr. 183 (1964); "Sterling Drug, Inc. v. Yarrow," 408 F.2d 978 (8th Cir. 1969).

Finally, subsection (c) subjects a product seller to liability for an unavoidably unsafe aspect of a product if the seller expressly warrants that a product is free from such defects. For example, if the product seller states that a product is "free and safe from all dangers of addiction" and the claimant becomes addicted to the drug, the seller would be subject to liability. *See* "Crocker v. Winthrop Lab., Div. of Sterling Drug, Inc.," 514 S.W.2d 429 (Tex.1974).

The approach taken in Section 105 recognizes that there may be circumstances where a seriously injured person is left without compensation for an injury caused by an unavoidably unsafe aspect of a product. This is unlikely to be a common occurrence, however, given the presence of other parties in the distributive chain. *See* Willing, "The Comment k Character: A Conceptual Barrier to Strict Liability," 29 "Mer. L. Rev." 545, 580-81 (1978). For reasons of policy, Section 105 proposes that a product seller not be held responsible for harms that are simply unavoidable. *See* A. Johnson, "Products Liability 'Reform': A Hazard to Consumers," 56 "N. Carol. L. Rev." 676, 690 (1978). If the costs of these harms are to be shifted from the individual, they should be borne by society at large. Section 105 should help encourage the development of new products without unleashing on the public unsafe products that are defective in construction or design under Section 104. It also makes clear to policy-makers that the tort-litigation system is not the means for addressing injuries caused by this type of hazard.

ANALYSIS

SEC. 106. RELEVANCE OF THE STATE OF THE ART AND INDUSTRY CUSTOM

Subsection (a) adopts a fundamental principle of evidence law for the purposes of product liability cases. It excludes the showing of post-accident changes in the design of a product, the "state of the art," or industry custom when that evidence is offered to show that the product was defective at the time of manufacture. *See* Federal Rule of Evidence 407 and Advisory Committee commentary.

The reasons underlying this rule are twofold: first, subsequent changes are deemed irrelevant (all they show is as one gets older, one may get wiser); and second, admission of such evidence may discourage the making of repairs.

While the latter rationale has been challenged, *see* "Ault v. International Harvester Co.," 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975), the relevance of such evidence on the issue of defectiveness is of very limited value. On the other hand, the prejudicial effect of showing the subsequent change or repair—particularly one undertaken by the product seller himself—is quite substantial. *See* "LaMonica v. Outboard Marine Corp.," 48 Ohio App.2d 43, 355 N.E.2d 533 (1976); "Haysom v. Coleman Lantern Co.," 89 Wash.2d 474, 573 P.2d 785 (1978).

Subsection (a) does permit the introduction of evidence of changes in the "state of the art" when it is relevant for purposes other than showing that the product was defective at the time of manufacture. Thus, evidence of such changes may be admissible to show that the product seller knew of the defect at a certain point in time. It might also be admissible where the product seller claimed the product hazard was impossible to avoid. In cases of this kind, the court should balance the probative value of the evidence against its prejudicial nature. Allowing the introduction of evidence in these cases should not become a vehicle for avoiding the basic purpose of the rule.

Subsections (b), (c), (d), and (e) address one of the major issues that have divided product sellers and consumer groups concerned about product liability. Product sellers have argued that when their products comply with the "state of the art," it is unfair to deem them defective. They further contend that industry custom is likely to incorporate all cost-justified product safety features. *See* R. Posner, "Economic Analysis of Law," 71 (1972). Consumers respond that it is inappropriate to permit product sellers to fix indirectly their own standard of liability. *See* Johnson, "Products Liability 'Reform': A Hazard to Consumers," 56 "N. C. L. Rev." 677, 680-81 (1978).

In reality, there may be less of a dispute between product sellers and consumers on this issue than appears on the surface. The approach taken in Section 106 attempts to clarify matters by distinguishing between "custom" and "state of the art."

Subsection (a) defines "state of the art" to distinguish it from custom in the industry. It was derived from a recently enacted section of Arizona law. "Ariz. Rev. Stat. Ann." § 12-681 (6)(1978). The subsection (a) definition comprehends a level of safety that was possible as a practical matter at the time of manufacture.

Under subsection (b), compliance with industry custom is merely evidence that the trier of fact may consider in determining whether a product was defective under subdivisions (B) and (C) of Section 104. *See, e.g.*, "Bruce v. Martin-Marietta Corp.," 544 F. 2d 442 (10th Cir. 1976); "Baker v. Chrysler Corp.," 55 Cal. App. 3d 710, 127 Cal. Rptr. 745 (1976); "Maxted v. Pacific Car & Foundry Co.," 527 P. 2d 832 (Wyo. 1974); "Roach v. Kononen," 269 Ore. 457, 525 P. 2d 125 (1974); "Olson v. Arctic Enterprises, Inc.," 349 F. Supp. 761 (D. N.D. 1972).

Subsection (c) also permits introduction of evidence of non-compliance with custom—evidence likely to be introduced by a product liability claimant. While it might be argued that non-compliance with custom should signal that, in fact, the product was defective, situations may arise where the product manufacturer followed an alternative procedure that was no less safe (perhaps even safer) than custom in the industry. For that reason, noncompliance with custom is admissible, but does not create a situation where the trier of fact would consider the product defective *per se*. *See* "Poches v. J. J. Newbury Co.," 549 F.2d 1166 (8th Cir. 1977).

Subsection (d) raises a presumption of nondefectiveness if a product conformed to the "state of the art" at the time of manufacture. This follows "Colo. Rev. Stat. ann." § 13-21-403 (1978), but does not go as far as "Ky. Rev. Stat. Ann." ch. 411, § 3(2)(1978), which creates a presumption for both "state of the art" and custom in the industry. The overwhelming majority of case law probably would direct a verdict for defendant in this instance. *See, e.g.*, "Olson v. Arctic Enterprises, Inc.," *supra;* "Wilson v. Piper Aircraft Corp.," 282 Ore. 61, 577 P.2d 1322, 1326 (1978)(". . . plaintiff's *prima facie* case of a defect must show more than the technical possibility of a safer design"); "Bruce v. Martin-Marietta Corp.," *supra;* "Maxted v. Pacific Car and Foundry Co.," *supra;* "Roach v. Kononen," *supra.*

Only a few intermediate appellate court decisions, primarily from one state, impose liability where the product was in accord with the technical, mechanical, and scientific knowledge reasonably feasible for use at the time of manufacture. *See, e.g.*, "Gelsumino v. E. W. Bliss Co.," 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973) and its progeny. *But see* "McClellan v. Chicago Transit Authority," 34 Ill. App. 3d 151, 340 N.E. 2d 61 (1975). *Compare* "Olson v. A. W. Chesterton Co.," 256 N.W. 2d 530 (N. Dak. 1977).

Section 106 thus provides special protection for the interests of product liability claimants in that it allows the trier of fact, in extraordinary situations, to find a manufacturer liable even though his product conformed to the "state of the art."

All presumptions authorized by this section can be rebutted by clear and convincing evidence that, in light of the factors set forth in § 104(2) or (3), that the product was defective. An example under § 104(2) where the presumption might be rebutted is where a product that conferred with a standard posed a very high probability of extremely serious injury and at the time of manufacture there were inexpensive and safer alternative methods of designing the product.

An example under § 104(3) where the presumption might be rebutted is if a product seller learned about a product hazard after the product was manufactured. In that instance, even though his product conformed with the "state of the art", the trier of fact may find that he should have made a reasonable effort to warn product users about such hazards. See Commentary to section 105.

Subsection (e) acknowledges that non-governmental entities may develop product standards that are both rigorous and sound. *See* Task Force Report, at IV-13-17. The review of such standards is a complex matter, and it is left to the court to decide whether a particular standard meets the criteria of subsection (e). Qualifying standards are given a special status—they create a presumption that the product was not defective in design under Section 104, subdivision (B).

ANALYSIS

SEC. 107. RELEVANCE OF COMPLIANCE WITH LEGISLATIVE OR ADMINISTRATIVE STANDARDS

Product sellers have contended that it is unfair to call a product defective when the challenged aspect of that product conformed to an applicable administrative or legislative standard. Some product liability loss prevention experts have suggested that making compliance with such standards a defense might create incentives for manufacturers to comply with them. Interagency Task Force on Product Liability, "Selected Papers," at 266 (Remarks of Professor Alvin S. Weinstein).

On the other hand, consumer groups have criticized such standards, claiming that many are formulated solely by and for industry. The approach of the common law as well as that embodied in the Consumer Product Safety Act, 15 "U.S.C." § 2074a (1976), is that most government safety standards are merely minimum standards. They are not set at a level that would make it appropriate to regard compliance with such standards as an absolute defense in a product liability case. *See* "Roberts v. May," 583 P.2d 305, 308 (Colo. App. 1978). Even if the standards were set above minimum

safety criteria when formulated, keeping them up-to-date remains a problem.

Section 107(a) comports with this general approach by not treating compliance with legislative and administrative standards as an absolute defense. Nevertheless, it allows some "credit" for compliance with such standards in appropriate circumstances. In sum, Section 107(b) creates a rebuttable presumption of non-defectiveness if the product seller persuades the court that the standard:

(1) Was developed as the result of careful, thorough product testing and a formal product safety evaluation;

(2) Was developed through a procedure where both consumer and manufacturer interests were considered;

(3) Was more than a minimum safety standard; and

(4) Was up-to-date at the time the product was manufactured.

The section follows the existing case law that has made adjustment for standards that are sound. See "Jones v. Hittle Service, Inc.;" 219 Kan. 627, 549 P.2d 1383 (1976) (universally accepted standards for odorizing LP gas outweigh expert opinion); "McDaniel v. McNeil Laboratories, Inc.," 197 Neb. 190, 241 N.W. 2d 822 (1976) (determination of the FDA prevails in absence of proof that the manufacturer furnished incomplete, misleading, or fraudulent information); "Raymond v. Riegel Textile Corp.," 484 F.2d 1025 (1st Cir., 1973) (standard promulgated under the Flammable Fabric Act was outdated). *Cf.* "Restatement (Second) of Torts" § 288c (1965) (requiring claimant in all cases of compliance to show that a reasonable person would have taken additional precautions).

Section 107 does not speak to two topics relating to compliance with governmental standards. First, it does not treat "failure to comply." This area is left to common law development under the general principles of negligence *per se*. *See* W. Prosser, "Torts," at 190, n. 31. Second, the Act does not cover the situation where the government has issued mandatory design and installation specifications. *See* "Hunt v. Blasius," 55 Ill. App.3d 14, 370 N.E.2d 617 (1977) (holding that compliance is an absolute defense).

ANALYSIS

SEC. 108 NOTICE OF POSSIBLE CLAIM REQUIRED

The purpose of this section is to inform product sellers at an early date that the product they produce may be defective. Under present law, a claimant may delay informing a product seller about a claim until the statute of limitations nearly has expired. In most jurisdictions, this period is two or three years. Although 77.8 percent of all bodily injury claims are reported within six months, *see* ISO, "Closed Claim Survey," at 100 (1977), the 22.2 percent that are not reported during this period are of concern because they represent about 68 percent of the claim payments.

A reasonable notice of claim requirement in product liability law promotes the interests of product users because it is a low-cost means of assisting product safety. Presumably, if informed about defective conditions at an early stage, a product seller is more likely to take action to correct such conditions and thus forestall future injuries. This is why notice of claim provisions have been utilized in other contexts. *See, e.g.,* Uniform Commercial Code § 2-607 (warranty breaches); 18 E. McQuillan, "Municipal Corporations" § 53.154 (ed. rev. 1977) (suits against municipalities for injuries); 3 A. Larson, "Workmen's Compensation Law" § 78.00 *et seq.* (1976) (notice of injury to employer). *See also* Comment, "Notice Requirement in Warranty Actions Involving Personal Injury," 51 "Calif. L. Rev.," 586 (1963); Phillips, "Notice of Breach in Sales and Strict Tort Liability Law: Should There Be a Difference?," 47 "Ind. L. J." 457, 468-69 (1972) (observing that requiring notice of claims may encourage defendants to make reasonable settlements).

This section is adapted from the recently enacted "Minn. Stat. Ann." § 604.04 (1978). It differs from analogous notice of claim provisions in that it does not provide that a claim or defense will be barred by the failure to meet its conditions. As the court noted in "Greenman v. Yuba Power Products, Inc.," 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697, 700 (1962), such a provision may "become a booby trap for the unwary. The injured consumer is seldom 'steeped in the business practice which justifies the rule,' [James, Product Liability, 34 Texas L. Rev. 192, 197] and at least until he has had legal advice it will not occur to him to give notice * * *"

Instead, Section 108 places a duty to give the notice of claim on the attorney. It imposes a cost on the attorney for investigation and other expenses that stem from the failure to give notice.

Section 108 also places a burden on product sellers, who are notified of an anticipated claim, to provide the attorney with the names and addresses of others known to be in the chain of distribution. Product sellers may also be held liable under this section for costs that stem from the failure to provide these names.

Section 108 assumes that claims arising under this section can be consolidated with the principal product liability claim brought under this Act.

ANALYSIS

SEC. 109 LENGTH OF TIME PRODUCT SELLERS ARE SUBJECT TO LIABILITY FOR HARM CAUSED BY THEIR PRODUCTS

Perhaps more than any other single factor alleged to be "the cause" of the countrywide product liability problem are the rules governing the responsibility of manufacturers for older products. Most product liability policies not only include claims based on products manufactured or sold during the given year, but also products manufactured or sold in the past. In the case of sellers of durable goods, this creates an "open-ended" liability situation.

The Supreme Court of Oregon summarized the general common rule with the statement: "Prolonged use of a manufactured article is but one factor, albeit an important one, in the determination of whether a defect in the product made it unsafe * * *" *See* "Tucker v. United Crane & Shovel Corp.," 256 Ore. 318, 473 P. 2d 862 (1970) (boom crane manufactured in 1956, collapsed in 1965). *See also* "Gates v. Ford Motor Co.," 494 F. 2d 458 (10th Cir. 1974) (24-year-old tractor); "Kaczmarek v. Mesta Machine Co.," 463 F. 2d 675 (3d Cir. 1972) (30-year-old pickling machine); "Mondshour v. General Motors Corp.," 293 F. Supp. 111 (D. Md. 1969) (17-year-old bus).

Partly in response to this open-ended liability potential, a number of states have enacted statutes of repose that begin at the time a product is first sold and distributed. *See, e.g.,* "Ariz. Rev. Stat. Ann." § 12-551 (1978) (12 years after product "first sold for use or consumption * * *"); "Fla. Stat. Ann." § 95.031(2) (1978) ("12 years after the date of delivery of the completed product"); "Ill. Ann. Stat." § 21.2(b) (1978) (12 years from date of first sale—strict liability); "Ind. Stat. Ann. § 33-1-1.5-5 (1978) ("10 years after the delivery * * * to the initial user"); "Neb. Rev. Stat." 25-702(2) (1978) (10 years after first sale); "Utah Code Ann." § 78-15-3(1) (1977) (6 years after date of initial purchase; 10 years after date of manufacture).

The advantages of these statutes are that they: (1) establish an actuarially certain date after which no liability can be assessed; and (2) eliminate tenuous claims involving older products for which evidence of defective condition may be difficult to produce. *See* "Telegraphers v. Ry. Express Agency," 321 U.S. 342 (1944).

On the other hand, a fundamental problem with these statutes is that they *may* deprive a person injured by a product of the right to sue even before the injury has occurred. *See* Johnson, "Products Liability 'Reform': A Hazard to Consumers," 56 "N. C. L. Rev." 677, 689-90 (1978); "Victorson v.

Bock Laundry Machine Co.," 37 N.Y. 2d 295, 335 N.E. 2d 275 (1975).

The limited available data show that the concern about older products may be exaggerated. *See* ISO, "Closed Claim Survey," at 105-108 (indicating that over 97 percent of product-related accidents occur within six years of the time the product was purchased and in the captive goods area 83.5 percent of all bodily injury accidents have occured within ten years of manufacture). Nevertheless, as the Task Force Report indicated, the underwriters' concern about *potential* losses associated with older products may be an important factor in the recent increase in liability insurance premiums for manufacturers of durable goods. *See* Task Force Report, at VII-21.

Section 109 attempts to provide product sellers with some security against stale claims, while preserving the claimant's right to obtain damages for injuries caused by unsafely manufactured products. It accomplishes this result through provisions on useful safe life, statutes of repose (with separate provisions for workplace and nonworkplace injuries), and a statute of limitations.

(A) *Useful Safe Life.* The common law in most states is that "[t]he age of an allegedly defective product must be considered in light of its expected useful life and the stress to which it has been subjected." "Kuisis v. Baldwin-Lima-Hamilton Corp.," 457 Pa. 321, 319 A.2d 914, 923 (1974) (brake-locking mechanism on a crane fell after more than 20 years of use). The "Kuisis" court noted further that in "certain situations the prolonged use factor may loom so large as to obscure all others in the case." *Id.*

The basic problem with most proposals to codify this rule into a useful life limitation has been the vagueness of the concept. Thus, while the Task Force Report noted that "if a useful life limitation were identified in statutory form, it might be expected that it would be given more serious attention by both judge and jury," Task Force Report, at VII-27, it also observed that "the concept would still lack specificity." *Id.*

Subdivision 109(A) was derived from "Minn. Stat. Ann." § 604.03 (1978). It serves to remind the court and the trier of fact that a product seller may be held liable only for harms caused during the useful safe life of the product. It does not attempt to apply fixed useful life standards for all products. *See* Phillips, "An Analysis of Proposed Reform of Products Liability Statutes of Limitations," 56 "N. C. L. Rev." 663, 673 (1978). Rather, it identifies factors that may help the trier of fact determine how long a product reasonably can be expected to perform in a safe manner. Section 109 uses the term "useful safe life" (as compared to "useful life") because the period in which the product can have some utility may be well beyond the period in which the product is safe. For example, some drivers may continue to use tires that lack sufficient treads for safety.

Factors (a)-(e) are self-explanatory. Factor (d) refers to the useful safe life stated by the product seller. Relying on this provision, a product seller could indicate that a product should not be used beyond a certain period of time. However, subdivision (A) does not give the product seller absolute power to limit a product's useful safe life. While this was suggested in "Velez v. Craine & Clark Lumber Corp.," 33 N.Y. 2d 117, 305 N.E. 2d 750 (1973), subdivision (A) gives the trier of fact the power to determine whether the product seller's limitation was a reasonable one. *Cf.* "Henningsen v. Bloomfield Motors, Inc.," 32 N.J. 358, 161 A.2d 69 (1960). Further, this subdivision makes clear that a product seller's limitation on useful life cannot bind the rights of a bystander. Nevertheless, where the product seller imposes a reasonable limitation, the trier of fact should give very serious consideration to this fact in determining whether the product was used beyond its useful life.

Factor (e), dealing with modifications of the product by users or third parties, relates to conduct that might shorten the useful life of the product. While the Act treats product modifications in a separate section, they are also factors in determining whether a product has been used beyond its useful life.

(B) *Statutes of Repose.* Statutes of repose differ from statutes of limitations in that they set a fixed limit after the time of the product seller's allegedly wrongful conduct—a limit beyond which the product seller will not be held liable. The rationale of such statutes is two-fold: First, if not aware of a claim, the passing of time may make it extremely difficult for a product seller to construct a good defense because of the obstacle of securing evidence. Although the burden of proof on the issue of defectiveness remains on the claimant under the Act, a jury, as a practical matter, may demand an explanation from a product seller when the claimant has suffered a severe injury. The second rationale is that persons ought to be allowed, as a matter of policy, to plan their affairs with a reasonable degree of certainty. This goes to the heart of the product liability insurance rate setting problem. Even though past data show that 83.5 percent of bodily injury claims arise within a ten-year period, there is no safeguard in the existing law that the past will portend the future. There is always the possibility that the number of claims for older products will increase. *See* ISO, "Closed Claim Survey," at 107.

(1) *Workplace injuries.* In the context of workplace injuries, the product seller's tort liability ends ten years from the date of the delivery of the completed product to its first purchaser or lessee who is not himself primarily engaged in the business of selling such a product. According to ISO data, 97.4 percent of product liability incidents occur within 72 months of the time a product is purchased. *See ISO, "Closed Claim Survey," at 108. Although the number of claims that would be cut off by this statute is small, the potential for such claims to arise has been a cause of the increase in product liability premiums.*

Although the data are limited, it appears in many instances that the reason for an unsafe workplace product has less to do with conduct of the product seller than it has to do with the party having direct responsibility for the care and maintenance of the workplace product—the employer. *See* ISO, "Closed Claim Survey," at 141. This is even more likely to be the case with products that are more than ten years old.

Therefore, subsection (1)(b) grants a product liability claimant subjected to an unsafe workplace product a claim against the workplace employer for lost wages and reasonable medical costs. As a practical matter, this provision amends state worker compensation law. The same is true of subsection (1)(c), which grants beneficiaries under state wrongful death acts a right to recover the pecuniary loss they suffered because an employer exposed the decedent to an unsafe product.

For purposes of this subsection an "unsafe" product is not only one that is defective within the meaning of Section 104, but also one that has been improperly maintained, altered or modified by the employer. The term also includes products that are no longer safe because they have simply worn out.

The Act places a strong incentive for accident prevention on the party who is in the best position to accomplish that goal. When a product is more than ten years old and is in an unsafe condition, the employer—not the product seller—is in the best position to take action to prevent workplace product injuries. This value of this incentive outweighs any new potential cost that may arise in the worker compensation system.

In the very few cases where an employer may be subject to additional liability, the product seller is not totally "off the hook." If the product seller has produced an unsafe product that

has failed after a ten-year period because of a defective condition inherent in the equipment at the time of manufacture, the employer who is liable under this subsection has the right in an arbitration proceeding to bring a contribution claim against the product seller. The employer will then be able to recover, on a comparative responsibility basis, the amount that is appropriate under the circumstances of the accident.

As compared to ordinary arbitration proceedings under this Act (which are subject to a trial *de novo*), the results of this arbitration proceeding are treated as a final judgment.

While product sellers may question the constitutionality of this arbitration provision, no serious constitutional issue can arise. The product seller benefits from this provision compared to present law which subjects product sellers to unlimited liability claims for full *tort* damages, including costs arising from pain and suffering and the possibility of punitive damages.

(2) *Non-workplace injuries.* For the most part, this subsection deals with consumer products. ISO data reflect that very few claims for consumer goods arise after a ten-year period. Most such claims are for durable goods and would be handled under subsection (1) provisions relating to workplace injuries. *See* ISO, "Closed Claim Survey," at 105-197 (1977). Nevertheless, consumers justifiably are concerned about overly broad absolute cut-offs to their right to sue. This provision recongizes consumer concerns in three basic ways:

(1) The term of the statute is ten years—beyond the term enacted or proposed in a number of states;

(2) The statute begins to run at the time of purchase, not the time of manufacture; and

(3) The statute does not contain an absolute cut-off, but rather a presumption that the product has been used beyond its useful life. Colorado law adopts this approach, "Colo. Rev. Stat. Ann." § 13-21-403(3) (1978); most other state product liability statutes do not.

Consumer concerns are also addressed by three of the additional restrictions contained in the next section. These restrictions are applicable to both consumer and workplace products.

(3) *Limitations on statutes of repose.* The statute contains four key limitations on its scope of operation.

First, liability may result where a product seller has expressly warranted or promised that a product can be safely for a period longer than ten (10) years. *See also* Uniform Commercial Code § 2-725(2).

Second, the statute of repose provisions do not apply where product sellers intentionally have misrepresented their products.

Third, subdivision (B) does not affect contribution and indemnity claims. Thus, an interim seller will not have to absorb a liability loss that was the true responsibility of the original manufacturer. *See* Defense Research Institute (Monograph) "Products Liability Position Paper," at 22; *See also* Phillips, "An Analysis of Proposed Reform of Products Liability Statutes of Limitations," 56 "N. C. L. Rev." 663, 670-71 (1978).

Fourth, there is an exception for pharmaceuticals that cause harms that take many years to manifest themselves, *see, e.g.,* "Krug v. Sterling Drug, Inc.," 416 S.W.2d 143 (Mo. 1967), and products that cause perceptible harm only through prolonged exposure. *See* "Michie v. Great Lakes Steel Div., National Steel Corp.," 495 F.2d 213 (6th Cir. 1974). *See also* Johnson, "Products Liability 'Reform': A Hazard to Conumers," *supra,* at 690-91 ("slumbering defects").

(c) *Statutes of Limitation.* Tort statutes of limitations traditionally begin at the time a person is injured. This subdivision follows that approach. Nevertheless, in accord with consumer concerns, subdivision (C) extends the limitation period beyond the time of injury in situations where the claimant would be unlikely to discover that he or she has been harmed, *e.g.,* long-term pharmaceutical harms. *See* Birnbaum, "First Breaths' Last Gasp: The Discovery Rule in Products Liability Cases," 13 "The Forum" 279 (1977). 000

ANALYSIS

SEC. 110 RELEVANCE OF THIRD-PARTY ALTERATION OR MODIFICATION OF A PRODUCT

This section deals with the situation where a third party—one other than the product seller or the claimant—has altered or modified the product and this has led to claimant's harm.

A Few courts have imposed liability on the product seller in this situation provided that te third party's conduct was in some manner "foreseeable." *See, e.g.,* "Blim v. Newbury Industries, Inc.," 443 F.2d 1126 (10th Cir. 1971) (machine safety guard removed by coworker). Decisions that hold the original product seller responsible in these instances border on absolute liability. Thus, insurers appear to have a just concern about broad-scale imposition of liability where third party intervention has been the principal cause of the accident. As the American Insurance Association has noted:

> It is difficult enough to calculate the risk associated with a given product even where there is access to knowledge about its basic inherent characteristics * * * The task becomes impossible if the premium calculations must take into account not only the inherent properties of the machine, but also its transformation in the hands of others, and their neglect of repair and maintenance.

AIA (monograph) "Product Liability Legislative Package," at 16 (1977). Moreover, if the law ignores modification of products, it will fail to place the incentive for risk prevention on the party or parties who have engaged in the wrongful conduct.

The authors of the "Restatement (Second) of Torts" § 402A recognized this fact and only subjected the product seller to liability when the seller's product reached "the user or consumer without substantial change in the condition in which it [was] sold." Comment g to this section stated the matter more firmly:

> The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Recently, a number of state legislatures have enacted the essence of this comment into law. *See* "Ariz. Rev. Stat. Ann." § 12-683(2) (1978); "Ind. Stat. Ann." 33-1-1.5 § 4(b)(3) (1978); "Ky. Rev. Stat. Ann." ch. 411, § 4 (1978); "N.H. Rev. Stat. Ann." § 507-D:3 (1978); "R.I. Gen. Laws Ann." ch. 299, § 9-1-31 (1978); "Tenn. Code Ann." ch. 703, § 9 (1978); "Utah Code Ann." § 78-15-5 (1977).

According to ISO's statistics, product modification occurs only in approximately 13 percent of the cases. Of these cases, the largest number of product modifications result from the conduct of employers (39 percent). *See* ISO "Closed Claim Survey," at 140-41. This raises the main problem of rules that limit a product seller's responsibility for subsequent product alterations or modifications—often the injured worker cannot sue the one who is really at fault because of the "exclusive remedy" provisions or worker compensation statutes. However, it seems fair to suggest that the destruction of a tort remedy against the employer

> Should not of itself create a third-party remedy against the manufacturer or distributor of the product in question. If Worker Compensation is regarded as the proper remedy in other cases of an exclusive employer's wrong, then so too should it be where that wrong involves [a] product acquired from third party defendants.

AIA (monograph) "Product Liability Legislative Package," at 15-16 (1977). Nevertheless, Section 110 takes ac-

count of the hardship that can result from an overly broad liability limitation on product modification or alteration; the provision is very narrowly drawn.

First, a product seller may avoid liability for a defective product *only* where the harm would not have occurred "but for" the alteration or modification. In contrast, the "Restatement" and the recently enacted state statutes cited above would shield the manufacturer whenever the third party's conduct was a "substantial cause." A rule of this type, however, invites litigation over what is "substantial," and also may diminish a product seller's responsibility for otherwise culpable conduct.

Cases in accord with the approach taken in Section 110 include "Temple v. Wean United, Inc.," 50 Ohio St.2d 317, 364 N.E.2d 267 (1977); "Santiago v. Package Machinery Co.," 123 Ill. App. 2d 305, 260 N.E.2d 89 (Ill. App. 1970); "St. Pierre v. Gabel," 351 So. 2d 821 (La. App. 1977).

Second, as subsections (a)(1) and (2) indicate, the product seller can not avoid responsibility for product alterations or modifications which the seller suggested (per instructions) or which the seller expressly consented.

Third, the product seller has a duty to anticipate certain modifications or alterations of his product. As Section 102(6) (Definitions) indicated, this refers to conduct that would be engaged in by a reasonably prudent person. Subsection (a)(3) is not intended to encompasss every type of act foreseeable by virtue of hindsight or otherwise.

Finally, subsection (b), adapted from Rhode Island Gen. Law Annot. ch. 299, Sec. 1 (1978), makes clear that ordinary wear and tear in a product is not the equivalent of a modification or alteration. However, a third party's failure to observe routine care and maintenance is considered a modification. In such instances, the third party is responsible for the injury. *See* "Ore. Rev. Stat." § 30.915 (1977); "N.H. Rev. Stat. Ann." § 507-D:3 (1978); "Utah Code Ann." § 78-15-5 (1977).

ANALYSIS

SEC. 111. RELEVANCE OF CONDUCT ON THE PART OF PRODUCT LIABILITY CLAIMANTS

Section 111 attempts to resolve existing uncertainty in the law about the relevance of a product liability claimant's conduct. It does this in two ways: First, it applies principles of comparative responsibility to situations where claimant's conduct suggests that he or she has some responsibility for the product-related incident. Second, it characterizes three basic kinds of such conduct and provides rules for each of them, namely, failure to inspect for a defective condition, use of a product with a known defective condition, and misuse of a product.

Although there is no assurance that the use of comparative responsibility principles will lower the cost of product liability claims, the inherent fairness of such principles has led to their adoption by over 30 states, and also has resulted in the adoption of a Uniform Comparative Fault Act (UCFA) by the National Conference of Commissioners of Uniform State Laws. This Act borrows freely from the UCFA and its accompanying commentary.

Some courts and commentators have voiced concern about the semantical and theoretical difficulties of mixing the "apples" of negligence with the "oranges" of strict liability. *See, e.g.*, "Kirkland v. General Motors Corp.," 521 P.2d 1353 (Okla. 1974); Robinson, "Square Pegs (Products Liability) in Round Holes (Comparative Negligence)," 52 "Calif. St. B.J." 16 (1977). These concerns appear to be more theoretical than real, particularly under this Act (as well as in common law product liability) where defendants are held liable based on conduct which may reflect varying degrees of fault. The utility of comparative responsibility for product liability cases has been appreciated by both state legislatures, *e.g.*, "Ark. Stat. Ann. §§ 27-1763-1765) (Supp. 1977); "Me. Rev. Stat. Ann." tit. 15 § 156 (Supp. 1978)), and courts *e.g.*, "Thibault v. Sears, Roebuck & Co.," 6 Prod. Saf. & Liab. Rep. 1000 (S. Ct. N.H. 1978); "Daly v. General Motors Corp.," 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); "Busch v. Busch Const., Inc.," 262 N.W.2d 377 (Minn. 1977); "Butaud v. Suburban Marine & Sport. Goods, Inc.," 555 P.2d 42 (Alaska 1976). It has also been recommended by a congressional subcommittee. *See* Report of the House Subcommittee on Capital, Investment and Business Opportunities at 76 (1978).

Section 111 places a strong incentive for risk prevention on the party who is best able to accomplish that goal. It also avoids burdening the careful product user with liability insurance costs assessed to persons who misuse or are otherwise at fault in their handling of products. While some economic analyses indicate that a comparative responsibility system creates a risk of economic inefficiency because of an over-investment in safety, the Act makes a value judgment that such an "over-investment" is a risk worth taking.

(a) *General Rule.* This subsection describes the general principle of comparative responsibility that will be applied under this Act. It *assumes* that the product seller has engaged in conduct that would lead to liability under this Act. Where the claimant has engaged in subsection (c)-type conduct and thus is at least partially responsible for the injury, such conduct will diminish the amount of the claimant's award proportionately to that measure of responsibility.

Section 111 adopts the consumer-oriented fairness of pure comparative negligence as compared with the "nondiscriminating rough justice of the modified type . . ." *See* "Prefatory Note," UCFA.

(b) *Apportionment of Damages.* In order to apply comparative responsibility principles under this Act, it is necessary for the trier of fact to supply certain information in written interrogatories. Subsection (b)(1) indicated that the trier of fact should set forth the amount of damages a claimant would receive if his comparative responsibility were disregarded. This helps assure that the trier of fact does not inflate or deflate the amount of damages claimant would deserve if he were free from responsibility.

Subsection (b)(2) requires the trier of fact to indicate the percentage of responsibility allocated to each party, including the claimant. Persons not before the court are not included, in part because of the extreme difficulty of determining the fault of such parties. Also, a jury's determination of an absent person's "fault" would not be binding on that person. In any event, both claimants and product sellers will have a significant incentive for joining available defendants since the greater the number of parties at fault, the smaller the percentage of fault allocated to each, whether claimant or product seller.

Subsection (b)(3) provides a general guideline to assist the trier of fact in comparing "fault" among the parties. The UCFA comments indicate that in appropriate cases, the trier of fact may also consider:

(1) Whether the conduct was mere inadvertence or engaged in with an awareness of the danger involved;

(2) The magnitude of the risk created by the conduct, including the number of persons endangered and the potential seriousness of the injury;

(3) The significance of what the actor was seeking to attain by his conduct;

(4) The actor's superior or inferior capacity; and

(5) The particular circumstances, such as the existence of an emergency requiring a hasty decision.

Section 111 departs from the UCFA in one respect—it does not consider "the extent of the casual relationship between the conduct and the damages claimed" as a factor in apportioning responsibility. While the distinction may be a difficult one to draw, this Act is premised on apportioning *responsibility* only—pure causation in

terms of the physical cause of the particular injury is irrelevant to that concept. *See* Malone, "Ruminations on Cause-In-Fact," 9 "Stan. L. Rev." 60 (1956).

Subsection (b)(4) helps to assure that the mathematics of comparative responsibility will be correctly determined. The court must determine the award for each claimant according to its findings made under this subsection. The subsection also indicates that the common law rule of joint and several liability of joint tortfeasors continues to apply under this Act. Claimant can recover the total amount of his or her judgment against any product seller who is liable under this Act.

However, as with the UCFA, the judgment for each claimant will also show the share of each party's total obligation to the claimant. This should save litigation costs and avoid the need for a special motion or a separate action on the issue. In situations where an employer would be immune from suit by the product claimant, the limitation of Section 113 applies.

Subsection (b)(5) follows the UCFA in providing for the reallocation of damages among the parties at fault when one of the parties' share is uncollectable. The reallocation procedure applies to a claimant who is contributorily at fault. This approach avoids the unfairness of the common law rule of joint and several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint and several liability, which would cast the total risk of uncollectibility on the claimant.

(c) *Conduct Affecting Claimant's Responsibility.*

(1) *Failure to Discover a Defective Condition.* At common law the product user had an obligation to inspect for defects; failure to do so could bar a claim. *See* "Palmer v. Massey-Ferguson, Inc." 3 Wash. App. 508, 476 P. 2d 713 (1970). However, under modern tort law, the product user is assured of a product that is reasonably safe for its ordinary use. *See* "Restatement (Second) of Torts" § 402A (1965): "Cepeda v. Cumberland Eng. Co.," 76 N.J. 152, 386 A. 2d 816 (1978). Section 111(c) follows these cases and does not require the product user or consumer to inspect a product for a defect. *See* "Kassouf v. Lee Bros. Inc.," 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962) (plaintiff without inspection, ate a chocolate bar containing worms and maggots).

Cases can arise where a defect would be very apparent to an ordinary prudent person. In such cases, it is appropriate to allow the trier of fact to diminish claimant's damages according to the latter's responsibility for the injury that occurred. Thus, in the example of the candy bar, if a claimant with good eyesight ate a candy bar that had bright green worms crawling over it, he or she should bear some responsibility for any ill effects suffered. If the product seller was aware of the defect in the goods at the time of sale, the punitive damages section of the Act (Section 120) would provide a strong disincentive to not sell such a product.

(2) *Using a Product With a Known Defective Condition.* Where it is clear that a claimant both voluntarily and unreasonably used a product with a known defective condition, the product seller is not liable under this Act. To allow a claim in such a situation would permit individuals, in effect, to create their own product liability claim. In that regard, it should be noted that consent is a defense to even intentional wrongs. *See* W. Prosser, "Torts," *supra*, at 101.

However, there may be cases where an individual voluntarily uses a product with a known defective condition, but the reasonableness of this conduct becomes a matter of dispute. For example, if a person discovers a welt in a tire, should that person be required to stop immediately and call for assistance, or is it reasonable to proceed to a nearby gasoline station to have the tire repaired? Many cases arise in this shadowy zone. *See* "Henderson v. Ford Motor Co.," 519 S.W. 2d 87 (Tex. 1974) with "Ford Motor Co. v. Lee," 237 Ga. 554, 229 S.E. 2d 379 (1976). Subsection (c)(2) allows the trier of fact to consider claimant's conduct and reduce damages where it is appropriate to do so.

Subsections (c)(1) and (2) avoid a problem that existed under the "Restatement," though through no fault of the "Restatement" drafters. Persons who engaged in very similar conduct were treated in a very different manner. For example, those who used a product after failing to discover a defective condition were granted a full claim and those who used a product after they had discovered that defective condition were barred. *See* "Restatement (Second) of Torts" § 402A, Comment n. This dichotomy caused litigation and appeals over the issue of whether or not plaintiff "knew" of a particular defect at the time he utilized a product. *See* "Karabatsos v. Spivey Co., 49 Ill. App. 3d 317, 364 N.E.2d 319 (Ill. App. 1977); "Teagle v. Fischer & Porter Co.," 89 Wash. 2d 149, 570 P.2d 438 (1977); "Poches v. J. J. Newberry Co.," 549 F.2d 1166 (8th Cir. 1977).

(3) *Misuse of a Product.* Subsection (c)(3) imposes no liability on the product seller where an injury occurs solely because claimant misused the product in some way that the product seller could not reasonably anticipate. Reasonably anticipated conduct is conduct which would be expected of an ordinary and prudent person. *See* Section 102(6) and commentary. Misuse by claimant in this context is equivalent to modification or alteration of the product by a third party. *See* "Rogers v. Unimac Co., Inc.," 115 Ariz. 304, 565 P.2d 181 (1977); "General Motors Corp. v. Hopkins," 548 S.W.2d 344 (Tex. 1977); "Edwards v. Sears, Roebuck & Co.," 512 F.2d 276 (5th Cir. 1975); *see also* Section 110.

In determining whether the product seller should have warned or instructed the claimant about potential misuses, the trier of fact should consider the factors listed in Section 104(C).

Where misuse of a product was a partial cause of an injury, claimant's damages are subject to reduction. *See* "General Motors Corp. v. Hopkins," *supra*.

ANALYSIS

SEC. 112. MULTIPLE DEFENDANTS: CONTRIBUTION AND IMPLIED INDEMNITY

Section 112 is based on sections 4 and 5 of the UCFA. Here, however, contribution and implied indemnity are merged in one section. Express indemnity—where one party has agreed to hold the other harmless for damages arising out of product liability actions—is left to commercial and common law. *See* Task Force Report, at VII-99.There is clear precedent for the merger of contribution and implied indemnity. *See* "Safeway Stores, Inc. v. Nest-Kart," 21 Cal. 3d 322, 146 Cal. Rptr. 550 (1978); "Dole v. Dow Chemical Co.," 30 N.Y.2d 143, 282 N.E.2d 288, (1972); "Skinner v. Reed-Prentice Division, Etc.," 70 Ill. 2d 1, 374 N.E.2d 437 (1977); "Busch v. Busch Constr., Inc.," 262 N.W.2d 377 (Minn. 1977). *See also* "N.Y. Civ. Prac. Law" § 1402 (McKinney Supp. 1976). This approach avoids the all-or-nothing aspect of implied indemnity law. In most situations, fault will be apportioned among product seller defendants. However, a situation could arise where the trier of fact could find that one product seller in the distribution chain was responsible for a product injury. This section should be read in conjunction with Section 113.

Subsection (a) establishes the basic rule that contribution will be determined by the proportionate responsibility of the defendants. Section 111 outlines the procedure for the trier of fact to make the appropriate determinations.

Subsection (b) outlines a simplified procedure where a party who has paid more than a proportionate share can recover from one who has paid less.

Subsection (c) indicates that if the court has not determined the proportionate responsibility of the parties,

contribution may be obtained in a separate action.

Subsection (d) indicates when a contribution action may be brought by a joint tortfeasor who has settled with claimant.

Subsection (e) sets time limits for bringing a contribution action.

It should be noted that contribution is appropriate among joint tortfeasors: each defendant contributing to the same harm is liable to the claimant for the whole amount of damages. If the defendants are liable for separate harms, contribution is not appropriate. *See* UCFA, comment on section 4.

Finally, an important issue in the area of contribution is left to the states, that is, the effect of a release of one tortfeasor but not the others. UCFA section 6 suggests an appropriate approach to this issue; the commentary on that section discusses the pros and cons of alternative approaches.

ANALYSIS

SEC. 113. THE RELATIONSHIP BETWEEN PRODUCT LIABILITY AND WORKER COMPENSATION

The relationship between product liability and worker compensation is a major topic covered in depth in the Task Force Report. *See* VII-85-113. Under current law in a number of states, the interaction of product liability and worker compensation law may result in the manufacturer of a workplace product paying the entire out-of-pocket cost of a product-related workplace injury plus damages for pain and suffering. This result occurs because the product manufacturer is unable to place a portion of the cost of that injury on an employer whose *negligence* may have helped bring about the claimant's injury. *See* "Liberty Mut. Ins. Co. v. Westerlind," 373 N.E.2d 957 (Mass. 1978); "Seaboard Coast Line R. Co. v. Smith," 359 So.2d 427 (Fla. 1978); Task Force Report, at VII-89-99.

After weighing many considerations, the Task Force and the United States Department of Commerce concluded that the development of worker compensation as a sole source for recovery in product-related accidents would be the best solution to the problem, but only if the worker received additional benefits in the course of overall worker compensation reform. A model product liability law is an inappropriate vehicle for making major alterations in worker compensation law.

The search for the next solution is not an easy one. If full contribution or indemnity by the product manufacturer against the employer is permitted, the employer may be forced to pay an employee—through the conduit of the third-party tortfeasor—an amount in excess of the employer's statutory worker compensation liability. This, arguably, thwarts a central concept behind worker compensation, *i.e.*, that the employer and employee receive the benefits of a guaranteed, fixed schedule, non-fault recovery system, which constitutes the *exclusive* liability of the employer. On the other hand, if contribution or indemnity is not allowed, the product manufacturer will bear the burden of a full common law judgment, despite the possibly greater responsibility of the employer. As the Supreme Court of Minnesota recently noted, this "obvious inequity is further exacerbated by the right of the employer to recover directly or indirectly from the third party the amount he has paid in compensation regardless of the employer's own negligence." *See* "Lambertson v. Cincinnati Corp.," 257 N.W.2d 679, 684 (Minn. 1977).

Equally troublesome is the fact that the present system appears to dull employer incentives to keep workplace products safe. The ISO "Closed Claim Survey" suggests that employer negligence is involved in 56 percent of product liability workplace cases. *See* ISO "Closed Claim Survey," Report 10, at 81 (1978).

The solution adopted by Section 113 has the support of the Supreme Court of Minnesota in "Lambertson v. Cincinnati Corp.," *supra*. The product manufacturer is allowed limited contribution up to the amount of the worker compensation lien. This reduces the inequity against the product manufacturer, but preserves the employer's interest in not paying more than worker compensation liability. *Compare* "Skinner v. Reed-Prentice Division, Etc.," 70 Ill. 2d 1, 374 N.E.2d 437 (1977) (full contribution allowed).

Admittedly, a shortcoming of Section 113's approach is that it does not reduce transaction costs substantially. *Compare* the approach suggested by the American Insurance Association, "Product Liability Legislative Package," *supra*, at 64. Also, the employer will not necessarily bear a full share of the economic costs of the injury sustained by the claimant. Nevertheless, considering all of the equities involved, Section 113 appears to offer the soundest solution apart from totally modifying worker compensation law to create a sole source remedy.

ANALYSIS

SEC. 114. THE INDIVIDUAL RESPONSIBILITY OF PRODUCT SELLERS OTHER THAN MANUFACTURERS

Section 114, derived in part from Tennessee law, *see* "Ten. Code Ann." § 23-3706 (Supp. 1978), addresses the problem of excessive product liability costs for parties in the distribution chain other than manufacturers in a way that does not compromise incentives for risk prevention. It also leaves the claimant with a viable defendant whenever he or she has been injured by a defective product.

The ISO "Closed Claim Survey" shows that manufacturers account for 87 percent of the total product liability payment amount, while wholesalers and retailers account for 4.6 percent. *See* ISO "Closed Claim Survey," Report 3, at 35 (1977). Case law suggests that distributors and retailers of products often shift this cost on to the manufacturer through an indemnity suit. *See e.g.*, "Hales v. Monroe," 544 F.2d 331, 332 (8th Cir. 1976); "Anderson v. Somberg," 158 N.J. Super. 384, 386 A.2d 413, 419-20 (1978); "Litton Systems, Inc. v. Shaw's Sales & Serv. Ltd.," 119 Ariz. 10, 579 P.2d 48, 50 (1978).

Despite their relatively small role vis-a-vis manufacturers as product liability defendants, retailers and distributors frequently are brought into a product liability suit. *See, e.g.*, "Tucson Industries, Inc., v. Schwartz," 108 Ariz. 464, 501 P.2d 936 (1976); "Vergott v. Deseret Pharmaceutical Co., Inc.," 463 F.2d 12 (5th Cir. 1972); "Duckworth v. Ford Motor Co.," 320 F.2d 130 (3d Cir. 1963). In view of ISO data showing that for every dollar of claims paid, at least 35 cents is spent in defense costs, *see* ISO, "Closed Claims Survey." Report 14, at 118, the net result is that retailers and distributors are subject to substantial product liability costs, both in terms of premiums and defense costs. These costs are added to the price of products and waste legal resources. *See* "Pender v. Skillcraft Industries, Inc.," 358 So.2d 45 (Fla. App. 1978).

Under Section 114, product sellers other than manufacturers must exercise reasonable care in their handling of products. This obligation includes warning about discoverable hazards. The focus of judicial inquiry will be on the opportunity the product seller (other than a manufacturer) had to discover the hazard and on whether circumstances put the seller on notice as to the character of the product. *See* "Edwards v. E. I. DuPont de Nemours. & Co.," 183 F.2d 165, 167 (5th Cir. 1950).

Subsection (a) provides that non-manufacturer product sellers are not subject to liability when they had no reasonable opportunity for product inspection which would or should, in the exercise of the defective condition. For example, if a defective product is in a sealed container and there is no way for a retailer to be aware of the condition, the retailer is not liable. In general, Section 114 does not impose liability on non-manfacturer product sellers where there are defects in con-

struction or defects in design that a reasonable person would have had no opportunity to discover. The manufacturer can avoid many of these defects; the distributor or retailer cannot. However, a non-manufacturer product seller can waive the benefits of subsection (a) through an express warranty. *Cf.* "Ky. Rev. Stat." § 411.340 (1978). For the purposes of this section, the term manufacturer is defined in Section 102(5).

Subsection (b) addresses the justifiable concern of Justice Traynor in "Vandermark v. Ford Motor Co.," 61 Cal. 2d 256, 37 Cal. Rptr. 896, 899, (1964) that:

> In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in ensuring that the product is safe or may be in a position to exert pressure on the manufacture to that end.

It should be noted that a number of courts have extended strict liability to retailers. *See, e.g.,* "McKisson v. Sales Affiliates, Inc.," 416 S.W.2d 787 (Tex. 1967); "Houseman v. C. A. Dawson & Co.," 106 Ill. App. 2d 225, 245 N.E.2d 886 (1969). *See also* U.C.C. § 2-315.

If the manufacturer is not subject to service of process or has been judicially declared insolvent, or where a court determines that the claimant would have appreciable difficulty in enforcing a judgment against the product manufacturer, the retailer or distributor has the same strict liability obligations as a manufacturer. Thus, subsection (b) only operates where a member of the enterprise *is* reasonably available to the injured plaintiff.

Some economists may criticize the thrust of Section 114 to the extent that it makes compensation of the victim paramount to the structuring of incentives that would optimize product safety. Another approach is that of a recently enacted Nebraska statute which flatly exempts non-manufacturer product sellers from liability unless they have been negligent. *See* Neb. Legis. Bill No. 665(3)(1978). *See also* "Sam Shainberg Company of Jackson v. Barlow," 258 So.2d 242, 244 (Miss. 1972) (same result under case law). However, the Nebraska approach can leave a person injured by a *defective* product (as defined by Section 104) without compensation. While this would be the unusual case, the law makes clear that in these situations the party who actually sold the product should bear the loss.

From another perspective on incentives for risk prevention, the obligation under Section 114 to make a reasonable examination of the product should ensure that the retailer or distributor will exert pressure on the manufacturer to make the product safe. Also, retailers or distributors can become manufacturers for the purposes of this Act if they design, assemble, fabricate, or otherwise prepare a product or component part of a product prior to sale, as well as if they hold themselves out as the manufacturer. *See* Section 102(5) (Definitions) and accompanying commentary.

ANALYSIS

SEC. 115. SANCTIONS AGAINST THE BRINGING OF FRIVOLOUS CLAIMS AND DEFENSES

The ISO data indicate that a substantial amount of product liability costs are incurred in the defense of product liability claims and lawsuits. *See* ISO, "Closed Claim Survey," Report No. 14 (1977) (defense costs equal about 35 percent of claim payments. Some have placed the blame for unnecessary defense costs and needless litigation on the contigent fee system. Nevertheless, as the plaintiff's bar properly observes, the contingent fee brings no return to a claimant's attorney where he or she is unsuccessful. On the other hand, some have argued that the contingent fee system has a negative impact in certain product liability cases to the extent that it causes insurers to settle even non-meritorious cases because the cost of defending such cases may be greater than the amount of settlement.

Analysis of the countervailing arguments suggests that the best solution to reducing unnecessary litigation costs is to address the heart of the problem—in short, discourage frivolous claims and defenses.

Section 115 is based, in part, on § 41 of the "Illinois Civil Practice Act" (as amended, 1976). It is also predicated on a proposal of the California Citizens' Commission on Tort Reform advocating sanctions against "frivolous" claims or defenses. *See* Report of the California Citizens' Commission on Tort Reform, "Righting the Liability Balance," at 146-47, 153-54 (1977).

The underlying purpose of Section 115 has broad support in existing statutes and court rules. Support comes from Rule 11 of the Federal Rules of Civil Procedure, which subjects an attorney to disciplinary action if he or she knowingly files a pleading or defense where no grounds support it. *See* "Barnett v. Laborers's Inter. U. of North America," 75 F.R.D. 544 (W.D. Pa. 1977). Similarly, Federal Rule of Appellate Procedure 38 permits a court to award "just damages and single or double costs" to a party who has been subject to a "frivolous" appeal. Additionally, Federal Rule of Civil Procedure 37(c) provides sanctions for an unreasonable failure to admit averments of fact or the genuineness of documents. In the Federal courts, the above rules are supplemented by 28 "U.S.C." § 1927 (1976) (imposing costs on an attorney who "multiplies the proceedings * * *"). *See* "A.L.R." 3d 209 (1976).

Under subsection (a), the statute may be invoked by either a product liability claimant or seller. Recovery is limited to reasonable attorney's fees and other costs that would not have been expended but for the fact that the opposing party pursued a claim or defense that was frivolous.

Under subsection (b), to make a finding that the claim was frivolous, the court must make a finding that the claim was without *any* reasonable legal or factual basis. This standard allows full room for bringing claims under novel legal theories.

Subsection (c) provides additional assurances that only frivolous claims will be sanctioned. First, the court may only impose damages under Section 115 on the basis of clear and convincing evidence, not merely the preponderance, of evidence. *See* "State of West Virginia v. Chas. Pfizer & Co.," 440 F.2d 1079, 1092 (2d Cir. 1971). Second, the court must set forth its findings of fact.

Subsection (d) gives the court latitude to impose costs on either attorney or client. As the Task Force Report noted, it is unlikely that many plaintiffs will be financially able to respond to such a claim. Task Force Report, at VII-61. It must be remembered that the attorney is in the best position to make a judgment about the reasonableness of bringing a claim or raising a defense. *See* ABA Code of Professional Responsibility, DR 7-102(A)(1)(2).

Subsection (e) protects a claimant's attorney who has expended time opposing a frivolous *defense.* This section can be invoked even where the claimant has *lost* a case.

Subsection (f) makes clear that recovery under this section is limited to expenses invoked by plaintiff or defendant and not those of parties outside the lawsuit.

ANALYSIS

SEC. 116. ARBITRATION

The Task Force Report suggested that compulsory non-binding arbitration may result in more accurate decisions, reduce overall litigation costs, and expedite the decision process. *See* Task Force Report, at VII-229-39.

Other reasons offered in support of arbitration procedures in product liability cases include: (1) Cases would be decided more accurately because a small group, with a member who is an expert in the field, should be able to comprehend the esoteric details of product liability cases; (2) Overtime, a resource bank of relatively neutral experts less easily misled (in technical areas) than a jury of laypersons could

be developed; (3) Arbitrators should be less affected by the emotional aspects of the case or by the artistry of counsel; and (4) The privacy of arbitration proceedings (as compared to judicial proceedings) should prompt more complete revelation of special manufacturing designs or processes. This, in turn, would permit more accurate judgments. *See* Task Force Report, at VII-235.

The ISO "Closed Claim Survey" suggests further that arbitration should also reduce accident reparation transaction costs. Even allowing for the fact that more substantial product liability claims are litigated to a verdict than are handled by arbitration, ISO data indicate that the average expense for lawyers as well as other allocated loss adjustments costs is considerably less when the case is handled by binding arbitration as compared with a court verdict. *See* ISO,"Closed Claim Survey," Report 14, at 120.

On the other hand, costs may increase under arbitration if there are numerous appeals for trials *de novo*. This potential problem may not be as serious, however, as once thought. Data collected by the Department of Justice show that appeal rates at the state level for a trial *de novo* have ranged from 5 to no more than 15 percent of all cases arbitrated. *See* Hearings before the Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, United States Senate, 95th Cong., 2d Sess., April 14, 1978. (Statement of Attorney General, Griffin B. Bell). *See also* Report of the California Citizens Commission on Tort reform, "Righting the Liability Balance," at 143 (1977) citing rejection of arbitration should expedite the reparations process. The Task Force Report showed that in the medical malpractice area, for example, the arbitration process had achieved a more expeditious resolution of claims than those operating under the jury system. *See* Task Force Report, at VII-238.

Indeed, the benefits of arbitration have prompted the Department of Justice to recommend that mandatory non-binding arbitration be used in federal courts in all tort and contract cases. The Department of Justice reached this conclusion after its Office of Judicial Improvements made a thorough analysis of the matter in a study conducted wholly independently of the Task Force Report. These concurrent efforts appear to have reached the same conclusion.

Section 1-6 draws on portions of the Department of Justice's proposed bill on mandatory, non-binding arbitration, *see* S. 2253, 95th Cong. 1st Sess.; H.R. 9778, 95th Cong., 1st Sess., the Statement of Attorney General Griffin B. Bell, *supra*, as well as state legislation on the topic of arbitration.

(a) *Applicability.* The Act provides for mandatory arbitration where the amount in dispute is less than $30,000, exclusive of interest and cost. While the figure is $20,000 less than the Department of Justice Bill's $50,000 level, it should cover the bulk of product liability claims. In that regard, the ISO closed claim data, trended for severity, show that the average paid claim in bodily injury cases is $26,004. While some have suggested limiting arbitration to smaller claims, it is the larger claims that have been the greater cost items in product liability cases, *See* ISO, "Closed Claim Survey," at 113.

While there has been no state experience with cases at the $30,000 level, Attorney General Bell has noted that when Pennsylvania increased the jurisdictional amount for the state's arbitration program from $3,000 to $10,000, there was no increase in the appeal rate. *See* Statement of Attorney General Griffin B. Bell, *supra*.

It seems relatively certain that an arbitration procedure will help expedite and reduce costs connected with smaller claims. ISO closed claim data show that the large majority of product liability payments are relatively small (more than two-thirds are under $1,000—even when trended for severity). *See* ISO,"Closed Claim Survey," at 113.

(b) *Rules Governing.* Subsection (1) indicates that arbitrators should apply the product liability substantive law rules of this Act. Where the Act does not provide a rule of decision, relevant state law would be applied.

Subsection (2) indicates that where a procedure is not covered, *e.g.*, when a court can vacate a judgment, the Uniform Arbitration Act (UAA) (enacted in a number of states) is to be used as a resource.

The Act also permits the state to designate an alternative source of rules in subsection (3)

(c) *Arbitrators.* The rules provide latitude for the parties to select a single arbitrator. Otherwise, the arbitration is to be conducted by three persons, one who is a lawyer or retired judge, one who has expertise in the subject matter area that is in dispute, and one who is a layperson. This provision differs slightly from the Department of Justice proposal in light of the needs of product liability. Having an individual who is familiar with the esoteric nature of the subject matter involved will help expedite the case and serve as a deterrent to the presentation of biased expert testimony. In addition, this subsection provides for a layperson to be included to help assure that the consumer perspective regarding product safety is represented. The process of selecting a layperson may be complicated, but it is suggested that either normal jury rolls be utilized or a list of laypersons be compiled for this purpose.

Aside from general guidelines regarding fairness and lack of bias, the Act does not outline the method of choosing arbitrators, but leaves that matter to the individual states. A state can help implement the general guidelines by requiring each arbitration panel candidate to disclose any personal acquaintance with the parties or their counsel and allow a *voir dire* examination. *see* Mich. "Comp. Laws Ann." § 600.5045(1) (2) (Supp. 1978). Some of the better procedures include:

(1) Having the American Arbitration Association select a pool of candidates according to its established selection procedures. Each party is allowed to reject certain candidates and rate the remainder in order of preference. Additional provisions take effect if this procedure fails to produce a panel. *See* "Mich. Comp. Laws Ann." § 600.5044(4)(5) (Supp. 1978);

(2) Having the court appoint arbitrators. "Mass. Gen. Laws Ann." ch. 231, § 60B (1978).

(3) Having an arbitration administrator appoint arbitrators. "Wis. Stat. Ann." § 655.02 (1978).

(4) Having the parties and court combine to appoint arbitrators. "Neb. Rev. Stat." § 44-2840, 2841 (1976); "Ohio Rev. Code Ann." § 21(A) (1977).

(d) *Arbitrators' Powers.* These provisions are taken from the Department of Justice proposal on arbitration. They grant the arbitrators jurisdiction and also give them powers of subpoena.

(e) *Commencement.* This provision is also derived from the Department of Justice proposal. Its purpose is to help expedite the proceeding. The Act contains a slight modification of the Justice proposal in order to allow an extension for "good cause shown." This seems appropriate in light of the fact that some product liability cases are very complex. *Cf.* "Ariz. Rev. Stat. Ann." § 12-567(C) (Supp. 1978) (medical malpractice).

(f) *Evidence.* One method of expediting the process is to use informal means of proof. Nevertheless, some guidelines are needed. The Act follows the department of Justice proposal in referring to the Federal Rules of Evidence as general guidelines. Strict adherence to rules of evidence is not required. *See* "Ariz. Rev. Stat. Ann." § 12-567-(D) (Supp. 1978).

(g) *Transcript of Proceeding.* With respect to the provision of a transcript of proceeding, the Act generally follows the Department of Justice draft.

(h) *Arbitration Award and Judgment.* The Act follows the Department of Justice proposal provisions on award and judgment. The parties may

request a trial *de novo* on issues of law or fact. If they do not so request in a timely manner, the action is at an end—there is no appeal.

(i) *Trial De Novo.* The Act follows the Department of Justice proposal provisions on trial *de novo*. Additional guidance on this topic may be found in the Uniform Arbitration Act § 8-131. The Act excludes evidence about the existence of a prior arbitration proceeding, the nature or amount of the award, and matters concerning the conduct of the arbitration (with the exception of the admission of testimony for impeachment purposes) at the trial *de novo*. A number of state medical malpractice arbitration statutes have taken the opposite view, *i.e.*, they admit the results of the arbitration proceeding on the premise that this will be a deterrent against persons seeking retrials of the proceeding. *See, e.g.*, "Ariz. Rev. Stat. Ann." § 12-567(M) (Supp. 1978); "Mass. Gen. Laws Ann." ch. 231 § 60B (Supp. 1978). *Cf.* "Wis. Stat. Ann." § 655 19(2) (1978) (excluding findings and order of arbitration panel). *See also* Volume VI, "Legal Study," at 155-56.

The approach of Section 116 would appear to be in accord with the Federal Constitution. *Cf.* "ExParte Peterson," 253 U.S. 300, 309 (1920). Moreover, with the exception of two Ohio lower court decisions, state courts have upheld the constitutionality of provisions that do admit panel findings before the jury. *See* "Eastin v. Broomfield," 116 Ariz. 576, 570 P.2d 744, 750 (1977); "Attorney General v. Johnson," 282 Md. 168, 385 A.2d 57, 67-68 (1978); "Paro v. Longwood Hospital," 369 N.E.2d 985 (Mass. 1977); "Prendergast v. Nelson," 199 Neb. 97, 256 N.W.2d 657 (1977); "State ex rel. Strykowski v. Wilkie," 81 Wis.2d 491, 261 N.W.2d 434 (1978). *Contra* "Simon v. St. Elizabeth Medical Center," 3 Ohio Op. 3d 164, 355 N.E.2d 903, 907-909 (C.P. 1976); "Graley v. Satayatham," 74 Ohio Op.2d 316, 343 N.E.2d 832 (C.P. 1976). *See generally*, Redish, "Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications," 55 "Tex. L. Rev." 759, 793 (1977); Lenore, "Mandatory Medical Malpractice Mediation Panels—A Constitutional Examination," 44 "Ins. Counsel J." 416, 422 (1977).

Nevertheless, a jury may have difficulty evaluating the conclusions of another fact finder where the jury was not privy to the prior fact finder's qualifications and mode of operation. Even if these matters could be explained to the jury, it might get sidetracked from the actual evidence in the case. *See* the observations of Judge Hinton in a classic comment, 27 "Ill. L. Rev." 195 (1932); 18 "A.L.R." 2d 1287 (1951). *But see* Federal Rule of Evidence 803 (22) (admitting felony convictions in a cognate civil case). For these reasons, the Act has followed the Department of Justice proposal on the issue.

Section 116(i)(iv)(aa) chooses an alternative deterrent against ill-considered appeals for trials *de novo* that does not interfere with the trial *de novo*. If a party fails to obtain a judgment more favorable than the arbitration award, the court will assess the cost of the arbitration proceeding, including the amount of arbitration fees, plus interest, against that party.

In light of the fact that the present product liability system has created serious problems and the fact that compulsory binding arbitration has the potential for dealing with some of those problems, this slight incentive for retaining a sound arbitration award should not run afoul of constitutions in most states. *See* Task Force Report, at VII-233. The Act does not enumerate grounds upon which a court may vacate an arbitration award. Guidance on this issue may be obtained from section 12 of the Uniform Arbitration Act.

ANALYSIS

SEC. 117. EXPERT TESTIMONY

In General. The Task Force's "Legal Study" demonstrated that product liability cases often are compromised because of the lack of standards with regard to selecting and presenting expert testimony *See* Volume IV, "Legal Study," *supra* at 153-155. One part of the problem is the biased expert; another is the unqualified expert.

Even if experts are properly qualified and objective, a jury of laypersons is often in a poor position to determine which expert is correct. For this reason, this Act gives the court power to make greater use of pre-trial arbitation where an unbiased, qualified expert will serve on the panel. *See* Section 116. Where arbitration is not used, however, this section should promote the goal of presenting objectives and sound expert testimony to the jury.

(a) *Appointment of Experts.* Subsection (a) is based on Rule 706 of the Federal Rules of Evidence and similar state rules. It indicates that courts have the power to appoint experts on their own authority. A number of courts have utilized this power even without the benefit of Federal Rule of Evidence 706 or a similar state rule. *See* 95 "A.L.R." 2d 390 (1964). As the Task Force Report noted, the presence of a court-appointed expert "has a cautionary impact on the expert for hire whose theories at trial are subject to dispute not only by an adversary expert, but also by a neutral-court-appointed one." Task Force Report, at VII-43, citing, Mitchell, "The Proposed Federal Rules of Evidence: How They Affect Product Liability Practice," 12 "Duquesne L. Rev." 551, 557-58 (1974). *See also* 2 J. Wigmore, "Evidence" § 563, at 648 (3d ed. 1940) ("* * * this expedient would remove most * * * abuses").

One problem with court-appointed experts is that the trier of fact may give them an aura of infallibility they do not deserve. Under Section 117, this possibility is diminished because the experts are subject to cross examination by *both* parties. Also, the section allows the court in its descretion to decline to disclose to the jury that the expert witness is, in fact, court-appointed.

(b) *Compensation.* Under Federal Rule of Evidence 706 and similar state rules, compensation of experts is left to the judge's discretion. This subsection goes a step further and provides two guidelines for compensating experts. Both guidelines should serve as an added inducement for attorneys to present objective expert testimony. The guidelines suggest that the court may impose the cost of the court-appointed expert on losing parties as well as on parties the court finds have been wrong in their estimation of damages.

(c) *Disclosure of Appointment.* This section follows Federal Rule of Evidence 706. In most instances, it is important for the trier of fact to appreciate that the witness is court-appointed. However, circumstances may arise where the court believes that disclosure of that fact will give the witness too much credence with the jury. Therefore, the court has discretion to withhold the information when it is appropriate to do so.

(d) *Parties' Experts of Own Selection.* This section also allows Federal Rule of Evidence 706. Precluding the parties from introducing their own experts would vest too much power in court-appointed experts.

(e) *Pre-Trial Evaluation of Experts.* A rule authorizing a court-appointed expert does not, in and of itself, provide guidance about who is properly qualified to testify in product liability cases. There are many approaches to that issue. One approach, used in some medical malpractice statutes, would require that an expert witness "spend a substantial portion of his professional time in the actual practice of his area of expertise. This was not followed because a person may be well-versed in technical product liability matters even if he does devote substantial time to testifying in cases. *See* Task Force Report, at VII-44. Unfortunately, it is impractical to utilize a "standard test" for all experts in product liability cases. *See* Donaher, Piehler, Twerski, and Weinstein, "The

Technological Expert in Products Liability Litigation," 52 "Tex. L. Rev." 1303, 1325 (1974).

(1) *Need for Pre-Trial Evaluation.* It is not necessary or cost-efficient to utilize the procedure outlined by Donaher *et. al., supra,* in *all* cases. This rule gives some guidance to the trial court in deciding whether to conduct a pre-trial hearing on the qualifications of expert witnesses. It is appropriate to do so in more complex cases and also where the pre-trial hearing would serve as a deterrent to the presentation of witnesses who were not qualified. Either party may bring this matter before the court by motion.

(2) *Factors in Evaluation.* The factors in evaluation are drawn from Donaher *et. al., supra.*

The court should inquire into the expert witness' background and skills and determine whether they are appropriate for the purpose of the case. The court should not only examine the witness' formal education, but also whether he or she had undertaken specific preparation for the litigation before the court. Finally, the court should examine a witness for bias. A witness with marginal expert skills, but who also had a strong bias should be considered unqualified.

(3) *Findings of Fact.* If it seems clear to the court that the expert's background and experience do not qualify the expert to testify, it should state this conclusion in its findings of fact under section (h).

ANALYSIS

SEC. 118. NON-PECUNIARY DAMAGES

Non-pecuniary damages include awards for pain and mental suffering. They are to be contrasted with pecuniary damages which compensate victims for lost wages, medical costs, and other expenditures brought about by a product-related accident.

According to the ISO Closed Claim Survey, 70 percent of claims closed with payment include amounts in addition to a claimant's pecuniary loss. *See* ISO, "Closed Claim Survey," at 54 (1978). Moreover, the average amount of payment above pecuniary loss increases significantly in the higher payment ranges. *Id.*, at 54-55. A most important reason for the difficulty in setting product liability rates is the "open-endedness" of damages for pain and suffering. *See* Task Force Report, at VII-64-65.

The Task Force Report suggested that limits on awards for pain and suffering "would reduce uncertainty and thereby mitigate the 'apprehension factor' that has contributed to the rise in product liability insurance rates." *Id.*, at VII-65. Nevertheless, such awards have deep historical roots and should not be limited in a manner that unreasonably curtails the rights of injured parties.

Section 118 addresses each of the major rationales offered in support of awards for non-pecuniary damages. First, in proposing to limit such awards, this section implicitly takes the position that the common law rationale for pain and suffering awards generally does not apply under this Act. The award for non-pecuniary damages arose in early common law cases as a substitute for an injured plaintiff seeking personal "vengeful retaliation." *See* Task Force Report, *Id.* In those cases, the defendant usually committed an intentional wrong. This rationale has little application to cases arising under strict product liability. Under this Act, a manufacturer is liable for harm caused by products found to be defective in construction regardless of fault. In cases of harm caused by products found to be defective in design or defective because of the absence of adequate warnings, the trier of fact must consider more sophisticated matters than whether the defendant "acted as a reasonable person under all the circumstances"—the general negligence standard.

A second rationale to support awarding damages for pain and suffering is that they have an important deterrent function. The Task Force Report found evidence that the general product liability problem caused manufacturers to devote more attention to product liability loss prevention techniques. *See* Task Force Report, at VI-50. Section 117 retains this deterrent function while placing some reasonable limits on awards for pain and suffering.

A third rationale, supported by members of the plaintiff's bar and some economic legal scholars, is that awards for pain and suffering are a reasonable attempt to provide some compensation for the serious discomfort that a plaintiff endures. *See* R. Posner, "Economic Analysis of the Law," 82 (1972). Other studies have questioned whether monetary awards for pain and suffering do anything to alleviate the symptoms they are alleged to address. *See* J. O'Connell and R. Simon, "Payment for Pain & Suffering" (1972); Peck, "Compensation for Pain: A Reappraisal in Light of New Medical Evidence," 72 "Mich. L. Rev." 1355 (1974). Section 117 adheres to the former assumption to this degree: When a claiment has suffered permanent serious disfigurement or serious mental illness, the amount of damages for pain and suffering are left to the sound discretion of the trier of fact with appropriate review by the court in cases of abuse of that discretion.

However, where the claimant has not suffered permanent serious disfigurement or permanent mental illness as a result of the product-related harm, damages for pain and suffering are limited to $25,000.

An ample body of case law in the area of worker compensation and more recently automobile injury reparation statutes serve as guidance for courts in determining "permanent serious disfigurements." *See, e.g.,* "Falcone v. Branker," 135 N.J. Super. 137, 342 A.2d 875 (1975) (collecting cases). That term has been held to provide a sufficient basis for legal interpretation. *See* "In Re Requests of Governor and Senate, Etc.," 389 Mich. 411, 208 N.W.2d 469, 480 (1973).

Courts also have defined and explained the term "mental illness" in a number of contexts. *See* "Carroll v. Cobb," 139 N.J. Super. 439, 354 A.2d 355 (1976) (voter registration requirements); "Sachs v. Commercial Insurance Co. of Newark, N.J." 119 N.J. Super. 226, 290 A.2d 760 (1972) (insurance policy); "In re Humphrey," 236 N.C. 141, 71 S.E.2d 915 (1952) (incompetency proceedings); "Commonwealth v. Moon," 383 Pa. 18, 117 A.2d 96 (1955) (committal proceedings); "Interstate Life & Accident Insurance Co. v. Houston," 50 Tenn. App. 172, 360 S.W.2d 71 (1962) (insanity exclusion provision).

Objections to limits on awards for non-pecuniary damages take several forms: One is that such limits may violate due process or equal protection clauses of some state constitutions. *Cf.* "Wright v. Central DuPage Hosp. Assoc.," 63 Ill. 2d 313, 347 N.E.2d 736, 743 (1976) (restriction of amount of general damages in medical malpractice); "Graley v. Satayatham," 74 Ohio Op. 2d 316, 343 N.E.2d 832, 836 (C.P. 1976) (requiring list of collateral source benefits in medical malpractice). Another is state constitutional prohibitions on damage limitations. *See, e.g.,* "Ariz. Rev. Stat. Ann.," Const. Art. 18, § 6 (1956); "Ky. Rev. Stat. Ann.," Const. § 54 (1963); "Penn. Stat. Ann.," Const. Art. 3, § 18 (1969). An argument that § 117 does not violate such prohibitions is that a strict product liability cause of action did not exist at the time the constitution was adopted and is therefore exempt from its interdictions. *See* "Rail N Ranch Corp. v. State," 7 Ariz. App. 558, 441 P.2d 786, 788 (1968).

These objections notwithstanding, Section 118 can be supported by three basic rationales. First, the common law reason for the rule does not support the application of damages for pain and suffering in strict liability cases. Second, the common law rule will continue to operate where injuries are serious. *Cf.* "Rybeck v. Rybeck," 141 N.J. Super. 481, 358 A.2d 828, 836 (1976), *appeal dism'd,* 150 N.J. Super. 151, 375 A.2d 269 (1977) (limited court

access for pain and suffering in no-fault—"the law is permitted to treat large problems differently from small problems if there is a rational basis for the difference"). Finally, some ceiling or limit on damages for pain and suffering will reduce uncertainty in one of the greatest liability insurance rate-making problem areas.

ANALYSIS

SEC. 119. THE COLLATERAL SOURCE RULE

The collateral source rule is a principle of tort law under which the defendant is not permitted to take "credit" for any money that an injured plaintiff received from another (collateral) source. The rule embraces both payments for loss of wages and medical expenditures.

The rule may permit double recovery by the plaintiff and also increase transaction costs. Section 119 recognizes these possibilities and provides for a limited modification of the collateral source rule where the claimant has received compensation for the same damages from a public source. Its approach is similar to that followed in medical malpractice by the states of Tennessee and Pennsylvania. *See* Task Force, "Legal Study," Vol. V, at 146.

There are two significant arguments against proposals to modify the existing rule. The first is that the "wrongdoer" should not have the benefit of a windfall. Proponents contend that it is better that the plaintiff have the benefit of a windfall than the defendant.

This argument can be rebutted in the context of product liability. Under Section 104 of this Act and the law of most states, product sellers may be held responsible for damages on a strict liability basis not merely because the defendant has engaged in negligent or intentionally wrongful conduct. Therefore, a selective modification of the collateral source rule in the context of product liability, as compared with medical malpractice, may be justified. *Cf.* "Graley v. Satayatham," 74 Ohio Op. 2d 316, 343 N.E. 2d 832 (C. P. 1976); "Simon v. St. Elizabeth Medical Center," 3 Ohio Op. 3d 164, 355 N. E. 2d 903 (C. P. 1976) (holding unconstitutional selective abolition in medical malpractice context). Other states, however, have upheld such selective abolition, or modification. *See* "Eastin v. Broomfield," 116 Ariz. 576, 570 P. 2d 744, 751-752 (1977).

The second argument against modifying the collateral source rule is that a manufacturer should not be permitted to "externalize" the cost of an injury caused by its products. This argument is very strong where the injured plaintiff has purchased health and accident coverage. In that instance, the defendant product seller should not be able to benefit from the claimant's prior prudence. Nevertheless, some proposals have modified the rule in that situation. *See* "Neb. Rev. Stat." § 44-2819 (Supp. 1976); "Prendergast v. Nelson," 199 Neb. 97, 256 N. W. 2d 657, 669 (1977); National Product Liability Council, "Proposed Uniform State Product Liability Act," § 207 (undated). *See also* Comment, "An Analysis of State Legislative Responses to the Medical Malpractice Crisis," 1975 "Duke L. J." 1417, 1447-50.

On the other hand, where the claimant has received damages from a public source, the argument is less persuasive. The benefits received were not through the claimant's pre-accident financial planning or made a part of one's remuneration from employment; rather they were derived from public tax funds that accumulated in part by contributions from the product seller. Since the product seller would be able to distribute the same cost again among consumers through product pricing, the public may be subjected to excessive costs.

A probable effect of Section 119 will be to reduce double expenditures in the context of medical costs. The ISO "Closed Claim Survey" suggests that medical costs represent approximately 19.7 percent of product liability claims. *See* ISO, "Closed Claim Survey," at 57 (1977). Nevertheless, the cost savings generated by this section probably will be modest. The ISO closed claim data, which were quite limited on this point, show that approximately 6.4 percent of claimants have been reimbursed by public collateral sources. *See* ISO, "Closed Claim Survey," at 181 (1977). Collateral sources paid for 19.8 percent of the claims in those cases. (This closely parallels the general percentage of medical benefits.) Although generating only modest savings, Section 119 should help reduce overall insurance costs. Liability insurers should take this matter into account when the formulate rates and premiums.

Section 119 also takes account of existing legislation that may authorize subrogation by public collateral sources. In order to reduce transaction costs and duplicative distribution costs, this section precludes subrogation.

Finally, Section 119 does not alter existing law that prohibits the defendant from introducing in evidence the fact that the plaintiff has been indemnified by a collateral source. That approach was rejected because it would leave the trier of fact in the role of balancing the delicate policy elements that surround proposals calling for abolition of the collateral source rule. Also, that approach would reduce the potential benefit of collateral source rule modifications in that it would increase transaction costs and lower predictability and consistency in the allocation of collateral benefits. *See* Task Force Report, at VII-74-75. *Cf.* Defense Research Institute, "Products Liability Position Paper," at 44-45 (1976) (advocating modification of evidentiary rules to allow trier of fact to consider all collateral benefits).

ANALYSIS

SEC. 120 PUNITIVE DAMAGES

Some product sellers and others have called for the abolition of punitive damages on the ground that they serve no proper "tort law" purpose, *see* Proposed Uniform State Product Liability Act § 206 (National Product Liability Council) (undated); *see generally* the Defense Research Institute Monograph, "The Case Against Punitive Damages" (1969) (marshalling arguments) and at least one court has accepted these arguments in the area of product liability. *See* "Walbrun v. Berkel, Inc.," 433 F. Supp. 384-85 (E.D. Wis. 1976); "Roginsky v. Richardson-Merrell, Inc.," 378 F. 2d 832 (2d Cir. 1967) (dictum).

Nevertheless, as Section 120 acknowledges, punitive damages serve an important function in deterring product sellers from producing, distributing, or selling dangerous products. *See* "Toole v. Richardson-Merrell, Inc.," 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); "Gillham v. Admiral Corp.," 523 F.2d 102 (6th Cir. 1975). At the same time, this section recognizes and addresses problems that the concept has caused in the context of product liability.

While many product sellers have expressed great concern about the economic impact of punitive damages, the ISO Closed Claim Survey suggests that the number of cases in which such damages are imposed is insubstantial. *See* ISO, "Closed Claim Survey," at 183 (1977). Nevertheless, concern about punitive damages has caused some insurers to decline insurance coverage for these damages. Also, a number of states and some insurers have declined to do so for the policy reason that a product seller should not be permitted to pass this cost on to an insurer. Transcending all concerns is the total lack of structure surrounding punitive damages.

Subsection (a) addresses a basic argument against punitive damages, namely that they apply a criminal law sanction to a civil law case. The defendant does not have the benefit of constitutional protections that would be available to him under the criminal law. Section 120(a) moves away from the ordinary "preponderance of evidence" test of civil cases and toward the criminal standard, but does not turn completely to a pure criminal law

standard of proof "beyond a reasonable doubt." Instead, the Act requires the plaintiff to show by "clear and convincing" evidence that punitive damages are justified. *See* Section 102(7) (Definitions).

Section 120(a) also requires that the claimant show that the product seller's conduct demonstrated reckless disregard for the safety of others. By "reckless disregard" the provision means a conscious indifference to the safety of persons who might be injured by the product, the traditional barrier that the plaintiff must cross in order to obtain punitive damages. *See* W. Prosser, "Torts," at 9-10 (4th Ed. 1971). The reckless disregard standard is identified in statutory form to avoid any possible misinterpretation of this basic area of law—it should be clear that a product seller does *not* have to pay punitive damages under ordinary strict liability or negligence standards.

Subsection (b) follows the current common law system in allowing the jury to determine in its discretion whether punitive damages should be awarded. *See* Prosser, "Torts," *supra*, at 9. On the other hand, this subsection draws upon a newly enacted Minnesota statute (Minn. Stat. Ann. 549.21 (1978)) in having the court, rather than the jury, determine the amount of those damages. This approach is in accord with the general pattern of the criminal law where the jury determines "guilt or innocence" and the court imposes sentence. This is particularly appropriate in product liability cases where, under current law, product sellers are potentially subject to repeated imposition of punitive damages for harm caused by a particular product.

Subsection (b) provides guidelines for the court to determine the amount of punitive damages. The guidelines offered are based on "Minn. Stat. Ann." 549.21(3) (1978). The drafters of that statute relied on a very thorough analysis of product liability and punitive damages. *See* Owen, "Punitive Damages in Products Liability Litigation," 74 "Mich. L. Rev." 1257, 1299-1319 (1976).

Factors (1) and (2) are self-evident. If the facts show that the product seller actually was aware of the specific hazard *and* its seriousness, *and* marketed it anyway, a higher award is in order.

Factor (3), profitability, recognizes that punitive damages may be used to directly attack the profit incentive that generated the misconduct.

Factor (4) is important regardless of the basic requirement that the product seller must have reckless disregard for the safety of others. If the product seller consciously concealed its activities, this augurs for a higher award.

Factor (5) acknowledges that a product seller who was reckless in producing the product, but who acted quickly to remove the product from the market upon discovery of the hazard, should not be subject to as harsh a sanction as one who failed to act. Some have suggested that punitive damages should be awarded only where corporate management has either authorized, participated in, or ratified conduct that shows a conscious or reckless disregard for public safety. *See* Task Force Report, at VII-79. Section 120 rejects that approach because it could foster legal disputes as to whether an individual stood "high enough" in the corporate structure to cause that individual to bear responsibility for punitive damages. Nevertheless, in circumstances where a non-management employee caused the harm and management acted quickly to undo that harm once it was discovered, a lower award may be appropriate.

Factor (6) is traditional under the common law. It is one that has been subject to criticism from product sellers and economists. Nevertheless, in light of the fact that deterrence of wrongful conduct is the principal reason behind punitive damages, it is appropriate to consider the impact an award will have on a particular product seller.

Factor (7) is more important in product liability cases than in others because it addresses the problem of multiple exposure to punitive damages. This factor directs the court to consider both criminal and civil liability to which the product seller has been or may be subjected.

The Act takes the position that the award of punitive damages should go to the claimant and not the state. While the argument that since the damages are non-compensatory they should go to the state has some merit the approach was rejected because of constitutional problems and the fact that it might place a claimant's attorney in a potential conflict of interest situation (is he trying the case for his client or the state?). *See* Task Force Report at VII-79.

APPENDIX A

A BIBLIOGRAPHY OF MAJOR COMPENDIUM SOURCES REVIEWED IN CONNECTION WITH THE MODEL CODE

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A review was also conducted of all enacted state product liability laws, all proposed federal product liability laws, and major proposed state product liability laws, as well as all law review and other related literature and major case law reported or published since the completion of the Interagency Task Force's seven-volume Legal Study in December, 1976. That study reviewed case law and literature published prior to that date. Consideration was also given to pre-1976 sources that were not reviewed by the Legal Study. Some primary sources have been cited throughout the section-by-section analysis and a more detailed bibliography is available at the law library of the Department of Commerce, Washington, D.C., Thomas B. Fleming, Chief.

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