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Product Liability: Federal Legislation? No!

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Liability: Legislation?

NO!

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The current mood of the country reflects the desire for government action by local and state units. "Get the feds out" appears to be the call of the 1980s. Disillusionment with Washington solutions is prevalent, particularly in the business community. Therefore, it is completely incomprehensible that a segment of the business community is looking to the federal government for relief in the area of product liability.

Product liability is being touted as a national problem that demands a national solution. This Alice in Wonderland approach by "big" business and trade associations is utopian at best. Since when can Washington provide a solution that is fair and equitable to the majority of citizens in the 50 states? Washington's "wonder cures," epitomized by the Employee Retirement Income Security Act (ERISA),[1] Black Lung Legislation,[2] the Occupational Safety and Health Administration (OSHA),[3] and the Consumer Product Safety Commission,[4] to mention only a few, depict a dismal record of success.

For more than a decade, Congress struggled with legislation intended to usurp the power of the states over automobile liability issues. Millions of dollars were spent, millions of pages of testimony were recorded, but the burning liability issue of the late 1960s was allowed eventually to become dormant and left to the states. The states have handled the issue of automobile liability in many ways, some by legislation, others by common law. No one solution was determined to be the best. Each state has been able to deal fairly with the problem in the best interest of its citizens and no calamity has fallen on the land because the "tablets" were not delivered from "on high"—the federal government.

The federal government has performed a valuable service by promulgating a model product liability act[5] and adopting legislation allowing manufacturers to self-insure.[6] However, federal legislation that would usurp the legislation and common law of the states is unwarranted and unwise. It would merely create an absolute legal morass for American business and consumers.

The development of tort law has traditionally been an area reserved exclusively to the states. Any reform required in the tort law of products should occur at the state level. Each state should be allowed to develop the law to meet its own particular concerns and problems.

Uniformity and certainty

Supporters of a federal product law base their argument on the lack of consistency among the various state

approaches to product liability law. But the basic premise that a federal law will bring stability to the area is unfounded. On the contrary, such legislation would create more inconsistency and uncertainty than now exists. The imposition of a federal product law would create uncertainty in jurisdictions that now have stable and well-developed product law.

Constitutionality

One factor in the application of a federal law that would create instability is the inevitable litigation over its constitutionality. There would be nationwide constitutional challenges to both the legislation as a whole and to particular provisions.

Because of the unprecedented withdrawal of a state's power to develop its own tort law there would be numerous challenges to the power of the federal government to legislate tort law for the states. Such an invasion of state sovereignty raises serious separation of powers questions. Further, an equal protection issue is raised as to any constitutionally valid rationale for the preemption of only a part of state tort law while leaving the rest intact.

Constitutional challenges also would be made to the validity of particular provisions of a federal product liability statute. A good example is the statute of repose that is part of the present Senate working draft of a federal product liability statute.[7] Statutes of repose already are constitutionally questionable at the state level.[8] To impose a national statute of repose applicable to all product actions would be met with serious and constant challenge.

This inevitable constitutional litigation would result in uncertainty as to whether the federal legislation would apply to a given jurisdiction. Courts finding all or part of the statute to be unconstitutional would then resort back to state law. An anomalous situation would develop in that some jurisdictions would be relying on federal law while others would continue to apply state product law. It would be years before the constitutionality of the law would be decisively determined by the U.S. Supreme Court. Further, if the legislation, or parts of it, were found to be unconstitutional, courts would be required to retrieve their state law after years of litigation under the federal law.

Judicial interpretation

Another factor that would defeat the goal of uniformity is the differing judicial interpretations that would be given to the same statutory language.

The draft now being considered by the Senate gives jurisdiction over this "federal" law to the state courts.[9] It is not unlikely that such a situation would result in 50 different interpretations of the same provision by 50 different state courts. Each state would develop its own unique interpretation of the law with the bare statutory language as the only common factor. Thousands of trial courts, hundreds of intermediate appellate courts and, finally, the 50 highest appellate courts would struggle with interpreting the less than precise federal legislation developed through the less than artful legislative process.

A related problem would be the varying treatment of areas not covered by the statute. It is impossible to codify product law to deal with every situation that gives rise to litigation. The question becomes how the state courts are to fill in gaps in the legislation. Because it does not appear to be constitutionally permissible to make decisions of one state court binding on a court in a different state, it is assumed that each jurisdiction would follow existing law or create new law to fill in the holes. It is clear that inconsistency would result from such a patchwork of state court decisions.

The result of this state implementation of "federal" law would be even greater instability in the law than now exists. Despite the present diversity in product law, each jurisdiction has its own body of law that can be identified and used to predict the law under new situations. However, a federal statute would require the wholesale junking of this law without any prior evaluation of its effectiveness. The courts in each state would be writing on a clean slate with only bare statutory language as a common factor. Any predictability and stability that had been established previously would be destroyed and replaced with a federal law of very uncertain application. Federal legislation, in an area reserved to the states, would result in a tremendous waste of court time relitigating issues previously settled in the particular jurisdiction at a horrendous cost to the consuming public in both dollars and uncertainty.

Rather than curbing judicial activism, heralded as the cause of many of the problems in product law, the judiciary would no longer be constrained in any way by established precedent, but would be free to decide the law on the basis of the "length of the chancellor's foot." It is readily apparent that it would be even more difficult for manufacturers and consumers to determine their respective rights and responsibilities. Rather than bringing stability to the law, such a statute would foster even greater unpredictability and inconsistency.

The same problems would exist if the already overburdened federal courts were given jurisdiction over cases falling within the purview of the statute. Different circuits would disagree on the meaning and application of any particular provision. Unless and until the Supreme Court decisively interpreted each provision there would be no consistency in the law. While it is clearly undesirable to inundate the Supreme Court with product litigation, without one court having the final word as to the interpretation of such a statute any degree of uniformity is clearly unattainable.

Further, the federal courts also would have the same problems as the state courts in filling in the areas not addressed by the legislation. Should they apply state law, under the Erie

doctrine,[10] that would have applied in the absence of federal preemption, should they look to decisions of other federal courts or should they create an entirely new federal tort law?

It is clear that the uniformity and stability that a federal law would create is more myth than reality.

What road to take?

Even if a federal law could establish the desired uniformity, how is it to be determined which single system will be the most effective in accomplishing the needed reform? A federal product law would require important policy decisions to be made at a national level ignoring very real distinctions between the states. Those decisions would clearly impinge on areas of particular state concern and expertise. Many policy issues arise, but this article deals with only a few.

Comparative negligence

A good example is the inclusion in the Senate working draft of a "pure" comparative negligence section.[11] A number of jurisdictions still adhere to the rule that contributory negligence on the part of a person seeking recovery in tort actions completely bars recovery.[12] Other states have adopted, either legislatively or judicially, a modified form of comparative negligence.[13] There are good arguments for each approach based on each state's local needs. But the proposed law would require all jurisdictions to allow a plaintiff who is found to be 99 percent negligent to recover against a defendant who is only 1 percent negligent. This is contrary to the position taken in a majority of jurisdictions.[14] The determination of whether to abolish or modify contributory negligence as a defense in a tort action is a matter of local concern and policy.

Further, the statute does not deal with the many issues that are intricately related to the operation of a comparative negligence statute. States applying some form of comparative negligence have spent years interpreting and refining their comparative negligence law as an integral part of their tort law. Each state has different rules as to joinder, defenses, releases, settlements, setoffs, contribution and indemnity. The problems that arise in multiparty suits when comparative negligence is applied cannot possibly be dealt with on a national level.

The federal government has neither the power nor the ability to override the individual wisdom of each state in determining whether comparative negligence, or what form of it, should be part of its tort system.

Another area of special local concern is the imposition of punitive damages in product liability action. Many states have recently come to grips with this issue and reached different conclusions.[15] Whether punitive damages are to be allowed in product cases or any other civil action is a matter of state policy. It is an unwarranted invasion of state autonomy to legislate for or against punitive damages on a federal level.

The form of statute of limitations to be applied in product cases is also an area best left to the states. The Senate draft contains a national statute of limitations which includes both a statute of repose and a discovery rule.[16] The states have taken very different approaches to such statutes. It is inappropriate for the federal government to legislate a national statute of limitations.

A dual system

Another problem posed by federal product legislation is the creation of a dual tort system in the states. The states would be required to apply a federal statute in product actions while applying state law in other tort actions. Litigants in various tort actions would be treated differently based on policy decisions made in Washington. In a jurisdiction which does not apply comparative negligence, litigants in a negligence action involving a product would be subject to comparative fault apportionment, while litigants in all other negligence actions would be subject to the contributory negligence defense.

The adoption of federal product legislation would also result in the application of a dual set of tort rules in the same action in many cases. An example is an automobile accident in

which the plaintiff joins both the negligent driver and the manufacturer of the allegedly defective product. Different rules, such as the limitations period, the availability of punitive damages and contributory negligence would be applied in the same action. One defendant would be subject to the federal comparative negligence statute while the other defendant may have the benefit of a contributory negligence defense.

The impracticality and inequity of such a situation is obvious. If a dual system is required to establish stable product law, it should be done at the state level, where the practical, procedural and evidentiary issues can also be considered.

A national legal nightmare?

Federal product liability legislation would create more uncertainty and inconsistency than now exists. Any reform needed in product liability law should be dealt with at the state level. Twenty-six states have enacted some form of product liability legislation[17] and many others have bills pending in their legislatures. Other states have highly developed and entrenched product liability common law. These legislative and judicial decisions reflect the political, social, economic and geographical realities in each state.

It is inappropriate for the federal government to intervene in the face of these state reform attempts. The states have traditionally been, and should continue to be, laboratories for innovation and experimentation. The best reform can be accomplished by allowing the states to draw from the experience of other states and adopt product law to meet their own needs. They can readily reform their law as needed. Federal law would ignore the real distinctions that exist between the states and could create a national legal nightmare not readily changed or reformed.

All the states do not encounter the same product liability law problems. While federal law may affect needed reform in one state, it would destroy a system that is working well in another state. Each individual legislature and judiciary is in a better position to judge the problems that exist in its own state and develop laws which solve those problems while retaining the best parts of existing law.

Responsible reform on a state-by-state basis would allow action based on real experience and local concerns, rather than speculation at the federal level. Federal product legislation is an inappropriate and unwarranted invasion of state power, denying the states the opportunity to develop product law that best meets the economic and legal needs of their own citizens.

FOOTNOTES

1. Employee Retirement Income Security Act, 29 U.S.C. § 1001 (1974).
2. Coal Mine Health and Safety Act, 30 U.S.C. § 801 (1966).
3. Occupational Safety and Health Act, 29 U.S.C. § 651 (1970).
4. 15 U.S.C. § 2053 (1972).
5. Model Uniform Product Liability Act, 44 Fed. Reg. 62, 714 (1979).
6. Product Liability Risk Retention Act, 15 U.S.C. § 3901 (1981).
7. S. 97-112, 97th Cong., 1st Sess. § 10 (1981).
8. *Compare* Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671, PROD. LIAB. REP. (CCH) ¶ 8935 (Fla. 1981) (Florida's twelve year statute of repose for all product liability actions violates the Florida Constitution's guaranty of access to the courts); Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874, PROD. LIAB. REP. (CCH) ¶ 8862 (Fla. 1980), with Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 54 Ill. Dec. 657, 425 N.E.2d 522 (1981) (Ten-year statute of repose did not violate the "certain remedy" clause of the Illinois Constitution).
9. S. 97-112, *supra* note 7, § 3(e).
10. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).
11. S. 97-112, *supra* note 7, § 7.
12. *E.g.*, Nelms v. Allied Mills Co., 387 So.2d 152 (Ala. 1980); Marean v. Petersen, 259 Iowa 557, 144 N.W.2d 906 (1966); Miller v. Mullenix, 176 A.2d 203, 227 Md. 229 (1962); Walsh v. Southtown Motors Co., 445 S.W.2d 342 (Mo. 1969).
13. *E.g.*, ARK. STATS. ANN. § 27-1765 (1979); COLO. REV. STATS. ANN. § 13-21-111 (1973); HAWAII REV. STATS. § 663-31 (1976); OHIO REV. CODE § 2315.19 (1981); OKLA. STATS. tit. 23 § 2315.19 (1979); WIS. STATS. § 895.045 (1979). *See also* C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE MANUAL, App. II (rev. ed. 1978 & Supp. 1981); V. SCHWARTZ, COMPARATIVE NEGLIGENCE, (1974 & Supp. 1981).
14. Only 11 states have adopted "pure" comparative negligence. *E.g.*, Kaatz v. State, 540 P.2d 1037, (Alaska 1975); Li v. Yellow Cab Co. of California, 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); MISS. CODE ANN. § 11-7-15 (1972); N.Y. CIV. PRAC. LAW § 1411 (1976). *See also* C. HEFT & C. HEFT, *supra* note 13; V. SCHWARTZ, *supra* note 13, at § 3.2.
15. *See generally* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES—LAW AND PRACTICE, §§ 6.01-6.38 (1981).
16. S. 97-112, *supra* note 7.
17. *See* 2 PROD. LIAB. REP. (CCH) ¶ 90,000.