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FEDERAL PRODUCT LEGISLATION AND TOXIC TORTS:
THE DEFENSE PERSPECTIVE

JOHN J. KIRCHER†

I. INTRODUCTION

In recent years, the country has witnessed a dramatic increase in both the number of product liability claims and in the litigation resulting from these claims. Governing the resolution of these claims is a collection of legal principles known as product liability law. As it exists today, product liability law is nothing more than the by-product of changing concepts regarding the responsibility of those involved in the business of manufacturing and selling products. Each

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1. Although the lack of reliable data collection at the trial court level makes estimates in this area somewhat suspect, one source has estimated that between 1971 and 1976 the number of product liability suits increased substantially, with between 60,000 and 70,000 claims filed in 1976. See Note, Industry-Wide Liability, 13 SUFFOLK U.L. REV. 980, 984 n.24 (1979) (citing 5 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY 585 App. 627 App. (1978)).

Several reasons may be advanced for this phenomenal growth in product liability claims:

1. Improved technology has resulted in the development and production of many new products and more complicated products to which the American public is exposed.

2. Through the media and otherwise, the American public is now much more aware of the right to seek a legal remedy for harm resulting from the tortious conduct of another.

3. The organized plaintiffs' bar has enjoyed what only may be referred to as a remarkable success in both the education of its membership (as to new substantive theories and as to effective, new trial tactics), and in advocacy in our courts and legislatures for pro-plaintiff law revision.

4. Our courts and legislative bodies, on the whole, have developed a consumer-protective orientation which has found expression in the liberalization of rules and legal liability.

2. For example, in 1965 the American Law Institute promulgated a rule of strict tort liability for product sellers and claimed the following justification for the rule: [T]he seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the 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; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is enti-
jurisdiction has evolved its product liability laws to meet its own particular social and economic needs. Of course, these needs may differ from jurisdiction to jurisdiction. Since the courts and legislature of each state are in the best position to understand those needs, they are, through the process of trial and error, continuously evolving a body of law which not only has the flexibility necessary to meet changes but also provides the stability of precedent.

Some members of Congress, however, have tended to view differently this evolution of product liability law. They have expressed the belief that conflicting rules make it difficult for manufacturers and other product sellers to know their legal obligations, and believe that these rules create burdensome costs which are passed along to product consumers. These members of Congress believe that this diffused process results in a burden to interstate commerce and that, as a result, federal product liability legislation is needed to establish uniform standards and clear and reasonable guidelines for product liability.

In the past few years, several bills have been proposed in Congress that would preempt state product liability law and substitute in its place a federal product liability statute. The most recent bill of this type is S. 44, known as the "Product Liability Act," introduced by Senator Kasten in the Ninety-eighth Congress. This bill is a slightly revised version of S. 2631, which was introduced by Senator Kasten in the previous session of Congress. Although S. 44 purports to establish "uniform standards" and "clear and reasonable guidelines," it is submitted that Senate Bill 44, like its predecessor, does neither. Rather than providing guidelines, it strips away existing guidelines found in product liability law, and presents the potential for an entirely new field of litigation. Furthermore, rather than establishing uniform standards, the bill employs generalized, undefined


4. Id.


6. S. 2631, 97th Cong., 2d Sess. (1982). Senate bill 2631, also known as the "Product Liability Act," was favorably reported by the Senate Committee on Commerce, Science, and Transportation who recommended passage of the bill. SENATE REPORT, supra note 3, at 1. S. 44 incorporates some of the changes which the Senate Committee made in S. 2631. See, e.g., notes 21-23, 45-48 & 117 and accompanying text infra. Otherwise, the two bills are virtually identical. Compare S. 44, supra note 5 with S. 2631, supra.
terms the interpretation of which is left to state courts who would be without the benefit of developed precedent.\(^7\)

Far from alleviating uncertainty and instability in the law of product liability, the proposed federal law would introduce more uncertainty and instability into that area. It affords no more guidance to those who are involved in interstate product activity than that which currently exists, since each state would be compelled to formulate its own interpretations of this "uniform" legislation. Unquestionably, those formulations would be based upon the public policy and economics of each particular state. Thus, there would be no change in the process by which product liability law is formulated, except possibly in those instances where the Act preempts existing state product liability law.\(^8\) Nevertheless, even in situations where the Act has preempted existing law, state courts would necessarily be drawn into the process of examining their own precedents to determine whether they comport with, or are at variance with, the vague provisions of the Act.

The problems which would result from the implementation of the proposed Product Liability Act can best be illustrated by focusing on the claims which center around the so-called "toxic torts," especially those claims which allege harm attributable to Diethylstilbestrol (DES) or asbestos. The advent of these claims has resulted in a wealth of unique and complex issues which do not fit neatly into any recognized theories applicable to product liability litigation. State courts have attempted to formulate product liability law to promote state policies which include risk spreading, deterrence, and protection of manufacturers. These state court decisions have also provided a measure of guidance to the manufacturers and insurers of those products which "have contacts" with those states. The proposed federal legislation purports to strip away that guidance and replace it with ambiguity and vagueness. Although the case law which has developed in this area is far from perfect, and is certainly subject to further refinement, it represents a well-reasoned and well-meaning attempt

\(^7\) See S. 44, supra note 5.

\(^8\) Id. § 3. The preemption section of S. 44 remains unchanged from the earlier version of the bill. See S. 2631, supra note 6, § 3(c). According to the Committee report on S. 2631, the legislative intent is to allow state law governing matters not dealt with by the act to remain in place. \textit{Senate Report}, supra note 3, at 22. Although some commentators have called for preemption of only state law inconsistent with the Act, the Committee has recommended that to avoid confusion all state law covered by the Act be preempted. \textit{Id}. The Committee report points out that while tort law has traditionally been a matter of state law, Congress has at times enacted statutes preempting state tort law. \textit{Id}. at 23. For a discussion of § 3(c) of S. 44, dealing with the preemption issue, see note 192 and accompanying text infra.
by the courts to clarify the myriad of problems in the area. On the other hand, the proposed federal legislation is anything but well-reasoned and it does not approach a workable solution for the defendant facing the many problems involved in litigating toxic tort claims. Furthermore, as Justice Frankfurter so aptly pointed out, "The intrinsic difficulties of language and the emergence, after enactment, of situations not anticipated by even the most gifted legislative imagination reveal the doubts and ambiguities in statutes that so often compel judicial construction."

The remainder of this article examines the problems which currently plague toxic tort litigation and then discusses why the proposed "Product Liability Act" fails to remedy some of the most basic problems inherent in this type of litigation.

II. TOXIC TORT LITIGATION: THE DEFENDANT’S BATTLE

The defendant-manufacturer in a toxic tort action and its liability insurer face numerous knotty problems. This article will attempt to demonstrate that the proposed federal product liability legislation alleviates none of these problems but instead attempts to avoid them either through the use of vague or all-encompassing language, or by ignoring them altogether.

A. Causation

A fundamental principle which underlies product liability law, and indeed all tort law, is that an actor cannot be held legally responsible for harm sustained by another unless there is a causal relationship between the tortious conduct of the actor and the harm sustained by the claimant. In the area of product liability, this principle is commonly stated in terms of some "defect" in the product for which the seller is responsible, and which is the legal cause of the injury or damage sustained by the plaintiff. Although the issue of causation is present in all product liability cases, it becomes particularly complex and confusing in relation to the toxic tort.

One area in which this causation problem can be illustrated involves claims emanating from the exposure of individuals to asbestos products. Although the media and various commentators have generally focused upon the dangers which are inherent in exposure to "asbestos products," the use of the generic term alone is potentially

10. See Restatement (Second) of Torts § 430 (1965).
misleading. The asbestos industry as a whole produces a wealth of diverse products.11 The dangers posed by these products differ widely depending upon their tendency to release harmful asbestos fibers.12 Some asbestos products present little or no health risks, or present risks which can be easily tolerated without adverse effects at certain levels.13 Therefore, mere proof of exposure to “asbestos,” without more, does not in itself establish the causal link necessary to tie that exposure to the physical harm alleged by a claimant. Furthermore, since some products with identical names have asbestos-free forms for certain applications,14 the fact that a plaintiff has been exposed to a given product likewise does not establish the requisite causal link. Furthermore, the link is all the more difficult to forge in light of the medical and other scientific evidence which indicates that several asbestos-related diseases may be caused by factors other than exposure to asbestos fibers, and that these diseases are not uniquely caused by, or specifically traceable to asbestos products.15

In contrast to products containing asbestos, all DES was chemically identical. While the causation controversy is therefore not as intense with DES-related disease as it is with asbestos-related disease, there is some dispute as to whether there is in fact a causal link between DES and the maladies experienced by the offspring of the women who ingested the drug.16

14. Mansfield, supra note 11, at 867.
15. Note, supra note 13, at 694. Various diseases that can be caused by asbestos exposure may also be caused by the inhalation of “fibrous dust and chemicals.” Id. Other asbestos-linked diseases may be caused by exposure to “chromates, nickel, coke, coke oven emissions, cigarette smoke, uranium, and arsenic.” Id. at 694 n.75 (citing speech by Peter Shea, Home Office Supervising Examiner for Liberty Mutual Ins. Co., Boston, Ma. to the Assoc. of Ins. Atty’s, Mar. 21, 1980).
16. Fischer, Products Liability—An Analysis of Market Share Liability, 34 VAND. L. REV. 1623, 1624 (1981). This commentator has noted that an estimated one-half million to three million women used DES while pregnant. Id. (citing Comment, DES
In light of this fundamental and crucial controversy over medical causation which permeates the toxic tort area, it would seem logical to expect that any "comprehensive," "uniform" federal legislation would include some provisions which would alleviate such areas of dispute, if not eliminate them entirely. However, the proposed "Product Liability Act" provides only that the claimant must establish "by a preponderance of the evidence that the unreasonably dangerous aspect of the product was a proximate cause of the harm" which forms the basis of the claim. Although this requirement attempts to paraphrase established hornbook law, its use of the term "proximate cause" creates the potential for serious problems because the Act does not define the term. Although "proximate cause" is a term widely used by lawyers, it has acquired various meanings and, having no integrated meaning of its own, its chameleon quality obscures the real issues of a case. The use in the proposed law of this vague and often disputed standard provides the courts with no guidance and will compel state courts to rely on precedent to interpret the phrase; or, if such precedent is to be ignored, it will require them to "re-invent the wheel." If state courts are to employ old precedent, or create new precedent, then little if anything will be gained by the "new" federal standard.

Through the use of the "proximate cause" standard, Congress would also necessarily invite any litigation to become a battle of experts, a situation not unlike the present state of affairs. Toxic tort

and a Proposed Theory of Enterprise Liability, 46 FORDHAM L. REV. 963 (1978)). However, only 384 women born during the period when DES was prescribed also suffer from the rare form of cancer DES allegedly causes. Id. at 1624 (citing Herbst, Cole, Noruis, Welch & Scully, Epidemiologic Aspects and Factors Related to Survival in 384 Registry Cases of Clear Cell Adenocarcinoma of the Vagina and Cervix, 135 AM. J. OBSTET. GYNECOL. 876, 877 (1979)). Furthermore, only 213 of this group had mothers who took DES while pregnant. Even among these 213 women, there was no clear causal connection between DES and the disease. Id. at 1624 (citing Note, Beyond Enterprise Liability in DES Cases—Sindell, 14 IND. L. REV. 695, 713-14 (1981)).


18. See generally S. 44, supra note 5. Although S. 44 does have a definition section, "proximate cause" is not defined. The Senate Committee report on S. 2631, which contained the same proximate cause language as the current version of the bill, likewise contained no real guidance as to the meaning of the term "proximate cause." It merely stated that "proximate cause" generally means that which is a significant cause in fact and is a factual inquiry inherent in each case. SENATE REPORT, supra note 3, at 24 & n.67.

19. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 42, at 244-50 (4th ed. 1971). Prosser notes that the confusion involved in defining proximate cause had led to different formulae. Id. at 246. These proposed formulae include the following: the nearest cause; the last human wrongdoer, cause and condition; the substantial factor test; and the justly attachable cause test. Id. at 246-48. See also Green, Proximate Cause in Texas Negligence Law, 28 TEX. L. REV. 471 (1950).
litigation is an area flooded with differing test results regarding the incidence of disease resulting from exposure to toxic substances. This conflict among experts is often seen in toxic tort litigation when experts who evaluate identical information come to different conclusions.\textsuperscript{20} By utilizing only the “proximate cause” standard, the proposed federal legislation has done little to prevent this conflict among experts from becoming a central problem in product liability litigation.

An earlier version of the bill introduced into the Senate in June, 1982, provided that expert opinion was insufficient to support a factual proposition unless it was supported or corroborated by objective evidence.\textsuperscript{21} However, the Senate Committee on Commerce, Science, and Transportation deleted this provision from the bill, contending that sufficient safeguards exist with regard to such testimony to justify its admission without corroboration.\textsuperscript{22} Although the inclusion of this provision regarding expert testimony may not have been well-advised, its deletion in S. 44\textsuperscript{23} and the deference given to the trial judge in evaluating an expert’s qualifications, coupled with his freedom to instruct the jury regarding such testimony,\textsuperscript{24} serves to illustrate the unsatisfactory, incomplete character of the proposed legislation. In refusing to address the usage and propriety of expert testimony in these actions, the bill opens the door to more confusion and uncer-

\begin{itemize}
\item \textsuperscript{20} See In Re Asbestos & Asbestos Insulation Material Prods. Liab. Litig., 431 F. Supp. 906, 909 (J.P.M.D.L. 1977) (“[t]he question of whether particular disorders may be attributable to exposure to a particular type of asbestos is a matter of dispute among medical authorities”). As one commentator has noted, in asbestos litigation these differences of expert opinion are often “major, fundamental, tenaciously held, and rigidly conceptualized.” Peters & Peters, Asbestos Product Liability, 4 J. PROD. LIAB. 49, 53 (1981).
\item \textsuperscript{21} S. 2631, supra note 6, § 4(b), at 7. Section 4(b) of S. 2631 reads as follows: “The claimant must introduce sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make the determinations specified in subsection (a). Expert opinion is not considered sufficient evidence to support a proposition of fact unless it is supported or corroborated by sound objective evidence.” \textit{Id.}
\item \textsuperscript{22} SENATE REPORT, supra note 3, at 14.
\item \textsuperscript{23} S. 44 only requires that “[t]he claimant must introduce sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make the determinations specified in subsection (a).” S. 44, supra note 5, § 4(b), at 7.
\item \textsuperscript{24} See SENATE REPORT, supra note 3, at 14. In evaluating the expert testimony provision in S. 2631, the Committee stated that proponents of the expert testimony provision had expressed a view that uncorroborated expert testimony should not be sufficient to establish a product liability claim. \textit{Id.} However, the Committee noted, there was other testimony which concluded that sufficient safeguards already existed with respect to expert testimony. \textit{Id.} Therefore, the Committee concluded that additional study was necessary before instituting any legislative remedy in this area. \textit{Id.}
\end{itemize}
tainty, and consequently more litigation—a far cry from its intended goal.

B. Causation—Manufacturer Identification

Assuming that a claimant can satisfactorily establish a causal link between the harm alleged and some generic substance, a question inevitably remains concerning the identity of the manufacturer of the particular product responsible for the harm. While this question presents no problem at all in most types of product liability actions, it is a particularly difficult problem in toxic tort litigation. Although “DES” or “asbestos” may be the culprit, both substances are, or have been, manufactured by numerous companies of varying size and in different geographic locations.\(^2\) The identification problem is further clouded by the lengthy latency period of diseases allegedly caused by DES and asbestos.\(^2\) In the decades between exposure to the questioned substance and the onset of any disease, the claimant’s memory regarding the brand of the product involved is likely to have grown dim and any manufacturing records which may have existed that could shed light on the question have probably been lost or destroyed.\(^2\)

This problem is severe in DES cases, because a claimant’s mother is often unable to recall the brand of the drug she ingested perhaps fifteen or twenty years ago.\(^2\) It is even more complex in cases involving asbestos exposure, where a claimant may have worked on many different job sites at which his employer or other contractors utilized asbestos products obtained from a number of different suppliers and manufacturers.\(^2\) When a claimant was exposed to asbestos as a by-


For example, in asbestos litigation 80 defendants were named in 103 asbestos suits. These defendants consisted of various manufacturers and sellers of asbestos products. See In re Asbestos & Asbestos Insulation Prods. Liab. Litig., 431 F. Supp. 906, 908 (J.P.M.D.L. 1977). Identifying the manufacturer of the DES that caused a plaintiff’s injury is an equally difficult task because DES was a fungible drug and pharmacists filled prescriptions for it with whatever brand was available. See Comment, supra, at 615 (citing Note, DES: Judicial Interest Balancing and Innovation, 22 B.C.L. REV. 747, 749 (1981)).

26. Comment, supra note 25, at 615. Cancer identified with DES has a latency period of 10-20 years. Id. (citing Anderson, Watring, Edinger, Small, Netland & Safaii, Development of DES—Associated Clear-Cell Carcinoma: The Importance of Regular Screening, 53 OBSTET. & GYNEC. 293, 297 (1970)). See also Note, supra note 1, at 999; Note, supra note 13, at 681.

27. Comment, supra note 25, at 615. See also Note, supra note 1, at 999; Note, supra note 13, at 681.


stander or as a consumer and the search cannot be confined to any particular employer, the identification problem becomes monumental.\textsuperscript{30}

In their desire to fashion a solution to the identification problem facing toxic tort plaintiffs, courts have been rather creative in stretching the boundaries of tort law far beyond their intended or logical limits. For example, the New York Court of Appeals in \textit{Bichler v. Eli Lilly & Co.}\textsuperscript{31} determined that DES manufacturers were engaged in a form of concerted action—labeled “conscious parallelism”—and imposed liability on that basis, even though the plaintiff could not identify the manufacturer of the drug that was ingested by her mother.\textsuperscript{32} Another novel approach for holding DES manufacturers liable despite a plaintiff’s inability to identify the manufacturer of the drug her mother had taken was formulated in the landmark opinion of \textit{Sindell v. Abbott Laboratories, Inc.}\textsuperscript{33} In \textit{Sindell}, the California Supreme Court concluded that a claimant who sued a “substantial share” of the relevant DES manufacturing “market” could maintain a cause of action.\textsuperscript{34} If the plaintiff prevailed, those manufacturers named in the suit would be responsible for the percentage of the plaintiff’s damages which corresponded to their share of the DES market.\textsuperscript{35} Courts faced with claims against asbestos manufacturers have similarly assessed liability without regard to proper identification of the manufacturers of the allegedly harmful substances involved, and have apportioned damages equally among the defendant/manufacturers despite the disparity among those manufacturers in terms of their size and the

\textsuperscript{30} \textit{Id.}


\textsuperscript{32} \textit{Id.} \textit{Bichler} involved a DES daughter who contracted cervical and vaginal cancer. \textit{Id.} at 577, 436 N.E.2d at 184, 450 N.Y.S.2d at 778.

\textsuperscript{33} \textit{Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).} In \textit{Sindell}, the plaintiff and 100 other similarly situated women brought suit against 11 drug companies who had produced DES. \textit{Id.} at 593, 607 P.2d at 925, 163 Cal. Rptr. at 133. The plaintiff alleged that ingestion of the defendants’ DES had caused cancerous vaginal or cervical growths in the daughters of mothers who had taken the drug while pregnant. \textit{Id.} at 594-95, 607 P.2d at 926, 163 Cal. Rptr. at 133-34. However, the plaintiff was unable to prove which one of the defendants had produced the actual DES taken by her mother. \textit{Id.} at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.

\textsuperscript{34} \textit{Id.} at 612-13, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46.

\textsuperscript{35} \textit{Id.}, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46. According to the \textit{Sindell} court, all the defendants had manufactured an identical product and, through no fault of the plaintiff, the manufacturer who caused the plaintiff’s injury could not be identified. \textit{Id.} at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144. In this situation, the court said, it is fair to hold each manufacturer liable for the proportion of the judgment represented by its share of the DES market. \textit{Id.} at 611-12, 607 P.2d at 937, 163 Cal. Rptr. at 145.
types of products manufactured. 36

These “shot-gun approaches” are undoubtedly premised on speculation and are patently unfair. A cause of action which targets only a “substantial share” of an undefined market, or which names only those producers that can be remembered or that are amenable to process, faces a very real possibility of excluding the one manufacturer whose product was responsible for the harm the claimant suffered. 37 A claimant afflicted with an illness allegedly caused by exposure to asbestos may well attempt to sue all of the manufacturers or other sellers whose products were present at any of the job sites where that claimant worked. However, even in the unlikely event that the claimant is successful in identifying and joining all of these potential defendants, the proof regarding the amount of exposure to each allegedly harmful product is clearly speculative, because of the variable working conditions and the presence or absence of safety precautions. 38 Given the time lag between exposure and illness and the numerous, often intangible, factors which differentiate the potential defendants in such actions, liability will inevitably be placed upon blameless sellers while the real culprit may go free. Proponents of these new approaches contend that these inequities will resolve themselves in the long run and that all manufacturers and other sellers will eventually come to bear their proper measure of liability. 39 This ar-

36. See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974). Borel was an industrial insulation worker who sued several manufacturers of asbestos-containing insulation. Id. at 1081. He alleged that the manufacturers had breached a duty of care by failing to warn of the dangers in handling asbestos products. Id. After determining that the jury had sufficient evidence to conclude that each defendant’s conduct was a substantial factor in the plaintiff’s injury, the court addressed itself to the apportionment of damages. Id. at 1094. Applying Texas law, the Fifth Circuit held that where several causes combine to produce an injury that reasonably cannot be divided, then the tortfeasors may be held jointly and severally liable. Id. at 1094-96.

37. Fischer, supra note 16, at 1659. According to this commentator, the market share liability theory has its origin in alternative liability, a fault-based doctrine which was designed to impose liability where the traditional rules of causation have failed. Id. Under the market share theory of liability, however, there is no assurance that the actual culprit is before the court. Id. See also Sindell, 26 Cal. 3d at 616, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting).

38. Mansfield, supra note 12, at 875. In the typical asbestos-related disease suit, the plaintiff is an insulation or shipyard worker who has been using products containing asbestos in his job for several decades. Id. The plaintiff usually will sue all of the manufacturers whose asbestos products were present at the job sites during the time when the plaintiff had worked. Id. As one commentator has pointed out, the exact amount of dust created by each manufacturer’s product or inhaled by the plaintiff can only be purely speculative. Id.

39. Note, Beyond Enterprise Liability in DES Cases—Sindell, 14 IND. L. REV. 695, 718 (1981). Since the Sindell approach requires the defendants to possess a “substantial” share of the entire market, only a minority of manufacturers would not have to
argument, however, is based upon speculation, and certainly cannot justify the initial imposition of such inequities.

The likelihood that a manufacturer ultimately will be held liable only for harm caused by its own actions is further decreased because these new theories of liability without caution discourage open fact-finding. For example, DES manufacturers marketed their product as a generic drug and marketed it for several different uses. Consequently, these manufacturers are often unable to collect data which would exonerate them from liability in a particular case. Unlike the famous case of Summers v. Tice, where the court fashioned a theory of alternative liability in part because the defendant had access to the evidence, the mothers who took DES who possess the crucial information regarding the identity of the DES ingested. Far from encouraging those individuals who took the drug to come forth with this evidence, the current system of handling toxic tort claims instead encourages the suppression of that information. It is much more appealing to collect from many manufacturers, rather than to be limited to the one responsible manufacturer who may be judgment-proof.

offset their liability costs with increased prices. However, if these smaller manufacturers achieve greater financial success through an initial avoidance of liability, they will become more attractive to plaintiffs and thus be more likely to be named as defendants in subsequent suits.

40. Fischer, supra note 16, at 1648. Sindell requires that each defendant be held liable for that proportion of the judgment represented by its share of the DES sold unless the defendant demonstrates it could not have made the DES which caused the plaintiff's injuries. Sindell, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. Since some manufacturers may have inadequate records or no records at all, they will be unable to meet the burden the Sindell court has imposed upon them. See Fischer, supra note 17, at 1649.

Even if a defendant might have made the DES which allegedly caused the plaintiff's injuries, the market share theory still produces inequitable results. For example, because DES had a variety of uses, raw production figures may not accurately reflect a manufacturer's share of the DES that was sold to prevent miscarriages. Id. at 1648. Furthermore, the fact that over 200 companies produced DES makes it difficult to gather the statistics necessary to compute accurately a defendant's true market share. See id. See also Sindell, 26 Cal. 3d at 602, 607 P.2d at 931, 163 Cal. Rptr. at 139.

41. 33 Cal. 2d 80, 199 P.2d 1 (1948). In Summers, the plaintiff was shot by one of two hunters who had each negligently fired his gun in the plaintiff's direction. Id. at 82, 199 P.2d at 2. Since the plaintiff had been acting in a reasonable way and both defendants were culpable and in a better position to identify the actual tortfeasor the court held that both defendants bore the burden of uncertainty as to which defendant actually caused the injury. Id. at 88, 199 P.2d at 5.

42. Fischer, supra note 17, at 1650. If the plaintiff could establish the identity of the responsible manufacturer but that manufacturer is insolvent, the plaintiff would be in a worse position than a plaintiff who could not identify the manufacturer of the DES that her mother had ingested. Id. The plaintiff who could not identify the specific manufacturer would be able to recover damages from joined defendants based on a market share theory while the plaintiff who could identify the manufacturer would have no recovery. Id.

43. Id. at 1649-50. For a discussion of this problem, see note 41 supra. See also
The same situation, of course, is true with regard to asbestos cases.\textsuperscript{44} The eagerness of some of our courts to fashion these novel remedies has forced manufacturers and their insurers to fight diligently those measures, thus resulting in protracted and expensive litigation. A defendant must be prepared to anticipate and counter any hybrid theory which a court or opposing counsel may propose. This makes it difficult to prepare an adequate defense, since traditional legal theories are likely to be ignored.\textsuperscript{45} Furthermore, the manufacturer may well be caught without adequate rejoinder to an approach proposed by a claimant and accepted by the court.

In light of the precarious position of manufacturers in toxic tort litigation, it would seem elementary that any proposed federal legislation would confront the causation-identification issue and resolve the problem in a clear, equitable fashion. However, the proposed “Product Liability Act” would only intensify and exacerbate the problems which already exist. This confusion is clearly illustrated by comparing two drafts of this supposedly comprehensive piece of legislation.

The earlier version of the bill, introduced in the Senate in June, 1982, as S. 2631, required a claimant to establish by a preponderance of the evidence that “the individual product unit which allegedly caused the harm complained of was manufactured by the defend-

\textsuperscript{44} Three asbestos companies—UNR Industries, the Manville Corporation, the Amatex Corporation—have filed under Chapter 11 of the Bankruptcy code. \textit{See} Tarnoff, \textit{Asbestos Broker Says Suits Forcing It Out of Business}, Bus. Ins., Feb. 21, 1983, at 2, col. 2-3. In jurisdictions which have adopted a market share approach to liability, a plaintiff who is unable to identify the manufacturer of the asbestos he used at his job would nonetheless be able to recover damages. In contrast, a plaintiff who knew he used asbestos produced by the Manville Corporation could not recover damages because the bankruptcy petition would prevent a judgment from being entered against the defendant.

\textsuperscript{45} \textit{See} \textit{Senate Report}, supra note 3, at 7. In evaluating the litigation problems in products liability cases the Senate Committee on Commerce, Science, and Transportation has observed as follows:

\textit{Uncertainty about the law of product liability increases the costs of litigating a claim. Time and effort must be expended by all parties to determine what the applicable legal rules are. Further, the possibility that a court may adopt a new legal standard in a given case gives the parties the incentive to argue for adoption of a new standard which would aid their case. Parties may have to brief and rebrief the same legal arguments repeatedly. Because the law is unclear and because, even if it is clear, may change, parties have great difficulty evaluating the merits of their case.}\textit{Id. See also Note, supra note 37, at 707.}
However, the bill then mitigated, if not abrogated entirely, the effect of this identification requirement by providing that if such identification was not feasible, the action could proceed if the claimant proved by clear and convincing evidence that every reasonable effort was made to identify the manufacturer, that the action had been commenced against all manufacturers who could possibly be responsible, and that all of these manufacturers were in a better position than the claimant to identify the responsible manufacturer. The impracticality of this latter provision is readily apparent. It is virtually impossible to join all possibly responsible manufacturers in toxic tort actions since the crux of the identification problem is precisely that all such parties cannot possibly be identified, given the number of manufacturers and the absence of data after a long latency period. Furthermore, defendant/manufacturers cannot be in a superior position to identify the responsible party or parties. In fact, the widespread distribution of a manufacturers' products and the lack of records of distribution patterns makes it impossible for a given manufacturer to exonerate itself, much less definitively inculpate another.

In light of the uselessness of the draft language, it would seem logical that any revision of the bill would carefully formulate the pertinent provision in recognition of the importance of the manufacturer identification issue. However, the revisions set forth by the Senate Committee on Commerce, Science, and Transportation in its report issued in December, 1982, instead eliminated the identification requirement of the legislation entirely, without giving any explanation as to the rationale behind this omission. In lieu of attempting to formulate a workable approach to the problem, the Committee's approach was to "solve" the problem by ignoring it. Regrettably, S. 44, the current version of the bill, adopts the Committee's approach.

46. S. 2631, supra note 6, § 4(a)(2), at 7. The requirement of specifically identifying the defendant as the manufacturer of the individual product unit causing the harm was dropped when the bill was reintroduced in the 98th Congress as S. 44. See S. 44, supra note 5. Under S. 44, the sole requirement for assessing a manufacturer's liability once its product has been proven unreasonably dangerous, is that the unreasonably dangerous aspect of the product must have been the proximate cause of the harm complained of by the plaintiff. See id., § 4(a)(2), at 7.
47. S. 2631, supra note 6, § 4(c), at 7-8. The new version of the bill has deleted this section. See S. 44, 98th Cong., 1st Sess. (1983). For a discussion of the determination of liability under S. 44, see note 44 supra.
48. See Senate Report, supra note 3, at 24. Apparently, the committee decided that the product liability claimant need not even attempt to identify a responsible manufacturer, since such identification is no longer an element of the cause of action. Nor does such a claimant have to explain why the identification is not feasible or demonstrate that a good faith attempt at identification was made.
The avoidance of the crucial manufacturer identification issue, of course, does not obliterate the problems created by that issue. Such complex problems do not simply disappear when ignored. Instead, they will continue to plague toxic tort cases until solved in some fashion by the courts. Since the proposed federal law provides no guidance in this area, courts would be compelled to approach the issue in the same haphazard and inequitable manner as has presently been utilized. In addition, courts adopting the Sindell market share approach to DES litigation would continue to be faced with certain basic definitional deficiencies. Although the Sindell court required that a "substantial share" of the DES market be joined as defendants, it never explained what exactly constituted such a "substantial share" and provided no guidance for those attempting to reach such a determination. This determination of what constitutes a "substantial share" of the market is obviously central to the entire market share theory, since the asserted purpose of the theory would fail unless sufficient manufacturers were joined to increase the likelihood that the real offender is included, and to enable the manufacturers to use the collective information provided by all defendants to possibly exonerate themselves. Yet, once again, the federal act evinces an ignorance of the critical problem in this area. While the case law is far from perfect, it certainly affords more guidance than does the silent legislation.

Similarly, the Sindell court required that the ambiguous "substantial share" be drawn from the relevant "market" but failed to define the latter term. Consequently, it is uncertain whether the

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50. See Note, Sindell v. Abbott Laboratories: A Market Share Approach to DES Causation, 69 CALIF. L. REV. 1179, 1197 (1981). According to this commentator, the Sindell court may have declined to specify a fixed percentage that would constitute a substantial share because it did not wish to be inflexible. Id. For a discussion of Sindell v. Abbott Laboratories, see notes 33-35 and accompanying text supra.

51. Note, supra note 48, at 1197. The commentator noted that the Sindell court advanced two reasons for using a substantial joinder requirement. Id. These reasons were the reduction of the likelihood that an offending manufacturer would escape liability and the mitigation of the injustice of shifting the burden of proof to the defendant. Id. (citing Sindell, 26 Cal. 3d at 612, 607 P.2d at 934, 163 Cal. Rptr. at 145). According to this commentator, the presence of the major producers of DES in a suit will also presumably cause the market information necessary for defendants to prove that they were less likely the cause of the plaintiff's injuries or perhaps not even present in the relevant market to be available. Id. at 1197-98. See also Note, supra note 38, at 720.

52. See Note, supra note 48, at 1189-92. Three market factors might be used in determining relevant market share. Id. The first, which is the only factor mentioned by the Sindell court, is that if the manufacturer can prove it did not sell DES during the appropriate purchasing period it could be dismissed from the suit. Id. at 1189. The geographic market could also be a factor, though there is nothing in Sindell which specifically defines the relevant geographic market. Id. at 1190-91. Finally,
53. Fischer, supra note 16, at 1643. If the case-by-case approach is adopted, courts will determine the relevant market based on the evidence available in a given case, which could lead to inconsistent results. Id.

54. See id. at 1648-49. There are several factors which make it difficult to define the appropriate market in DES cases. First, since DES-related injuries have a long latency period, records bearing on this issue may have been lost or destroyed. Id. at 1648. Secondly, there is no statistical breakdown between the amount of DES prescribed to prevent miscarriages—and thus relevant to determining the appropriate market share—and that supplied for other uses. Id. Finally, even where raw DES production data is available, the different marketing strategies of manufacturers may make it difficult to coordinate this data with the relevant market. Id. at 1649. See also Comment, supra note 25, at 632.

55. See Sindell, 26 Cal. 3d at 613, 607 P.2d at 37-38, 163 Cal. Rptr. at 145-46. For a discussion of Sindell, see notes 32-34 and accompanying text supra.

56. See Fischer, supra note 16, at 1645-47.

equally among the defendant manufacturers despite deficiencies in size and production volume.\textsuperscript{58} In each instance, the courts have sought to resolve the issue of proper apportionment of damages among defendants. The proposed federal legislation would halt the progress toward this goal without contributing anything toward a reasoned solution.

Currently, manufacturers also face numerous jurisdictional problems when they try to join other manufacturers who may be responsible for the harm claimed.\textsuperscript{59} By placing jurisdiction over product liability claims in state courts, the proposed federal act does not alleviate this jurisdictional dilemma.\textsuperscript{60}

Clearly, the proposed federal legislation does little to assist a manufacturer defendant in his case and does just as little to curtail the arbitrary assessment of liability which so often occurs. If Congress chooses not to solve this problem, the courts should be permitted to continue developing more workable approaches, without the shackles of a useless federal regulatory scheme.

C. Economic Concerns

Arbitrary and encompassing liability, such as that which results

\textsuperscript{58} See Mehaffy, Asbestos-Related Lung Disease, 16 Forum 341, 348 (1980). Distributing the burden equally presumes that all manufacturers are of approximately the same size, yet a small manufacturer's products may have only been used by the plaintiff on rare occasions. \textit{Id.}\textsuperscript{59}. Therefore, it is manifestly unfair to hold the small manufacturer to the same degree of liability as a large manufacturer whose products the plaintiff had been using extensively over a number of years. \textit{Id.}\textsuperscript{60}

\textsuperscript{59} See Note, supra note 37, at 721-22. In \textit{Sindell}, a California case, actions involving the sale of drugs in Illinois and in Florida were consolidated. \textit{Id.} at 721. However, since some companies that sold DES in those states did not sell DES in California, they may not have been subject to the jurisdiction of the California courts. \textit{Id.} at 721-22. Furthermore, due to the inevitable loss of records over the years between exposure to DES and manifestation of a DES-related injury, it may have been impossible to establish whether a defendant actually sold the drug in a particular state. \textit{See} Fischer, supra note 17, at 1649.

\textsuperscript{60} \textit{See S. 44, supra note 5, § 3(d) at 6.}
from the abrogation of strict causation and identification requirements, clearly poses severe and potentially debilitating economic problems for manufacturers. The increasingly large judgments obtained in DES cases have exposed manufacturers to crushing liability for conduct which when originally undertaken posed no unreasonable risk of harm to others. Similarly, the cost of damages in asbestos cases may come to billions of dollars, and transcend the financial capacity of the industry, insurers, and government-funded programs.

In light of this potentially monumental liability, manufacturers are compelled to insure themselves against possible financial ruin. However, the unpredictability of potential loss in this area has increased insurance rates substantially. Many companies, particularly smaller ones, may not be able to afford larger insurance premiums; yet without insurance they have little hope of obtaining needed investment capital. Furthermore, both smaller companies and their larger counterparts may deem it financially unwise to pass this burden of increased insurance costs on to the consuming public in the form of higher product prices. Faced with excessive judgments and increased business expenses associated with potential liability, some businesses are faced with the prospect of bankruptcy or may decide to go out of business.

Small manufacturers, which have a lesser ability to distribute such costs, are undoubtedly more prone to bankruptcy than are larger enterprises. However, larger manufacturers which are blameless

61. See generally Note, supra note 1, at 1013. See also Mehaffy, supra note 56 at 352. Of course, to the extent that the doctrine of strict liability in tort is applied in those actions, the reasonableness of the manufacturer’s conduct is of absolutely no consequence. See RESTATEMENT (SECOND) OF TORTS § 402A comment a (1965).


63. Note, supra note 1, at 1003. The difficulty of estimating potential liability provokes insurers to protect themselves by charging higher rates. Id.

64. Id. at 1003. Liability insurance costs have soared as much as 300% in one year, mainly due to increases in the number and size of product liability claims. Id. at 1016 n.193 (citations omitted).

65. See Note, supra note 39, at 717 (citations omitted).

66. See Note, supra note 1, at 1003. Defendants in product liability suits may lose business in the marketplace if they absorb their increased liability and insurance premiums by raising the prices of their products. See id. Companies who are unable to raise their prices may decide not to purchase liability insurance, but instead may establish a claims fund and bear the risk themselves. See id. at 1016 n.193. One company opted to go out of business rather than purchase product liability insurance at a cost of 10% of its annual sales. See id., (citing Wall St. J., June 3, 1976, at 1, col. 1).

67. See id. at 1003. Because industry-wide liability increases the number of plaintiffs who can recover, the cost of doing business is increased for all manufacturers. This additional cost may be enough to put smaller manufacturers out of business. See id. at 1005 n.129. A policy whereby smaller businesses are forced out and the
but nevertheless liable also find themselves in unenviable positions.68
Given the relaxation of rules of causation, particularly abrogation of
the requirement that the "wrongdoing defendant" be identified, many plaintiffs are now free to pick and choose their target defend-
ants in toxic tort actions.69 The large manufacturing enterprises are
easily recognizable and claimants undoubtedly realize that the poten-
tial for recovery is greater from the "deeper pockets"70 of the large
companies. Furthermore, large manufacturers who tend to keep
more detailed records may be more readily identified by those plain-
tiffs who still sue under traditional theories of liability which require
that the manufacturer be identified.71 Therefore, large companies are
open to "double exposure" under both traditional and market share
theories of liability.72

control of larger business strengthened may seriously affect the economic structure of
American industry. See id. at 1005.
68. See Note, supra note 39, at 716-17.
69. Sindell, 26 Cal. 3d at 616, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richard-
son, J., dissenting). See also Fischer, supra note 17, at 1649-50.
For a discussion of theories of liability which do not require that the plaintiff
identify the manufacturer who caused the plaintiff's injury, see notes 32-34 and ac-
companying text supra.
70. See Note, supra note 39, at 716-17.
Justice Richardson, dissenting in Sindell, pointed out the unfairness which may
result when the manufacturer identification element is abolished and the defendant's
wealth becomes a factor in determining liability:
This "deep pocket" theory of liability, fastening liability on defendants pre-
sumably because they are rich, has understandable popular appeal and
might be tolerable in a case disclosing substantially stronger evidence of
causation. . . . But as a general proposition, a defendant's wealth is an
unreliable indicator of fault, and should play no part, at least consciously,
in the legal analysis of the problem. In the absence of proof that a particu-
lar defendant caused or at least probably caused plaintiff's injuries, a de-
fendant's ability to bear the cost thereof is no more pertinent to the
underlying issue of liability than its "substantial" share of the relevant mar-
ket. A system priding itself on "equal justice under law" does not flower
when the liability as well as the damage aspect of a tort action is determined
by a defendant's wealth.
Sindell, 26 Cal. 3d at 618, 607 P.2d at 941, 163 Cal. Rptr. at 149 (Richardson, J.
dissenting) (emphasis in original).
71. When the "wrongdoing defendant" can be identified, that defendant will, of
course, be liable for 100% of the plaintiff's damages under traditional theories of tort
liability. See Note, supra note 50, at 1192-93. Those manufacturers who keep more
detailed records, or who have a more distinct product shape or color will be subject to
double exposure, bearing full responsibility where identification can be made, and
market share liability in other cases. Id.
72. See id. One commentator has claimed that the targeting of large businesses
is justified, since imposing liability on such manufacturers may compel the manufac-
turers to set safety and quality standards for the entire industry. See Note, supra note
1, at 1005. According to this commentator, "If all manufacturers are to be held liable
for the similar products generated by the various members of the industry, the larger
manufacturers, who have the most to lose through products liability, would have an
incentive to organize the industry and attempt to set production quality standards."
Such far-reaching economic consequences will not be confined to businesses, however. Consumers will be affected by these practices as well, since the imposition of liability without proof will cause the pricing system in the affected industries to reflect a cost not rightfully placed upon it. Furthermore, since this liability is to be imposed well after a given product is marketed, the resulting losses will have to be spread over other product lines and will cause an increase in the cost of safe, beneficial products. The revenue generated by these price increases will not be sufficient to recoup all of the losses arising from the arbitrary imposition of liability. Consequently, some manufacturers will necessarily become insolvent. Thus, in so extending liability, a plaintiff's potential recovery will necessarily be diminished as funds available to pay judgments are depleted. The irony of this cycle is that, in an attempt to strengthen a plaintiff's ability to recover, recovery may actually become less certain.

Considering the potential economic problems which can result from the development of relaxed rules applicable to product liability litigation, one would expect that those fashioning the proposed federal product legislation would attempt to avert such a crisis. The proposed federal law, however, would only serve to exacerbate these economic problems. Under the proposed legislation, a court would be empowered to reallocate to other defendants any portion of a judgment which is deemed uncollectable from the party against whom it is assessed. Therefore, if one product manufacturer becomes insolvent, its burden would simply be passed along to another until that entity also became unable to pay. Consequently, a shrinking pool of

Id. It would appear impossible to reconcile such a view with our Anglo-American tradition of justice.

73. See Note, supra note 39, at 711.

74. Note, supra note 49, at 1201. For example, DES liability costs cannot be confined to DES because it is no longer used as a miscarriage preventative. Id. Consequently, to offset losses sustained through damage awards and insurance costs, drug manufacturers have had to raise the prices of safe and beneficial drugs. Id.

75. See Comment, supra note 25, at 634.

76. S. 44, supra note 5, § 9(d), at 19. According to S. 44,

If a claimant has not been able to collect on a judgment in a product liability action, and if the claimant makes a motion within 1 year after the judgment is entered, the court shall determine whether any part of the obligation allocated to a person who is a party to the action is not collectable from such a person. Any amount of obligation which the court determines is uncollectable from that person shall be reallocated to the other persons who are parties to the action and to whom responsibility was allocated and to the claimant according to the respective percentages of their responsibility, as determined under subsection (b)(2).

Id.
"deep pockets" would be compelled to bear the burden until no more
"deep pockets" remained.

Such economic strain could only go on for so long before manu-
ufacturers would be compelled to take some responsive action. Indus-
try-wide liability, particularly if fostered by a federal product liability
act, certainly has the potential for causing a severe, detrimental im-
 pact on the research and development of new products. Rather
than deterring manufacturers from unsafe practices, this onerous lia-
bility could curtail production entirely. Fearing that every new prod-
uct could be a potential source of liability, manufacturers might
stop producing new products or, if they continue to produce new
products, they would feel obligated to test those products exhaust-
tively for a protracted period of time. If a manufacturer produced a
drug today which cured leukemia, how could it be certain that this
drug would not produce harmful effects in the offspring of the person
who ingested the drug—particularly if the harmful effects did not
manifest themselves for twenty or more years after those offspring
were born? If the manufacturer delayed the marketing of the drug
until it could be absolutely certain that it would produce no harmful
effects, how many people would continue to suffer and die from
leukemia?

The proposed federal law does little to guide manufacturers and
give them confidence in the release of new products. Replete with
undefined terms, it poses more questions than it answers. It tells us
that a product is defective in construction if it "deviates" in a "mate-
rial" way from specifications, and that a product is unreasonably
dangerous in design if the manufacturer, based on "sound support" in
the medical, scientific or technological community, knew or should
have realized the danger. Furthermore, the proposed Act states

77. See Note, supra note 48, at 1201. This commentator has suggested that the Sindell market share approach encourages, through economic incentives, longer peri-
ods of testing to eliminate unsafe drugs. Id. However, it has been recognized cor-
rectly that the efficacy of more extensive testing is not guaranteed, and that the
benefit of such testing must be weighed against the cost of delayed release of new
products and potential cures. Id.

78. Note, supra note 1, at 1004. This commentator predicts that the vastly in-
creased risk of liability for product-related injuries will inevitably reduce the incentive
to continue research in the area of disease prevention and cure. Id.

79. S. 44, supra note 5, § 5(a), at 8. See also id. § 4, at 6-8. Section 4 of the
proposed "Product Liability Act" further provides that a manufacturer is liable to a
claimant if the claimant can establish that the product is "unreasonably dangerous"
in its construction, design, failure to warn, or failure to conform to an express war-
renty, and that this unreasonably dangerous aspect of the product was the proximate
cause of the injury. Id. § 4(a)(1)-(2), at 6-7.

80. Id. § 5(b), at 8-9. Recovery in a design defect action also requires that "a
that liability hinges upon whether the means to eliminate a danger are within "practical, technological feasibility."81—a term that is rather obliquely defined by the act82—and tells us that an alternative design is better than the one chosen if the "hazards it eliminates are greater than any new hazards it creates for any persons and for any uses."83

These vague and convenient labels do not define a manufacturer's duty. It is unlikely that uniform standards would emerge since the state courts must give these terms meaning. The manufacturing community actually would be in a worse position if the proposed Act were adopted since concerned manufacturers would have no guidance and even less certainty than under existing case law. Furthermore, under S. 44 many manufacturers may feel that improved quality control on their part would be meaningless, because without the tightening of the requirements of causative defendant identification, they may still be liable for the shoddy, unsafe practices of other manufacturers.84 Even if product manufacturers do improve their design and production processes, the proposed federal law would give them no guidance with regard to product warning. Again, the proposed Act utilizes terms of convenience without substance.85

It would be much more prudent for manufacturers who are concerned with their liability to rely on existing precedent while seeking to convince the courts to adopt more equitable common law rules. The common law obviously provides much more flexibility, as well as the opportunity for reevaluation, than does an unyielding statute.

D. Insurance

Assuming that liability can in some way be imposed and allocated equitably among potentially responsible defendants in a toxic

means to eliminate the danger that caused the harm was within practical technological feasibility." Id. § 5(b)(2), at 9.

81. Id.

82. See id. § 2(8), at 3. "[P]ractical technological feasibility" is defined in the bill as "the technical, medical, and scientific knowledge relating to the safety of a product which, at the time of production or manufacture of a product, was developed, available and capable of use in the manufacture of a product, and economically feasible for use by a manufacturer." Id.

83. Id. § 5(e)(2)(B), at 10.

84. See note, supra note 1, at 1004.

85. See S. 44, supra note 5, § 6, at 11-15. For example, the proposed legislation requires that part of the claimant's case is to establish that the "warnings or instructions, if provided would have led a reasonably prudent product user either to decline to use the product or to use it in a manner so as to avoid harm of the type alleged by the claimant." Id. § 6(b)(4), at 12. This subjective standard provides no guidance to manufacturers seeking to include adequate warnings with their products.
tort action, the damage awards will inevitably come to rest upon their insurers. This, of course, assumes that the defendant manufacturers are insured. However, the recent trend toward the imposition of industry-wide liability has the potential for increasing product liability insurance rates even higher than they have been in the past, thereby putting such insurance out of the reach of some manufacturers. The difficulty manufacturers may encounter in obtaining affordable insurance is a crucial concern. Yet an even more pressing problem is determining which insurer should be burdened with the judgment, or at what point insurance coverage attaches. The comprehensive general liability policies which are typically involved in toxic tort cases make coverage dependent upon the happening of an “occurrence” within the policy period. Because a plaintiff may have been exposed to the products of several manufacturers during the course of several decades of exposure, and because each manufacturer may have had various insurers during that time span, courts must determine which insurers are obligated to indemnify a manufacturer in a particular case.

In struggling with the question of insurer liability for asbestos-related injury claims, courts have devised three theories as to when insurance coverage is triggered. The first of these theories—the exposure or pro rata theory—maintains that an injury occurs upon initial exposure to the hazardous substance. Thus, under this theory all insurers who have provided coverage during the period a plaintiff

86. See Note, supra note 1, at 1003. Over the last several years, increasingly generous awards granted to an increasingly large number of plaintiffs have caused insurance rates to skyrocket. See id. The expansion of liability under the market share theory would raise the cost of products liability insurance even further. See id. For a discussion of the impact that increased products liability insurance premiums have had on manufacturers, see notes 63-66 and accompanying text supra.

87. For example, the time which elapses between a plaintiff’s initial exposure to asbestos and the manifestation of asbestosis may be considerable. In many instances, asbestos manufacturers have had different product liability insurers over that period or have been insured for only part of the time involved. See Mansfield, supra note 11, at 875-77.

88. See id. at 875. The operative word “occurrence” has been defined as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” DEFENSE RESEARCH INSTITUTE, ANNOTATED COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY § 1.08 (1979).

89. See Mansfield, supra note 11, at 875.

90. For a detailed discussion of how courts have grappled with the problem of insurance coverage for asbestos-related diseases, see Note, Asbestos-Related Diseases Trigger Insurer’s Duty to Defend and Indemnify When the Diseases Become Reasonably Capable Of Diagnosis, 28 VILL. L. REV. 1335 (1983).

91. See Mansfield, supra note 11, at 876. Proponents of the exposure theory rely on medical evidence that upon the first inhalation of an asbestos fiber which reaches a terminal alvelous, a histological reaction takes place. Id. This reaction, proponents
was exposed to the hazardous substance may be held jointly and sev-
erally liable.\textsuperscript{92} Since the harm insured against is deemed to have oc-
curred at exposure, an insurer who provided coverage at the time of a
plaintiff's exposure is not relieved from liability simply because it no
longer insures the defendant at the time the suit is brought.\textsuperscript{93} The
exposure theory has been followed by the Sixth Circuit in \textit{Insurance
Company of North America v. Forty-Eight Insulations}.\textsuperscript{94} Noting that “bod-
ily injury” and “occurrence” as used in the policies are inherently
ambiguous terms in the context of a progressive disease,\textsuperscript{95} the Sixth
Circuit found that “bodily injury” occurs upon initial inhalation of
asbestos fibers and need not rise to the level of a disease.\textsuperscript{96} The \textit{Forty-
Eight} court then held each insurer liable for its pro rata share of the
damages as determined by the length of the plaintiff's exposure to
asbestos manufactured by the company that the insurer had in-
sured.\textsuperscript{97} The manufacturer was also responsible for its share of the

of the exposure theory argue, should be considered a “bodily injury” within the
meaning of the insurance contract. \textit{Id.}

\textsuperscript{92} See, e.g., \textit{Borel v. Fibreboard Paper Prods. Corp.}, 493 F.2d 1076 (5th Cir.
\textsuperscript{93} See \textit{Mansfield}, supra note 11, at 876. For example, if a plaintiff were exposed
to asbestos in a shipyard from 1942 to 1946, the insurer who provided coverage for
those years would bear the entire burden for damages even though the diagnosis for
the asbestos-related disease was made in 1975 and the suit filed in 1976. \textit{Id.} at 876.
\textsuperscript{94} 633 F.2d 1212 (6th Cir. 1980). \textit{Forty-Eight Insulations, Inc.} was a manufacturer
of products containing asbestos. \textit{Id.} at 1214. Since 1955, it had insurance cov-
erage under various policies issued by five different insurance companies. \textit{Id.} at 1215.
One of the insurance companies brought a declaratory judgment action to settle the
dispute over which insurers were liable under the various policy provisions. \textit{Id.} at
1216. For a more detailed discussion of \textit{Forty-Eight}, see \textit{Note, Each Insurer Which Pro-
vides Coverage During Workers' Exposure to Asbestos Is Proportionately and Individually Liable
\textsuperscript{95} 633 F.2d at 1222. Rejecting the claim that asbestosis should be treated the
same as any disease, the court stated, “Cumulative disease cases \textit{are} different from the
ordinary accident or disease situation.” \textit{Id.} at 1219 (emphasis supplied by the court).
This conclusion of the \textit{Forty-Eight} court was based on three considerations. First, the
underlying theory of liability was a continual failure to warn which had led to a
continuous inhalation of asbestos particles. \textit{Id.} Second, expert testimony had estab-
lished that tissue injury occurs upon initial inhalation, and that the time when asbes-
tosis manifests itself is not the time when the disease occurs. \textit{Id.} Finally, the court
stated that “we are bound to broadly construe the insurance policies to promote cov-

\textsuperscript{96} \textit{Id.} at 1222-23. Since the policy defined “bodily injury” as “bodily injury,
sickness or disease . . . ,” the court felt it was clear that “bodily injury” should be
construed to include the tissue damage which takes place upon initial inhalation of
asbestos. \textit{Id.} Each breath of asbestos fibers constituted a separate bodily injury
under this rationale. \textit{Id.}
\textsuperscript{97} \textit{Id.} at 1225. The court did not impose joint and several liability because
under this pro rata assignment each insurer's liability was individual and proportion-
ate. \textit{Id.} The \textit{Forty-Eight} court explained that “where an insurer can show that no
exposure to asbestos manufactured by its insured took place during certain years,
then that insurer cannot be liable for those years.” \textit{Id.}
plaintiff's exposure which had occurred during periods when the manufacturer was uninsured. 98

The second theory as to when an injury is deemed to occur for purposes of insurance coverage—the "manifestation theory"—looks to the insurance coverage applicable at the time when a claimant's asbestos-related condition "manifests" itself. 99 The First Circuit adopted the manifestation theory in *Eagle-Picher Industries v. Liberty Mutual Insurance Co.* 100 The court in *Eagle-Picher* advanced their reasons for adopting the manifestation theory of insurance coverage. First, the court noted that medical experts had agreed that the injury caused by asbestos inhalation does not occur simultaneously with the initial exposure but rather that some time necessarily must pass before tissue destruction begins. 101 Second, the court decided that in giving these insurance policies their common and ordinary meaning, the language of the policies was more compatible with the manifestation theory because the policies at issue clearly distinguished between the accident or exposure and the resulting injury or disease. 102 Third,
the First Circuit reasoned that in order to effectuate the insurance policies' purpose of providing coverage, all doubts regarding the interpretation of these policies should be resolved in favor of coverage.\textsuperscript{103} The court then concluded that the responsible insurer is the one who provided coverage when the asbestos-related disease became reasonably capable of medical diagnosis.\textsuperscript{104} In contrast, the Sixth Circuit in \textit{Forty-Eight} had reasoned that the application of a manifestation theory would unfairly deny coverage to the defendant manufacturer, since no insurer would extend coverage to include later years when a disease with a long latency period might manifest itself.\textsuperscript{105}

The third theory regarding when an asbestos-related injury occurs for insurance coverage purposes—known as the “continuous trigger” or “everybody pays” theory—is a hybrid of the exposure and manifestation theories. The continuous trigger theory was adopted by the District of Columbia Circuit in \textit{Keene Corp. v. Insurance Company of North America}.\textsuperscript{106} In attempting to fulfill the reasonable expecta-

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assume that the disease resulted when symptoms which impaired his health manifested themselves or the disease's onset was capable of diagnosis. \textit{Id}. In addition, the court noted that the term “injury” is commonly associated with the result produced by the infliction of “something that causes 'loss, pain, distress, or impairment.'” \textit{Id}. (citing \textit{WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY} 1164 (3d ed. 1966)). Asbesto-

\textit{Id}. at 19. Therefore, the \textit{Eagle-Picher} court said, “To state that the disease occurs when these sub-clinical alterations take place, where, as here, the disease does not inevitably or even usually result from sub-clinical changes, is to subvert the plain meaning of 'disease' and to read the term entirely out of the policy.” \textit{Id}. at 19-20.

\textit{Id}. at 23. Since Eagle-Picher was uninsured during the longest period of exposure, and most asbestos-related disease claims were brought during the coverage period, coverage based on the manifestation theory would best effectuate the policy's purpose of providing insurance coverage. \textit{Id}.

\textit{Id}. at 25. The court thereby rejected both Eagle-Picher's contention that “all policies in force from the time of initial exposure until and including the time of manifestation are triggered by an asbestosis claim,” and the district court's ruling that the operative date is either the date of diagnosis, or, if no diagnosis, the date of death. \textit{Id}. at 16, 24.

\textit{Id}. at 1219. The court in \textit{Forty-Eight} explained, The insurance policies before us are comprehensive general liability policies which are designed to insure the manufacturer against products liability suits. The contracting parties would expect coverage to parallel the theory of liability. Otherwise . . . the manufacturer's coverage becomes illusory since the manufacturer will likely be unable to secure any insurance cover-

\textit{Id}. at 1034 (D.C. Cir. 1981), \textit{cert. denied}, 455 U.S. 1007 (1982). \textit{Keene} Corp. was named as a co-defendant in numerous suits alleging injury caused by exposure to \textit{Keene}'s thermal insulation products which contained asbestos. \textit{Id}. at 1038. \textit{Keene} tendered these asbestos-related damage cases to its insurance carriers for de-

\textit{Id}. at 1039. This prompted \textit{Keene} to seek a declaratory judgment to determine the extent to which each insurance carrier covered \textit{Keene}'s liability for the asbestos-related claims. \textit{Id}. at 1038. The United States
tions of the manufacturer when it purchased the policy, the Keene court interpreted "bodily injury" to encompass "any part of the single injurious process that asbestos-related diseases entail."\(^{107}\) The court, therefore, concluded that inhalation exposure,\(^{108}\) exposure-in-residence\(^{109}\) and manifestation\(^{110}\) of the resultant asbestos-related diseases all trigger coverage under the insurance policies.\(^{111}\) Even though only part of the disease may have developed during any given period of policy coverage, the Keene court nevertheless held each insurer liable for the full amount of the judgment rendered against the asbestos manufacturer, subject only to policy limits and to policy provisions governing liability allocation when more than one policy is triggered by a single injury.\(^{112}\)

Each of these approaches has its own major drawbacks. The

District Court for the District of Columbia held that the indemnification and defense costs should be prorated among the insurance companies in accordance with the relative extent of exposure during their respective policy periods. 513 F. Supp. 47, 51 (D.D.C.), rev'd, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982). The District of Columbia Circuit rejected the district court's use of the exposure theory, choosing instead to apply the continuous trigger theory of coverage. Keene, 667 F.2d at 1039, 1047.

107. 667 F.2d at 1047. The Keene court explained that this definition included "any part of the injurious process that begins with an initial exposure and ends with manifestation of disease." Id.

108. Inhalation exposure is the initial inhalation of asbestos-containing material into the body. Id. at 1042.

109. Exposure-in-residence is the subsequent development of the disease in the body after inhalation exposure has occurred. Id.

110. Manifestation of the asbestos-related disease occurs when the "cellular damage advances to the point of becoming a recognizable disease." Id. at 1043. For additional discussion regarding the manifestation of asbestos-related disease, see note 97 and accompanying text supra and note 113 and accompanying text infra.

111. 667 F.2d at 1042-47.

112. Id. at 1047-48, 1050. The Keene court noted that although the continuous-trigger theory imposes full liability on each insurer, where there is more than one insurer, the other insurance provisions of each policy provide a formula for contribution from each insurer, thereby guaranteeing "that a single insurer would [not] be saddled with full liability for any injury." Id. at 1050. The court pointed out that this was a reasonable interpretation of these policies since the policies' language did not provide for a reduction in the insurers' liability if an injury occurred only in part during a particular policy period. Id. at 1048. Therefore, the court said the only logical interpretation of these policies is that once an insurer's coverage is triggered, the insurer is liable for the full extent of the judgment against the insured, up to the policy limits. Id. at 1048. The Keene court also stated that its holding was justified in light of the expectations of the insured. Id. at 1041-42. The court noted the general principle that

[i]the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

Id. at 1042 n.12 (citing Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961, 967 (1970)).
manifestation theory subjects an insurer to liability for harm which may have occurred years earlier simply because it insures the manufacturer at the time of the manifestation of the disease.\footnote{113} Furthermore, if a manufacturer’s insurance coverage is terminated before a disease manifests itself, the manufacturer will be totally without insurance coverage for the ensuing claims.\footnote{114} Similarly, the exposure theory may also prove inequitable. Under that theory, an insurer may be held responsible years after coverage was terminated,\footnote{115} while the manufacturer who purchases a liability policy immediately after exposure has occurred would remain completely uninsured for the prior period.\footnote{116} Lastly, the continuous trigger theory only superficially resolves the inequities of the exposure and manifestation theories by triggering coverage throughout the injurious process. While it avoids uncertainty by assuming insurance coverage for the insured, the continuous trigger theory is unduly burdensome to insurers because it makes the insurer responsible even though the manufacturer was voluntarily uninsured during a portion of the injurious process.\footnote{117} Further, the very existence of three distinct theories creates uncertainty and prevents both insurers and manufacturers from predicting their possible exposure.

In light of this confusion, and the very real necessity of alleviat-
ing it, any allegedly comprehensive uniform product liability act should address and resolve the insurance coverage issue. Yet, the proposed federal legislation mentions neither insurance nor the allocation of insurer liability. Guidelines for manufacturers and insurers regarding the triggering and allocation of insurance coverage would be appropriate in section 12 of the proposed Act, entitled "Time Limitation on Liability," since such a section ostensibly would give an indication of the legislative attitude toward the time of accrual of a product liability cause of action. But rather than directly addressing the issue of insurance coverage, the proposed Act instead avoids this issue by providing for a twenty-five year statute of limitations applicable when the harm alleged was caused by unsafe design, formulation, or failure to give adequate warnings or instructions. However, this limitations period is inapplicable when the harm claimed was caused by the "cumulative effect of prolonged exposure to a defective product" or "did not manifest itself until after the expiration of that period." After thus removing the statute of limitations, the proposed Act establishes nothing to take its place, thereby avoiding the crucial question of when a cause of action does in fact accrue under such circumstances. The proposed Act thus leaves insurers and manufacturers with the prospect of enormous liability, but provides no guidance respecting the triggering of insurance coverage. Consequently, manufacturers and insurers will still be compelled to extensively litigate each claim on a case-by-case basis.

118. See S. 44, supra note 5, § 12, at 25. Section 12 of S. 44 is identical to § 12 of S. 2631, the previously proposed "Product Liability Act," except that § 12(d) of S. 2631 has been eliminated. Section 12(d) of S. 2631 established that no products liability claim could be brought "more than two years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm." S. 2631, supra note 5, § 12(d), at 25. S. 2631 also contained an alternative section of the statute of limitations for product liability actions which has not been included in S. 44. See id., § 12, at 26 (Alternative Section for Time Limitation Liability). The Report of the Senate Committee on Commerce, Science, and Transportation on S. 2631 does not explain either the Committee's deletion of § 12(d) or its deletion of the alternative section on time limitations. See Senate Report, supra note 3, at 50-52.

119. See S. 44, supra note 5, § 12(a)(1), at 25. Section 12(a)(1) provides in pertinent part as follows:

If any product is a capital good, no claim alleging unsafe design or formulation . . . or failure to give adequate warnings or instructions . . . may be brought for harm caused by such a product more than 25 years from the date of delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or using the product as a component in the manufacture of another product.

Id.

120. Id., § 12(b), at 26. This 25-year limitations period is also inapplicable when the harm claimed was caused by "the manufacturer or product seller intentionally misrepresenting facts about the product or fraudulently concealing information about the product." Id.
E. Statute of Limitations

Not only does the proposed federal legislation fail to address the difficult issues concerning the allocation of insurance coverage, it also fails to alleviate the uncertainty faced by both plaintiffs and defendants in determining whether an action has been commenced in a timely fashion. As applied to toxic torts, it has been claimed that existing statutes of limitations allow manufacturers to expose the public to dangers as long as no recognizable harm appears within the generally brief limitations period within which personal injury actions may be commenced.

Possibly in an attempt to mitigate this supposed inequity, the proposed "Product Liability Act" has established a twenty-five-year statute of limitations for product liability actions involving capital goods. This long limitations period admittedly would protect the rights of victims whose exposure to a toxic substance caused a disease characterized by a long latency period between exposure and manifestation. However, such a period is inequitable to manufacturers, sellers, and their insurers. Manufacturers and insurers would be required to defend suits involving injury from exposure to products containing toxic substances up to, and in certain cases beyond, twenty-five years earlier.

After such a time period, it is possible that...

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121. For the entire text of the statute of limitations provision of Senate Bill 44, see id. § 12, at 25 (Time Limitation of Liability).


A major purpose of product liability law is to place the risk of product-related injury upon the party most able to distribute it—the manufacturer. See Birnbaum, Unmasking the Test for Design Defect: From Negligence to Warranty to Strict Liability to Negligence, 33 VAND. L. REV. 593, 596 (1980). The invocation of any statute of limitations in delayed reaction torts shifts the risk of the product-related injury from the manufacturer to the injured individual under the guise of preventing stale claims. As a result, the defendant is immune from liability for its actions regardless of the plaintiff's diligence in asserting the claim. See Comment, supra note 12, at 1314.

For a survey of the various statute of limitations theories applicable to products liability actions, see generally 3A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 39-40a (1982).

123. See S. 44, supra note 5, § 12(a)(1), at 25. For the text of § 12(a)(1), see note 116 supra. For a comparison of § 12 of S. 44 and § 12 of its predecessor, S. 2631, see note 115 supra.

124. See generally S. 44, supra note 5, § 12, at 25. As noted previously, Senate Bill 44 eliminates the 25-year limitations period for cases where the alleged harm was caused by "the cumulative effect of prolonged exposure to a defective product" or when the harm did not manifest itself until after the 25-year period had expired. Id. § 12(b)(2)-(3), at 26. For a discussion of the statutory exemptions to the 25-year statute of limitations, see also note 117 and accompanying text supra.
records and data vital to the defense of such an action, as well as crucial employees involved in the design, manufacture, or sale of the product may be unavailable. As a result, a manufacturer may be exposed to virtually limitless liability without the ability to present an adequate defense. Not only does the bill fail to set an outside time limit for certain products susceptible to product liability claims, but it also completely ignores an entire class of product liability cases in its time limitation provisions. Section 12(a)(1) of the bill applies the twenty-five-year statute of limitations only to "capital goods" and not to consumer goods.125 Thus, the Act fails to provide a statute of limitations period to be applied in the many toxic tort cases involving consumer goods.126

Similarly, the proposed Act applies the twenty-five-year limitations to claims "alleging unsafe design" or "failure to give adequate warnings or instructions."127 Yet, the bill fails to supply a limitations period for claims which allege that a product was unreasonably dangerous in construction or manufacture when it left the manufacturer's control.128 In its report on S. 2631, the Senate Committee justified the exemption of these claims, as well as those alleging breach of express warranty, by pointing out that strict liability was applicable in

125. S. 44, supra note 5, § 12(a)(1), at 25. Section 12(a)(2) of S. 44 defines a capital good as any product other than a motor vehicle or any component part of such a product which is both depreciable under the Internal Revenue Code of 1954, as amended, and was "(A) used in a trade or business; (B) held for the production of income; or (C) sold, leased, or donated to a governmental or private entity for the production of goods, for training, for demonstration or other similar purposes." Id. § 12(a)(2), at 25.

126. See id. § 12(a), at 25. See also Senate Report, supra note 3, at 13 ("claims for certain harms, such as harms from drugs, which do not manifest themselves until many years after product use would not be barred by this section").

127. S. 44, supra note 5, § 12(a)(1), at 25. For the pertinent text of § 12(a)(1), see note 119 supra.

128. Section 12(a)(1) states that the 25-year statute of limitation applies to "claim[s] alleging unsafe design or formulation as provided in Section 5(b)." S. 44, supra note 5, § 12(a)(1), at 25. Section 5(b) defines a design or formulation defect as rendering a product unreasonably dangerous if at the time the product was made or certified, whichever is earlier, a reasonably prudent manufacturer in the same or similar circumstances would not have used that design or formulation. Id. § 5(b), at 8. A separate section, § 5(a), deals with the construction or manufacturing defects which render a product unreasonably dangerous and subjects the manufacturer to liability if the product deviates from either design specifications, formula, or performance standards of the manufacturer, or otherwise identical units when it left the manufacturer's control. Id. § 5(a). For the text of § 5(a), see note 134 infra. Since section 12(a)(1) applies the 25-year statute of limitations only to § 5(b) products, it excludes a manufacturer's liability for construction or manufacturing defects that were present when the product left the manufacturer's control—the § 5(a) type of defect—from this limitations period. For the text of these sections, see S. 44, supra note 5, § 5(a)-(b), at 8; § 12(a)(1), at 25. See also S. 2631, supra note 6, § 5(a)-(b), at 9; § 12(a)(1), at 24 (identical to those sections of Senate Bill 44).
such cases. Viewing strict liability as inconsistent with a time limitation on the instigation of a cause of action, the Committee found the exemption to be warranted. Furthermore, the Committee report noted that the limitations period for products liability actions should be determined by state law. However, since the stated object of the proposed federal legislation is to introduce certainty into the area of products liability, to leave this issue—which is characterized by non-uniformity—open to state action demonstrates the futility of this federal legislation.

F. Miscellaneous Problems

One of the most misleading aspects of the proposed Federal Product Liability Act is that it avoids addressing all of the problems previously discussed, while doing so in a manner which makes it appear as if those problems have been solved. It accomplishes this anomalous result by utilizing convenient all-encompassing terminology which carries very little substance. Therefore, while the proposed Act may appear to provide much-needed answers, it certainly does not.

The first question, and perhaps the most obvious one, which the proposed Act fails to address is precisely what type of "products" its regulation encompasses. Section 2(10) of the proposed Act advances a definition of "product," but this definition fails to specify whether the Act pertains only to new products or if it covers used products as well. The bill also states in section 12(a) that its statute of limita-
tions begins to run from the date of the product's delivery to its first purchaser or lessee who is "not engaged in the business of selling or leasing the product or using the product as a component in the manufacture of another product." At first glance, the "first purchaser" provision appears to limit the application of the bill to new products. But, it is entirely conceivable that a product could have been used for a time by a person engaged in the business listed in section 12 and then much later sold to its "first purchaser," as defined by the proposed Act. Under such circumstances, given the twenty-five-year statute of limitations, a manufacturer would be open to indefinite exposure for harm allegedly caused by such a "used" product and would find no relief in the proposed Act.

As previously noted, the proposed federal legislation utilizes similarly indefinite and questionable terminology in attempting to define the "duties" of a manufacturer. Section 5(a) of the bill provides that a product is unreasonably dangerous in construction or manufacture if it deviates "in a material way" from specifications. However, "material" is never defined and the Committee report does little to clarify this point, stating only that if the deviation is not "material" then the product is not unreasonably dangerous.

Similarly, the proposed Act provides that a product is unreasonably dangerous because it lacks necessary warnings if the manufacturer either knew about the alleged danger or should have known "based on knowledge which was reasonably accepted in the scientific, technical or medical community." However, the bill does not ex-

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135. S. 44, supra note 5, § 12(a)(1), at 25. For the pertinent text of § 12(a)(1), see note 119 supra.
136. For a discussion of the lack of guidance the proposed Act offers to manufacturers, see notes 79-85 and accompanying text supra.
137. S. 44, supra note 5, § 5(a), at 8. According to § 5(a), "[a] product is unreasonably dangerous in construction or manufacture if, when the product left the control of the manufacturer, it deviated in a material way—(1) from the design specifications, formula, or performance standards of the manufacturer; or (2) from otherwise identical units manufactured to the same manufacturing specifications or formula." Id. For further discussion of § 5(a), see note 128 supra.
138. Senate Report, supra note 3, at 27 (citing Wiseman v. Goodyear Tire & Rubber Co., 29 Wash. App. 883, 887-88, 631 P.2d 976, 979-80 (1981)). Thus, the Committee has defined the questionable term by using the term itself.
139. S. 44, supra note 5, § 6(b)(1), at 11. Section 6(b) states that [a] product is unreasonably dangerous for lack of necessary warnings or instructions if the claimant establishes by a preponderance of the evidence that at the time the product was sold—

1. the manufacturer knew or, based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm;
2. the manufacturer failed to provide the warnings or instructions
plain or define what constitutes such reasonable acceptance. The Committee report also does little to shed any light upon this question; it only states that a manufacturer has a duty to keep abreast of developments in the "relevant learned communities" and is therefore presumed to know of "reasonably accepted" developments.\textsuperscript{140} The paucity of the Committee's explanation is exacerbated by the fact that the crucial issue in product liability litigation often involves a determination of what in fact was the state-of-the-art at the time a given product was manufactured. Such a determination is never reached without reference to lively debate among members of such "relevant" communities, all advancing a position which each feels has sound support and is "reasonably accepted." Although attempting to establish a "uniform" standard, the proposed Act will not serve to eliminate these debates, but will instead encourage them through the very terminology it employs.

A comparable problem is presented by section 5(b)(2) of the bill which provides that a product is not unreasonably dangerous in design unless "a means to eliminate the danger that caused the harm was within practical technological feasibility."\textsuperscript{141} This "practical technological feasibility" is ostensibly defined by the proposed Act, but this definition lends no more guidance or certainty than does the "reasonably accepted" criteria\textsuperscript{142} previously discussed.

In addition to its failure to define accurately and adequately the many terms crucial to the area of product liability litigation, the pro-

\begin{itemize}
\item[(3)] the manufacturer failed to provide those warnings or instructions to the claimant or to another person in accordance with subsection (d)(1);
\item[(4)] those warnings or instructions, if provided, would have led a reasonably prudent product user either to decline to use the product or to use it in a manner so as to avoid harm of the type alleged by the claimant.
\end{itemize}

\textit{Id.} § 6(b)(1)-(4), at 11-12. Section 6(b) of S. 44 does not substantively alter § 6(b) of S. 2631. \textit{Compare} S. 44, supra note 5, § 6(b), at 11, with S. 2631, supra note 6, § 6(b), at 11.

\textsuperscript{140} Senate Report, supra note 3, at 33.

\textsuperscript{141} S. 44, supra note 5, § 5(b)(2), at 9.

\textsuperscript{142} Id. § 2(8), at 3. Section 2(8) of the proposed federal legislation provides that "'practical technological feasibility' means the technical, medical, and scientific knowledge relating to the safety of a product which, at the time of production or manufacture of a product, was developed, available and capable of use in the manufacture of a product, and economically feasible for use by a manufacturer." \textit{Id. Cf.} S. 2631, supra note 6, § 2(8), at 3 (containing a similar definition of "practical technological feasibility").
posed Act if implemented would leave many glaring gaps in the field of products liability law. As one commentator has noted, “It is impossible to codify the product law to deal with every situation that gives rise to litigation.”143 This is particularly true in the area of toxic torts where litigation is in its relative infancy and numerous new issues are bound to appear. If the proposed Act cannot address those questions which have already arisen in this area, it certainly is inadequate to handle any issues yet to be recognized. Given the inevitable void, state courts will have to fill in the gaps in the legislation, since they are expressly given jurisdiction.144 Because each state court system is an independent entity, each jurisdiction will be forced to deal with these gaps according to its own determination of policy. Consequently, the federal goal of “uniformity” in product liability could only be achieved through exhaustive review by the Supreme Court.145 Furthermore, since the proposed Act is applicable only to product liability actions, a dual tort system will inevitably be created in each state.146 Litigants in product liability actions would thus receive either the benefit or the detriment of the federal Act—depending upon one’s viewpoint—while litigants in other tort actions and product liability actions not covered by the proposed Act would continue to proceed under existing common law.147 The possible repercussions in such a split system would invade the very foundations of tort law in each state.

Most notably, the proposed Act’s invasion of state tort law is evi-

144. See SENATE REPORT, supra note 3, at 21.

Section 3(c) of the proposed Act only preempts any state law which exists on the subject matter of the Act. S. 44, supra note 5, § 3(c), at 6. For the text of § 3(c), see note 133 supra.

The Conference Committee elaborated upon § 3(c), stating that “[i]t focuses on the most important issues in product liability tort law and leaves other issues to the individual States.” SENATE REPORT, supra note 3, at 21. The Conference Committee further cited that “[t]he Committee intends that where a matter is not addressed in the act, it remains subject to applicable State law. In applying State law on matters not covered by this act, courts and State legislatures may act in accord with their own State’s product liability tort law.” Id. at 22.

145. SENATE REPORT, supra note 3, at 23. The Conference Committee contended that § 3(c) “ensures that the rules set forth in the act are uniformly applied in all product liability actions, regardless of where the harm occurred and regardless of which court hears the claim. All courts, State and Federal, with jurisdiction over a product liability action must apply the act.” Id. This statement, however, minimizes the fact that state product liability law will be applied in matters which the proposed Act does not cover. For a discussion of this limitation to preemption, see notes 9 & 143 and accompanying text supra.

146. Ghiardi, supra note 143, at 7.
147. For a discussion of the extent to which the proposed Act preempts state law, see notes 8, 144 & 145 and accompanying text supra.
denced by the inclusion of a "pure" comparative responsibility section in the proposed legislation. This system of negligence or fault allocation has been included despite the fact that the majority of states has adopted either a "modified" comparative negligence system, or retained the rule of common law negligence that a claim-

148. See S. 44, supra note 5, § 9, at 18. The provision in the proposed Act dealing with comparative responsibility provides that

[all claims under this Act shall be governed by the principles of comparative responsibility. Comparative responsibility attributed to the claimant's conduct under section 10(c) shall not bar recovery in a product liability action, but shall reduce any damages awarded to the claimant in an amount proportionate to the responsibility of the claimant.]

Id. § 9(a), at 18. Section 9(c) of the proposed Act then states that liability will be "in proportion to [each party's] percentage of responsibility for the claimant's harm." Id. § 9(c), at 19. Section 9(d) permits reallocation of an uncollectible judgment against a co-defendant joint tortfeasor among the remaining joint tortfeasors in proportion to the percentages established in § 9(b)(2). Id. § 9(d), at 19.

Section 9 of S. 44 is basically the same as the comparative responsibility provision which appeared in S. 2631. Compare S. 44, supra note 5, § 9, at 18 with S. 2631, supra note 6, § 9, at 18.


149. For jurisdictions recognizing the modified comparative negligence system in products liability actions, see, e.g., Wagnon v. Barker, 236 Ark. 55, 364 S.W.2d 314 (1963) (a plaintiff's contributory negligence, under comparative negligence statute will not bar recovery if his negligence is less than that of the defendant); Mountain Mobile Mix, Inc. v. Gifford, 628 P.2d 133 (Colo. App. 1981) (adapting the modified comparative negligence approach whereby recovery will not be denied to a plaintiff if his negligence is less than or equal to that of the defendant), rev'd on other grounds, 660 P.2d 883 (1983); Bissen v. Fujii, 51 Hawaii 636, 466 P.2d 429 (1970) (adopting the "less than" theory of comparative negligence under comparative negligence statute); Sandifer Motors Inc. v. City of Roeland Park, 6 Kan. App. 2d 308, 628 P.2d 239 (Kan. Ct. App. 1981) (adopting the "less than" theory); Jackson v. Frederick's Motor Inn, 418 A.2d 168 (Me. 1980) ("less than" theory); Jack Frost, Inc. v. Engineering Bldg. Components Co., 304 N.W.2d 346 (Minn. 1981) ("less than" theory); Leyva v. Smith, 357 S.W.2d 169 (Tex. Civ. App. 1977) (adopting the "less than or equal to" variation of the modified comparative negligence doctrine under comparative negli-
ant's contributory negligence acts as a complete bar to recovery.\textsuperscript{150} Such state-by-state determinations have been formulated after careful consideration of the public policy and perceived needs of each particular jurisdiction. In addition, each state has formulated detailed procedural rules which comport with these policy determinations.\textsuperscript{151} Therefore, the introduction of a "foreign" comparative responsibility rule into product liability actions would serve to undermine the legitimate policies of many states, and would also necessitate the creation of an entirely new body of procedural rules to handle those cases. The inherent unfairness of requiring different policies and procedures in some types of product liability actions but not in other product liability and tort actions—not to mention the senselessness of such a scheme—militates against the establishment of such a dual system.

Similarly, the inequity of a dual system is clearly evidenced by the inclusion of a punitive damages section in the proposed federal Act.\textsuperscript{152} As with comparative responsibility, the allowance of punitive damages is a matter of state policy.\textsuperscript{153} The various states have taken

\textsuperscript{150} For a survey of comparative negligence in every jurisdiction, see generally \textit{Heft}, supra note 148.

\textsuperscript{151} The Pennsylvania legislature also adopted a form of modified comparative responsibility in its Comparative Negligence Act. \textit{See} 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1982) ("the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff . . . where such negligence was not greater than the causal negligence of the defendant . . . but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff"). For a more detailed discussion of this statute, see generally \textit{Comparative Negligence in Pennsylvania}, 24 \textit{Vill. L. Rev.} 419 (1979).

\textsuperscript{152} For an example of a jurisdiction which continues to apply the common law doctrine of contributory negligence to product liability actions, see, Mackey v. Greenview Hosp., Inc., 587 S.W.2d 249 (Ky. Ct. App. 1979).

\textsuperscript{153} \textit{Ghiardi}, supra note 143, at 7 ("[e]ach state has different rules as to joinder, defenses, releases, settlements, setoffs, contribution and indemnity").
differing approaches regarding the applicability of punitive damages to product liability actions in accordance with the prevailing policy of each jurisdiction.¹⁵⁴ However, the proposed Act presumes to ignore these policy determinations and grants punitive damages if certain indefinite criteria are met. Section 13 of the bill defines the standard for imposing punitive damages by utilizing phrases such as “conscious, flagrant indifference to safety” and “extreme departure from accepted practice.”¹⁵⁵ These terms are certainly susceptible of more than one judicial interpretation, particularly in the area of toxic torts where the manufacturer’s knowledge of the safety of his product may be crucial to the determination of liability. In a jurisdiction that does not allow punitive damages in other types of tort actions, a judge who may be particularly outraged by certain conduct would be authorized to award those damages under the proposed Act, thereby contravening an established state policy against punitive awards. While the very nature of toxic tort cases may bring safety questions to the forefront, this necessary focus should not in and of itself be sufficient to subject a manufacturer to punitive damages when all other tort defendants in that jurisdiction are immune from that form of liability.

A disparity also exists between the statute of limitations established by the proposed Act and the period generally established for personal injury actions in most states. While section 12 of the bill gives a claimant twenty-five years from the date of product delivery to commence his action,¹⁵⁶ most states set the statute of limitations for personal injuries at a much shorter time.¹⁵⁷ Allowing a claimant alleging injury by a product to have a substantially longer period of time within which to bring an action than a claimant injured in some other manner is a state of affairs which cannot be justified.

The folly of this dual system becomes more apparent when it is applied to a single fact situation. For example, an auto accident may give rise to a lawsuit in which the plaintiff joins both the driver and the manufacturer of an allegedly defective auto.¹⁵⁸ Under these circumstances, co-defendants could be subjected to different comparative negligence calculations, punitive damage awards, and even

¹⁵⁶. For the text of the proposed Act’s statute of limitations provision, see note 119 and accompanying text supra. For further discussion of the proposed Act’s statute of limitations provision, see notes 120-28 and accompanying text supra.
¹⁵⁸. Ghiardi, supra note 143, at 7-8.
statutes of limitations although a single injury is alleged which has arisen out of a single occurrence. One commentator has addressed the difficulty of meshing federal legislation with state tort law rules, but has concluded that the proposed Act would focus it almost exclusively on product liability problems, leaving procedural areas to state control. However, it is the very drafting of the Act which has created the problem of how to integrate federal and state products liability laws. By focusing exclusively on product liability issues, the proposed Act ignores the reality that product liability cases do not occur in a vacuum and that they often entail non-product litigants and issues beyond the realm of product liability. Because of the diversity inherent in many product liability cases, state procedural controls would be inadequate to integrate the often widely divergent state and federal requirements. Consequently, given the very real problems which this dual system presents, the justification of the federal legislation as a way of introducing certainty into product liability litigation becomes very weak and unsupportable.

III. Need for the Proposed Act

In light of the many practical and legal questions which the proposed federal Product Liability Act raises but fails to answer, it is apparent that such a law is neither logical nor necessary. Furthermore, “redrafting” the proposed Act—no matter how carefully

159. Id. at 8.
161. In addition to the legal issues previously raised, the proposed federal Product Liability Act also raises potential constitutional questions. See generally Ghiardi, supra note 143, at 6. Challengers could first attack the legislation on the grounds that it invades the sovereignty of the states as guaranteed by the tenth amendment. See id. Challengers might also assail aspects of the Act as depriving defendant manufacturers due process of law. See Comment, Policy and Proof: Shifting the Burden of Proof in a Product Liability Case, 34 BAYLOR L. REV. 83, 102 (1982). For example, the proposed Act does not require an injured plaintiff to identify the manufacturer who produced the product that caused his injury; the burden is upon the defendant to exculpate himself. See S. 44, supra note 5, § 4, at 6. One commentator has noted that if an industry or some of its members were held “liable without proof of causation this would result essentially in the taking of property of all named defendants in order to pay for the harm that may have been caused by only one defendant, or by one who is not even a party of the lawsuit.” Comment, supra, at 102.

Because of the possibility of constitutional attack, the Act’s goals of uniformity and certainty will be greatly undermined. Courts that found the Act in accord with the federal constitutional mandate would apply its provisions, while those finding the Act unconstitutional would ignore the federal law and resort to prior state law. Resolution of these constitutional challenges would take years and, if the Act were to be found unconstitutional by the Supreme Court, the states again would be left to their own devices in resolving product disputes.
done—cannot even approach a solution to these monumental problems. Product liability very simply is an area of the law which should be left to the states, because each state is best able to ascertain the needs of its citizens and formulate ways to satisfy those needs. Many states have already enacted product liability legislation or are in the process of doing so. Additionally, the common law in most states reflects a step toward dealing with problems created by product liability litigation and constitutes a basis upon which further solutions can be formulated.\textsuperscript{162} For example, in the area of toxic tort litigation, a wealth of case law dealing with injuries allegedly attributable to DES or asbestos reflects a reasoned approach to dealing with such claims. Concededly, the reasoning utilized in many of these cases has been criticized and the development of the law in this area is far from complete. However, it is the very complexity of this area of product liability which necessitates a gradual development of solutions to its problems; no shorthand, “uniform” law can possibly accelerate this process by anticipating and dealing with every possible problem which has arisen or may yet arise.

Alleviating dissatisfaction with judicial theories or proposals in the product liability area is best accomplished by overruling those questionable cases by state legislation or by developing case law which would lead product liability law down a totally different path. At all costs, however, it is each unique, individual state which should be given the task of reforming product liability law through legislation and judicial precedent. Only state legislatures and the judiciary can measure public sentiment and public needs and incorporate them into a useful body of law. No omniscient federal legislation can accomplish this result by mere speculation.

If indeed the federal government is compelled to alleviate perceived problems in this field, it can always do so on a much more restricted basis. For example, at the heart of all the DES and asbestos cases lie the federal regulations and government standards which proved to be woefully inadequate as time passed. As one commentator has noted, DES-related injuries are not so obviously the result of someone’s negligence, since a drug manufacturer may have relied upon standards established by the federal Food and Drug Administration.\textsuperscript{163} Similarly, asbestos manufacturers long complied with government standards regarding permissive dust levels, only to discover

\begin{footnotesize}
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\item[162.] See 5 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY app. H-1 (1982). Thirty states have also enacted product liability legislation, and many others have product liability bills pending in their legislatures. For the text of the enacted state product liability statutes, see id.
\item[163.] Note, supra note 39, at 722-23. This commentator, however, maintains that
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years later that these standards were inadequate.\textsuperscript{164} The federal government, if genuinely concerned about the increase in toxic tort litigation, should assume some financial responsibility for these losses or at the very least increase the funding granted to supervisory agencies so that a closer watch could be kept on production in this area.\textsuperscript{165}

The federal government could also advocate the development and passage of state product liability laws, and perhaps assist the states in such steps if requested to do so. That type of activity would move the United States closer to “uniform” product liability law, but would do so in a much more logical and efficient manner. Certainly these steps would help to reform the law much more than would the complete eradication of valuable precedent.

Federal preemption of the entire product liability field would destroy this area of law rather than reform it, leaving no guidance for the formulation of the systems to take its place. Consequently, Congress should move away from sweeping preemption and should focus instead on constructive reform. It must be remembered that all change is not necessarily progress, and that all movement is not necessarily forward.

\textsuperscript{164} This reasoning is applicable only if the manufacturers have complied with all FDA standards. \textit{Id.} at 722 n.171.

\textsuperscript{165} \textit{See} Note, Market Share Liability for DES (Diethylstilbestrol) Injury: A New High Water Mark in Tort Law, 60 Neb. L. Rev. 432, 446-47 (1981) (advocating partial governmental liability, a ceiling on the amount of damages a plaintiff could recover, increased funding to agencies responsible for regulating DES manufacturing, banning sales of products which violate quality and safety standards, and establishing a system of uniform loss apportionment).