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THE PROPOSED FEDERAL PRODUCT LIABILITY STATUTE FROM THE TOXIC TORT PLAINTIFF'S PERSPECTIVE

JERRY J. PHILLIPS†

I. INTRODUCTION

SENATE BILL 44, the proposed federal "Product Liability Act," was introduced in the Senate on January 26, 1983. This bill is basically a reintroduction of S. 2631, which Senator Kasten of Wisconsin had introduced in the previous session of Congress. Powerful manufacturing and insurance lobbying interests have been marshalled in support of this legislation, and informed sources say that the S. 44 has a fair chance of passage in both houses. In contrast, the American Trial Lawyers Association (ATLA), the American Bar Association, and the American Bar Association's Task Force on Product Liability have opposed this legislation. See Dworkin, Federal Reform of Product Liability Law, 57 TUL. L. REV. 603 (1983); Hollowfield, Historical Perspective on Product Liability Reform, 1 J. PRODS. L. 75 (1982). For a detailed critical analysis of S. 2631, see Twerski, National Product Liability Legislation: In Search For the Best Possible of All Worlds, 18 IDAHO L. REV. 411 (1982). See also Robb, The Proposed Federal Product Liability Act, 6 J. PROD. LIAB. 147 (1983); Schmidt & Derman, The Constitutionality of Federal Products Liability—Toxic Torts Litigation, 6 J. PROD. LIAB. 171 (1983).

S. 2631, which was also entitled the "Product Liability Act," was reported favorably by the Senate Committee on Commerce, Science, and Transportation who recommended its passage. Senate Comm. on Commerce, Science and Transportation, Report on Product Liability Act, S. Rep. No. 670, 97th Cong., 2d Sess. 1 (1982) [hereinafter cited as Senate Report]. S. 44 incorporates some of the changes which the Senate Committee made in S. 2631, but the two bills are virtually identical. For further discussion of the minor differences between these two bills, see Kircher, Federal Product Legislation and Toxic Torts: The Defense Perspective, 28 Vill. L. Rev. 1116 (1983). The Senate Committee Report on S. 2631 contains a wealth of information regarding the provisions of S. 2631. The report is also useful in any critical analysis of S. 44, since this latter bill is essentially a reintroduction of S. 2631.

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2. Id.


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sociation (ABA) and consumer groups in general have come out in opposition to the legislation. For an issue of such far-reaching implications for the general public, there has been remarkably little news coverage of the proposed law. It is significant, however, that the bill has attracted substantial criticism from both the plaintiffs' and the defense bars. This paper will explore some of the disadvantages of the proposed law from the perspective of the plaintiff—the ordinary user and consumer—with emphasis on the implications this bill has for toxic tort litigation.

II. An Overview of the Proposed Federal Products Liability Statute

S. 44 is far-reaching in its scope and implications. If enacted, the bill would make some significant changes in the law of products liability: it abolishes litigation based on strict liability for design and failure to warn; it significantly limits the scope of the duty to

...
warn; it generally relieves nonmanufacturing sellers from products liability; it adopts pure comparative fault and abolishes joint and several liability; it immunizes the plaintiff's employer from contribution and indemnity suits brought by third party tortfeasors, such as a manufacturer or product seller; it establishes a statute of repose of uncertain scope; it restricts recoverable punitive damages; it sub-

§ 6(b) of S. 2631. According to the Senate Report to S. 2631, the standard of responsibility under § 6 of that bill "is predicated on fault." Senate Report, supra note 4, at 32.

For a more detailed discussion of § 6(b) of S. 44, see notes 34-35 and accompanying text infra.

12. S. 44, supra note 1, § 6. Basically, § 6(d) restricts the scope of the class of persons to be warned more narrowly than the class of reasonably foreseeable plaintiffs. Id. § 6(d). Section 6(c), dealing with post-manufacture warnings, arguably relieves the manufacturer from liability, not only under that section, but also in general when reasonable efforts are made to give such a warning. Id. § 6(c)(2). Cf. Restatement (Second) of Torts § 437 (1965) (if an actor's negligent conduct causes injury, reasonable efforts to prevent the harm will not excise him).

13. S. 44, supra note 1, § 8. Section 8 of S. 44 makes product sellers liable only for harms caused by their own conduct except in very limited situations. See id. § 8(a) & (e). See also Senate Report, supra note 4, at 38. If a manufacturer is not subject to service of process in the forum state or the court determines that a judgment against the manufacturer is unenforceable, then the product seller is liable for harm caused by the product as if it were the manufacturer. S. 44, supra note 1, § 8(3). See also Senate Report, supra note 4, at 38.

14. S. 44, supra note 1, § 9. The comparative responsibility section of the proposed federal legislation provides in pertinent part as follows:

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).

15. Id. § 9(c). According to section 9(c) of the proposed Act, "the court shall enter judgment against each party determined to be liable in proportion to its percentage of responsibility for the claimant's harm . . . ." Id. Thus, the proposed Act replaces the concept of joint and several liability with a concept of comparative responsibility.

16. Id. § 11(c). Section 11(c) states as follows:

In any product liability action in which damages are sought for harm for which the person injured is entitled to compensation under any State or Federal workers' compensation law, no third party tortfeasor may maintain any action for implied indemnity or contribution against the employer or any coemployee of the person who was injured.

Id. Consequently, under this provision an employer is not liable for the plaintiff's injuries beyond the extent of its workmen's compensation obligation. See Senate Report, supra note 4, at 49.

17. S. 44, supra note 1, § 12. For a more detailed discussion of S. 44's statute of repose, see notes 121-42 and accompanying text infra.

18. S. 44, supra note 1, § 13. The proposed legislation's section on punitive damages provides as follows:

Punitive damages may be awarded to any claimant who establishes by clear and convincing evidence that the harm suffered was the result of the reckless disregard of the manufacturer or product seller for the safety of
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stastically narrows the use of evidence of post-accident remedial measures;19 and it probably requires identification of the particular defendant and the amount of his causal conduct in every instance.20

Aside from these proposed major changes of the common law, there are a number of miscellaneous changes that S. 44 if enacted would make in existing products liability law. These changes seem to be gratuitous, unnecessarily obtrusive into traditional areas of states’ rights, and unsupported by any discernible public policy. For example, physical injury to the product itself is excepted from products litigation under the proposed Act,21 although the clear trend is to in-

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Punitive damages may not be awarded in the absence of a compensatory award.

19. Id. § 13(a)(1). The proposed Act then proceeds to define “reckless disregard” as “conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by a product and constituting an extreme departure from accepted practice.” Id. § 13(a)(2). However, under the bill a “negligent choice among alternative product designs or warnings, when made in the ordinary course of business,” by itself does not constitute “reckless disregard.” Id.

Section 13(b) of the bill sets forth the factors the trier of fact should consider in determining whether punitive damages are appropriate:

(1) the manufacturer’s or product seller’s awareness of the likelihood that serious harm would arise from the sale or manufacture of a product;

(2) the conduct of the manufacturer or product seller upon discovery that the product caused harm or was related to harm caused to users or others, including whether upon confirmation of the problem the manufacturer or product seller took appropriate steps to reduce the risk of harm;

(3) the duration of the conduct and any concealment of it by the manufacturer or product seller; and

(4) whether the harm suffered by the claimant was partly the result of the claimant’s own negligent conduct.

20. See id. §§ 8(a), 5(a), 4(a) & 9(c). For a more detailed discussion explaining why these sections seem to require that the plaintiff identify the particular defendant who caused his harm and to specify the amount of his causal conduct, see notes 91-97 and accompanying text infra.

21. S. 44, supra note 1, § 2(5)(A). “Harm” is defined in a definition section of the proposed Product Liability Act. See id. § 2. Damage to the product itself is specifically excluded from the bill’s definition of “harm.” See id. § 2(5)(a). Later, in § 3(b), the bill reiterates the view that “harm” under the Act does not encompass damage caused to the product itself by stating as follows:

(b) No person may recover for any loss or damage caused by a product except to the extent that the loss or damage constitutes harm. A civil action for loss or damage caused to a product itself or for commercial loss is not a product liability action, and shall be governed by applicable commercial or contract law.
clude such injury within the scope of products liability. 22 The bill also defines the harm for which damages may be recovered in a way that precludes all recovery for economic loss, including lost wages, even when physical injury is present. 23 Such a restriction on recovery is foreign to the common law and at odds with traditional notions of compensation. 24 Furthermore, S. 44 reverses the clear majority trend to bring real estate transactions within the scope of products liability. 25 In one fell swoop, it also abolishes the entire body of product law based on tortious misrepresentation. 26

Id. § 3(b). For further discussion of how S. 44 defines "harm," see note 23 and accompanying text infra.

22. Fordyce Concrete, Inc. v. Mack Trucks, Inc., 535 F. Supp. 118, 126 (D. Kan. 1982) (allowing recovery for damage to the defective product itself where plaintiff establishes the elements of § 402A of the Restatement (Second) of Torts); Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982) ("damage to the product itself is the physical harm required by § 402A").

23. S. 44, supra note 1, § 2(5). S. 44 defines harm as follows: "(A) physical damage to property other than the product itself; (B) personal physical illness, injury, or death of the claimant; or (C) mental anguish or emotional harm of the claimant caused by the claimant's personal physical illness or injury; 'harm' does not include commercial loss." Id. (emphasis added). Section 3(b) of the Act restates the position that commercial loss cannot be recovered. For the text of § 3(b), see note 21 infra.


25. Id. § 2(11)(A). See Zipser, Builder's Liability For Latent Defects in Used Homes, 32 STAN. L. REV. 607, 607 n.5 (1980) (30 states recognize implied warranty in the sale of new houses). Cf. SENATE REPORT, supra note 4, at 20 n.52 (1982) ("[t]he Act does not follow those few cases that have have extended product liability law to situations where the seller both builds and sells 'mass produced' homes").

26. S. 44, supra note 1, § 4(a). Under § 4 of S. 44, a manufacturer is liable if a claimant establishes the following elements by a preponderance of the evidence:

(A) the product was unreasonably dangerous in construction or manufacture . . . ;
(B) the product was unreasonably dangerous in design or formulation . . . ;
(C) the product was unreasonably dangerous because the manufacturer failed to provide adequate warnings or instructions about a danger connected with the product or about the proper use of the product . . . ; or
(D) the product was unreasonably dangerous because the product did not conform to an express warranty made by the manufacturer with respect to the product . . . ; and

(2) the claimant establishes by a preponderance of the evidence that the unreasonably dangerous aspect of the product was a proximate cause of the harm complained of by the claimant.

Id. Thus, one of the ways in which a manufacturer can be liable under S. 44 is for breach of express warranty. See id. § 4(a)(1)(D). Since § 3(c) of S. 44 provides that the proposed law "supersedes any State law regarding matters governed by this Act," it would appear that if S. 44 were enacted, tortious misrepresentation would no longer be a valid cause of action in products liability suits. See id. at § 3(c). Additional support for this view comes from the Senate Committee Report to S. 2631, a bill which was an earlier draft of S. 44. In its report, the Senate Committee on Commerce, Science, and Transportation stated that the bill is intended to preempt state law on all matters addressed therein. SENATE REPORT, supra note 4, at 22. Later, in a discussion on express warranty, the Committee cited cases decided under § 402B of
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The proposed federal products liability legislation is intended to preempt state law and to establish a uniform body of national products liability law. Yet, it seems highly unlikely that the bill, if enacted, would achieve such uniformity since trial jurisdiction is vested in state courts, with only the remotest likelihood that the United States Supreme Court would provide uniformity of interpretation through the exercise of its certiorari jurisdiction.

During the past several years, most of the major state legislatures have considered and rejected products legislation that would curtail consumer interests. These states did not reject such legislation merely because they feared their sister states would not enact similar legislation. Had the proposed laws been considered sound, they probably would have been enacted on a state-by-state basis without regard to whether there was any assurance of similar sister state enactments. When such proposed statutes have been largely rejected

27. S 44, supra note 1, § 3(a) & (c). According to Section 3 of S 44, This Act governs any civil action brought against a manufacturer or product seller for loss or damage caused by a product, including any action which before the effective date of this Act would have been based on: (1) strict or absolute liability in tort; (2) negligence or gross negligence; (3) breach of express or implied warranty; (4) failure to discharge a duty to warn or instruct; or (5) any other theory that is the basis for an award for damages for loss or damage caused by a product. Any civil action brought against a manufacturer or product seller for harm caused by a product is a product liability action. . . .

28. SENATE REPORT, supra note 4, at 23. It was the belief of the Senate Committee which reviewed S 2631 that the uniform standards imposed by a federal products liability act would “resolve many of the problems and ambiguities currently associated with products liability law.” Id.

29. S 44, supra note 1, § 3(d). Section 3(d) of the bill provides that “[t]he district courts of the United States shall not have jurisdiction over any civil action arising under this Act, based on sections 1331 or 1337 of title 28, United States Code.” Id. The Senate Committee Report to S 2631, which contained a virtually identical provision, explained that the proposed “Product Liability Act” does not create federal question jurisdiction or jurisdiction based on an act of Congress regulating commerce. SENATE REPORT, supra note 4, at 23. Parties can still, however, bring an action in federal court if it is based on diversity jurisdiction. Id. Since the proposed Act does not create a new basis for federal court jurisdiction, most products liability actions would continue to be handled by the state courts. See id.

30. For a compilation of product liability statutes which have been enacted by various states, see 2 PRODS. LIAB. REP. (CCH) ¶ 9,110 et seq. (1981). L. FRUMER & M. FRIEDMAN, 5 PRODS. LIAB. app. H (1982).
after considered review by the major states of this nation, it seems anomalous that Congress—riding on a tide of conservatism—should then undertake to overrule the judgment of the various states in an area that has traditionally been left to state regulation.

For a piece of legislation which purports to be comprehensive and far-reaching, S. 44 is fraught with numerous ambiguities and problems of interpretation. However these ambiguities might be resolved, it seems unfortunate to lock the law of products liability in a statutory straitjacket since this is an area that seems preeminently suitable for caselaw development. The remainder of this paper will consider in more detail some of the specific changes that the bill, if enacted, would effect in the law of products liability.

III. THE NEGLIGENCE—STRICT LIABILITY DICHOTOMY

S. 44 identifies four categories of defects that may give rise to an action under the proposed Act and specifies the respective standards of liability for each category. In the category of design or formulation defects, section 5(b) of S. 44 provides that a product is not unreasonably dangerous in design or formulation unless, at the time of the product's manufacture or government certification, the manufacturer knew or should have known about the danger "based on knowledge which was reasonably accepted in the scientific, technical, or medical community" and a means to eliminate the danger was "within practical technological feasibility." The second category of defects involves products that are unreasonably dangerous because the manufacturer failed to give either adequate warnings or instructions regarding the product. In this second category, according to section 6(b) of the proposed Act, a product is not unreasonably dangerous for lack of necessary warnings or instructions unless the manufacturer knew or should have known of the danger, reasonably could have warned the user of the danger, and the warning would have enabled
the reasonably prudent user to avoid harm from the product.\textsuperscript{34} Both section 5(b) and section 6(b) thus use terminology which establishes a negligence standard for design and warning litigation\textsuperscript{35} rather than a strict liability standard.\textsuperscript{36}

The third category of defects in the proposed Act concerns construction or manufacturing defects.\textsuperscript{37} Section 5(a) by implication imposes a strict liability standard for defects in this category.\textsuperscript{38} In the

\begin{enumerate}
\item Section 6(b) of the proposed Act states specifically,
\item 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—
\begin{enumerate}
\item 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;
\item the manufacturer failed to provide the warnings or instructions that a reasonably prudent manufacturer in the same or similar circumstances would have provided with respect to the danger which caused the harm alleged by the claimant, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of that harm;
\item the manufacturer failed to provide those warnings or instructions to the claimant or to another person in accordance with subsection (d)(1); and
\item 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{enumerate}
\end{enumerate}

\textsuperscript{34} Id. § 6(b). Section 6(b) of the proposed Act states specifically,
\item 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—
\begin{enumerate}
\item 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;
\item the manufacturer failed to provide the warnings or instructions that a reasonably prudent manufacturer in the same or similar circumstances would have provided with respect to the danger which caused the harm alleged by the claimant, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of that harm;
\item the manufacturer failed to provide those warnings or instructions to the claimant or to another person in accordance with subsection (d)(1); and
\item 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{enumerate}

\textsuperscript{35} See id. §§ 5(b) & 6(b). The “reasonably prudent manufacturer” language of § 5(b) and § 6(b)(2) is typically employed as part of a negligence standard. For the text of § 5(b), see note 10 supra. For the text of § 6(b), see note 34 supra.

\textsuperscript{36} Strict liability is a theory of liability that is not predicated upon fault; in fact, it eliminates entirely the question of whether the defendant was negligent. See W. Prosser, supra note 24, § 103, at 672. Under a strict liability theory, a seller may be liable to a “user or consumer even though he has exercised all possible care in the preparation and sale of the product.” See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973) (quoting Restatement (Second) of Torts § 402A comment a (1965)), cert. denied, 419 U.S. 869 (1974).

\textsuperscript{37} See S. 44, supra note 1, § 5(a). For the complete text of § 5(a), see note 38 infra.

\textsuperscript{38} See S. 44, supra note 1, § 5(a). Section 5(a) states that
\item 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—
\begin{enumerate}
\item from the design specifications, formula, or performance standards of the manufacturer; or
\item from otherwise identical units manufactured to the same manufacturing specification or formula.
\end{enumerate}
fourth and final category of defects are products which are unreasonably dangerous due to their failure to conform to an express warranty. For products in this fourth category, section 7(b) of the proposed federal legislation expressly provides for a strict liability standard.

Why is there this negligence/strict liability dichotomy in the bill? The Senate Committee Report to S. 2631, which was an earlier draft of S. 44, never explains the reasons for the dichotomy. It simply concludes that strict liability is justified for construction or manufacturing defects and for products which fail to conform to express warranties because consumers have a “right to expect” that products will be free of manufacturing or construction defects, and that they have a “right to rely” on express warranties without regard to the degree of fault of the warrantor. In contrast, where warnings are concerned, the committee decided that “a fault-based standard is fair

2631, claimants should be able to recover for harms caused by production or manufacturing defects “without having to prove that the manufacturer was at fault.” Senate Report, supra note 4, at 26. Consequently, the Senate Committee considered “[n]either the fault nor the degree of care used by the manufacturer” to be relevant for defectively constructed or manufactured products. A strict liability standard of responsibility, the Committee said, was appropriate with such defects. Id. at 27.

39. See S. 44, supra note 1, § 7. Section 7(a) of S. 44 deals with express warranties for products. Under this section,

A product is unreasonably dangerous because it did not conform to an express warranty if—
(1) the manufacturer made an express warranty about a material fact relating to the safe performance of the product;
(2) this express warranty proved to be untrue; and
(3) the failure of the product to conform to the warranty caused the harm.

As used in this subsection, “material fact” means any specific characteristic or quality of the product, but does not include a general opinion about, or general praise of, the product or its quality.

Id. § 7(a).

40. See id. § 7(b). Section 7(b) states that a “product may be unreasonably dangerous for failure to conform to an express warranty although the manufacturer did not engage in negligent or fraudulent conduct in making the express warranty.” Id. Section 7(b) of S. 2631 contained an identical provision. According to the Senate Committee Report for S. 2631, § 7 had adopted “the generally recognized strict liability standard for breach of express warranty.” Senate Report, supra note 4, at 36. Strict liability was fair in these instances, the Committee said, “[B]ecause a manufacturer who extends an express warranty to a product user should be expected to meet that warranty.” Id. at 36-37.

41. For a more detailed discussion of the relationship between S. 44 and S. 2631, see notes 3-4 and accompanying text supra.

42. Senate Report, supra note 4, at 26. For a discussion of the provision in S. 44 which specifies a strict liability standard for construction and manufacturing defects, see notes 37-38 and accompanying text supra.

43. Senate Report, supra note 4, at 37. For a more detailed description of the provision in S. 44 which prescribes a strict liability standard for products that do not conform with express warranties, see notes 39-40 and accompanying text supra.
and promotes product safety." Similarly, with regard to design defects, the committee concluded that strict liability was both "inappropriate" and provided no "meaningful guidelines as to when liability is to be fairly assessed."

By designating negligence as the appropriate standard in warning cases, the proposed federal legislation will have a direct effect on toxic tort litigation generally, and on asbestos litigation in particular. Asbestos litigation typically is based upon a theory of failure to warn or failure to warn adequately. S. 44 has specified that warning litigation must be based on proof that the defendant manufacturer knew or had reason to know of the dangerous condition—in other words, a negligence standard is imposed by the bill. While a number of courts have held that strict liability is inappropriate for design and warning cases, the decisions are by no means uniform in reaching this result. For example, in a leading recent asbestos case, Beshada v. Johns-Manville Products Corp., the New Jersey Supreme Court held that strict liability is appropriate for a warning case. In Beshada, the court also ruled that the state-of-the-art defense was inapplicable to warning cases because it was essentially a negligence defense.

44. Senate Report, supra note 4, at 32. For a description of the section in S. 44 that deals with the appropriate standard of liability for failure to give adequate warnings, see notes 33-35 and accompanying text supra.

45. Senate Report, supra note 4, at 26. For additional discussion regarding the standard of liability S. 44 imposes for design defects, see notes 32 & 35 and accompanying text supra.

46. Levy, Toxic Tort Litigation—A Plaintiff's Perspective, in Asbestos Litigation 75, 84 (W. Alcorn, Jr. ed. 1982) ("[c]ases in the toxic and industrial litigation field often involve failure to warn, rather than improper design or manufacture"). See, e.g., Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1086 (5th Cir. 1973) (asbestos case brought, inter alia, under negligent failure to warn theory and under strict liability theory alleging "that the defendants' products were unreasonably dangerous because of the failure to provide adequate warnings of the foreseeable dangers associated with them"); cert. denied, 419 U.S. 869 (1974).

47. See S. 44, supra note 1, § 6(b). For an additional discussion regarding the standard of liability S. 44 imposes upon manufacturers for failure to give adequate warnings, see notes 34-35 and accompanying text supra.


51. Id. at 201, 447 A.2d at 544. But see O'Brien v. Muskin Corp., 94 N.J. 169 463 A.2d 298 (1983) (in a design and warning case, risk may outweigh utility and liability may be imposed even though no alternative feasible design is shown); Feldman v. Lederlee Labs., 460 A.2d 203 (N.J. Super. 1983) (state-of-the-art defense applies in suit against drug manufacturer for failure to warn).

52. Id. at 202-04, 447 A.2d at 545-46.
have known regarding a product at the time it was distributed. According to the Beshada court, abrogation of this defense provides manufacturers with an incentive to invest in safety research.

The Beshada court also pointed out that this defense in a warning case requires that the parties present proof of what "could have been known." Such proof, the Beshada court said, "will inevitably be complicated, costly, confusing, and time-consuming." The New Jersey Supreme Court then went on to caution courts to "resist legal rules that will so greatly add to the costs both sides incur in trying a case." S. 44, however, never considers or addresses this legitimate concern that a negligence theory of liability is burdensome to both parties. It is, of course, true that one cannot in fact warn about that which is not reasonably knowable. Yet, this situation is no different in principle from that which occurs when strict liability is imposed for production defects in instances where the manufacturer by the exercise of due care or merchant could not have discovered the defect.

Another problem with the negligence/strict liability dichotomy is that it makes distinctions among types of defects that are not always valid. For example, under the common law, design liability often turns upon a negligence standard, since the relevant inquiry is whether a product could have been made safer without undue cost, destruction of utility, or increased alternative safety hazards. Usu-

53. See id. at 202, 445 A.2d at 545. According to the Beshada court, in warning cases "the state-of-the-art defense asserts that distributors of products can be held liable only for injuries resulting from dangers that were scientifically discoverable at the time the product was distributed." Id.

54. Id. at 207, 447 A.2d at 548. The New Jersey Supreme Court in Beshada explained that "[t]he 'state-of-the-art' at a given time is partly determined by how much industry invests in safety research." Id. Imposing on manufacturers "the costs of failure to discover hazards," the court said, creates "an incentive for them to invest more actively in safety research." Id.

55. Id.

56. Id. According to the Beshada court, the state-of-the-art defense meant that each side would "have to produce experts in the history of science and technology to speculate as to what knowledge was feasible in a given year." Id. Furthermore, the court thought that juries would be incapable of understanding the key concept of scientific knowability, and would be unable to resolve such a complex issue. Id. at 207-08, 447 A.2d at 548.

57. Id. at 208, 447 A.2d at 548.

58. See Vlases v. Montgomery Ward & Co., 377 F.2d 846 (3d Cir. 1967) (action for breach of implied warranty of merchantability and implied warranty of fitness for a particular purpose will lie even where seller is unable to discover the defect in the goods).

59. See Owens v. Allis-Chalmers Corp., 414 Mich. 413, 426-28, 326 N.W.2d 372 (1982) (manufacturer of forklift not liable for defective design of forklift, which did not include seat belt or some form of driver restraint, absent evidence concerning "unreasonableness" of risks arising from the failure to include such restraints).
ally expert testimony is a necessary part of this inquiry. Yet in some cases, consumer expectations as to safe design may establish liability without any detailed inquiry or expert testimony regarding available alternatives. In this situation, the design defect resembles and merges into a production defect. Conversely, there may be alleged production defects about which there are no fixed consumer expectations, so that expert testimony will be required to establish defectiveness. Thus, production and design defects cannot be readily distinguished on the basis of the kind of proof necessary to establish one or the other. Similarly, breaches of express warranty and failures to warn may sometimes be established by consumer expectations while at other times expert testimony will be required.

The assignment of a negligence standard to cases involving warning or design defects, but not to cases involving express warranties or production and manufacturing defects, also fails to comport with reality in products liability actions. In none of these situations is it always true that the defective condition could have been eliminated by the exercise of due care, while in all of them the exercise of due

60. See Lynd v. Rockwell Mfg. Co., 276 Or. 341, 554 P.2d 1000 (1976) (in design defect cases, expert testimony is usually, but not always, "an indispensable element of plaintiff's case").

61. See id. at 349, 554 P.2d at 1005 (lay jury was held to be able to understand issues relating to the defectiveness of the design of a table saw without plaintiff's presentation of expert testimony); Bernal v. American Honda Motor Co., 87 Wash. 2d 406, 553 P.2d 107 (1976) (damage suffered by stationary vehicle in collision may evidence a design defect if those damages are disproportionate to the speed at which it was struck).


63. See Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967) (ordinary consumer has no meaningful expectation as to a non-defective wheel’s ability to withstand a high-speed collision with a large rock and therefore expert testimony is required to determine whether wheel failed to perform as safely as an ordinary consumer would have expected).

64. In Seely v. White Motor Co., the express warranty that the truck was “free from defects in material and workmanship under normal use and service” essentially reflected ordinary consumer expectations. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). On the other hand, in Dunham v. Vaughan & Bushell Mfg. Co.—where a hammer was represented as being made of steel with a carbon content of “1080” and as being of the “best quality”—expert testimony was offered and perhaps required in order to establish defectiveness. 42 Ill. 339, 247 N.E.2d 401 (1969).

In warning cases expert testimony may be required to establish the existence of a defect in some instances but not in others. For example, in Shell Oil Co. v. Gutierrez the court excluded expert testimony as to the sufficiency of a label warning on the ground that the jury was as competent as an expert to determine the issue. 119 Ariz. 426, 581 P.2d 271 (Ariz. Ct. App. 1978). In allergy cases, however, expert testimony is frequently required to establish the incidence of the allergic reaction and thereby to determine whether the manufacturer had a duty to warn. See, e.g., Grau v. Proctor & Gamble Co., 324 F.2d 309 (5th Cir. 1963).
A concrete dual standard, therefore, is not supported by the realities of products liability cases.

Similarly, the proposed legislation's specification of a negligence standard for only design and warning defects cannot be justified by reasoning that such defects result from a conscious decision made by a manufacturer. Design choices, for instance, are often thought of as conscious decisions. It is clear, however, as the court in *Bowman v. General Motors Corp.* recognized, that many design defects are inadvertent simply because the designer failed to take into account the consequences that might flow from a particular design choice. Conversely, a decision as to the extent of quality control testing is often calculated based on economic practicalities, with the designer of the testing procedure fully aware that the choice of a particular procedure will result in a predictable number of products having production defects. Furthermore, the decision of whether or how to warn, and whether or how to expressly warrant a product, may also contain elements of both conscious and inadvertent choice.

A final distinction that is often made between design and production defects is that the former affects a whole line of products.
while the latter does not. This distinction, though, cannot provide the rationale for imposing a different standard of liability for design and warning defects than for manufacturing and production defects and breaches of express warranties because the distinction does not always—or even generally—hold true. A design defect in a given line of products, such as a defectively engineered motor mount, may only cause injury in occasional instances where there has been a particular combination of use and stress.\(^\text{71}\) It therefore seems academic to speak of a design defect in a whole line of products if the defect only occasionally causes injury. On the other hand, a production defect which occurs only infrequently may nevertheless by symptomatic of flaws in a whole line of products. For example, porosity is a characteristic of all metal, but this general characteristic may evolve into a specific defect when the porosity becomes excessive due, at least in part, to use and stress.\(^\text{72}\) Similarly, a drug may cause an adverse side effect to some, but not all, people although the harm-producing characteristic is present in all like drugs.\(^\text{73}\) Whether a side effect is described as a production or a design defect thus seems adventitious rather than grounded upon a true difference in nature. Correspondingly, an express warranty or a warning may accompany either some or all of the products of a particular product line. In either situation, an inadequate warning or breach of warranty may only occasionally cause an injury,\(^\text{74}\) so that one cannot really distinguish these two types of defects on the basis that one affects an entire product line while the other does not.

Even assuming that the four categories of defect established by the Senate bill could be readily distinguished, the question would still remain as to why they \textit{should} be distinguished in terms of legal consequences. The Senate Committee Report to an earlier version of the bill claims that the basis for the distinctions lies in the expectations of consumers,\(^\text{75}\) but it offers no explanation as to why consumers should


\(^{73}\) Crocker v. Winthrop Laboratories, 514 S.W.2d 429 (Tex. 1974) (plaintiff became addicted to drug thought to be nonaddictive).

\(^{74}\) Huebert v. Federal Pac. Elec. Co., 208 Kan. 720, 494 P.2d 1210 (1972) (breach of express warranty when switch failed to operate properly after lightning struck electrical circuit). \textit{See also} Johnson v. Husky Indus., 536 F.2d 645 (6th Cir. 1976) (where purchaser was asphyxiated by carbon monoxide while using charcoal to heat house, warning on bag of charcoal was held inadequate).

\(^{75}\) For a discussion of the Senate Committee Report and its treatment of consumer expectations, see notes 42 & 43 and accompanying text supra.
have lesser expectations where design\(^{76}\) and warning\(^{77}\) defects are concerned. Furthermore, if S. 44 were enacted, its negligence/strict liability dichotomy would mean that some injured plaintiffs would be denied recovery for damages because they could not supply the type of proof that is required in a negligence action. Although some commentators have contended that the proof required to establish a design or warning defect in strict liability will also establish a case in negligence,\(^{78}\) this is not always true. For example, in *Delaney v. Towmotor Corp.*,\(^{79}\) the plaintiff was unable to establish negligent design but nevertheless recovered in strict liability.\(^{80}\) Commentators have noted that the *Delaney* case is not atypical in its result.\(^{81}\)

The negligence/strict liability dichotomy of S. 44, even if it could be explained plausibly, may not be able to withstand first amendment scrutiny. Following the lead of the Supreme Court in *New York Times v. Sullivan*\(^{82}\) and *Gertz v. Robert Welch, Inc.*,\(^{83}\) courts have required proof of negligence or even recklessness as a constitutional condition to recovery for misrepresentation.\(^{84}\) If the theory behind these cases carries over to the products liability context, recovery

76. See Senate Report, *supra* note 4, at 26. The Senate Committee justified the imposition of a negligence standard of liability for design defect cases by stating that "there are practical and public policy reasons for adhering" to such a standard. *Id.* Furthermore, the Committee said, "strict liability in design or formulation defect cases is unfair and unworkable." *Id.* According to the Committee, since "strict liability has been recognized as inappropriate in actions against engineers, architects, physicians, lawyers, pilots" and many others, there was "no cogent rationale for singling out manufacturers as a group for strict liability treatment." *Id.* The Committee did not, however, address the role of consumer expectations in this area.

77. See *id.* at 32. The Senate Committee Report to S. 2631, which like S. 44 had a negligence/strict liability dichotomy, stated that a negligence standard was advisable in warning cases because it is easily understood by litigants and triers of fact and that "strict liability for failure to warn is unfair and unworkable." *Id.*


79. 339 F.2d 4 (2d Cir. 1964) (forklift operator, injured when overhead guard collapsed, sued manufacturer claiming defect in manner that overhead guard was affixed to forklift).

80. *Id.*


82. 376 U.S. 254, 283 (1964) (constitutional guarantee of free speech delimits a state's power to award damages for libel; actual malice, knowledge of falsity or reckless disregard of the likelihood of falsity, is required in actions brought by public officials against critics of their official conduct).

83. 418 U.S. 323, 347 (1974) (so long as states do not impose strict liability, they are free to decide whether they wish to impose negligence or recklessness as the standard of liability for a publisher or broadcaster of a defamatory falsehood injurious to a private individual).

in strict liability for breach of express warranty may become constitutionally untenable.

It has been recognized that misrepresentation permeates the law of products liability. 85 A direction or warning often constitutes a representation or warranty of safety if the product is used in compliance with that warning. 86 Also, as this article demonstrated earlier, production and design defects are not readily distinguishable. 87 If the negligence/strict liability dichotomy of the Senate bill is frozen into law, there will be inevitable pressures to re-characterize a products action as one or another of these categories so as to suit the needs of the litigants. These pressures will generate the kind of complex litigation that caused the Beshada court to reject the analogously complex state-of-the-art defense. 88 The complexity will be exacerbated in the mass litigation context that is typical of toxic torts. 89 Since the bill vests jurisdiction in the state courts, 90 there is little likelihood of uniformity of interpretation. On the contrary, widely varying rules seem likely.

IV. IDENTIFICATION OF THE DEFENDANT

Section 8(a) of S. 44, dealing with the responsibility of nonmanufacturing product sellers, provides that the defendant seller will be liable if the claimant establishes that "the individual product unit which allegedly caused the harm complained of was sold by the defendant." 91 This section pretty clearly requires the plaintiff to establish the identity of the particular nonmanufacturing defendant who caused his harm. 92 It also requires the plaintiff to establish that the particular defendant sold the product. 93 In contrast, in traditional

86. This proposition, however, is not supported by the informed consent type of warning case. See, e.g., Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir.) (manufacturer can avoid liability for unavoidably unsafe product if adequate warning of danger is provided), cert. denied, 419 U.S. 1096 (1974).
87. See notes 59-65 & 70-74 and accompanying text supra. See also Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (refusing to distinguish between design and production defects because of the difficulty of determining the type of defect involved in many such cases).
88. For a discussion of this aspect of the Beshada decision, see notes 55-57 and accompanying text supra.
90. For a discussion of the provision of the bill that vests jurisdiction in state courts, see note 29 and accompanying text supra.
91. S. 44, supra note 1, § 8(a).
92. See id.
93. Id. Section 8(a) of S. 2631 is very similar to § 8(a) of S. 44. The Senate
products litigation neither proof of identity nor of sale is regularly required in every case as a condition of liability.\(^{94}\)

The identification requirement may extend not only to nonmanufacturing sellers but also to manufacturers. Section 5(a), dealing with construction defects, provides that a product is unreasonably dangerous only if it contained such a defect when it "left the control of the manufacturer."\(^{95}\) Section 4(a) provides that a manufacturer is not liable on any theory unless the plaintiff establishes that the unreasonably dangerous aspect of "the product was a proximate cause of the harm complained of"—"the product" presumably being that of the defendant.\(^{96}\) Furthermore, section 9(c), which deals with compar-

Committee Report to S. 2631 explained that the philosophy behind § 8 was "the principle that a party should be responsible only for harms caused by its own conduct." SENATE REPORT, supra note 4, at 38. According to the Committee, product sellers are frequently sued in products liability actions although they are seldom responsible for the harm the plaintiff suffered. \(^{Id}\). While product sellers do not bear the ultimate costs of the judgment, the Committee recognized that they may incur large legal costs. \(^{Id}\). Consequently, the purpose of § 8 was to help "eliminate the costs associated with defending these suits by ensuring that product sellers are responsible only for harms caused by their own conduct." \(^{Id}\).

Section 8 does, however, provide two instances where a plaintiff can recover from a product seller even though the manufacturer actually was responsible for the harm to the plaintiff. S. 44, supra note 1, § 8(e). In situations where the manufacturer responsible for the harm is not subject to the service of process or where the court determines that a judgment would be unenforceable against the manufacturer, the product seller can be treated as though it were the manufacturer. \(^{Id}\). Thus, in these two limited situations the product seller may be held fully responsible although its conduct did not cause the harm. SENATE REPORT, supra note 4, at 38. For the full text of § 8(e), see note 109 infra.


In Anderson, a surgical instrument broke off in a patient's spinal cord during an operation. 67 N.J. at 294, 338 A.2d at 3. The patient sued, among others, the medical supply distributor that had allegedly furnished the instrument to the hospital. \(^{Id}\). at 295, 338 A.2d at 3. The New Jersey Supreme Court held that at least one of the defendants was liable for the plaintiff's injury and therefore the burden of proof shifted to the defendants. \(^{Id}\). at 302, 338 A.2d at 7.

In Davis, a father brought suit against a self-service store for injuries his son sustained in the store when the son removed a machete from its sheath to examine it. 505 S.W.2d at 684. The Davis court found that the rule of strict liability was applicable even though there had been no "sale" of the product in the sense of a transfer of title for consideration. \(^{Id}\). at 691.

\(^{95}\) S. 44, supra note 1, § 5(a). For the full text of § 5(a), see note 38 and accompanying text supra.

\(^{96}\) S. 44, supra note 1, § 4(a)(2). Section 4(a) states in pertinent part that "[i]n any product liability action, a manufacturer is liable to a claimant if— . . . the claimant establishes by a preponderance of the evidence that the unreasonably dangerous aspect of the product was a proximate cause of the harm complained of by the claimant." \(^{Id}\). § 4.

There appears to be no manufacturer identification requirement in § 4 of S. 44. S. 2631, on the other hand, would have required the claimant to establish "that the
ative responsibility, apparently imposes liability only on the basis of actual cause, which, of course, would require identification of the particular defendant.

These provisions substantially undermine much traditional tort law and much of the developing law of products liability. Thus, the market share liability theory of Sindell v. Abbott Laboratories may be abrogated by one or more of these sections, as may the enterprise liability theory of Hall v. E.I. DuPont de Nemours & Co. The concert-of-activity theory of cases such as Bichler v. Eli Lilly and Co.,

individual product unit which allegedly caused the harm was manufactured by the defendant." S. 2631, supra note 3, § 4(a)(2). Notably, however, S. 44 does impose an identification requirement identical to that of S. 2631 for cases in which the defendant is a product seller other than a manufacturer. See S. 44, supra note 1, § 8(a)(1)(A).

97. See S. 44, supra note 1, § 9(c). According to the Senate Committee Report to S. 2631, which contained an almost identical provision, under § 9's comparative responsibility the manufacturer or seller "pays only for the harms for which it is responsible, except when all or a portion of the judgment against a co-defendant joint tortfeasor is not collectable." Senate Report, supra note 4, at 40.

98. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980). In Sindell, the plaintiff brought an action against manufacturers of the drug DES seeking to recover for injuries caused to her as a result of the administration of that drug to her mother during pregnancy. Id. at 593-94, 607 P.2d at 925-26, 163 Cal. Rptr. at 133-34. The specific manufacturer of the drug that the plaintiff's mother had ingested could not, however, be identified. Id. at 593, 607 P.2d at 926, 163 Cal. Rptr. at 134. The Sindell court stated that the plaintiff could hold liable for her injuries the manufacturers of DES which was produced from an identical formula, upon a showing that those manufacturers had produced a substantial percentage of the drug in question. Id. at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144-45. Each manufacturer would be held liable for the proportion of the judgment represented by its share of the drug market unless it demonstrated that it could not have made the product which caused the plaintiff's injuries. Id. at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. See also Collins v. Eli Lilly Co., Prod. Liab. Rep. (CCH) ¶ 9871 (Wisc. 1984) (joint and several liability with contribution in DES case) (application of comment k of Restatement (Second) of Torts § 402(a) rejected on facts of case).

99. 345 F. Supp. 353 (E.D.N.Y. 1972) (refusing to dismiss action against multiple manufacturers of blasting caps which exploded and injured plaintiffs, despite plaintiffs' inability to prove which of the defendants manufactured the product which caused the harm). It has been suggested that enterprise liability is actually a hybrid theory combining elements of alternative liability and concert of action. See NOR, DES and a Proposed Theory of Enterprise Liability, 46 Fordham L. Rev. 963, 974 (1978). See also 1 Frumer & Friedman, Products Liability § 2A.01, at 1-33 (1983) (describing enterprise liability in the context of Hall, and concluding that the theory seems appropriate in those catastrophic cases in which a number of manufacturers produce substantially similar products to that which injured the plaintiff).

100. 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982). In Bichler the plaintiff brought an action against a manufacturer of DES for injuries sustained as a result of her prenatal exposure to that drug. Id. at 578, 436 N.E.2d at 184, 450 N.Y.S.2d at 778. The defendant was the only pharmaceutical manufacturer named, although the pharmacist who filled the prescription of the plaintiff's mother stocked DES made by at least three other companies. Id.

The concert-of-action theory provided the basis of the defendant's liability in Bichler. Id. at 580-84, 436 N.E.2d at 185-88, 450 N.Y.S.2d at 779-82. This theory of
the alternative liability theories of Ybarra v. Spangard,101 Summers v. Tice102 and Anderson v. Somberg103 may be abolished by the bill and so may the nondelegable-duty theory of Vandermark v. Ford Motor Co.104 and Sabloff v. Yamaha Motor Co.105 Even the liability of successor corporations,106 and of joint tortfeasors as set forth in cases such as Landers v. East Texas Salt Water Disposal Co.,107 may be called into question. Such a wholesale revamping of torts and products law, however,

liability rests upon the principle that “[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify, and adopt his acts done for their benefit, are equally liable with him.” W. Prosser, supra note 24, § 46, at 292 (footnotes omitted). In Bithler, the court found that the defendant’s liability could have been based on either of two findings: 1) a finding that the defendant and other drug companies consciously paralleled each other in failing to test DES as a result of some implied understanding, or 2) a finding that drug companies had acted independently of each other in failing to do such testing, but that such independent actions had the effect of substantially aiding or encouraging the failure to test by the others. Id. at 585, 436 N.E.2d at 188, 450 N.Y.S.2d at 782.

101. 25 Cal. 2d 486, 154 P.2d 687 (1944). The court in Ybarra stated that “[w]here a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have causes the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.” Id. at 494, 154 P.2d at 691.

102. 33 Cal. 2d 80, 199 P.2d 1 (1948). In Summers, two hunters negligently fired simultaneously in the plaintiff’s direction, but the plaintiff was struck by only one bullet. Id. at 82-83, 199 P.2d at 2-3. The Summers court utilized the alternative liability theory. Id. at 84-99, 199 P.2d at 3-5. Underlying this theory is the principle that “[w]here the conduct of two or more actors is tortious and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which has caused it, the burden is upon each actor to prove that he has not caused the harm.” Restatement (Second) of Torts § 433B(3) (1965).


104. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (automobile manufacturer which did not deliver automobiles to dealers ready to be driven away by ultimate purchasers, but instead relied upon dealers to make final inspections, corrections, and adjustments necessary to make the automobiles ready for use, could not escape liability for defect in automobile on the grounds that the defect may have been caused by something that the authorized dealer did or failed to do).

105. 113 N.J. Super. 279, 273 A.2d 606 (N.J. Super. Ct. App. Div. 1971) (motorcycle manufacturer, which did not deliver its motorcycles to its authorized dealer ready to be driven away by ultimate purchasers but relied on dealer to attach front wheel and otherwise assemble certain parts to make the motorcycles ready for use, could not escape liability for injuries sustained by motorcyclist when the front wheel locked by claiming that the defect in the motorcycle might have been caused by something that the dealer did or failed to do in attaching the front wheel to the motorcycle), aff’d, 59 N.J. 365, 283 A.2d 321 (1971).


107. 151 Tex. 251, 248 S.W.2d 731 (1952). The Landers court stated, “Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty
Toxic TORT LITIGATION should not be made to turn on the niceties of inadequately considered phrases in federal legislation.

V. THE NONMANUFACTURING SELLER

Section 8 of S. 44 makes a product seller "other than a manufacturer" liable only if it is negligent or if it breaches an express warranty. However, according to section 8(e), the seller will be treated as a manufacturer if "the [actual] manufacturer is not subject to service of process under the laws of the State in which the action is brought," or "the court determines that the claimant would be unable to enforce a judgment against the [actual] manufacturer." These "subject to service" and "enforceable judgment" exceptions set forth in section 8(e) are fraught with ambiguity and uncertainty. Who is "the manufacturer" referred to in this subsection? Furthermore, what happens if there is more than one manufacturer, as for example when there is an assembler and a component part manufacturer?

Since the exceptions in section 8(e) are not precisely defined, one wonders whether a manufacturer whose identity cannot be determined would be deemed not subject to process, thereby imposing on the seller a more stringent standard of care. Similarly, one wonders whether a plaintiff would be considered unable to enforce a judgment against the manufacturer whose insurer is insolvent or denies liability to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages . . . ."

108. S. 44, supra note 1, § 8(a). Section 8(a) states in pertinent part as follows: In any product liability action, a product seller other than a manufacturer is liable to a claimant, if the claimant establishes by a preponderance of the evidence that:

(2)(A) the product seller made an express warranty, independent of any express warranty made by a manufacturer as to the same product, about a material fact directly relating to the safe performance of the product;

(B) this express warranty proved to be untrue; and

(C) the failure of the product to conform to the warranty caused the harm.

109. Id. § 8(e). Section 8(e) provides as follows:

A product seller is liable for harm to the claimant caused by a product in the same manner as the manufacturer of the product if—

(1) the manufacturer is not subject to service of process under the laws of the State in which the action is brought; or

(2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

110. An unidentifiable defendant doing business in a jurisdiction is theoretically but not practically subject to service.
ity.\textsuperscript{111} The language of the proposed federal legislation obviously opens a whole Pandora's box of potential interpretive problems. For example, assume the trial court determines that the seller is not subject to the exceptions clause of section 8(e) because the manufacturer is subject to service or that the plaintiff will be able to enforce a judgment against it. Under the proposed Act, what happens if the court is reversed on appeal? Specifically, will the statutes of limitations or repose be deemed to have continued to run with respect to the seller who had been effectively, but erroneously, let out of the case by the trial court? It would seem harsh to the plaintiff to allow the statute to run, but presumably the twenty-five-year statute of repose contained in section 12 would continue to run since no exception for such a case is contained in its list of express exceptions.\textsuperscript{112} The ambiguous language of the bill likewise does not provide adequate guidance in a situation like the Manville bankruptcy, where there is substantial doubt regarding the propriety of Manville using a Chapter 11 proceeding.\textsuperscript{113} If S. 44 were enacted, what would be the status of the plaintiff's claims against potential nonmanufacturing defendants while the Manville bankruptcy is pending?

Other problems of interpretation arise when the language of section 2(6) of the proposed legislation is considered in conjunction with section 8. Section 2(6) of the bill apparently defines a manufacturer to include a licensor, franchisor, lessor, and perhaps a product certifier.\textsuperscript{114} There may be situations where predecessor and successor cor-

\textsuperscript{111} See S. 44, supra note 1, § 8(e). Section 8(e) of S. 44 is silent regarding this problem.

\textsuperscript{112} Under the accepted rule of statutory construction, “Expressio unius est exclusio alterius” (the expression of one thing is the exclusion of another), no implied exception can be engrafted onto the statute. See Black’s Law Dictionary 521 (rev. 5th ed. 1979).


\textsuperscript{114} S. 44, supra note 1, § 2(6). According to § 2(6), [a] “manufacturer” means (A) any person who is engaged in a business to design or formulate and to produce, create, make, or construct any product (or component part of a product), including a product seller, distributor, or retailer of products with respect to any product to the extent that such a product seller, distributor, or retailer designs or formulates and produces, creates, makes, or constructs the product before that product seller, distributor, or retailer sells the product; or (B) any product seller not described in clause (A) which holds itself out as a manufacturer to the user of the product;

Id.
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Corporations are both subject to suit. Is it enough that one of these potential "manufacturers" be insolvent, or not subject to service in order to trigger the exceptions contained in section 8(e)? Indeed, where there is more than one manufacturer, will any of these manufacturers be treated like retailers for purposes of section 8?

Section 2(6), which defines a manufacturer, also provides that a seller will be treated like a manufacturer if it "holds itself out as a manufacturer to the user of the product." This "holding out" language of section 2(6) does not track the traditional language of section 400 of the Second Restatement of Torts, which includes in the definition of manufacturer a seller who puts out a product but fails to identify the actual manufacturer. It is also unclear whether the user, the consumer, or the bystander must show some form of reliance on the "holding out" in order to recover.

The likely purpose of significantly restricting the liability of non-manufacturing sellers in the proposed federal legislation is to achieve economy in transactional costs. However, where the restrictions are surrounded by large areas of uncertainty as they are in this bill, with a great potential of unfairness for the consumer, it seems judicious not to tamper with the existing structure. Hamlet's famous

115. See, e.g., Tift v. Forage King Indus., 108 Wis. 2d 72, 322 N.W.2d 14 (1982) (present corporation, which has substantially the same identity as the still existing sole proprietorship which "metamorphosed" into that corporation, could be sued by injured party alleging that sole proprietorship had sold him a defective product); Nieves v. Bruno Sherman Corp., 86 N.J. 361, 431 A.2d 826 (1981) (where one corporation acquires all or substantially all of the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the still existing intermediary acquired corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the acquired corporation).

116. See RESTATEMENT (SECOND) OF TORTS § 400 (1965). According to § 400 of the Restatement, "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." Id. Liability under this section can attach if the seller simply fails to identify the manufacturer. See Slavin v. Francis H. Leggett & Co., 114 N.J.L. 421, 177 A. 120 (1935) (distributor of can of peas held liable for injury to one biting on piece of stone found in the peas where distributor marketed the goods under its own trade name and failed to identify the canner on the label of the product).

117. Typically, reliance must be shown in order to succeed on any claim based on misrepresentation. See RESTATEMENT (SECOND) OF TORTS § 400 comment d (1965); Phillips, Product Misrepresentation And The Doctrine of Causation, 2 Hofstra L. Rev. 561 (1974).

118. Section 8 of S. 44, which restricts the liability of nonmanufacturing sellers, contains language which closely tracks the language of § 8 in S. 2631. Compare S. 44, supra note 1, § 8 with S. 2631, supra note 3, § 8. According to the Senate Committee Report for S. 2631, § 8 was designed to help eliminate the costs that nonmanufacturing sellers incur in defending product liability suits by limiting liability only to harms caused by their own conduct. Senate Report, supra note 4, at 38. For additional discussion regarding the philosophy behind § 8 of S. 2631, see note 93 supra.
VI. COMPARATIVE RESPONSIBILITY

Section 9 of S. 44 adopts a standard of pure comparative fault that would presumably apply to actions in strict liability as well as to those in negligence and deceit. Pure—as opposed to modified—comparative fault, although favored by commentators, is nevertheless the minority position. The imposition of a federal pure comparative system in products cases, that would operate concurrently with a state modified comparative system for other tort claims, creates the potential for substantial confusion in cases involving defendants sued jointly and severally on theories of products liability and general tort liability.

Even more far-reaching is the provision of section 9(c), which abolishes joint and several liability in favor of several liability. It is unclear who would have the burden of proving apportionment under this provision. It seems clear, however, that the apportionment is to be made as to all potential co-tortfeasors—whether or not they are

120. See S. 44, supra note 1, § 9. For the pertinent text of § 9 which adopts a standard of pure comparative fault, see note 14 supra.
121. Under a modified comparative fault system, a plaintiff may recover so long as his fault is not as great as (or in another formulation of the theory, not greater than) that of the defendant. Phillips, The Case for Judicial Adoption of Comparative Fault in South Carolina, 32 S.C.L. REV. 295, 296 (1980). In contrast, a pure comparative fault system allows a plaintiff to recover against a defendant who is proximately at fault to any degree. Id.
122. Li v. Yellow Cab Co. of Calif., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (adopting the pure form of comparative fault and recognizing it as the one favored by most scholars and commentators).
123. See Phillips, supra note 121, at 296.
124. S. 44, supra note 1, § 9(c). For the text of § 9(c), see note 15 supra.
125. See S. 44, supra note 1, § 9(c). The text of § 9 is silent on this point. See id.
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a party to the case, whether or not they could be separately sued by the plaintiff, and whether or not the plaintiff himself is responsible for any portion of his own injuries. Such extraordinary changes in present tort law are proposed without even so much as a passing discussion of the policy implications involved, or of the need for such drastic action. These proposed changes have significant ramifications for mass toxic tort litigation such as that involving asbestos products.126

VII. THE STATUTE OF REPOSE

It has become fashionable to term a statute of limitations that can cut off a cause of action before it ever accrues as a statute of repose.127 Section 12, providing a twenty-five-year outer cutoff period running from the date of first consumer sale, is such a provision.128 However, similar statutes, particularly in the area of products liability as well as builders' and architects' liability, have been struck this burden on the defendant, as is done with contributory negligence, avoidable consequences, and comparative fault. See Phillips, supra note 121, at 316.

Section 9 of S. 44 also contains a provision for reallocating the judgment where the claimant has been unable to collect from a joint tortfeasor. See S. 44, supra note 1, § 9(d). Under this provision,

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.

126. For example, § 9(d) of S. 44 might come into play in a situation where one manufacturer files for bankruptcy after a plaintiff has been awarded a judgment against that manufacturer. In such a situation, other manufacturers would have to bear more than their equitable portion of the judgment, probably without a chance of ever recouping the amount from the other tortfeasor. Consequently, if the pool of solvent manufacturers diminished, an ever-diminishing number of manufacturers would have to recompense plaintiffs. In the long run, plaintiffs might wind up receiving no compensation as manufacturers who were parties to the action file bankruptcy petitions in order to avoid staggering amounts of potential liability.


128. S. 44, supra note 1, § 12(a)(1). Section 12(a)(1) of the proposed federal legislation 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.
down under state constitutions as denying access to courts. 129

Assuming section 12 would pass constitutional muster—and that issue would be controlled by federal rather than state constitutional provisions by virtue of the preemption provision of article VI of the United States Constitution 130—substantial questions remain as to the wisdom of the proposed provision. Section 12 is erratic in its application, applying only to design and warning defects involving capital goods. 131 It is also erratic in its exceptions. It does not apply to actions for deceit or fraudulent concealment; 132 to harm caused by prolonged cumulative exposure to a defective product; 133 to injury which

129. See Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982) (products liability statute which barred actions not brought within 10 years after the first use of the product was unconstitutional as violative of the Alabama constitutional amendment requiring “[t]hat all courts shall be open” and that every person, for any injury done him, “shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay”); Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980) (statute providing that no action may be brought more than 10 years after substantial completion of improvement to real property against any person performing or finishing design, planning, supervision, construction or supervision of construction of the improvement violated state constitutional provision requiring that all courts be open, that all laws of a general nature shall have uniform operation, and that special laws shall not be passed where general laws can be made applicable).

One Illinois appellate court struck down a statute providing that no action for damages for patient injury or death could be brought against a physician after four years from the date on which the act, omission or occurrence alleged to have been the cause of the injury took place. See Woodward v. Burnham City Hosp., 60 Ill. App. 3d 285, 377 N.E.2d 290 (1978) (using state proscription against special legislation), rev’d, 79 Ill. 2d 295, 402 N.E.2d 560 (1979).

See generally Dworkin, supra note 127, at 53.

130. U.S. CONST. art. VI, cl. 2 (“the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).

131. S. 44, supra note 1, § 12(a)(1). For the relevant text of § 12(a)(1), see note 128 and accompanying text supra. The proposed bill defines “capital good” as used in § 12(a)(1) as follows:

any product, other than a motor vehicle, or any component of any such product, if it is also of a character subject to allowance for depreciation 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.

S. 44, supra note 1, § 12(a)(2).

132. S. 44, supra note 1, § 12(b)(1). Section 12(b) contains various exceptions to the statute of repose set forth in § 12(a). According to § 12(b)(1), § 12(a) is not applicable if “the manufacturer or product seller intentionally misrepresented facts about the product or fraudulently concealed information about the product, and that conduct was a substantial cause of the claimant’s harm.” Id.

133. Id. § 12(b)(2). Section 12(b)(2) states that § 12(a)’s statute of repose is not available if “the harm of the claimant was caused by the cumulative effect of prolonged exposure to a defective product.” Id.
occurs within the twenty-five-year period but which manifests itself only after expiration of the twenty-five years;\textsuperscript{134} or to actions for contribution or indemnity.\textsuperscript{135} One wonders why the proposed legislation contains these exceptions. Apparently, the exceptions were included because it was thought unfair in some instances to cut off a cause of action before it accrued. But if it is unjust in some instances, why is it not in all?

The bill's statute of repose may serve as a bar in many types of toxic tort cases. These cases are often tried under a failure to warn theory,\textsuperscript{136} thus bringing such litigation squarely within the coverage of the repose statute.\textsuperscript{137} It may, of course, be possible for some toxic tort claims to fall within the exceptions to section 12.\textsuperscript{138} For example, toxic tort claims typically involve cumulative exposure\textsuperscript{139} and thus would be excepted from the statute of repose.\textsuperscript{140} Perhaps such claims will not be based on defective design or failure to warn theories. Consequently, whether the statute of repose applies to any given toxic tort case will depend on the factual circumstances of the claim. Asbestos-related diseases, for instance, can apparently result from slight exposure\textsuperscript{141}—as opposed to the ambiguous "prolonged" exposure—to an asbestos product which may be part of a "capital good" as defined by the bill,\textsuperscript{142} and thus in such instances would be covered by the proposed statute of repose.

Under accepted principles of statutory construction, the listed exceptions should be presumed exhaustive.\textsuperscript{143} It defies common

\textsuperscript{134}. Id. § 12(b)(3). Section 12(b)(3) provides that § 12(a) is inapplicable where "the harm, caused within the period referred to in subsection (a) [of § 12], did not manifest itself until after the expiration of that period." Id.

\textsuperscript{135}. Id. § 12(c). Section 12(c) specifically states that nothing in § 12(a) "shall affect the right of any person who is subject to liability for harm under this Act to seek and obtain contribution or indemnity from any other person who is responsible for that harm." Id.

\textsuperscript{136}. See note 46 and accompanying text supra. See also 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.7 (1956).

\textsuperscript{137}. See § 12(a)(1). The 25-year time limitation on claims under the bill applies to failure to give adequate warnings or instructions with capital goods. For the pertinent text of § 12(a)(1), see note 130 and accompanying text supra. A product which contains asbestos very well might fall within the definition of a "capital good" as set forth in § 12(a)(2) of the bill.

\textsuperscript{138}. For a description of these exceptions, see notes 132-36 and accompanying text supra.

\textsuperscript{139}. See Phillips, supra note 113, at 344-45.

\textsuperscript{140}. See note 133 and accompanying text supra.

\textsuperscript{141}. See Phillips, supra note 113, at 344 ("[t]here is no known safe level of exposure, and apparently a very slight exposure can cause one of the asbestos cancers").

\textsuperscript{142}. For the proposed bill's definition of a "capital good" to which the time limitations imposed by § 12 of S. 44 apply, see note 131 and accompanying text supra.

\textsuperscript{143}. See note 112 and accompanying text supra.
sense, however, to conclude that exceptions—or the tolling of the statute—would not occur for breach of a continuing duty to warn, for post-sale defective repairs, or for express warranties explicitly extending to the future. What about the nonmanufacturing seller that has been erroneously dismissed from the suit by the trial court; surely the statute should not run on this defendant. Yet, if these and other exceptions are made, will they not swallow the rule?

The policy reasons for such a repose provision are far from clear. If only a few claims would fall within the ambit of the statute, it seems unfair to cut off these claims arbitrarily. If, on the other hand, there are many claims, the very existence of such a number indicates a significant problem in need of redress. It is peculiar that a manufacturer should be permitted to make a product that can last more than twenty-five years, and yet that it should not be held responsible for injuries caused during the expected life.

VIII. CONCLUSION

It can be seen from the foregoing sample of provisions in S. 44 that there are serious questions of policy and of interpretation concerning the proposed federal products liability statute. Given the fact that cases arising under the law are vested in state courts, it is unlikely that any significant degree of uniform interpretation would develop. Yet, uniformity is the major justification proffered for enacting the

144. See Phillips, An Analysis of Proposed Reform of Products Liability Statutes of Limitations, 56 N.C.L. Rev. 663, 666-67 (1978) ("[s]ome courts have held that once a manufacturer supplies a defective product, he is under a continuing duty either to correct the defective condition or to warn the purchaser of that condition," under a normal statute of limitations, "failure reasonably to perform that duty should cause the statutory period to begin anew each day the duty is not performed").

145. Id. at 667. Normally, under a statute of limitations, repairs that are negligently performed or which cause other defects in the product start the limitations period running anew. Id. If a statute of limitations runs from the date of sale, it could discourage repairs because a manufacturer might delay in making a repair relying upon the fact that the statutory period could run before any injury from the defective product occurred. Id.

146. Id. at 669. Under the Uniform Commercial Code, a cause of action for breach of warranty in the sale of goods accrues "when tender of delivery is made except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." Id. See U.C.C. § 2-725(2) (1977). The rationale behind this exception would support an exception to a statute of repose as well.

147. The statute does not address this problem. Well-accepted principles of statutory construction, however, suggest that this situation would not be an exception to the time limitation imposed by § 12. For a brief discussion of the relevant maxim of construction in this situation, see notes 111 & 142 and accompanying text supra.

Another major justification, that is seldom expressly made, is that the bill would constitute a substantial retrenchment on the rights of the consuming public. It is understandable why this second justification is not often voiced by the proponents of the bill.

In some areas, such as commercial and business law, national uniformity may be a desideratum. Tort law is not such an area, however. Tort law has traditionally gained its vitality and strength from the flexibility of common law development. To cast large portions of that law into a statutory straitjacket in the name of a chimerical goal of uniformity and at the price of basic, long-standing and consumer-oriented principles, is questionable indeed.

149. The subtitle to the proposed federal legislation describes S. 44 as a bill "[t]o regulate interstate commerce by providing for a uniform product liability law . . . ." See S. 44, supra note 1.
150. See Dworkin, supra note 4, at 620.
151. Id.