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SYMPOSIUM PROCEEDINGS

PROF. JOHN HYSON: There have been a number of points that have been raised by the panelists this afternoon. At this point in the program, I want to give the speakers an opportunity to respond to each other.

From the last two speakers, we have had considerable criticism of the proposed federal legislation. Even accepting the proposition that Senate Bill 44, the proposed federal legislation, is not the best legislation that one could come up with—although perhaps some of our speakers will want to defend the legislation—isn't it clear that there should be uniformity? If there is to be uniformity, doesn't it have to come at the federal level, and consequently, isn't federal legislation necessary? Does anybody want to respond to that?

VICTOR SCHWARTZ: A number of assertions made by some of the other panelists about Senate Bill 44 which Senator Kasten has proposed were incorrect, if one reads the bill together with the Committee Report, which would be the source that courts would look to for interpreting each and every provision of the bill. On the other hand, there were some points made by my co-panelists today that were constructive suggestions and should be looked into. One of the benefits of the process that goes on in committee, is that all comments are considered very carefully and all points of view are heard. Substantively, the Kasten bill is in the middle philosophically between where Professor Kircher was and where Professor Phillips is. This actually gives me a little bit of comfort, although this is not my bill. The bill itself has been drafted by a staff under the direction of Senate majority and minority members. It evolved out of six or seven years of draft model legislation which was first proposed for use at the state level—the Department of Commerce Task Force's Uniform Product Liability Act. The present bill is Senator Kasten's S.44. It has twenty-five co-sponsors.

Product liability law differs from other areas of law, such as automobile insurance law. Automobile insurance rates are set on a state-by-state basis. If any of you has ever moved from one state to another, you know that the cost of your automobile insurance has changed. In New York, the rate is one amount; in Arizona it is another.

In contrast, product liability rates are set on a country-wide basis. Every insurer in the United States of America sets them that way.

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If you move your factory from New York to Arizona, product liability rates and premiums are going to be exactly the same. This is because goods are marketed in interstate commerce. That’s why Senator Goldwater, of Arizona, for example, is a co-sponsor of the Kasten bill. Even the President of the United States—who is not known for advocating incursions into states’ rights—has fully and completely supported federal product liability law.\(^1\) On the issue of whether product liability law should be federal, conservative Senator Helms of North Carolina endorses it, as does liberal Congressman Waxman from California.

The Defense Research Institute, the delegates of the American Bar Association, and the American Trial Lawyers Association are all against a federal product liability law. This is unfortunate because the bill would reduce unnecessary legal costs while preserving the tort litigation system. I was pleased to see that when the members of the American Bar Association were polled, however, they came out in favor of a federal product liability law.

Let’s look at the positions of the consumer groups. The Consumer Federation of America has indicated that it has no problem with respect to states’ rights—they appreciate the needs of interstate commerce in regard to a federal product liability bill. However, they have, in written testimony, expressed numerous concerns about the fairness of the bill.\(^2\)

By way of contrast, Ralph Nader’s Congress Watch has indicated that it will not support a product liability bill, “no matter how fair and balanced it may be.”

Let me make one other point about uniformity. On whether there should be a federal automobile no-fault compensation system, the insurance industry was divided. The big “I”—the Independent Insurance Agents of America, which is the largest insurance organization—did not support automobile no-fault. The Kasten bill is the first time the overwhelming majority of the insurance industry—inurers and agents alike—have endorsed any federal tort bill. Thus, insurers, who certainly have a pragmatic sense of legal costs, believe that this federal product liability legislation would reduce legal costs.

S. 44 is not being sold as any panacea. With any statute there

\(^1\) The Reagan administration has, since this Symposium was held, also endorsed the substantive portions of S. 44.

\(^2\) Since the date of this panel discussion, Senator Gorton and his staff after reviewing these concerns entered into negotiations with Senator Kasten to seek changes in the bill. Many key changes were made. I would hope that the Consumer Federation of America will review these changes and let us all know whether they consider the new bill fair.
are going to be problems of interpretation. There are such problems under the Uniform Commercial Code, but I know no one who would go back to common law rules. There are problems under the Federal Rules of Evidence, as is evidenced by the number of books interpreting the Federal Rules of Evidence. But, I know of no one who would go back to having common law rules of evidence in the federal courts. Having the benefit of expertise such as that possessed by the panelists at this Symposium, Professor Twerski, and others has resulted in a continually improving bill.

PROF. HYSON: Mr. Goggin and Mr. Locks, I think you should have opportunity to respond regarding the extent to which the products liability litigation bar are opposed to this legislation because of self-interest.

ROBERT GOGGIN: I know that with the no-fault automobile insurance proposal, there was great consternation eight or ten years ago when no-fault provisions applicable to automobiles were proposed. Many members of the plaintiffs’ and defense bar were concerned that a significant portion of their business would be “no-faulted” away. The reverse has happened. For some reason or other, the $750 threshold or the $1,000 threshold for auto insurance claims does not seem to be the bar that everyone had anticipated. If the cases haven’t increased in number, they have increased in scope. I personally have not seen any diminution in business because of the enactment of the no-fault auto insurance. I believe that probably the same thing would happen with the enactment of the proposed federal products liability legislation, if you’re just looking at it from the self-interest standpoint. For instance, someone mentioned that if the manufacturers showed “a reasonable effort to warn” they would be exonerated from liability even if the warning were, in fact, ineffective. Well, I can just anticipate the amount of litigation that that particular phrase would spawn. What’s “a reasonable effort?” What did the manufacturers do? How many people are you going to subpoena in, and depose on, what efforts were made to warn, and so forth? So from what I’ve heard today, I don’t see that the Bill as it’s proposed would really diminish litigation. Perhaps it might actually have the adverse effect and enhance it.

PROF. HYSON: Mr. Locks, do you want to make any comments?

GENE LOCKS: My understanding is that the plaintiffs’ bar, for obvious self-interest reasons, would be against the bill. Although it is in our self-interest to be against the bill, our motivation is no different
than the self-interest of the proponents of the Bill who are trying for economic reasons to pass it. Anyone who tries to criticize whatever position a person takes regarding a bill of this type and says that the opponents of the bill are motivated by economic interests should certainly mention that the proponents also have an economic interest in the bill. I happen to think, as Mr. Goggin does, that any kind of federal products liability legislation, including this bill, will not work. It will simply create other opportunities for litigation which plaintiffs' lawyers will utilize to make sure that our economic interests are not destroyed by the bill. Frankly, I think that the less involvement there is on a national level with anything in this area, the better it is. I do not agree there has to be uniformity among the states. I do think the laws in different states are entitled to be different, and that the people in those states have the right to decide what the laws are in those states.

PROF. HYSON: Professor McGovern?

PROF. FRANCIS McGOVERN: I will begin by saying that I am looking at this federal legislation from the perspective of a judge. The argument that the federal legislation is supposed to bring uniformity to this area of law gives me some problems when I think about who will be the ultimate arbiter of this particular bill if it is enacted. I find it difficult to believe that the U.S. Supreme Court would devote a substantial amount of time to interpreting the meaning of this bill. Professor Schwartz, could you respond to how you envision uniformity being served, given the potential problem of differing interpretations among the states or among the circuits?

MR. SCHWARTZ: Well, let's look again at the situation as it exists today. The current situation is that any judge in any court can alter existing product liability law. Thus, the situation today is totally open-ended. Anything can be done at any time and rules are made retroactively. For example, in New Jersey, the law in the warnings area of product liability used to be based on fault. The issue of warnings thus related to what you knew, or were likely to have known, at the time the product was made. Then, last June a case called Beshada v. Johns-Manville Products Corporation came down from the New Jersey Supreme Court. In Beshada, the New Jersey Supreme Court said that what a manufacturer knew at the time a product was manufactured was irrelevant. Instead, the court said it was going to impute knowledge to the manufacturer regarding what it knew back at the time the product was made. This ruling was totally retroactive against the manufacturer in the case.
My response to you, Professor McGovern, is that I can only compare the bill with the existing system. The bill is accompanied by a committee report that serves as a guideline for the courts. All I can say is that the courts would all be looking to the same documents—a statute and an accompanying committee report—for guidance rather than the open-ended situation that exists today.

In key areas, I think, the law is clear. Let’s take construction defects. The bill says, specifically, when a product differs from other products in the same line, and this difference causes an injury, a construction defect exists. The jury can look at it and see whether a construction defect exists. S. 44 uses strict liability for construction defects. When it comes to design and duty to warn liability, S. 44 does talk about what a reasonably prudent manufacturer would do in the same or similar circumstances. This standard has a long-developed history in tort law.

I would also like to emphasize that the proposed “Product Liability Act” is not a compensation system. It is also not a no-fault bill. It has nothing to do with black lung, the Federal Employees’ Compensation Act, or the Federal Longshoremen’s and Harbor Workers’ Compensation Act. The only thing on the books that’s like this proposed legislation is the Federal Employees Liability Act (FELA), which is a federal tort law.

As far as considering whether the interpretation of this Act should be solely in the province of the federal judiciary, I would note that state court judges will follow federal appellate decisions. This has occurred under the Federal Employees Liability Act since 1909.

PROF. HYSON: I want to just spend a couple more minutes, perhaps, on the panel discussion. Then, we can have questions from the audience. Professor McGovern, did you want to follow up on Mr. Schwartz’s comments?

PROF. McGOVERN: Well, in a little bit different way. Professor Schwartz raised the state-of-the-art question when he mentioned Beshada. One issue in Beshada is what type of evidence can the plaintiff introduce to show that the product was defective when it was sold. That is, can the plaintiff introduce into evidence some type of new discovery of a hazard that new technology could have avoided? And typically, courts recently have been allowing this type of evidence. What’s unique about Beshada, it seems to me, is that the defendant then cannot go back and say, “But I didn’t know it.” I was curious, Mr. Locks, as to why plaintiffs are pushing so hard in avoiding this evidence from the defendant of who knew what when, because typi-
cally it seems to me that type of information has added rather substantially to the fire in the case for the plaintiff?

MR. LOCKS: Let me first make sure that everybody understands the question. There is in the asbestos litigation, a great deal of juicy knowledge that the manufacturers had thirty, forty, or even fifty years ago regarding the hazards of asbestos. Obviously, that knowledge is very helpful in a punitive damage case, but if you have strict liability with no state-of-the-art defense, you don't need it. In many instances, and particularly in Pennsylvania, we have proceeded on a straight strict liability basis and have decided not to put in that kind of evidence. The reasons sometimes have been to expedite trials. For example, we got a case over in two days and got a verdict against Mr. Goggin's client, Johns-Manville, and another manufacturer rather than spending four and a half months litigating the case and going for punitive damages. There is one punitive damage case that we won. It's still on appeal and has now been stayed because of Manville's bankruptcy. The damages awarded in that case will now be deferred as a debt in the bankruptcy in priority and we haven't collected a dime. In the other case we still haven't collected any money, but we've got a much better shot of getting our money quicker. I think the answer to the question, really, is that our goal is to get a favorable verdict for our clients as quickly as we can. If we litigated the issue and we've won it once, we've proven it, do we have to do it over and over again? And doesn't it enter into the value of our case? Maybe it slightly diminishes it a little bit. I don't know. I really don't think it's that significant. That's a personal view. I know other plaintiffs' lawyers who absolutely feel that the only way they can win the case is to throw in this evidence of what the defendant knew; this type of evidence helps them take a case that has a very minimal value because this evidence puts extra value on it. Well, I just don't agree.

PROF. HYSON: I'd now like to give an opportunity for the audience who has been with us during this Symposium to ask any questions that you might have or make any comments. Does anyone have any questions?

AUDIENCE: I'd like to address this question particularly to Mr. Schwartz, but also to any other members of the panel who may wish to respond. I have seen various items in the newspapers about the asbestos cases which suggest that during World War II, the government was possessed of certain evidence indicating that asbestos was dangerous to workers' health and that the government did not publicize this evidence. The newspapers also seem to suggest that the
government might even have put pressure on the manufacturers to keep this evidence quiet out of national security considerations because basically it was very important to have a large and willing labor supply to work for the Navy yard for the purpose of building the ships that were necessary to win the war. If that’s the case, don’t we have a situation somewhat analogous to the situation of the Japanese Americans who were interned—people whose personal rights may have been sacrificed by the federal government in the interest of the larger cause? If so, would you favor some type of specific program where the federal government would make some contribution toward indemnifying these people?

MR. SCHWARTZ: I don’t know that I’ve seen everything that you mentioned, but I appreciate the fact that there have been allegations that the United States government was aware of many of the risks and that warnings were not provided to workers by the United States government. Because of a labyrinth of intersecting laws—the Federal Torts Claims Act, the Federal Employees Compensation Act—and a case called Stencil v. Aero Jet Engineering, it has been extremely difficult for companies that either manufactured, distributed, or mined asbestos to bring contribution or indemnity claims against the federal government. Very recently, only three weeks ago in fact, a case came down from the Supreme Court, which has become known as the Lockheed case, that suggests in some situations indemnification against the federal government may be possible. Currently, about 16,000 cases are pending against the federal government. As more and more cases are brought against the federal government, and the Department of Justice has to open more and more files, they may at some point sit down at the table and decide what their responsibility is. It’s my judgment, that the federal government’s assumption of responsibility for the injuries of these plaintiffs will be a break-through which will expedite the resolution of these cases. Because you have a key party with assets who is not at the table, when and if they come to that table, I think it will help expedite the resolution of a lot of the cases.

PROF. HYSON: Does anyone else wish to comment?

MR. LOCKS: I’d like to comment about that. It is an absolute red-herring and a creation of the imaginative mind of some lawyers representing some asbestos manufacturers. First of all, there was a case tried by Johns-Manville against the government on indemnification, and Johns-Manville put on an entire case against the government; the government put on no witnesses and Johns-Manville lost
the case. Manville went into the case on an indemnification and an active-passive negligence theory, and the court ruled that while the government's conduct was not the best, its conduct was certainly not as culpable as that of the manufacturer. Secondly, as far as any illusions regarding the knowledge of the government, I've yet to see a manufacturer produce any evidence that the government's knowledge of the hazards of asbestos was greater than, or equal to, the knowledge of the manufacturers.

The manufacturers have tried to claim the government has some responsibility and that the government ought to pay. At the present time, fifty percent of the cases involving people from Naval shipyards or private shipyards were working under a government contract. All of these people have claims under the Longshoremen's and Harbor Worker's Act or the Federal Employees' Compensation Act, and many of them are receiving benefits. Therefore, the government is paying them now. If a plaintiff is successful against the manufacturers, the government does have a subrogation claim for what they've paid, which might not be so fair. If the manufacturers really want to change the law and really want to get government to share in the payment of asbestos claims, they can do it very simply. The manufacturers should stop trying to pass an asbestos bill and stop trying to make the government responsible by winning an indemnification or contribution action. Instead, manufacturers should simply make the government amend the subrogation provisions of the Longshoremen's and Harbor Worker's Act and the Federal Employees' Compensation Act, and make the government waive their liens in those cases, just like insurance companies do in the private sector. This way the government will have paid a substantial amount towards settling a given claim.

PROF. HYSON: Are there any other questions?

AUDIENCE: Just a moment ago, Professor McGovern alluded to the fact that the Supreme Court of the United States may be somewhat reluctant to rule on the product liability issues which the proposed act would present. About a week or so ago, the Supreme Court declined to rule in a case in which it was asked, in essence, to break the stalemate among the various circuits on the insurance question in the asbestos cases. I was interested in whether there are any comments from the panel regarding what impact this denial of certiorari has had on the case management and on the pre-litigation claims settlement procedure?

PROF. McGOVERN: That's the third time the Supreme Court
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has refused to hear this issue and resolve the variation among the circuits concerning which insurance company has what coverage for what particular manufacturer and what product. There’s been a race to the courthouse now not only in this context, but also in the DES cases, some worker compensation cases, and across the board. So, purely from the academic perspective, it seems like we’ve got a real variety of rulings to deal with. Mr. Goggin, you probably know more about this issue than I do.

MR. GOGGIN: We have not been involved in taking the asbestos cases up on the insurance issue. Manville initially did not have a problem with respect to basic coverage. However, in litigation in California they do have a gigantic problem with respect to some of their excess coverage, and who’s going to pay it and when. Most of the cases dealing with the insurance issues—that is on the manifestation versus the exposure theory which is where the split of authority exists—have been brought by companies other than Manville. It has not proven to be a significant problem to us in defending these cases on behalf of Manville at our level. When it comes to paying for these cases, I think it was one of the significant reasons why Manville went into bankruptcy. The carriers have taken the position that there was no coverage at all. Manville, when faced with that conclusion had no option but to say at this point, “We have to throw it into bankruptcy,” and so Manville then amended their complaint against their insurers to include punitive damages, indicating that one of the reasons they are in bankruptcy is because of the insurers’ bad faith in not extending coverage for the premiums paid. However, at the trial level the insurance issue has not proved to be a problem in the defense of the cases.

PROF. HYSON: Mr. Locks, would you also like to comment on this question?

MR. LOCKS: The failure of the Supreme Court to act on the insurance issue hasn’t made any difference in the ultimate resolution of these problems. It is public knowledge now that the private sector for the past five months has been working with insurance companies, with plaintiffs’ counsel, and with manufacturers to try to resolve some of the problems that asbestos has created in a way that could expedite settlement of claims, and would allow a pre-complaint program or claims handling program. There has been something created called an Asbestos Claims Council among numerous carriers—they have agreed to make an effort to find a facility to try to deal with claims; they have also sought to get the insureds to cooperate. The fact that
the Supreme Court did or didn’t accept the most recent appeal to “clarify the area” has not made any difference in this process which is much closer to fruition than many people think. In fact, hopefully such a private resolution of the asbestos problem will set a standard for any type of federal preemption or involvement in the area. I can’t say much more than that.

PROF. HYSON: Any other questions?

AUDIENCE: I want to ask Mr. Locks and Mr. Goggin whether they believe that the bankruptcy law would tend to be applied in these cases as it is in medical cases. I would also like to ask Mr. Locks what practical effect on plaintiffs’ cases would Manville’s pleading Chapter 11 have on what cases that can actually be brought.

MR. GOGGIN: I can’t speak on behalf of Manville with respect to what they did and why they did it. As just trial lawyers in the field, we were privy to the Manville bankruptcy petition about the same time the general public was privy to it. Whether Manville is going to sustain the attack against them regarding whether or not this is a legitimate bankruptcy, I really can’t speak to. Probably Mr. Locks knows more about it than I do, since he’s been more involved in the day-to-day running of the bankruptcy issue, and I know that the plaintiffs’ attorneys certainly have a position with respect to that.

MR. LOCKS: The motion to dismiss the bankruptcy has been filed; it’s still pending and it’s undergoing discovery at this point. It won’t really be heard yet for three or four more months. Discovery must be completed on this motion to dismiss which alleges a lack of good faith in the filing; it alleges questions of whether or not a company can truly go into bankruptcy when it is insolvent technically or legally, and a number of other things. The official position of the Asbestos Plaintiffs’ Committee is that they should be out of bankruptcy. They didn’t have the right to go there in the first place. The effect that Manville’s petition has had on the litigation is very interesting, and different. You can’t sue them. So consequently the new cases are being filed against the other defendants and not Manville. By being stayed, the statute of limitations is tolled, so there is no prejudice vis-a-vis Manville.

However, there is one problem. There is a question of those claims that developed—where the manifestation of disease occurred after Manville went bankrupt, the so-called post-petition claims. Manville is trying to have the bankruptcy deal with future claimants. Many people, including the asbestos plaintiffs, feel that Manville only has the right to deal with existing, pre-petition claimants—those
plaintiffs that filed or could have filed a case before they went into bankruptcy. Query: if those post-petition claimants were diagnosed last week and therefore aren’t properly treatable in the bankruptcy, can’t they now bring a law suit even against Manville? Is the statute of limitations tolled vis-a-vis those post-petition people? It’s a tough question as to whether or not the bankruptcy can even deal with future claimants.

As to the existing cases, proceeding against the other asbestos defendants has been ongoing, and country-wide. There was a three or four month hiatus while all of the co-defendants tried to stay the proceedings on the theory that when a major defendant who is an indispensable party like Manville goes into bankruptcy, it stays all proceedings in that particular case. There have been numerous rulings in various jurisdictions on this issue and, essentially, all the cases are proceeding. There’s only been two rulings in the bankruptcy court but both said that the stay didn’t apply to the non-bankruptcy co-defendants. Such rulings have created a further problem in dealing with those co-defendants who do not now want to pay the full value of the verdict, or the full value of the settlement of the case. When plaintiffs get a verdict they are entitled to collect full dollars from the co-defendants, so the co-defendants don’t like it very much. It raises a further question as to what claims or what rights the co-defendants have in the bankruptcy proceeding, because their claims are for contribution or indemnity against Manville. However, the co-defendants don’t have a claim for contribution until they pay the underlying verdict to the plaintiff. Therefore, the plaintiffs’ bar says pay us our verdict and then sue Manville in the bankruptcy proceedings because then the co-defendants have a liquidated claim for whatever the contribution is. Therefore, the co-defendants have no prejudice, according to the plaintiff’s bar. Of course, the co-defendants have a different view of the matter.

Secondly, co-defendants feel they have claims for indemnity. The claims for indemnity don’t necessarily require a plaintiff’s claim to be liquidated so a case doesn’t necessarily go to verdict first. The co-defendants are “asserting claims against Manville for indemnification for past payments and future claims that they may be held in.” The co-defendants claim that they’re going to present those claims in the bankruptcy court and, therefore, they are bigger creditors than even perhaps some of the plaintiffs are. The only trouble is they haven’t presented any law suits yet that way. All I can tell you is that the focus of the case shifts a little bit. The plaintiffs, at least our plaintiffs, remember J M logos very much, but our plaintiffs have
always remembered some other logos, too, and they make sure they don't forget mentioning them in the course of those trials.

MR. GOGGIN: One interesting aspect, I recall reading about, is that the co-defendants petitioned the bankruptcy court to stay all the proceedings. In the alternative, the co-defendant's said, "Let the cases go to trial with Manville in them," but let no judgment be enforced against Manville. This alternative was one of the proposals before the bankruptcy court, but the bankruptcy court said, "No," it couldn't do that either. The Manville bankruptcy raises probably a legitimate concern among co-defendants that they are being severely prejudiced by having to go to trial against asbestos plaintiffs without a substantial player in the case; I think they tried to get the Supreme Court to review the bankruptcy judge's ruling on that but to no avail.

PROF. HYSON: It's five o'clock, and we've been together now for about four hours, and it's been a very enjoyable four hours. I realize some of you may still have questions and comments and you will have an opportunity to ask those questions or make those comments if you will come join us at a reception that will follow immediately hereafter in the student lounge.

Before we depart, I want to say, however, that in a future issue of the Villanova Law Review, there will be publication of the proceedings of this symposium. I want to express thanks on behalf of the School and, if I may presume to do so on behalf of the Law Review, to the panel for their very interesting and lively comments today. I also want to express thanks on behalf of the panel, again presuming to do so, to the members of the audience for being so attentive and presenting such interesting questions and comments. And, on my own behalf, I would like to express thanks to the Law Review for inviting me to be part of this very interesting afternoon. Thank you.