Product Liability War Heats Up

Manufacturers, Facing Higher Product Liability Insurance Premiums, Are Looking at the Benefits of a Uniform Law in Order to Survive

Since the mid-1970s, a movement has been growing in the business community for the establishment of a uniform product liability law. Support has come from across the board—manufacturers, wholesalers, retailers, small and large businesses, insurers, state administrators and a fair number of lawyers. In the past year, the movement has been gathering momentum on Capitol Hill, in the form of legislation introduced by Sen. Robert Kasten (R-Wis).

Product liability laws vary widely from state to state—even from case to case within a state. Some adhere to the doctrine of strict liability. Others include an element of negligence. Still others impose “strict-warranty liability.”

Manufacturers Confused

This hodgepodge of laws has left manufacturers confused, since they design products for national and international markets, not local or state markets. This was recognized by Gov. John Carlin of Kansas in vetoing a state product liability law: “Unless a law is passed on the federal level . . . only a small number of Kansas business owners could benefit from the special protections contained in the bill.”

Others have raised questions about the broader economic consequences of the varying rules and the volume of litigation they produce, such as increased manufacturing and insurance costs. According to Rep. Jim Broyhill (R-NC), these increased costs “hindered American industry’s ability to compete with foreign manufacturers, and also contributed to unemployment, discouraged technological innovation, new product development and raised prices to the American consumer.”

Legal fees are indeed burdensome for both consumers and manufacturers in a product liability suit. The Senate Commerce Committee says that $7 goes for attorneys on both sides for every $6 paid in benefits to victims. Moreover, consumers’ rights to recover for an injury depend almost entirely on the chance circumstances of where they live or happen to be at the time of injury. The result of this widely divergent and frequently changing body of state law is that consumers and manufacturers alike are left with no clear understanding of their rights and responsibilities.

Federal Law Needed?

A growing number of federal legislators of both parties share their concern. Comments Rep. Henry Waxman, (D-Cal.) chairman of the Subcommittee on Health and the Environment, “The current patchwork of 50 different states’ laws on product liability causes confusion, conflict and unnecessary costs for everyone involved.”

The Reagan Administration is also lending its support for such standards, despite its position favoring more regulation by the states and less at the federal level. “Because of the interstate movement of products,” says Commerce Secretary Malcolm Baldrige, “any one state’s product liability law uniquely affects producers and consumers throughout the entire nation. Manufacturers and consumers in one state may find their choices limited by the product liability law of another state, even though they may have no opportunity to participate in the latter state’s lawmaking process.”

However, strong opposition to a federal product liability law exists. The opponents, led by consumer groups such as the Consumer Federation of America and Ralph Nader’s Congress Watch, charge that proposals for a federal standard are simply an attempt by businesses to shield themselves from responsibility for their acts. These groups particularly disapprove of a provision in Sen. Kasten’s legislation that would subject the manufacturer to a negligence test to determine liability: Did the manufacturer exercise “reasonable prudence” in the design of his product and in the warnings governing its use?

David Greenberg, legislative affairs
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director for the Consumer Federation of America, warns, “Between an innocent manufacturer and an innocent victim, [the proposed bill] chooses the manufacturer and says no liability.” Greenberg argues that more research and development by the manufacturer could prevent injury. He believes that the present state system, imperfect as it is, forces manufacturers to make their goods as safe as possible. Any attempt to weaken that incentive, he feels, could result in fewer safe products and more injuries.

Supporters of the proposal disagree. They charge that the courts have been making major changes in broad social and economic policy. Court decisions have converted traditional law into something approximating a social-insurance system for compensating victims of product-related injuries. In general, supporters of federal product liability law believe that people should be held responsible for their own negligence, for misuse or alteration of products.

In testimony before the Senate’s Subcommittee on the Consumer, one manufacturer argued against a company’s liability for injury from a defective product, “even though the defect was not knowable at the time it was designed and manufactured. We cannot foresee everything that might happen in the future.”

The Association of Trial Lawyers of America opposes a federal product liability law on the grounds that it would constitute an unprecedented invasion into states’ legal affairs. The association suggests that a federal statute would produce no improvement in the current situation, as various state courts would interpret the statute differently, giving rise to a large number of appeals.

On the other hand, supporters of a federal statute say that the interstate nature of product manufacturing and distribution makes it almost impossible for states, either through case law or statute, to address the product liability problem in a meaningful way.

Any federal statute is subject to differing interpretations in state courts, so it’s impossible to legislate certainty. That, however, doesn’t mean that steps toward certainty shouldn’t be taken.

**Bill Provisions**

According to Sen. Kasten, his legislation has three basic goals: to bring stability to product liability law
by providing “clear, coherent rules with respect to liability for design and warning defects”; to bring fairness to the law by requiring a manufacturer to always pay the damages for which it’s responsible; and to reduce legal costs.

Some of the major provisions under consideration are:

• Discovery rule. This provides that the period for filing suit doesn’t begin to run until the claimant discovers his harm and its causes.
• Design and warning liability. “Reasonable prudence” is the standard of liability for both design and warning cases. In addition, a continuing duty is placed on manufacturers to discover product dangers.
• Misuses and alteration. The manufacturer is required to anticipate the conduct that’s “expected, ordinary and familiar of the class of persons likely to use or be exposed to the product.”
• Seller’s liability. Although wholesalers and retailers generally would be liable only for injuries caused by their negligence, they could be made liable in cases in which the maker of a product was bankrupt, out of business or immune to a judgment.
• Product improvements. Injured parties would not be allowed to use improvements in a product or corrective measure as evidence that an injury-causing product previously had been unsafe.
• Punitive damages. This provision allows punitive damage awards only on “clear and convincing” evidence of reckless disregard for safety, a higher standard than most states now use. It also requires that judges, not juries, set the amount of punitive damages, in contrast to state practice. Once a punitive damage award had been made against a defendant, further awards based on the same allegations would be barred.
• Workers’ compensation. This provision would keep the product liability and workers’ compensation systems separate, by preventing employers from suing or being sued in product liability for harms caused to their employees.

For the Future

The current situation isn’t good for business, in its pursuit of needed profits, or for consumers, in their desire for protection. Says Tom Kerester, a C&L partner in the government relations office in Washington, “Clearly, something must be done. If federal law isn’t passed, then state laws must somehow be made uniform.”