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CONGRESS'S WELCOME CONTRIBUTION TO PRODUCT LIABILITY REFORM

(Updating *Backgrounder* No. 498, "The Liability Insurance Crisis: What Washington Can Do to Help, March 27, 1986, and *Backgrounder Update* No. 35, "The Liability Insurance Crisis: What Next," January 22, 1987.)

Written off as dead last year by most observers, the issue of federal product liability reform suddenly was brought back to life at the close of last year as a House subcommittee approved a bill to set national standards for product liability cases. H.R. 1115, sponsored by New Jersey Democrat James Florio and New Mexico Democrat Bill Richardson, has bipartisan support. The legislation is expected to be considered soon by the full Energy and Commerce Committee. If enacted, the measure would go far toward reforming the nation's product liability system, benefitting consumers and manufacturers--without infringing on the rights of those wrongfully injured by products.

In recent decades, the scope of product liability law has increased enormously, to the detriment of U.S. businesses and consumers. Increasingly, not only have manufacturers been found liable without proof of negligence, or lack of due care, but without fault on their part at all. The result: soaring liability costs. Over the last year, the immediate crisis in liability insurance has eased and rates have levelled off or even decreased. Yet the underlying problems persist.

Key Provisions. The Florio-Richardson bill would begin to reform the system while wisely leaving product liability law in most respects a matter of state law. Key provisions of the bill include:

◆◆ **Manufacturers could be found liable for damages only** if their product were proved defective and "unreasonably dangerous." A product could only be found to be unreasonably dangerous if: 1) it had a construction defect; 2) it failed to contain adequate safety warnings; 3) it was improperly designed; or 4) it failed to conform to an express warranty made by the manufacturer. Though this provision would have little effect on the extent of liability in the typical product case, it would prevent courts from inventing new bases of liability not resting on the principle of fault. By restricting and classifying the definition of liability, the provision would increase the fairness of the system, as well as its predictability.

◆◆ **Manufacturers could not be found liable** if they did not, and could not, know of the defect; or if there were no alternative, safer design. Liability could not be found if the harm were caused by an "inherent characteristic" of the product (such as harm from tobacco or alcohol), or for a drug or medical device which is "unavoidably unsafe." This would help to ensure that defendants will not be found liable for making an unsafe product when there is nothing they could, or should, have done to make that product safer. This reform is essential to ensure that manufacturers are found liable only for their own wrongful actions, and not simply made to be no-fault insurers of last resort.

◆◆ **Manufacturers would be completely free of liability** if the plaintiff were under the influence of drugs or alcohol at the time of an accident, providing that condition was more than 50 percent responsible for the injury. Thus, those primarily responsible for their own injuries could not shift the cost of their injuries to manufacturers and consumers.

◆◆ **Punitive damages could be assessed only** if their justification is proved through "clear and convincing evidence." More important, evidence supporting punitive damages would, on the defendant's request, be presented after the initial finding of liability. This would prevent juries from being influenced by evidence irrelevant to the question of liability, such as the defendant's financial resources. Further, the bill would prevent punitive damages from being imposed for drugs and medical devices that have been approved by the Food and Drug Administration. This common sense provision protects providers of such products from being punished in state courts for selling FDA-approved products.

As significant as are the provisions in the bill are those provisions left out. Excluded are many reforms which hindered prior bills. Thus the Florio-Richardson bill includes no caps on the size of damage awards, no changes in joint and several rules (which can make every defendant in a case liable for 100 percent of the damages), and no provisions regarding attorney's fees. So doing, the legislation addresses the issues with greatest need for federal action, without excessive intervention into areas better addressed by state law. Some federal action is needed because the interstate nature of manufacturing has left state legislatures with little incentive to set reasonable standards. This is because benefits of such action would be dispersed mostly to manufacturers outside their particular states. A national framework thus is needed to reduce the uncertainty and complexity for manufacturers and the cost to consumers. Federal action, however, is not needed on other problems, such as excessively large awards or joint and several liability, because the state rules governing these issues cover all court cases, not just products cases. States have an incentive to reform these laws on their own, and they have begun to do so. For the most part, H.R. 1115 allows the states to continue their reforms.

This legislation sets clear standards of liability, to prevent manufacturers from being held liable for injuries for which they are not at fault, without abridging the rights of individuals wrongfully injured. At the same time, it generally avoids undue interference with state laws. It is an excellent first step toward useful and fair reform of U.S. product liability laws.

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