Unknown Speaker

Opening Statement

Today we are going to begin discussions on the issues involving product liability. I suspect that much of the testimony will relate to equity considerations and relative position of the plaintiffs versus the defendents in the legal process. While these considerations are appropriate to the subject I believe that the committee must also consider the broader public policy questions.

Product liability plays a very important role in our society by providing incentive for safe consumer product and safe products used by workers. Many including myself consider product liability the last line of defense against unsafe products. If we reduce the incentives for the production of safe products by amending the product liability law where do we find replacement for that lost incentive.

I look forward to seeing that these safety issues are fully discussed at this and subsequent hearings.

HAWLOCT #1

PRINTER'S NO. 1034

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 916 Session of 1989

INTRODUCED BY COY, STEIGHNER, HECKLER, CHADWICK, BATTISTO, WOZNIAK, GAMBLE, CESSAR, BROUJOS, DIETTERICK, HASAY, DISTLER, BIRMELIN, MOWERY, FAIRCHILD, MELIO, FLICK, GODSHALL, BUSH, VAN HORNE, DORR, DEMPSEY, SCHULER, TANGRETTI, FARMER, CLYMER, SCHEETZ, D. R. WRIGHT, JADLOWIEC, HERSHEY, TRELLO, COLAFELLA, NOYE, McCALL, GEIST, PICCOLA, MORRIS, DALEY, E. Z. TAYLOR, SEMMEL, PHILLIPS, REINARD, MERRY, S. H. SMITH, COLAIZZO, JOHNSON, MRKONIC, SAURMAN, FREIND, WILSON, BARLEY, LANGTRY, FARGO, CORRIGAN, FLEAGLE, BURD, WILLIAMS, EVANS, OLIVER, STUBAN, BRANDT, YANDRISEVITS, CAPPABIANCA, MOEHLMANN AND J. H. CLARK, APRIL 3, 1989

REFERRED TO COMMITTEE ON JUDICIARY, APRIL 3, 1989

AN ACT

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, adding provisions relating to product liability actions.

The General Assembly finds that there is a need for remedial legislation to establish in statutory form certain clear limitations with respect to the imposition of liability in actions for damages for harm alleged to have been caused by products. The General Assembly also finds that the establishment of such limitations is consistent with public policy on product safety and with the basic legal rights and principles governing product liability actions. This act does not and is not intended to set forth all of the proof required or all of the defenses available in product liability actions, but only to codify, clarify and establish the limiting principles set forth herein.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 42 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:

§ 5539. Statute of repose for product liability actions.

(a) General rule.--Except as provided in subsection (b), a product liability action must be commenced against a supplier within the time otherwise limited by this subchapter and within that supplier's period of repose.

(b) Exception.--If a product liability action accrues against a supplier less than two years before the end of that supplier's period of repose, that product liability action may be commenced against that supplier within two years from the date on which that action accrued.

(c) No extension of limitations.--This section shall not extend the period within which any civil action or proceeding may be commenced under any provision of law.

(d) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Product liability action." Any action or claim against a supplier for recovery of damages for death or injury to person or property alleged to have been caused by a product (including any action or claim for contribution or indemnity), irrespective of whether such action or claim is based on strict liability in tort, negligence, breach of warranty, misrepresentation, any other legal theory or statute or any combination of the foregoing.

"Supplier." A person who manufactures, sells or otherwise supplies a product and is engaged in the business of supplying

such a product.

"Supplier's period of repose." The period ending 15 years after that supplier supplied for use or consumption the product alleged to have caused the death or injury to person or property for which recovery of damages is sought or, if that supplier did not supply the product for use or consumption, the period ending 15 years after the product was first supplied for use or consumption by a subsequent supplier.

Section 2. Section 7102 of Title 42 is amended to read:

§ 7102. Comparative [negligence] responsibility.

(a) General rule.--In all actions brought to recover damages for [negligence resulting in] death or injury to person or property, the fact that contributory responsibility is attributed to the plaintiff [may have been guilty of contributory negligence] shall not bar a recovery by the plaintiff or his legal representative where such [negligence] responsibility was not greater than the [causal negligence] responsibility of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of [negligence] responsibility attributed to the plaintiff.

(b) Recovery against joint defendant; contribution.--Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his [causal negligence] responsibility to the amount of [causal negligence] responsibility attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is

so compelled to pay more than his percentage share may seek contribution.

(c) Downhill skiing.--

[(1)] The General Assembly finds that the sport of downhill skiing is practiced by a large number of citizens of this Commonwealth and also attracts to this Commonwealth large numbers of nonresidents significantly contributing to the economy of this Commonwealth. It is recognized that as in some other sports, there are inherent risks in the sport of downhill skiing.

[(2)] (d) Voluntary assumption of risk.--The doctrine of voluntary assumption of risk as it applies to [downhill skiing] injuries and damages associated with downhill skiing or any other activity or conduct involving known or inherent risks is not modified by [subsections (a) and (b)] this section.

[(d)] (e) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Defendant or defendants against whom recovery is sought." Includes impleaded defendants.

"Plaintiff." Includes counterclaimants and cross-claimants.

"Responsibility." Causing or contributing to cause the death or injury to person or property for which recovery of damages is sought, whether by negligent act or omission, by supplying any defective product, by breach of warranty, by misrepresentation, by any other conduct or activity violative of the applicable legal standard or by any combination of the foregoing.

Section 3. Chapter 83 of Title 42 is amended by adding a subchapter to read:

CHAPTER 83

PARTICULAR RIGHTS AND IMMUNITIES

* * *

SUBCHAPTER G

PRODUCT LIABILITY ACTIONS

Sec.

§ 8371. Short title of subchapter.

This subchapter shall be known and may be cited as the Pennsylvania Product Liability Act.

§ 8372. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Harm." Death or injury to person or property.

"Product liability action." Any action or claim against a supplier for recovery of damages for harm alleged to have been caused by a product (including any action or claim for contribution or indemnity), irrespective of whether such action or claim is based on strict liability in tort, negligence, breach of warranty, misrepresentation, any other legal theory or statute or any combination of the foregoing.

"Supplier." A person who manufactures, sells or otherwise supplies a product and is engaged in the business of supplying such a product.

§ 8373. Basic limitations on the liability of suppliers.

(a) General rule.--A supplier of a product is not an insurer or guarantor of the safety of the product. In a product liability action, a supplier of a product shall not be liable if the plaintiff does not prove that the product was supplied by that supplier in a defective condition unreasonably dangerous for its intended use as a result of:

(1) a material deviation of the product from the design specifications, formulae or performance standards of its manufacturer or from otherwise identical units manufactured to the same specifications, formulae or standards;

(2) the design of the product;

(3) the failure of that supplier to provide adequate warning or instruction about the product; or

(4) the failure of the product to conform to an express factual representation which was made by that supplier about that product and on which there was specific and justifiable reliance.

(b) Additional basic limitation applicable to nonmanufacturing suppliers.--

(1) Except as provided in paragraph (2), a supplier of a product who did not manufacture the product in whole or in part shall not be liable in a product liability action if the plaintiff does not prove one or more of the following:

(i) The supplier exercised substantial control over the design, testing, packaging or labeling of or the providing of warning or instruction about that aspect of the product which caused the harm for which recovery of damages is sought.

(ii) The supplier altered or modified the product, and that alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought. The term "alteration" or "modification" shall mean any material change in a product, including changes in the design, packaging or labeling of the product, changes to or removal of any safety feature or any warning or instruction, deterioration or damage caused by failure to observe proper maintenance, installation, preparation or storage procedures and changes resulting from repair, renovation, reconditioning, recycling or reclamation of the product.

(iii) The supplier had, at the time that supplier supplied the product, actual knowledge of the product defect which caused the harm for which recovery of damages is sought.

(iv) The supplier made an express factual representation about that aspect of the product which caused the harm for which recovery of damages is sought.

(2) Paragraph (1) shall not apply if:

(i) valid in personam jurisdiction cannot be

obtained in this Commonwealth over either a manufacturer of the product or any other supplier described in paragraph (1)(i) through (iv); or

(ii) the court determines that neither a manufacturer of the product nor any other supplier described in paragraph (1)(i) through (iv) would be able to satisfy a judgment if found liable in a product liability action.

§ 8374. Product design.

In a product liability action, the product shall not be found to be in a defective condition unreasonably dangerous for its intended use as a result of the design of the product if:

(1) at the time the product left the control of the manufacturer, there was not a practical and technically feasible alternative design which would have prevented the harm for which recovery of damages is sought without impairing the intended use or desirability of the product. An alternative design of a product is practical and technically feasible only if, at the time the product left the control of the manufacturer, the technical, medical and scientific knowledge relating to that alternative design was developed, available and capable of use in the manufacturing of the product and economically feasible for such use by a manufacturer; or

(2) the harm was caused by an inherent or unavoidably unsafe aspect of the product. An inherent or unavoidably unsafe aspect of a product is an aspect incapable, in light of the state of the technical, medical and scientific knowledge available at the time the product left the control of the manufacturer, of being eliminated or made safe without

impairing the intended use, availability or desirability of the product.

§ 8375. Warnings or instructions about products.

(a) General rule.--In a product liability action, the product shall not be found to be in a defective condition unreasonably dangerous for its intended use as a result of the failure of the supplier to provide adequate warning or instruction about the product if the supplier provided information which a reasonably prudent person in the same or similar circumstances would have provided with respect to the dangers or safe use of the product. A warning or instruction is provided when it is communicated in a manner reasonably calculated to convey the information:

(1) to intended users or consumers of the product;

(2) to the extent that it is not practical and feasible for a supplier to convey information directly to intended users or consumers, to those persons who can reasonably be expected to act in accordance with the information for the protection of users or consumers or who can reasonably be expected to convey the information to users or consumers; or

(3) in the case of prescription drugs or other products required by law to be used or consumed only at the direction of certain persons, to those persons qualified to direct the use or consumption of such products.

(b) Unnecessary warnings or instruction.--A supplier shall not be liable in a product liability action for failing to provide information about the product which was:

(1) known by the person to whom the warning or instruction would have been provided; or

(2) generally known to the class of persons to whom the

warning or instruction would have been provided.

(c) State of knowledge.--A supplier shall not be liable in a product liability action for failing to provide information about the product which that supplier did not know and, in light of the technical, medical and scientific knowledge available at the time the supplier supplied the product, could not reasonably have known.

(d) Governmentally required warning or instruction.--If a warning or instruction conforms to the requirements of a Federal or State statute or agency regulation or the terms of a product approval by a Federal or State agency, a supplier of the product shall be considered to have provided an adequate warning or instruction.

§ 8376. Alteration or modification of products.

A supplier shall not be liable in a product liability action for harm caused by an alteration or modification of the product by a person other than that supplier which was not reasonably foreseeable by the supplier or which could not practically and feasibly have been prevented, deterred or controlled by the supplier. The term "alteration" or "modification" shall mean any material change in a product after the supplier supplied the product, including changes in the design, packaging or labeling of the product, changes to or removal of any safety feature or any warning or instruction, deterioration or damage caused by failure to observe proper maintenance, installation, preparation or storage procedures and changes resulting from repair, renovation, reconditioning, recycling or reclamation of the product.

§ 8377. Product misuse.

A supplier shall not be liable in a product liability action

for harm caused by misuse of a product which was not reasonably foreseeable by the supplier or which could not practically and feasibly have been prevented or deterred by the supplier. The term "misuse" shall mean use of a product materially different from its intended use, including uses inconsistent with the specifications and standards applicable to the product, uses contrary to warning or instruction provided by the supplier or any other person, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

§ 8378. Limitation on liability for certain common consumer products.

Suppliers of certain common consumer products the consumption of which is recognized by the ordinary consumer as presenting a risk to health shall not be liable in a product liability action unless the harm for which recovery of damages is sought was caused by a manufacturing defect in the product. This section shall apply to common consumer products of the kind described in comment i to section 402A of the Restatement (Second) of Torts. The term "manufacturing defect" shall mean a material deviation of the product from the design specifications, formulae or performance standards of its manufacturer or from otherwise identical units manufactured to the same specifications, formulae or standards.

§ 8379. Admissibility of evidence of adherence to government or industry standards.

Evidence that the product which allegedly caused the harm complied in material respects, at the time the product left the control of the manufacturer, with standards, conditions or specifications established, adopted or approved by a Federal or

State statute or by any agency of the Federal or State government with authority over the design, packaging, labeling, performance or approval of the product, or with industry-wide standards, practices or customs relating to the product shall be admissible in a product liability action.

§ 8380. Inadmissibility of evidence of subsequent improvements or measures.

When, after a supplier has supplied a product alleged to have caused harm, improvements are made or measures are taken with respect to that product or any similar product which, if made or taken previously, would have made the harm less likely to occur, evidence of those subsequent improvements or measures is not admissible against the supplier in a product liability action to prove that the product was defective. This rule does not require the exclusion of evidence of subsequent improvements or measures when offered for the purpose of impeachment. The terms "improvements" and "measures" mean all changes in design, manufacture, testing, packaging, labeling, marketing, promotion, distribution or sale, including any recall, notice, warning, instruction or other suggestion or recommendation with respect to a product.

§ 8381. Limitation on liability for punitive damages for harm caused by products regulated by the Federal Food and Drug Administration.

Punitive damages shall not be awarded in a product liability action if a drug or device or food or food additive which caused the harm for which recovery of damages is sought was subject to premarket approval or licensure by the Federal Food and Drug Administration (FDA) under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.) or the Public Health Service Act

(42 U.S.C. § 201 et seq.) and was approved or licensed; or is generally recognized as safe and effective pursuant to conditions established by the FDA and applicable regulations, including packaging and labeling regulations. This limitation on liability for punitive damages shall not apply if the plaintiff proves by clear and convincing evidence that the product manufacturer fraudulently withheld or misrepresented information required to be submitted under the regulations of the FDA, which information was material and relevant to the harm for which recovery of damages is sought. For the purposes of this section, the terms "drug," "device," "food" and "food additive" shall have the meanings given in the Federal Food, Drug, and Cosmetic Act.

Section 4. This act shall apply to any product liability action within the jurisdiction of any court on or after the effective date of this act, except that section 1 of this act shall not apply to any product liability action which accrued before the effective date of this act.

Section 5. The provisions of this act are severable. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application.

Section 6. This act shall take effect immediately.

HouDocd #2

HOUSE OF REPRESENTATIVES
DEMOCRATIC COMMITTEE

BILL ANALYSIS

BILL NO. HB 916 PN 1034 SPONSOR: Coy
COMMITTEE: Judiciary DATE: 10/24/89 (EM)

EXISTING LAW: Obviously, for years now, persons suffering bodily injury or death caused by manufactured products have been permitted, depending upon the circumstances and the availability of in personam jurisdiction over the various potential defendants, to sue a variety of suppliers involved in the chain of distribution of such product either in an action based upon proof of negligence of such defendant(s), or on the theory of breach of warranty under Article 2 of the Uniform Commercial Code (applicable in Pennsylvania under Title 13 of the Pennsylvania Consolidated Statutes), or on the theory of strict tort liability under §402A of the Restatement of Torts 2d, applied in Pennsylvania by the Pennsylvania Supreme Court ever since its landmark decision in Webb v. Zern in 1966. No attempt will be made here to explain and elucidate upon the scope of existing law applicable to these three basic concepts of personal injury liability since to do so would unduly prolong what will already be projected to be a very lengthy bill analysis because of the inherent nature of HB 916.

PURPOSE: HB 916 would significantly diminish the rights of product injury victims to recover the amounts of damages which they can presently recover in Pennsylvania, would significantly diminish the defendants against whom any damages for a product injury can presently be recovered in Pennsylvania, would require for the first time that the concept of comparative negligence (retitled "contributory responsibility" or "comparative responsibility") be applied to reduce or eliminate an injured plaintiff's right to recover damages in a breach of warranty or strict tort liability case, and would cap the period of time allowed to sue after a particular supplier has marketed the product for use or consumption under a new concept of a 15-year period of repose which will supplement the existing statutes of limitations.

The HB 916 Statute of Repose. In addition to Pennsylvania's basic 2-year statute of limitations for filing negligence suits and §402A cases against a supplier after the injury occurs, and the 4-year statute of limitations applicable under the UCC for breach of warranty in certain cases, HB 916 would require a "statute of repose" for all product liability actions. A "product liability action" within the scope of HB 916 is any action or claim against a supplier for recovery of damages for death or injury to person or property alleged to have been caused by a product (including any action or claim for contribution or indemnity), regardless of

whether such action or claim is based on strict tort liability, negligence, breach of warranty, misrepresentation, any other legal theory or statute or any combination of the foregoing. The general rule of HB 916 is that hereafter, any product liability action under any such theory must be commenced against the supplier within the time specified by the Bill and within such supplier's period of repose, regardless of whether the statute of limitations has also run against the plaintiff. The 2-year personal injury statute expires usually 2 years after the injury or damage is suffered. The 14-year UCC statute expires 4 years following delivery of the product by such supplier, regardless of whether the party subsequently injured had any reason to know of the breach of warranty at the time delivery was made.

The phrase "supplier's period of repose" is defined as the period ending 15 years after that supplier supplied for use or consumption the product alleged to have caused the death or injury to person or property for which recovery of damages is sought or, if that supplier did not supply the product for use or consumption, the period ending 15 years after the product was first supplied for use or consumption by a subsequent supplier. The purpose of such period of repose is to place a time cap upon the period of time that any supplier can be held responsible for putting a product into circulation (15 years) regardless of whether or not such product first causes an injury at a time beyond such period of repose but still within the period of the normal 2 or 4-year statute of limitations. An exception to the general rule is that if a product liability action accrues against a supplier less than 2 years before the end of such supplier's 15-year period of repose, then such action may be commenced against that supplier within 2 years from the date on which the action accrued. It is specified that under no circumstances shall the period of repose section be construed to extend the period within which any civil action or proceeding may be commenced under any provision of law. The premise of the statute of repose is that since evidence and witnesses are less easily located and available with the passage of time and it becomes increasingly difficult to determine who if anybody was responsible for an injury, and very few products have an indefinite lifetime (if some product does not live up to a warranty of being defect-proof for say 20 years, this "repose" section would still bar suit if it became defective after 17 years and caused an injury) then any product liability action must be brought within 15 years of the date when the product was sold or supplied by the particular supplier.

In that regard, the word "supplier" as used throughout HB 916 is defined as a person who manufactures, sells or otherwise supplies a product and is engaged in the business of supplying such a product.

Comparative or contributory responsibility. HB 916 would amend the current comparative negligence statute to provide that if the plaintiff in any product liability action is partly responsible for his own injury, the amount of his award must be reduced proportionately. If the plaintiff is found to have been primarily responsible for his own injury so that the degree of his responsiblity

was greater than the responsibility of the defendant(s) against whom recovery is sought, then the plaintiff should be altogether barred from recovery. At the same time, the existing doctrine of voluntary assumption of the risk is statutorily reaffirmed under HB 916 so that it would apply to injuries and damages associated with downhill skiing (presenty a part of the comparative negligence statute and enacted in protection of the ski resorts) or any other activity or conduct involving known or inherent risks. However, since HB 916 merely states that the doctrine of voluntary assumption of the risk is not to be deemed modified by the proposed changes to the comparative negligence statute, the courts and juries will probably continue to ignore the assumption of the risk doctrine in cases involving substantial injury and a lawsuit against a substantial defendant.

The concept of "responsibility" engrafted upon the comparative negligence statute by HB 916 is defined as "causing or contributing to cause the death or injury to person or property for which recovery of damages is sought, whether by negligent act or omission, by supplying any defective product, by breach of warranty, by misrepresentation, or by any other conduct or activity violative of the applicable legal standard or by any combination of the foregoing." Currently, the Supreme Court of Pennsylvania refuses to apply the doctrine of contributory negligence in breach of warranty or strict tort liability cases and HB 916 would obviously change that.

New limitations on theories of product liability. The basic rule is that the supplier of a product (as previously defined) will not be held liable for an injury caused by such product unless there is a defect in the product that makes it unreasonably dangerous. A product is defective only if there was a flaw in the design of the product or if the product deviated from the design (e.g., if a part was missing); or if the product failed to carry necessary instructions or warning; or if the product supplier made a specific claim (warranty or guaranty) about the product (e.g., stated that it could be safely operated in a certain way or would last a certain period of time), and the plaintiff sustained an injury because he relied upon such claim. However, HB 916 radically changes the law of products liability by providing that if an injured person sues a non-manufacturing supplier of a product (retailer, wholesaler, etc.), who very seldom has any control over how the product is actually made, it must be shown that there was some active involvement on such supplier's part with regard to the injury-causing defect. Under the new concept, such wholesaler or retailer will be held liable for the injury only if such supplier had a substantial role in the design, testing, packaging or labeling of the part or aspect of the product that is defective, or if he was substantially responsible for providing instructions or warnings about such part or aspect of the product, or if he altered or modified the product in a way that caused the injury or helped to cause it, or if before he saw the product, the supplier knew about the defect that caused the injury, or if such supplier made a specific claim (warranty or guaranty) about the product and the consumer sustained an injury by reliance upon such claim. This radical limitation upon the liability (particularly in breach of warranty and strict tort liability cases) of a non-manufacturing supplier would not apply if valid in personam

jurisdiction could not be obtained in Pennsylvania over either the manufacturer of the product or some other supplier subject to liability, or if the court determines that the manufacturer of a product or any other such culpable supplier would be unable (because of bankruptcy, insolvency, whatever) to satisfy a judgment upon liable in a product liability action. However, HB 916 contains no provision that would toll the 2-year or 4-year statute of limitations for filing a lawsuit against a non-manufacturing supplier in a situation where valid in personam jurisdiction cannot be obtained over anybody else, or where the manufacturer is judgment-proof. By the time that it can be determined in some other lawsuit whether another potential defendant is not subject to valid in personam jurisdiction of Pennsylvania courts or is actually judgment proof, it would often be too late to sue a non-manufacturing supplier. It is not unusual for a disputed in personam jurisdiction issue to linger in the trial courts and appellate courts of the Commonwealth for years before final resolution - - - beyond the statute of limitations for bringing suit against a non-manufacturing supplier. There is no procedure in Pennsylvania for obtaining a ruling now as to the future susceptibility of a defendant to in personam jurisdiction or as to attachment of such defendant's resources now to pay off a potential future liability, in the event that such defendant becomes insolvent after a few years of litigation.

State of the art products, etc.. In a product liability suit, if HB 916 becomes the law, the design of a product will not be found defective if when the product was manufactured, there was no safer design available (i.e., the product's design was "state of the art"); or if the injury was caused by an inherent or unavoidably unsafe aspect of the product (motorcycles can never be as safe as an enclosed car, vaccines usually all have one or more serious side effects, but the risks of those side effects can not be eliminated without making the vaccines available, etc.). Also, a product will not be found to be defective on the grounds that its warnings or instructions were inadequate if the supplier provided the warnings or instructions that a reasonable person would have provided under the same circumstances, or if the information in question was generally known (i.e., to the source or consumers who would use the product), or was specifically known to the injured person; or if the information in question was not known to the supplier and could not have been known to him, given the technical, scientific or medical knowledge available at the time that he placed the product into circulation, or if the supplier provided the warnings or instructions required under applicable federal and state laws or regulations. It seems then, that contrary to existing law, a product supplier would owe no obligation to recall the product because of subsequently acquired information or to supply to its ultimate customer subsequently acquired information concerning problems with the product, after the product has already been into circulation.

If a person sustains an injury because of a product has been altered or misused, the supplier will not be held liable for the injury unless the alteration or misuse of the product was reasonably forseeable by such supplier and there were practical, effective

measures that the supplier could have taken to prevent or control the product's alteration or misuse, and the supplier failed to take such measures. The sponsor of HB 916 points out that a supplier can certainly forsee that careless people will sometimes dive into the shallow end of a swimming pool, but has few if any practical or effective measures available to him that would prevent such an occurrence.

Products in common usage and having generally known risks. Suppliers of certain common consumer products that present inherent, generally known risks will not be held liable in a product liability law suit unless the injury was caused by a manufacturing defect in the product. The term "manufacturing defect" means a material deviation of the product from the design specifications, formulae or performance standards of the manufacturer or from otherwise identical units manufactured to the same specifications, formulae or standards. Thus, points out the sponsor, the risks of a bottle of whiskey to the health are well known. A bottle of whiskey is not defective or unreasonably dangerous because it can cause intoxication - - but it would be defective and the supplier subject to liability under HB 916 if it were contaminated with some toxic substance.

Adherence to government/industry standards. Evidence that the product which allegedly caused the harm complied in material respects, at the time the product left the control of the particular supplier, with standards, conditions or specifications established, adopted or approved by a federal or state statute or by any federal or state agency with authority over the design, packaging, labeling, peformance or approval of the product, or with industry-wide standards, practices or customs, shall be admissible in a product liability action.

Inadmissability of evidence of subsequent improvements. When, after a supplier has supplied a product alleged to have caused harm, the supplier causes improvements to be made or measures are taken with respect to such product or any similar product which if made or taken previously would have made the harm less likely to occur, evidence of such subsequent improvements or measures shall not be admissible against the supplier in a product liability action. This aspect of HB 916 is primarily a codification of case law, the Pennsylvania courts generally taking the positition that such evidence does not necessarily prove the the defendant had been negligent or otherwise liable before the accident occurred, and is consistent with the fact that such manufacturer is a good citizen by always trying to improve the product and by trying to make it more injury-proof after acquiring knowledge of injuries which have in fact occurred.

FDA-approved products. The Bill provides that punitive damages shall not be awarded in a products liability action if a drug or device or food or food additive which caused the harm for which recovery is sought was subject to pre-market approval or licensure by the Federal Food and Drug Administration and was approved or licensed; or is generally recognized as safe and effective pursuant to

conditions established by the FDA and applicable regulations, including packaging and labeling regulations. On the other hand, such limitation on punitive damages liability will not apply if the plaintiff proves by clear and convincing evidence (a more stringent standard than proof by a preponderance of the evidence, the current law), that the product manufacturer fraudulently withheld or misrepresented information required to be submitted under the regulations of the FDA, which information was material and relevant to the harm for which the recovery of damages is sought. The sponsor argues that a supplier who complies with the FDA's "stringent" requirements and procedures simply can not be found to possess the culpable state of mind necessary to justify punitive damages.

HB 916 would apply to any product liability action within the jurisdiction of any (Pennsylvania) court on or after the effective date thereof, except that the statute of repose provision shall not apply to any product liability action which accrued before the effective date of HB 916. The general principle of law is that legislation may not take away rights of parties which have already accrued (usually the date of injury) before the effective date of such legislation, a principle with which the effective date provisions of HB 916 conflict. There is, however, a severability provision.