

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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House Bill 916
Product Liability Issues

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HOUSE JUDICIARY COMMITTEE
HOUSE LABOR RELATIONS COMMITTEE

Room 140, Majority Caucus Room
Main Capitol Building
Harrisburg, Pennsylvania

Thursday, October 26, 1989 - 10:00 a.m.

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BEFORE:

Honorable Thomas R. Caltagirone, Majority
Chairman
Honorable Mark B. Cohen, Majority Chairman
Honorable Nicholas B. Moehlmann, Minority
Chairman
Honorable Jeffrey E. Piccola, Minority Chairman
Honorable David K. Levdansky
Honorable Andrew J. Carn
Honorable Robert L. Freeman
Honorable John F. Pressman
Honorable Michael R. Veon
Honorable Kenneth E. Brandt
Honorable Edgar A. Carlson
Honorable J. Scot Chadwick
Honorable Joseph M. Gladeck, Jr.
Honorable David W. Heckler
Honorable Kenneth E. Lee
Honorable Ronald S. Marsico
Honorable Jere L. Strittmatter
Honorable Christopher McNally
Honorable Michael E. Bortner

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BEFORE (CONT'D):

Honorable Richard Hayden
Honorable Joseph Lashinger, Jr.
Honorable Lois Sherman Hagarty
Honorable Robert D. Reber, Jr.
Honorable Karen A. Ritter
Honorable Michael C. Gruitza
Honorable Paul McHale
Honorable Gerald A. Kosinski

STAFF MEMBERS: (Labor Relations Committee)

Michael Cassidy
Majority Executive Director

Nevin J. Mindlin
Minority Executive Director

James M. Trammell, II
Minority Research Analyst

STAFF MEMBERS: (Judiciary Committee)

Katherine Manucci
Executive Secretary

William H. Andring, Esquire
Majority Chief Counsel

David Krantz
Majority Executive Director

Mary Woolley, Esquire
Minority Counsel

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1 1 CHAIRMAN CALTAGIRONE: I'd like to
2 2 get started. Members and guests, I appreciate
3 3 it if everybody would refrain from smoking in
4 4 the room because it is kind of crowded. If you
5 5 care to indulge in a smoke, please use the
6 6 hallway outside.

7 7 I'd like to start off with the
8 8 introduction of the members. I am Chairman Tom
9 9 Caltagirone, Chairman of the House Judiciary
10 10 Committee. Chairman Mark Cohen will be joining
11 11 us, Chairman of the House Labor Relations
12 12 Committee.

13 13 For the benefit of the guests and
14 14 also our stenographer, if the members and staff
15 15 that are currently here would please introduce
16 16 themselves, we will start over to my left at the
17 17 far table. Please introduce yourself for the
18 18 record and just come right down the row. We
19 19 will do the members that are present at this
20 20 time.

21 21 REPRESENTATIVE CARLSON: Repre-
22 22 sentative Edgar Carlson, 68th District.

23 23 MR. TRAMMELL: Jim Trammell with the
24 24 staff of the Labor Relations Committee.

25 25 REPRESENTATIVE BORTNER: I'm

1 Representative Mike Bortner, York.

2 MR. MINDLIN: I'm Nevin Mindlin and
3 I'm the Minority Executive Director of Labor
4 Relations Committee.

5 MR. ANDRING: Bill Andring, I'm legal
6 counsel for the Judiciary Committee.

7 REPRESENTATIVE CHADWICK: Represen-
8 tative Scott Chadwick.

9 REPRESENTATIVE HECKLER: Represen-
10 tative Dave Heckler, Bucks County.

11 REPRESENTATIVE McNALLY: Represen-
12 tative Chris McNally, Judiciary Committee from
13 Allegheny County,

14 MR. CASSIDY: Mike Cassidy, Executive
15 Director of Labor Relations Committee.

16 REPRESENTATIVE MOEHLMANN: Represen-
17 tative Nick Moehlmann, Lebanon County, Minority
18 Chairman of the Committee.

19 REPRESENTATIVE HAYDEN: Represen-
20 tative Rick Hayden, Philadelphia County.

21 REPRESENTATIVE MARSICO: Represen-
22 tative Ron Marsico, Dauphin County.

23 CHAIRMAN CALTAGIRONE: Thank you. We
24 will commence immediately with the testimony and
25 we will start off with Representative Jeff Coy,

1 who is the prime sponsor of House Bill 916. He
2 will have former Governor Leader, I believe,
3 testifying.

4 REPRESENTATIVE COY: Governor
5 Leader's schedule, I understand, is such that he
6 will be a bit delayed. He will be here later.
7 I'd like to have Senator Madigan join me.

8 Mr. Chairman, members of the
9 Committee, as I'm sure you're aware, recent
10 events have given today's hearing, and the
11 timeliness of it, particular interest. I
12 introduced House Bill 916 and Senator Madigan,
13 who is with me, introduced an identical piece of
14 legislation, Senate Bill 816, several months
15 ago. The Bills have been referred to the
16 appropriate committees in the House and the
17 Senate. Today is really the first opportunity
18 we have had, in a public forum, to introduce the
19 issues and to discuss it with you all.

20 We received the results of a study
21 conducted by two professors at Pennsylvania's
22 Wharton School, which you will hear a little bit
23 later. They found that product liability costs
24 had increased by \$5 billion--I say billion with
25 a "b"--in Pennsylvania over the past three

1 years, a significant drain on our state's
2 economy.

3 This month Forbes magazine ran a
4 cover story headline, "The Litigation Scandal."
5 They said the liability system is out of
6 control. It said that the rest of the economy
7 was being held to ransom.

8 Just six days ago, ABC's 20/20 news
9 program devoted a major segment of the show to
10 the product liability crisis. ABC came to the
11 same conclusion. Our product liability system
12 is crippling the economy. It's driving safe,
13 useful products off the market and it's stifling
14 innovation.

15 The ABC report made many of the same
16 points and cited several of the cases that
17 Senator Madigan and I had planned to discuss
18 this morning. With the Committee's permission,
19 we'd like to relinquish some of our time in
20 order to show the report in its entirety. We'd
21 like to do that now, Mr. Chairman.

22 (Video presentation occurred)

23 CHAIRMAN CALTAGIRONE: Before we get
24 started again, there have been several members
25 that have since joined us. Chairman Mark Cohen,

1 Chairman of the House Labor Relations Committee,
2 has joined us and other members that have since
3 come in since we opened, stand and identify
4 yourself.

5 REPRESENTATIVE RITTER: Karen Ritter
6 from Allentown.

7 REPRESENTATIVE VEON: Mike Veon,
8 Beaver Falls.

9 REPRESENTATIVE PRESSMAN: Jack
10 Pressman, Allentown.

11 REPRESENTATIVE LEE: Ken Lee, Wyoming
12 County.

13 REPRESENTATIVE LEVDANSKY: David
14 Levdansky, Allegheny County.

15 REPRESENTATIVE LASHINGER: Joe
16 Lashinger, Montgomery County.

17 REPRESENTATIVE GLADECK: Joe Gladeck,
18 Montgomery County.

19 REPRESENTATIVE HAGARTY: Lois
20 Hagarty, Montgomery County.

21 REPRESENTATIVE PICCOLA: Jeff
22 Piccola.

23 REPRESENTATIVE MORRIS: Sam Morris of
24 Chester County, Chairman of the House
25 Agricultural Committee.

1 REPRESENTATIVE COY: Thank you,
2 Mr. Chairman. ABC, as you can see from the
3 videotape, was looking at the product liability
4 crisis from national perspective. I would ask
5 that the committees keep in mind that the crisis
6 is at its peak in Pennsylvania.

7 The Commonwealth Foundation recently
8 reported that more product liability cases were
9 filed in federal courts in Pennsylvania last
10 year than in any other state. The number of
11 million dollar awards has increased in Penn-
12 sylvania by more than 1500 percent since 1983.

13 One of this country's most
14 distinguished legal scholars, Professor James
15 Henderson of Cornell University, will be joining
16 us later this morning to explain why Penn-
17 sylvania has become a breeding ground for public
18 liability lawsuits. He will confirm what I'm
19 telling you now. Pennsylvania's product
20 liability law encourages people to sue. It's
21 confusing, extreme and unfair. It's the worst
22 of its kind in the nation.

23 Bear in mind also that it is entirely
24 case law; law that has been created by a lot of
25 different cases and a lot of different

1 courtrooms. The General Assembly has never had
2 its say on the issue. We've never put a product
3 liability statute on the books. It's time we
4 did.

5 In April, Senator Madigan and I
6 introduced the Pennsylvania Product Liability
7 Act as additional identical Bills in the State
8 House and State Senate. The House Bill 916 has
9 67 co-sponsors drawn from both sides of the
10 aisle and it awaits action in your Committee,
11 Mr. Chairman.

12 You each have received a detailed
13 commentary on the Bill. We will be addressing
14 specific provisions later in the hearing. In
15 the few moments left for me, I'd like to share
16 general thoughts on the intent of the
17 legislation and anticipate some of the arguments
18 that may be raised against it.

19 You will hear from people today who
20 have been injured while using a product. When
21 they relate the circumstances of those injuries,
22 ask yourself this question: If House Bill 916
23 had been law when the injury occurred, would it
24 have prevented the person from going to court
25 and recovering damages?

1 Those highly publicized cases that we
2 are all familiar with, cases involving products
3 like the Ford Pinto, the answer to the question
4 is an emphatic no. If a supplier puts a
5 defective product on the market, he will be
6 legally accountable for the injury that the
7 product causes. That's the law in Pennsylvania
8 today and it will still be the law if House Bill
9 916 is enacted.

10 The proponents of this legislation
11 will try to characterize it as a "big business"
12 Bill, but ask yourself this question: When a
13 lawsuit without the slightest validity can still
14 generate hundreds of thousands of dollars in
15 legal expenses, who is at the most risk? The
16 corporate giant or the neighborhood merchant?
17 Large corporations can absorb the costs of
18 lawsuit on the fringes. The owner of the corner
19 hardware store may not be able to. Even if he
20 wins, a lawsuit can put him out of business.

21 That's precisely why the most active
22 and vocal support of this legislation comes from
23 small businesses. They know what's at stake.
24 They know who has been hurt the most by the
25 current law. When you hear today from those who

1 would like to leave the current law as it is,
2 you'll be asked to think about the rights of
3 consumers. Senator Madigan and I agree with
4 that. This is a consumer issue. It's a
5 consumer issue because it involves public
6 safety. It's also a consumer issue because safe
7 products are being pulled off the shelves. It's
8 a consumer issue because new products are not
9 being developed. It's a consumer issue because
10 all of us are paying unnecessarily higher prices
11 for a great many of the things that we buy.

12 The heart of the issue is the need
13 for fairness; fairness for the consumer who is
14 harmed by a flawed product, and fairness as well
15 for those who are being harmed by flaws in our
16 product liability law.

17 Senator Madigan and I believe that
18 you will find that fairness in the legislation
19 before you now. You will find too that House
20 Bill 916, for the most part, achieves its
21 purpose within existing boundaries. It isn't a
22 wholesale reworking of our liability system. In
23 some areas we are simply affirming or clarifying
24 current case law.

25 Elsewhere, we are making specific

1 narrow changes that will bring Pennsylvania back
2 into the legal mainstream. House Bill 916 is a
3 reasonable measure. Senator Madigan and I hope
4 it can be addressed today and in the days ahead
5 in a reasonable way.

6 We have already had lengthy
7 discussions with organizations and colleagues
8 who have had questions and concerns about the
9 Bill. We will continue to have those
10 discussions and we will continue to look for
11 ways to improve the legislation. We will ask
12 the Judiciary Committee, in turn, to act
13 promptly on the Bill so that we can continue
14 this discussion on the floor of the House.

15 One final point. It has been eight
16 years since the full House of Representatives
17 has had an opportunity to air this issue. In
18 those eight years, my colleagues, we have voted
19 to spend billions of dollars on economic
20 development in Pennsylvania. Yet, we have done
21 nothing to correct a law that's costing us
22 billions; a law that has a major impediment to
23 economic growth; a law that's hurting businesses
24 and consumers and workers alike.

25 In those same eight years dozens of

1 states have reformed liability laws. More than
2 30 states in this nation have passed some sort
3 of product liability reform statute. Every
4 other major industrial state has passed some
5 sort of product liability reform statute.

6 Product liability is a major area of
7 public policy. Everyone in this room realizes,
8 I think, that sooner or later the General
9 Assembly will have to come to grips with the
10 issue. This isn't a decision that's going to be
11 deferred. It's not a decision that is going to
12 go away. It's a responsibility that we have to
13 face up to, and the longer it takes for us to
14 reclaim the issue, the greater the price we will
15 all have paid.

16 I'd like to ask Senator Madigan to
17 make a few remarks at this time before we go on.

18 SENATOR MADIGAN: Thank you,
19 Representative Coy and to Chairman Caltagirone.
20 I want to thank you for the privilege of
21 allowing me to appear here this morning. It's
22 been five years since I have had the opportunity
23 to participate in the workings of the House of
24 Representatives, so it's a bit like coming home
25 today. I thank you for that.

1 I have co-sponsored, or sponsored the
2 Bill in the Senate and I would like to update
3 you as to the status there. Senate Bill 816 was
4 introduced with 27 co-sponsors in the Senate.
5 By mutual agreement, I have allowed my good
6 friend, Representative Coy, to move this in the
7 House. I'm pleased that we are having hearings
8 and I have no doubt, when it comes to the
9 Senate, if you take action, we will act
10 expeditiously on it also.

11 I think -- and I'm going to be brief.
12 There are just a couple of areas. As pointed
13 out, and there has been a study done and there's
14 billions of dollars of costs to our economy, and
15 as part of that study a question was raised to
16 me by a good friend, how come so many of the
17 CEOs say the product liability that we have now
18 is not a major problem?

19 The reason is that, cost is passed
20 right through to the consumers and we all pay
21 for it. I believe we have a real opportunity to
22 do some reform in product liability. Eight
23 years ago we failed to do that. I believe the
24 consumers of this Commonwealth, the small
25 business people --

1 I have a small businessman in my --
2 who has a family business who decided to go
3 ahead and develop a product. His general area
4 is in construction, but he's an inventor. He
5 was unable to purchase product liability and
6 that product never went on the market.

7 However, there were some sales made
8 and he told me just a few days ago, he said, "I
9 lay awake at night. I'm trying to buy back
10 every piece of equipment that I sold, and
11 there's very few left." But he said, "I wake up
12 at night wondering whether my family and my
13 business is going down the tubes."

14 Small aircraft -- I represent
15 Lycoming County which is the home of Textron
16 Lycoming Aircraft, makers of the Lycoming
17 motors, which for 65 years has been the backbone
18 of small aircraft. In four years the product
19 liability cost of a small aircraft has gone from
20 \$75,000 per aircraft to \$100,000 per aircraft.

21 Piper Aircraft left the State of
22 Pennsylvania and, perhaps, with product
23 liability reform they will return. I thank you
24 for your consideration. I hope we can move
25 ahead. There are many areas of agreement, as I

1 have talked with opponents and proponents of the
2 product liability, they have indicated that
3 there are areas of agreement and I believe that
4 we do have the opportunity to move ahead and do
5 some meaningful product liability reform.
6 Thanks for your consideration.

7 REPRESENTATIVE COY: Thank you,
8 Senator Madigan.

9 CHAIRMAN CALTAGIRONE: Good to have
10 you back with us again, Senator. I also might
11 add, your daughter who works for the Attorney
12 General, works very closely with us. She's
13 doing a great job.

14 REPRESENTATIVE COY: Mr. Chairman, I
15 see we are still on the time schedule for your
16 next witness at 10:40. I just want to say one
17 or two brief comments. No. 1, thank you for
18 holding this public hearing. This is the first
19 time that a legislative committee, in recent
20 years, has even brought this matter this far, to
21 a public hearing, to have the issue heard. I
22 think you're to be commended for that.

23 Mr. Chairman, you obviously have
24 people on both sides of the issue talking to you
25 about it. I think it's important that we hear

1 this in public; that we air it in public and
2 work on the issue. For that much, and for your
3 willingness to do that part, I appreciate it.
4 Thank you very much.

5 CHAIRMAN CALTAGIRONE: I'd like to
6 add that that same comment should apply equally
7 to Chairman Cohen of the Labor Relations
8 Committee. We have worked very closely together
9 on these issues.

10 We'll open it up for questions from
11 the members. Representative Bortner.

12 REPRESENTATIVE BORTNER: Senator
13 Madigan, since I serve in the House, not the
14 Senate, I'm not as familiar with your Bill and
15 what's going on in the Senate. Is your Bill in
16 your Committee or the Judiciary Committee?

17 SENATOR MADIGAN: It's in the
18 Judiciary Committee of the Senate.

19 REPRESENTATIVE BORTNER: Is the
20 Chairman of the Senate Judiciary Committee
21 taking up the Bill or is the Bill under active
22 consideration of the Senate?

23 SENATOR MADIGAN: It is not at this
24 point. We made the determination that I would
25 not attempt to move it as long as there was

1 activity in the House.

2 REPRESENTATIVE BORTNER: On such an
3 important issue, why would you do that?

4 SENATOR MADIGAN: I believe many
5 times it gets much more confusing if Bills are
6 moving in both Houses. Mutual agreement with
7 Representative Coy, we felt that we should --
8 would allow him to move in the House. As long
9 as movement was in the House, it would continue
10 and I have not made a personal request to the
11 Chairman of the Judiciary Committee to move this
12 legislation.

13 I have talked with him about it. I
14 have not asked him what his feelings are. I
15 asked him to be a co-sponsor. He did not desire
16 to be, for a number of reasons. Many of us as
17 Chairmen in the Senate do not specifically like
18 to get on Bills and give us the opportunity of
19 flexibility as a Chairman to move in many
20 directions as those Bills are considered.

21 REPRESENTATIVE BORTNER: Have you
22 asked him not to move the Bill?

23 SENATOR MADIGAN: No, I have not.

24 REPRESENTATIVE BORTNER: I only
25 finish by saying, this strikes me as odd. This

1 is my second term now, that all the focus on
2 this issue has been in the House of Repre-
3 sentatives. Obviously, this is a bi-partisan
4 coalition, a lot of different groups involved.
5 It strikes me as odd that there's not an effort
6 made to also move the Bill and work on this
7 issue in the Senate. I was curious to get some
8 input on that.

9 SENATOR MADIGAN: I believe, perhaps,
10 a little bit of history, eight years ago product
11 liability passed the Senate and came to the
12 House where it died. I believe certainly our
13 feeling was that I did not want to ask my
14 colleagues to move a Bill that was not going to
15 move in the House of Representatives.

16 REPRESENTATIVE BORTNER: One other
17 question for either one of you, and there are a
18 lot of other specifics I will talk about with
19 other witnesses. Just one sort of general
20 question for your reaction, both of you have
21 stated, and I believe you honestly feel, that
22 this would not impact on people who have
23 legitimate claims to -- for a product or for
24 injuries and that you said that most of the
25 cases you look at would still have been able to

1 be brought. Is that true also with the 15-year
2 statute of repose? Would that not have been an
3 impediment in some of the cases that you are
4 talking about?

5 REPRESENTATIVE COY: Mike, I honestly
6 don't have the figures on how many cases would
7 have been impacted by the 15-year statute of
8 repose. There's no question about the fact that
9 that section of the Bill is a limiting factor.
10 Frankly, the line has to be drawn someplace.
11 Many other states that have passed some sort of
12 product liability reform have different
13 statutes, nine years in some states, ten,
14 twelve.

15 I choose 15 when we drafted this Bill
16 because I thought it was a liberal figure. If
17 that doesn't work, let's suggest a year term
18 that does work. Does 20 work? Does 25?
19 Somewhere along the line you have to say that
20 you cannot warrant a product forever. That's
21 what the current case law in Pennsylvania is.
22 You have to warrant a product forever. That's
23 what I think is unfair. That's what I think we
24 need to address by statute in the Commonwealth.

25 REPRESENTATIVE BORTNER: Thank you

1 very much. Thank you, Mr. Chairman.

2 CHAIRMAN CALTAGIRONE: I also would
3 like to submit an opening statement remarks by
4 Chairman Cohen for the record then.

5 (Opening statement submitted and
6 attached hereto)

7 CHAIRMAN CALTAGIRONE: Are there
8 other members?

9 (No audible response)

10 CHAIRMAN CALTAGIRONE: Gentlemen,
11 thank you.

12 REPRESENTATIVE COY: Mr. Chairman, I
13 do want to indicate, as your schedule indicates,
14 Governor Leader will be here a bit later and was
15 unable to be here right now.

16 CHAIRMAN CALTAGIRONE: He's here.

17 REPRESENTATIVE COY: May I take this
18 opportunity to introduce him.

19 CHAIRMAN CALTAGIRONE: If he'd like
20 to share some remarks with us, he's certainly
21 welcome to do so.

22 REPRESENTATIVE COY: Mr. Chairman,
23 those of you who don't know, ought to know a
24 gentleman who served the Commonwealth ably and
25 well for four years as the Chief Executive

1 Officer. It's my privilege to introduce to the
2 Committee at this time former Governor and good
3 friend and a strong supporter of this
4 legislation, Governor Leader.

5 (Applause)

6 FORMER GOVERNOR LEADER: Seems like
7 old times. It's be a long time. I want to
8 address the two chairmen, Chairman Caltagirone,
9 Chairman Cohen, members of the Committee, Ladies
10 and Gentlemen:

11 I'm delighted to be here. I
12 appreciate the fact that your two committees
13 have taken the time to bring up this very
14 important subject and give all of us a chance to
15 come in here and share our opinions, our
16 feelings and our experiences with you.

17 If you will permit, I'd just like to
18 give you my written document and ask you to make
19 that a part of the record. Then I'd just like
20 to sit here and chat with you a little bit about
21 some of my experiences, some of my feelings.

22 I left Harrisburg about 30 years ago
23 this past January. When Chairman Caltagirone
24 introduced me to the House a few months ago, I
25 must confess I hadn't been before anybody in the

1 General Assembly for 30 years, and I received a
2 warm reception that kind of gave me a few goose
3 pimples to be back. It's like coming home. I
4 can only assume that people who are in the
5 legislature now must have learned about me
6 through their grandfathers.

7 In any event, when I left here it was
8 not with the feeling that a former Governor
9 should be coming back here and advising or
10 critiqueing what was happening in the
11 legislative branch, or the executive branch for
12 that matter. So, for the past 30 years I have
13 been keeping myself busy in business, especially
14 in health care. I like to believe now that
15 maybe I have earned my spurs, so to speak, as a
16 businessman and in the sense of a health care
17 professional. It's been a stimulating and
18 interesting career.

19 I must say that a lot of it was
20 triggered as a result of the motivation and
21 stimulation that I received while studying,
22 considering and even helped legislate in the
23 field of health care, and in matters that
24 pertained very strongly to business.

25 There was one thing I was always very

1 proud of, and that is, even though we did push
2 hard for a number of social welfare programs, I
3 was proud of the fact that we never did anything
4 that jeopardized the financial standing of the
5 Commonwealth of Pennsylvania in the financial
6 community; that we always received interest
7 rates when we had to go to the market to borrow
8 that were comparable to all of the other
9 industrial states of the nation. I'm sure that
10 all of us here today are very much aware of the
11 fact that Pennsylvania must stay competitive in
12 every possible way.

13 I remember, when I was elected in
14 1954, Pennsylvania had slipped back in
15 permitting certain truck weights. All our
16 neighboring states had permitted trucks to carry
17 heavier weights. We slipped behind. In the
18 bi-partisan basis, we were able to bring those
19 laws and regulatios up to date.

20 During the Thornburgh administration,
21 Pennsylvania slipped behind in some of our
22 banking laws. Some of the states in the Federal
23 Government, especially our neighboring states,
24 were pushing ahead and we had fallen behind.
25 Thanks to the legislative action and the

1 Governor's signature we were brought up to date
2 in that field.

3 Recently, two professors at the
4 Wharton's School of the University of
5 Pennsylvania announced that in a survey of 150
6 odd businesses in the Commonwealth, in over a
7 six-year period it had cost them over \$3 billion
8 because of what I like to believe are out of
9 date, laws in the field of liability, tort
10 reform.

11 Pennsylvania can't afford to fall
12 behind. Yes, thank God, we are prospering
13 pretty well today, but where will we be
14 tomorrow? Where will we be in the eyes of those
15 who control the relocation of plants. Where
16 will we be in the eyes of those who are
17 considering plant expansions, those who are
18 already here? We have to look to the future.

19 I'd just like to mention a few of my
20 personal experiences in the field. One of them
21 was as a board member of a gas and water
22 utility, perhaps eight years ago. We have a
23 major insurance carrier on liability insurance.
24 They simply canceled. They said we are not
25 going to renew. We are not going to do any more

6 1 gas and water liability insurance.

2 So, we shopped around for a couple of
3 months and, fortunately, found four or five
4 smaller companies and we pieced the thing
5 together with an increase of a couple hundred
6 percent, we were able to replace the insurance.

7 Now, you say utilities can afford to
8 pay it. Sure they can. It becomes part of the
9 rate pace. The utilities and the people who
10 consume gas and water are paying for it. This
11 is an insidious thing. What happened to this
12 \$3 billion that 150 some companies had to pay
13 over six years. It gets not just into business;
14 it gets just not into utilities; it gets into
15 various charities.

16 A couple months ago my wife
17 decided -- we were very interested in an abused
18 women's operation out our way. My wife said, "I
19 think instead of trading" -- She was going to
20 get a new car, a new station wagon. She said,
21 "I think instead of trading my station wagon in,
22 I think I will give it to this group." I said,
23 "That's a very noble thing to do. While you're
24 doing it, you better get the insurance for it
25 because I don't think they budgeted insurance

1 for a station wagon over there, and in that kind
2 of operation it might be a little bit onerous."

3 So, my wife called our insurance
4 agent, bought the insurance at \$2600 a year.
5 The vehicle was appraised at \$6500 a year. She
6 pays the insurance for the next two or three
7 years, her charitable contribution for the
8 insurance will be greater than the gift. You
9 see how it's diluting our charitable dollars.

10 Two weeks ago on NBC, on the Today
11 Show, they had a doctor, a gynecologist. They
12 asked him why he discontinued his obstetric
13 practices. He said because my insurance went
14 from \$37,000 a year to a \$100,000 a year.
15 Members of these Committees, how many babies do
16 you think that gynecologist would have to
17 deliver to make up the difference between
18 \$37,000 and \$100,000 plus a year?

19 You say we have plenty of people to
20 deliver babies. Well, that's probably true; but
21 among the nations of the world -- among the
22 western nations of the world in terms of infant
23 mortality, we are 13th from the top. Why?
24 Well, the experts say lack of prenatal care,
25 lack of good care at the time of delivery. How

1 many gynecologist have dropped the obstetrics
2 end of their practice because they can't afford
3 to pay that additional money? It's an insidious
4 thing. It creeps into everything.

5 Dauphin County six years ago was
6 paying \$63,000 a year for their liability
7 insurance. Six years later today they are
8 paying \$160,000 a year, a 250 percent increase.
9 Of course, the taxpayers are going to pick that
10 up. It hits us everywhere; as I pointed out a
11 moment ago, right down to our charitable
12 dollars.

13 I don't need to tell you what happens
14 to us in health care, which is my field. We
15 keep pushing it up. We were carrying
16 \$11 million of liability insurance. We pushed
17 it up to sixteen because we saw some of the
18 settlements that were coming through. Now we
19 pushed it up to 21 million; a little company
20 taking care of 650 people, carrying \$21 million
21 of insurance coverage in liability because we
22 are scared.

23 We had 35 or 40 of those people to my
24 farm yesterday for a hay ride. You know what
25 went through my mind. I wonder if my liability

1 insurance covers this when we take people to my
2 farm for a hay ride?

3 How many good things aren't happening
4 in America, or in Pennsylvania, because we are
5 scared. We are intimidated. We are intimidated
6 because we have developed a lottery mentality
7 where everybody pays and a few people benefit.
8 You wonder why insurance companies won't shoot
9 craps with us anymore, a lot of them? Do you
10 wonder why they have either dropped out of the
11 field or restricted the areas in which they are
12 willing to cover? I know there are people who
13 say this won't bring your liability insurance
14 down, to which I say nonsense. I believe in the
15 free American system.

16 A lot of years ago, when I went into
17 the nursing home field, a friend of mine said,
18 "Why are you going in there? I said, "There's a
19 tremendous need for nursing homes." Twenty-five
20 years ago there was. My friend said, "George,
21 just remember one thing. Anything that's needed
22 in the United States of America that somebody is
23 willing to pay for, will not only be produced,
24 but it will be produced in abundance and even in
25 surplus." The same thing is true when we take

1 the crap shooting out of liability insurance,
2 there are going to be companies coming back in
3 it and will introduce the competition that we
4 used to have and rates will come down.

5 But, you can't blame people with the
6 insurance mentality who are accustomed to sound
7 actuarial business practices that they are not
8 going to shoot craps with us in Pennsylvania,
9 and they don't have to. There are 34 or 35
10 other states that have already taken other
11 action. They can do business there.

12 Enough said about that. I'd like you
13 to think about this whole matter, not as to what
14 may be to your best advantage in the next six
15 weeks or the next six months, or even in the
16 next six years. We have a wonderful Common-
17 wealth. Your people and my people, most of
18 them, came here a long time ago. We prospered
19 here. We built a great economy. Why should we
20 permit this undercutting of our basic economy by
21 an antiquated, outdated, unfair set of laws.
22 That's why I'm here on behalf of myself and Drew
23 Lewis, my Co-Chairman, for the Pennsylvania
24 Committee on Civil Justice.

25 I think you know I feel this very

1 deeply in a personal way or I wouldn't be here.
2 I don't make a practice of coming before
3 committees. This is not part of my job. I have
4 a very busy career in what I do. I feel this
5 very deeply. I'll convey that to you. I'm very
6 grateful, and I'm very grateful for each one of
7 you for your patience with me.

8 CHAIRMAN CALTAGIRONE: Thank you
9 Governor. Are there questions? Chairman Cohen.

10 CHAIRMAN COHEN: Thank you very much
11 for coming before us, Governor. One of your
12 examples dealt with automobile insurance, about
13 the high cost of automobile insurance. Does
14 this Bill deal with automobile insurance?

15 FORMER GOVERNOR LEADER: It's a whole
16 series of Bills. I'm not an expert on any or
17 all of them. It's just an example of the type
18 of thing where big settlements and big claims
19 are gotten.

20 CHAIRMAN COHEN: You also dealt with
21 your experience in the nursing home field. Does
22 this Bill deal with the nursing home industry?

23 FORMER GOVERNOR LEADER: I don't know
24 that it especially does.

25 CHAIRMAN COHEN: Thank you. I have

1 no further questions.

2 CHAIRMAN CALTAGIRONE: Thank you
3 Governor. Thank you, Representative Coy. Are
4 there any other questions from members?

5 Representative Freeman.

6 REPRESENTATIVE FREEMAN: Thank you,
7 Governor, for coming. It's always a pleasure to
8 see anyone that served the Commonwealth before a
9 Committee of our nature.

10 You mentioned in your remarks that,
11 in your opinion, our products liability laws
12 were one of the primary reasons why the cost of
13 products liability insurance is high. Given the
14 fact that you mentioned 34 or 35 states that
15 have changed their products liability law, do
16 you have any evidence that their insurance rates
17 in this area have come down after changing the
18 products liabilities law?

19 FORMER GOVERNOR LEADER: I don't at
20 this time, but it seems to make common sense if
21 we re-introduce competition by getting more
22 people back in the field, we have always found
23 in America that that has tended to bring prices
24 down.

25 REPRESENTATIVE FREEMAN: To the best

1 of your knowledge --

2 FORMER GOVERNOR LEADER: I haven't
3 made a study of those other states.

4 REPRESENTATIVE FREEMAN: Thank you.

5 CHAIRMAN CALTAGIRONE: Mike.

6 REPRESENTATIVE VEON: Thank you,
7 Mr. Chairman. Governor, I would be one of those
8 legislators whose grandfather, in fact, did tell
9 me about your career and I have the greatest
10 admiration and respect and appreciate you being
11 here today.

12 I'd like to, for the record, suggest
13 that I think that your comments made a very good
14 case for reform of the insurance industry, but
15 I'm not so sure that it's for reform of the
16 products liability. I just want to, for the
17 record, suggest, with all due respect, that
18 there is another side to this issue and that
19 some of us have some very deep concerns about
20 workplace safety, safety of workers in this
21 state, and that the groups such as the AFL-CIO,
22 who represent hundreds of thousands of workers
23 in this state, feel very strongly about this
24 Bill.

25 I just would suggest, with great

1 respect that there is another side; that the
2 issue is not as cut and dry as you have
3 suggested, and would hope that maybe at sometime
4 there would be a chance for me to sit down with
5 you and present that other side of the issue.

6 Thank you, Governor, and thank you,
7 Mr. Chairman.

8 FORMER GOVERNOR LEADER: Thank you.
9 I will be glad to do that.

10 CHAIRMAN CALTAGIRONE: No other
11 questions?

12 (No audible response)

13 REPRESENTATIVE CALTAGIRONE: Again,
14 thank you very much Governor Leader and
15 Representative Coy.

16 FORMER GOVERNOR LEADER: Thank you,
17 Chairman Caltagirone.

18 REPRESENTATIVE COY: Thank you.

19 CHAIRMAN COHEN: Our next witness is
20 Jim Moran, Director of Philadelphia Project on
21 Occupational Safety and Health, PHILAPOSH.

22 MR. MORAN: Mr. Chairman, thank you.
23 I'm Director of PHILAPOSH. We're 150 unions.
24 We fight for safe jobs.

25 What this Bill is about is making the

1 workplace less safe than it really is. It's
2 already unsafe and it's going to be made worse
3 by this legislation. We feel this Bill would
4 deprive the economic incentive to make the
5 workplace safe. We feel it's a killer bill and
6 it will kill more workers and injure more
7 workers and maim more workers and poison more
8 workers than we are already doing, and we are
9 doing a lousy job at this point. We have
10 witnesses here today to tell the other side of
11 this story. We have some slides to show you
12 actual conditions.

13 I have given out my statement to the
14 members of the Committee. It goes as follows
15 and will be followed by a few slides and a brief
16 presentation by two victims.

17 Product liability is the main force
18 to cause product safety. Workers injured on
19 unreasonably dangerous products must not be
20 stripped of the Common Law Right to sue
21 culpable, unethical manufacturers.

22 An unreasonably dangerous product is
23 one that contains a risk of injury that could be
24 eliminated or reduced by reasonable accident
25 prevention measures. Courts have held that

1 reasonable accident prevention measures are
2 those that are both economically and technically
3 feasible. We agree.

4 It is unethical to expect
5 Pennsylvanians to pay for the harm caused by
6 out-of-state manufacturers of unreasonably
7 dangerous products. Out-of-state manufacturers
8 and unethical Pennsylvania-based manufacturers
9 would obviously rather we pay for the harm
10 caused by their unreasonably dangerous products.

11 Why should Pennsylvania workers
12 suffer physically, mentally and economically
13 when they get injured and sick on unreasonably
14 dangerous products? Why should the spouse and
15 family members of a seriously injured and sick
16 worker suffer mentally and economically when
17 their loved one is needlessly injured or
18 sickened on unreasonably dangerous products.

19 Occupational injury and disease leads
20 to family problems. Divorce is a common result.
21 Why should Pennsylvanians pay for the cost of
22 social worker services, psychologists,
23 psychiatrists and other counselors. Why should
24 our school counselors be burdened with the task
25 of caring for students whose lives have been

1 disrupted because of the physical pain, mental
2 stress and economic hardship that result when a
3 parent is seriously injured or sickened on the
4 job?

5 Psychologists and psychiatrists have
6 consistently found that the greatest stress-
7 linked mental disorders are affected most
8 severely by life changing events such as major
9 personal injury or illness, loss of job, and
10 major financial change. Sexual dysfunction and
11 divorce are common consequences of this stress.
12 Families are shattered.

13 The manufacturers of unreasonably
14 dangerous products would rather we Penn-
15 sylvanians pay for the social and economic
16 consequences of occupational injury and disease
17 rather than allowing our tort system to respond
18 to this injustice. Very shortly I'll show you
19 some slides of unreasonably dangerous equipment
20 that cause serious injury and death to
21 Pennsylvania workers.

22 I was unable to obtain graphics to
23 demonstrate the results of chemicals which
24 caused reproductive damage. Mutagens and
25 teratogens cause birth defects. Some workers

1. who are exposed to mutagens and teratogens are
2 operating room personnel in hospitals exposed to
3 anesthetic gases, workers in foundries, battery
4 manufacturers, chemical workers, construction
5 workers and many others exposed to lead;
6 agricultural workers exposed to pesticides;
7 x-ray technicians, radiologists, dental
8 technicians, et cetera, exposed to radiation.
9 Manufacturers very, very rarely warn of
10 mutagenic and teratogenic effects of their
11 chemicals. They very rarely do research to
12 determine what level these chemicals cause
13 reproductive damage.

14 Their products are unreasonably
15 dangerous unless people know full extent of the
16 harm to which they are exposed. Until employers
17 fully recognize the dangers of the chemicals
18 they purchase and until workers fully recognize
19 the danger they are exposed to, this harm will
20 continue. The basis of toxic tort is almost
21 always the failure to warn the purchasers and
22 users of the dangerous effects of the chemicals
23 and methods to control their exposure.

24 Children with birth defects are a
25 great emotional burden on their parents, as well

1 as a great economic burden on school systems,
2 mental health facilities, et cetera. Don't take
3 away from parents the right to sue for the
4 injustice of being exposed to chemicals which
5 cause birth defects in their children when they
6 were not given the opportunity to know what
7 damage could result from their exposure.

8 Manufacturers are reluctant to
9 perform research into mutagenic and teratogenic
10 effects of chemicals. They are reluctant to
11 warn people that these results are likely among
12 people of child-bearing age. They will not do
13 so unless they are forced to pay for the
14 consequences of their conduct.

15 I want to start the slides. In this
16 first slide the baker lost two fingers while
17 reaching in to feel the dough being mixed in the
18 dough mixer, in this dough mixer. An interlock
19 barrier guard should cover this area. However,
20 as it is in this photo it complies with the
21 manufacturer's standards as well as the OSHA
22 standards. This is an unreasonably dangerous
23 product because a simple interlocked barrier
24 guard could reduce the risk of injury.

25 European manufacturers equip their

1 vertical dough mixers with interlocked barrier
2 guards. Our manufacturers haven't been sued
3 enough to give them the economic incentive to
4 protect our workers.

5 Now Slide 2. This is a block-making
6 machine with many unguarded parts. The next
7 slide is a closeup of one of the reciprocating
8 parts.

9 Next slide. This part moves in and
10 out. A worker lost three fingers when trying to
11 lubricate it. It should be fully enclosed with
12 a remote lubricating system as was suggested
13 many years ago by the National Safety Council.
14 This machine was manufactured in the '70's. The
15 National Safety Council recommended remote
16 lubricating methods before this machine was
17 manufactured. This machine was manufactured in
18 violation of OSHA standards.

19 This machine number 4. This machine
20 was also manufactured in violation of OSHA
21 standards in the 1980's. A woman lost the use
22 of her arm while trying to feed this machine.
23 The manufacturers settled this case for
24 \$200,000.00. The woman has very little use of
25 her dominant arm. She's 28 years old. She was

1 very angry with the small settlement. She's
2 permanently, totally disabled.

3 Slide 5. A worker was squirted with
4 scalding hot water in the face when attempting
5 to operate this hose. The nozzle is not done
6 conspicuous as to which end the stream will come
7 from.

8 Slide 6. A worker's foot was crushed
9 when the load jumped out of the hook when a
10 shaft broke above. The hook should be equipped
11 with a safety latch at its throat to prevent the
12 load from slipping out. In the construction
13 industry, hooks are almost always equipped with
14 safety catches. In factories, they are almost
15 never equipped with safety catches. Until
16 manufacturers supplying hooks on overhead
17 cranes, hoists, et cetera, are sued, they won't
18 provide safety catches in factories.

19 Slide 7. This is a taffy mixer. It
20 was rebuilt by a machine rebuilding company in
21 violation of OSHA standards. A worker lost an
22 arm when his shirt got entangled with one of the
23 rotating shafts.

24 Slide 8. A worker fell while gaining
25 access to this cab. He was disabled for one

1 year. He still suffers pain from his back
2 injury.

3 Another manufacturer has recognized
4 the hazard -- change the slide -- Another
5 manufacturer has recognized this hazard and
6 installed guardrails to prevent this type of
7 injury. Product liability brings product
8 safety.

9 Slide 10. This is a forklift truck.
10 The operator stands in the compartment on the
11 left-hand side. That needs to be corrected on
12 your copy. The operator stands in the
13 compartment on the left-hand side. One
14 manufacturer has had over a thousand operators
15 have their feet crushed when the vehicle is in
16 reverse and the brakes fail. The worker's foot
17 becomes crushed between the truck and the object
18 that it strikes. When the operator lifts his
19 right foot the brake is applied. When the
20 operator lifts his right foot it is necessarily
21 outside of the compartment.

22 The instructions say, never have your
23 feet outside of the compartment, but this is
24 impossible. Side entry trucks are manufactured
25 by some manufacturers whose side entry design

1 eliminates this hazard. The product shown is
2 unreasonably dangerous. This manufacturer still
3 manufactures trucks that are essentially
4 identical to this after crushing a thousand
5 workers' feet.

6 The company that sold the forklift
7 trucks to this employer sold them with standard
8 forks. It is unreasonably dangerous to handle
9 the loads in this factory with standard forks.
10 Special load attachment devices are designed to
11 handle this type of a load. This load fell on a
12 young woman and she's now a paraplegic. Sellers
13 of equipment should be sure it is appropriate
14 for the use that the employer will put it to.
15 The employer didn't know there are devices to
16 safely handle these loads.

17 Next. This cabinet tipped over and
18 crushed a worker when he opened the top two
19 drawers. It was top heavy. It should have been
20 designed so that he could only open one drawer
21 at a time. It also should have been designed so
22 that it was tapered with regard to the depth of
23 each drawer; that is, so that the deeper drawers
24 are on the bottom to preclude the possibility of
25 dangerously changing the center of gravity.

1 The black and yellow striped
2 mechanism moves in a vertical direction. It was
3 descending and crushed a worker's head. He was
4 fatally injured. The guard was put on after the
5 accident. This machine was sold by the manu-
6 facturer in 1983. It violates OSHA standards.
7 However, there are no particular industry
8 standards related to this machine.

9 Next. This is a conveying system in
10 a stone quarry. The rectangular device --
11 next slide -- The rectangular device just above
12 center is a magnet to pick up tramp iron from
13 the conveyor. A worker climbed up on the
14 conveyer with a crow bar to remove the metal
15 which had adhered to the magnet. The operator
16 of the conveyor didn't realize he was on there.
17 He started up the conveyor and the worker was
18 crushed. He's now a quadraplegic.

19 The manufacturer of the magnet should
20 have had a device to de-energize the magnet.
21 The manufacturer of the conveyor should have had
22 an alarm system to announce to the worker a
23 warning sound to alert him that the conveyor was
24 about to start.

25 Next. Foundry workers are exposed to

1 silica which causes silicosis. Many manu-
2 facturers of material containing silica fail to
3 warn that it could cause permanent lung damage.
4 When workers, their representatives and factory
5 owners are acutely aware that their product is
6 causing harm in their factory, they are more
7 likely to reduce the exposure.

8 However, manufacturers of silica
9 containing material often fail to get the
10 warning to the users. Incidentally, the primary
11 reason that our society is now addressing the
12 public health hazard created by asbestos is
13 because juries have found it to be unfair for
14 the asbestos industry to have hidden the infor-
15 mation that they knew about the harm asbestos
16 can cause.

17 The recently passed right-to-know
18 laws have helped workers know what they are
19 being exposed to. However, there are great
20 deficiencies in the information supplied by
21 manufacturers. It is extremely important that
22 workers are able to hold these manufacturers
23 responsible for giving misleading information.

24 I can list more than a dozen
25 accidents where people suffered serious physical

1 harm because information given to the employer
2 by the manufacturer with regard to safe ways to
3 handle the chemicals was inadequate. Many of
4 these workers are suing the manufacturer of
5 chemicals because of inadequate warnings. Don't
6 take away their chance of some measure of
7 economic justice.

8 The tort system can never fully
9 compensate people who become paraplegics,
10 quadraplegics, lost arms, suffer brain damage,
11 suffer serious burns, have children with birth
12 defects, et cetera. Nevertheless, the tort
13 system is the greatest hope for giving economic
14 incentive to manufacturers of unreasonably
15 dangerous products. Please don't give these
16 unscrupulous, unethical manufacturers a free
17 ride on the backs of Pennsylvania workers and
18 employers.

19 If the perpetrator of the injustice
20 is not held accountable, it will continue. In
21 our society the dominant motivator is the
22 "bottom line". Our greatest hope to affect the
23 bottom line is to speak the language of the
24 unethical manufacturers, and that's money. It
25 is "economic greed" and "license to kill", not

1 social or economic justice to motivate the
2 sponsors of this Bill. Thank you.

3 I want to introduce Carolyn Hall
4 whose father worked at Roman Haus. She has a
5 few things to tell you about what happened to
6 her.

7 MS. HALL: I live in Bridesburg. I
8 don't know if any of you are familiar with that
9 area. I live down by the Betsy Ross bridge by
10 the Delaware River. I live in the chemical
11 death trap of the city. I was 16 years old and
12 my father was murdered by a chemical plant. He
13 was one of 53 workers who worked on BCME. It
14 was a terrible death. One by one my father's
15 friends would die.

16 Every day he'd come home he said he
17 was going to be next, but prior to this, the
18 government had issued a warning to Roman Haus to
19 supply equipment to the men who were working on
20 this chemical with suits, gloves, masks,
21 goggles, and special equipment.

22 Well, Roman Haus didn't want to put
23 out that money. They wanted to make their bucks
24 and that was it; so, the hell with the workers.
25 According to the plant, one by one would die.

1 Questions were being asked by families, why were
2 these men being murdered? I use the word murder
3 because that's exactly what it was. They were
4 told and did nothing. They didn't protect their
5 men.

6 One day my father came home and he
7 said his ear lobe blood test showed some signs.
8 They sent him for an x-ray. It started out to
9 be a speck on his lungs. The next x-ray they
10 sent him for -- but they never changed his job
11 or protected him. They continued to let him go
12 in there unprotected.

13 Yeah, they took his work clothes once
14 in a while and washed them, but other times they
15 came home and were washed with our clothes but
16 nothing was ever -- We didn't know. We didn't
17 know it was really the chemical that was the bad
18 guy until later.

19 Then he would come home with weird
20 stains on his clothes, yellow residue. Then the
21 odor started. It smelled like fish. It smelled
22 like rotten meat that had been laying in the hot
23 sun. The lung spot got bigger and they took him
24 to the hospital. He had one lung removed and
25 part of his rib cage. He started his way back.

11

1 Instead of putting him in the mixing department
2 where he was used to, they degraded him. They
3 put him on a tow motor, made him feel less of a
4 man, made his mental status worse.

5 As time went on he got sicker and
6 another one of his friends died, Beansy. They
7 had nicknames for each other. He was a pall
8 bearer. He cried and he said, "I'm not going to
9 last much longer." I didn't go to school one
10 day because I had a funny feeling in my stomach,
11 and my father was rushed to the hospital. A
12 couple days later he did die. He had oat cell
13 cancer all through his body.

14 For a man went from two hundred and
15 some pounds down to 130, it was degradable. For
16 a man who went from a well paid job to a lesser
17 paid job and management laughing at him all the
18 way, the unprotecting company reaped all their
19 profits on the death of all of these men.

20 Where was the government to help
21 protect these men with your rules and laws?
22 Where was OSHA when we needed them? Where was
23 the environment people when we needed them and
24 we kept crying out for help?

25 Many of you have seen my face on TV

1 before about air pollution. Yeah, I live there
2 yet and I should get out, but why should I give
3 up my home and my fight so people in higher
4 places and Roman Haus can reap the benefits
5 without knowing what they have done.

6 I have had medical problems but I
7 can't link them to Roman Haus, but some day I
8 will. Before I die I will link them to there
9 because I know they are responsible for a lot
10 more deaths than were ever recorded.

11 Don't put this law in effect.
12 Protect the working person. Make the workplace
13 protect us. It took me 17 years to get money to
14 help my mother to live a better life; 17 years
15 to get people to help me prove that these people
16 were murderers, which the government already
17 knew but did nothing but sit back and collect
18 their money, their pay.

19 Please look at both sides of this
20 issue before you pass any kind of Bill. We
21 didn't get that much money out of the lawsuit
22 before you pay your lawyer. We had \$50,000 the
23 first time, the lawyers takes their half.
24 Second time I had to go back and fight because
25 there wasn't enough. How can you put a price on

1 a life? We got \$100,000 the second time I went
2 back. Again, your lawyers take your money.
3 Again, you have to put out money to investigate
4 all these things. By the time you're done you
5 don't really have anything left.

6 We had a struggle and I had to give
7 up my education in order to go to work. I don't
8 think anybody here would do that. You would get
9 up and fight, and that's why I am here; to make
10 sure you look at both sides.

11 Make these people do what they are
12 supposed to; to protect the working person.
13 Don't take our rights away. This is the only
14 thing we have left. Thank you.

15 MR. MORAN: This is Nancy Wisniewski.

16 MS. WISNIEWSKI: I'm here to testify
17 for my husband because he cannot do it from an
18 injury he sustained on September 1988. My
19 husband cannot be here because he has a brain
20 injury from falling from a ladder approximately
21 30 feet, September of 1988. Also, he has total
22 amnesia of the accident. He is still under
23 different doctors for his injuries.

24 Besides the head injury he has a back
25 injury, disk problem in his neck, a dislocated

1 shoulder. He also has nerve damage in the arm
2 and fingers. He's seeing a psychiatrist because
3 he has major depression. He has organic
4 personality syndrome with psychotic features and
5 he's paranoid.

6 Although he's collecting workmen's
7 comp, we just don't have a family. I don't have
8 a husband. My children don't have a father
9 anymore. He's like a knick-knack. He's like a
10 vegetable.

11 I never brought a lawsuit yet against
12 this, but his co-worker said the ladder didn't
13 have any feet and he would be willing to
14 testify. This past year I was just more
15 concerned that he was going to live.

16 Also, his employer, the Philadelphia
17 Housing Authority, did nothing but harass him
18 from the beginning, which made matters worse.
19 All of the injuries that he has had, they would
20 call on the phone, knock on the door, sit on the
21 street and tell my husband if you can sit there
22 you can go to work.

23 I wish my husband could have made it
24 here today because you don't have to be a doctor
25 and look at this man to see I don't have a

1 husband.

2 MR. MORAN: I want to sum up.

3 MS. WISNIEWSKI: That's all. I just
4 get upset.

5 MR. MORAN: I want to sum up. Some
6 of this might not seem it related to this bill.
7 In one case here we talked about somebody who
8 did sue and ended up with \$180,000, grand total
9 after a 17-year fight. The loss of a father,
10 the injury to the family, all this is
11 irreplaceable. No way to compensate it.

12 In the other case the suit wasn't
13 filed, but look what the injury did to the
14 family. Somebody has to take care of somebody
15 that can't go out and work themselves and they
16 have to stay home and take care of somebody
17 because of brain damage. What are we talking
18 about here that insurance companies are not
19 doing too well or something's wrong with the
20 present system? Are we getting too much out of
21 this, workers?

22 It seems to me you're shutting off
23 the last chance for any economic justice for
24 working people. Consumers are part of this too,
25 but I think it's an attack on workers and an

1 attack on injured workers. We are outraged with
2 this bill. That's all I have to say.

3 CHAIRMAN COHEN: Thank you very much
4 for your testimony. Representative Chadwick.

5 REPRESENTATIVE CHADWICK: Thank you,
6 Mr. Chairman. Mr. Moran, I'd like to address my
7 comments and questions to you, if I might. I
8 would first like to refer to the last sentence
9 of your testimony where you indicate that it's
10 "economic greed" and "license to kill"; not
11 social or economic justice that motivates the
12 sponsors of this bill.

13 My name is on this bill. I'm a
14 sponsor. I have no financial interest in any
15 business doing business in this Commonwealth or
16 anywhere else. I am personally offended that
17 you have challenged my motives. There are 65
18 sponsors of this legislation, good men and
19 women, friends and colleagues of mine on both
20 sides of the aisle. Not a one of them, in my
21 view, is guilty of what you have charged us
22 with. I think you owe us an apology.

23 MR. MORAN: Sponsors was probably a
24 poor choice of words. What I really meant to
25 say, and my apology for that, and you're correct

1 in pointing that -- those who bring and lobby
2 for this bill is what I'm talking about; the
3 people who would benefit from this bill:
4 insurance industry, the tobacco industry, drug
5 companys, manufacturing companys. I think I
6 said that throughout the testimony.

7 That's unfortunate that word is
8 there. I agree with you. You deserve an
9 apology and I apologize for that.

10 REPRESENTATIVE CHADWICK: It's
11 accepted and I appreciate that.

12 MR. MORAN: I also point out who I'm
13 really talking about. I want that to be clear
14 and let that show on the record.

15 REPRESENTATIVE CHADWICK: Fine. Now,
16 if I might get to some more substantive matters.
17 We saw some slides and we discussed a number of
18 cases where workers had been injured as a result
19 of defective or poorly designed products. Other
20 than the possible exception of a statute of
21 repose, would you please tell me the specific
22 section of House Bill 916 that would have
23 prevented any one of those injured Plaintiffs
24 from recovering or bringing a lawsuit?

25 MR. MORAN: Well, the one argument in

1 the Bill, and I don't have it in front of me, is
2 that, if it meets OSHA standards or meets
3 industry standards, that kind of think. Much of
4 this equipment met standards. It still injured
5 or killed.

6 REPRESENTATIVE CHADWICK: Mr. Moran,
7 my recollection is that, in case after case you
8 said these pieces of equipment violated OSHA
9 standards?

10 MR. MORAN: Not in all those cases.
11 Some cases I did say that, but not in all cases.

12 MR. GALLAGHER: My name is Vince
13 Gallagher and I'm a safety specialist. I used
14 to work for OSHA for 12 years. I do volunteer
15 consulting work for PHILAPOSH. I helped Jim
16 with the presentation. Most of those slides did
17 not violate OSHA standards. OSHA standards were
18 promulgated, for the most part, the safety
19 standards in 1970. They are the state of the
20 art from almost two decades ago. That's what
21 the OSHA standards are.

22 Most of those slides showed
23 violations also of industry standards, current
24 industry standards. The American National
25 Standards Institute is where OSHA 20 years ago

1 got their standards. The state of the art
2 question or doing it as everybody else is doing
3 it is not -- will take away a lot from workers
4 because people today will manufacture according
5 to industry standards, according to OSHA
6 standards unreasonably dangerous products that
7 are still killing people and maiming people.

8 Incidentally, much of the references
9 to support those slides show defective products
10 come from literature established around the turn
11 of the century by safety engineers.

12 REPRESENTATIVE CHADWICK: Were you
13 here earlier when the ABC report was shown?

14 MR. MORAN: Yes, I was. I thought it
15 was highly prejudicial and should have been
16 showing a film of 60 Minutes to tell the other
17 side of it.

18 REPRESENTATIVE CHADWICK: Do you
19 disagree with the statements made by employers
20 in that presentation that people have lost their
21 jobs and are out of work because of the
22 liability problem?

23 MR. MORAN: I would disagree with
24 that.

25 REPRESENTATIVE CHADWICK: What is the

1 reason, if not liability, that Cessna stopped
2 making single-engine airplanes?

3 MR. MORAN: I don't know the answer
4 to that. The reason I'm responding the way I am
5 is because, in many cases where plants have shut
6 down in this country or moved out of state,
7 their parting shot is, it was OSHA or EPA that
8 made me move.

9 OSHA was attacked like crazy in the
10 early '70's. Whenever a plant shut down it was
11 because of OSHA or EPA, or whatever. When you
12 further investigated those stories and looked
13 into the real reasons for plant closure and
14 plant movement, those issues were 17 and 18 on
15 the hit parade; weren't really the cause that
16 those places moved. There might have been some
17 element of it in why a company stopped doing
18 something, but the sole reason I don't buy it.
19 I don't believe it.

20 REPRESENTATIVE CHADWICK: I have no
21 further questions, Mr. Chairman.

22 CHAIRMAN COHEN: Thank you.
23 Representative Heckler.

24 REPRESENTATIVE HECKLER: Thank you,
25 Mr. Chairman. Mr. Moran, just a few additional

1 questions. I know we have heard from you before
2 in the Labor Relations Committee, but could you
3 tell me just in very short terms what does
4 PHILAPOSH do? What are your primary activities
5 as an organization?

6 MR. MORAN: We are an independent,
7 nonprofit coalition of 150 unions and health and
8 legal professionals. We develop educational
9 materials, put on workshops, conferences. We
10 consult to workers who are injured, consult to
11 unions who have helped safety problems in the
12 workplaces they represent, whether those are
13 chemical problems or asbestos or unsafe
14 machinery. We are a resource center for
15 information and expertise, essentially.

16 REPRESENTATIVE HECKLER: That had
17 been my understanding, particularly the resource
18 center part of it. I'm just wondering, we saw a
19 number of slides depicting particular pieces of
20 equipment that may well be dangerous. Do you do
21 anything about, or organizations with whom you
22 have relationships, one, getting OSHA standards
23 changed to encompass the particular devices and
24 make whoever is in charge of the workplace
25 responsible for updating that equipment?

1 And two, what do you do about simply
2 informing on a direct basis a manufacturer or
3 somebody in control of this equipment that they
4 have got a problem that should be corrected?

5 MR. MORAN: It's a twofold question.
6 On the first part, we, for example, have
7 petitioned OSHA for new regulations in a number
8 of areas. We also have filed suit against OSHA
9 for their failure to do their job. Yes, we do
10 watch OSHA and police it somewhat.

11 In terms of correcting conditions,
12 above and beyond all of the things that I
13 mentioned earlier, we also go into plants where
14 there's agreement between labor and management
15 and we look at conditions. We write up a report
16 and make recommendations and companies, in many
17 cases, correct those conditions; replace
18 machinery, put in ventilation, et cetera.

19 Because we are not a federal body, we
20 do not fine the companies or anything like that.
21 Right at the work site, yes, we try to help
22 conditions. As a matter of federal regulation
23 or state regulation, we work on that end of it
24 too.

25 REPRESENTATIVE HECKLER: I have one

1 question which may be -- I'll direct it to you
2 and may be best answered by your consultant --
3 I assume in response to Representative
4 Chadwick's previous question that you were
5 referring to the Section 8374 of the proposed
6 Bill, the product design language.

7 As I read that language, a lawsuit
8 alleging that a particular product failed to
9 meet either a recognized industry standard or
10 recognized government standard would not be
11 barred. I'd like to understand what it is about
12 the language of that Bill specifically that --

13 Let me preface that question by
14 saying that I have been disappointed up to this
15 time. I'm delighted we are having this hearing
16 because there's been an inclination in the whole
17 area of tort reform that the opponents can sit
18 back and pot shot without ever attempting to
19 join the issue and say this standard is
20 unreasonable, but this standard is reasonable.

21 I'd like to know with as much
22 specificity as you can muster, either now or in
23 writing at some later point, what it is about
24 the standard, the language concerning product
25 design that is inappropriate and what language

1 you believe would be appropriate.

2 MR. MORAN: I think you said if it
3 didn't meet the standards a suit could follow?
4 Is that what you said?

5 REPRESENTATIVE HECKLER: Well,
6 essentially. As I say, I framed the question.
7 Perhaps, you could discuss it with your
8 consultant and --

9 MR. MORAN: We will be happy to
10 follow-up and write to you some more specific
11 information.

12 A short answer to your question is,
13 the standards under OSHA for example, which is
14 mostly what we see affecting workers as far as
15 we deal with in the tri-state area, are woefully
16 inadequate and outdated and too weak. If some-
17 body would point to, well, we met the standard,
18 that's too weak.

19 REPRESENTATIVE HECKLER: Just so we
20 are clear, and I will look forward to getting
21 some additional information from you. So we are
22 clear, I think the language in the Bill, what
23 you're referring to and Representative Chadwick
24 just pointed out to me, is an evidentiary
25 profession. It assures that the persons being

1 sued will be able to offer into testimony the
2 existence of a protective government standard.
3 It's not going to prevent the Plaintiff and
4 Plaintiff's counsel from attacking that standard
5 for presenting more up-to-date industry
6 standards or expert testimony that says OSHA is
7 a bunch of fools and knaves. Here is this
8 standard as it should it be, and his product was
9 defective therefore. I will look forward to
10 receiving that.

11 I wonder if I might address a couple
12 questions. I'm sorry, ma'am, I did not get your
13 name.

14 MS. HALL: Carolyn Hal.

15 REPRESENTATIVE HECKLER: Thank you.
16 You mentioned the tragic situation involving
17 your father and it has taken 17 years to get it
18 redressed. Can you describe to us, and again, I
19 recognize that you are not legal counsel, what
20 sort of lawsuit you ultimately brought and won
21 in this matter?

22 MS. HALL: What I had to do first was
23 to prove to Roman Haus that I was well aware of
24 the government telling them about BCME. I had
25 to show them first that I knew all about that

1 letter that they had received and destroyed from
2 the government. They did a research backing on
3 it. I had to go back in 1953 or earlier when it
4 first came to light.

5 Then I had to research what it did.
6 It was absorbed into the system. Is that what
7 you were asking me?

8 REPRESENTATIVE HECKLER: Rather than
9 get into the facts, I suppose the question I'm
10 asking is how your testimony relates to the
11 legislation before us? I think, unfortunately,
12 the way these hearings have been scheduled
13 there's a danger of sort of muddying the safety
14 of the workplace legislation, which I understood
15 would be taken up more next week, with the
16 product liability issue. Was the lawsuit which
17 you or your mother and your family brought
18 against Roman Haus as a Defendant?

19 MS. HALL: Roman Haus and the
20 chemical plants that produced the compound.

21 REPRESENTATIVE HECKLER: And the
22 chemical -- so it was a separate company that
23 produced the chemical?

24 MS. HALL: Right. It comes through a
25 chemical truck, one of those with nozzles, and

1 they hook it up to the place and they just leak
2 so much of that chemical into the kettle. It's
3 cooked and brought to a certain temperature and
4 another one inserted.

5 REPRESENTATIVE HECKLER: Prior to
6 filing the lawsuit, did your family receive
7 Workers' Compensation benefits?

8 MS. HALL: No. We were told we were
9 not eligible for any kind of Workers' Compensa-
10 tion because my father had cancer and that was
11 his problem. We lived on Social Security at
12 that time.

13 REPRESENTATIVE HECKLER: Your issue
14 with Roman Haus was that, they had a Workers'
15 Compensation obligation because your father's
16 death was the result of a disease caused by the
17 workplace?

18 MS. HALL: Right. There was a lot of
19 us who brought suit at that time.

20 REPRESENTATIVE HECKLER: Then you
21 separately brought suit against the chemical
22 supplier, presumably, for failure to warn or --

23 MS. HALL: They were the chemical
24 supplier. They made it themselves. They said
25 it was separate, but it was their partner, I

1 guess you would say.

2 REPRESENTATIVE HECKLER: Subsidiary.

3 MS. HALL: Right.

4 REPRESENTATIVE HECKLER: Again, I
5 would welcome, if it's possible, Mr. Moran, to
6 learn whether the circumstances of that case, of
7 this tragic situation, would have -- if this
8 product liability legislation that we are
9 considering had been in effect at relevant
10 times, whether it would have precluded the kinds
11 of recoveries that ultimately occurred.

12 MR. MORAN: Short answer is, she
13 would not have the right to sue. You want more
14 detail.

15 REPRESENTATIVE HECKLER: I doubt your
16 conclusion.

17 MR. MORAN: Isn't there a latency
18 period in this bill? Isn't there a problem with
19 the 15 years? Wouldn't it affect asbestos
20 legislation as well as chemical tort?

21 REPRESENTATIVE HECKLER: What I'm
22 hearing, and maybe I misunderstood, but what I
23 was hearing was that, the exposure was occurring
24 virtually up to the time of death and certainly
25 shortly well within 15 years so that it had not

1 seemed to me, as I understood the facts, that
2 the period of repose would impact this
3 particular case. I would say to you --

4 MR. MORAN: I don't want to split
5 hairs on that, but we will get you information
6 on that.

7 MS. HALL: Can I answer that? That
8 ball that had started back in 1953 and it is
9 still up to date. I have not linked it yet with
10 my condition and my children's condition to
11 Roman Haus, but I will, like I said prior to
12 this; that there is a connection that -- it's
13 like a chemical imbalance in the body that
14 because of the air and the clothes being washed
15 together and the bed linen and things like that,
16 all that was contaminated and reproduced in us,
17 in the children.

18 REPRESENTATIVE HECKLER: You're
19 saying that, conceivably, an action that you
20 would have in the future --

21 MS. HALL: Right. You don't know
22 what it can be. Later on in time you're going
23 to see children born with a lot of defects.
24 You're not going to know where they came from,
25 but they originated from the problem in the

1 workplace. What we are saying is, please take a
2 look and see what's going on and bring your OSHA
3 up to date.

4 REPRESENTATIVE HECKLER: Again, there
5 may be a great deal of merit in a lot of what
6 you say. I'm trying to understand its impact
7 upon this legislation specifically. Thank you
8 very much, Mr. Chairman.

9 REPRESENTATIVE LEE: Mr. Chairman.

10 CHAIRMAN COHEN: Representative Lee.

11 REPRESENTATIVE LEE: Mr. Moran, I'd
12 like to address one question to you. You
13 mentioned when you were showing the slides, the
14 bread mixer I believe, you said that in Europe
15 they have guards against that kind of stuff. Is
16 it your opinion that the state of workplace
17 safety is generally better in Europe than it is
18 in the United States?

19 MR. MORAN: I didn't say that, but in
20 some cases it is. Certainly, in Scandinavia it
21 is.

22 REPRESENTATIVE LEE: Are you aware,
23 though, in Europe the laws regarding product
24 liability make it much more difficult to sue
25 than any law in the United States?

1 MR. MORAN: That may be true.

2 REPRESENTATIVE LEE: In fact, if you
3 bring a lawsuit in Europe and you lose the
4 lawsuit, you have to pay the Defendant's legal
5 fees. Are you aware of that?

6 MR. MORAN: No, I'm not. I don't
7 know how much that impacts on that specific
8 machine.

9 REPRESENTATIVE LEE: They also have
10 no law concerning such strict liability. I know
11 because I spent a month in Europe taking a
12 course just on comparative liability laws.
13 There's no comparison between the two. I don't
14 think there's any appreciable difference between
15 the state of the workplace safety in Europe and
16 workplace safety in the United States. Just
17 claiming that product liability law is the sole
18 reason for workplace safety is not the case.

19 MR. MORAN: I don't believe I said
20 that. I didn't say it was the sole reason.

21 REPRESENTATIVE LEE: Thank you.

22 REPRESENTATIVE McNALLY: Mr.
23 Chairman.

24 CHAIRMAN COHEN: Yes.

25 CHAIRMAN CALTAGIRONE: Chris.

1 REPRESENTATIVE McNALLY: Mr. Moran,
2 are you familiar with the doctrine of the
3 voluntary assumption of risk?

4 MR. MORAN: I'm not an attorney.

5 REPRESENTATIVE McNALLY: Mr. Chadwick
6 had asked you about which provisions would have
7 an adverse impact and would have prevented
8 employees from being compensated. In this bill,
9 on page 4, line 11, there is an expansion of the
10 adopted voluntary assumption of risk.

11 To summarize it, assumption of risk
12 means that if you know that there is an inherent
13 danger in a particular activity and you engage
14 in that activity, then you should not be
15 compensated for any injuries that result from
16 that conduct.

17 MR. MORAN: Certainly, we oppose that
18 line of reasoning. It says coal miners should
19 not be compensated because they know it's
20 dangerous in a coal mine.

21 REPRESENTATIVE McNALLY: That's
22 right.

23 MR. MORAN: That's a ridiculous line
24 of reasoning.

25 REPRESENTATIVE McNALLY: The

1 individuals that we heard about in the slide
2 presentation; for example, the baker, he knew
3 that there were dangers and risks inherent in
4 his occupation, did he not?

5 MR. MORAN: People know that in any
6 line of work.

7 REPRESENTATIVE McNALLY: That's
8 right.

9 MR. MORAN: Yes, that's true. They
10 know they are dangerous.

11 REPRESENTATIVE McNALLY: Point is,
12 that here again is another example of a
13 provision in this bill that would have prevented
14 those employees from being compensated for their
15 injuries?

16 MR. MORAN: Okay.

17 REPRESENTATIVE McNALLY: I wanted to
18 add that's another provision that's going to
19 adversely affect employees in the workplace.

20 CHAIRMAN CALTAGIRONE: Representative
21 Lashinger.

22 REPRESENTATIVE LASHINGER: Thank you,
23 Mr. Chairman. Very briefly, Mr. Moran, has your
24 organization compiled any data that might
25 demonstrate that maybe through an evaluation of

16

1 workmen's comp claims, specific loss claims,
2 that there are people that don't litigate? I
3 was intrigued by the last lady who was kind
4 enough to testify today, by her statement that
5 they had yet to explore the notion of suing in
6 that case. Are there people --

7 Maybe this could be an earthquake and
8 it's not. Maybe it's just a tremor at this
9 point in the crisis.

10 MR. MORAN: For the most part,
11 injuries at work, people can't sue. The
12 compensation laws says you cannot sue your
13 employer. The vast majority of injuries at
14 work, there's no suit.

15 REPRESENTATIVE LASHINGER: I'm
16 talking about cases that involve product safety?

17 MR. MORAN: You're saying they don't
18 sue?

19 REPRESENTATIVE LASHINGER: Yes.

20 MR. MORAN: There's a lot that don't
21 sue. I don't have the specific -- Where would
22 be the best place to get the statistics?

23 MR. GALLAGHER: If I may respond, I
24 would appreciate it. When I worked for OSHA and
25 made 792 inspections and almost always looked at

1 the OSHA injury log before making an inspection
2 and would generally try to look at the machine
3 that caused the injury, my experience has been
4 that the vast majority of time when people are
5 injured on unguarded machinery that they don't
6 have any notion that they can sue somebody
7 because they thought it was their fault because
8 they are often told that it was their fault;
9 that they should not have been doing what they
10 were required to do, in many cases.

11 I would say that it's my experience,
12 having investigated over 500 serious injuries,
13 the vast majority of time, even when there is a
14 possibility of liability, it is not recognized
15 by the person who is injured nor by their
16 employer.

17 MR. MORAN: We deal with injured
18 workers all the time. There are other injured
19 workers who are here; at least a few hundred
20 calls a year from injured workers. Even when
21 they have a clear right to sue, often I'm told
22 by widows who lost their husbands and other
23 injured people that they don't want to sue.
24 They are not interested in suing. They don't
25 want money. You can't replace what they lost.

1 I don't agree with that thinking, but a lot of
2 people feel like that. It's not the litigation
3 circus that we are being told.

4 CHAIRMAN COHEN: Thank you.

5 CHAIRMAN CALTAGIRONE: Representative
6 Heckler.

7 REPRESENTATIVE HECKLER: Thank you,
8 Mr. Chairman. Just very briefly, since
9 Mr. McNally has offered his interpretation of
10 one provision of this bill in the aid of the
11 witness, I would just like to point out that the
12 voluntary assumption of risk provision which he
13 quotes does not attempt to establish a new
14 principle of law. What that section says is
15 that, "The doctrine of voluntary assumption of
16 risk, as it applies to injuries and damages and
17 associated with downhill skiing or any other
18 activity or conduct involving known or inherent
19 risks is not modified by this section."

20 It's always been my understanding
21 that that was a doctrine recognized in court
22 case law. I recall walking out of a torts class
23 in law school because a Texas court applied that
24 doctrine to a fellow who was required to walk
25 over an open vat on a board, into which, he

1 plunged one day and perished and was found not
2 to have any liability exists on the doctrine of
3 assumption of risk.

4 It is my understanding that Penn-
5 that doctrine in that fashion. The language of
6 this bill isn't going to change case law, at
7 least as I understand it.

8 CHAIRMAN COHEN: Represented Hayden.

9 REPRESENTATIVE HAYDEN: Thank you,
10 qwertyuiopMr. Chairman. I'd like to direct the
11 question to your consultant. I'd like to cover
12 the area of the government or industry standards
13 issue of the admissability of that kind of
14 evidence.

15 I'd like to clarify, I think there's
16 a misconception among some people who seem to
17 think that when a government standard is enacted
18 with respect to a product, or actually directs a
19 manufacturer to comply with certain
20 specifications, that somewhere there's a huge
21 government research and development unit that
22 does independent testing with respect to those
23 standards and makes independent verification and
24 certification as to the validity of those
25 standards. My understanding is completely the

1 opposite. I think you started to touch upon
2 that in your testimony.

3 My understanding is, if you are
4 talking about OSHA and some of the other
5 industry-based organizations which are in our
6 Federal Government, that what they do they will
7 sift through and examine standards which are
8 generated; in fact, not by the government but by
9 the industry, and review them, but not review
10 them in the sense of independent testing and
11 simply apply them across the board.

12 Was that your experience at OSHA and
13 is that an accurate description of the way
14 government standards are enacted?

15 MR. GALLAGHER: With all due respect,
16 sir, to explain the standards the promulgation
17 process within OSHA and industries influence
18 would be very very lengthy. I'd like to make
19 one comment that I think may clarify things.

20 When I first started with OSHA, the
21 industry standard and the OSHA standard was five
22 fibers per cc time waited over eight hours,
23 which would mean you could breath about 100
24 million fibers of asbestos daily and that was
25 considered the safe level.

1 Then they lowered it to two fibers,
2 which brought it down to 40 million fibers per
3 day you could breathe and that was considered a
4 safe level within OSHA. Now they have it down
5 to .2 fibers per cc, a far cry from where it was
6 when I first started in the business. And now
7 OSHA compliance officers are telling people that
8 that's safe, and that's what industry will
9 comply with and that's what everybody tends to
10 think is safe.

11 The standard promulgation process
12 within OSHA and within industry is a compromise
13 process. The people who make recommendations to
14 OSHA invariably don't get what they want. They
15 base their recommendation on science. OSHA
16 promulgation standards is a process where
17 everybody participates, everybody brings in
18 their researchers and everybody argues it's
19 going to cost too much or it's not going to cost
20 hardly anything at all. But, the scientists are
21 the ones that recommend to OSHA what they would
22 like them to do and OSHA usually gets something
23 watered down from that.

24 The same with industry standards are
25 compromised standards. They are considered

1 minimal standards, but my experience has been
2 there's a great myth that industry standards and
3 OSHA standards are the state of the art. They
4 are, perhaps, the state of the industry, but
5 they are not the state of the art because the
6 state of the art is what could be done in my
7 mind; what's ethically possible; what's economic
8 justice. I think they are the primary
9 considerations of what brings PHILAPOSH here
10 today to talk about economic injustice.

11 CHAIRMAN COHEN: Chief Counsel
12 Andring.

13 MR. ANDRING: This bill would
14 establish a 15-year statute of repose. Is it
15 common for industrial equipment and machinery to
16 be used beyond the 15-year period or not?

17 MR. GALLAGHER: I have been in over a
18 thousand factories in Pennsylvania. It's most
19 of the industrial equipment is over 15 years
20 old. Most of the technology used today is over
21 15 years old.

22 MR. ANDRING: One other question
23 which kind of ties into that. Under current
24 Pennsylvania laws, the supplier would have an
25 obligation to recall a product if it

1 subsequently discovered information intending to
2 show it was dangerous, or at least to
3 disseminate to the ultimate customer information
4 that it acquired problems with use of the
5 product. This bill could be read to remove that
6 requirement that a manufacturer, supplier, would
7 no longer be required to disseminate
8 subsequently acquired information.

9 Is it common in the industry, since
10 machinery and equipment is in service so long,
11 for subsequent information to be disseminated
12 and result in modification of the machinery or
13 changes to improve safety based on experience?

14 MR. GALLAGHER: I can't say to the
15 extent that recall programs exist with product
16 manufacturers. The National Safety Council has
17 recommended for over 15 years that manufacturers
18 of products establish product safety management
19 programs which include a written recall program.
20 I have dealt with some attorneys in litigation
21 who ask the Defendant for a copy of their
22 written recall program and we have never
23 received a copy of a written recall program.

24 I would think if you made a search
25 and called up some of the manufacturers that you

1 know and ask them to send you a copy of their
2 recall program, their written recall program
3 recommended for well over 15 years, if they can
4 send you one then they should be able to trace
5 their products also. They should know who buys
6 their products to the extent feasible.

7 They should also know how they are
8 going to communicate with their users in the
9 event that they find alternative to the design
10 that was found to be defective. That would mean
11 to advertise in the journals, to know who their
12 customers are, and know which percentage of
13 their customers they can locate and which they
14 can't. All that type of information is rarely
15 given to the Plaintiff's attorney in discovery.

16 That type of information would defend
17 them against these lawsuits. The recommen-
18 dation, it seems to me, by the National Safety
19 Council has not been followed by a great deal of
20 the manufacturers; not all of the manufacturers.
21 Some of them have excellent programs. I don't
22 want to sound one-sided.

23 I come across the most scrupulous and
24 conscientious of manufacturers who, indeed,
25 follow the guidelines established by the highest

1 authorities., That's not the rule. The rule is
2 that, most of the time they can't present
3 information to take them off the hook.

4 MR. ANDRING: Thank you.

5 CHAIRMAN COHEN: Nevin Mindlin.

6 MR. MINDLIN: Thank you,

18
7 Mr. Chairman. I too am a little confused. As I
8 understood this was to deal with product
9 liability. Is that generally what we are
10 discussing or are we talking about workplace
11 torts?

12 MR. MORAN: Products are in the
13 workplace.

14 MR. MINDLIN: Dealing with products
15 in the workplace but not the workplace itself.
16 In other words, a product brought into the
17 workplace, a manufactured product utilized by an
18 employer as opposed to what may take place
19 between the employer and employee? Is that my
20 understanding of what you're doing? Products
21 liability we are talking about?

22 MR. MORAN: Sure.

23 MR. MINDLIN: I'm trying to get an
24 understanding of that. If that's the case, I'm
25 a little curious and like to know for my own

1 edification. There was a couple questions
2 raised about the applicability of OSHA standards
3 with regard to various equipment. In your
4 testimony there was one at least that you
5 indicated clearly that it did meet OSHA
6 standards and others that indicated that they
7 did not -- It's not clear whether or not they
8 met them at the time of their manufacture or
9 whether OSHA standards had changed after the
10 purchase.

11 I'd like to get an understanding, if
12 one accepts at face value the legal concept that
13 OSHA deals with what are recognized hazards. If
14 an employer of individuals purchases a product
15 that at the time of its purchase met OSHA
16 standards and an injury occurs despite the
17 safety precautions that are required by law, and
18 a standard course of law, is there a tort there?

19 MR. MORAN: I'm not a lawyer but I
20 think so.

21 MR. GALLAGHER: You're saying it was
22 manufactured in violation of OSHA standards?

23 MR. MINDLIN: No, it was manufactured
24 according to OSHA standards. It met what were
25 recognized as health and safety standards in

1 order to obviate or recognize hazard.

2 MR. GALLAGHER: Sir, I'm not a lawyer
3 but as I understand the law today is that, if
4 the product did not comply with OSHA standards,
5 that is not a bar from a liability suit. The
6 state of the art is not a bar. It's a defense,
7 but it doesn't mean that the jury might not
8 recognize that the standard within OSHA or the
9 National Consensus Standard was inadequate.

10 MR. MINDLIN: I'm asking your
11 opinion. Do you believe that's correct?

12 MR. GALLAGHER: My opinion is not
13 important. As a matter of fact, juries have
14 decided in favor of Plaintiffs in products that
15 have complied with OSHA standards and industry
16 standards.

17 MR. MINDLIN: Assuming that's your
18 opinion. The next question is, the product
19 meets with OSHA standards at the time of its
20 manufacture. The standard changes at some later
21 time. Whose responsibility is it to bring that
22 equipment up to standard?

23 MR. GALLAGHER: Both the manufacturer
24 is responsible under -- not legally, but under
25 prudent behavior --

1 MR. MINDLIN: I'm talking under OSHA.

2 MR. GALLAGHER: OSHA has authority
3 only over the employer of the employee.

4 MR. MINDLIN: If that equipment is no
5 longer meeting OSHA standards; it had at the
6 time of its manufacture, but it is no longer
7 meeting OSHA standards, you're saying that it's
8 the employer's responsibility at that point to
9 bring that equipment --

10 MR. MORAN: Under OSHA.

11 MR. MINDLIN: -- To refit that
12 equipment.

13 MR. MORAN: Under OSHA.

14 MR. MINDLIN: They are legally
15 required to bring that machinery up to
16 standards.

17 MR. GALLAGHER: Yes, sir. One of the
18 problems with that, is that, a machine
19 manufacturer employs design engineers. Employs
20 all the full staff of (inaudible word) engineers
21 as well as statisticians, et cetera, to make
22 that sure they manufacture a reasonably safe
23 product. The person who purchases the machine
24 manufactures a different product and should be
25 interested in the safety of that product that

1 they manufacture.

2 Unfortunately, especially the small
3 businessman, assumes that the products they buy
4 are reasonably safe because they were purchased
5 that way. That is not always true. Many times,
6 and even until today, people will manufacture
7 equipment that's in violation of OSHA standards,
8 in violation of ANSI standards (American
9 National Standards Institute) and it results in
10 injury and the employer thinks that they have
11 complied with OSHA and they were providing a
12 safe work environment when, indeed, they were
13 not.

14 MR. MINDLIN: Thank you.

15 CHAIRMAN COHEN: Are there other
16 questions?

17 (No audible response)

18 CHAIRMAN CALTAGIRONE: Gentlemen,
19 thank you, and ladies.

20 Ted Walters and Eleanor Filoon.

21 I'd like to also submit comments and
22 some documentation from Representative Fleagle
23 for the record.

24 (Letter dated 10/24/89 from
25 Representative Fleagle was submitted for the

1 record)

2 CHAIRMAN CALTAGIRONE: For benefit of
3 the House Judiciary members that are here, when
4 we break for lunch I'd like to see you just
5 briefly in the Speaker's office to give you an
6 update on the Camp Hill situation.

7 Identify yourselves for the record.

8 MR. WALTERS: Good morning. Ladies
9 and Gentlemen. My name is Ted Walters. I'm
10 President of an activist group. We are called
11 Pennsylvania Citizens for Workers' Compensation
12 Reform. I'd like to speak on two subjects.

13 The first is just a little factual
14 background on the Norelco clean water machine.
15 This is a liability case. From 1982 to 1986
16 agencies of the Federal Government, Consumer
17 Product Commission, Food and Drug
18 Administration, Consumer Report, Environmental
19 Protection Agency and the Federal Trade
20 Administration has told Norelco to take this off
21 the market, to no avail.

22 We were enforced, my wife and I, to
23 file a class action suit benefiting every man,
24 woman and child who had purchased and proof of
25 this machine. Through this class action suit,

1 if they would incur any damages due to the
2 cancerous substance put in this machine, in
3 these tinted filters, they could open up and sue
4 individually for the damage to this chemical
5 exposure, which was misrepresented. It was
6 stated that the clean water machine would purify
7 the tap water. Instead, it put a substance, a
8 chemical known as methylene chloride, which is a
9 cancer-causing agent.

10 I'd like to speak on the second
11 thing.

12 CHAIRMAN CALTAGIRONE: All right.

13 MR. WALTERS: Second thing which is
14 very bad, it's called asbestos, the road to a
15 dusty death. We seen pictures of a very nice
16 video of 20/20. It belittled the asbestos
17 worker for the sake -- They are saying the
18 courts are filled with these cases of asbestos
19 and it doesn't mean much. We have known about
20 the dangers of asbestos to the human body for 75
21 years; first being in 1907 in Great Britain. It
22 hit the United States shortly after the first
23 World War in 1918.

24 In 1928, two of the first death
25 resulted asbestos cases were shown in the United

1 States. During World War II we had over one
2 million men and women working around the clock
3 in our shipyards. They were sawing this
4 substance and contaminating different types of
5 people. This generation has mainly passed
6 away, most likely due to the asbestos exposure
7 cancer but not detected at that time.

8 In 1974, Dr. Ken Smith, a medical
9 supervisor of the then John's Mandal Corporation
10 evaluated 708 workers and found that 435 workers
11 had lung changes.

12 The positions of these conglomerates
13 who manufactured the asbestos and supplied the
14 asbestos and used the asbestos products, and
15 this was their position, don't tell the workers
16 of the lung changes. Let them get sick and take
17 off work because of their association with the
18 asbestos or die from asbestosis.

19 Under House Bill 916's 15-year period
20 of repose, countless victims from asbestos
21 exposure, chemical exposure and other industrial
22 diseases and faulty equipment, and so on, could
23 not be compensated for the loss of life and
24 health.

25 House Bill 916 is an inhumane,

1 anti-worker, un-American bill. We, the workers
2 of this Commonwealth, have been lied to. Our
3 health and our well-being has been seduced by
4 our employers. I'd like to note we have injured
5 workers in the audience today, injured workers
6 from our group, some who have asbestosis who are
7 dying on their feet; some have lymph gland
8 cancer who are dying on their feet; some from
9 toxic chemical spills which wouldn't come down
10 in 15 years. It will take 20 or 25 years for
11 them to come down with these illnesses.

12 Employers sent them into an unsafe
13 workplace unprotected and even lied to them,
14 said, there's no danger in our health. I'm one
15 of these victims. Our present Workers'
16 Compensation system is poor compensation for
17 these terminal occupational diseases. Most of
18 these diseases don't show up until 20 to 25
19 years down the road. The 15-year period of
20 repose under House Bill 916 would deny most of
21 these victims of their due compensation.

22 As President of the Pennsylvania
23 Citizens for Workers' Compensation Reform, I
24 strongly urge you to defeat House Bill 916 and
25 support and pass House Bills 1012 and 1030, the

1 Workplace Safety Bills. Pennsylvania workers
2 want to succeed, not just survive. Thank you
3 very much.

4 MS. FILOON: My name is Eleanor
5 Filoon. I'm President of Injured Workers of
6 Pennsylvania.

7 We oppose this bill, not only for
8 workers, but I think that every person that uses
9 products would be subjected to loss of their
10 health, for basically the protection of the
11 insurance companies. Who's going to benefit by
12 this bill? Certainly not the workers; certainly
13 not people at large. We are the victims of the
14 various things that this bill includes. We need
15 protection by this legislature to really look
16 into what this bill is going to do.

17 Let me give you an example of what
18 happens in Workers' Compensation. In Workers'
19 Compensation the legislators decided that they
20 didn't want to have double recovery for injured
21 workers if there was a third-party suit
22 involved, which is basically what you're talking
23 about here where it is a machine that could
24 cause the injury -- a defect in the machine.
25 So, they said they don't want the injured worker

20

1 to have double recovery. They will collect
2 Workers' Compensation but nothing else.

3 Under the third-party suit they said
4 we will have subrogation. The employer won't be
5 subrogated. The insurance company will be
6 subrogated. That's double recovery for the
7 insurance company. They have already received
8 the premium collecting for the insurance. Now
9 what they are saying is, when the injured worker
10 gets injured, now the injured worker can't
11 collect the benefits; the insurance company is
12 going to collect the benefit. They have
13 collected twice already and the injured worker
14 is injured but not being compensated. What
15 makes sense in that?

16 In fact, the injured worker is the
17 only party that can take the case into the
18 courts on a third-party suit. The insurance
19 company can't do it. The employers can't do it.
20 Yet, if there's an award of benefits for pain
21 and suffering in a third-party suit, that award
22 has to be paid in subrogation to the insurance
23 company for repayment of anything that they have
24 paid out.

25 Workers' Comp doesn't provide pain

1 and suffering. It just doesn't make sense. Who
2 is this bill for? It's for the insurance
3 companies.

4 Are the premiums of the employers
5 going to go down? Are the premiums of the
6 manufacturers going to go down? No. Is the
7 liability for the injury going to be paid? No.
8 So, who is going to profit? The insurance
9 companies; strictly the insurance companies.

10 The premiums on the insurance is
11 going to go up and up just as it always has.
12 They have recently requested, and it's before
13 the Insurance Commissioner, an increase of 30
14 percent -- 5 percent in insurance rates on
15 workers' compensation against every employer,
16 but there's no increase in benefits to the
17 Claimant to substantiate that.

18 Over 28,000 people that are injured
19 in Pennsylvania are denied their benefits by the
20 insurance companies. The administration does
21 not enforce the laws against the insurance
22 companies and it is we, the injured workers, who
23 have are subjected to the harassment by the
24 insurance companies and the lack of
25 administrative ability to enforce any law in

1 Workers' Compensation against the insurance
2 companies for the Claimants.

3 We have a few people. There was a
4 young man, Chuck his name was, he was
5 approximately 19. He was at work. He worked in
6 sheet metal, had four of his fingers cut off.
7 The man collected a total of \$1300, and had four
8 fingers removed by a machine that was
9 defective--\$1300, a young man. Would you like
10 to walk around like that? I don't think so.

11 The man is dead now. A few years
12 later he took his life. How much was that a
13 part of what this man felt; the fact that his
14 four fingers in such a severe accident and the
15 misery that it caused this boy. How much of
16 that was to blame for the suicide?

17 We have another member in our group,
18 the man is probably about 48 years old. His
19 injury occurred in 1976. He had a third-party
20 suit. The chair he was sitting on -- He was a
21 guard. The chair he was sitting on was
22 defective. The chair broke, caused injury all
23 through his arm, up his shoulder and into his
24 neck. Third-party suit Workers' Compensation,
25 they settle for \$35,000.00. We are not talking

1 these millions that they are showing on this
2 20/20. \$35,000.00. You know what he got of
3 that \$35,000.00? Nothing. Because, what has
4 happened is, there was a contract that they had
5 made that the insurance company would settle for
6 \$10,000 in subrogation.

7 In this latest appeal the Workers'
8 Compensation Appeal Board said the insurance
9 company cannot lessen the amount of the
10 subrogation than the amount that they actually
11 paid in the claim. Ten thousand was to go to
12 them. Eight thousand was to go to the attorney
13 and he was to get the balance of what,
14 \$14,000.00. What happened was, the Referee said
15 no. You have to subrogate the insurance company
16 for the entire amount.

17 Understanding now, first of all, the
18 insurance company can't take a case to court.
19 It's not a -- an injured party can't take the
20 case in court and neither is the employer. Only
21 the injured worker can take that case in court.

22 Why take a case in court? Because
23 under Workers' Compensation law, everything that
24 is paid is going to be paid back to the
25 insurance company so the insurance company can

1 have a double recovery. What does the Claimant
2 get? Well, if you don't know anything about
3 Workers' Compensation, I would suggest that you
4 make an investigation, because what they get in
5 Workers' Compensation is a lot of harassment, a
6 lot of run around.

7 This Mike that had the \$35,000
8 settlement, his case is still going on. There
9 was just a remand from the Workers' Compensation
10 Appeal Board, second remand -- we are not
11 talking about first -- second remand. Since
12 1976 this case has been bounced back and forth
13 between the Referees and the Workers' Comp-
14 sation Appeal Board trying to get a decision on
15 this settlement.

16 It's before the Referee. He's waited
17 over six months now and he's still waiting for a
18 hearing date on this one issue. This man is in
19 such bad shape now that he expects to die any
20 day with all of the harassment he has gone
21 through. What has he gotten? So little it's
22 ludicrous, and we are talking about the
23 liability.

24 Let's look into the Workers'
25 Compensation law. Let's make it so, yes, if the

1 employer deliberately does something to cause
2 that injury, that this man does not have to just
3 be subjected to years of harassment by the
4 Workmen's Compensation and insurers. That this
5 man is going to profit for pain and suffering,
6 and that this man will get attorney fees and
7 there'll be punitive damages in there.

8 Workers' Compensation is not
9 sufficient, and in particular, what we go
10 through in Workers' Compensation I beg you
11 people, please look into this. Right now we
12 have nothing; and we need not less, but more
13 cases taken into the courts so that our rights
14 will be taken care of. They are not done now.
15 Nobody is protecting the injured worker and we
16 need more trial attorneys to be in there taking
17 these cases, making these demands that these
18 cases are made and payments is made as is
19 required by the Act that you put into effect.

20 We need somebody to sit down and say,
21 yes, they will be compensated for these
22 deliberate injuries that are destroying Penn-
23 sylvania citizens, your constituents and injured
24 workers, them and their families. I thank you
25 very much for hearing me.

1 CHAIRMAN CALTAGIRONE: Thank you.

2 Questions from members?

3 (No audible response)

4 CHAIRMAN CALTAGIRONE: Thank you very

5 much. We appreciate your testimony.

6 Dr. Henderson.

7 Representative Steighner will make

8 brief remarks.

9 REPRESENTATIVE STEIGHNER: Thank you,

10 Mr. Chairman. Chairman Caltagirone, on behalf

11 of Chairman Cohen, members of the House Labor

12 Relations Committee and House Judiciary

13 Committee, I appreciate this opportunity to

14 present to you this morning Professor James

15 Henderson of Cornell University Law School.

16 Professor Henderson is considered one

17 of the leading authorities on product liability

18 in this country. He's co-author of the most

19 widely used case book on product liability.

20 He's currently involved in putting together a

21 five-volume treatise on product liability. I

22 think you will find his testimony this morning

23 enlightening, informative and succinct on the

24 legislation that is before you concerning

25 product liability. Thank you, Mr. Chairman.

1 CHAIRMAN CALTAGIRONE: Thank you.

2 PROFESSOR HENDERSON: I'm Jim
3 Henderson. As he just said I teach law at
4 Cornell Law School. I have done this over the
5 past 25 years, more or less, at several law
6 schools. I'm coming here today -- I'm from out
7 of town and so I'm an expert. As you saw when I
8 sat down, I'm sure the biggest expert in
9 products liability in this country, maybe the
10 world.

11 I appear on behalf of the
12 Pennsylvania task force on product liability
13 which supports passage of HB 916. I submitted
14 to you some written testimony, and, with your
15 permission, would like it to be made part of the
16 record. In that written testimony I indicate
17 I'm not only pleased to be here, but I'm
18 excited. I'm excited because Pennsylvania court
19 decisions in products liability present unique
20 problems that require fixing and I'm partici-
21 pating in this modest way in the process of
22 considering what changes will occur.

23 Pennsylvania products liability law
24 is not just unique. It is patently perverse and
25 wrong headed. Among scholars like myself, your

1 highest court is famous for the confusion its
2 decisions have generated. In that five volume
3 treatise that I'm doing for Little-Brown, the
4 publisher in Boston, I have, as you'd imagine, a
5 chapter in product design liability and
6 subsections on the various standards that courts
7 in this country have used to decide whether
8 designs are defective.

9 I have 11 standards. Ten of them I
10 refer to generically, reasonableness, consumer
11 expectation and the sort. Frankly, they are
12 shadings on one another. One of them I have
13 labeled "The Pennsylvania Approach". You shall
14 be honored and memorialized in this treatise as
15 having produced a unique and I think
16 unmanageable and incoherent approach to product
17 design liability and, more generally, products
18 liability.

19 Let me explain briefly why I think
20 Pennsylvania law is pathological in a number of
21 respects and what Bill 916 would do to remedy
22 the situation. I start with a proposition to
23 which no one objects. Suppliers of products are
24 strictly liable for the harm proximately caused
25 by product defects. Section 402 (a) of the

1 Restatement of Tort second established that
2 proposition 25 years ago and Pennsylvania courts
3 adopted it soon thereafter. The basic notion is
4 common sense itself. For a supplier to be
5 liable in tort, something must have been wrong
6 with the product. I haven't heard anyone
7 contradict that so far today. Products can have
8 something wrong with them in several different
9 ways. The two ways that are most problematic
10 are product design defects and defects due to
11 failure to instruct or warn about hidden risks.

12 They are difficult because the courts
13 have got to engage in the process of developing
14 standards for defectiveness. A majority of
15 jurisdictions have adopted standards for design
16 and failure to warn defects that require
17 Plaintiffs to show something that the supplier
18 could practically and feasibly have done to make
19 the product safer. Indeed, that was the thrust
20 of most of the testimony from labor people
21 concerned with safety in the workplace.

22 I stress the words practically and
23 feasibly because every product ever distributed
24 in this world could be made safer at any cost in
25 materials or inconvenience. Automobiles could

1 be made safer by selling them without engines.
2 Therefore, they would not be able to move or
3 hurt people, but no one would want engineless
4 cars.

5 Jurisdictions, everywhere but here,
6 sensibly require the Plaintiff to show that an
7 alternative method of design or warning was
8 available at the time of distribution and was
9 feasible for the Defendant to adopt. Cars
10 without engines are not defective because
11 engineless cars are not feasible alternatives.

12 In 1978, in an infamous decision in a
13 case entitled Azzarello v. Black Brothers
14 Company, your high court steered Pennsylvania
15 law out of the mainstream into -- incoherence is
16 the only word that comes to mind. In effect,
17 they substituted the garbled form of absolute
18 liability with a version of strict liability
19 adopted by most other jurisdictions, and clearly
20 intended by the framers of 402 (a).

21 What I'd like to do is read you a
22 quote from that infamous case and see what you
23 think. Here is an instruction that every jury
24 in every case in this Commonwealth is given
25 routinely. "The supplier of a product is the

1 guarantor of its safety. The product must
2 therefore be provided with every element
3 necessary to make it safe. If you find, jury,
4 that the product at the time it left the
5 Defendant's control lacked any element necessary
6 to make it safe or contained any condition that
7 made it unsafe, then the product was defective
8 and the Defendant is liable for all harm caused
9 by such defect."

10 Now, it seems to me that, clear
11 enough, that this standard abandons the anchor
12 of feasibility--and your courts have made it
13 very clear that's what's going on in the
14 mainstream approach--and substitute something
15 which virtually every academic observer of
16 products liability law, and I'm quite certain
17 judges and jurors in this Commonwealth as well
18 have found it incoherent. It's a garbled form
19 of absolute rather than merely strict liability.

20 What I find interesting, and in a way
21 ironic, is that, Mr. Moran when he spoke
22 condemning the products we saw on the slides
23 repeated the phrase, "unreasonably dangerous
24 product" at least 20 times. If I had to
25 characterize the thrust of what he had to say,

1 and I embrace it and bear hug it, is that, if
2 you produce an unreasonably dangerous design and
3 that unreasonably dangerous design hurts
4 somebody you ought to pay. But are you ready
5 for this? Your courts for some 12 years have
6 denied that unreasonably dangerous has anything
7 to do with design and warning cases.

8 Do you know what this Bill before you
9 does? Several things. It re-introduces the
10 unreasonable dangerous design concept into your
11 law. So, honest to goodness, for 20 minutes --
12 moved by what I heard and very much moved by the
13 stories and I'm not trying to trivialize them a
14 bit, I heard him making a point in pitch for the
15 heart of this Bill, bring back "unreasonably
16 dangerous" and you will be in the mainstream.
17 Keep it out in the corridor and you're headed
18 for unnecessary grief of the sort that we began
19 with this morning.

20 When I first read the Azzarello
21 opinion, understand the one that I read to you
22 that took the "unreasonable danger" out of the
23 design arena, I wrote and published not one but
24 two articles condemning that decision. I did
25 that in 1978 and 1979. I'm emphasizing that so

1 you don't think that I came to this conclusion
2 recently. I've believed this ever since your
3 court did this.

4 Let me read you a brief quote from
5 what I wrote in 1978, taken literally, "The test
6 in Azzarello is absurd and unworkable. No
7 sensible person would insist that a product
8 designer must include every precaution however
9 costly. At bottom, the designer alternatives to
10 which Plaintiffs points in these cases must be
11 shown somehow to have been feasible or sensible
12 regardless of whether one speaks in terms of
13 unreasonable danger." What I was trying to say,
14 if Pennsylvania wants to play a verbal game,
15 fine, but by God, don't take this seriously. I
16 tell you that for 12 years your courts have
17 taken it serious with a vengeance.

18 In 1987 your high court had an
19 opportunity to revisit Azzarello quite self-
20 consciously. When I saw it coming, and I got
21 the event sheets and began to read the opinion
22 in Lewis v. Coffing Hoist, my heart skipped a
23 beat. I said, "Now we are going to get this
24 right. Thank goodness." Well, no, sir, far
25 from it. Your court pushed Azzarello, your high

1 court, a step or two further.

2 Evidence of how a certain type of
3 product was generally designed and the relevant
4 industry was not -- simply not the legal
5 standard, and I think that's mainstream. Custom
6 ought not prevail as the standard. It wasn't
7 even admissible because it was completely
8 irrelevant because your court has eschewed
9 unreasonable danger completely. This is
10 absolute liability, not strict.

11 Two justices, this is Dissenate
12 (phonetic) and Lewis. Justice Hutchinson begins
13 his dissent with words that I cannot recall
14 having seen an appellate opinion in tort, "I am
15 obliged in the words of popular song to speak
16 out against the madness." I got misty-eyed
17 reading that. Of course, five of your seven
18 justices are further in the trenches the other
19 way.

20 I ought at this point to have you
21 bear in mind that I'm an academic from out of
22 state and I will not directly be affected by
23 what you do in this matter. If you enact
24 legislation my treatise will reflect that fact.
25 If you do not it will reflect that fact. I

1 think the treatise will be more interesting if
2 you don't act and leave the law the way it is.

3 In fact, I think lawyers will need my
4 treatise more than if you make sense of Penn-
5 sylvania law, so I'm here hurting the sales of
6 my treatise in the future; but I don't want you
7 to make a mistake. Your highest court has made
8 your states famous among my fellow products
9 liability mavens. What to do, if anything? I
10 suggest that you enact legislation before you or
11 very close to it.

12 Why a statute? Well, it's my sincere
13 and considerate judgment that your high court is
14 not going, until I retire, to do anything about
15 this. They seem perfectly happy in their
16 confusion. Even if I thought they might, I
17 would probably be retired and my son teaching
18 law before it ever happened. You're here. You
19 have got something going. Now you ought to do
20 it.

21 Why this particular statute? I have
22 testified before other legislatures regarding
23 other proposals. I have refused to do it a
24 couple of times and a couple of times I have
25 insisted on major overhauls before I would agree

1 to support, but I can't remember a time when a
2 Bill, when I first read it struck me with the
3 resonance that this one does. It's aimed right
4 at the problems. It's restrained. I'm
5 perfectly willing, when I quit in a minute, to
6 take question on the provisions, here or later.
7 I have gone through them rather carefully. You
8 have the best chance I have ever seen to do it
9 right and to make some sense out of it.

10 The concrete example I would turn to
11 is 8374. This is on page 8 of the Bill. I was
12 going to read through it, but I'm going to save
13 time by simply saying, it speaks to the short-
14 coming that's at the heart of your Juris
15 Prudence. Plaintiffs, if this becomes law, will
16 have to show feasible reasonable alternatives.
17 That's, in my opinion, what's basically wrong
18 with what you're doing, but your court is doing
19 it in any event. I would be happy to respond,
20 as I say, to other provisions.

21 I want to close making one further
22 point. Although I'm very weak on the details, I
23 understand that you -- and I understand more
24 clearly now having heard this morning's
25 testimony, share a concern with what I refer to

1 as workplace safety. I share the concerns.
2 From the age 16 through my second year in law
3 school I worked summers in a food processing
4 plant. I have my own little stories to tell.
5 Thank God I came out with my fingers, and others
6 I knew quite well didn't, and I think it's a
7 mess.

8 In the course of these hearings you
9 have heard people say that products liability
10 laws made the workplace safe in Pennsylvania. I
11 didn't read that fellow Moran to say that was
12 the only thing, but he did stress it as an
13 important factor. I hope that's the case. I
14 mean, what are we doing after all.

15 My point is that, passage of this
16 Bill will do nothing to reduce the incentives
17 for producers of machinery and the like to take
18 care in the design of their products and the
19 marketing of them. If you look at 8374, if
20 feasible alternatives are available, and I swear
21 that's every case we saw this morning, then
22 manufacturers, if they fail to adopt those
23 alternatives, are going to be liable under this
24 Bill.

25 I have to make an exception for the

1 repose business, and we can talk about that if
2 you'd like, but other than that I don't agree
3 with the suggestion that the voluntary
4 assumption of risk is going to lay a glout on
5 workplace litigation. It never has to this
6 date, and Representative Heckler made the point
7 that this law doesn't change it. It simply
8 leaves it where it is. It's not a threat to
9 workers in the workplace environments when they
10 sue manufacturers. I wouldn't put any faith in
11 the claims that this is going to kill incentives
12 for manufacturers to take care.

13 Indeed, moved as I was by the
14 testimony, it really went right by the problem
15 that you are confronting now. A lot of it had
16 to do with worker comp. May I say, and I will
17 close with this observation, as an outsider I'm
18 somewhat baffled why you would be mixing in one
19 hearing worker comp problems and products
20 liability problems. I'm not telling you they
21 aren't related, and I'm not telling you one is
22 more important than the other. I could be
23 persuaded they are both important.

24 By gosh, you have a Workers' Comp
25 system in a statute entirely separate from this.

1 You have a long and sometimes proud and
2 sometimes less than that history in dealing with
3 Workers' Comp. It's a very complex matter
4 without going into it. I didn't come here to
5 talk about worker comp. I came here to talk
6 about my main field, products. I'm a little
7 puzzled as to why they get mixed up in a hearing
8 like this.

9 I heard some people condemn the Bill
10 before you because it's not going to solve
11 worker comp problems. It's not going to prevent
12 the next war either. There are some things this
13 bill isn't going to do, but one thing I think it
14 will do is, it's going to make Pennsylvania law
15 sensible for the first time in half of my
16 career.

17 Thank you, and I would take questions
18 if you have some.

19 CHAIRMAN CALTAGIRONE: Thank you,
20 Doctor. Questions?

21 REPRESENTATIVE McHALE: Thank you,
22 Mr. Chairman. Doctor, I found your testimony to
23 be --

24 PROFESSOR HENDERSON: I dare say, I'm
25 not a doctor. I went to law school when you got

1 a Bachelor of Laws. They sent me, Harvard did,
2 a little certificate. For ten bucks I could
3 have gotten a JD. It may have happened to
4 somebody else in this room. I said, "The hell
5 with it. I'm going to die a bachelor of law
6 person." So I'm not a doctor.

7 REPRESENTATIVE MCHALE: Professor, I
8 appreciate that clarification. I do have a JD
9 and you can call me doctor.

10 PROFESSOR HENDERSON: God bless you.

11 REPRESENTATIVE MCHALE: Professor, do
12 you support the concept of strict liability as
13 it is traditionally defined under
14 Section 402 (a) of the restatement?

15 PROFESSOR HENDERSON: Sure. May I
16 say this bill does too. This is a, let's have
17 Pennsylvania go to strict liability measure in
18 my view. That's what this is and get the heck
19 out of the mess.

20 REPRESENTATIVE MCHALE: That's how I
21 heard your testimony. Frankly, I'm a little bit
22 confused by that because, as I look at Section
23 7102 on page 3 of the bill, the concept of
24 comparative responsibility is introduced in
25 Pennsylvania law. At least as I understand

5 1 strict liability, that kind of concept raises a
2 defense would not be traditionally allowed.

3 Would you comment both on strict
4 liability and how that section would impact upon
5 it?

6 PROFESSOR HENDERSON: Yes. Some
7 states have, in my opinion, unfortunately,
8 reasoned thus: Negligence is a doctrine that
9 comparative fault is comfortable with because
10 fault is negligence. When you move to strict
11 liability, comparative fault or negligence is,
12 in its terms, inapplicable.

13 REPRESENTATIVE MCHALE: If I can
14 interrupt, that's the reason for my confusion.
15 That was black letter law when I went to law
16 school. Has that changed?

17 PROFESSOR HENDERSON: Yes, it really
18 has. There are a lot of jurisdictions now, and
19 if you like I can brief this later, that are
20 very merrily and happily applying comparative
21 fault notions to strict liability cases. What
22 this would do is bring you in line with that.

23 It's a complex issue. There are many
24 reasons. The one I urge you not to adopt, don't
25 sit still for the purely formal argument that

1 since this is negligence and this is strict we
2 can't do it, because you can.

3 REPRESENTATIVE MCHALE: When I took
4 the bar exam in 1977, that pure approach is what
5 got you through the bar exam.

6 PROFESSOR HENDERSON: Okay, but we
7 got you your JD.

8 REPRESENTATIVE MCHALE: Yes, it
9 certainly did. That's doctor, Professor.

10 PROFESSOR MCHALE: God bless you.

11 REPRESENTATIVE MCHALE: I truly am
12 not familiar with the change in the case law in
13 the intervening years. I'd be interested to
14 know what the predominant approach is among the
15 majority of jurisdictions. I truly don't know
16 what the answer to that question is, as to how
17 many jurisdictions allow a Defendant to raise
18 fault as a defense and how many jurisdictions
19 rely on what I will refer to as the more
20 traditional, perhaps outdated, approach of
21 strict liability which would preclude such a
22 defense. I'd like to know how the jurisdictions
23 break down.

24 PROFESSOR HENDERSON: I'm not, as
25 brilliant as I may appear, a walking

1 encyclopedia. I cannot right now spout off my
2 mouth the printout of all the jurisdictions. I
3 could do that if you give me just a little bit
4 of time when I get home.

5 My impression is, that the cases, the
6 jurisdictions in this country are split. The
7 trend is toward the adoption of comparative
8 fault. Most of the academic talk is one hundred
9 percent behind that move for reasons we can
10 articulate and there seems -- The cases in
11 which this is most important are ones that I
12 referred to earlier, design and warning cases.

13 The manufacture and defect cases and
14 we all kind of know what those are, are just not
15 problematic. This bill doesn't really speak to
16 them directly. If that's all we had we would
17 never be here. It's the design cases where you
18 condemn every single one of them, all ten
19 million of them by implication when you condemn
20 one. That's where the comparative fault idea
21 seems to flourish. I would support it. My own
22 analysis suggests it's time.

23 You asked me how is it done? How do
24 you think about comparative fault in a strict?
25 It's mostly causation. If you look at the

1 section that you asked me to respond to, you'll
2 see that that's just what the drafters had in
3 mind. Did the behavior of the Plaintiff
4 arguably, unforeseeable and untoward, make a
5 substantial factual contribution to the harm,
6 and if it did, we ought to reduce the recovery.
7 We ought to have some incentives on people like
8 me--I'm probably the clumsiest person in the
9 room--to invest moderately in care.

10 I don't know of a jurisdiction that
11 pushed it real hard, but it ought to be in the
12 law.

13 REPRESENTATIVE McHALE: As a matter
14 of theory, I have no problem with that. Having
15 spent some time in the courtroom, I have
16 concerns about the practicalities of that
17 approach. I'll touch on that in just a moment.

18 You indicate you're not quite sure
19 off the top of your head. I don't know either
20 off the top of my head how jurisdictions break
21 down in terms of the legitimacy of raising a
22 defense of comparative fault.

23 Do you know, for instance, what the
24 rule of law is among most of the urban states,
25 particularly those in our part of the country?

1 Can you raise it as a defense in New York? Can
2 you raise this defense in New Jersey or
3 Maryland? Is there any trend in this part of
4 more urbanalized or industrialized part the
5 nation?

6 PROFESSOR HENDERSON: I'm going to
7 have to check. You gave me that much, Doctor.
8 What I will do is check on it, but my impression
9 is that, yes, in the state similar to yours,
10 that would be the way to go--the comparative
11 fault way.

12 REPRESENTATIVE MCHALE: Would be the
13 way to go or is the way to go?

14 PROFESSOR HENDERSON: Is and would
15 be.

6
16 REPRESENTATIVE MCHALE: The concern
17 that I have with that approach is a practical
18 one. That is, if we require a Plaintiff who has
19 been injured to prove not only the traditional
20 elements of a strict liability claim against a
21 Defendant, often, frankly, a Defendant whose
22 financial resources are superior to the
23 financial resources of the injured Plaintiff.
24 And, in addition to that, we force the Plaintiff
25 to rebut claims that are raised by the Defendant

1 as to the Plaintiff's own fault, I envision
2 years of discovery and complications in the
3 litigation of that claim that we do not now
4 have.

5 As a practical matter, it's going to
6 make it a whole lot tougher, no matter how
7 meritorious the claim the Plaintiff might have
8 for that Plaintiff to recover; not because
9 justice isn't on his side, but money and time
10 may not be on his side. If you can respond to
11 that, I'd appreciate it.

12 In conjunction with that, do you or
13 have you represented Plaintiffs in products
14 liability cases?

15 PROFESSOR HENDERSON: Well, how would
16 Agent Orange strike you starting off?

17 REPRESENTATIVE MCHALE: Pretty
18 significantly.

19 PROFESSOR HENDERSON: I engaged in
20 that for two and half years, with no expectation
21 of any compensation. I did it because I thought
22 veterans were getting screwed. The Veterans
23 Administration, if you know, turned their backs
24 on these people and I worked my fanny for two
25 and a half years fighting what we call the paper

1 war.

2 REPRESENTATIVE MCHALE: That's an
3 excellent example. You and I agree on that
4 substance and point of law. In that case,
5 bringing it back to my question here, did the
6 manufacturer of dioxyn raise a claim of
7 comparative fault, i.e., that the veterans knew
8 what they were doing or acted in a manner that
9 contributed to their own injury? Was it raised
10 in that case? And if it were raised in that
11 case, would it have complicated your job
12 unfairly?

13 PROFESSOR HENDERSON: We had not
14 reached the stage. That case had been set up to
15 be tried in a seriatim fashion, with the
16 causation issue one of the very first, because
17 without cause there's no claim. I do not recall
18 having seen the Plaintiff's fault issue being
19 raised. I do not recall briefing it and I would
20 have been there when we did. Whether some of
21 the lawyers --

22 You see, we were the academic team,
23 and they got us for nothing. We did a pretty
24 good job, fighting what I call the paper war;
25 you know what I mean, endless papers, briefs.

1 REPRESENTATIVE MCHALE: It's terribly
2 expensive.

3 PROFESSOR HENDERSON: It buries you.
4 When we finally filed with the Court the work we
5 had done, I swear it was a stack four feet high
6 without any duplications.

7 REPRESENTATIVE MCHALE: I'm worried
8 that this bill would take that four-foot stack
9 and triple it, particularly in terms of the
10 burden placed on the Plaintiff. I'll give a
11 practical example of the litigation you raised.
12 I don't want to monopolize things so I'll
13 conclude at this point.

14 In the case you described, Agent
15 Orange, I think it would have been ludicrous if
16 the manufacturer of dioxyn had claimed, for
17 instance, that the soldiers in the field were
18 told not to drink out of streams; that they were
19 told to use water that was supplied through the
20 normal logistics and systems; but that, in fact,
21 one of your clients, on a very thirsty -- on a
22 very hot day, with extreme thirst had consumed
23 and drunk water from a stream. As a result of
24 that, had, through his own conduct, ingested
25 dioxyn into his system.

1 Maybe that happened, maybe it didn't;
2 but the simple fact that that defense would have
3 been raised would have, I think, very much
4 complicated your job on behalf of the Plaintiff.
5 That's the sort of thing that I'm worried about.

6 In a case where the Plaintiff clearly
7 has justice on the side, the cost and pain of
8 litigating that matter could be increased
9 substantially by requiring him not only to prove
10 his own case, but to disprove, perhaps, a
11 spurious allegation of comparative fault raised
12 by a Defendant.

13 PROFESSOR HENDERSON: I think I have
14 pretty good answer to what you said, though I
15 share your concern. If I accepted the
16 conclusion that you just reached I'd have
17 problems, but I don't. Here's why.

18 I confess not to have researched the
19 Pennsylvania law on this very point. Had I been
20 pressured I would have pretty easily. I know,
21 speaking generally, across the country that
22 there are two kinds of cases; one of them is a
23 warning case and the other is design, where I'm
24 pretty confident that your judiciary, given
25 their history, would never let the, "Oh, you

7

1 have yourself to blame" element to come in. One
2 of them is failure to warn.

3 The Agent Orange case is a failure to
4 warn case at heart. Think of how heinous it
5 would be if the Plaintiff's claim is, you never
6 told me about the risk and the Defendant says, I
7 told you not to drink the water. That is self-
8 defeating in extreme.

9 The other kind of case is the
10 workplace case. If I claim that there should
11 have been a guard to prevent my hand from
12 getting under a ram, if that's the gist of my
13 claim, then it is heinous to think a Defendant
14 could--and in most states that have addressed
15 this question they clearly cannot--this is a
16 matter of law, no litigation claim--claim, "Oh,
17 but what were you doing sticking your hand under
18 the ram?"

19 You see the characteristic the two
20 cases share. You should have saved me from my
21 inadvertence with a cost-effective device. I'm
22 human. I work in the place day-in day-out,
23 day-in day-out. I make one mistake and I lose
24 four fingers. That should not happen. You
25 should have a guard. This bill would permit

1 that claim to come.

2 REPRESENTATIVE MCHALE: No, not under
3 the circumstances that you described, but not
4 because of any reason that you articulated. Are
5 you familiar with Pioser v. Newman Company under
6 Pennsylvania law?

7 PROFESSOR HENDERSON: I'm not good at
8 names.

9 REPRESENTATIVE MCHALE: I urge you to
10 look at that case decided by the Pennsylvania
11 Supreme Court on March 17, 1987. It bars
12 virtually any litigation which might be brought
13 by a Pennsylvania employee against a
14 Pennsylvania employer.

15 PROFESSOR HENDERSON: No, no. Stop.
16 I'm talking about claims against the machine
17 manufacturer. Fair enough. No. I'm talking
18 about claims against the machine manufacturer
19 for failing to have a device. I thought this
20 was a products liability.

21 REPRESENTATIVE MCHALE: It is.
22 That's why I didn't raise that earlier. That's
23 next week, but there would be no claim against
24 the employer under the circumstances that you
25 described.

1 PROFESSOR HENDERSON: No, no.
2 Whether there should be or not is a matter I
3 wasn't asked to come here and address. If your
4 claim is that the machine should have had a
5 device to prevent you from inadvertently ruining
6 your life, it damn well doesn't sit on the
7 manufacturer's position to say, what were you
8 doing being inadvertent? You sell the prima
9 facie claim and there's no room to argue
10 comparitive fault, and most courts that have had
11 to address that question have come out that way.
12 I'm so certain your courts would.

13 REPRESENTATIVE McHALE: "I don't
14 share that certainty. It's a possibility but
15 not a certainty.

16 PROFESSOR HENDERSON: I don't know
17 whether to be funny now or not. This is
18 serious.

19 REPRESENTATIVE McHALE: It certainly
20 is.

21 PROFESSOR HENDERSON: Your courts
22 have certainly shown a propensity to push this
23 thing about as far in the direction of "what
24 does it matter". My sense is, if you enacted
25 this bill, that that same propensity balanced

1 off against these measures of good sense would
2 put you maybe in the forefront. No promises.

3 REPRESENTATIVE McHALE: I simply
4 close with this. My concern with Section 7102
5 is that, for a Plaintiff bringing a products
6 liability claim, the increased burden, in terms
7 of practicality of litigation, would be
8 substantial. It would be much harder for that
9 Plaintiff to prove his case, whether or not the
10 Plaintiff has a good case, if justice is on his
11 side. If there's no justice on his side,
12 without relevance to the equity of his claim, as
13 a practical matter, during discovery and in the
14 Court room, Section 7102 would raise hurdles
15 that would be very difficult for a Plaintiff of
16 modest means to overcome.

17 PROFESSOR HENDERSON: What I have
18 tried to say today is that, I don't agree with
19 that. If I agreed with it I would be concerned.
20 I think that there are ways around the most
21 serious problems with this, most courts have
22 taken them.

23 REPRESENTATIVE McHALE: You're
24 relying on future judicial interpretation rather
25 than the literal text of this statute?

1 PROFESSOR HENDERSON: This statute
2 ought to get an A plus--we use the letter system
3 at Cornell--for its restraint. If the
4 suggestion were that this thing start to look
5 like the model uniform product liability act, a
6 codification of will of the law, a little
7 treatise -- I resent it for that fact by the
8 way. It's in the Federal Register and you can
9 get it free. Here I'm writing a treatise that I
10 hope I'm going to sell.

11 Put that aside --

12 REPRESENTATIVE MCHALE: Do you have a
13 citation in the Federal Register on that?

14 PROFESSOR HENDERSON: I do, actually
15 I do. I'm not going to try to fake it. I can't
16 remember the cite.

17 REPRESENTATIVE MCHALE: I was teasing
18 when I said that.

19 PROFESSOR HENDERSON: I know you
20 were. Let us tease a little. Even as you could
21 remember miraculously that case's name on the
22 worker comp, we don't want to make this a
23 35-page angle. I'd rely on the courts. I have
24 a theory about it. We are saving them from
25 themselves as much as anything.

1 REPRESENTATIVE McHALE: My suggestion
2 is, why don't we put it in the statute? I'll
3 close with that. Why don't you take what you'd
4 like to see a court conclude at some point in
5 the future, reduce it to current language and
6 amend the pending bill. I think that would
7 relieve many of my concerns.

8 Thank you, Mr. Chairman.

9 CHAIRMAN CALTAGIRONE: Representative
10 Bortner.

11 REPRESENTATIVE BORTNER: Thank you,
12 Mr. Chairman. I don't want to belabor this
13 point but I want to pick up on it. What I'd
14 like to do is, rather than talk about the
15 elements of the legislation that I might agree
16 with, focus on the ones that I have problems
17 with and get your comments on that.

18 My law school training tells me that
19 in a products liability case you focus on the
20 defective product. I think you said that that's
21 what that should be. I guess I'm not nearly as
22 concerned about what other states may be doing
23 as in doing what I think is right and what I
24 think is logical.

25 I guess it is not logical for me to

1 introduce the concept of comparative fault or
2 contributory negligence or fault when the focus
3 of a claim is not on, either what the Plaintiff
4 did or really what the manufacturer did, but on
5 the defective product itself.

6 PROFESSOR HENDERSON: Okay. That's
7 an argument that I've heard and it's honestly
8 held and I don't give it the back of the hand.

9 I suppose at this point I have got to
10 say, speaking for myself, that if you're talking
11 about the design and warning cases, you can say
12 the focus is on the design or the warning and
13 that's strict liability. That's what you people
14 do here and I'm all for it. But, the moment you
15 start doing that, by implication, if you condemn
16 the design, if this works the way it should, you
17 condemn the choices that the designer made and
18 you've condemned the designer. I'm not saying
19 that you want to do that in your jurisprudence.

20 The wonderful thing about this
21 statute is, and I was struck by it. I raised
22 some questions when I first got it, why don't
23 you go this way. I'm convinced that you ought
24 not tinker, or tinker at the very minimal, with
25 your terminology. That talk about guarantor has

1 got to go, but stick to the substance.

2 What my sense is, Representative, I
3 find it intellectually quite comfortable to talk
4 about what was wrong with the design and then
5 did the user contribute, and here I'll use a
6 word major, because I don't think we will
7 trivialize the thing, component to causing the
8 harm. It just so happens that out there, there
9 are accidents where you might say the design is
10 defective and you might say the user contributed
11 in a significant way of causing it. I don't
12 like the notion of the system imposing the whole
13 brunt of the responsibility on the designer.

14 I guess, if I put it personally, what
15 I resent is the notion that if there is ten of
16 us on a block that buy a product like a lawn
17 mower and eight of us use it very carefully and
18 sensibly and two of us abuse it, you conjure the
19 picture, ten beers for lunch. What I don't like
20 is if you don't discount those guys who injure
21 themselves, I'm going to share the cost. I
22 don't think that's fair.

23 In the egregious cases it seems to me
24 the law ought to have some way, in those cases,
25 of saying to the users, you guys played a role

1 in this. You're not non-contributors to the
2 risk. Maybe that's where we part. It does, I
3 will say, and I admire your notion of don't do
4 it just because they are doing it. That isn't
5 where I'm coming from.

6 REPRESENTATIVE BORTNER: I understand
7 that. Let me ask another question here. This
8 is a part of the bill that you specifically did
9 not talk about. Quite honestly, I find to be
10 the most objectionable part of the legislation
11 probably. That's the statute of repose. Am I
12 to understand that you do not support that
13 concept of the legislation?

14 PROFESSOR HENDERSON: Put the way you
15 did, no. I support that concept. Now, I'm
16 careful because I have seen dozens of statutes
17 of repose. Some of them are Draconian and we
18 wouldn't want to get near them. North Carolina
19 has a six-year period commencing with first
20 distribution. That would take care of -- Most
21 cases would be barred.

22 Fifteen years strikes me as more than
23 the medium length of time. A rational person
24 might, and you heard earlier the comment,
25 consider altering that dimension of it. If you

1 ask me, is the concept of repose worthy of
2 enactment, I say yes. Yes, it is. Again, the
3 explanation would take some time and I don't
4 want to impose on you, but it's the notion that,
5 in products liability cases especially, you
6 reach a point when a product is old enough, and
7 I'm thinking now durable goods cases, where to
8 try to try it today under circumstances that
9 existed then when so much has changed becomes
10 impossible. It really becomes a crap shoot.

11 At that point, you do reach a point
12 at sometime, and let me leave that vague, where
13 it sorts of nets out a plus not to consider the
14 old product cases. That's the way I feel. It's
15 a tradeoff. You're going to bar a few worthy
16 claims.

17 If I said otherwise, I would be
18 kidding you, but you're going to resolve
19 quickly--which was his concern--the lion's share
20 of what turn out to be unworthy claims on a
21 feasible alternative approach. You reach a
22 point where the tradeoff is worth it and I'd
23 recommend it to you. You have a statute of
24 repose in your jurisprudence here dealing with
25 completed improvements to real property.

1 REPRESENTATIVE BORTNER: I know we
2 have made some exceptions. My concern, and you
3 actually put your finger on it because you kind
4 of qualified your answer in terms of durable
5 goods. I can understand that much better. I
6 have met with some of my manufacturers of
7 equipment. In those cases I can understand
8 that.

9 Fifteen years is a long time when you
10 make a machine that's used day in and day out
11 and if the machine causes an injury that's
12 generally recognized right away. My problem is
13 in the case of chemicals, consumables,
14 pharmaceuticals, where I'm not sure that is such
15 a long time. The injury may be occurring
16 without the person who's being injured being
17 aware of it. I make that comment to you because
18 I can see a big difference between the argument
19 for that statute in the case of, as you said
20 durable goods, as opposed to those kind of
21 products that I see the effects, perhaps, not
22 showing up for a much longer period of time?

23 PROFESSOR HENDERSON: I'm under no
24 constraints sitting here. I'm telling you
25 honest to God what I think. Speaking for

1 myself, I tend to agree with you.

2 REPRESENTATIVE BORTNER: One last
3 question on the statute of repose. That would
4 be this. In your opinion, could this still be a
5 good piece of legislation without that statute?
6 Could we have states reform their products
7 liability laws without addressing that problem?

8 PROFESSOR HENDERSON: Could I first
9 say something that I think is important to be
10 said? I'm not a legislator and I'm not an
11 expert on how this works. My fear would be, if
12 you all are on the verge, and I get the sense
13 you may be, of doing something about the state
14 of your law that is so screwed up, then my hope
15 as an objective viewer would be to see that
16 happen. So, here's my fear.

17 If I say to you, yes, it still would
18 be a good bill, then I have pointed to
19 something, by implication, that can go and then
20 I am going to be asked would it still be a good
21 bill if something else. I think, and this could
22 get wittled down to the point it becomes not a
23 good bill.

24 My sense is that, what's mainly
25 wrong--how to put this?--you lack a statute of

1 repose for products. That's a characteristic
2 that many other jurisdictions, whose law I
3 respect, share with you. What you're famous for
4 isn't the lack of statute of repose. What
5 you're famous for is what I addressed; this
6 guarantor, reasonable safety doesn't matter a
7 twit. That speaker earlier made his whole
8 presentation on the point of something
9 something, and I sat there going "Wow". Wait
10 until I get up and remind you that's what this
11 bill introduces into your law. So, you know, I
12 don't want to dissemble.

13 REPRESENTATIVE BORTNER: I don't
14 really mean it as a trick question. I think you
15 have answered my question pretty well.

16 PROFESSOR HENDERSON: I'd like to see
17 every jurisdiction in the product area have a
18 sensible repose statute. I think that would
19 improve the jurisprudence of every state. Your
20 lack of one probably is not what brings me here
21 today.

22 REPRESENTATIVE BORTNER: I agree with
23 you, by the way. I don't think anybody can or
24 should be the guarantor of a product forever. I
25 don't think that's reasonable.

1 One last thing, and I'll make a
2 comment and follow with a question. You, I
3 think, have said you believe this was products
4 liability and somewhat unsure as to why the
5 workmen's compensation issue enters into it.
6 I'll tell you why I think that happens is
7 because, I believe because our Workers'
8 Compensation law, I assume like most, is an
9 exclusive remedy.

10 There are, in fact, products
11 liability suits brought against the manufacturer
12 of equipment that would not be brought if there
13 was a remedy against an employer, where there
14 may have been a change in the equipment. There
15 may have been something removed from the
16 equipment that the manufacturer had no control
17 over. That's why I think to a certain extent
18 they are related.

19 You will not be here next week when
20 we really go into more of the workplace safety,
21 what's been called the toxic safety aspects of
22 some other legislation. I'd like to ask you, if
23 you don't mind giving your opinion, do you feel
24 that an employer who may be guilty of
25 intentional conduct, intentionally removing a

1 piece of safety equipment or a guard or who
2 intentionally hides the fact from workers that
3 they are dealing with toxic or dangerous
4 chemicals, do you believe there should be a
5 direct cause of action against those
6 perpetrators, or that employer, for lack of a
7 better term?

8 PROFESSOR HENDERSON: Yeah, but can I
9 follow-up?

10 REPRESENTATIVE BORTNER: Sure.

11 PROFESSOR HENDERSON: I have watched
12 the courts in several states attempt to do that.
13 Some of them have retreated from it and here's
14 the problem. The moment you sit down to try to
15 draft a remedy, until somebody shows me some
16 work that I haven't seen yet--and I confess I
17 haven't tried myself--it threatens to unravel
18 the whole worker comp situation.

19 Bear in mind, when I was working one
20 summer down in Miami, my hometown, in that
21 plant. I saw somebody walk into the bathroom.
22 They were screwing around with a colleague,
23 tripped, fall and break his elbow badly on the
24 floor. I was about 18 at the time and I didn't
25 know any law. I said, "Oh God, what a terrible

1 thing. You're going to sue somebody. No, I
2 can't." I got it explained to me quickly in the
3 next day or two. I marveled at the fact that
4 this fellow, no one was at fault, he tripped on
5 his own feet, screwing around with a friend, is
6 going to have a remedy through the worker comp.
7 He appreciated that fact also.

8 In exchange for that, we have the
9 bar. If I could, by some magical way,
10 articulate an exception that just captured the
11 cases worth capturing, then I would be moved to
12 do that. I'm moved by what I heard today this
13 morning. I'm telling you I haven't seen it
14 happen yet, and my hunch is, if I had that other
15 proposal before me I would see it by steps, gut
16 the bar and every case could be stretched to
17 make a prima facie case, and then what have you
18 got? You have amended this other thing in the
19 context of a products liability debate. I don't
20 deny they are related by the way. We're on the
21 same wavelength.

22 REPRESENTATIVE BORTNER: I didn't
23 mean to suggest you were. I'm really giving you
24 my comments as to why I think the two are
25 related. To really try to reduce what you have

1 said to a few words, I think what you're telling
2 me it's kind of a flood gate argument. You
3 would be opening the door not to just worthy
4 claims, but less meritorious claims.

5 PROFESSOR HENDERSON: I haven't
6 studied the proposal before you with any care.
7 I read it in haste. I would be willing to bet
8 if we played the game of what about this and
9 what about that, you would see pretty soon,
10 again, in terms of reaching the jury -- it's
11 kind of a first cousin to his problem on the
12 Plaintiff's side, but I do think the two
13 problems differ in that regard.

14 If somebody would show me good
15 language, I would have two suggestions. One,
16 deal with it. Don't mix it up with products
17 liability because half of the testimony this
18 morning was addressing a problem, and indeed,
19 his case, Poindexter or whatever, was sue the
20 employer case. That went right by me. I
21 thought we were talking products. I see a
22 chance for confusion mingling the two in the
23 hearings. That's up to you.

24 REPRESENTATIVE BORTNER: What I'd
25 like to do, if you haven't seen them, I'd like

1 to send you those two bills and the two opinions
2 that they result from. You don't have to
3 comment to me; just for your own information
4 since I have asked you questions.

5 PROFESSOR HENDERSON: I have the
6 bills. I was given them yesterday. As I say, I
7 have read them in haste. My impression was,
8 though I'm not ready, I do have them and you'd
9 like to I would be happy to share some thoughts
10 with you.

11 REPRESENTATIVE BORTNER: Thank you.
12 I have taken a lot of time. Thank you,
13 Mr. Chairman.

14 CHAIRMAN CALTAGIRONE: Representative
15 Heckler.

16 REPRESENTATIVE HECKLER: Thank you.
17 Professor, you made me feel better than I have
18 felt in years about having opted for a L.O.B.
19 rather than a JD.

20 PROFESSOR HENDERSON: Did you have a
21 choice at the time? Don't take credit.

22 REPRESENTATIVE HECKLER: At Virginia
23 I think they were just going to a JD. I asked
24 did I had to take any extra courses? They said,
25 no. I said, what the heck, same difference.

1 To get away from some of the esoteric
2 discussion of legal doctrine that we heard from
3 the last couple questioners, one of the
4 arguments that has been made generally by the
5 critics of this legislation, in the press in
6 particular, is that, this whole piece of
7 legislation is really, to coin a phrase, "a
8 smoke screen for the tobacco industry". What
9 this is really about is cigarettes and people
10 suing about lung cancer or emphysema. Do you
11 have any observations with regard to that?

12 PROFESSOR HENDERSON: Well, if I
13 thought that that was the major effect of this
14 legislation; in other words, if I had been sent
15 the bill and could see at a glance that's what
16 this was about, I think it would have put me
17 off. If you ask me, will certain provisions of
18 this bill shore up what I think are existing
19 rules of Pennsylvania law, making an attack on a
20 variety of products, I use the phrase "where
21 they live", attacking beer because it contains
22 alcohol is the example in my written statement,
23 or cigarettes because they cause the dreaded
24 effects. Will this bill shore up your law on
25 those fronts? Yes, it will.

1 Now, I would defend right down the
2 line the good sense of that. I have done it in
3 print; again, several years before it ever
4 occurred to you to consider this bill. On top
5 of all of the difficulties of trying a design
6 case, to attempt to decide if a category of
7 product that can't be changed to be made safer
8 without taking the essence of it away, is good
9 for America on a case-by-case basis just cannot
10 be done in anything but an incoherent, hit-or-
11 miss way. That's the view.

12 Will this bill, if it's enacted into
13 law, hold in place something that I think is
14 there already, and I'd say practically every-
15 where and it's a position that I applaud. It is
16 not, you see, that I don't think cigarettes are
17 a menace. I don't smoke and I resent it when
18 people smoke. You don't have a no-smoking
19 section of this restaurant? See you later.
20 That's me.

21 But, I can't imagine that the
22 products liability system could address the
23 enormity of the issue of whether we ought, as
24 Americans, tolerate any level of smoking among
25 the minority of us that seem to enjoy it. We

1 are addressing that at another forum. A day
2 doesn't pass that I don't see it. It's not
3 getting by us. It's not like we turned our back
4 on it. It's not like the poor worker who has
5 nobody but the Plaintiff's lawyer as a champion.
6 We are worried to death about it. If you asked
7 me, if I were suddenly the czar of products
8 litigation, do I want that in court, case by
9 case. Oh no, for goodness sake, no. It just
10 asks so much more of the system than I could
11 ever hope to deliver.

12 I don't view this as a cigarette
13 measure but it has some effects. Your law
14 currently does.

15 REPRESENTATIVE HECKLER: Thank you,
16 Professor. One other question. There was some
17 earlier discussion from earlier witnesses about
18 this business of the admissability or the
19 relevance, shall we say, of government
20 standards; whether it be OSHA standards or,
21 conceivably, as I understand the bill, could
22 apply to various other government adopted
23 standards that would apply to a product.

24 Is the way that that subject is
25 treated in the bill generally in step or

1 generally out of step with the general state of
2 the law?

3 PROFESSOR HENDERSON: I think it's in
4 step. In fact, again, I would view it as more
5 modest than a lot of positions that courts have
6 taken. There is a kind of subtext out there
7 that is moving in the direction of bowing to
8 government standards, making them control in
9 some effective way. As I read this, it's a
10 measure aimed at more letting them into proof.

11 As I understand your law, you
12 currently do allow government standards into
13 proof. As I understand it, you may not
14 allow--and it's confusing and fault-ridden
15 because of your jurisprudence--are your industry
16 standards. This recent case, Lewis v. Coffing
17 Hoist, suggest very strongly that those are not
18 admissible, and how seriously the Court system
19 will take that.

12

20 Understand, admissible even, gee,
21 everybody says to me, "Have faith in the jury."
22 Yet, they don't want to allow something in as
23 though jurors cannot handle it. It comes in.
24 It's worth what it's worth. To keep it out, if
25 you're going to try to run a sensible system,

1 this state is almost unique in that regard. I
2 can't think of another one that does that in
3 terms of admissibility. If you ask me should
4 custom control, no. Should it be relevant and
5 admissible, yeah.

6 REPRESENTATIVE HECKLER: Professor, I
7 thank you. If we ever succeed in adopting a
8 merit selection system for appellate court
9 judges I hope you consider moving to Penn-
10 sylvania. I wouldn't want to suggest that you
11 would have to go through a state-wide campaign,
12 although I think you're up to it. Thank you
13 very much.

14 CHAIRMAN CALTAGIRONE: There are
15 several more members. Representative McNally.

16 REPRESENTATIVE McNALLY: Mr. Reber had
17 the first question.

18 CHAIRMAN CALTAGIRONE: Representative
19 Reber.

20 REPRESENTATIVE REBER: Before you do
21 move to Pennsylvania, I'd check the salary
22 structure. Professor, you do have in front of
23 you and have had an opportunity, as I understand
24 your testimony, to review House bill 916, is
25 that correct?

1 PROFESSOR HENDERSON: Yes.

2 REPRESENTATIVE REBER: In this House
3 bill in Section 7102, it appears on page 3,
4 there are comparative -- blotting out the use of
5 the word negligence and introducing the word
6 responsibilities. I counted at least seven
7 times and I know prior to that you referenced it
8 a few occasions before I did so start counting
9 the use of the word fall as opposed to the use
10 of the word responsibility as set forth in this
11 statute.

12 I also found very heartening your
13 comment, not to "tinker" very little with
14 terminology. I always have a sincere concern
15 when we as a legislative branch begin to tinker
16 with traditional words and when we talk about
17 tort law, when you tinker with the word
18 negligence, it really causes me some concern.
19 It causes me some concern when we went to a
20 comparative negligence doctrine in the Common-
21 wealth of Pennsylvania a number years back.

22 I'm wondering what your thoughts are
23 on the use of the word "responsibility" as
24 proposed by the proponents of this statute and
25 knowing the propensity of the appellate courts

1 in Pennsylvania to really go out on a
2 far-fetched expositions and terminology and what
3 have you, as well as legal theories arising from
4 terminology, what we may, in fact, be doing with
5 the stated case law in years to come by
6 tampering with that? Your comments in 30
7 seconds or less.

8 PROFESSOR HENDERSON: Quickly. I
9 deserve that. Look at page 4, the definition of
10 responsibility; "Causing or contributing to
11 cause the death or injury to a person or
12 property for which recovery of damages is
13 sought, whether by negligent act or omission,"
14 then it goes on to pick up the products
15 language. I honestly believe that this
16 responsibility notion is probably artful
17 drafting.

18 Fault, I was more responding to the
19 concern over here -- no, the notion of whether
20 we can apply a contributory fault notion in
21 strict. I use that word. I think moving to
22 some word of this sort and then making it clear
23 in the definition that you're including
24 negligence and the product stuff will work.

25 Now, if you ask me to bet on your

1 courts to work this out, sort of here we go
2 again, I have some hope that they would look at
3 this, guided by what's happening in a lot of
4 other states. Indeed, some states, as you may
5 know, the courts have interpreted statutes that
6 talk about negligence as though they apply to
7 strict as well.

8 Wisconsin I believe has done that.
9 They say that strict is nothing but negligence
10 per se. It's a verbal trick but they see the
11 good sense of applying comparative notions to
12 strict tort. Responsibility, as I sit here,
13 until informed further, gets kind of good marks.
14 It gets us out of the pit but includes the
15 negligence in the definition.

16 REPRESENTATIVE REBER: Are you
17 familiar with any other jurisdictions that after
18 a long substantial pattern of the usage of the
19 word negligence in the traditional sense as we
20 know it in tort law has gone away from that in
21 statutory instruction and applied the word
22 responsibility?

23 PROFESSOR HENDERSON: I am not going
24 to kid you. I don't know --

25 REPRESENTATIVE REBER: I do not --

1 PROFESSOR HENDERSON: My answer is,
2 I don't know; then I don't know either way. I
3 could certainly check. That would be something
4 that could be done very quickly, but I think
5 even if it's true that no other state has done
6 it, defined as this is, it will work. But --

7 REPRESENTATIVE REBER: My concern
8 being, by defining a word which we really have
9 no track record, if you will, even from other
10 jurisdictions, as to where it leads to, do we,
11 in essence, then wipe out, for all intent and
12 purposes, other traditional case law deter-
13 minations that may have been given to the word
14 negligence and what normally and consequentially
15 would have flowed from that in the past and,
16 thereby, open up a whole new pandora's box in
17 defining what, in fact, is the responsibility,
18 et cetera, et cetera?

19 Do you understand where I'm going
20 with this? I thought I made that known at the
21 outset my concern in tampering with something
22 such as a word that we seem to all know.

23 PROFESSOR HENDERSON: My written
24 statement I admit to you, when you get a chance
25 to look at it, aware of tinkering, aware of

1 introducing new boutique ideas, I do see that as
2 a cost. I guess I see this as a cost. If I
3 accept your thought, it might be worth
4 incurring.

5 REPRESENTATIVE REBER: One last
6 comment, Professor. I'd like to thank you for
7 another statement that you did make to the
8 Committee. With your permission I will
9 hopefully be allowed to quote you in the future.
10 That statement was that, the "poor workers who
11 have no one other than the Plaintiff's lawyer to
12 act as their champion" when there's an attempt
13 in the course of, I'm sure this particular piece
14 of legislation and other pieces of legislation
15 in the so-called tort reform area, to limit
16 attorney fees and contingencies I'll be glad to
17 quote you on that.

18 PROFESSOR HENDERSON: Just a moment.
19 I mean every word of that. This bill in no way,
20 in my view, takes away from the chance of a poor
21 injured worker to seek a damn good lawyer on
22 contingency fee. It's one of the things, of
23 which, I'm frankly proud when you compare with
24 other systems. There's nothing like getting
25 screwed and having nobody to turn to, whether on

1 the criminal side or the tort side.

2 The fact that we have the opportunity
3 I view as a plus. I have said that in Chicago
4 Law Review telling you, in effect, don't enact
5 the New Zealand plan. I doubt you would do
6 that. That much of it is good. What we need
7 are better standards, better than you have now
8 and then it will work.

9 I meant it when I said I feel for
10 these people, and I think that if I could work
11 out an exception, and if you people can do it
12 then more power to you. I think adopting may be
13 impossible to ask. You can quote me.

14 CHAIRMAN CALTAGIRONE: Representative
15 Hagerty.

16 REPRESENTATIVE HAGERTY: My question
17 was covered.

18 CHAIRMAN CALTAGIRONE: Representative
19 McNally.

20 REPRESENTATIVE McNALLY: You spoke a
21 great deal about the strict liability aspects of
22 this bill. Apparently, the bill applies to
23 claims and actions other than those which are in
24 a theory of strict liability. For example, one
25 type of product liability action that's covered

1 by this legislation would be a misrepresentation
2 action.

3 PROFESSOR HENDERSON: Right.

4 REPRESENTATIVE McNALLY: As I under-
5 stand it, there are generally two varieties of
6 misrepresentation: intentional and negligent
7 misrepresentations. I guess maybe the
8 colloquial term of intentional misrepresentation
9 is a lie.

10 PROFESSOR HENDERSON: Yes.

11 REPRESENTATIVE McNALLY: Given that,
12 why should we have a period of repose for a
13 supplier who lies? How would that be reasonable
14 or restrained?

15 PROFESSOR HENDERSON: Again, I'm here
16 not saying something somebody told me to say.
17 My answer is, I don't think you should have such
18 a thing.

19 REPRESENTATIVE McNALLY: What about
20 in terms of negligence?

21 PROFESSOR HENDERSON: Can I interrupt
22 because I should not be flip. I'm sitting here
23 trying to look like I'm doing God's work. When
24 I say you should not have one, there's a lot of
25 detail to be filled it. It's just a smidgeon of

1 fraud that has no causal connection with the
2 Plaintiff's injuries, but I know what you're
3 saying. If the fraud is what causes the
4 Plaintiff to delay in bringing a claim beyond
5 the repose period, then no.

6 REPRESENTATIVE McNALLY: What is
7 about the theory of negligence? A lot of
8 manufacturers provide maintenance bulletins for
9 the lifetime of the product. If we have a
10 statute of repose at 15 years, doesn't that --
11 and suppose the reasonable and prudent manu-
12 facturer does provide maintenance bulletins.
13 Wouldn't the statute of repose tend to provide
14 an incentive for a manufacturer to stop
15 providing those maintenance bulletins after 15
16 years because he can't be sued, even though it's
17 the reasonable and prudent thing to do?

18 PROFESSOR HENDERSON: You know, I
19 confess that's a problem that I hadn't addressed
20 in my thinking about this. What you're afraid
21 of is, if you continue to do that, you extend
22 the period that those bulletins would cause the
23 15 years to continue to run each time that was
24 done. Is that the notion?

25 REPRESENTATIVE McNALLY: If providing

1 maintenance bulletins on a product for the
2 lifetime of the product, say an airliner or
3 DC10, 747, if that would be the reasonable and
4 prudent thing to do, why should we provide an
5 incentive to just -- for a manufacturer to stop
6 doing that after 15 years, even though the
7 manufactured product might be in existence for
8 16, 20, 25, 30 years?

9 PROFESSOR HENDERSON: I'm having
10 trouble -- I thought I understood what you were
11 asking. I know it's my problem but not yours.
12 In what sense would the incentives -- I'm
13 looking here on pages 2 and 3 for the operative
14 language.

15 REPRESENTATIVE McNALLY: Let me just
16 maybe back up. Suppose the reasonable and
17 prudent manufacturer, that the standard of care
18 for a manufacturer is to provide a maintenance
19 bulletin for an aircraft like a DC10 for the
20 lifetime of that product. It wouldn't be very
21 difficult. There's a limited number of DC10's.

22 PROFESSOR HENDERSON: I see what
23 you're saying.

24 REPRESENTATIVE McNALLY: If the
25 manufacturer knows that he or it cannot be sued

1 after 15 years, even though it would be
2 reasonable and prudent to provide the
3 maintenance bulletin for the lifetime of that
4 aircraft, they might as well stop. They are
5 never going to be liable if we have the statute
6 of repose.

7 PROFESSOR HENDERSON: Let's look at
8 the top of 3, supplier's period of repose, we
9 won't drag this out, but just let me react to
10 it. "The period ending 15 years after that
11 supplier supplied for use or consumption the
12 product alleged to have caused the death to
13 persons or property for which recovery of
14 damages is sought."

15 Let me ask you and anybody else that
16 wants to speak it, might not Representative
17 Heckler's point about the continued exposure to
18 the carcinogen in the workplace be read into
19 that? That is to say, I'm sitting here honestly
20 wondering if the language "supplied the product"
21 might not, and I'm looking now to see, might
22 that not cause in the case that you described
23 where there's clearly under Pennsylvania law a
24 duty to continue to supply these things, and if
25 such a failure occurred a breach of a duty say

1 to warn or instruct after the 15 years, whether
2 a court might not looking at this construe the
3 language in a way to cause the period to begin
4 to run anew.

5 REPRESENTATIVE McNALLY: I don't know
6 if that would be a statute of repose.

7 PROFESSOR HENDERSON: Well, yeah. It
8 might be, though, in the cases where a
9 Defendant, by the nature of the product, has
10 this continuing duty, we would make an exception
11 very close to the one alluded to where workers
12 are exposed over time continually to a product
13 that causes them injury. If you ask me will the
14 repose effectively bar those claims, no, at
15 least with respect to the product continually
16 delivered.

17 It might be that I could read this
18 and, I'm flying by the seat of my pants, it
19 might be I could read this to be sufficiently
20 analagous to the other point to get us out from
21 under.

22 Under existing Pennsylvania law a
23 breach has occurred and then -- but more to the
24 point, a product has been supplied, that would
25 include within the notion of the product it

1 could come off. Clearly, component parts
2 distributed later kick in a new 15-year period.

3 REPRESENTATIVE McNALLY: I think
4 you're stretching it pretty far. Maintenance
5 bulletins are part of the product that was
6 supplied.

7 Let me move on. I just had really a
8 couple other questions. Again, talking about
9 not strict liability theories, but for example,
10 contributory responsibility does seem a little
11 bit in opposite when you're talking about
12 misrepresentation being the theory of recovery.
13 If my injuries are caused because someone lied,
14 how is my responsibility or my actions, how
15 should that have a bearing on whether I recover
16 and how much?

17 PROFESSOR HENDERSON: You're talking
18 about comparative responsibility?

19 REPRESENTATIVE McNALLY: Right.

20 PROFESSOR HENDERSON: As I said to
21 you, it seems to me that if you're talking about
22 failure to warn and the Plaintiff's fault
23 consists of conduct which proves the fact that
24 there was a failure to communicate a risk, all
25 you have done is told, "By the way, stay away

1 from the drinking water" and the gist of the
2 complaint is, you could have told me it would
3 kill me or it might. Then I don't see
4 comparative fault playing any role. I resist
5 the notion we start making this statute 30 pages
6 long, I really do. You could come back at a
7 later time if that became a problem. I wouldn't
8 predict that it would. Your misrepresentation
9 point is even easier for me.

10 REPRESENTATIVE McNALLY: The other
11 thing about the failure to warn is that, this
12 law would say that a warning is unnecessary if
13 the information contained in the warning or the
14 instructions is generally known to the class of
15 persons in which the Plaintiff was included.
16 How are we going to know and how are we going to
17 define a class of persons?

18 Obviously, from the Defendant's
19 perspective, they are going to define class of
20 persons in such a way that even a person who may
21 not have had any knowledge or reason to know the
22 warnings or instructions is still included in
23 the class of persons?

24 PROFESSOR HENDERSON: Elsewhere in
25 other jurisdictions where the class of persons

1 notion has been developed. I don't see any
2 great difficulty. I'm always looking to
3 criticize courts. The classes, it's not as
4 though there's one hundred different classes or
5 one huge class. Usually, courts deal in terms
6 of an expert class of users and what might be
7 called ordinary users. It's a generalized
8 notion and I don't remember seeing a lot of
9 problems with that.

10 Again, I'd come back and say, my
11 advice would be, for goodness sake, if you all
12 think this is a basically good measure, then
13 don't expand it and address every single
14 problem. I think what's gone wrong here is a
15 very fundamental glitch that occurred 12 years
16 ago and has affected a good bit of your law
17 dealing with warning and design, but there are
18 some fronts on which. I think this statute
19 is -- at least half of it is codification
20 against the possibility of change for the worse.

21 You're doing it. The marginal costs
22 are low and going ahead and addressing, but I
23 would think we can leave it to courts. That
24 idea of category or class of consumer is not a
25 hot house notion. It's in the law. I would

1 just bet that the courts would handle that with
2 some good sense.

3 REPRESENTATIVE McNALLY: Last
4 question. I happened to look very quickly at an
5 article that you wrote called "Products
6 Liability in the Passage of Time, The
7 Imprisonment of Corporate Rationality". You
8 seemed to indicate that the products liability
9 system--and I tend to think that you would argue
10 that Pennsylvania is one of the worst
11 culprits--tends to provide an incentive to a
12 corporate manager to defer improvements in
13 product design because that would be offered as
14 proof that the original product was defective.

15 But at the same time you seem to
16 indicate that another reason for deferral of
17 improvements in product design was, if I can
18 remember the terms you used, corporate
19 psychology, concentration on the short-term
20 returns on innovations and investments.

21 Again, I only got to read your
22 article briefly, but it seemed to me that you
23 rather brushed aside the possibility that
24 deferrals in product improvements may really be
25 a result of the concentration on short-term

1 results rather than looking at the long term.

2 PROFESSOR HENDERSON: This bill,
3 unless I miss something, doesn't address that
4 problem. I don't know how it could be expected
5 to, but may I say, in the theory of charity with
6 which I took Moran's testimony, I didn't feel he
7 felt that products was the only thing making the
8 workplace safe. Don't we say enough if we say
9 that, given those underlying economic
10 incentives -- and you have it quite right. I'm
11 tickled. You're the fourth person to read that
12 piece. I'm tickled you got it right. It's a
13 thankless task.

14 You got it straight. I don't think
15 this bill can address the underlying economics.
16 I think it would be crazy to try to reform the
17 market in that sense. Don't I prove enough if I
18 say that having a rule this permits subsequent
19 design changes to come in and be flaunted
20 without any limits at all exacerbates the
21 difficulties that underlie it? It's like
22 throwing kerosene on a fire as far as I'm
23 concerned. It need not happen, truly, that
24 subsequent measure provision makes a great deal
25 of sense.

1 Rule 407 of the Federal Rules makes
2 it the law in most federal courts, a lot of
3 states agree. You got me there a little bit. I
4 did point to some factors that I think are
5 beyond maybe control. It's the theory of the
6 firm notion that incentives within a firm cause
7 managers want to look good in the short run and
8 they are dancing to a tune that kind of ignores
9 the societal interest. That's true in every
10 institution; it's not just business firms.

11 If that theory is right, I honestly
12 don't know what a products liability bill could
13 do with it, except to say, make the law as
14 straight as you can make it because you're
15 dealing with an underlying current that failure
16 to change products will make it much worse than
17 you imagine.

18 It wasn't a piece, by the way,
19 condemnatory of managers of firms as being
20 special monsters. It's true of law faculties;
21 it might even be true of legislatures for all I
22 know. Any system of members trying to be
23 together but competing within an environment is
24 going to have those incentives. That's the
25 theory of the firm literature that I applied to

1 products. You've got it.

2 CHAIRMAN CALTAGIRONE: Representative
3 Pressman.

4 REPRESENTATIVE PRESSMAN: Thank you,
5 Mr. Chairman.

6 Professor Henderson, unlike a number
7 of the other questioners, I don't have a JD or
8 LLB or whatever those things are.

9 PROFESSOR HENDERSON: Why should you
10 have the advantage?

11 REPRESENTATIVE PRESSMAN: Except that
12 these things are written by you people. There's
13 more us in the legislature than you, but we are
14 expected to understand these. I have a
15 question. I'm taking advantage of the fact that
16 you are here today and are somewhat an expert on
17 product liability and I guess on legislation in
18 this area.

19 On page 11, line 13, that begins
20 with -- paragraph begins on line 13. On line 19
21 it says something about "comment i to Section
22 402A of the Restatement (Second) of Torts." My
23 understanding, and this was briefly described to
24 me that this is a textbook or some kind of a
25 book that's out there that describes certain

1 things in law.

2 It was also brought to my attention
3 that in this Restatement of Torts, and I'm not
4 sure if I have the right section, because of my
5 lack of LLB or whatever, it says something like
6 certain products are inherently dangerous. Am I
7 correct?

8 PROFESSOR HENDERSON: Well, keep
9 going. Yeah.

10 REPRESENTATIVE PRESSMAN: Under that
11 section, does it not address the issue of
12 tobacco; that tobacco is inherently an unsafe
13 product or something like that; so, the idea
14 being that because it is inherently unsafe, if
15 people use it they are doing something
16 themselves and that the tobacco company should
17 not be held liable for any diseases or death
18 that may occur from the use of that product?

19 PROFESSOR HENDERSON: Comment i
20 specifically refers to tobacco, but other
21 products as well. If you'd like to know, this
22 much I checked before I came here. I'm not
23 faking like I'm remembering this from long ago.

24 Butter is an example; alcoholic
25 beverages, I think they used whiskey. I used

1 beer in my written statement; and castor oil. I
2 can't understand that. To that list I would add
3 salt. If you had been to my last appointment
4 with my doctor, you'd have a longer list of
5 things that would meet the comment i.

6 I gather that this group of mostly
7 legal intellectuals, judges and professors, met
8 in the early '60s in Washington and tried to
9 develop this strict liability rule and said,
10 what are some products that we think might be
11 dangerous and might be consumables, which is
12 what this about, where we would not like to see
13 and we think common sense suggests that you
14 can't go after those products per se or
15 categorically as being bad.

16 I like your words. Let the consumers
17 make the personal choice. If the society ever
18 should want to ban one of them, like we tried
19 before I was born, then we will try that again.
20 That was fun.

21 Until the time comes when we decide
22 to do that -- There'd be a whole new Elliot
23 Ness series; I can see it coming. Until the
24 day comes we want to do that, don't let tort try
25 to address those mega problems. Yes, tobacco is

1 mentioned but not singled out.

2 REPRESENTATIVE PRESSMAN: Part of the
3 reason I ask this question is, Representative
4 Heckler in his examination brought up the issue
5 of tobacco and whether or not this bill does
6 address tobacco. It does address tobacco when
7 it mentioned in Restatement of Torts, tobacco
8 was specifically mentioned?

9 PROFESSOR HENDERSON: Yes. I would
10 be happier myself thinking of it as it addresses
11 tobacco because it addresses product and tobacco
12 is a product. It addresses products and tobacco
13 is a product.

14 REPRESENTATIVE PRESSMAN: Follow-up
15 question to that, is it common practice in
16 writing legislation like this to refer to
17 something like the Restatement of Tort? Is it
18 more common to state in the legislation the
19 exemptions or the law?

20 My reason for asking that is, in my
21 studies of government and political science, a
22 fellow from the state you live in now, Al
23 Smith, was known as the best little bill drafter
24 in Albany. One of his tactics was to keep
25 referring to different things that lead the

1 reader away from the bill and doesn't tell you
2 in the bill exactly what his bill is about.

3 I have to find a copy of the
4 Restatement of Torts to know what this is about
5 and I can't find out what this bill is about by
6 just reading the bill. I'm asking you, is this
7 a common practice; and if it is, then I stand
8 corrected and I guess maybe I need to get some
9 more books for my shelf.

10 PROFESSOR HENDERSON: Yes. I
11 certainly can't tell you, I don't recall another
12 statute making reference to comment i. If you
13 ask me if is it fair for a statute like this --

14 REPRESENTATIVE PRESSMAN: I'm not
15 asking you if it's fair. I'm asking you if it's
16 common practice in your experience.

17 PROFESSOR HENDERSON: If it's fair or
18 common practice for a statute of this sort to
19 address a complex rather technical subject like
20 products and incorporate by reference right on
21 through technical terminology, terminology known
22 only to lawyers and that kind of thing, yes, I
23 would say it was. Indeed, I didn't have a
24 problem. It could be that this is a function of
25 my being so steeped in this that I fail to see

1 it from your perspective.

2 I said I was from Florida. My dad
3 told me, "There's one thing I have to warn you
4 about Jim. If you are going to succeed in life
5 and that is, when somebody starts off a question
6 with 'I don't know a whole lot about this but
7 I'm just' -- down there with a slight draw, 'I'm
8 kind of a good old boy, you're going to have to
9 help me with that.'" He said, "Duck for cover
10 because you're about to have your head taken
11 off."

12 I think your non-lawyer status does
13 put you at a slight disadvantage making sense of
14 this. I found nothing untoward in making
15 reference to what is, to products people, just a
16 classic idea. I can walk up to friends and say,
17 comment i or they will laugh or cry. It's
18 really quite a frequently used notion. I didn't
19 read as though they were failing to say
20 anything.

21 REPRESENTATIVE PRESSMAN: One of the
22 concerns that's been raised in this town about
23 this issue and in relation to tobacco, up until
24 a few years ago, the tobacco industry as a force
25 or presence in this town was almost nonexistent.

1 In recent years many of our contract lobbyists
2 have signed outside contracts with the tobacco
3 industry. There's a whole group of people that
4 are supporting this legislation that, according
5 to information, is primarily supported by the
6 tobacco industry. I don't know if those facts
7 are all completely true. In fact, I plan to ask
8 the gentlemen that later today when they testify
9 about that.

10 It's made a number of us very
11 suspicious when things like this appear because
12 we keep getting told this is not about tobacco.
13 In my area they said no one in the room was even
14 representing tobacco industry. That wasn't
15 true. That was an incorrect statement that was
16 made that day. I'm becoming very suspicious. I
17 think you may understand my suspicion. Also, my
18 suspicions are raised by my abhorrence for
19 tobacco.

20 PROFESSOR HENDERSON: I share that.
21 I might even outdo you about that. But, 12
22 years ago in the North Carolina Law Review with
23 no sense that I'd ever be here today, I
24 supported language--and I would be happy to send
25 you--that is remarkably similar to the language,

1 the mood of this bill. I just think it's right.
2 If tobacco is one of the -- that's the way I
3 look at it, one of the many, many products
4 affected, then so be it. This is good law.
5 Tobacco fight I'll join you, honest to God, out
6 on the picket line someplace, but just not in
7 court; not case by case, is my view. Products
8 cannot address that question.

9 REPRESENTATIVE PRESSMAN: One final
10 question, Professor. In this area you made
11 several references about why you're here today
12 and everything. Is someone your client?

13 PROFESSOR HENDERSON: I told you who
14 I represented--the Pennsylvania Task Force on
15 Product Liability Reform.

16 REPRESENTATIVE PRESSMAN: And you're
17 a paid representative of them?

18 PROFESSOR HENDERSON: Well, I'm
19 hoping that's the case. Indeed, can I say
20 something to you. If I'm not, I want all of you
21 to be witnesses. I'm relying on the fact and
22 the hope that I will get remunerated for my
23 work, not my opinion. I wrote these things down
24 and published them. You're so damn young you
25 might have been in high school. I believe it

1 and I believed it for most of my adult life.

2 The fact that I worked damn hard and
3 became an expert doesn't in any way preclude me
4 from coming down here and doing honest work. I
5 have tried to be candid with you. I have jumped
6 through no hoops. I'm kind of hoping I get
7 paid. We haven't really talked about it, truly,
8 the terms and all, but -- Well, there it is.

9 REPRESENTATIVE PRESSMAN: You learned
10 in law school not to talk too long about those
11 things.

12 PROFESSOR HENDERSON: You do, don't
13 you?

14 CHAIRMAN CALTAGIRONE: Are there
15 other questions?

16 REPRESENTATIVE CHADWICK: Professor
17 Henderson, Representative Scot Chadwick.
18 Following up on Representative Pressman's line
19 of questioning, the next witness who is
20 scheduled to testify is going to testify in
21 opposition to the bill. I have the advantage of
22 having a copy of his written testimony in front
23 of me. He's going to use words like Dalkon
24 Shield, Ford Pinto, tobacco.

25 In this Halloween season, is he

1 attempting to scare us away from doing something
2 we ought to be doing unreasonably?

3 PROFESSOR HENDERSON: If he's not,
4 he's not doing his job, is he? But, you know,
5 again, not to trivialize it, it seems to me
6 those are major concerns. Every one of those
7 items on that list is something. I put tobacco
8 up at the top of my personal hit list in terms
9 of things that I resent. I mean it when I say
10 to him I will go out, if he wants to join me, on
11 some picket line somewhere. I will fight to the
12 end the notion you will bring it in my courts
13 and do it ad hoc case by case.

14 Now, would this bill change the Pinto
15 cases? No. Now, I got to put repose aside and
16 we did that. I don't think it would. Those
17 products were well within 15 years when they --
18 some could not, maybe weren't, but would this
19 feasible approach stop a Pinto claim? No.
20 Would it stop a Dalkon Shield? No.

21 You saw on the screen two hours ago
22 that there are good IUDs. That was a lousy one.
23 If it hurt a woman in my life I would be so damn
24 mad I'd be coming down here screaming, but not
25 against this reform but, you know. If he says

1 things like that he's doing his job, but it's
2 overkill. It's missing the point. This won't
3 lay a glove on it.

4 If he's down here saying we ought to
5 ban tobacco through the courts, then I'm saying,
6 "the hell you say we ought to do that," as much
7 as I feel strongly about it.

8 REPRESENTATIVE CHADWICK: Thank you
9 Professor, for saying something that I think
10 really needed to be said.

11 CHAIRMAN CALTAGIRONE: Representative
12 Bortner.

13 REPRESENTATIVE BORTNER: I really
14 hate to do this. In the area of the design
15 defect, I want to know this honestly. Would
16 this legislation bar a recovery in the case
17 where a product is defective, absolutely
18 defective, but there is no better way to make
19 it?

20 I say that because, in my view, there
21 may be some products out there that we just
22 don't need. First one that comes to my mind is
23 Bounce fabric softener or something like that.
24 Society just doesn't need it. Perhaps, there's
25 not a better way to do it, but maybe it should

1 not be manufactured in the first place. Would
2 this legislation interfere with a lawsuit to
3 recover damages in that situation?

4 PROFESSOR HENDERSON: Yes. But it
5 would not do any more than what your law has
6 done on that front so far, to my knowledge. It
7 certainly is. I say mainstream. It's the vast
8 majority opinion. I don't think Bounce is at
9 all an example of a product that couldn't be
10 improved.

11 REPRESENTATIVE BORTNER: It really
12 isn't. It's just really the most worthless kind
13 of thing I can think of in a minute.

14 PROFESSOR HENDERSON: I have it way
15 down on my list. I never thought about Bounce.
16 You see, when you sit and think about this,
17 examples come to mind. But if I were someone
18 who did this for a living, I think I could show
19 you, with no slight of hand, those aren't
20 examples of unavoidably dangerous products; they
21 really just are not.

22 When you come up with an example that
23 is truly, then my feeling is, and I say this
24 with respect, where are we getting off telling a
25 bunch of folks who do think Bounce is the

1 neatest thing in the world, they think it's
2 going to help their sex lives -- Why? Let the
3 market decide those things. The moment you
4 start talking, though, about products that are
5 really, really bad, then I'm thinking let's turn
6 to other forums. Really, that's my thought.

7 REPRESENTATIVE BORTNER: Thank you.
8 It's a fair answer. I appreciate that.

9 CHAIRMAN CALTAGIRONE: Thank you very
10 much, Professor. I think you really earned your
11 fee.

12 PROFESSOR HENDERSON: I thank you for
13 that.

14 CHAIRMAN CALTAGIRONE: We will recess
15 now for a late lunch until the hour of 2:30.
16 Members of the Judiciary Committee please
17 proceed over to the Speaker's office for a very
18 brief briefing.

19 (At or about 2 o'clock p.m., the
20 Committees recessed for lunch; to reconvene
21 at or about 2:30 p.m.)

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AFTERNOON SESSION

1
2 CHAIRMAN CALTAGIRONE: Could we get
3 started with this afternoon's proceedings? We
4 will have Trial Lawyers Association start off.

5 MR. MATUSOW: My name is Don Matusow.
6 I'm a practicing lawyer and do a considerable
7 amount of work in the area of product liability.
8 I'm here representing the Pennsylvania Trial
19 Lawyers Association. With me today on my left
9 is Leonard Sloane, also a practicing lawyer who
10 happens to be President of Pennsylvania Trial
11 Lawyers Association this year. A job, frankly,
12 I do not envy him. On my right is another
13 practicing lawyer, Howard Messer from
14 Pittsburgh. He is the Chairman of Pennsylvania
15 Trial Lawyers Product Liability Section.
16

17 I'd like from the outset to state
18 that I have heard the present Bill 916, proposed
19 House Bill 916, represents some form of
20 compromise and does not really radically depart
21 from existing law. If I could do anything else
22 today other than to convince you that that is
23 very, very far from what actually the effect of
24 916 would be. 916 is true other than the
25 statute of repose would not bar access to the

1 Court. The Dalkon Shield cases and other cases
2 could still be instituted. That is true,
3 except, again, as I say, with the statute of
4 repose.

5 Each of the sections of this statute
6 is designed to deprive the victim of his
7 opportunity to win that case. This piece of
8 legislation says, yes, you can come into court.
9 What we don't want you is to go out of court as
10 a winner. That's the effect of this, each of
11 the sections of this particular piece of
12 legislation.

13 There really are two effective ways
14 to deter irresponsible or negligent conduct,
15 particularly in the area of product liability.
16 The first of those ways is government
17 regulation. A second of those ways is private
18 lawsuits.

19 Unfortunately, government regulation,
20 this morning's witness who was a former OSHA
21 inspector. I think really captured that;
22 government may be well meaning, but in terms of
23 attempting to regulate the safety of products,
24 it is ill equipped to perform that job. I think
25 government regulation has brought about many

1 safety improvements. I don't mean to say it's a
2 totally ineffective vehicle.

3 Standing alone, it cannot begin to
4 insure that the workplace will be safe or that
5 our homes will be safe or that our automobiles
6 will be safe, or that the drugs we take will be
7 safe. We need in addition to that an effective
8 avenue of access to the courts through private
9 litigation. Yes, I am going to mention Dalkon
10 Shield and the Ford Pinto and DDS. Not so much
11 for the exact impact of this statute on those
12 cases, we can discuss that, but for the
13 regulatory impact that private lawsuits had on
14 those products.

15 Ford Pinto, that gas tank passed
16 government regulations. It was in full
17 compliance with then existing standards. We all
18 know that hidden in Ford Motor Company's files
19 was a memorandum where they decided that instead
20 of spending three to ten dollars per car for a
21 safety improvement, they'd bite the bullet for
22 lawsuits and incur whatever deaths, maimings
23 resulted from the location of that particular
24 gas tank.

25 That memo and the change in the Ford

1 Pinto -- not just Ford Pinto, but all of the
2 other car manufacturers who had to respond to
3 that emphasis on safety with regard to the
4 location of their fuel system. You can't
5 measure what a product liability law that is in
6 effect now has done just by each individual
7 case. The deterrent effect is tremendous.

8 If it was not for private litigation,
9 I don't know whether Ford would still be
10 manufacturing that death trap; hopefully not.
11 Hopefully, publicity and other things finally
12 would have caught up. Many, many lives were
13 saved through private litigation.

14 The same with Dalkon Shield,
15 Thalidomide, a drug that made grotesque babies.
16 There's no other way to describe it. The only
17 way that drug was taken off the market was a
18 lawyer in Philadelphia, Arthur Rains. He
19 happens to be Chancellor of the Bar in
20 Philadelphia now. He gave up about five years
21 of his life, professional life, and yes, he did
22 receive fees. He was doing it pro bono. He was
23 doing it on behalf of specific clients, but
24 notwithstanding that, if it wasn't for the
25 activities of that one particular lawyer,

1 Thalidomide probably would have stayed on the
2 market for at least another decade, maybe
3 longer.

4 I believe that the product liability
5 laws, one of its primary functions, even as
6 opposed to compensating victims, is the
7 deterrent effect that it has on manufacturers.

8 I have heard today that this
9 legislation won't impede that deterrent effects.
10 I must say that defies logic. If I'm accurate,
11 and I'm sure I will get a few questions testing
12 that accuracy, this legislation is really
13 designed to limit a client's ability to recover.
14 Along with it goes the deterrent effect hand in
15 glove. For someone to say that this really is
16 just sort of cleaning up the law and making it
17 sort of look like the rest of the law around the
18 country and it's not going to have any impact on
19 deterrence is really blinded to the facts.

20 If it makes a product liability
21 lawsuits more difficult, makes them less likely
22 to win, there's less likely the deterrent effect
23 that's been carried on. Maybe if these cases
24 become so difficult there won't be an Arthur
25 Rains to discover Thalidomide.

1 How do you measure those costs? I'm
2 not sure how you're going to do that. I'm
3 telling you one thing, they are significant
4 savings that are bought about for every citizen
5 of this Commonwealth by effective product
6 liability legislation.

7 If there's any doubt about the intent
8 of this legislation to limit people's
9 opportunities in the courtroom, I just take you
10 to the preamble of this particular House
11 Bill 916 where it says the "purpose is to
12 establish, in statutory form, certain clear
13 limitations with respect to the imposition of
14 liability in product liability cases." That's
15 not my statement of what the purpose of this law
16 is. That's the statement of the drafters of
17 this legislation.

18 I must say that every section that
19 follows that and comes after that preamble
20 carries it's intent out with deadly accuracy.
21 It carries the intent out to limit, as it says,
22 "to set certain clear limitations" with respect
23 to the ability of people to recover. This is
24 not trial lawyers jargon. This comes, again, as
25 I say, from the statutory preamble.

1 The other thing, I have not heard in
2 these hearings of an example of one improper
3 result in the courts of Pennsylvania as a result
4 of the existing legislation. They talked about
5 scare tactics. This legislation creates all
6 sorts of problems. I would like to be --
7 I'm sure there's one or two in every system;
8 there's going to be. I would like to see the
9 proponents of this legislation to point to cases
10 where the manufacturer lost when he should not
11 have lost.

12 That's what I challenge the
13 proponents to do, because this system that we
14 have now, and as a practicing attorney I can
15 tell you, it's not easy to win a product
16 liability lawsuit. Then Chief Justice Lord of
17 the Eastern District of Pennsylvania several
18 years ago conducted a survey. Manufacturers won
19 approximately 80 percent of all product
20 liability lawsuits under the current type of law
21 that's in existence today.

22 We all heard we want to level the
23 playing field. If we are going to level the
24 playing field any further, I guess you want the
25 level playing field is where there's no

1 successful product liability lawsuits.

2 In order to win a product liability
3 lawsuit, the Plaintiff must be able to show--he
4 has the absolute burden--that there was a defect
5 in the product. That means that the product was
6 made with some element that made it unsafe for
7 its intended use, or it lacks some element to
8 make it unsafe for its intended use. In design
9 cases that really pits David against Goliath.
10 David here is the Claimant and the Claimant's
11 attorney with their limited resources against
12 Goliath, General Motors.

13 Our firm has a number of cases
14 against General Motors. In most of those cases
15 the out-of-pocket expenses that the law firm
16 incurs to prosecute those actions go well above
17 \$50,000.00. Some automobile cases have gone
18 above \$200,000 that the law firm has put out in
19 prosecuting the case. That particular case
20 involved air bags and the attempt to institute
21 more safe restraint systems in automobiles.

22 So, there is a heavy burden on the
23 Plaintiff. I sort of have gotten the idea today
24 that a Plaintiff comes in and he shows he was
25 hurt with abusing a product, and that he's hurt

1 badly, and he goes out with a pot full of money.
2 That's not accurate. Again, if the proponent
3 can start to point to cases, to make it alive to
4 you, where this Claimant unjustly secured an
5 advantage from the company because of our laws
6 on a repetitive basis, then I would say, wait a
7 second; the problem has to be addressed. I
8 haven't heard one word of testimony in that
9 regard this morning.

10 With regard to the deterrence effect
11 of product liability legislation, I think many
12 of you probably are familiar with the Rand
13 Corporation. It's basically a conservative
14 think-tank organization. In one of their
15 studies on this issue they say, it is the threat
16 of product liability lawsuits which constitutes
17 our singular most effective deterrent against
18 the manufacture, distribution and sale of unsafe
19 products. That, indeed, is an accurate
20 statement by the Rand Corporation.

21 We all saw the 20-720 tape this
22 morning. I guess we should share the 60_Minutes
23 tape which took just the other view. I don't
24 agree with the Piper manufacturer that said it
25 was because of product suits that we went out of

1 business. The only reason that that could be
2 is, so many Pipers went down that -- there were
3 so many accidents with Pipers that they were an
4 unsafe plane. Then maybe they deserved to go
5 out of that line of business.

6 As one of the other witnesses said
7 this morning, when OSHA was passed, and any
8 plant would close, that's what they'd throw
9 their blame on. It was OSHA and all those
10 horrible requirements that the law is imposing
11 upon us to make these safe products. Now, if a
12 manufacturer who has an interest in depriving
13 and limiting lawsuits goes out of a particular
14 line of business, that's the claim.

15 If the claim is accurate, I say thank
16 God. Thank God the Piper -- I don't
17 particularly think the Piper is that dangerous
18 from my experience. In truth, because of my
19 limited knowledge of how many Piper accidents,
20 if there are that many falling out of the skies
21 that product liability has become an onerous
22 problem to them, then they ought to get out of
23 the business. They have insurance. I really
24 have a very, very hard time with those claims of
25 the disasters that product liability legislation

1 is supposed to have taken place.

2 I have seen personally, in representing
3 injured workers, improvements in products. Not
4 many years ago I represented a young man
5 15 years old in a meat processing place. The
6 young man was required to work on a power driven
7 meat grinding machine. There had been a guard
8 placed on there by the manufacturer, but they
9 knew everybody took them off, so they made it
10 very easy to take the guard off instead of
11 taking steps -- because the people are working
12 in the cold sometimes and the guard might slow
13 things down a little bit.

14 In tracing that particular manu-
15 facturer's product, I went back probably about
16 40 years and the product I'm talking about was
17 probably made about 20 years before. You could
18 see improvements in those products that
19 corresponded with liability imposed costs
20 through the court system.

21 In other words, I could find a case
22 when I put the name of a manufacturer in the
23 computer thing and you get all of the cases that
24 were ever decided against that manufacturer.
25 Well, you see the case and not long thereafter

1 you see the product improvement as a result of
2 that particular finding by a court. Until
3 finally, the present machine that that
4 manufacturer is making, a young man would have
5 to almost dive into it to lose his arm. It was
6 just using your head. There was no new tech-
7 nology involved in the most recent machine. It
8 was just a way of using existing technology.
9 Again, I'm a great believer in the deterrent
10 effect of product liability litigation.

11 With regard to House Bill 916 and its
12 effect on litigation, I'll address a couple of
13 the sections and then certainly answer any
14 questions with regard to remaining sections.

15 I think we heard enough about the
16 statute of repose and the ill effects that the
17 proposed legislation would create in both
18 latency cases, airplanes, almost every product
19 in manufacturing plants, the broadness of that
20 statute of repose was shocking.

21 In terms of the admissibility of
22 industry standards and government standards,
23 it's true that this piece of legislation just
24 makes that admissible. It doesn't sound so bad.
25 Why shouldn't it be admissible? Particularly

1 with industry standards, that's having the fox
2 watch over the chicken coop. If you think why
3 this is in the legislation, and I can tell you
4 in terms of the courtroom where I have spent
5 some time, that if the manufacturer is able to
6 go in and show this complied with existing
7 regulations, the Ford Pinto with its existing
8 regulations --

9 There was child's sleepwear on the
10 market that passed all regulations that would
11 burn just as fast as newspaper and slower than
12 cardboard but met all those regulations. It can
13 have tremendous impact to juries when they hear
14 that the government says that this product is
15 safe and who are we to say different from the
16 government, and the same with industry
17 standards.

18 National Fire Safety Council, that
19 sounds very impressive, but 90 percent of the
20 members of that particular council are made up
21 of industry. To have an industry regulate
22 itself and say what's a good product and what's
23 not a good product is exactly what the courts
24 are designed not to do. It's to leave it to the
25 jury what is and what is not a good product.

1 With regard to the product design
2 cases, now this legislation would require the
3 Plaintiff to become the design engineer for the
4 manufacturer. That's what it's asking. It's
5 asking David to say to Goliath, look, here's how
6 this should have been made safer. I would say,
7 in most instances, the Plaintiff's lawyer does
8 undertake that obligation to show how it could
9 be safer. This makes it mandatory that David
10 becomes Goliath's engineer.

11 It says, look, it's not going to be
12 defective unless there was no practical
13 alternative design that was cost-effective and
14 that would not affect the desirability of the
15 product. That language is in this legislation.
16 They are saying, if any of those changes would
17 affect what the manufacturer intended as the
18 desirability of its product, then the product
19 would not be defective. There's lots of zingers
20 in this. I submit that in some ways that
21 beginning of Section 8374 sounds not totally
22 unreasonable, I must say.

23 Then you read the full language where
24 they say any improvement can't impinge on the
25 desirability of the product. Again, that really

1 goes way, way beyond present law, the law of any
2 state in this country and is unnecessary.

3 We've talked about the protection
4 specifically for the tobacco industry and this
5 legislation is replete with that. This would
6 guarantee that there would not be one case
7 against the tobacco companies in Pennsylvania;
8 end of case; no maybe's, no if's, no possi-
9 bilities. They would go on. That's not an
10 unintended result of this legislation.

11 Another, product warning which is
12 another big avenue where people are asking that
13 they be advised of what can harm them. I don't
14 think an unreasonable request. Again, some
15 parts of this section don't sound too bad. You
16 read it. It doesn't sound too bad, but when you
17 look at the language it says they only have to
18 give the warning that a reasonable person in the
19 same position as themselves would have to give.
20 Let me translate that for you.

21 That means they only have to give the
22 warning that other manufacturers would have had
23 to give. Again, it's a case of the fox guarding
24 the chicken coop. When they say a manu-
25 facturer -- They are not saying in here it's

1 what a reasonable consumer would want to know.
2 They are only saying what a reasonable
3 manufacturer would tell them. That's in this
4 bill, again, in the guise of some language that
5 just doesn't sound so bad. But is there any
6 justification, I ask you, to limit a manu-
7 facturer's duty to warn to the same as what
8 other manufacturers would have told those
9 people. We'll let them know what we're going to
10 tell them.

11 Another example in that same section
12 is that there would be no liability to failing
13 to provide information that was generally -- let
14 me start over. There would be no liability
15 under this section for failing to provide
16 information generally known to the class of
17 persons to whom the warning was supplied to.
18 What about the worker who didn't know? He's a
19 new guy. He didn't know what his other workers
20 knew. Shouldn't they have tried to get to him
21 by having the warning on the product? This bill
22 would encourage them not to put the warnings on
23 the product itself because it gives them so many
24 defenses to that requirement. Isn't that new
25 worker entitled to that same protection?

1 I believe we have a few additional
2 minutes. I'd like I did introduce Mr. Messer
3 who has some comments with regard to workplace
4 safety.

5 MR. MESSER: Mr. Chairman, members of
6 the committee, when we talk about the bill, or
7 any bill, it's always comforting to know that
8 everybody in the room has a desire to do two
9 things: First of all, it seems to me that the
10 paramount interest of every legislator is to
11 protect the health and well-being of his or her
12 constituents.

13 The second important issue is, how
14 can we at the same time provide a reasonable
15 economic climate within which business can be
16 conducted in this state?

17 As Mr. Matusow said, there's no
18 reason this Committee is considering this
19 legislation other than to provide some cost
20 savings by either insurance rate reduction or
21 some economic factor or benefit which would
22 anored (phonetic) to the manufacturers as a
23 result of the legislation being passed. There
24 is no other purpose to this legislation unless,
25 as the professor told us this morning, it's

1 simply for the academic purpose of placing Penn-
2 sylvania in what he considers to be the main-
3 stream of product liability law.

4 With that in mind, the Pennsylvania
5 Trial Lawyers Association suggests there are
6 certain remedies that you might consider in
7 addition to the ones that you have in 916. For
8 example, on the issue of the statute of repose
9 which was discussed this morning, wouldn't it be
10 easy for the manufacturer of a product to place
11 on that product a useful life for the product?
12 For example, a sheer might have a useful life of
13 ten years; a ram rod in a steel mill might have
14 a useful life of 30 years.

15 So, the manufacturer who designs that
16 product, obviously using engineering and
17 scientific technology which we all know is at
18 his command, would have the opportunity to say
19 to the purchaser, another businessman, my
20 product will last for ten years. After it's
21 done ten years from now it's not going to be
22 safe anymore. During that ten-year period I am
23 going to warrant this product for three years,
24 and for the next seven years I will send you
25 bulletins and so on to tell you how to maintain

1 this machine. But, after ten years you're on
2 your own.

3 We could all live with that, can't
4 we? If, at the end of that ten years that
5 employer, that manufacturer, then undertakes to
6 continue using the machine, despite the repre-
7 sentations of the manufacturer of the product,
8 then he should assume the liability of the
9 manufacture of the product because at that point
10 in time he knows that the manufacturer says it's
11 not safe.

12 I'd ask you to consider whether or
13 not that is not a reasonable solution to the
14 argument regarding a statute of repose within
15 the product liability area.

16 In addition to that, as Mr. Matusow
17 has told you, Plaintiffs' lawyers don't walk
18 into courtrooms and have bushels of money thrown
19 at them. It doesn't happen. Many reasons for
20 that. Some of the defense lawyers in this room
21 are the reasons for that; some rules of evidence
22 are the reasons for that; the cost is the reason
23 for it. But, there are certain things that this
24 legislature can do to increase the availability
25 of information to all Plaintiffs, all of your

1 constitutents, about products who are the
2 subject of litigation.

3 There's a massive trend in the United
4 States today for defense lawyers to request the
5 Court to have the Plaintiffs' lawyers sign
6 secrecy stipulations. What these stipulations
7 entail is, "Mr. Messer, if you represent this
8 client, whatever information you find out during
9 the discovery of this lawsuit about any defect
10 in this product will not be disclosed to any
11 other person without an order of court." And
12 the courts are asking you to sign them, some
13 directing you to sign them, and you sign them,
14 because, obviously, you have a client to protect
15 and your duty to that client supersedes your
16 duty anywhere else.

17 There are a lot of cases sitting out
18 there that have never been tried; that you have
19 never read about; that have been settled
20 regarding defective products where the infor-
21 mation which would be of general public good and
22 welfare will never hit the light of day. This
23 legislature can say, those orders of court are
24 inappropriate in this jurisdiction and any
25 information that must be disclosed in a public

1 court proceeding is available for public
2 examination.

3 We talked a lot about the tobacco
4 industry being involved in this state and in
5 this litigation, in this legislation, and in
6 this effort. I don't know if they are or not.
7 But, their industry is a prime example of the
8 type of manufacturer that may need to be
9 reminded of its social responsibility to our
10 society.

11 There is in existence the technology
12 and the scientific know-how to produce a
13 significant fire safe cigarette. This fire safe
14 cigarette is designed to prevent fire arising
15 out of cigarettes left in beds, on pillows, on
16 rugs, on carpets, around children. The effort
17 of the tobacco industry to develop this
18 cigarette is not well-known; however, it does
19 exist. There is a cigarette that is better than
20 the one we have today that can be sold and
21 manufactured in this jurisdiction that isn't
22 being manufactured in this jurisdiction and it
23 is safer than the old one.

24 I think you have a right to question
25 whether or not this legislature can develop a

1 bill which requires the production of cigarettes
2 in Pennsylvania to be of a fire safe quality.

3 In addition, as to the tobacco
4 industry, there's always a question as to the
5 cause of the carcinoma, or cancer. It's extra-
6 ordinarily difficult for a Plaintiff to prove
7 causation in these cases. This is despite the
8 fact that the Surgeon General has already spoken
9 on the issue; Surgeon General of the United
10 States.

11 This is only industry, that I'm aware
12 of, that periodically, and over a period of
13 years, and, for example, in one year kills
14 358,000 of its clients that they have to
15 replace. We should say to them, you're making
16 billions of dollars off of cigarette sales.
17 You're promoting your industry which you have a
18 right to do. However, we are going to place the
19 burden upon you to come into the courtroom and
20 say that the cigarette that this man smoked did
21 not kill him; that some other cause did.

22 Let's make -- If the manufacturer is
23 so sure his product is safe or his product
24 didn't do what the Plaintiff says it did, then
25 let's make him come in affirmatively in the

1 tobacco situation and prove -- let's shift the
2 burden to him to prove that the cigarette did
3 not kill this gentleman and not the other way
4 around. They have the money. They have the
5 time. They, obviously, have the energy within
6 which to protect their own interest.

7 These are the types--I overspent my
8 time here a bit--of legislation that we need to
9 have in order to protect the public. There has
10 to be a balance between cost and the shifting of
11 cost and human lives. There is no member of
12 this legislature, at least in my opinion, that
13 would say that if we save 50 bucks it's worth
14 the risk if 35 people die. That's not the
15 issue.

16 The issue is, we have to maintain and
17 we have to provide the traditional protection to
18 all of our citizens. In today's society we are
19 not only talking about punch presses. We are
20 not only talking about people who use scissors
21 in a mill. We are not only talking about these
22 machines. We are talking about chemicals that
23 have never had a long-term test on what happens
24 to a human, for example, who inhales a
25 particular chemical. We don't know, for

1 example, right now what contaminants there are
2 in certain products because they don't have to
3 be disclosed.

4 If we find that out 15 years from now
5 or 30 years from now, are we going to foreclose
6 our sons and daughters and grandsons and nieces
7 and nephews from attacking the manufacturers of
8 these products who may have made, and probably
9 do make enormous sums of money off of them? If
10 the risk is to be placed in this situation, it
11 has to be placed upon private industry.
12 Government doesn't have the money or time or the
13 regulators to control it.

14 The court system has handled the
15 problem effectively and now we have to say, if
16 industry is going to manufacture products, they
17 must bear the risk of undertaking to cure the
18 problems they create if, in fact, they do create
19 them.

20 REPRESENTATIVE LEE: Mr. Chairman.

21 CHAIRMAN CALTAGIRONE: Mr. Lee.

22 REPRESENTATIVE LEE: I'm interested
23 in your testimony, Mr. Matusow. I sit here and
24 I'm an attorney as well. I can't disagree with
25 anything you say concerning how the products

1 liability tort arena plays a significant role in
2 encouraging manufacturers to make their product
3 safer.

4 What I'm sitting here and finding
5 hard to believe is that, trial lawyers can come
6 in here today and just say there's absolutely no
7 problem out there as far as some of the cases
8 that are being brought.

9 I just give you one example when I
10 was going to law school. I had a friend, my
11 roommate, in fact, who was working for a local
12 Plaintiff's firm here in Harrisburg. They had a
13 case about an unfortunate kid who dove into a
14 swimming pool where there was a tire in the
15 middle of it, big industrial tractor tire.
16 Unfortunately, he dove into it. He broke his
17 neck and he was paralyzed. What did the lawsuit
18 pertain to? They sued the manufacturer of that
19 truck tire on the basis that they failed to warn
20 that you should not dive into this truck tire
21 when it's in the pool. I hope that case was
22 thrown out early on.

23 MR. MATUSOW: It was.

24 REPRESENTATIVE LEE: At the same time
25 that truck tire manufacturer had to come in,

1 spend a lot of its time and money and people
2 that buy those trucks, drive those trucks, or
3 carry those materials around. I am just
4 disappointed that trial lawyers aren't in here
5 saying we have a problem in here. Please do
6 not -- We can see why you want to try to solve
7 that problem, but at the same time don't forget
8 about the people that are legitimately injured
9 and should be compensated.

10 MR. MATUSOW: I don't disagree with
11 you, Representative, that there are lawyers who
12 bring stupid suits. It happens, unfortunately.
13 As with every other profession, there are wrong
14 headed or misguided or whatever. By the way,
15 this legislation would not assist in that
16 problem one bit. Other legislation with regard
17 to frivolous suits that have been talked about,
18 and we have indicated some willingness to
19 participate in those discussions, I agree with.

20 Again, though, I have not heard of
21 cases where the system has been abused by the
22 law as it exists now for the recoveries of
23 people. Yes, some cases I wish there were, but
24 this particular bill won't cure that.

25 MR. SLOAN: I want to mention, you're

5

1 talking about the swimming pool case. Do you
2 know there are an awful lot of quadraplegics as
3 a result of swimming pool accidents. In Phila-
4 delphia there were recently cases that were
5 tried, whereby, gentlemen were diving off of
6 diving boards not realizing that they were
7 hitting their head on the other end of the pool,
8 the hopper bottom, because the manufacturer, to
9 make it cheaper, didn't make the pool long
10 enough and knew about the injuries.

11 There's a situation where maybe this
12 particular case you're talking about was wrong,
13 but there are 150 quadraplegics or 300
14 quadraplegics a year as a result of economic
15 decisions being made in the swimming pool
16 industry. The NSPI has the statistics.

17 REPRESENTATIVE LEE: One of the most
18 disturbing areas of this whole problem to me is
19 not who ends up getting the money; whether it be
20 that the manufacturers keep the money or it ends
21 up getting to people who are legitimately
22 injured. My problem is somewhere between here,
23 where the manufacturer has the money, and here,
24 where the person injured is getting the money,
25 we have nearly 50 percent of the money going

1 into paying attorney fees, insurance fees, court
2 costs, et cetera.

3 I'm trying to find some way we can
4 reduce that amount of money and stop wasting all
5 this money on an endless bureaucratic system
6 that we have set up right now.

7 MR. MATUSOW: I'll tell you. When I
8 first started practicing, discovery was not
9 nearly as extensive as it is now. It sort of
10 was try it out of your briefcase. I kind of
11 liked that system better. It suits my
12 temperament; meaning, I don't want to go through
13 all the work that's required in product
14 liability lawsuits now. There's a tremendous
15 amount of paperwork, as was discussed this
16 morning, in discovery. That's not just in
17 product liability litigation. It's in
18 securities litigation, any kind of litigation
19 you want to talk about. There's nothing
20 peculiar about products in that regard.

21 With regard to the point as to fees,
22 our law firm does charge one-third after
23 deducting costs of a lawsuit. I have indicated
24 cost of those lawsuits might run up to
25 \$200,000.00. If we lost those cases, and we do

1 lose cases, those \$200,000 are not paid by
2 anybody. We can't come to the government or
3 anyone else. That's an economic risk that we
4 took. So, that has something to do with the
5 contingent fee.

6 I heard somebody say this morning
7 that with an airline crash case all you have got
8 to do is come into court and you'll get money;
9 it ought to be two percent. That's crazy. I
10 have a friend out in California who is on trial
11 now for the tenth week and they haven't even
12 finished the Plaintiff's case in an airplane
13 crash case. Their expenses are phenomenal.

14 Particularly in products where it's
15 so difficult to win, the contingent fee, which
16 is the only way an injured person can get
17 representation, can be supported almost every
18 time. Very few times, when I sued General
19 Motors or anybody else, they say, "Well, don't
20 worry about it, we'll pay you the money."
21 Between starting that suit and whenever it's
22 resolved, the amount of time, effort and
23 resources spent are phenomenal; not just
24 large.

25 I mean, to really prosecute a case

1 against General Motors we might have three
2 lawyers in our office working tremendous hours,
3 pouring through papers. Sometimes they have you
4 come into a room, and I think they throw the
5 stuff up the stairs first, documents that might
6 take two weeks to find a document where they
7 show they crash tested that car and it failed.
8 It might take you three weeks to find that in
9 the mountain of paper. It's not just the
10 Plaintiffs' lawyers that contribute to the
11 extent that there are costs involved.

12 But, again, I think most importantly,
13 there's nothing peculiar to product liability
14 lawsuits to the problem that you're addressing.

15 REPRESENTATIVE LEE: I know it's a
16 general concern I have concerning all types of
17 cases. No further questions.

18 CHAIRMAN CALTAGIRONE: Representative
19 Hagerty.

20 REPRESENTATIVE HAGERTY: Thank you.
21 Since this bill was introduced, the favorite
22 attack has been against tobacco. We all
23 understand that tobacco is evil and bad. I'm
24 just curious, are you suggesting that you ought
25 to be able to sue the tobacco company and

1 recover for getting cancer? I don't understand
2 what the argument is, other than tobacco is evil
3 and a great word to use. Should we be able to
4 sue and recover for getting cancer?

5 MR. MATUSOW: I believe there are
6 certain valid cases against the tobacco company
7 that go back many years when they had knowledge
8 and didn't put the warnings on. Once warnings
9 came out in existence -- This, again, is my
6 personal view; other lawyers might disagree.
10 Again, I think there are valid cases to be
11 brought against the tobacco companies.
12

13 REPRESENTATIVE HAGERTY: You're
14 suggesting, I guess, warnings have been 25, 30,
15 35 years?

16 MR. MATUSOW: Less than that. I
17 think it was in 1972. The statute of repose
18 would have knocked out, as proposed in this
19 bill, would have knocked out what I believe are
20 the valid cases against the cigarette
21 manufacturers.

22 REPRESENTATIVE HAGERTY: So that the
23 whole fight over tobacco, then, you're telling
24 me is whether or not the cases of people who
25 smoked prior to 25 years ago, and I assume kept

1 on smoking because they didn't get cancer even
2 after the warnings, can be brought or not?

3 MR. MATUSOW: We have been looking
4 for the guy who quit smoking then, but we
5 haven't found him, 15 years ago. I frankly
6 don't understand the tobacco companies. They
7 know a lot more than I do, so fine. For them to
8 have spent the time, money and resources that
9 they have, and they have targeted Pennsylvania,
10 there's no doubt about that, as one of the
11 states -- there's not been a case yet against
12 them that has won. I think they are spending
13 money in varieties of ways to achieve a result.
14 I think they are crazy. I think it's dumb
15 business. There's no cases against them; no
16 offense guys.

17 REPRESENTATIVE HAGERTY: You're not
18 suggesting that the cases should be brought. I
19 thought other attorneys suggest that somehow if
20 tobacco is killing people they should be able to
21 be sued.

22 MR. MATUSOW: Not just because
23 they're killing people, once the warnings were
24 there. If they're fire safe -- Mr. Messer was
25 indicating there are a lot of accidents caused

1 by cigarettes setting fires. They can make a --

2 REPRESENTATIVE HAGERTY: You're not
3 suppose to smoke in bed. Don't we all know
4 that?

5 MR. MESSER: That doesn't apply to
6 the children that are hurt.

7 REPRESENTATIVE HAGERTY: I'm
8 frustrated because it seems to me it's been very
9 convenient to somehow judge this whole piece of
10 legislation because --

11 MR. MATUSOW: You judge it somewhat
12 by its proponents and what their motives are.

13 REPRESENTATIVE HAGERTY: I disagree
14 with you. I judge a piece of legislation by
15 what's in the bill, by the content of the bill.
16 I have already gone through this one week
17 suggesting that we ought to look at content of a
18 piece of legislation and what it's going to do
19 and not by name calling.

20 I only bring this up because I would
21 be more interested in hearing specifically which
22 sections would limit what kind of lawsuits,
23 because I happen to be sympathetic generally to
24 many of the concerns, particularly about statute
25 of repose, than I would to continuing the

1 rhetoric over what I think is a non-issue here,
2 and that is this tobacco lawsuit.

3 MR. MATUSOW: Again, I believe there
4 are valid cases, potentially valid cases against
5 cigarette companies. Personally, I don't think
6 a lot about them. I don't think they are such
7 great cases. I'm just saying they're
8 potentially valid.

9 I'm sort of with you about that.
10 That's why I'm kind of mystified at the process
11 why there is so much time and effort being
12 expended in order to achieve a result that I
13 think the courts are already going to take care
14 of for the tobacco companies.

15 By the way, that was not on behalf of
16 Pennsylvania Trial Lawyers. They would kill me.
17 That was just on behalf of myself in terms of my
18 view of tobacco litigation.

19 REPRESENTATIVE HAGERTY: I don't know
20 about time and effort. I can only tell you the
21 30 letters I got this week from businesses
22 supporting this legislation were businesses in
23 my district. I don't know about time and
24 effort.

25 I have a lot of concerns about this

1 legislation. I agree with you on that, but I
2 want to focus on those concerns because I don't
3 think it serves any purpose for anyone to just
4 continue to point fingers at non-existent issues
5 here to make it easy.

6 MR. MATUSOW: I didn't in my
7 testimony.

8 REPRESENTATIVE HAGERTY: I should not
9 be expressing my frustration with you. It's
10 been the whole tone of discussion on this
11 legislation that I have heard.

12 MR. MATUSOW: If I can do anything
13 today is to leave you with the idea that the
14 rhetoric that you have heard that this piece of
15 legislation is modest, is compromised, is far
16 from the truth. It is not. It will radically
17 alter a client's ability to recover in every
18 aspect of that bill, including --

19 This morning I heard the discussion
20 about contributory negligence now being added as
21 a defense. As the law exists now you can look
22 at the Claimant, if he voluntarily assumed the
23 risk--that is, he knew there was a danger and he
24 took the chance--he would be barred from
25 recovery. The punch press operator who said I'm

1 going to get my hand in there before that ram
2 comes down again, he would be barred from
3 recovery.

4 This legislation doesn't want to stop
5 there. They add a whole new defense, a very
6 important one. The professor this morning said
7 the courts wouldn't make it too broad. I happen
8 to disagree with that. I think it would be
9 inappropriate to pass legislation hoping the
10 courts would not make it too broad. But that
11 worker, because he momentarily -- He's been on
12 the line six hours that day. He's a little
13 tired, his hand gets caught. He put his hand
14 where it shouldn't be, he would be barred or
15 substantially barred under this proposed
16 legislation. That's a radical, not just a
17 modest, a reform, a nice easy kind of change
18 that we can all deal with.

19 Most every one of the sections have
20 kickers like that. With the design section,
21 which in some ways look reasonable, but when you
22 analyze it, they really want to go beyond any
23 law that exists in the country in the design
24 area.

25 REPRESENTATIVE HAGERTY: One more

1 question on that point. Have you made any
2 proposals to modify these sections so that you
3 think they will be either modest proposals or
4 clarify the law?

5 MR. MATUSOW: No. We are against
6 this legislation. There's nothing preservable
7 in that particular piece of legislation. We
8 have dealt, and I have been active in the
9 legislature including on products liability,
10 since 1978; called into Senator Jubelirer's
11 office and spent--over ten years ago now--and
12 spent until 2:30 in the morning on product
13 liability reform legislation, with I might say a
14 small gun at our heads, but in any event, that
15 happens.

16 There's not been one issue,
17 Representative, that we have walked away from
18 and said we will not discuss. That's been true.
19 No one has approached us on this, particularly.
20 This legislation we can't go and put a pen to
21 it. It's that radical. You have to put an axe
22 to it.

23 REPRESENTATIVE HAGERTY: I'm curious.
24 How do you respond to the case we heard about
25 this morning?--I don't remember the name of it--

1 Azzarello case, in which our court gave the
2 following instruction to the jury to indicate
3 that the supplier of the product is the
4 guarantor. You do not believe that that needs
5 any correction or clarification in Pennsylvania?

6 MR. MATUSOW: I believe they should
7 be the guarantor. You want them to be the
8 guarantor, but you can't win, Representative.
9 You take one line, that's one thing. You can't
10 win unless you show the defect in the product.
11 They're a guarantor if there's a defect. That's
12 what the judge tells them.

13 That language was taken out of
14 context. It's matched with other language
15 what's required of the Plaintiff to prove. That
16 doesn't mean -- Again, that's what I thought
17 people might think when they heard that
18 language. All you have to show is the product
19 hurt someone and they collect. No. You have to
20 show the specific design or manufacturing defect
21 and then they're the guarantor. I would think
22 you would want that to be the case.

23 REPRESENTATIVE HAGERTY: I guess what
24 I'd like to see would be the whole jury
25 instruction then, because if that's the jury

1 instruction read to us this morning, I would be
2 concerned. I don't see how the jury can reach a
3 contrary conclusion, contrary to the Plaintiff,
4 if that's what the jury instruction is.

5 MR. MATUSOW: There is no doubt, and
6 we are trying to get statistics. They are just
7 not available. Product liability lawsuits in
8 Pennsylvania, under this law, most are lost.
9 Whether that figure is still Judge LLOYD's
10 80 percent, slightly above or somewhat below, I
11 can't tell you. But I do know --

12 REPRESENTATIVE HAGERTY: I have to
13 tell you that that statistic does not mean
14 anything to me. I don't know how many are
15 settled. More than that, what I need to know
16 what our law is and what it should be. I think
17 that's our job; not to determine how many
18 lawsuits are won or lost.

19 MR. MATUSOW: In this case I have to
20 disagree with that. They are saying that this
21 law brings about bad results. That has to be
22 eventually tested in the crucible. Our crucible
23 is our courtrooms -- or our juries are. If they
24 are under this present law, and I'm correct that
25 they are winning way, way more than the

1 majority, that crucible is working. They want
2 you to change that crucible.

3 Again, I haven't heard--I'm sure
4 there will be some--but day-in, day-out results
5 with that law is responsible for improper
6 recoveries.

7 REPRESENTATIVE HAGERTY: Let me share
8 with you one other perspective and then I will
9 stop. Quaker Chemical is in my district, and
10 when the head of Quaker Chemical came in to see
11 me he expressed to me the problem is not jury
12 verdicts. The problem is that the civil justice
13 system is such that you don't get to the jury;
14 that the cases are settled with the enormous
15 pressures because of costs and time lag is such
16 that these cases have to be settled for amounts
17 of money where probably if you got to the jury,
18 at least he felt in Montgomery County, a fair
19 result would be obtained

8
20 I only share that with you because I
21 agree with you. I'm not someone who says that
22 jury verdicts are unfair. I have great faith in
23 our juries and think that most results are
24 fairly determined.

25 MR. MATUSOW: Their insurance

1 companies and large and small corporations who
2 make business judgments about settlements, and a
3 lot of it has to do with what their product is.
4 It's not so much -- they're not really so much
5 worried about the law exactly. The law is not
6 as important as the product. When they are
7 making their settlements, almost every time
8 they're taking a look, what is our exposure
9 because of problems with this product. They are
10 making business judgments.

11 If they believe that, business-wise,
12 they will come out dollars ahead by prosecuting
13 and following the statistics, they will do it.
14 There's no gun to anyone's head to settle.
15 Trust me, Representative Hagerty, this is no gun
16 to their head if they are winning cases. They
17 know what the outcomes are if they want to take
18 the client to the courtroom.

19 They are talking about some
20 potential. I can only show you how the law
21 day-to-day operates in the courtrooms of this
22 country -- of this Commonwealth, under the law I
23 hear is out of the mainstream. The results
24 aren't. They are consistent.

25 As a matter of fact, this

1 legislation, in the design area, wants to take
2 the law of Pennsylvania in favor of the manu-
3 facturers where no one else will trod. When
4 they say -- The new change can't interfere with
5 the desirability of the product. Again, you
6 read the rest of the section it doesn't sound so
7 bad, but that's far into any jurisdiction.

8 REPRESENTATIVE HAGERTY: Thank you.

9 CHAIRMAN CALTAGIRONE: Representative
10 Ritter.

11 REPRESENTATIVE RITTER: No.

12 CHAIRMAN CALTAGIRONE: Representative
13 Chadwick.

14 REPRESENTATIVE CHADWICK: Thank you,
15 Mr. Chairman.

16 I'd like to start out, Mr. Matusow,
17 by congratulating you on another excellent job.
18 I don't think I had an opportunity after the
19 medical malpractice hearing to tell you that I
20 thought you also did an outstanding job
21 testifying as an expert witness in that complex
22 area. I think the litigation industry is
23 fortunate to have someone like you who is so
24 accomplished in so many areas.

25 Further, if I'm ever injured by a

1 defective product and been mistreated by the
2 doctor, I want you to represent me. Before we
3 leave today I'd like your card.

4 MR. MATUSOW: Our law firm does get
5 most of its business from other lawyers,
6 referral basis. Basically, the only work we do
7 is product liability and medical malpractice;
8 number of areas in the workplace, construction
9 site accident. The other kind of cases most
10 lawyers feel they can handle. Those are the
11 kind of cases that get referred to us routinely.

12 REPRESENTATIVE CHADWICK: On a more
13 serious note. I was very much moved today by
14 the testimony of some the victims of defective
15 products and substances who testified earlier.
16 I was also struck by the fact that two of them,
17 as I recall, indicated that one of the reasons
18 that they really hadn't been very well
19 compensated as a result of what had happened to
20 them--I can't remember the exact words--it was
21 the lawyers got so much of the money.

22 As Representative Lee indicated, the
23 ABC report indicates that the whole litigation
24 process eats up more than 50 cents out of every
25 dollar and less than 50 cents of every dollar

1 goes to an injured victim.

2 I congratulate your firm for holding
3 the line on contingent fees at 33 percent, but
4 it's a fact that in more and more places they
5 are drawing as high as 40 percent. Is there any
6 real reason in view of the fact that it's these
7 innocent and injured victims who are losing out
8 that we shouldn't put an amendment in this Bill
9 to cap fees at 33 percent?

10 MR. MATUSOW: Can we talk about your
11 statistics first?

12 REPRESENTATIVE CHADWICK: Let me
13 touch one more line.

14 I have heard from witnesses, not just
15 at this hearing, but some of the Labor Relations
16 Committee hearings we have had, from a lot of
17 victims who are in pretty serious financial
18 straits, but I haven't run into a trial lawyer
19 yet who is in the same circumstances. In view
20 of the fact that we are talking about injured
21 victims here, should we do something to hold the
22 line on legal costs?

23 MR. MATUSOW: The statistics that you
24 quoted about the 50 percent, a lot of that 50
25 percent is going to defense lawyers and just the

1 general costs; not the lawyer itself. Now
2 you're talking about the contingency fee.
3 That's not under the same circle that you have
4 just drawn. In those cases, the clients
5 routinely get well more than the 50 percent.
6 The question again is whether or not, at least
7 the cases I'm aware of, they come away
8 reasonably compensated for all of the work that
9 was done--the lawyers.

10 If you are saying to me is 40 percent
11 unreasonable, I can't say that. I can say what
12 our law firm does. Are you going at the same
13 time look to the defense side to save the money,
14 or are you just going to the Plaintiffs? It's
15 one thing where our fees are attacked -- I'm not
16 embarrassed about any fee I have ever charged.
17 Our firm will, and many many firms do, if the
18 case gets settled more quickly than we antici-
19 pated, charge less. I can take you through our
20 contingent fees and it wouldn't be 5 percent or
21 ten percent where the fee is less than I have
22 indicated. That's not unusual for lawyers.

23 Most times the people who talk about
24 that--I'm sure this is not in your case--are
25 looking to prevent the person from getting to

1 the lawyer to begin with. That's the main
2 topic.

3 If you said 33 percent, I can't
4 disagree with that. That's what I charge, but
5 are there circumstances that I believe 30
6 percent is not adequate, yeah. Those air bag
7 cases, they are monstrosities to undertake on
8 behalf of the victim. The Philitamide
9 litigations, they are monstrosities. It's not a
10 red herring but, again, it's not what you have
11 been talking about in this Bill. You have
12 succeeded in putting me on the hot seat I'll say
13 that.

14 REPRESENTATIVE CHADWICK: Your voice
15 is very good at attacking. I wanted to put you
16 on the defense to see how you did.

17 MR. MATUSOW: It's not addressed in
18 this bill, for one thing. To the extent that
19 people want to talk about contingent fees and
20 have a study about that, I don't think that's
21 inappropriate. That should at least be the
22 subject of scrutiny. I'm not sure if it's
23 honest scrutiny.

24 I get concerned when I have a feeling
25 I'm being made a scape goat and I have had that

1 feeling many times on this issue. Where I'm not
2 made a scape goat and it's a legitimate inquiry
3 into fees, and I respect that, and I think the
4 lawyers are every bit as entitled to that
5 scrutiny as any other profession in this
6 Commonwealth.

7 REPRESENTATIVE CHADWICK: I really
8 had no intention of raising that subject when I
9 came in here today. When two of the victims
10 indicated that fees had eaten into the
11 compensation that they so much needed --

12 MR. MATUSOW: Did you hear the
13 pathetic amounts that they got, though? The
14 lawyer might have worked an awful long time.
15 You really don't know that that was an unfair
16 thing that the lawyer charged. These people
17 talked about years and years where the lawyers
18 was with them and the system let them down; not
19 the lawyer in those particular instances.

20 Maybe you ought to look at--I know
21 this is not this hearing--the compensation
22 system. Maybe it's not working properly in
23 those terms, or the law product liability which
24 could give freer access to these people.

25 Those particular examples, I'll bet

1 you the lawyer was way undercompensated on an
2 hourly basis. You could pick examples where
3 that may not be true, but with the Claimants
4 that were here today with the plight that they
5 were in, that the law placed them in, the lawyer
6 didn't make any windfall on those cases.

7 REPRESENTATIVE CHADWICK: Let me
8 leave it with the statement that I don't see any
9 reason why 33 percent isn't enough. I would be
10 interested in knowing why we shouldn't cap fees
11 at what you charge, 33 percent. Thank you,
12 Mr. Chairman.

13 CHAIRMAN CALTAGIRONE: Any other
14 questions? Representative Heckler.

15 REPRESENTATIVE HECKLER: Good
16 afternoon. We found it to be a fruitless
17 endeavor to interrogate you on an earlier
18 occasion. Nevertheless, being a fool, I will
19 try again.

20 My greatest concern in these matters
21 is that you folks, and I say you folks the trial
22 bar, have succeeded in raising objections to
23 various tort reform proposals. I'm kind of
24 surprised if the tobacco industry spends more
25 than you folks do in the general environs of

1 Harrisburg, preventing some kind of closure,
2 preventing everybody from sitting down in the
3 room and saying, "All right, this is what makes
4 sense; this is not what makes sense. You, as
5 members of the legislature, should buy into this
6 and should not buy into that."

7 Once again, Representative Hagerty
8 was looking for some kind alternatives from you
9 and we are told that this Bill, which has been
10 described by what I found to be at least a
11 pretty credible witness, to be getting us back
12 into the mainstream. Instead, this Bill is some
13 kind of radical departure. There's no point in
14 talking about it.

15 With that lengthy preamble, I figure
16 I'm doing better at making a speech than asking
17 a question, you mentioned in passing frivolous
18 suits. Do you have any specific response to the
19 bill, which is part of the general tort package
20 dealing with frivolous lawsuits, which, as I
21 understand it, embodies federal rules.

22 MR. MATUSOW: I have not read that.
23 I'm not empowered to speak on that. I'm kicking
24 this one to my left.

25 MR. SLOAN: Let me say in general, we

1 have never been opposed to preventing frivolous
2 lawsuits. In fact, when we looked at the
3 frivolous lawsuits provisions, we have looked at
4 them in terms of protecting the clients and the
5 public against frivolous lawsuits. It would
6 have to be a provision that was fair; frivolous
7 lawsuits and frivolous defenses.

8 REPRESENTATIVE HECKLER: What that
9 bill does --

10 MR. SLOAN: In addition to which old
11 Federal Rule 11, which eliminated this need for
12 this reasonable inquiry, which in many cases
13 cannot be done because the case comes to the
14 lawyer, the victim comes to the lawyer at some
15 points in time. We never really opposed
16 controls on frivolous lawsuits because regard-
17 less of what you read in The Inquirer, the great
18 majority of our members do not file frivolous
19 lawsuits.

20 We would not be opposed to legis-
21 lation preventing frivolous lawsuits, frivolous
22 claims, frivolous hindering of the prosecution
23 of the claim against the Defendant, hiding
24 discovery materials, things of that nature. As
25 long as it covers everything, we are willing to

1 live with the consequences of it.

2 REPRESENTATIVE HECKLER: But,
3 specifically, are there expansions, that you are
4 aware of, that are required to that bill that's
5 presently pending?

6 MR. SLOAN: We haven't sat down and
7 gone through it word for word in terms of adding
8 or changing words. No one has asked us to. We
9 are testifying in terms of what's going on.

10 MR. MATUSOW: I think what's been
11 clear is, there is concerns that we have. As
12 long as they are addressed at one time and not
13 piecemealing it and saying, do you agree with
14 this, do you agree with that, you might find a
15 surprising number of agreements as long as it
16 was in part of the total package. That happened
17 in medical malpractice which I did participate
18 in for at least seven years now in that process,
19 where we had almost arrived at a deal that would
20 have -- there would have been substantial
21 interference with the Claimants in court. But,
22 as a compromise, had to include insurance
23 reform; that killed the proposal.

24 MR. SLOAN: Let me say with this
25 products bill, I don't see how you can

1 straighten out whatever problems you perceive in
2 this Commonwealth without addressing two other
3 areas; that is, the insurance reform, because we
4 have heard this morning from Governor Leader
5 that he was concerned about insurance premiums.
6 I don't see one representative of the insurance
7 industry on the agenda nor any information that
8 in any way, anything you're doing by this bill
9 will affect premiums.

10 Second thing that we don't have here
11 in your bill is the corollary which is workplace
12 safety. If we can have a products liability
13 bill which has some product reform, some
14 workplace safety, some insurance reform, then
15 it's going to benefit the citizens of this
16 Commonwealth.

17 REPRESENTATIVE HECKLER: It's my
18 understanding that representatives of the
19 insurance industry want to testify before this
20 jointure committees and are requesting that
21 additional time be scheduled for that purpose,
22 so I don't think those folks are hanging back.

23 Let me offer the observation, and
24 that is, in the words of a trial lawyer who is
25 close to my heart, a D.A. back home, that's the

1 the octopus -- this famed octopus closing. You
2 guys, as far as I'm concerned, are laying down
3 an ink screen.

4 I want to deal with the merits of the
5 legislation that is before us. The question of
6 whether the insurance industry are good guys,
7 bad guys or somewhere in-between is simply not
8 relevant to the merits of whether we are going
9 to make our laws better or worse. We can do
10 this all day. I'm imposing on the Committee at
11 this point.

12 One or two very specific points. You
13 have raised the question of the ability to
14 cross-examine on -- I'm sorry, the admissibility
15 of standards and how potentially devastating
16 that would be to the Plaintiff's case because
17 the government says it's so. You're, obviously,
18 a fairly effective cross-examiner.

19 For those who are hearing this who
20 aren't familiar with the courtroom, wouldn't you
21 agree that given bare admissibility, you're
22 going to be able to cross-examine whoever is
23 advancing that -- however that standard comes
24 in, you're going to be able to demonstrate just
25 the things we heard today; that they were

1 promulgated in 1974 based on state of the art
2 back then; that there are other states of the
3 art that are more relevant.

4 You're telling me you can't get the
5 truth about the shortcomings of a particular
6 standard before a given jury by cross-
7 examination and presenting other witnesses for
8 that matter?

9 MR. MATUSOW: I'm saying I could give
10 it a good try; sometimes yeah and sometimes no,
11 depending on the circumstances. But, why should
12 an industry be entitled to show their own
13 regulation as being safety -- as saying to the
14 jury that that's some plus on their behalf? Why
15 should that industry, and no other industry, get
16 that same protection; that they can say their
17 regulations have some impact as whether it's
18 safe or not?

19 To answer your question directly,
20 it's really sometimes yeah and sometimes no. I
21 have done it in other jurisdictions where I have
22 had to. In the government regulations it's
23 pretty tough stuff. It's got a pretty heavy
24 imprimatur of being bought on high. It's a
25 heavy burden to do that. It's one that they are

1 not really entitled to.

2 REPRESENTATIVE HECKLER: We have
3 heard today that the statute of repose is a
4 particular area of concern with this legis-
5 lation. Are any of you aware of standards in
6 other states which provide some latitude or
7 exception for, for instance, situations which
8 involved latency period, toxic exposure, that
9 sort of thing.

10 MR. MATUSOW: There are such
11 examples. If you would really be effective,
12 though, you put in exceptions for life
13 expectancy. We all know about the aging fleet
14 of airplanes and crashes have been shown to be
15 as a result of defective products, not just
16 defective maintenance or poor piloting. Those
17 products are still capable of causing mass
18 deaths. If you put something in, as Mr. Messer
19 indicated, about the life expectancy of the
20 product, the latency period, the people -- you
21 would exception it to death, basically.

22 Again, you're talking -- that
23 particular thing only gives, primarily,
24 stability to the insurance company to cut off
25 the tail then be able to regulate the amounts of

1 their premiums a little bit better. That has
2 some validity, but I think the cost is way too
3 much if you are going to turn out injured
4 victims of a huge airplane crash. That
5 stability ain't going to mean a lot to them.

6 I don't think as a matter of social
7 balancing, who is more entitled to the
8 protection. I don't think it's any insurance
9 company in the statute of repose. I think it's
10 the victims.

11 REPRESENTATIVE HECKLER: That's the
12 policy situation we are here to make.

13 MR. MATUSOW: That's a policy choice,
14 I agree.

15 REPRESENTATIVE HECKLER: One final
16 question. Maybe this is frivolous. You have
17 told us that there are cigarettes now that are
18 safe, or could be manufactured which would be
19 safe, as regards to starting fires.

20 First of all, are there any
21 cigarettes manufactured in Pennsylvania?

22 MR. MESSER: I have no idea whether
23 they are not.

24 MR. MATUSOW: Only some funny ones I
25 have a feeling. Other than that, I'm not aware

1 of any straight cigarette that would come under
2 that.

3 REPRESENTATIVE HECKLER: One thing
4 that occurs to me, and I don't know whether it's
5 a particular kind of paper they use, or
6 whatever, but my thought, if I were a cigarette
7 manufacturer, would be that, I'll start
8 distributing these things and then you guys are
9 going to find a way to sue me for causing
10 somebody's lung cancer or black lung or
11 whatever, because I'm now using some material
12 that has not been used in the past. Frankly, I
13 think that's a good example of what you have
14 done to all of the industries in this country.

15 MR. MATUSOW: You mentioned any
16 cigarettes manufactured in -- The interesting
17 thing about the bill is, it's basically going to
18 serve foreign manufacturers at the expense of
19 Pennsylvania citizens. That's really what's
20 going to happen. Products coming in from Taiwan
21 will take the protection of the law over Penn-
22 sylvania's citizens. No savings in insurance,
23 because insurance is a national or international
24 kind of situation. No matter what you do here
25 you won't save any premium dollars. What you

1 will do is take away the rights of Pennsylvania
2 citizens.

3 I know it's flippant because it's
4 easy to go after the Taiwanese or the Japanese.
5 But, all manufacturers out of this state are
6 going to take advantage of this legislation.
7 There's not that much -- Most of the cases that
8 we deal with are out-of-state Defendants.
9 That's who is going to reap the benefit of this
10 proposed legislation and not even save any
11 money.

12 It's more psychological to them than
13 it is what they actually save. They are not
14 going to save money, but they are going to
15 deprive people. That's what I don't understand.

16 REPRESENTATIVE HECKLER: At the risk
17 of prolonging this, I'm going to try to get the
18 last word in. If that's the case, maybe what we
19 should do is move the joint and several bill so
20 that at least we can be sure that the
21 distributors and middle men and retailers of
22 this Commonwealth will get some relief.

23 CHAIRMAN COHEN: Thank you very much
24 for coming.

25 MR. MATUSOW: Thank you very much for

12

1 having us.

2 CHAIRMAN COHEN: Next witness,
3 running only two and a half hours behind
4 schedule, Dr. Peter Linneman, Professor of
5 Public Policy and Finance, Wharton School of the
6 University of Pennsylvania. Dr. Linneman had
7 previously testified before the Labor Relations
8 Committee on minimum wage. We're pleased to
9 have you here before this joint Committee this
10 afternoon.

11 DR. LINNEMAN: I'd like to make a few
12 comments, and then also mention that there is a
13 prepared report that I hope you have available.
14 I'd like you all to take a look at it and
15 incorporate it as part of the record.

16 It's an opportunity on my behalf to
17 be here. I was originally going to say "this
18 morning". As you pointed out, we're running a
19 little late, so I will say this late afternoon.
20 What I'd like to do is take a few moments of
21 your time to tell you about a study that's been
22 sponsored by the Pennsylvania Product Liability
23 Task Force that has been conducted by Dr. Daniel
24 Ingberman and myself. He is also of the Wharton
25 School of the University of Pennsylvania.

1 This study does something that we
2 were unable to find anybody else having done
3 before, which was to pick up on some of the
4 things that occurred here today; nobody gets
5 hurt. It's only a few industries. It doesn't
6 affect workers. It doesn't affect prices.
7 Among other questions, and quite simply, try to
8 do ascholarly study and examine if that's true
9 in the Commonwealth. Let me give you a broad
10 overview of our results.

11 What we found was that the current
12 system is imposing a large adverse effect on the
13 business environment in the Commonwealth, and
14 that this impact is growing more negative and is
15 expected to grow more negative over the coming
16 years. It cuts across all sizes of firms in the
17 State of Pennsylvania. It cuts across all
18 industries, though, as you might expect, not as
19 large in the server sector, the impact is not
20 felt there, and that is a significant portion of
21 our economy.

22 Notably, it is felt in the wholesale
23 and retail distribution as well as various forms
24 of manufacturing. We estimate something on the
25 order of \$5 billion. Let me say it again,

1 \$5 billion additional cost of doing business in
2 the State of Pennsylvania over the last three
3 years for Pennsylvania firms have resulted from
4 dealing with the product liability system.

5 Further, these costs increases.
6 Those are not the costs. Those are the
7 increases in the cost that have taken place over
8 the last three years as a result of product
9 liability consideration. That's not the end of
10 the story.

11 Contrary to what I just heard
12 testified, our study shows it does affect
13 citizens in the Commonwealth in two very
14 dramatic ways. It reduces their choices as
15 consumers and raises the prices they pay as
16 consumers, as well as reduces their job
17 opportunities. I'll come back to that in a few
18 moments.

19 Let me give you a little background
20 on how we did the study. The study is modeled
21 after a national study done by the Conference
22 Board. It notably differs, in that, we narrow
23 the focus just strictly be on the State of
24 Pennsylvania rather than nationally, which was
25 the case with the Conference Board study. We

1 did that for the obvious reason that this is the
2 group that's trying to make a decision about
3 what is the environment in this state; and you
4 heard this morning from Professor Henderson that
5 Pennsylvania, at least in his view and I think a
6 lot of legal scholars, who said it is extreme in
7 that regard. We wanted to focus on
8 Pennsylvania.

9 We also wanted to do, unlike the
10 Conference Board which just focused on manu-
11 facturing, to look at the economy of the State
12 of Pennsylvania and how it is impacted, for
13 better and for worse, for no impact and some
14 impact, to try to identify this broader picture.
15 The way we achieved that was a survey which is
16 included in the full report which you have
17 available.

18 It's a survey that was sent to the
19 chief officer of a sample of firms drawn
20 randomly from the million dollar directory of
21 the State of Pennsylvania which represents a
22 broad cross-section of firms in the State of
23 Pennsylvania. We asked these questions of the
24 chief executive simply because they are the ones
25 who have an idea of the costs the firm has

1 undertaken, how they have taken price change
2 decisions, movement decisions, product
3 decisions.

4 We found, for example, that 80
5 percent of these executives responded that they
6 believe that the current system is having a
7 negative impact on the business environment in
8 the State of Pennsylvania. Now, they are not
9 saying that's the only thing that's having a
10 negative impact. They are not saying it's not
11 the most important, but 80 percent are saying
12 this is a negative aspect of the business
13 environment in the State of Pennsylvania.

14 Fifty-two percent indicated that the
15 current system has a negative impact on their
16 own business. I think that's noteworthy in the
17 sense that it has a larger impact in terms of
18 its negative perception on the business
19 environment than it is actually having on
20 individual businesses.

21 You may say, 52 percent, that's half
22 of the economy. To me that's a large number.
23 To you, you might say half are unaffected.
24 Don't forget, we have a large service sector in
25 this state. You would not expect them to be

1 terribly impacted; not surprisingly, the impact
2 is higher among wholesale, retail and product
3 manufacturing firms.

4 Sixty-two percent indicate that they
5 have had significant cost increases as a result
6 of the product liability system; and 93 percent
7 indicate it's not going to get any better, at
8 least as they see the system right now, in the
9 future.

10 I already indicated the \$5 billion in
11 additional costs incurred over the last three
12 years is what we estimate. I'm not trying to
13 mislead you by saying I know that is \$5 billion
14 to the dollar. I'm trying to give you a sense
15 of the order of magnitude. In the full report
16 we provide alternatives so you can get a sense
17 for yourself of where you think that falls.

18 As I said it doesn't end there.
19 Forty-two percent of these firms indicated that
20 they have raised their prices to their customers
21 as a result of the current system, imposing
22 additional costs on them that they then pass on
23 to consumers. A quarter of the respondents
24 indicate that they killed, for lack of a better
25 term, or dropped, introduction of new products

1 into the marketplace; in so doing, reducing
2 consumers choice.

3 I might also mention, in so doing,
4 may create a perverse situation in terms of
5 customer safety, which, as we all know, the
6 evolution is towards safer products; and by
7 deterring new products there is a sense of
8 you're left with the older model in many cases;
9 certainly, not in every case.

10 Picking up on the theme that was just
11 mentioned, it doesn't affect the citizens of the
12 Commonwealth. It does. Nine percent indicate
13 that they have laid off workers as a result of
14 product liability costs and their related
15 concerns. I believe three percent, a very small
16 number, actually moved their facilities. Bear
17 in mind this doesn't even include those firms
18 who chose not to locate in the Commonwealth. We
19 could not survey them. We are only looking at
20 those who are here.

21 Essentially, I think the message of
22 our study is that, for the first time we tried
23 to quantify some aspects of costs. What we find
24 is ambiguously, those costs are large and
25 they're growing. Any way you want to cut it

1 they're large and growing. They are significant
2 concern to the businesses in the state.

3 I certainly am not saying that you
4 should eliminate the product liability system,
5 and I hope you don't interpret our study in that
6 way. I think the real statement we are making
7 is that, those of you here who are legislators
8 have a duty, we believe, in face of these costs,
9 to try to figure out a way to achieve the
10 benefits of the system but eliminate some of
11 these costs and reduce the growth of these
12 costs. We are not here saying take anything
13 away from the citizens, but rather, give them
14 what they deserve but more efficiently.

15 I'll give you an analogy that comes
16 out of my professional life as a teacher. You
17 may recall, you always wanted to know what are
18 we going to be responsible for on the exam?
19 That's the most common question we get asked.
20 We tell the students what they are going to be
21 responsible for on the exam; not to take away
22 options of those students to learn, but to
23 rather assist their options in learning. By
24 giving them certainty and some guidance, we can
25 better utilize their scarce resources.

1 I think that's the task before you;
2 that by introducing more clarity and more
3 certainty that you can achieve lower costs and
4 the same benefits. I think that's a challenge
5 you face. I understand the bill is trying to
6 deal exactly with that, of introducing more
7 certainty and in the process reducing costs.

8 Let me stop at that point and say I'm
9 happy to answer any questions you might have,
10 clarification or otherwise.

11 CHAIRMAN COHEN: Dr. Linneman, can we
12 discuss the methodology of your study?

13 DR. LINNEMAN: Be happy to.

14 CHAIRMAN COHEN: You interviewed
15 corporate executives in Pennsylvania. Were
16 these interviews conducted in person or by mail
17 responses?

18 DR. LINNEMAN: They were survey
19 responses by mail and fax. They were not
20 personal interviews. Let me say it that way to
21 cover it best.

22 CHAIRMAN COHEN: These were estimates
23 by the people I suppose. Did you require any
24 documentation of any of these figures for you to
25 evaluate in these surveys?

14

1 DR. LINNEMAN: No. The instrument
2 for the survey is the three-page or four-page,
3 whatever it is, as included. As a researcher,
4 obviously, I would have liked to have had more
5 information. Truthfully, if we would have asked
6 for the type of documentation you're requesting,
7 I think as a research matter we would have been
8 left with absolutely no information, no response
9 and no insight at all as to where the system is.

10 So, these are the type of tradeoffs
11 you always make in research; not just economic
12 research, but any type of research. How you
13 balance off, I'd like more and better
14 information. I want some information of
15 quality. We believe that this methodology is
16 valid. It follows standard methodology and
17 yields useful and helpful results.

18 CHAIRMAN COHEN: What you have is,
19 although you come up with percentages and
20 average figures, what you have is percentages
21 and averages of undocumented estimates? That's
22 all this really is, right?

23 DR. LINNEMAN: They may have
24 documentation; they, being the Respondent.

25 CHAIRMAN COHEN: Do you have any

1 documentation for this on your survey so that if
2 somebody gave you an estimate with documentation
3 that would count more than an estimate without
4 documentation, or did you just ask what is your
5 opinion?

6 DR. LINNEMAN: The instrument is
7 exactly as shown. They may have documentation.
8 I don't have access if they do and I don't know
9 if they have documentation provided or not.

10 CHAIRMAN COHEN: Representative
11 Pressman, do you have any questions?

12 REPRESENTATIVE PRESSMAN: Yes,
13 Mr. Chairman, thank you. Dr. Linneman, hello
14 again. We saw each other in Philadelphia.

15 DR. LINNEMAN: This is a much more
16 pleasant surrounding as I recall.

17 REPRESENTATIVE PRESSMAN: Do you have
18 a copy of your report in front of you?

19 DR. LINNEMAN: Yes, I do.

20 REPRESENTATIVE PRESSMAN: Turn to the
21 letter that comes right after page 20. In your
22 opening remarks you referred to trying to do a
23 scholarly, your word, report on this product
24 liability question. You may have used that word
25 offhand.

1 Would you consider your report a
2 scholarly report? Would this be something that
3 you would use to be published if you were up for
4 tenure or something like this? Would this be
5 the kind of report you would use?

6 DR. LINNEMAN: Fortunately, for a lot
7 of reasons, I'm not up for tenure. Fortunately,
8 I guess, I'm well beyond that. I suspect some
9 of the junior faculty would like me to have that
10 moment again in life from their point of view.

11 The answer is, is this the type of
12 research I normally do as a scholar, which I
13 think you're saying and would publish and use?
14 I think the answer is yes. We are in the
15 process of submitting this to a scholarly
16 journal. That process will take the normal
17 review time. I can't say what an editor will
18 say. I'm on a number of editorial boards. I'm
19 hopeful. I think my co-author is hopeful that
20 it be accepted and be disseminated. We believe
21 it has important results.

22 Let me also say, it is the type of
23 work I normally do, in that, I don't think
24 scholarly journals are the only thing I was
25 trained to disseminate through. In particular,

1 I think disseminating in this sort of forum is a
2 useful forum for someone who has had the
3 training I have had to utilize through their
4 career.

5 DR. LINNEMAN: Have you been involved
6 much in public opinion or other types of surveys
7 in the past, or is it a new endeavor?

8 DR. LINNEMAN: No, it's not a new
9 endeavor. I have probably done surveys of
10 generically this sort eight times, ten times,
11 seven times. In fact, we just got done, I
12 reported yesterday at a conference survey of --
13 I can't remember the number; a number of
14 communities across the United States. Yes, it's
15 the type of research we do.

16 REPRESENTATIVE PRESSMAN: Are you in
17 the habit, when you do a public opinion survey
18 like this, of stating a point of view as you did
19 in the first paragraph of your letter, where you
20 said, "Public concern about the product
21 liability system has dramatically increased
22 during the last few years as individuals and
23 corporations have been affected by the rising
24 cost of litigation insurance and other defensive
25 measures", immediately starting out with a point

1 of view. Are you in the habit of doing that in
2 public opinion surveys?

3 DR. LINNEMAN: Let me state two
4 parts. Yes, I am in the habit of having an
5 introductory paragraph that states why this is
6 being done. No, I'm not in the habit of writing
7 a cover letter that states an opinion on the
8 study matter in terms of results, and I
9 certainly believe that it's a gross
10 mischaracterization, and I must tell you, some
11 offense, quite honestly, at saying that
12 paragraph, which I will read because it's short
13 enough that I actually can read it. It says:

14 "Public concern about the product
15 liability system has dramatically increased
16 during the past few years as individuals and
17 corporations have been affected by the rising
18 costs of litigation, insurance, and other
19 defensive measures." I'd like to assert that
20 is a fact. That is not an opinion.

21 The mere fact that this hearing is
22 taking place I will use as my evidence; not
23 necessarily my presence, but the fact that you
24 have had a full room better part of the day;
25 that you have got hearings next week scheduled,

1 I don't think that's an opinion. I think that's
2 a factual statement.

3 REPRESENTATIVE PRESSMAN: We will
4 differ a little bit on that. That second
5 paragraph, you state who your client is. All
6 public opinion surveys that I have ever been
7 involved in, and I think probably all the
8 politicians sitting up here, one of the
9 important things is, you never reveal your
10 client because it's stating your client out
11 excuse (phonetic) your answer.

12 DR. LINNEMAN: I have never done a
13 political survey in the way you have described.
14 I can't comment how they are done. I can tell
15 you every survey business that I have done in
16 this case, and as I understand literature of
17 survey of businesses, by all means.

18 Again, I usually would say in the
19 second paragraph, exactly as done here, I state
20 who it is that is sponsoring this. Why? I
21 believe that the Respondent deserve that right
22 to know. They particularly deserve that right
23 to know, because you may or may not be aware,
24 there are many instances where firms are willing
25 to respond to me because of the latter part of

1 this saying that things will be kept
2 confidential and not be revealed to others. I
3 think it's important they know why I'm doing --

4 REPRESENTATIVE PRESSMAN: Not reveal
5 it to the legislature?

6 DR. LINNEMAN: In aggregation, I have
7 no trouble with that. I have no trouble with
8 that in my publication when I've done it. What
9 I don't want to do is send a letter to someone
10 saying, do business, tell me your business on
11 ways you might not tell a competitor and just
12 trust me. I'm not working for a competitor.

13 That's what that paragraph says. It
14 says, I'm going to lay my cards on the table and
15 tell you who it is that I'm involved with as a
16 factual statement; nothing more.

17 REPRESENTATIVE PRESSMAN: Your
18 admission of who your client is and in the third
19 paragraph you state, "Legislative hearings on
20 product liability reform could be held in
21 Harrisburg as early as May and the result of the
22 survey will be sent to legislators at those
23 hearings." Did you have any concern by stating
24 what the exact use of your report would in any
25 way skew the results?

1 DR. LINNEMAN: No. I do not believe
2 that saying that is skewing in its nature.
3 There's nothing in the study itself as you look
4 at the responses that would suggest it was
5 skewing in nature. Again, I think if you are
6 asking anyone to take the time to carefully
7 consider doing something, and I think this is
8 consistent with all of the survey literature
9 that I'm aware of on, at least (inaudible word).
10 As I said, I have no knowledge of the political
11 surveys.

12 REPRESENTATIVE PRESSMAN: Public
13 opinion surveys. I'm not just talking about
14 political surveys, but public surveys.

15 DR. LINNEMAN: What I'm telling you
16 is the literature I'm aware of, in terms of
17 business surveys, you let them know what your
18 intention is. You let them know who you are.
19 As I said, the opening paragraph is nothing more
20 than a factual statement of motivation.

21 REPRESENTATIVE PRESSMAN: In your
22 seeking of information, you were not really
23 seeking hard data. What you were seeking was
24 opinions of CEOs?

25 DR. LINNEMAN: Depends what you mean

1 by hard data. I was --

2 REPRESENTATIVE PRESSMAN: As you told
3 the Chairman, you have no hard data to back up
4 this information. You told the people you were
5 surveying who your client was, told what it
6 would be used for, but you asked for no back-up
7 documentation to prove their point; and yet, you
8 present this fact. It's just an opinion. It's
9 not actual fact.

10 DR. LINNEMAN: What I'm presenting
11 are the results of the survey. I think that's
12 what we say very clearly in the study. In fact,
13 what we lay out very clearly in the study is the
14 methodology for the standard reason of
15 scientific replication so that somebody can know
16 exactly what's there. If what you're saying is
17 that --

18 REPRESENTATIVE PRESSMAN: I'm
19 challenging your methodology is what I'm doing.

20 DR. LINNEMAN: You can challenge it
21 but I'm willing to sit here saying it's a
22 methodology that I have employed and that has,
23 in other instances, that I know of any number of
24 other scholars who have employed it in many
25 other instances.

16

1 If you are going to tell me that the
2 methodology is going to stand up to the scrutiny
3 of the editor of the journal, I don't know. If
4 you ask, do I think it will, I think it will or
5 I wouldn't do it.

6 REPRESENTATIVE PRESSMAN: In
7 Pennsylvania there's approximately 220,000 firms
8 doing business. You reduce that 220,000 to
9 6324.

10 DR. LINNEMAN: It's roughly that
11 number, six thousand some odd.

12 REPRESENTATIVE PRESSMAN: Go to page
13 35, Table 1. From that 6324, which was
14 originally 220,000 in Pennsylvania, you reduced
15 that to that 439 for your sample of people that
16 you were going to survey.

17 DR. LINNEMAN: Let me start by
18 saying, I didn't per se reduce it from 200,000
19 or whatever the number is, of all firms in the
20 State of Pennsylvania. That was done by the
21 million dollar directory, which was a broad
22 source of listings of who these firms were. I
23 want to clarify it wasn't like I was hand
24 picking who not to include. Then taking that
25 million dollar directory number, the 6234, a

1 sampling of 439 was done.

2 REPRESENTATIVE PRESSMAN: From that
3 you received 115 usable surveys; usable is your
4 word.

5 DR. LINNEMAN: That's correct.

6 REPRESENTATIVE PRESSMAN: Now, out of
7 220,000 firms in Pennsylvania, you have usable
8 surveys of 115 out of 200,000.

9 DR. LINNEMAN: Is there a point?

10 REPRESENTATIVE PRESSMAN: My point
11 is, again, your methodology. The survey size
12 is, I believe, and the error rate is somewhere
13 around 10 percent when you have such a small
14 sample of 115 out of a possible universe of
15 220,000.

16 DR. LINNEMAN: The large portion of
17 the two hundred -- I don't know if the number is
18 two hundred, but beyond the 6324 are extremely
19 small firms.

20 REPRESENTATIVE PRESSMAN: One of the
21 things we are hearing in these hearings and what
22 we have been hearing in the rhetoric concerning
23 this is about how much the small firms are being
24 hurt. That's why they are supposed to tug at
25 our heart strings to do something about this

1 because of the small firms that are being hurt;
2 yet, you excluded them automatically from your
3 survey.

4 DR. LINNEMAN: That's not true. I
5 did not exclude them automatically. There are,
6 as I recall --

7 REPRESENTATIVE PRESSMAN: Didn't you
8 have something like a half a million dollar
9 cutoff.

10 DR. LINNEMAN: Half a million dollars
11 in sales.

12 REPRESENTATIVE PRESSMAN: So, anybody
13 who made less than half a million dollars in
14 sales, mom and pop retail we have been hearing
15 about so much, who doesn't do half a million
16 dollars in sales is not included?

17 DR. LINNEMAN: I think there are a
18 lot of firms that are quite small and most
19 people would call them mop and pops that are
20 readily within the range of this sample. I
21 think the important thing on this sample is
22 that, among those surveyed the response rate was
23 quite high by traditional standards; and that
24 when you look at the responses you are finding
25 impacts on firms below a million in sales, above

1 a million in sales, above five million in sales,
2 above 50 million in sales.

3 I'm not trying to argue that it's, to
4 the decimal point, the same in all of those.
5 I'm saying that the responses we got indicated
6 across the board all these sizes are affected.
7 I'm happy to say that I can't give you a precise
8 number what about under half a million in sales.

9 REPRESENTATIVE PRESSMAN: In your
10 Table 1 under Respondents, the percentage for
11 people under SIC Code No. 2, they are 20 percent
12 of the Respondents, 20 percent of your sample;
13 yet, they only represent 9 percent of the people
14 of the million dollar directory, a plus of 11
15 percent.

16 Under SIC Code No. 3, under the
17 million directory, they are only 15 percent of
18 the population, but under your sample size they
19 are 25 percent, a 10 percent swing. Again, just
20 on those two there's a 21 percent variation in
21 the original population. Again, it goes back to
22 what I said about the error rate of
23 approximately 10 percent.

24 Didn't you feel uncomfortable having
25 this survey so heavily weighted in that area of

1 Respondents?

2 DR. LINNEMAN: First of all, I
3 dispute a little bit--in fact, quite a bit--your
4 characterization of heavily weighted. What I
5 think you look at -- I think the easiest sense
6 of overresponse is less so the sample
7 representation than the response rate in a way
8 that might concern, which is the last column in
9 Table 1. You're correct in noting that SIC
10 Codes 2 and 3 do have higher response rates than
11 the average, which is 26 percent.

12 There is some, in that sense, over-
13 weighting, which is why we took the care in
14 laying out any number of the results of giving
15 you results that not only sort of gave an
16 aggregate number. I gave some aggregate numbers
17 in my overview, but as I said, you have the full
18 survey. Why should you go through the other
19 tables? We were careful to lay out the
20 responses for each of those SIC categories for
21 each of those size categories. In that sense,
22 there is no bias at all when we are looking at
23 them within that framework.

24 REPRESENTATIVE PRESSMAN: You're not
25 an attorney, are you?

17

1 DR. LINNEMAN: Not that I'm aware of.

2 REPRESENTATIVE PRESSMAN: I guess I
3 follow-up with No. 6 where there's a 10 percent
4 swing the other way with negatives.

5 DR. LINNEMAN: Let me just be --
6 Again, I don't know political surveys other than
7 I read them in the newspaper. You're going to
8 have swings. The question is, what are the
9 tolerable levels of swings? Remember here what
10 you're talking about is a smaller universe of
11 firms than you have of voters, for example, and
12 you're not talking about a situation where views
13 are sort of like the whims of what did I hear on
14 the television this morning of a politician's
15 view or something like that.

16 That's why we carefully tried to
17 document these cross tabs so you can see what
18 the responses are just among manufacturers or
19 just among wholesalers or just among service
20 firms, so you can get a sense of how robust
21 those results are. I think the overall answer
22 is, they are quite robust.

23 We also take the care to document
24 some sense of confidence ranges and intervals in
25 that regard. As I say, if I gave the sense of

1 absolute precision in any of the numbers that I
2 gave you, in my overview I certainly apologize
3 for that because I don't think that's the tone
4 of the study. I didn't mean to create that
5 tone.

6 REPRESENTATIVE PRESSMAN: I think
7 this study has been presented in such a way that
8 it is. I guess my final question would be, you
9 mentioned in your earlier remarks that you
10 didn't believe that you would be able to get the
11 kind of evidentiary -- you wouldn't be able to
12 get the kind of information from the businesses
13 if you asked for more documentation or you asked
14 it be documented.

15 I would be curious if you had
16 presented yourself, as you did, representing
17 Pennsylvania Task Force on Product Liability and
18 also to what it was going to be used for. I
19 would have thought because the firms of this
20 state, many are represented in this room, many
21 belong to the task force and belong to the Civil
22 Justice Coalition would be anxious and willing
23 to share this information with a scholar such as
24 yourself and be able to provide us with infor-
25 mation, documented information, on the effects.

1 When I don't receive documented
2 information and I receive this, and I understand
3 what you're trying to do, Doctor, it makes it
4 very hard for me to accept this as being truly
5 representative of the feelings of business
6 communities individually and us in Pennsylvania.

7 DR. LINNEMAN: I can't speak for you.
8 If you are uncomfortable, you're uncomfortable.

9 REPRESENTATIVE PRESSMAN: I'm telling
10 you my concern. You said it's too small of a
11 group. Two hundred twenty thousand firms in
12 Pennsylvania is not too small of a group to get
13 correct survey data from. If you are going to
14 use your method, I think you needed to have a
15 much broader survey which would be much more
16 representative of the businesses, and by cutting
17 off at a half million you have thrown out a
18 whole group of people that we are being
19 constantly asked to defend by this law.

20 DR. LINNEMAN: I think that is a very
21 good point that we may have cut off some people,
22 but that does not mean that the responses for
23 these groups of people are not accurate, are not
24 representative, and are not indicative of what's
25 going on.

1 May I add, that there's this large
2 number of very small firms that are not caught
3 if there's an iota of cost being borne by each
4 of those firms and they are not even something
5 we attempt to put into this. Add up 190 or
6 whatever it is -- 196,000 iotas because we
7 limited, in some sense you say, to the larger.
8 That just adds on top of the numbers we already
9 indicated.

10 I can't speak for you, but I think
11 what I would do is find discomfort, not in the
12 fact they were excluded on a methodological
13 grounds, but on top of whatever they have
14 identified for these firms, of a fairly large
15 variety of size I might add. There's only
16 small guys who I hear screaming to me and I
17 don't have a quantification of what's happening
18 to them, which is beyond and above these
19 numbers. That's what I would react to if I were
20 in your situation, but I can't tell you what you
21 should think.

22 REPRESENTATIVE PRESSMAN: Thank you.

23 CHAIRMAN COHEN: Representative
24 Heckler.

25 REPRESENTATIVE HECKLER: I just want

1 to make the observation that I think you have
2 been keeping company with lawyers too long,
3 although you didn't go to law school.

4 REPRESENTATIVE PRESSMAN: We need
5 less in the legislature.

6 REPRESENTATIVE HECKLER: That would
7 be one solution. I believe it was the Bar who
8 said, first let's kill all the lawyers. I
9 sometimes subscribe to that but I haven't
10 decided to start with myself.

11 On the other hand, I did want to make
12 the observation without asking any additional
13 questions because I think the survey speaks for
14 itself. It has certain limitations, but it
15 certainly is not quite as meaningless as some
16 folks would like to think it is. I once said I
17 lost a jury trial as prosecutor because the
18 defense counsel managed to convince the jury
19 that despite the fact we had two eyewitness
20 identification, we didn't have fingerprints.

21 This report is what it is. The fact
22 that it's a horse and not a camel doesn't
23 necessarily make it unmeaningful or unworthy of
24 our consideration. Thank you.

25 CHAIRMAN COHEN: Mr. Cassidy.

1 MR. CASSIDY: Maybe I'm going to beat
2 the dead horse just a little bit.

3 DR. LINNEMAN: Following up on that,
4 I hope you're not suggesting I'm dead. I've
5 just been called a horse. I hope the next man
6 doesn't suggest I'm the tail end of such a
7 horse.

8 MR. CASSIDY: Part of the reason, I
9 think, for the analogy to polling--and polling
10 is something I do some of--is because you're not
11 collecting data, so in that sense you're not
12 collecting hard data.

13 DR. LINNEMAN: Yeah.

14 MR. CASSIDY: You are collecting
15 opinions. If you are collecting opinions you
16 should follow, I would think, standard opinion
17 collection practices. The standard practice for
18 collecting polling data would be to have some
19 sort of random sample or stratified sample in
20 significant numbers; in other words, a statis-
21 tically significant sample, I'll say you can
22 draw some conclusions from the data.

23 The other problems in that, in your
24 115 responses, which are not random to start
25 with, would be a plus or minus ten percent if

1 you had saw your poll on television and they
2 would say this poll has an error rate of plus or
3 minus 10 percent. If you had accomplished a
4 goal and had all 439, you have would have plus
5 or minus five percent margin of error on that
6 opinion poll.

7 DR. LINNEMAN: I think you're high.

8 MR. CASSIDY: In around there. I
9 think on the ten percent I'm being kind.

10 DR. LINNEMAN: You're using 200,000,
11 I presume, in arriving at those numbers, rather
12 than the 6000. I'm just presuming.

13 MR. CASSIDY: The size of the
14 universe is not terribly relevant. The size of
15 the universe becomes more relevant as you come
16 down to your cross tabs.

17 DR. LINNEMAN: I fully agree with
18 that statement.

19 MR. CASSIDY: You would have to
20 increase the size of the sample if you are going
21 to increase confidence in your cross tabs.

22 DR. LINNEMAN: In the cross tabs;
23 precision, obviously, the more you cross cut.

24 MR. CASSIDY: So, cross-cutting the
25 sample of 115, you're goin to lose accuracy

1 rapidly.

2 DR. LINNEMAN: I readily admit, and
3 in fact, that's why I think we tried to stress
4 the broader implication that there is something
5 out there; that it's moving in an unpleasant
6 way. They may be perceptions. They may
7 realities.

8 I happen to believe that there's a
9 lot of reality in that because it matches other
10 things I'm hearing, matches other things I'm
11 seeing, but even if they are only perceptions --

12 Let me say on the perceptual part, I
13 believe in the context particularly of what's
14 the impact on the business environment, that
15 perception is the reality when it's all said and
16 done; that is, they may have no cost impact. It
17 may not have hurt their business at all, but if
18 they believe it has, and if that's the
19 perception that businesses transmit to other
20 businesses and that they believe when they are
21 making decisions, on the business part, that is
22 the reality.

23 MR. CASSIDY: You also translate that
24 perception into dollars and cents as far as how
25 much that cost in Pennsylvania.

1 DR. LINNEMAN: We tried to provide
2 precision estimates.

3 MR. CASSIDY: If I was doing polling
4 I would have lowest confidence in that sort of
5 cross tab. When I do a poll, as a matter of
6 fact I tell clients, although generally I'm not
7 paid, what the confidence level is in that
8 particular poll.

9 The other problem I think which shows
10 that also the sample is skewed and didn't work
11 out quite well, is that, your manufacturing SIC
12 Codes came out about 21 percent above what it
13 should have in response sense.

14 DR. LINNEMAN: Yes.

15 MR. CASSIDY: Your responses were
16 what I normally call a sample as opposed to what
17 you call a sample.

18 DR. LINNEMAN: You can call them
19 whatever you want, as long as we both know what
20 we're talking about.

21 MR. CASSIDY: I think it points out
22 another problem. What we are doing here, we are
23 essentially asking people who care deeply about
24 first serving a universe and saying, who in this
25 universe cares enough on this question to answer

19

1 and who wants to make a political statement on
2 this because you told them in advance what
3 you're going to use the information for, for a
4 legislative Committee hearing.

5 In polling we call that, one
6 instrument error, your questions, are
7 reactivity. On the reactivity part of it, when
8 you tell somebody in advance, I'm collecting
9 information to gravitize the product liability
10 crisis so I can give it to a legislative
11 hearing, you're not likely to get very accurate
12 opinion.

13 DR. LINNEMAN: Let me take exception.
14 I don't believe as we read through that letter
15 that I said I was going to offer anything other
16 than the results that I got. That's literally
17 all it says; nothing more, nothing less.

18 MR. CASSIDY: If I design a survey
19 and we can ask all of the business repre-
20 sentatives in the room whether we think it would
21 be a fair methodology, that I will contact all
22 union stewards and see which ones really care
23 about worker safety--out of that crew I will ask
24 them if product liability helps ensure worker
25 safety--I imagine I'd get a very, very high rate

1 of response.

2 Then I will ask to follow-up on that
3 and say, in your opinion what would your company
4 do if they didn't have the pressures of product
5 liability, the threat of product liability is
6 forcing them to make safer products. I'm sure
7 all the union stewards would come back and say
8 they'd do absolutely nothing.

9 I'd follow-up on one half and say,
10 estimate how many limbs, deaths, concussions,
11 things like that we are going to have as a
12 result of not having any worker safety because
13 there's no product liability?

14 DR. LINNEMAN: Let me say, if the
15 statement is, wouldn't it be nice to have more
16 responses; yes. It would also be nicer if I
17 were seven pounds lighter, if I could run a
18 little faster, jump a little higher, et cetera.

19 In life and in reality you set
20 parameters under which you do a study. You lay
21 out what those are. You lay out the limitations
22 and you lay out the implications fully, which I
23 believe we have done. I believe it says exactly
24 what it says; that there's a big problem here.
25 You may not like that answer. You may not

1 believe that answer, but what I have heard
2 today, what I have seen in the newspapers, is
3 that the businesses in this state do.

4 You mentioned the selectively
5 dimensions. One of the things we did in
6 pursuing alternative dollar calculations was to
7 consider what if the responses were biased and
8 we laid out that range of what that implied to
9 the estimates, making a proper set of adjust-
10 ments, and a very normal set of adjustments were
11 done.

12 Quite honestly we felt that you, as
13 the legislature, deserved that information. I
14 don't think you should believe me per se. I
15 think you should be particularly skeptical
16 because this is the only game in town. This is
17 the only study, period; not just Pennsylvania;
18 of anywhere in the United States of anything
19 like this. You can turn a blind eye to it and
20 say, since it's the only one and it's not
21 perfect, we are not going to care about it.

22 I think that would be a big mistake
23 because that's, essentially, an anti-scientific
24 approach that says, if it ain't perfect we don't
25 do it. It has valuable, insightful information,

1 twist that information several ways to let you
2 know the terms of these response possibilities.

3 MR. CASSIDY: The study also did not
4 ask the questions to define the benefits which
5 come from the cost. If there's a cost, there's
6 a benefit. The legislature is being asked to
7 weigh cost and benefits of product liability.
8 We heard mostly about the cost. The 1987 --

9 DR. LINNEMAN: I don't think you were
10 right when you said, to every cost there is a
11 benefit. There are certainly lots of times, and
12 I don't want to be cute with you, where there
13 are costs there are benefits, and for where
14 there are benefits there are costs. I don't
15 think that is always true. Quite simply.

16 MR. CASSIDY: Going to the confidence
17 report which you have in your study after the
18 '88 report, going to the conference board '87
19 version where they did ask some of those
20 questions, what were the costs of product
21 liability? One of the costs of product
22 liability was improved labeling. I think would
23 you assume that also has a benefit?

24 DR. LINNEMAN: We did ask for the
25 benefits among firms. We did not explore the

1 benefits among consumers. We are very candid
2 and very forthright about that. I certainly
3 hope we were on that.

4 We did allow for firms to indicate
5 benefits because if you look at the categories
6 of responses that they were allowed, they were
7 allowed to say positive impacts on them and very
8 positive, strongly positive impacts on them.
9 Not many firms, in fact, almost no firms
10 indicated positive or strongly positive effects
11 on them. I think there's a reason for that. I
12 don't think there's anybody getting, among the
13 firms that is, much benefit out of this.

14 Now, among the consumer, people are
15 being protected for the products. That is a
16 different question of what are those benefits.
17 This is a study of the costs. That's why in
18 many ways -- I know we haven't done a
19 cost/benefit study, nor did we try to do a
20 cost/benefit study. Doing a cost study is a
21 large enough task.

22 That's why I really believe the point
23 here is not to take away benefits. The point
24 here is to recognize very real costs. As you
25 hear benefits being testified to one way or

1 another by other parties, you're going to have
2 to weigh those tradeoffs. What I tried to give
3 you was some number on the costs side. We could
4 find no evidence other than individual people
5 testifying.

6 Another way of doing this is 115
7 firms in the Commonwealth, if you want to view
8 it that way, testifying through a document.
9 That is more firms than you're going to hear
10 during your hearings.

11 MR. CASSIDY: That would be an
12 accurate characterization.

13 DR. LINNEMAN: I think it's more than
14 that, but at minimum it is that.

15 CHAIRMAN COHEN: I think it's 80
16 firms or so who believe there's a social problem
17 affecting business in general.

18 DR. LINNEMAN: One hundred fifteen
19 testifying, of which, 80 or so are saying this
20 is a big problem.

21 CHAIRMAN COHEN: Fifty-five or so are
22 saying this is a problem for them personally.

23 DR. LINNEMAN: Whatever the numbers
24 divide out to be. That's at minimum what it
25 says. I think it says more than that because I

1 do think it represents a broader insight.

2 CHAIRMAN COHEN: How many of these
3 people were members of the Civil Justice
4 Coalition?

5 DR. LINNEMAN: I don't believe I've
6 ever seen a membership list of the Civil Justice
7 Coalition. So, to be honest, I can't tell you.

8 CHAIRMAN COHEN: You didn't have a
9 membership list of the Civil Justice Coalition?

10 DR. LINNEMAN: It's not something we
11 check one way or the other in doing this. I
12 don't believe I've ever seen a membership list
13 of that. I may have, but I don't recall seeing
14 it. Certainly, the sample was selected in a
15 way, and the million dollar directory was
16 selected in a way that had no eye to that--
17 totally blind.

18 MR. ANDRING: And how many of these
19 questionnaires did you actually send out?

20 DR. LINNEMAN: 439.

21 MR. ANDRING: And they were all
22 accompanied by a cover letter that indicated who
23 you were, who you were working for and the
24 results were to be submitted to this Committee?
25 Is that essentially the content of the cover

1 letter?

2 DR. LINNEMAN: That is essentially
3 what it said.

4 MR. ANDRING: I have to admit I
5 haven't read your report. I will also admit I
6 don't know much about polling. It seems to me
7 if you send out over 400 of these questionnaires
8 with that cover information to various companies
9 around the Commonwealth and 75 percent of them
10 don't even bother to respond, those 75 percent
11 maybe are telling us something even more
12 relevant than the 25 percent who did.

13 DR. LINNEMAN: I don't agree with
14 that. I think that survey responses -- and we
15 talked extensively with colleagues over the
16 years on what type of survey responses are
17 normal on these types of efforts. The answers
18 tend to run around 15 to 20 percent. That cuts
19 across a large range of types of studies. You
20 can imagine --

21 I suspect you gentlemen and ladies
22 get questionnaires all the time on your desk.
23 How do you spend your day? It gets lost on your
24 desk, you're doing other things. There's any
25 number of reasons surveys are not returned. The

1 survey response, in the area where we are at, of
2 25 percent is good. I won't say it's
3 spectacular beyond all description, but it's
4 good by the standards. That, quite simply, is
5 the statement on it.

6 CHAIRMAN COHEN: Any other questions?
7 Representative Strittmatter.

8 REPRESENTATIVE STRITTMATTER: Doctor,
9 I appreciate your defense in being here with us
10 today. Thank you for testifying. I can't
11 believe you have been subjected to such
12 badgering. You have agreed to come and testify
13 before these Committees. I'd like to also point
14 out that I'm also dismayed at the late hour,
15 such badgering of the opponents of the
16 legislation earlier today. They only brought in
17 two witnesses. They only showed pictures of few
18 machines, but I didn't see the same degree of
19 interrogation trying to discredit them. I
20 appreciate you keeping your cool. I don't think
21 I would have in your position.

22 Maybe myself in your position I know,
23 dealing with my colleagues, we deal with surveys
24 all the time, legislative surveys and opinions
25 and anecdotal evidence. You hear it every day

1 on the floor.

2 Surveys go out to 30,000 households
3 and get 200 back, and all of a sudden we're
4 making major decisions on what we heard on 200
5 survey returns. I think 25 percent is fine.

6 I can't believe that we are
7 challenging -- Your title, put in the record
8 again, is Professor of Public Policy and Finance
9 at the Wharton School University of Penn-
10 sylvania. I thank you very much for keeping
11 your cool and thank you very much for coming to
12 testify today.

13 DR. LINNEMAN: My pleasure. You guys
14 are pussy cats in terms of badgering. I'm used
15 to students. They are really nasty.

16 CHAIRMAN COHEN: I'd like to say when
17 I send out questionnaires I never state in
18 questionnaires the representing firms and I
19 never represent to anybody who represent my
20 constituency. I assume 55 people said one thing
21 and 211 people said something else. That's the
22 only way I report it.

23 I think what is controversial about
24 Dr. Linneman's study is, he represents his
25 sample as being representative of the universe

1 of Pennsylvania businesses. I think that's
2 what's controversial. I think that's why we had
3 the extended questioning. Thank you very much,
4 Dr. Linneman, for being here today.

5 Our next set of witnesses include
6 Timothy Proctor, Counsel for Merck, Sharp and
7 Dohme; Paul Roedel, Chairman and CEO of
8 Carpenter Technology Corporation; Harvey
9 Bradley, President Bradley Lifting Corporation,
10 York County; and Robert S. Grigsby, an attorney
11 from Alder, Cohen & Grigsby, a law firm in
12 Pittsburgh.

13 Gentlemen, we appreciate you coming.
14 We appreciate you staying to this late hour.

15 MR. GRIGSBY: I'm Bob Grigsby from
16 Pittsburgh. Chairman Cohen and honorable
17 members of the Committees: As promised,
18 Mr. Proctor, Mr. Roedel and Mr. Harvey, in due
19 course, are going to make statements to you.
20 Last time I had the pleasure of appearing here
21 was to testify before the Senate Judiciary
22 Committee to confirm as a judge. It was a very
23 mild experience in contrast to the searching
24 inquiries I have seen today.

25 Since that time, when I didn't get

1 elected, needless to say, I have served on the
2 Board of Directors of the PBI. I'm sure you all
3 know what that is, those of you who are
4 attorneys.

5 CHAIRMAN COHEN: Pennsylvania Bar
6 Institute for those who don't know.

7 MR. GRIGSBY: That's correct. Thank
8 you, Mr. Chairman. I also practice law
9 representing both Plaintiffs and Defendants, but
10 predominantly Defendants. I would like to make
11 just a couple of short statements regarding this
12 proposed legislation and what I personally
13 believe to be a crying need for legislation of
14 this nature.

15 I have heard a great deal controversy
16 and discussion of pros and cons, although I
17 haven't heard anything con that's been
18 substantive to hardly anything other than the
19 questions having to do with the statute of
20 repose.

21 The other provisions of this
22 legislation relating to the substantive aspects
23 of it, namely the attempt to bring back into
24 focus that which the American Law Institution
25 promulgated 25 years ago, in which our Supreme

1 Court, with the swift movement of its pen in
2 1978, emasculated and took unreasonably
3 dangerous out. I think it's sorely needed in
4 Pennsylvania because we don't have the
5 definition in the field of product liability
6 that other states do.

7 We can't change the climate in
8 Pennsylvania to make it equal with the sun belt
9 areas that seem to be attracting a lot of
10 business, but we can change the climate in
11 product liability to create a product liability
12 law, or collection of laws, through the
13 legislative action, that will give those people
14 who are engaged in manufacturing endeavors, both
15 within the state and out, who hire people in the
16 state, a better understanding of what the law is
17 and how to comply with the law.

18 Some simple illustrations I'd like to
19 bring to your attention, first of all, those
20 dealing with state of the art. When I get
21 students in my law school class at the
22 University of Pittsburgh, I tell them--and I
23 don't teach product liability, by the way--that
24 they prove state of the art in product liability
25 cases. They can't believe that, but that's the

1 law in Pennsylvania.

2 When I explain to them they are
3 defending a case they cannot prove there was no
4 better design available to make it any safer,
5 any more functional, any better product, they
6 can't believe that. When I tell them if
7 something is unavoidably dangerous, such as
8 beer, that does produce certain problems with
9 the pancreas if consumption is too much and the
10 consumer happens to have any synthetic reactions
11 to beer, as illustrated in the Stroh's case,
12 they can't believe that, but they are beginning
13 to believe it because they've read the cases
14 now. They can't believe that one cannot prove,
15 in defending a case, that you have complied with
16 standards.

17 On the other side of the coin, there
18 can be proof that you have not complied with the
19 standards. That's proof of defect, but
20 initially, you cannot prove that you have
21 complied with standards. All of this point to
22 the fact that there is a crying need.

23 I heard reference made to warnings
24 being given, particularly to groups. Thought
25 entered my mind if I were a seller of silica

1 products I'd like to have challenged that person
2 at the moment as to how in the world someone is
3 going to write a warning on a piece of sand.
4 That's a very challenging -- there's no way to
5 do it.

6 To the user, the fellow down there
7 shoveling it is working with it, there's no
8 other way to impart this warning because if you
9 impart the warning to the buyer, to the
10 employer, the argument was made, well, that
11 doesn't get to the victim. That's quite true,
12 but the law is supposed to be sensible. It's
13 supposed to be that which is workable and that
14 can do justice across the board and not simply
15 achieved results in a field of cases that they
16 call hard cases making bad law.

17 I have probably talked more than I
18 should have in view of the hour. I will be here
19 to answer questions if I can. I would like to
20 give the floor to my friend, Mr. Proctor.

21 MR. PROCTOR: Committee members who
22 are here at this point in a long day and warm
23 room I appreciate your attention. I have
24 distributed a statement to the Committee which
25 I'd like to go through quickly with you.

1 My name is Timothy D. Proctor. I am
2 Counsel, Marck Sharp & Dohme, Division of Merck
3 & Company, Incorporated, headquartered in West
4 Point, Pennsylvania. I am here on behalf of the
5 Pharmaceutical Manufacturers Association of
6 which Merck is a member.

7 The Pharmaceutical Manufacturers
8 Association is a trade association representing
9 more than 100 research-based pharmaceutical
10 companies responsible for nearly all the new
11 prescription medications discovered, developed
12 and marketed in this country. Sixteen member
13 companies have facilities in this state, among
14 which Connaught Laboratories, Johnson & Johnson,
15 the Rorer Group, SmithKline, Wyeth-Ayerst and
16 Merck have major corporate offices in
17 Pennsylvania. In total, PMA member companies
18 employ over 27,000 Pennsylvania citizens.

19 Last year, PMA members spent
20 \$6.5 billion on the research and development of
21 new medicines. Once marketed, many of these
22 medications will bring significant therapeutic
23 advances to Pennsylvanians and, indeed, to
24 people throughout the country and around the
25 world.

1 There are several Bills being
2 discussed today that PMA supports. I would like
3 to focus my remarks on House Bill 916, which
4 addresses product liability; and, in particular,
5 on Section 8381 of that bill, which addresses
6 punitive damages in cases involving products
7 regulated by the Food and Drug Administration.
8 Other witnesses are covering the other
9 provisions of House Bill 916 and the other
10 important Bills.

11 Product liability is a subject of
12 particular concern to research-based
13 pharmaceutical manufacturers. To quote from a
14 report of the Board of Trustees of the American
15 Medical Association: "Product liability is
16 having a profound negative impact on the
17 development of new medical technologies.
18 Innovative new products are not being developed
19 or are being withheld from the market because of
20 liability concerns or inability to obtain
21 adequate insurance. Certain older technologies
22 have been removed from the market, not because
23 of sound scientific evidence indicating lack of
24 safety or efficacy, but because product
25 liability suits have exposed manufacturers to

1 unacceptable financial risks."

2 Among these risks the threat of
3 punitive damages can be particularly
4 discouraging for manufacturers engaged in
5 pharmaceutical research. Section 8381 of House
6 Bill 916 would prohibit punitive damages in
7 cases involving products regulated by the Food
8 and Drug Administration, when there is no
9 evidence of fraud or misrepresentation by the
10 manufacturer.

11 Let me summarize the arguments in
12 favor of this provision. Punitive damages are
13 intended to deter and to punish knowing,
14 willful, wrongful conduct. A pharmaceutical
15 manufacturer who has complied in good faith with
16 the rigors of the FDA regulatory process,
17 including years of study, the submission and
18 review of literally a truckload of data, and
19 thoughtful approval of product labeling has, by
20 definition, not engaged in the kind of wrongful
21 conduct that should be subject to punitive
22 damages.

23 Requiring such a manufacturer to face
24 the threat of punitive damages is a completely
25 unwarranted deterrent to pharmaceutical research

1 and development, research which ultimately
2 benefits patients in the Commonwealth, employees
3 of pharmaceutical companies in the Commonwealth,
4 and the Commonwealth's economy. Removing this
5 threat in the context of compliance with FDA
6 regulations represents no compromise of the
7 rights of injured parties.

8 Product liability concerns and the
9 threat of punitive damages in particular inhibit
10 the access of patients to useful pharmaceutical
11 products.

12 Consider, for example, vaccines. The
13 magnificent results they have achieved are
14 beyond challenge. Smallpox has been eradicated
15 worldwide. The number of measles cases has
16 dropped from 525,000 per year before 1962 to
17 3032 in 1981. Polio has dropped from 57,000
18 cases in 1952 to four in 1984. Whooping cough,
19 still a dreaded killer disease in third-world
20 countries, is largely controlled here. And yet,
21 there has been a sharp decline in the number of
22 vaccine manufacturers, and liability exposure is
23 an important cause of that decline. A number of
24 our most important vaccines are now produced by
25 only one manufacturer.

1 Merck, the company I am associated
2 with, is currently the sole U.S. supplier of
3 vaccines against mumps, measles and rubella. It
4 is also the developer and marketer of a vaccine
5 against hepatitis B, the first vaccine for human
6 use produced using recombinant DNA technology.
7 Much of the work leading to this scientific
8 breakthrough was done in our laboratories here
9 in Pennsylvania for sale worldwide. Hepatitis B
10 is a very serious, infectious disease.

11 Chronic manifestations of the disease
12 are associated with liver cancer. While
13 vaccines comprise approximately seven percent of
14 Merck's U.S. pharmaceutical sales, they are
15 responsible for half the product liability
16 lawsuits we have faced in recent years. At this
17 time, the total of pending claims in industry
18 wide vaccine lawsuits is more than ten times the
19 total annual sales of all vaccines in the United
20 States.

21 It is this kind of experience with
22 vaccines that led to the enactment of the
23 National Childhood Vaccine Injury Act, federal
24 legislation which recognized the inability of
25 the tort system to deal with the scientific and

1 public policy issues raised by vaccine lawsuits.

2 For those injured by pediatric
3 vaccines, it provides for a no-fault compen-
4 sation fund derived from an excise tax on
5 the vaccines covered. A Claimant unsatisfied
6 with his award can still initiate a suit under
7 modified rules, including a limitation on the
8 availability of punitive damages similar to that
9 being proposed here.

10 Vaccines intended for adults, such as
11 our hepatitis B vaccine, are not covered by the
12 Act at all and future pediatric vaccines are not
13 automatically covered. An AIDS vaccine would
14 not be covered by this Act.

15 House Bill 916 attempts to address
16 some of the excesses that have come to exist in
17 our tort system. House Bill 916 does not in any
18 way exempt manufacturers from responsibility for
19 defective products. Instead, the bill fairly
20 limits inappropriate threats to those manu-
21 facturers who endeavor to provide quality
22 products of significant benefit to society.

23 CHAIRMAN COHEN: Before the next
24 speaker begins speaking, Representative
25 Caltigarone and I have been discussing about how

1 late we should go tonight and how many witnesses
2 we hear. Two witnesses already indicated they
3 are really interested in this, but their goal is
4 to get home at a reasonable hour so they would
5 prefer to be scheduled at some other time.

6 We will be having another hearing
7 next week. If anybody who has not contacted us
8 and indicated they would prefer to speak next
9 week, we will have at least one additional
10 hearing. If anybody else wishing not to testify
11 tonight and would prefer at a time when there
12 will be more members present and probably
13 greater attention span among the people present,
14 please contact Michael Cassidy.

15 You may continue.

16 MR. ROEDEL: I'm Paul Roedel. I'm
17 Chairman and Chief Executive Officer of Carpent
18 Technology Corporation in Reading, Pennsylvania.
19 We employ 3600 people, 2900 of whom are in
20 Pennsylvania. We produce specialty steels for
21 a wide variety of end use markets, such as
22 automobiles, airplanes, power plants, the
23 defense industry, medical or surgical implants.

24 With me today is Mr. Harvey Bradley,
25 President of Bradley Lifting Company of York,

1 Pennsylvania, and the two of us are here today
2 on behalf of the Coalition of Pennsylvania
3 Manufacturers representing five regional
4 manufacturers' associations across Pennsylvania
5 with over 2000 member companies employing over
6 35,000 citizens in this Commonwealth.

7 I have given copies of this testimony
8 to all of you. I will move through it and not
9 cover parts of it that I think have been
10 adequately covered with others, in respect to
11 the time today. We are here in the hopes of
12 moving forward House Bill 916, creating a
13 product liability statute to guide the judicial
14 decisions in product liability cases.

15 We support a product liability system
16 that requires manufacturers of defective
17 products to provide compensation to individuals
18 who have been injured because of the product
19 defect. What we ask you to do is to establish
20 the principle and guideline that a product must
21 be found to be defective in order for liability
22 to be assessed.

23 The next paragraph of my testimony
24 speaks to the number of cases filed in the State
25 of Pennsylvania, in the last year, more than any

1 other state in the year. Pennsylvania is well
2 above the national average of award sizes.

3 Among our members of the coalition it
4 is extremely common for a company to have
5 several lawsuits pending with the likelihood
6 that the cases will be settled out of court
7 regardless of whether the case has any merit.
8 Legal costs, lost man hours weighed against
9 increasing uncertainty of winning a product
10 liability case in Pennsylvania puts heavy
11 economic pressure on companies to settle those
12 baseless lawsuits.

13 Chiefly through a succession of court
14 cases, product liability for personal injury has
15 expanded from a fault base standard,
16 realistically, to a strictly liable standard,
17 but is rapidly headed to a standard of absolute
18 liability, even though there may be no wrongful
19 or negligent conduct involved.

20 Manufacturers can be held liable for
21 risks which were scientifically unknowable at
22 the time of production. Furthermore, they can
23 be found liable if the Plaintiff misused the
24 product, if other parties contributed to the
25 injury, and even if no connection was

1 established between the Defendant's actions and
2 the Plaintiff's injuries.

3 Often damages for harm caused by a
4 product are paid not because of wrongful or
5 negligent conduct by manufacturers or sellers,
6 but rather because of a social policy judgment
7 about which party could bear the financial loss.

8 At present, Pennsylvania has no
9 statutory guidelines on product liability. All
10 Pennsylvania's product liability law is case law
11 or common law developed on a case-by-case basis
12 by the courts. We are not asking you to rewrite
13 all product liability law, but to address some
14 of the areas that are more onerous.

15 By enacting House Bill 916 you will
16 be establishing a number of guidelines that are
17 important. My testimony lists ten of those, all
18 of which, have been covered through information
19 you already have. I will not read through all
20 of those.

21 We agree that manufacturers should be
22 held liable for defective products. We do not
23 agree that manufacturers should be held liable
24 if they were not responsible for the injury.
25 The provisions of House Bill 916 attempt to

1 bring that fairness back into the product
2 liability system.

3 We are here as a coalition to tell
4 you today that we cannot continue to absorb the
5 increase in costs of our present liability
6 system and remain competitive in today's
7 increasingly global economy. The cost of
8 lawsuits and liability insurance premiums are
9 only part of the total costs of the liability
10 system.

11 Much harder to measure are the
12 indirect costs associated with a loss of
13 productivity, loss of international
14 competitiveness, and the economic loss related
15 to goods and service that are withdrawn, not
16 developed or not produced because the risks of
17 liability outweigh the potential returns in
18 today's product liability environment. Many
19 U.S. firms incur much greater product liability
20 costs than their foreign competitors. Total
21 U.S. liability insurance costs, for example,
22 exceed those of Japan by a factor of 15.

23 It is also interesting to note that
24 the liability system is extremely inefficient.
25 Plaintiff's receive only a fraction of the total

1 dollars expended through the tort system.
2 According to the Rand Corporation, of the
3 \$19 billion spent on non-auto cases in 1985,
4 \$11 billion went to litigation costs, including
5 attorney fees and time cost of litigants,
6 leaving only \$8.2 billion in compensation
7 to the Plaintiffs. That's an average of 57
8 percent of the total expenditures.

9 Finally, several current court
10 practices deter improvements and innovations in
11 products. For example, evidence of subsequent
12 improvements being offered in court as evidence
13 of previous defects discourages such
14 improvements. House Bill 916 would remove that
15 barrier. The state of the art defense and the
16 statute of repose suggested in the bill would
17 also prevent the retroactive application of new
18 knowledge and new standards of liability.

19 Let me just close with a couple
20 comments regarding Carpenter Technology
21 Corporation specifically. We are a specialty
22 steel producer and part of the American iron and
23 steel industry. That industry has played a
24 vital role in this state over the course of its
25 history. You know the economic problems we've

1 had in this state as a result of restructuring
2 of the steel industry, a main thrust of which
3 was international competitiveness on their part.

4 We'll tell you that during 1989 our
5 company, Carpenter, celebrated its centennial
6 year. We felt very good about that one
7 hundredth birthday because we are now seeing the
8 results of a very difficult restructuring that
9 we too lived through in the past five years, and
10 the driving force on that restructuring was the
11 imperative that we become globally competitive
12 in order to maintain our economic strength.
13 That meant we rationalized facilities; we shut
14 down a plant in Connecticut; we reduced costs
15 including 28 percent reduction in the number of
16 people we employed, and we refocused our
17 strategy. Our strategy is working.

18 What you need to understand is that
19 Carpenter makes critical stainless, high
20 temperature, high nickel, high alloy steels that
21 ultimately become critical parts in very complex
22 systems that support the quality of life that we
23 enjoy in this country.

24 We make stainless and cobalt-based
25 steels that our customers fabricate into hip

1 joints, bone joints, bone screws and knee joints
2 for surgical implants.

3 We make high strength and nickel
4 based steels that become rotating parts in jet
5 engines for military and commercial airplanes.

6 We make stainless steels that our
7 customers fabricate into pumps, valves, fittings
8 and fasteners for critical applications in power
9 plants, oil drilling rigs and chemical
10 processing plants. We make chrome silicon
11 steels that our customers fabricate into
12 automobile engine valves.

13 During our entire 100 years, we have
14 been on the forefront of the development of new
15 specialty steels. We and our customers have
16 found the scientific and engineering keys to
17 producing and fabricating critical parts that
18 support our ability to drive automobiles, fly in
19 jet planes, enjoy reliable energy sources and
20 our steel--I don't know why I picked this one--
21 even helps us enjoy an occasional beer.

22 You can see that Carpenter and its
23 customers fabricate products with a high product
24 liability risks. We have accepted that risk and
25 rigorously administer our product quality

1 systems with full documentation of our process
2 and testing results. At the same time, we and
3 our customers are competing against foreign
4 producers of automobiles, airplanes, fittings,
5 fasteners, surgical implants and hundreds of
6 consumer products requiring specialty steel
7 parts.

8 It is imperative that you recognize
9 that companies like Carpenter accept the risk
10 associated with our products and simultaneously
11 drive to stay globally cost competitive against
12 companies in different countries with different
13 human and social value systems.

14 You can help us by supporting House
15 Bill 916 which, in our opinion, will bring a
16 reasonable balance into the present system of
17 determining whether or not a product liability
18 award should be assessed and against whom. We
19 are not asking you to do away with strict
20 liability doctrine. We are not asking to do
21 away or put limits on the amount of compensation
22 awarded, and we are not asking to reduce the
23 incentive of the manufacturer to make a product
24 safe.

25 What we are asking is for you to

1 establish the principle and guideline that a
2 product must be found defective in order for
3 liability to be assessed. We strongly support
4 the passage of House Bill 916. Thank you.

5 Now, Harvey Bradley has a comment or
6 two about his company.

7 MR. BRADLEY: Members of the
8 committee, my name is Harvey Goliath Bradley.
9 I'm President of Bradley Lifting Corporation.
10 We are manufacturers of fabricated machinery in
11 the steel, aluminum and paper mills. We are 16
12 years old. We employ 45 people. The present
13 liability system is not only a financial
14 burden with the large companies but also for the
15 small ones.

16 There seems to be no control on the
17 amount of time and money spent in the discovery
18 stage, which would make Christopher Columbus
19 look like an amateur. For example, my company
20 has two pending cases; one is six and a half
21 years old. We have one two and a half. In the
22 first case the Plaintiff was badly injured
23 through no fault of theirs, but the legal
24 technicalities of rival insurance companies and
25 their lawyers have kept it going for nearly

1 seven years.

2 Being an engineer, I would have
3 settled this in the first six months. It was
4 fairly clear and fairly adequate.

5 Case No. 2, a broken finger. The
6 suit came in out of the blue. It occurred two
7 years before I got the suit. The person injured
8 was already back at work for 18 months and still
9 doing the same job. However, my problems are
10 just starting.

11 You know, as a small businessman you
12 receive a suit it's like you got a hot potatoe
13 in your hand. I lost that first suit by default
14 because I sent it to the wrong insurance
15 company. Over that two years we have changed
16 insurance companies and the law had changed. It
17 had to go to the original insurance company. By
18 the time one had looked at it and sent it back
19 and resent it to the other one and they started
20 to take action, I had received a letter from the
21 court saying, when are you going to be appearing
22 today? That was a court in Kentucky. There was
23 no way.

24 The Plaintiff lawyer called me and
25 said, "Are you going to be there?" I said,

1 "There is no way." Anyway, the insurance
2 company lawyers are very smart and very capable,
3 and I wish I could hire engineers of the same
4 quality. They latched onto the nub of the
5 situation and I was running between public
6 notaries and getting testimonies and documents
7 written out so they could reverse the decision
8 and that's what they did in two months' time and
9 got me back in court. Now it's on the back
10 burner.

11 I have attended Interrogatories,
12 hearings and other dragged-out meetings of which
13 the Plaintiff, his lawyer, the Defendant and my
14 lawyer, our insurance company lawyer, the
15 employee's lawyer, the fringe-party lawyers and,
16 of course, the recorder. I sit back mentally
17 and I look at the cost of all of this in front
18 of me for one finger. It's ridiculous.

19 If you could pass this present
20 legislation with a reasonable statute of
21 repose -- I would think ten years is reasonable.
22 Even the lawyer said ten years was fine. I
23 would think that would be great for my product.
24 But, you must remember the life of a product
25 depends on its use. If an airplane starts

1 falling out of the sky after about 15 to 20
2 years because of fatigue, use fatigue. It grows
3 old.

4 All of the kinds of recycling and
5 rehabilitation cannot beat replacing it. So,
6 from a business point of view, I wish everybody
7 would scrap everything in ten years' times.
8 It's the best thing that could happen to
9 business.

10 Anyway, I'm going to cut a long story
11 short. The lawyers talked about removing
12 guards, making them difficult to remove. If I
13 made them difficult -- I'm designing machines.
14 You're talking to a designer now. I'm designing
15 machines every day. If I made a guard difficult
16 to remove, they won't remove it, so it won't get
17 maintained properly or they will leave it off
18 rather than screw around putting it back on.

19 There was a lot of wise words spoken
20 today, but you should get on the business end of
21 designing it and know how people use things and
22 knowing that if you do this, they are not going
23 to do a darn thing. You have got to make it as
24 reasonably easy for people to do things as
25 possible. That goes for protective guards too.

1 I'm prepared to answer any questions
2 at all about designing of machinery and things
3 like that because I have done it all my
4 lifetime.

5 CHAIRMAN COHEN: We appreciate that.
6 Any questions?

7 (No audible response)

8 CHAIRMAN COHEN: I would like to
9 know, any of you gentlemen active in the
10 Pennsylvania Chamber of Commerce?

11 MR. GRIGSBY: I am not.

12 MR. BRADLEY: I'm a member, but I
13 don't represent them.

14 CHAIRMAN COHEN: I was just asking that
15 because Chamber of Commerce just named Chief
16 Justice man of the year for 1988. It just
17 occurred to me we will be hearing all these
18 attacks on the Supreme Court seems to be some
19 discrepancy with that evaluation of Chief
20 Justice. I assume you would not be very happy
21 if the legislature would mandate that products
22 not be used after 15 years or so in order to
23 insure they were safe?

24 MR. BRADLEY: The life of a product
25 is a variable thing. What suits one industry

5

1 won't suit another. It's a question of abuse,
2 how many cycles it's been put to and period of
3 time. I would think that most machinery should
4 go back to the manufacturer every ten years for
5 an overhaul. It happens in my business. A
6 person will say, this is getting pretty shot and
7 they send it back and I give it a new lease on
8 life. I'd say it's good for another five years.
9 It saves them scrapping valuable machinery after
10 only ten years of service.

11 CHAIRMAN COHEN: Is that standard
12 practice to look into -- to have the
13 manufacturer look into machinery after every
14 five or ten years?

15 MR. BRADLEY: No, it's not standard
16 practice.

17 MR. GRIGSBY: Being a farmer at
18 heart, Mr. Chairman, I think you'll encounter a
19 great deal of resistance from the agricultural
20 forces of this Commonwealth because I have a
21 1949 Ford AM tractor that's been running very
22 hard ever since. I'm sure that if somebody is
23 going to look for defects they could find a lot
24 of them, but it's never hurt anybody in all that
25 time.

1 MR. ROEDEL: Speaking from a steel
2 industry standpoint, where equipment does last a
3 long time, we recently put \$125 million hop mill
4 into Reading, Pennsylvania, that we hope to last
5 40 years because the hop mill that is there now
6 is 35 years old and is kept in good repair; but
7 it's not, in our opinion, the manufacturer's
8 responsibility. It becomes our responsibility
9 to maintain that equipment in a safe and well-
10 maintained condition.

11 I think you cannot draw that broad
12 spectrum of 15 years and throw it out. You
13 would not have very much in the steel industry
14 left in the United States if you did that.

15 CHAIRMAN COHEN: That would be my
16 feeling as well. Any other questions?

17 (No audible response)

18 Next witnesses is Karen Hicks.

19 MS. HICKS: Hello. My name is Karen
20 Hicks. I'm National President of Dalkon Shield
21 Information Network. I'm based in Bethlehem,
22 Pennsylvania. I'm a resident of the State of
23 Pennsylvania.

24 My personal story with Dalkon Shield
25 began in 1971. We are now in 1989. Almost 20

1 years that it has affected my life, and to this
2 day I have not been compensated for my injuries
3 from the Dalkon Shield.

4 I divided Dalkon Shield history into
5 two historical periods; the ancient period being
6 the origin of the tragedy in '68, and the modern
7 period modern period being the beginning of the
8 Chapter 11 bankruptcy against Robins in 1985.
9 A. H. Robins is the manufacturer.

10 Our organization arose during this
11 modern period, the last five years, out of a
12 total lack of information to Dalkon Shield
13 users, former Dalkon users, for what was more
14 than a decade. To this day is still --
15 information is still spotty. Our organization
16 is a nonprofit grass roots advocacy organi-
17 zation. We exist completely and totally on
18 volunteer power and volunteer labor.

19 I will tell you up front, and you
20 have asked other people today who is paying
21 their bills. Nobody pays our bills. In fact,
22 it costs me money to be here. I am passionately
23 committed to the issue of defective products
24 directly because of my personal experience, but
25 also serving now as an advocacy organization and

1 having talked to thousands of other Dalkon
2 Shield women.

3 I have traveled to Richmond,
4 Virginia, to the court hearings for the past
5 three years. I have been there 15 times
6 approximately. Because I felt that there were
7 many issues that were not addressing the injured
8 parties, I began to learn from the ground up
9 when I first tried to meet with the judge I was
10 told that he couldn't meet with litigants,
11 direct litigants. I asked what's an litigant.
12 I didn't even know. Today I am very proud to
13 say I know a lot more about bankruptcy
14 litigation and bankruptcy law than I ever
15 thought I would have to in my entire lifetime.

16 The Dalkon Shield, earlier today
17 there was some -- I'm offended by a comment I
18 heard from one of the Representatives earlier
19 today who likened the Dalkon Shield as a scare
20 tactic and it's approaching Halloween and are
21 some of you supposed to be scared by the story
22 of Dalkon Shield. I certainly hope that you are
23 scared by the story of the Dalkon Shield. For
24 me it was a living hell for the better part of
25 my adult life. For ten years I was unaware that

1 the illnesses that I had repeatedly were caused
2 by this defective product.

3 In 1985 I had a total hysterectomy on
4 the one-week anniversary of my second marriage.
5 The passion that I have for the issue sur-
6 rounding deceptive tactics comes from the rage
7 that has given me the energy to do this kind of
8 work. The Dalkon Shield now is a symbol and
9 only one of many. A recent book called
10 Corporate Crime and Violence, Big Business Power
11 and the Abuse of the Public Trust cites 36 cases
12 of deception of public trust, not just Dalkon
13 Shield.

14 I don't ever like to hear the case of
15 the Dalkon Shield or others trivialized in any
16 kind of way because those of us whose voices are
17 getting stronger, whether we are Agent Orange
18 victims or asbestos victims or DES victims or
19 Thalidomide victims, we are coming together in
20 the recognition that many of the tactics that
21 are used involve suppressing tragedies like this
22 for a very long time. So, something like the
23 15-year repose really would make many thousands,
24 if not millions, of people unable to seek
25 compensation.

1 I heard it said that the Dalkon
2 Shield victims, this statute of repose in the
3 new bill would not apply to Dalkon Shield
4 victims. It absolutely would. The injuries
5 began in early 1970's.

6 There are still women in relation to
7 a national publication where we were cited. We
8 had 500 telephone calls in April of 1989 from
9 women who had no idea that their injuries and
10 their own health histories were linked to this
11 thing, their former use of the Dalkon Shield
12 IUD. There are still many people, hundreds,
13 maybe thousands of people unaware of the Dalkon
14 Shield injuries. They would not be able to
15 approach a court of law in the State of
16 Pennsylvania.

17 Besides that, no one can because the
18 solution for the Dalkon Shield tragedy was for a
19 healthy robust company to seek the protection of
20 a Chapter 11 of the U.S. Bankruptcy Code.
21 Therefore, now, whenever it becomes final and
22 people may charge at this point that it is the
23 Plaintiff's bar that is delaying the final
24 resolution to that, I must point out in the
25 first two and a half years of the bankruptcy

1 litigation there were only extensions and
2 delays. The whole thing has been drawn out.

3 There may be some compensation. Most
4 women will be disappointed with that compen-
5 sation. There will be no punitive damages.
6 There will be no further liability ever allowed
7 in the Dalkon Shield case. We are talking about
8 an unsatisfactory resolution from a tragedy
9 that's even somewhat accepted as resulting from
10 a known defective product.

11 The thing that weighs on my mind a
12 lot is the fact that this kind of corporate
13 crime has only a civil redress at this time.
14 There are hardly any criminal prosecutions for
15 these kinds of crimes. Many of us, including
16 myself, feel that the corporation has used the
17 shield, the A. H. Robins Company has used the
18 shield of the corporation to really minimize its
19 total liability in this particular case.

20 This type of corporate crime affects
21 millions of unsuspecting people and potential
22 victims. By contrast, street crime is one on
23 one and it's single party. I don't mean to
24 trivialize the trauma of street crime, but
25 corporate crime affects potentially millions of

1 people. The entire public is put at risk for a
2 case like willful and reckless endangerment of
3 the public.

4 For that reason, the current form of
5 the product liability bill for Pennsylvania is
6 unsatisfactory to me and to victims like me. I
7 have seen, unlike the Wharton professor, I have
8 seen the list of the Civil Justice Coalition. I
9 don't see one victims' organization on that
10 list. They didn't approach my organization and
11 ask for my support for the tort reform package
12 in front of you.

13 I believe that the tort loss that we
14 have should be made stronger than they are.
15 There are certainly excesses and counter
16 arguments on either side at both ends and there
17 must be a compromise somewhere, I agree, but we
18 need to ensure that victims are protected.

19 I think that summarizes about all I
20 wanted to say.

21 CHAIRMAN COHEN: Thank you very much.
22 Any questions?

23 REPRESENTATIVE HECKLER: Thank you,
24 Mr. Chairman. Apart from the statute of repose
25 provisions which you indicate in the present

1 form would cut off some claims. Are there any
2 other provisions of the Bill which you under-
3 stand would have interfered either with the
4 lawsuit which you brought or which should be
5 available to other people who have been a victim
6 of the kind of corporate conduct you're talking
7 about?

8 MS. HICKS: I would have to get my
9 notes out to be able to address that. I think
10 there are, but let me get this other part.
11 Well, the state of the art, let's say. Dalkon
12 Shield was state of the art at the time, was not
13 widely acknowledged that there was scientific
14 fraud, medical scientific fraud at the very
15 first level. The inventor falsified his data
16 and got it published.

17 They weren't at that time regulating
18 medical devices at the FDA. The Dalkon Shield
19 was a medical device. Pharmaceutical companies
20 give very little data to the FDA. I'm not
21 satisfied that even FDA approved drugs are
22 necessarily safe. We are talking about
23 deception. The drugs involved -- where there's
24 clear fraud and deception in their invention and
25 perpetration.

1 Also, eliminating punitive damages
2 for FDA approved drugs kind of goes along with
3 that. I want to feel more confident that FDA is
4 doing its job to protect me, and I certainly
5 don't see evidence that it's a strong regulatory
6 agency, particularly in the area of drugs being
7 given to healthy people, not sick people; but in
8 the case where healthy people are given -- are
9 promised something that their life is going to
10 improve in some way. I will remain a skeptic;
11 that we have a sufficient strong regulatory
12 agency.

13 REPRESENTATIVE HECKLER: Thank you.
14 Let me just make the observation that I, as an
15 elected official, I share some of your concerns
16 generically about bureaucrats and their ability
17 to make appropriate decisions, especially on
18 important matters without appropriate public
19 accountability.

20 I would make the observation that,
21 both with regard to the state of the art and
22 specifically the punitive -- bar on punitive
23 damages which you infer, there's a specific
24 exception to fraud in that language. It would
25 have been to me the offensive cases that we hear

1 about involve the conduct of the asbestos
2 companies in knowing that they had a harmful
3 substance and concealing that and continuing to
4 market. I'm not as familiar with all of the
5 facts surrounding the Dalkon Shield, but that
6 certainly is my understanding of the situation
7 there.

8 I just don't see anything, with the
9 possible exception of the statute of repose, in
10 this legislation that would keep someone in a
11 position of having been victimized by corporate
12 crime from seeking redress. As I say, I have
13 been looking today for people who want to reach
14 some kind of jointure in terms of talking about
15 the statute of repose and limitations or
16 exceptions to that statute of repose where it is
17 not reasonable for the victim to know that they
18 have been victimized, whether it's by exposure
19 to chemicals, or like the Dalkon Shield where
20 the effects only become manifest over time.

21 I don't imagine that there's any
22 member of this legislature who wants to prevent
23 a victim, who was not reasonably on notice that
24 they had been affected by a defective product,
25 from being able to bring a suit.

1 MS. HICKS: My only response to that
2 is that, if we consider that there are strong
3 tort laws now and we want to change them good
4 for whom; good for business, in my opinion. But
5 if we want to change them and do what I call
6 make them more anti-consumer, or weaker -- look
7 how long it has taken even in the cases where
8 there have been fraud or deceit or willful
9 reckless endangerment? Look how long it has
10 taken for those people to be compensated.

11 I don't think you'll find asbestos
12 victims either, or Agent Orange victims feeling
13 satisfied that they have been duly compensated
14 for their injuries. It's a struggle, a
15 continual struggle.

16 I see that being more of a struggle
17 and more difficult for future victims or the
18 ones where there are products now, Dalkon Shield
19 is just a symbol to me anymore. My fear is the
20 other drugs, other devices, whatever, products
21 that are out there right now.

22 REPRESENTATIVE HECKLER: As I say,
23 it's my reading of this legislation it's not
24 enough for us to say we are making things
25 stronger or weaker. We have to deal with this

1 with a bit more precision. It's my under-
2 standing that, with possible exception of the
3 way in which the statute of repose is crafted,
4 that we are not talking about keeping you or
5 other people in those situations out of court.

6 Thank you, Mr. Chairman.

7 CHAIRMAN COHEN: Thank you very much
8 for testifying.

9 MR. HOFFMAN: I was going to begin
10 for the panel. My name is Peter Hoffman. I'm a
11 lawyer in Philadelphia. I'd like to introduce
12 the other Pennsylvanians that are here with this
13 panel who will make presentations: Art
14 Glatfelter of York, who is Chairman of the
15 Criminal Justice Coalition; Peter Hickock from
16 Harrisburg who is President of the W.O. Hickock
17 Manufacturing Company; and Don Tortorice, a
18 lawyer from here in Harrisburg.

19 It states on the agenda I'm here as a
20 member of the Pennsylvania Defense Institute.
21 Until last week I was President of Pennsylvania
22 Defense Institute. I'm here in that capacity
23 and also as a lawyer who tries products
24 liability cases. It's been my privilege to
25 represent Defendants, and it's also been by

1 privilege to represent Plaintiffs.

2 I represented Plaintiffs in products
3 liability cases for both bodily injury and
4 property damage and industrial accidents,
5 aviation cases, consumer products, toxic torts,
6 pharmaceutical products. It's been my privilege
7 to work for the Pennsylvania Bar Institute and
8 to have been a lecturer and author for them in
9 their statewide products liability institutes in
10 both in 1985 and 1988.

11 It's my opinion that this bill, House
12 Bill 916, is a fair, balanced precise piece of
13 legislation and I support it entirely and
14 wholeheartedly.

15 As you were, I was moved by the
16 testimony of Miss Hall this morning and
17 Miss Wisniewski who talked about how they were
18 affected and how their families were affected by
19 exposure to toxic substances. I was moved by
20 the testimony of Miss Hicks. It's my opinion,
21 after reading the bill and studying it, and I
22 agree with Representative Heckler in this
23 regard, that the bill will not affect the rights
24 of those people would have to sue a Defendant in
25 a products liability case.

1 Representative Hagerty this afternoon
2 asked about the Azzerello case. She wanted to
3 know what the charge was and the state of the
4 charge and state of the law was in Pennsylvania.
5 Let me read it to you. In all its precision and
6 all its majesty, because when you're a Defendant
7 or representing a Defendant and you hear the
8 charge, you will hear it three times. You hear
9 when the Plaintiff's attorney opens. You hear
10 it when the Plaintiff's attorney closes, and you
11 hear it when the judge charges the jury, at
12 which point the Plaintiff's attorney is nodding.
13 I can tell you when I have represented the
14 Plaintiff I've done it. The charge is a
15 frightening charge.

16 It says, "The supplier of a product
17 is guarantor of its safety". It was those words
18 that caused Representative Hagerty to think that
19 was the kind of charge that essentially
20 instructed the jury to find for the Plaintiff.
21 But the charge says more because it defines
22 defective product. "The product must therefore
23 be provided with every element necessary to make
24 it safe for its intended use. If you find that
25 the product, at the time it left the Defendant's

1 control, lacked any element necessary to make it
2 safe for its intended use or contained any
3 condition that made it unsafe for its intended
4 use, then the product was defective and the
5 Defendant is liable for all harm caused by such
6 defect."

7 I suggest to you that that charge is
8 not a balanced charge, and I agree with
9 Professor Henderson that it should be amended
10 and that this Act will be helpful in that
11 regard.

12 CHAIRMAN COHEN: Was that charge
13 upheld by the State Supreme Court?

14 MR. HOFFMAN: That is the charge
15 mandated by the State Supreme Court, and it is
16 the standard jury instruction that's put out by
17 the Pennsylvania Bar Institute in reaction to
18 that.

19 I want to talk about comparative
20 causation. There was a question that was raised
21 about comparative causation today and would the
22 use of it at trial make things more cumbersome.
23 I can tell you the concept of comparative
24 causation already exists and it exists now in
25 three Superior Court cases which deal with it as

1 among Defendants; so the Superior Court has
2 wrestled with it, and I believe had it not been
3 for the precise language of 7102, as it
4 currently exists, the Superior Court would have
5 applied it in the products liability case with
6 respect to the Plaintiff. It also exists in the
7 asbestos cases, both the state court with the
8 Martin case and the Bell case in the federal
9 court.

10 With respect to warning, Section
11 8376, I want to make one comment about that.
12 Under Section 8376, in a failure to warn case,
13 the standards by which the Defendant would be
14 judged is what was known to the Defendant at the
15 time. That's not the state of the law in
16 Pennsylvania. The name of the case is Peg vs
17 General Motors. Under that case the manu-
18 facturer has a duty to warn regardless if he
19 knew of the risks or had reason to know. We
20 believe that Section 8376 writes what we believe
21 is wrong with respect to the Defendant.

22 I'll now turn the testimony over to
23 Mr. Glatfelter.

24 MR. GLATFELTER: Thank you very much,
25 Chairman Caligarone and Cohen, members of the

1 Labor and Judiciary Committees. I appreciate
2 having this opportunity to make a very short
3 statement on behalf of the Pennsylvania Civil
4 Justice Coalition of which I'm Chairman. As
5 both a Chairman and a concerned citizen and
6 businessman, I have spent the better part of
7 eight years now working to reform the civil
8 justice system.

9
10 Before you are seven bills dealing
11 with various reforms to this system. Civil
12 Justice Coalition and its one thousand plus
13 members endorse these legislative initiatives
14 not because we feel the system needs dissolved,
15 but because we feel it needs fine tuning. What
16 is proposed is not, in our estimation, a radical
17 departure from current law. It will continue to
18 ensure legitimate and proper rights of persons
19 who suffer from wrongful or careless acts of
20 others. It ensures fairness within the system.
21 It eliminates fears that plague the medical
22 profession. It alleviates the practice of
23 making anyone pay for all damages even if they
24 are only slightly responsible; permit wrongdoers
25 to be penalized and punished; enable our
businesses to develop new products and devise

1 new techniques.

2 In short, if these bills are enacted
3 into law they will inject predictability and
4 balance back into the system. It will help
5 foster a sense of individual responsibility for
6 individual action or inaction.

7 Pennsylvania Civil Justice Coalition
8 is a broad based coalition of more than 110
9 organizations representing various business
10 trade associations, local political leaders and
11 professional groups who actively support tort
12 reform. Their involvement is indicative of the
13 pervasive and ever-growing desire for some
14 "sense" to be put back in a system that no
15 longer exhibits any.

16 On their behalf, I urge your support
17 in favorable action on House Bill 916 and House
18 Bills 1436 through 1440.

19 I am an insurance agent. I have been
20 an insurance agent for 42 years. I am a small
21 businessman and I have heard a lot of comments
22 made earlier today about small business. I can
23 assure you with 42 years in this field dealing
24 with primarily small business--and I happen,
25 through my office, to ensure about 75 percent of

1 the volunteer fire departments in this state--
2 that there is a serious problem with small
3 business. I am trying to fight it.

4 I take exception to the comment that
5 was made this morning about who is going to
6 benefit. I'll tell you who will benefit. Small
7 business and the Commonwealth of Pennsylvania as
8 a whole will benefit by creation of and
9 retention of jobs. I will be one of the people
10 who will lose up front, because if we can do
11 this, there's no doubt in my mind that over a
12 period of time -- and I have seen it. I write
13 business in 49 states. I can tell you states
14 where this was done years ago where we have seen
15 more insurance availability and certainly some
16 reduction in premiums.

17 I have been through so many cycles in
18 this business in 42 years that I can assure you
19 it's a highly competitive business. If there's
20 some predictability put back in this system, I
21 think you will see the small business and the
22 Commonwealth as a whole benefit because we will
23 maybe quit sending our jobs overseas.

24 I thank you for your time and
25 attention. Right now I'd like to introduce

1 Donald Tortorice, an attorney and a Board member
2 of the Civil Justice Coalition to address each
3 bill.

4 MR. TORTORICE: Chairman Caltagirone
5 and Chairman Cohen, I think if we are talking
6 specifically about the five general tort reform
7 bills that comprise the rest of the package
8 other than House Bill 916, which has taken the
9 Lion's share of focus during all of the
10 testimony today, that I reflect on a bit of
11 history relating to the development of those
12 bills.

13 When I first became active in the
14 tort reform effort of the Chamber of Commerce,
15 at that time it was called, it was apparent that
16 those in business were pursuing bills, and you
17 had all seen them, they had been introduced,
18 which did more than just right the pendulum to a
19 horizontal. That was essentially an attempt to
20 move the pendulum in a very pro-business and
21 anti-consumer, anti-Plaintiff kind of fashion.

22 On the Risk Control Committee two
23 years ago, the then Chairman Bill Graham and I
24 agreed that if we were going to do anything with
25 respect to tort reform, whether it be a products

1 bill, whether it be a medical malpractice bill
2 or whether it be one of the specific bills, we
3 would have to first have a very strong Dutch
4 uncle talk with those of the moving members of
5 the Chamber of Commerce and tell them that what
6 we have to do is not that which works
7 necessarily to businesses' interest, but that
8 which is fair. For a couple of reasons.

9 One, to do so would be to expect this
10 deliberative body, House of Representatives, to
11 do, one, what we shouldn't be doing; and equally
12 importantly, and from a practical standpoint
13 more importantly, would be asking you to do what
14 we know you wouldn't do.

15 We said, listen, boys and girls.
16 Let's sit down and take a look at the kinds of
17 complaints we have had and see what we can do in
18 order to redress what we genuinely think is
19 inappropriate; what we genuinely think is
20 unfair. At that time we decided that we would
21 put aside and we would not pursue the kinds of
22 things that really weren't inequitable.

23 You could see the bills that would
24 put caps on awards. First they were proposed in
25 statutory form and then they were proposed in

1 the form of the beginning of a process toward a
2 necessary constitutional amendment, which would
3 be necessary to do that in Pennsylvania.

4 You have seen a number of bills
5 introduced attempts to limit or eliminate the
6 contingency fee system, which essentially has
7 been called and is to a large extent the poor
8 man's keys to the courthouse.

9 We said, listen, let's not try to do
10 those things that we know in our own hearts we
11 should not be trying. Let's do those things
12 which we think are fair and those things that we
13 can go and look into the faces of legislators
14 and try to convince them they should agree with
15 us and do it.

16 The five specific bill package that
17 we came up with is one that I think is
18 imminently defensible in its objectives and in
19 its fairness. I'm speaking with respect to each
20 of the bills.

21 First of all, the reduction of
22 present worth. The only thing that that bill
23 does is reflect, in a very conservative way, the
24 current value of money that is anticipated to be
25 paid out as an annuity throughout the future,

1 determined by the amount to be paid out and the
2 term over which it is to be paid out.

3 Let me anticipate a question that may
4 come from the Committee because I've heard it
5 before. In House Bill 1436 there is no specific
6 authorization that a jury can consider inflation
7 or that a jury can consider future increases in
8 productivity as determined by an appropriate
9 expert witness.

10 We believe that if the House believes
11 it is necessary to specify that, we think it is
12 probably true without specifying it, but if you
13 think it is necessary to specify that and from
14 the standpoint of the Civil Justice Coalition we
15 do not object to it. The reason for it is
16 because all of these factors; inflation,
17 increased productivity and the current value of
18 money, are all realistic, fair, facts of life
19 that we are going to have to live with.

20 House Bill 1437, the frivolous claims
21 bills. I haven't heard anybody rise to object
22 to this bill. It requires that any Plaintiff or
23 any Defendant, before he or she files papers,
24 first read the papers; certify they are well
25 grounded in fact; certify that the claims are

1 reasonably grounded in law and are not filed for
2 the purposes of obstructors delay. I think even
3 Len Sloane, the President of Pennsylvania Trial
4 Lawyers Association, I think I quote him
5 correctly, said they really didn't have a great
6 deal of trouble with that particular Bill.

7 1438 - punitive damages. We have
8 punitive damages in Pennsylvania today and we
9 have limits. If anyone up there can tell me
10 what the limits are, it will be the first time
11 that I know. The phraseology used in appellate
12 decisions to justify or to limit punitive
13 damages are vague beyond my comprehension.
14 Willfulness, wantonness, outrageous conduct,
15 gross negligence, as applied practically, really
16 mean nothing more than the sense of negligence
17 plus.

18 We think that it would be fair, when
19 we are talking about punitive damages, and keep
20 in mind that this the only element of the civil
21 law where we can visit punishment, punishment upon
22 someone. We do it in the civil law with
23 preponderance of evidence, 51 percent -- really
24 50.1 percent. It's not beyond a reasonable
25 doubt as is traditionally in all other cases

1 required for punishment in our society.

2 What we have said is if we won't do
3 away with punitive damages and for the deterrent
4 effect, let's not rule them out altogether.
5 Let's define what is necessary in order to visit
6 them upon a party.

7 We have defined it as being action
8 that is a manifestation of an evil motive, or
9 action which, pursuant to the evidence, is
10 proved to have caused damages which the actor
11 had a reason to know would occur, or which a
12 reasonable person would have a reason to know a
13 high degree of likelihood would be caused.

14 We believe these are fair standards.
15 They are far-reaching standards, but we believe
16 they are fair standards before through the civil
17 law we exact punishment upon a party. We also
18 suggest that there is an appropriate nexus
19 between punishment, between punishment and
20 whatever compensatory damages are or may be in a
21 civil case.

22 The suggested standards we think is a
23 very liberal one, 200 percent of the compen-
24 satory damages, so that, if in a civil suit
25 \$100,000 in compensatory damages are awarded,

1 the trier of fact can recommend to the Court
2 that up to another \$200,000 in penalty be
3 visited upon the Defendant.

11

4 What we are suggesting to you is that
5 there be another standard, rather a standard
6 set. If you have another standard that you
7 think would be fair, we will be happy to talk to
8 you about it, but there should be some nexus,
9 rather than having no guidelines at all as the
10 Pennsylvania Supreme Court in the last year has
11 said, a civil suit in which there's absolutely
12 no compensatory damages can have punitive damage
13 that is unlimited. That's what the Supreme
14 Court said. We think that if that is the case,
15 that is really why we have a body of criminal
16 law. It should not be something that we have
17 visited upon our civil law system.

18 Joint and several liability. Today
19 the law of Pennsylvania is that one who is one
20 percent liable could have to stand 100 percent
21 culpable financially. We think that doesn't
22 make any sense. We think it's unfair. We
23 suggest adjusting the system to this extent, and
24 we think it's a very, very modest extent. If
25 the Defendant is ten percent or less liable,

1 then all he should have to pay is his
2 proportionate share of noneconomic damages
3 pursuant to his culpability for the injury.
4 That is his noneconomic share. For all of the
5 economic damages he is still fully jointly and
6 severally liable.

7 Also, he should only have to stand
8 responsible for pro rata share if he's less
9 responsible than the Plaintiff who brings the
10 action. If the Plaintiff is 20 percent culpable
11 and a Defendant is five percent culpable, it
12 doesn't seem a lot of sense that one who only
13 has one-fourth of the culpability of the party
14 bringing the action should have to pay 100
15 percent of the damages that are payable.

16 Finally, collateral sources. This is
17 a bill which, quite frankly, has been visited
18 with so many exceptions that it promises
19 relatively little savings, but there are savings
20 there. Under current Pennsylvania law, if a
21 Claimant is paid for a loss of a limb or lost
22 work or any payment from any third-party
23 collateral source, the Plaintiff can go into
24 court and can present his case as though he had
25 received nothing. Any facts having to do from

1 payment from third parties cannot be mentioned
2 at all in the proceeding. It would give rise to
3 a mistrial.

4 Under any other circumstance the
5 presentation of a case like that would
6 constitute perjury, but, because of our
7 collateral source rule, it's part of the way we
8 do things. We suggest that if collateral
9 sources have been paid, the jury be told about
10 it. Not that they be deducted automatically,
11 but you simply tell that body of people to whom
12 we look for the resolution of all our civil law
13 cases in this area; tell the jury about it.

14 Then we have listed exceptions,
15 excepted from the rule that we propose would be
16 life insurance paid for by the party who is
17 making the claim, all life insurance, all
18 pension benefits, all payments if there's
19 federal subrogation, all health insurance or
20 disability insurance that may have been paid by
21 the Claimant himself or someone within his
22 family so that the provident Plaintiff who has
23 taken care of his family will not be punished as
24 a result of his problems.

25 We also think that if there's any

1 subrogation that exists, the jury may also be
2 told about that. The end effect being that what
3 we have is to have presented a fair and complete
4 story to that body of people to whom we look as
5 a repository of appropriate results in our civil
6 law system, the jury. Simply let them know.
7 Don't keep it out falsely and misleading.

8 Those are the five bills. We think
9 they are fair. If you have any suggestions for
10 making them more fair, we are more than ready to
11 listen to you. Thank you.

12 CHAIRMAN COHEN: Last witness I
13 believe.

14 MR. HICKOK: Good evening my name is
15 Peter Hickok. I'm President of Hickok
16 Manufacturing of Harrisburg, Pennsylvania. I am
17 also a member of the National Federation of
18 Independent Business/Pennsylvania and am here
19 today on their behalf.

20 With me today on my far left is
21 Timothy Lyden, State Director of NFIB Penn-
22 sylvania. NFIB Pennsylvania is the Common-
23 wealth's largest small business organization,
24 representing well over 21,000 small business
25 owners. Our members comprise all sectors of the

1 economy. Their common tie is that they are all
2 small independent businesses.

3 We sincerely appreciate this
4 opportunity to express our support for the
5 package of liability reform bills before the
6 Committee, House Bill 916, House Bill 1434
7 through House Bill 1440. The liability issue
8 for some time has been one of the most serious
9 issues facing small business. Reform of Penn-
10 sylvania's current liability system continues to
11 be a top priority of NFIB Pennsylvania.

12 The costs of the liability crisis are
13 very high. I could cover some statistics to
14 show its impact. More effectively I feel a
15 description of the impact that the runaway
16 liability system has had on our small
17 manufacturing business will give an even better
18 picture.

19 Our business is a family-owned
20 business founded by my great-great grandfather
21 145 years ago. We are a small machinery
22 manufacturing company and our primary product is
23 a machine that puts lines on paper. Our
24 customers use our machines to produce loose-leaf
25 paper, spiral notebooks, legal pads, et cetera.

1 Chances are, some of the legal pads you are
2 using were lined by one of our machines.

3 In our 145 years of existence, our
4 company has endured, among other things, foreign
5 competition, the depression and hurricane Agnes.
6 I feel that we are still in operation today
7 because we manufacture good products.

8 The constant threat of lawsuits does
9 not affect our business. It affects our
10 customers with regard to the type of product we
11 can provide them, not to mention the costs of
12 the product we provide them. I am here today
13 because I know, as do so many other businesses,
14 public and nonprofit agencies and consumers that
15 the current liability system simply cannot be
16 tolerated any further.

17 I want to say at the outset that
18 neither I nor NFIB is interested in taking away
19 an injured party's right to sue. If a business
20 makes a product that is defective and that
21 product injures someone, the business should be
22 held liable. What we are interested in is
23 bringing a level of common sense and fairness
24 back to our liability system.

25 My experience with the liability

1 system has been a long one. It started several
2 years ago with a lawsuit brought against us by a
3 person who was hurt by one of our paper lining
4 machines. Even though the machine's operating
5 parts are unavoidably dangerous and common sense
6 dictates that care must be taken when operating
7 the machine, the person was hurt.

8 At this point in time, our machines
9 did not have a safety guard, nor did the
10 machines of any other company in the industry.
11 However, after this accident, even before the
12 person's lawsuit was completed, we immediately
13 recognized the need and we accepted the blame,
14 even though it was not entirely ours.

15 This is an example of how the liability
16 system should work. The end result of this
17 lawsuit was a safer product. But, despite the
18 fact that we have greatly improved the safety of
19 our machine with the inclusion of safety guards,
20 numerous lawsuits where injury has occurred
21 because these safety devices and procedures we
22 have provided are not being used. We feel a
23 liability system in which we are still liable
24 for injuries over which we have no control is
25 just not fair.

1 We manufacture a safe and productive
2 machine. Yet, we constantly have to operate
3 with the threat of a large judgment against us
4 even if we have little or no responsibility for
5 an accident. In other words, an unfair and
6 unjust liability system could potentially do
7 what foreign competition, natural disasters and
8 depressions have been unable to do--put Hickok
9 Manufacturing out of business.

10 This threat is not the only negative
11 effect. The current liability system imposes
12 unnecessary costs on our company in many other
13 ways. Beyond the cost of our liability,
14 insurance premiums is the cost of our company's
15 resources, which must be diverted to defend
16 against the numerous lawsuits with which we must
17 contend. The deposition for the case in which I
18 am now involved provides a good example. It
19 involves one of our machines, for which we
20 supplied the appropriate safety apparatus, but
21 during the operation of which an accident
22 occurred.

23 There are many co-defendants in this
24 case, most of whom had nothing to do with the
25 accident, but all of whom had to have attorneys

1 present for my deposition. As a result, there
2 were an average of eight attorneys and a court
3 reporter at my deposition for two-work weeks and
4 a day. Multiply the average attorney's fee for
5 eight attorneys times 11 work days and the cost
6 clearly becomes overwhelming, and this is just
7 for my deposition. Other costs include the
8 engineering efforts to produce drawings for
9 evidence in lawsuits. Most important, I had to
10 be away from my business for over two weeks.

11 The point of this is that, these
12 lawsuits are not promoting a safer product. To
13 the contrary, we have to think about
14 manufacturing products that will withstand
15 scrutiny in court. So twisted has liability
16 thinking become that we actually have a
17 disincentive to improve the safety of our
18 product for fear that it will be claimed that we
19 know that our machines are unsafe.

20 We have, of course, disregarded this
21 disincentive and are manufacturing the safest
22 product we can. Unfortunately, injuries may
23 occur despite our best efforts to prevent them.
24 The lawsuits that result from this are doing
25 little more than diverting needed resources to

1 very unproductive uses.

2 If a person removes the safety shield
3 from a circular saw or uses the saw in a way
4 other than the way in which it was intended to
5 be used, should the manufacturer be held liable
6 if the manufacturer took all of the practical
7 measures to prevent such misuse?

8 If a person is still using a product
9 which was manufactured 30 years ago, is it
10 realistic to hold the manufacturer of that
11 product liable even though technological
12 advances have made later generations of that
13 product much safer? I know of no products that
14 will last forever and continue to function as if
15 they were brand-new. Is it reasonable to reduce
16 awards to their present worth so that a
17 Plaintiff does not receive an unfair windfall?

18 Is it fair to continue to allow those
19 who initiate lawsuits that have no merit to go
20 unpenalized for their actions?

21 Is it fair for a Defendant that
22 shared only a small portion of the blame of an
23 accident to nevertheless be responsible for the
24 full judgment?

25 I could go on, but I will stop here

1 to say that the provisions of the liability
2 reform package address these very questions
3 about our liable system. With the exception of
4 the reasonable limit of the statute of repose,
5 at no time do these proposals take away the
6 right to sue. We never want that right taken
7 away from someone who is truly hurt by a
8 defective product, but we do want to remove the
9 abuse of that right.

10 NFIB Pennsylvania strongly believes
11 the time is now to bring fairness and common
12 sense back to our liability system. We can no
13 longer tolerate the system's ill effects.

14 Again, thank you for this opportunity
15 to express the views of small business.

16 CHAIRMAN COHEN: Thank you very much,
17 Mr. Hickok. That concludes testimony this
18 afternoon. Any questions?

19 (No audible response)

20 CHAIRMAN COHEN: I'd like to note
21 very briefly, share with us approximately how
22 many times suits have been brought against your
23 company?

24 MR. HICKOK: I don't recall.

25 CHAIRMAN COHEN: Over what period of

1 time are we talking about?

2 MR. HICKOK: I don't recall
3 specifically, but I can give you a general idea.
4 I believe starting about 1973, probably '73 or
5 '74 was the first suit at a time when I just
6 started with the company. I believe we have had
7 about 10 to 15 lawsuits over that time frame.

8 CHAIRMAN COHEN: I guess your first
9 accident was around 1973 or before 1973?

10 MR. HICKOK: I think it was in 1969,
11 I believe; again, working from memory.

12 CHAIRMAN COHEN: How many of these
13 suits have been settled or decided?

14 MR. HICKOK: There are, at this
15 point, three pending suits.

16 CHAIRMAN COHEN: The others are over?

17 MR. HICKOK: Yes.

18 CHAIRMAN COHEN: For the first one
19 where you did not have a safety guard which you
20 put it in subsequently, you accepted responsi-
21 bility. Did you accept responsibility in the
22 other ones?

23 MR. HICKOK: In what sense? In some
24 cases --

25 CHAIRMAN COHEN: Did you either

1 settle or lose them?

2 MR. HICKOK: Only that one case did
3 we have a verdict against us. The remainder of
4 the cases were either settled or thrown out. We
5 have also had cases thrown out.

6 CHAIRMAN COHEN: You believe some
7 other cases thrown out were frivolous cases?

8 MR. HICKOK: Apparently so.

9 CHAIRMAN COHEN: That's all of the
10 questions I have. Thank you very much for
11 coming.

12 I want to thank gentlemen from the
13 bar institute for pointing out the bar institute
14 has had an annual sessions on this. How far
15 back are the annual sessions?

16 MR. HOFFMAN: Statewide products
17 liability '85, '88, probably '82. We generally
18 do them every two or three years.

19 CHAIRMAN COHEN: Okay. I will try to
20 get copies of those.

21 MR. HOFFMAN: I will send them to
22 you.

23 CHAIRMAN COHEN: Thank you very much.
24 That concludes our hearing of this afternoon.
25 On behalf of Representative Caltagirone and I,

1 we thank everybody that is present.

2 (At or about 6:15 p.m. the hearing
3 concluded)

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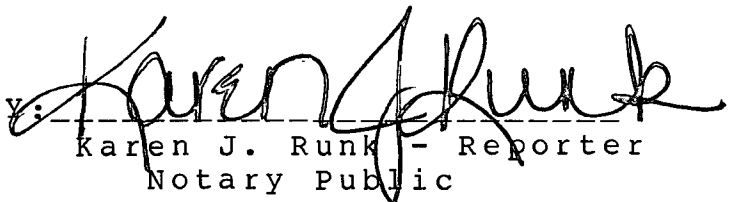
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C E R T I F I C A T E

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