TESTIMONY BY

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Introduction

Thank you for inviting me to testify today. I appear on behalf of the Pennsylvania Task Force on Product Liability, which supports passage of House Bill 916 aimed at reforming certain aspects of Pennsylvania products liability law. I am a professor of law at Cornell Law School where I teach and work in the fields of products liability and torts. Over the past twenty years I have published numerous books and law review articles on these subjects and am currently working on a five volume treatise on products liability. Over the last ten years or so I have testified from time to time before committees of state legislatures and the Congress on the subject of products liability reform.

Given my long and continuing interest in products liability, you can appreciate how pleased and excited I am to be able to speak with you today. I use the word "excited" advisedly, for never have I spoken before a legislative committee regarding a reform proposal toward which I had any stronger sense of appropriateness. As I shall explain, court-made products liability law in Pennsylvania presents unique problems that exceed in magnitude those presented by the law of any other American jurisdiction. Given these difficulties, one might have expected the advancement of a far stronger, more sweeping legislative proposal for change. Instead, House Bill 916 is a

remarkably restrained and balanced proposal, aimed precisely at those areas that present problems and content to leave the rest of products liability law well enough alone. No product of human endeavor is perfect; but taken as a whole I find this a remarkably appropriate piece of proposed legislation.

I am attaching to my written testimony a memorandum of law prepared by an academic colleague, Aaron Twerski, who has co-authored with me a widely-used products liability case book. It is my understanding that this memorandum was submitted to the House Judiciary Committee last year, and I agree with Professor Twerski wholeheartedly.

Why Products Liability Reform Is Needed in Pennsylvania

Modern American products law traces it origins to the early 1960's, during which time courts in a growing number of jurisdictions began imposing strict liability on product manufacturers and other commercial suppliers for harm caused by product defects. Most of the early cases involved manufacturing defects--physical imperfections in a small percentage of product units that cause the units to fail dangerously during intended use--although liability for defective product designs and unreasonable failures to warn of hidden dangers

was also clearly in the offing. In 1965, in Section 402A of the Restatement of Torts, Second, the American Law Institute recognized strict liability in tort for harm caused by products distributed in a defective condition unreasonably dangerous to the user or consumer. Just one year later the Pennsylvania Supreme Court recognized strict liability in Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966). As the courts began to apply strict liability in the decade that followed Webb, observers had no reason to believe that Pennsylvania would stray from the mainstream of American products liability developments.

The first strong hint that Pennsylvania courts might depart significantly from the mainstream of products liability came in 1975 in a plurality decision in Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975). Prior to that decision, in cases involving allegedly defective product designs plaintiffs typically showed that a safer alternative design could have been adopted by the defendant and that failure to do so made the design unreasonably dangerous and therefore defective. In an opinion joined by one other Justice, Chief Justice Jones in Berkebile hinted that a harsher, less balanced approach might be adopted in such cases, one that did not depend on the concept of "unreasonable danger."

The case that pulled Pennsylvania clearly out of the traditional paths of American products liability law is Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978), in which the plaintiff attacked the design of a coating machine. The jury returned a defendant's verdict after being instructed in the traditional manner that the plaintiff must show that the design was "unreasonably dangerous." On appeal, the Supreme Court disapproved the jury instruction given at trial, rejecting the relevance of the concept of "reasonable safety" to the issue of design defectiveness. Thereafter, according to Azzarello, juries in design cases in Pennsylvania were to be given the following instruction:

> The [supplier] of a product is the guarantor of its safety. The product must, therefore, be provided with every element necessary to make it safe for [its intended] use. If you find that the product, at the time it left the defendant's control, lacked any element necessary to make it safe for [its intended use] or contained any condition that made it unsafe for [its intended use] then the product was defective, and the defendant is liable for all harm caused by such defect.

It is difficult to imagine a jury instruction more likely than this one to mislead and confuse a jury trying to decide a difficult product liability case. Lest anyone believe that this instruction is even the least bit acceptable, he need only read the firestorm of criticism aimed at Azzarello by observers both within and without Pennsylvania. See,

e.g., Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence, 33 Vand. L. Rev. 593, 636-639 (1980); Henderson, Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of an Emerging Consensus, 63 Minn. L. Rev. 773 (1979); Henderson, Products Liability: Controversial New Decision on Design Defects, 2 Corp. L. Rev. 246 (1979); Comment, Returning the "Balance" to Design Defect Litigation in Pennsylvania: A Critique of Azzarello v. Black Bros. Co., Inc., 89 Dick. L. Rev. 149 (1984); Note, Restatement (Second) of Torts--Section 402A--Uncertain Standards of Responsibility in Design Defect Cases--After Azzarello, Will Manufacturers Be Absolutely Liable in Pennsylvania?, 24 Vill. L. Rev. 1035, 1050 (1979). And lest anyone think even for a moment that I came to my own conclusion only recently, consider this quote from a piece I wrote and published more than ten years ago, a few months following publication of the Azzarello decision:

> Taken literally, the test [in Azzarello] is absurd and unworkable. No sensible person would insist that a product designer must include every precaution, however costly. At bottom, the design alternatives to which plaintiffs point in these cases must be shown somehow to have been feasible, or sensible, regardless or whether one speaks in terms of "unreasonable danger." For the Pennsylvania Supreme

Court to suggest otherwise is nonsensical. 2 Corp. L. Rev. 246 (1979).

Even if the only mischief worked by Azzarello were its rendering incoherent the definition of product design defect, legislation putting things right would be needed. When the rule governing liability becomes so uncertain that no one can predict outcomes in design cases, the law ceases to provide meaningful incentives to develop safer products. But this is not the only mischief caused by the Azzarello decision. By seeking to eliminate all traces of a reasonableness standard from products liability law, Azzarello has undermined the entire foundation supporting judicial efforts to engage in meaningful review of product liability. For example, Pennsylvania is one of a small handful of jurisdictions that do not limit a defendant's responsibility for design to the technology reasonably and feasibly available when the design in question was adopted. Indeed, evidence that the manufacturer met the highest standards available is not even admissible at trial. See Santiago v. Johnson Machine and Press Corp., 834 F.2d 84 (3d Cir. 1987), relying on Lewis v. Coffing Hoist Div., 515 Pa. 334, 528 A.2d 590 (1987) and Carrecter v. Colson Equipment Co., 346 Pa. Super. 95, 499 A.2d 326 (1985).

The same kinds of confusion and distortion have befallen the rules governing liability for product suppliers' failure to warn and instruct regarding product-related risks of injury. A majority of American courts approach failure-to-warn claims by asking whether a reasonable person in the defendant's position would have supplied additional or different instructions or warnings. Such an approach is entirely consistent with the theory of strict liability set forth in Section 402A. In Pennsylvania, however, failure-to-warn cases have been muddled by the same confusing rhetoric that has undermined design litigation. Pennsylvania juries are, under the precedents earlier discussed, instructed that they must find the product defective for lack of warning if it lacked any element necessary to make it safe. See Dambacher v. Mallis, 336 Pa. Super. 22, 61-63, 485 A.2d 408, 428-30 (1984), appeal dismissed, 508 Pa. 643, 500 A.2d 428 (1985). Moreover, juries are instructed that the duty to warn is "nondelegable;" a supplier who adequately warns its immediate purchaser and takes all available steps to see that the warning reaches other users will nevertheless be liable if for reasons beyond its control the warning does not reach the person who ultimately suffers injury. See Berkebile, supra.

Some Pennsylvania courts have even suggested that a product supplier owes a duty to warn of dangers about which he neither knew nor could have known. See Carrecter v. Colson Equipment Co., 346 Pa. Super. 95, 103-04, 499 A.2d 326, 331 (1985). As many commentators have pointed out, such an approach makes no sense whatever. It is patently unfair to suppliers and creates no incentives whatever for suppliers to act more safely. Given rulings of this sort it is hardly surprising that Judge Wieand of the Pennsylvania Superior Court has characterized Pennsylvania law governing liability for failure to warn as "unworkable" and "explosive." See Dambacher, supra, 336 Pa. Super. at 76-77, 485 A.2d at 436-37 (Wieand, J., concurring and dissenting). A well-drafted products liability reform statute should include provisions that bring Pennsylvania's treatment of failure-to-warn claims back into alignment with the positions adopted in a majority of American jurisdictions.

Clearly, Pennsylvania's deviations from the American mainstream of products liability law must be corrected. The incoherent notion that a manufacturer can be held liable for failing to adopt an alternative design that was not available to it, or that achieving a risk-free society at any cost is a worthwhile goal, should no longer be recognized in this Commonwealth. Moreover, the corrections must be accomplished

by statute. The Pennsylvania high court signalled loud and clear in Lewis, supra, that it has no present intention of re-thinking Azzarello or bringing Pennsylvania law back into the mainstream of American products liability law. And even if the Supreme Court should decide to change direction, the nature of the judicial process would make the reform of the law by the courts time-consuming and haphazard.

How House Bill 916 Will Solve the Problems Just Identified

I shall not undertake a section-by-section critique of House Bill 916. I am familiar with its contents and support its provisions. Following my oral presentation, I would be happy to answer questions concerning any part of the proposal. I would like to highlight certain portions of the bill, however, with a view to showing how they aim at solving the problems I have identified above. Section 8373 sets forth as a general rule that product suppliers are not insurers or guarantors of the safety of their products. In order to recover in a products liability action the plaintiff must prove that the product was supplied in a defective condition unreasonably dangerous for its intended use. Section 8373 describes four sources of defectiveness: (1) manufacturing defects; (2) defective product designs; (3) failure to instruct or warn; and (4) failure of the product to conform to express

factual representations by the supplier. By limiting products liability claimants to the four generally accepted bases of liability, the bill ensures that there will be no liability unless something was wrong either with the product itself or with the way it was marketed.

Section 8374 defines the basis for liability for defective product design. Essentially, it requires the plaintiff to prove, consistent with the law in a clear majority of other states, that an alternative, safer design was practically and feasibly available to the defendant and would have prevented the harm for which recovery is sought.

The bill also addresses the problems associated with failure-to-warn claims under existing Pennsylvania law. Section 8375 provides that product suppliers will not be liable for failure to warn or instruct if they provide information that a reasonably prudent person in the same circumstances would have provided. A warning or instruction is deemed provided when it is communicated in a manner reasonably calculated to convey the information either to users or consumers or, when that is not feasible, to intermediaries who can reasonably be expected to act effectively to reduce the risk.

These provisions in the bill address two major existing problems in design and warning cases and therefore make important and needed changes in Pennsylvania law. But the other provisions

contained in House Bill 916 are also necessary and important. Azzarello has so undermined the products liability law in this Commonwealth that other closely related areas have already become distorted or must be shored up against the possibility that they, too, will succumb to court-imposed chaos. One of the latter areas involves attacks on products whose risks of injury are inherent to the product categories themselves and which cannot be eliminated without eliminating the usefulness and desirability of the products. Beer is an example of such a product. Because beer contains alcohol, it presents risks of injury to consumers and others. But the less risky alternative--beer without alcohol--is not considered to be "beer" by most people. The drafters of §402A of the Restatement of Torts, Second, explicitly provided for nonliability in connection with such products. Comments i and k to §402A provide that inherently or unavoidably unsafe products such as alcoholic beverages and certain prescription drugs are not defective if the risks associated with their use are unavoidable and generally recognized by consumers or warned against. These are time-honored, sensible positions and should be codified in a products liability bill. They are currently the law in Pennsylvania. But their codification will ensure that

Pennsylvania courts do not introduce further confusion in connection with these issues.

Other provisions of House Bill 916 work in similar fashion to ensure that the seeds of confusion spread by the ill-conceived decision in Azzarello do not take root and overrun other areas of products liability. For example, as already suggested by Pennsylvania court opinions, a court inclined to refer to product suppliers as "guarantors" of complete safety might well impose liability for failure to warn of scientifically unknowable risks. Thus, the bill ensures explicitly that Pennsylvania courts will not in the future follow the ill-conceived and generally condemned minority position that imposes liability on suppliers for failing to provide information that was both unknown and unknowable under the technical, medical and scientific knowledge available when the supplier supplied the product. In similar fashion, talk of suppliers as "guarantors" has led courts to develop a test which would make suppliers liable for post-sale alterations, modifications and misuses over which the supplier had no control. House Bill 916 also aims at preventing such aberrations.

Along the same lines, but in the area of evidentiary rules, the bill changes existing Pennsylvania law regarding the admissibility of evidence of improvements in design or marketing adopted by a

defendant supplier after having supplied the product that injured the plaintiff. Such evidence is unfairly prejudicial to defendants when admitted to prove defectiveness; consistent with Rule 407 of the Federal Rules of Evidence, Section 8380 excludes it when offered for that purpose.

Briefly to summarize the main thrusts of the reforms that House Bill 916 would achieve, the proposal clearly and almost exclusively addresses the areas of liability for defective product designs and failures to warn or instruct. This focus makes sense because these are the areas most in need of change. Moreover, the bill does not attempt sweeping, radical reform. In every instance I have considered above, the bill either moves Pennsylvania law back into the solid mainstream of American products liability law or works to assure that Pennsylvania courts, distracted by the "supplier as guarantor" language from Azzarello, are not tempted to change existing law for the worse. The bill is sensible, limited, balanced, and deserves passage.

Over-All Characteristics That Make the Bill Attractive

The characteristic of House Bill 916 that impresses me the most is its restraint. Many other proposals for products liability, epitomized

by the Model Uniform Product Liability Act (MUPLA), are far more sweeping in their scope. In contrast, this bill reaches into Pennsylvania products liability law in minimalist fashion, changing and codifying only those portions that require change and codification. As anyone can tell by merely leafing through the bill, it is, in truth, a restrained and balanced proposal.

Another characteristic of the bill that I find very attractive is its reliance on traditional concepts and principles. Drafters of tort reform proposals are often tempted to introduce new concepts, perhaps in an effort to display their verbal dexterity. House Bill 916, in contrast, relies on plain words spoken plainly. No one claims it is perfectly drafted. But it deserves high marks for straightforwardness and clarity.

The final general characteristic to which I will direct attention is the bill's timing. If this were ten years ago, and Pennsylvania were one of the first states to address the question of products liability reform, the task would be truly daunting. Ten years ago, I would have spent most of my energies trying to justify the very idea of treating by statute a traditionally court-made body of common law. But this is not ten years ago. Pennsylvania is not being asked to be a pioneer. A clear majority of states have enacted some form of

products liability legislation, including your sister states of Ohio and New Jersey. As I observed at the outset, Pennsylvania court-made law in this area is uniquely wrong-headed to a sufficient degree to have justified legislative action long before this. The sooner Pennsylvania law breaks free from the uniquely unfair and inefficient approach spawned by Azzarello, the better. The time is right for these changes to be made.

What the Bill Does Not Do

In assessing House Bill 916 it is useful to consider some things that the bill does not do--approaches that might have been, but were not, taken.

The bill does not render Pennsylvania products liability uniquely pro-defendant. It is important to understand that passage of this bill will not place Pennsylvania in the forefront of jurisdictions that have reacted strongly and arguably overzealously in undoing by statute what courts have done by common law decision. Instead, as I have explained earlier in my testimony, House Bill 916 will bring Pennsylvania back into the solid, sensible majority camp from which its courts have unfortunately strayed. The bill demonstrably moves Pennsylvania law toward the center, not away from it.

The bill does not impose arbitrary caps on liability. Were the sponsors of this reform proposal interested in holding product suppliers' liability within limits regardless of the means of accomplishing that objective, an attractive vehicle would be dollar limits, or "caps," on what injured plaintiffs may recover. Consistent with its objective to bring good sense back to the products liability law of Pennsylvania, the bill eschews any such arbitrary capping of liability. Instead, the bill brings this Commonwealth into the traditional mainstream, of which liability caps have never been a part.

The bill does not eliminate incentives for suppliers to invest in product safety. When House Bill 916 becomes law, Pennsylvania products liability plaintiffs will be required to do exactly what such plaintiffs in a majority of other jurisdiction are required to do: prove that something was wrong either with the product itself or with the manner in which the product was marketed. In connection with allegedly defective designs, plaintiffs are required to show that a feasible alternative was available to and would have been adopted by, a reasonable person in the defendant's position, which alternative would have prevented the plaintiff's injury. This approach creates the proper incentives for suppliers to adopt safer designs when they are feasible, which is precisely when they should be adopted. The same

is true with respect to the providing of warnings about product dangers.

Conclusion

More than any other jurisdiction, Pennsylvania needs sensible legislation reforming products liability law. Bad law needs to be changed for the better; and good law needs to be shored up, here and there, against the otherwise strong possibility of court-made changes for the worse. House Bill 916 is a restrained, balanced and well-drafted proposal that would accomplish what needs to be accomplished. It deserves enactment.

Testimony of Professor Aaron Twerski on Product Liability Reform in Pennsylvania

I have been asked by the Pennsylvania Civil Justice Coalition to comment on the need for legislative tort reform in Pennsylvania with special focus on product liability law. I have followed the legislative reform movement both in Congress and in the several states and have written extensively on the subject of statutory product liability reform. As a member of the Pennsylvania bar I have watched the development of product liability law in Pennsylvania with considerable interest and am delighted to have the opportunity to share my thoughts with you on this matter of such great public interest. Although there are several bills presently pending before the state legislature, it is not my intent at this juncture to comment upon specific provisions in the various proposals. Rather, I will limit my remarks to the need for legislative reform and to the outline of legislation which I believe to be indispensable if rational and meaningful action by the legislature is to take place.

My position over the years has been that product liability law is in need of legislative correction. In no state is such correction more needed than in the Commonwealth of Pennsylvania. The Pennsylvania Supreme Court has created a body of product liability law that is idiosyncratic, irrational and at bottom incomprehensible. It is so far out of line with the broad consensus of national product liability doctrine that most courts and commentators simply view it as aberrational. Manufacturers, with considerable justification, believe that they cannot fairly defend product liability actions in Pennsylvania. Failure to act by the legislature will have the inevitable effect of placing Pennsylvania manufacturers at a decided competitive disadvantage. The neighboring states of New Jersey and Ohio have recently enacted important legislative reform to bring their law into line with the broad national consensus. Pennsylvania can ill afford to be the "lone-star" state championing positions which are viewed as unjust by almost all legal commentators.

There is a myth that legislative reform of product liability rules is anti-consumer in nature. However, responsible legislative reform seeks to preserve the core of strict liability for defectively manufactured products. There is good reason to preserve those aspects of product liability law that have fostered the goals of product safety. But, rules of law that are incomprehensible and that cannot be complied with by the most responsible of manufacturers do not enhance product safety. They breed disregard for the law. If the law demands of manufacturers that which cannot be accomplished then the law simply becomes irrelevant. See Twerski, A Moderate and Restrained Federal Product Liability Bill, Targeting the Crisis Areas for Resolution, 18 U. of Mich. J. of L. Reform 575 (1985). By insisting that the law set the kinds of standards to which

manufacturers can realistically conform, product safety is enhanced and the law becomes the guiding light for responsible behavior. The reforms that I suggest reject those aspects of Pennsylvania law that are widely perceived as unfair and irrational. Good legislation ultimately redounds to the benefit of consumers and business alike. Not only will products be safer but the business climate will be more robust and competitive. All constituencies in the Commonwealth will be the winners.

In short, legislative reform is necessary in Pennsylvania to bring Pennsylvania back into the mainstream of American product liability law. To accomplish this goal, legislation should target those areas in which the decisional law has been the most confusing and is seriously aberrational. A brief review of several landmark Pennsylvania cases will demonstrate why the need for reform is so urgent.

I. Pennsylvania Case Law - Azzarello and Its Progeny

In 1966 the Pennsylvania Supreme Court adopted the doctrine of strict products liability in Webb v. Zern , 422 Pa.424, 220 A.2d 853 (1966). For almost a decade the law in Pennsylvania was in tandem with the developing case law throughout the country. Beginning with Berkebile v. Brantly Helicopter Corp 462 Pa. 83, 337 A.2d 893 (1975) the Court gave evidence that it was prepared to adopt a harsh and uncompromising doctrine of products liability. Berkebile, however, was a plurality opinion and there was some doubt as to whether a majority of the Court was prepared to adopt the extreme position articulated in that decision.

The case that identified Pennsylvania as the state that espouses a doctrine akin to absolute liability was Azzarello v. Black Bros Co., Inc. 480 Pa. 547, 391 A.2d 1020 (1978). That case involved an allegation that a coating machine was defectively designed. The jury had found for the defendant-manufacturer after being instructed that the plaintiff had to establish that the design of the machine in question was "unreasonably dangerous." The Court disapproved this instruction which predicates liability on the premise that reasonable safety is the standard for appropriate design. In doing so it not only rejected the view of the overwhelming majority of courts throughout the country but it gave its approval to the following most unusual jury instruction:

> "The [supplier] of a product is the guarantor of its safety. The product must, therefore, be provided with every element necessary to make it safe for [its intended] use. If you find that the product, at the time it left the defendant's control, lacked any element necessary to make it safe for [its intended use] or contained any condition that made it unsafe for

[its intended use] then the product was defective, and the defendant is liable for all harm caused by such defect."

Legal commentators have been outspoken in their criticism of Azzarello. Professor James Henderson, Jr., one of the nations leading authorities on product liability law said of the Azzarello test:

"Taken literally, the test is absurd and unworkable. No sensible person would insist that a product designer must include every precaution, however costly. At bottom, the design alternatives to which plaintiffs point in these cases must be shown somehow to have been feasible, or sensible, regardless of whether one speaks in terms of "unreasonable danger." For the Pennsylvania Supreme Court to suggest otherwise is nonsensical." 2 Corp. L. Rev. 246 (1979).

Professor Sheila Birnbaum, another leading writer, after quoting the Azzarello instruction asks:

"Is there any product that cannot be made safer in some way? This instruction calls forth fantastic cartoon images of products, both simple and complex, laden with fail-safe mechanism atop fail-safe mechanism" 33 Vand. L. Rev. 593, 637 (1980).

Professor Birnbaum concludes:

"The only function left for the jury under Azzarello is to determine whether the product left the supplier's control lacking any element necessary for its intended use or possessing any feature that renders it unsafe for its intended use. Thus, the question of reasonableness may not be considered by jury even in a closely contested case. Id. at 639.

Other commentators both within and without the state have been equally critical. See, e.g. O'Donnell, Design Litigation and Strict Liability: The Problem of Jury Instructions Which Do Not Instruct, 56 U. of Det. J. Urb. L. 1051, 1072 (1979); Comment, Returning the "Balance" to Design Defect Litigation in Pennsylvania: A Critique of Azzarello v. Black Brothers Company, 89 Dick. L. Rev. 149 (1984); Note, Restatement (Second) of Torts -- Section 402A -- Uncertain Standards of Responsibility in Design Defect Cases -- After Azzarello, Will Manufacturers be Absolutely Liable in Pennsylvania, 24 Vill.L. Rev. 1035, 1050 (1979). Indeed, in our recently published book my co-author and I noted that a "special gift of prophecy is necessary to predict" how to interpret Azzarello. Twerski and Henderson,

Products Liability -- Problems and Process at 560 (Little Brown 1987).

The mischief created by Azzarello has not been limited to the definition of product defect. By seeking to rid product liability law of all vestiges of negligence Azzarello has brought about the rejection of well-established doctrines utilized in the overwhelming majority of states as sensible limitations on a manufacturer's liability. Thus, Pennsylvania is one of the few states that does not recognize that a manufacturer's liability should be limited to the state-of-art technology that was available at the time the product was manufactured. Indeed, evidence that the manufacturer met the highest standards extant is not even admissible in a products liability action. See Santiago v. Johnson Machine and Press Corp. 834 F.2d 84 (3rd Cir 1987), relying on Lewis v. Coffing Hoist Div. Duff-Norton Co., Inc. ___Pa.____, 528 A. 2d 590 (1987) and Carrecter v. Colson Equipment Co., 339 Pa. Super. 95, 499 A.2d 326 (1985).

Similarly, the Pennsylvania courts have refused to adopt the doctrine of comparative fault in product liability cases. See Capuno v. Echo Bicycle Co., 27 D.& C. 3d 524, 532 (Northhampton Cty. 1982); Jackson v. Spagnola, 349 Pa. Super. 471, 503 A.2d 944 (1986); Staymates v. ITT Holub Industries, ___ Pa. Super.___, 527 A.2d 140 (1987). This means that no matter how grave the fault of the plaintiff in contributing to his own injury, the manufacturer is liable for the entire loss. The court in Staymates correctly noted that the Pennsylvania position was contrary to the national consensus and suggested that any change in this doctrine should come from the legislature.

As noted earlier, the legislature is not being asked to create novel doctrine nor to turn the clock back before the onset of modern product liability law. There is a need to bring Pennsylvania law within the broad consensus that has emerged throughout the country. Enacting legislation dealing with the following topics would go a long way toward accomplishing this goal.

II. Legislative Reform

A. Product Design

(1) State-of-Art

It is imperative that Pennsylvania adopt a state-of-art limitation to its product liability law. Very simply, as the law presently stands, a manufacturer can be held liable in 1988 for failing to include a design in a product manufactured in 1948 even though the technology and know-how to install such a design

was not available in 1948. See Santiago v. Johnson Machine and Press Corp., 834 F.2d 84 (3rd Cir. 1987). This is not strict liability. It is absolute liability in its most vengeful form. The overwhelming majority of states have flatly rejected this approach either by judicial decision or by specific legislation. See, e.g., Boatland of Houston v. Bailey 609 S.W.2d 743 (Tex. 1980); Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 450 N.E.2d 204 (1983); Wash. Rev. Code Sec. 7.72.050(1) (Supp. 1985); Ky. Rev. Stat. Sec. 411 .310 (2) (Supp. 1984); Ariz. Rev. Stat. Ann. Sec. 12-683 (1) (1982); New Jersey, Senate Bill 2805, N.J. Stat. Ann. § 2A:58C-3.a(1) [enacted 1987]; Ohio Rev. Stat. Ann. Sec. 2307.75 (F) [enacted 1987]. There is simply no justification for permitting a doctrine which imposes liability retroactively for conduct which could not be altered using the finest technology available at the time of manufacture to hang as an albatross around the necks of Pennsylvania manufacturers. The scholars to whom this view has been attributed have formally stated that it is not now and never has been their position that such liability should be imposed upon manufacturers. Wade, On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing, 58 N.Y.U. L. Rev. 734 (1983). A carefully drawn state-of-art provision can return the law of Pennsylvania to sanity on this point.

(2) Inherent Characteristics of Products

It is necessary to clarify by legislation that product designs cannot be attacked in cases where the risk associated with the product are inherent to the product and generally recognized by the ordinary consumer. Products such as liquor and tobacco should not be subject to claims that they should have been designed or formulated in a different manner. The inherent characteristics of such products are an essential element of their design. If a consumer should recognize that the use of such a product involves risk, he is in a position to make a personal choice about using the product. Vexatious and improbable claims that an inherent characteristic is a "defect" do not advance any of the purposes for which strict liability was adopted. Legislation embodying this sound principle has been passed in numerous jurisdictions. See New Jersey, Senate Bill 2805, N.J. Stat. Ann. § 2A:58C-1.3(2) [enacted 1987]; Ohio Rev. Stat. Ann. Sec. 2307.75 (E) [enacted 1987]. Moreover, it is part of the common law of most states that have adopted the Restatement (Second) of Torts Sec. 402 A, comment i. There is good reason to believe that Pennsylvania adheres to this view. See Brown v. Caterpillar Tractor Co., 741 F.2d 656 (3rd Cir. 1984); Overpeck v. Chicago Pneumatic Tool Co., 823 F.2d 751, 754 (3rd Cir. 1987). But given the great confusion which Azzarello has engendered, there is need to clarify this issue and resolve it with finality.

(3) Unavoidably Unsafe Products

A product liability bill should include a provision which addresses the problem of unavoidably unsafe products. The unwise imposition of liability in these cases is not only a matter of concern to manufacturers. Properly understood, it is of legitimate concern to consumers as well because they will find that valuable products will effectively be denied to them. For example, several courts have recently suggested that drug manufacturers should be subjected to design defect liability even though there is an unavoidably unsafe aspect of the drug which cannot be eliminated from it. See, e.g., Kearle v. Lederle Laboratories, 172 Cal. App. 812, 218 Cal. Rptr. 453 (1985); Borchu v. Ortho Pharmaceutical Corp., 642 F.2d 652 (1st Cir. 1981); Ortho Pharmaceutical Corp. v. Heath, 722 P.2d 410 (Colo. 1986); Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374, 383 (1984).

It is important that the practical implications of imposing such liability be well understood. The issue is not whether a drug company or other product manufacturer has a responsibility to warn against foreseeable dangers or possible side-effects of its products. No one takes issue that such reasonable warnings must be given. What could happen if a provision exculpating manufacturers from design defect liability is not enacted into law is that the Pennsylvania courts could impose liability against drug companies and other manufacturers of important consumer products for marketing products that contained extensive warnings of risks and side effects on the theory that the products should not have been marketed at all. Utilizing risk-utility balancing the courts could on their own conclude that, overall, the product was not sufficiently beneficial to society to market.

Consider the effect of such a holding on the availability of such products as drugs. A skilled physician may decide, given the peculiarities that attend a given patient's condition, that a certain drug is indicated even though it has a significant risk potential and has possible side-effects. It may be that the drug should not be used for the majority of patients but no doctor should be barred from making his own therapeutic decision once he is fully advised of the risks. By imposing design defect liability on drug manufacturers, courts arrogate onto themselves the right to make the decision that a drug should not have been made available to physicians for treatment. They, in effect, become a surrogate FDA barring drugs from the market through the mechanism of product liability design defect claims. The net effect is that drug companies will be forced to remove drugs from the market even though they may be the only drugs available to treat certain patients because they fear that a court might ultimately decide that in totality the drugs were not sufficiently beneficial to society.

By adopting a provision which removes design defect liability for unavoidably unsafe products the legislature will provide assurance that drugs and other products which are of importance to the citizens of Pennsylvania will not be peremptorily removed from consumers who are fully warned of foreseeable risks. This is the position of the Restatement (Second) of Torts, § 402A, comment k and is widely reflected in case law throughout the country. Information, rather than paralyzing fear, should be the standard which governs the availability of drugs and other consumer products which bear unavoidable risk. There is some reason to believe that Pennsylvania case law recognizes this principle. See Incollingo v. Ewing, 444 Pa. 263, 288, 282 A.2d 206, 220 (1971); Leibowitz v. Ortho Pharmaceutical Corp., 224 Pa. Super. 418, 307 A.2d 449 (1973). Again, however, Azzarello casts such a shadow over the law of products liability in this Commonwealth that clarification is sorely needed. The spectre of liability in this area is so frightening that reasonable doubts as to the meaning of the law should be resolved.

B. Manufacturer Not Guarantor

In earlier discussion I noted the almost unanimous view of the legal commentators that the jury instruction mandated by Azzarello that the manufacturer is the "guarantor" of a product's safety is a gross misstatement of the law. No other court in the United States utilizes such an extreme standard of liability. There is no reason that Pennsylvania manufacturers should be saddled with liability that is both unfair and idiosyncratic. A simple provision stating that juries may not be instructed that a manufacturer is the guarantor of the product's safety will assure that this unfortunate terminology will no longer plague Pennsylvania manufacturers.

The abolition from jury instructions of the language which states that the manufacturer is the "guarantor" of the product's safety will not only bring Pennsylvania law into line with the law in the rest of the country, it will also eliminate enormous confusion in the trial of product liability cases. Pennsylvania courts have been plagued with the difficulty of explaining to jurors that though the manufacturer is the "guarantor" of a product's safety it is not the "insurer" against all injuries that result from the use of a product. Distinguishing between these two terms is no easy task. See Dambacher v. Mallis, 336 Pa. Super. 22, 485 A.2d 408 (1984). Enormous confusion has been engendered by the "guarantor" instruction and it spawns needless appellate litigation. All will be better served by a straightforward legislative repeal of this most troublesome doctrine.

C. Warnings

(1) The Reasonableness Standard

Perhaps the most frightening aspect of the Azzarello decision is the impact that it has had on failure-to-warn litigation. The statement in Azzarello that "a jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for its intended use" is often tantamount to automatic liability when the plaintiff alleges that the defect is the failure to warn. As long as a possible warning can be conjured up the case will most often go to the jury. The Pennsylvania courts have acknowledged that they will rarely interfere by directing verdicts since "the cost of adding a warning, or of making an inadequate warning adequate, will at least in most cases be outweighed by the risk of harm if there is no adequate warning." Dambacher v. Mallis, 336 Pa. Super. 22, 485 A.2d 408, 423 (1984). It is important to understand just how harsh the present doctrine is, without some sensible limitation, and why it must be legislatively modified.

First, it is clear that under Pennsylvania law a manufacturer can be held liable for failing to warn of risks that were scientifically unknowable when it marketed the product. Carrecter v. Colson Equipment Co., 346 Pa. Super. 95, 499 A. 2d 326, 331 (1985); Pegg v General Motors, 258 Pa. Super. 59 n.10, 391 A.2d 1074, 1083 n.10 (1978). That a manufacturer should be held liable in 1988 for a risk which was scientifically unknowable when the product was marketed in 1948 is simply unfair because manufacturers can only market products on the basis of foreseeable risks. The ability to predict the future belongs to the prophets. It has not been and cannot be the predicate for making responsible business and safety decisions.

Leading commentators have argued that manufacturers cannot, by hypothesis, insure against risks they do not know exist. As a consequence, when liability is later imposed, based on hindsight, all they can do is charge the losses against capital, or go out of business. See Danzon, Tort Reform and the Role of Government in Private Insurance Markets, 13 J. Legal Studies 517 (1984); A. Schwartz, Products Liability, Corporate Structure and Bankruptcy: Toxic Substances and the Remote Risk Relationship, 14 J. Legal Studies 689 (1985). Furthermore, there is something intuitively wrong about imposing liability on a manufacturer whose conduct met the highest standards of corporate responsibility when it was undertaken.

Not only have the commentators been sharply critical, but most courts have simply found the liability for "unknowable and unforseeable harm" principle untenable. See, e.g., Prentis v.

Yale Manufacturing Co., 421 Mich. 670, 365 N.W.2d 176 (1984); Cover v. Cohen, 61 N.Y.2d 261, 274-75; 461 N.E.2d 864, 871, 473 N.Y.S.2d 378, 385 (1984); Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1090 (5th Cir. 1973). Pennsylvania product liability law is simply out of line with the overwhelming majority view.

It is nonsense for the law to mandate that manufacturers be omniscient. A section requiring a manufacturer to meet a standard of reasonable prudence would place Pennsylvania law back into the national mainstream.

There is a second and even more significant rationale for imposing a standard of reasonableness on warnings. The premise of the court in Dambacher, supra that warnings are not costly is seriously in error. Warnings, in order to be effective, must be selective. They must call the consumer's attention to a danger that has a real probability of occurring and whose impact will be significant. One must warn with discrimination because the consumer is being asked to discriminate and to react accordingly. As we noted in our study for the National Science Foundation:

> "The warning process, in order to have impact will have to carefully select the items which are to become part of the consumer's mental apparatus while using the product. Making the consumer account mentally for trivia or guard against risks that are not likely to occur impose a very real societal cost." Twerski, Weinstein, Donaher and Piehler, The Use and Abuse of Warnings in Products Liability, 61 Cornell L. Rev. 495, 514-515 (1976).

Also see Dunn v. Lederle Laboratories, 121 Mich. App. 73, 328 N.W.2d 576, 580-81 (1983). The position of the Pennsylvania courts that products may be declared defective even if the conduct of the manufacturer was reasonable in choosing the appropriate warning simply because it did not contain every "element necessary to make it safe" is simply not supportable. Imposing upon a manufacturer a standard of reasonable prudence in selecting the appropriate warning would bring the law of Pennsylvania in line with that of most other jurisdictions. It has the ring of good common sense.

Finally, subjecting a manufacturer to a standard of reasonable prudence would provide the courts ample discretion to decide in which cases the manufacturer should be required to warn the consumer directly and in which cases it is appropriate to warn an intermediary. There is language in several important cases that the duty to warn is of a "non-delegable" nature. See Brown v. Caterpillar Tractor Co., 741 F.2d 656.659 (3rd Cir. 1984); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 103, 337 A.2d 893, 903 (1975). Once again the harsh language of

Azzarello has created an unrealistic standard. Manufacturers cannot reach consumers in all cases with their warnings. Intermediate buyers of component parts integrate these parts in the overall product. See Wenrick v. Schloemann-Siemag Aktiengesellschaft, 361 Pa. Super. 137, 522 A.2d 52 (1987). Drug manufacturers must perforce direct their communications about prescription drugs to doctors. Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206 (1971). In these cases courts recognize that a "reasonable prudence" test must govern. Courts should not be deprived of the discretion to make the selfsame reasonableness determination in all cases where real world considerations dictate that the manufacturer responsibly exercised its duty to warn.

(2) Meeting Government Standards

A statute which seeks to accomplish sensible reform should contain a provision with a presumption that a warning is adequate if it is in conformity with the mandates of state or federal law.

There is good reason to treat the warning issue as a matter that deserves special consideration. How to warn and what to warn about are extremely difficult decisions for a conscientious manufacturer. For example, assume that a drug manufacturer has fragmentary evidence of a particular side-effect that may be related to the use of a drug. The FDA may believe that the evidence is so thin and unreliable that it should not be warned against. What is the responsible drug manufacturer to do? Should it follow FDA guidelines or should it peer into the future and consider possible future product liability claims? Furthermore, what internal standards should it use to decide about whether to warn based on fragmentary evidence?

When a responsible government agency has weighed these questions and prescribed what it believes to be an adequate warning, then at the very least a presumption should arise that the governmentally approved warning is adequate. A plaintiff should be free to rebut such a presumption and to introduce evidence that the approved warning was inadequate. Thus, a statutory provision creating a presumption of adequacy would not totally preempt a cause of action even when government warning standards have been met. It does, however, demand that the expert role of government agencies be treated with appropriate respect by the judiciary.

It should be noted that a fair number of states have already enacted similar provisions. See, e.g., Colorado Rev. Stat. Sec. 13-21-403; Kansas Stat. Ann. Sec. 60-3304; North Dakota Cent. Code Sec. 28-01.1-05; Tennessee Code Sec. 28-28-104; Utah Code Ann. Sec. 78-15-6. The Model Uniform Product Liability Act, Sec. 108 (A) [44 Fed. Reg. 62730 (1979)]. Also see N.J. Senate Bill 2805, N.J. Stat. Ann. § 2A:58C-1.4 [enacted 1987]. The National

Childhood Vaccine Injury Act of 1986 which was signed into law by the President on Nov. 14, 1986 provides that when the plaintiff chooses to sue for tort damages rather than seek compensation under the alternative no-fault compensation plan there exists a presumption that the warnings were adequate if they met FDA requirements.

Finally, leading jurists have noted that case by case relitigation of governmentally approved standards makes no sense when the governmental agencies indicate fidelity to the selfsame legal standards which govern product liability litigation. Perhaps the most eloquent expression of this point of view was set forth by Justice Hans Linde, one of this country's most distinguished appellate judges and an outstanding scholar, in the case of Wilson v. Piper Aircraft Corp., 577 P.2d 1322, 1335 (Ore. 1978). In that case the defendant manufacturer had designed a plane in conformance with FAA standards. Justice Linde spoke to the role of statutory compliance in a concurring opinion. His words deserve careful attention.

> "It must be kept in mind that this aircraft is alleged to be defective not because it fell short of the safety standards set for its type, but on the ground that these standards provide insufficient safety for the whole series. But once the common-law premise of liability is expressed as a balance of social utility so closely the same as the judgment made in administering safety legislation, it becomes very problematic to assume that one or a sequence of law courts and juries are to repeat that underlying social judgment de novo as each sees fit. Rather, when the design of a product is subject not only to prescribed performance standards but to government supervised testing and specific approval or disapproval on safety grounds, no further balance whether the product design is "unreasonably dangerous" for its intended or foreseeable use under the conditions for which it is approved needs to be struck by a court or a jury unless one of two things can be shown: either that the standards of safety and utility assigned to the regulatory scheme are less inclusive or demanding than the premises of the law of products liability, or that the regulatory agency did not address the allegedly defective element of the design or in some way fell short of its assigned task." [Footnotes omitted, emphasis added.]

This eloquent statement uttered in the context of governmentally approved design standards is even more compelling in the case of warnings whose language has been specifically approved by governmental agencies. Manufacturers have a right to request

that conformance with exacting warning requirements be given substantial credence by the courts.

D. Modification of Joint Tortfeasor Liability

Before addressing the question as to whether it is wise to reform joint and several tort liability, some brief comment is in order. Those who argue in favor of the doctrine have argued that the doctrine of joint and several tort liability has a long and distinguished history. There are valid points to be made on both sides of the "joint and several" debate. Reasonable persons can differ. There is, however, very little historical support one way or the other for the application of the "joint and several" doctrine in a modern-day setting.

It is true that where two defendants each contributed to a single indivisible injury the common law adopted a rule of joint and several liability. It did so because it had no mechanism to apportion the damages between the two defendants. The rule of apportioning responsibility between the parties is a rather new phenomenon. The doctrine of comparative responsibility in which percentage responsibility is assigned to each defendant (and to the plaintiff) was simply not in place.

All this has changed in the last two decades. Over forty jurisdictions including Pennsylvania have adopted the doctrine of comparative responsibility. Such responsibility is routinely assessed by juries in all personal injury litigation. Now the question must be faced. If a plaintiff is injured through the separate fault of two unrelated defendants and the relative responsibility of each defendant is clearly established by the jury, should not each defendant pay its share as determined by the apportionment of the jury?

Why has this issue become such a burning question in the late 1980's? I believe that it is because in the last decade, litigation has begun to focus on institutional defendants who have become "defendants of last resort." Manufacturers are being asked to pay for the negligent (often reckless) conduct of parties who, for all practical purposes, are immune from tort liability.

Consider the following examples:

(1) A reckless driver loses control of his car and crosses the median strip hitting the plaintiff's car head on. Following the accident, plaintiff seeks to establish that the brakes of the defendant's car were defective and had they been sound, the accident could have been avoided. The defendant driver carries 10,000/20,000 automobile liability insurance.

(2) An aircraft manufacturer is sued following an accident for failing to design a redundancy system into the aircraft. Evidence indicates that the cause of the crash was negligent repair of the aircraft by a local outfit that does aircraft repair. The repairer carries no insurance and has no assets to speak of.

In each of the above cases, it is likely that a jury will assess the lion's share of responsibility (perhaps 90% or more) to the non-manufacturing defendant. But these defendants have been rendered immune from suit. The reckless driver who carries 10,000/20,000 liability insurance and is permitted to drive a car carrying these woefully inadequate limits has transferred the cost of his conduct to the auto manufacturer. You and I pay this cost when we purchase a new car. We, rather than the reckless drivers of the world, pay for the ills of reckless driving. In short, joint and several liability fails to internalize the costs of negligent or reckless conduct. The costs are shifted away from primary wrongdoers and borne by third party defendants whose liability is often marginal at very best. There is little wonder that manufacturers who face this scenario daily respond with outrage.

It is important to understand that Pennsylvania now embraces a minority view on this issue. A brief survey of the legislation that has been enacted to date in close to thirty jurisdictions will demonstrate that the statutory reform movement has viewed this issue as one of great significance. There are two basic statutory patterns that dominate on the issue of joint and several liability: (1) outright abolition of joint tortfeasor liability with regard to both economic and non-economic loss; and (2) abolition of the joint tortfeasor doctrine with regard to non-economic loss alone. These two basic schemes are then subject to modification in some jurisdictions by the application of a percentage threshold (e.g. 20%-50%) i.e. if the defendant exceeds the threshold then liability is joint rather than several. Furthermore, some jurisdictions make special exceptions from the scheme abolishing joint-tortfeasor liability for such actions as environmental torts and conspiratorial torts.

A large number of states have abolished joint-tortfeasor liability for both economic and non-economic losses. Arizona, Colorado, Idaho, Kansas, North Dakota, Oklahoma, Utah, Vermont and Wyoming exemplify this group. Montana and Iowa are part of this group, but have enacted a 50% threshold which reinstates joint liability if exceeded by any defendant. On the other hand, a significant number of jurisdictions follow the California-Proposition 51 model which permits joint-tortfeasor liability for economic loss alone. Florida, Illinois, and New York, follow this model though each state has its own particular version and threshold percentage.

New Jersey which has recently adopted reform on joint and several liability has eliminated all joint tortfeasor liability for any defendant whose responsibility is below 20%. For defendants whose responsibility falls between 20% and 60% there is joint liability for economic loss but several liability for non-economic loss. Only when the responsibility of a defendant exceeds 60% is there joint and several tort liability for both economic and non-economic loss. The Ohio legislation simply limits the amount of damages recoverable for non-economic loss to the defendant's percentage of responsibility. Thus both of Pennsylvania's neighboring states already have far more restrictive legislation than that presently being proposed in the bills before the legislature. Indeed, the American Bar Association has recommended the adoption of legislation which limits the liability of a defendant for non-economic loss to his percentage of responsibility when it is below 25%.

There is a clear national consensus that the joint tortfeasor doctrine which imposes crushing losses on defendants whose fault contribution is minuscule is simply unfair and must be legislatively altered. Pennsylvania should join this broad national consensus and provide sensible limitations on this harsh and punitive doctrine.

E. Non-Manufacturing Suppliers - Relieving the Innocent Defendant

A significant development in recent years has been the movement by both the judiciary and the legislature to relieve non-manufacturing defendants (i.e. wholesalers and retailers) from strict liability for selling a defective product when it is clear that there was no fault whatsoever on their part in selling the product. These defendants complain bitterly that even though they do not ultimately pay the cost of the personal injury awards because they are passed back to the manufacturer who is finally responsible for the damages, they are forced to expend huge litigation costs because they are named as defendants in the law suits.

A significant number of states have adopted statutes to alleviate the plight of the non-manufacturing defendants. See e.g. Idaho Code § 6-1407 (Supp. 1985); Kan. Stat. Ann. § 60-3306 (1983); Ky. Rev. Stat. Ann. § 411.340 (Baldwin Supp. 1984); Minn. Stat. Ann. § 544.41 (West Supp. 1986); N.C. Gen. Stat. § 99B-2 (1985); Ohio Rev. Code Ann. § 2305.33 (Page Supp. 1985); Tenn. Code Ann. § 29-28-106 (1985); Wash. Rev. Code Ann. § 7.72.040 (Supp. 1986). The Model Uniform Product Liability Act, § 105 also provides relief from strict liability to non-manufacturing defendants. For the most part these statutes relieve the non-manufacturing defendant from liability unless the plaintiff: (1) cannot assert jurisdiction over the manufacturer; (2) will ultimately be unable to collect a judgment against a

manufacturer; or (3) alleges primary negligence against the nonmanufacturing seller. For all practical purposes the legislation proposed for Pennsylvania tracks the philosophy of these legislative efforts. The legal costs of keeping a "dummy" defendant in the case are significant. Consumer safety is not enhanced. Rarely anyone but the lawyers benefit from the unnecessary inclusion of these defendants in products cases.

Conclusion

The State of Pennsylvania has the harshest product liability law in the country today. It is widely perceived as irrational and simply unfair. It is not that merely one doctrine or another is skewed toward unwarranted tort recovery. No single doctrine can have that effect. Rather it is a combination of doctrines that creates a body of law that in its totality is grotesque. Fairly read, Pennsylvania law mandates that: (1) the manufacturer is the guarantor of a product's safety; (2) a manufacturer is liable even though the technology for avoiding the injury was not available when the product was mandated; (3) a manufacturer is liable even though the risk of injury was unknowable by the manufacturer when the product was marketed; (4) a manufacturer is liable even if a product met the most exacting warnings mandated by the government; (5) a manufacturer is fully liable for all damages even though the plaintiff was substantially responsible for bringing about his injury; (6) a manufacturer is fully liable for all losses even though it its fault is adjudged by a jury to be a small minuscule percentage of the fault which brought about the injury; (7) innocent retailers and wholesalers are strictly liable even though there was nothing that they could have done to have prevented the injury.

This combination of rules is a prescription for nothing but financial ruin for responsible business. As long as Pennsylvania manufacturers are subject to these rules, plaintiffs will seek out Pennsylvania as a haven to bring suit against Pennsylvania manufacturers. Other state courts using conflict of law principles are free to impose harsh Pennsylvania law against Pennsylvania manufacturers on the theory that if Pennsylvania is prepared to impose such liability against its own corporate citizens, there is little reason for other states to treat them more solicitously.

The proposed reforms suggested in this memorandum are not radical or novel. They <u>are</u> the law today in the large majority of jurisdictions. No reasons has been offered and none can be offered as to why Pennsylvania should be the "tort-haven" of the United States. Sensible legislation will place Pennsylvania manufacturers on equal footing with manufacturers throughout the country. More important, product liability law will be perceived once again as fair and equitable to all.

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PUBLICATIONS:

Book Reviews

Unsafe At Any Speed (Nader) 46 B.U. Law Rev. 135 (1966).

How To Avoid Probate (Dacey) 46 B.U. Law Rev. 417 (1966).

Death, Property and Lawyers (Shaffer) 47 N. Dame Law Rev. 404 (1971).

Final Report of the National Commission of Product Safety 51 B.U. L. Rev. 704 (1972).

Ending Insult to Injury, (O'Connell) 56 B.U. L. Rev. 830 (1976).

The New Zealand Accident Compensation Reform, (Palmer) 48 U.Chi. L. Rev. 781 (1981).

Articles

Mistake and Fraud in Wills: A Comparative Analysis of Existing Law, 47 B.U. Law Rev. 303 (1967).

Mistake and Fraud in Wills: A Suggested Statutory Departure, 47 B.U. Law Rev. (1967).

A Defense to the Use of the Hypothetical Case to Determine the Causation Issue, 47 Tex. L. Rev. 183 (1973).

Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531 (1973).

Design Defect Litigation Revisited, 61 Cornell L. Rev. 541 (1976).

Expanding the Negligence Concept: Retreat From the Rule of Law, 51 Ind. L.J. 467 (1976).

Implementing Federal Environmental Policies: The Limits of Aspirational Commands, 78 Colum. L. Rev. 1429 (1978) (with Richard N. Pearson).

Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform, 56 N.C. L. Rev. 625 (1978).

Renewed Judicial Controversy Over Defective Product Design: Toward The Preservation of an Emerging Consensus, 63 Minn. L. Rev. 1036 (1980).

Extending the Boundaries of Strict Products Liability: Implications of the Second Best, 128 U. Pa. L. Rev. 1063 (1980).

Coping With the Time Dimension in Products Liability, 69 Calif. L. Rev. 919 (1981).

Should A Process Defense Be Recognized in Product Design Cases?, 56 N.Y.U. L. Rev. 585 (1981).

Process Constraints in Tort, 67 Cornell L. Rev. 901 (1982).

The Boundary Problems of Enterprise Liability, 41 Md. L. Rev. 649 (1982).

Why "Creative Judging" Won't Save the Products Liability System, 11 Hofstra L. Rev. 845 (1983).

Products Liability and the Passage of Time: The Imprisonment of Corporate Rationality, 58 N.Y.U. L. Rev. 765 (1983).

Agreements Changing the Forum for Resolving Malpractice Claims, 49 Law & Contemp. Prob. 243 (1986).

The Virginia Birth-Related Medical Injury Compensation Act: Limited No-Fault Statutes as Solutions to the "Medical Malpractice Crisis," (a chapter in book by Nat'l Institute of Medicine (1988).

The Quiet Revolution in Products Liability, 37 U.C.L.A. L. Rev. (1990)(with Ted Eisenberg).

Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, (1990) (with Aaron Twerski).

Process Norms in Products Litigation: Liability for Allergic Reactions, (1990).

Columns

Products Liability Columns which covered a variety of subjects and which appeared regularly, in The Corporation Law Review from 1978-1980.

Casebooks

The Torts Process (Little, Brown and Co.) (3rd ed. 1988) (with Richard N. Pearson).

Products Liability: Problems and Process (Little, Brown and Co.) (1987) (with Aaron Twerski)(1989 Supp.)

Treatise

Henderson on Products Liability (Little, Brown and Co.)(multi-volume work in progress; expected publication mid-1990s).

Reports

The Designated Compensable Event Project, Innovative Alternatives Subcommittee of the ABA Commission on Medical Professional Responsibility (with Boyden and Tancredi) (1980).

Taggants in Explosives 202-226 (Analysis of products liability implications, prepared for U.S. Office of Technology Assessment, published April 1980).