

Matusow - Messer

TESTIMONY BEFORE THE JUDICIARY COMMITTEE
AND THE LABOR RELATIONS COMMITTEE
OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES

OCTOBER 26, 1989

(PRODUCTS LIABILITY)

PRESENTED BY:

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THE 1989-1990 LEGISLATIVE SESSION BRINGS WITH IT ONCE AGAIN CALLS BY CERTAIN SPECIAL INTEREST GROUPS TO LIMIT THE RIGHT OF ACCESS TO THE COURT FOR THOSE WHO ARE INJURED BY DANGEROUS AND DEFECTIVE PRODUCTS. WE WOULD LIKE TO APPLAUD THE PENNSYLVANIA LEGISLATURE FOR ITS PAST TRACK RECORD OF STANDING TALL IN DEFENSE OF INDIVIDUAL RIGHTS AND ACCESS TO THE COURT FOR THOSE VICTIMS WHO HAVE BEEN HARMED OR KILLED BY UNSAFE PRODUCTS.

WHILE PROPONENTS OF HOUSE BILL 916 SAY PUBLICLY THAT THIS IS "A COMPROMISE BILL" OR "FINE TUNING" OF PRODUCTS LIABILITY LAW, THEIR ACTIONS BELIE THESE STATEMENTS. INDEED, THE ENORMOUS AMOUNT OF MONEY, TIME AND EFFORT INVESTED IN PENNSYLVANIA BY THESE GROUPS - PARTICULARLY THE TOBACCO INDUSTRY - SHOWS THE EXTENT AND THE FAR REACHING EFFECTS THAT THIS LAW WOULD BRING TO THE CITIZENS OF PENNSYLVANIA IF ENACTED.

PURPOSE OF CIVIL JUSTICE SYSTEM

IN AMERICA, THERE ARE TWO WAYS BY WHICH TO DETER UNSAFE OR IRRESPONSIBLE BEHAVIOR: GOVERNMENTAL REGULATION AND THE THREAT OF LITIGATION. THE CIVIL JUSTICE SYSTEM OFFERS THE ADVANTAGES OF THOROUGHNESS AND FLEXIBILITY.

NO NUMBER OF FEDERAL OR STATE INSPECTORS, NO NUMBER OF SPECIAL GOVERNMENTAL INVESTIGATIVE AGENCIES OR OTHER BUREAUCRACY CAN HOPE TO PROVIDE THE SAME LEVEL OF DETERRENCE AS DOES OUR CIVIL JUSTICE SYSTEM. NOR WOULD THE BUSINESS COMMUNITY OR SOCIETY AS A WHOLE TOLERATE THE LEVEL OF BUREAUCRATIC INTRUSION THAT WOULD BE NECESSARY TO APPROACH THE EFFICIENCY OF THE LEGAL SYSTEM IN

FERRETING OUT UNSAFE CONDUCT. INDEED, WITH FEDERAL BUDGET CONSTRAINTS AND A PHILOSOPHY OF "LAISSEZ-FAIRE" PERMEATING IN WASHINGTON, THE NEED FOR AN EFFECTIVE CIVIL JUSTICE SYSTEM HAS NEVER BEEN GREATER.

PRODUCTS LIABILITY LAW AND ANY CHANGES THAT ARE BEING CONSIDERED ARE FIRST AND FOREMOST WORKERS AND CONSUMERS ISSUES, NOT LEGAL ISSUES. INCREDIBLY, PROPONENTS OF HOUSE BILL 916 ARE GOING AROUND SAYING THAT THIS PIECE OF LEGISLATION WILL NOT RESTRICT AN INDIVIDUAL'S RIGHTS TO BRING A LAWSUIT OR RESTRICT AN INDIVIDUAL'S RIGHT TO JUST COMPENSATION. WE WOULD LIKE TO SPECIFICALLY EMPHASIZE SEVERAL SECTIONS OF THE BILL IN RESPONSE TO THOSE STATEMENTS.

THE "STATUTE OF REPOSE" CONTAINED IN SUBSECTION 5539 COULD LEAVE THOUSANDS OF VICTIMS WITHOUT A MEANINGFUL REMEDY. A 15 YEAR PERIOD IS INCAPABLE OF ACCOUNTING FOR THE LATENCY PERIOD OF SEVERE AND OFTEN FATAL DISEASES CAUSED BY EXPOSURE TO VARIOUS SUBSTANCES. IF HOUSE BILL 916 WERE PASSED, AN EXPOSED PERSON COULD LOSE HIS OR HER REMEDY BEFORE EVEN HAVING ANY KNOWLEDGE OR REASON TO KNOW OF THE HARM DONE BY THESE PRODUCTS. IS THIS FAIR?

THE EVIDENTIARY PROVISIONS OF SUBSECTION 8379, PERMITTING ADMISSION OF "EVIDENCE OF ADHERENCE TO GOVERNMENT OR INDUSTRY STANDARDS" STARTS FROM A FUNDAMENTALLY FALSE PREMISE. THESE STANDARDS ARE GENERALLY FORMULATED ON INFORMATION SUPPLIED OR CONTROLLED BY THOSE WITH AN ECONOMIC INTEREST IN THE "REGULATED" PRODUCT.

FOR EXAMPLE: CHLORDANE AND DDT, NOW RECOGNIZED AS DANGEROUS POISONS NEVER SUITABLE FOR CERTAIN USES, WERE LONG TREATED AS

RELATIVELY HARMLESS, BASED ON "SCIENTIFIC" STUDIES PROVIDED THE GOVERNMENT BY THE CHEMICAL MANUFACTURING INDUSTRY.

DESPITE FALSE CLAIMS BY PROPONENTS OF HOUSE BILL 916, SECTION 7102(B) INDEED ALTERS THE LEGAL PRINCIPLE OF STRICT LIABILITY. SINCE 1975, OUR COURTS HAVE NOT ALLOWED CONTRIBUTORY NEGLIGENCE TO BE USED IN A PRODUCT LIABILITY CASE. THE RATIONALE BEHIND THIS PROHIBITION HAS ITS ROOTS IN PRODUCT LIABILITY THEORY AND IN THE COURTS' EMPHASIS ON THE SAFETY OF THE PRODUCT. ONCE COMPARATIVE NEGLIGENCE IS INTRODUCED INTO A PRODUCT LIABILITY CLAIM, THE TRIAL WILL NOT FOCUS SOLELY ON THE PRODUCT ITSELF. THE SOLE PURPOSE OF STRICT LIABILITY IS TO INCREASE THE SAFETY OF PRODUCTS, NOT JUDGE FAULT.

THE SECTION OF THE PROPOSED LEGISLATION DEALING WITH "DESIGN DEFECTS" IS ALSO DISQUIETING FOR CONSUMERS AND WORKERS. UNDER THIS PROVISION OF HB 916, A MANUFACTURER CANNOT BE FOUND TO HAVE DESIGNED A DANGEROUS OR DEFECTIVE PRODUCT IF THE ALTERNATIVE DESIGN COSTS TOO MUCH AND WAS NOT CAPABLE OF BEING USED BY THIS PARTICULAR MANUFACTURER OR IF IT WOULD IMPAIR THE PRODUCT'S "DESIRABILITY." THIS PROVISION ALLOWS THE MANUFACTURER TO PROVE THAT ANY OTHER DESIGN, ALTHOUGH IT MAY HAVE BEEN SAFER, DID NOT MAKE ECONOMIC SENSE. THE DALKON SHIELD, FORD PINTO, AND OTHER PRODUCTS ARE EXAMPLES HERE. ANOTHER EXAMPLE IS THE FIRE-SAFE CIGARETTE, A PRODUCT KNOWN TO BE PRODUCED BY THE TOBACCO INDUSTRY, BUT NOT AVAILABLE FOR COMMON CONSUMER USE.

THE PENNSYLVANIA TRIAL LAWYERS ASSOCIATION JOINS VICTIMS, LABOR, CONSUMER, AND ENVIRONMENTAL GROUPS IN OPPOSING THIS DRACONIAN PRODUCTS LIABILITY LANGUAGE. BY MAKING IT LESS LIKELY

THAT MANUFACTURERS WILL HAVE TO PAY FOR INJURIES CAUSED BY THEIR PRODUCTS, THIS PIECE OF LEGISLATION WOULD SERIOUSLY UNDERMINE THE INCENTIVE TO PRODUCE SAFE PRODUCTS. IF THE VICTIMS OF PRODUCTS SUCH AS ASBESTOS, DALKON SHIELD DEVICES, INCINERATING FUEL TANKS IN PASSENGER CARS, AND COUNTLESS OTHERS HAD NOT HAD ACCESS TO THE COURT SYSTEM, MOST IF NOT ALL OF THESE DANGEROUS ITEMS WOULD STILL BE ON THE MARKET. AS WELL INTENTIONED AS IT MAY BE, GOVERNMENT ALONE HAS NEVER BEEN STRONG ENOUGH TO ADEQUATELY PROTECT THE PUBLIC.

ONE OF THE PRINCIPLE ARGUMENTS OF THOSE WISHING ANTI-CONSUMER CHANGE IN PRODUCTS LIABILITY LAW IS THAT PRODUCT LIABILITY LAWSUITS ARE EXTREMELY COSTLY, AND ARE A MAJOR PROBLEM IN REMAINING COMPETITIVE. HOWEVER, A 1987 REPORT BY THE INDUSTRY-FUNDED CONFERENCE BOARD FOUND THAT "THE IMPACT OF THE LIABILITY ISSUE SEEMS FAR MORE RELATED TO RHETORIC THAN TO REALITY... WHERE PRODUCT LIABILITY HAS HAD AN NOTABLE IMPACT - WHERE IT HAS MOST SIGNIFICANTLY EFFECTED MANAGEMENT DECISION MAKING - HAS BEEN IN THE QUALITY OF THE PRODUCTS THEMSELVES. MANAGERS SAY PRODUCTS HAVE BECOME SAFER, MANUFACTURING PROCEDURES HAVE BEEN IMPROVED, AND LABELS AND USE INSTRUCTIONS HAVE BECOME MORE EXPLICIT."

WHILE ADVOCATES OF PRODUCTS LIABILITY REFORM SAY THAT PENNSYLVANIA'S PRODUCT LIABILITY LAW IS COSTING US TOO MUCH MONEY, HOW CAN WE JUDGE WHAT THE SAVINGS ARE IN THE REDUCED NUMBER OF INJURIES AND DEATHS AND THE NUMBER OF PERSONAL TRAGEDIES THAT HAVE BEEN AVOIDED AS A RESULT OF A STRICT PRODUCTS LIABILITY LAW?

THE QUESTION OF PRODUCT LIABILITY REFORM - MORE SO EVEN THAN THE OTHER SO-CALLED "TORT REFORM ISSUES" - HAS A UNIQUELY UNFAIR

ANTI-CONSUMER AND ANTI-WORKER BIAS IN IT. SINCE MOST PRODUCTS USED IN PENNSYLVANIA ARE MANUFACTURED OUTSIDE THE STATE, PRODUCT LIABILITY "REFORM" MEANS THAT PENNSYLVANIA VICTIMS WILL NOT BE COMPENSATED, WITHOUT ANY CORRESPONDING DIRECT SAVINGS OR LOWER INSURANCE PREMIUM RATES! WHILE WE STEADFASTLY OPPOSE ANTI-CONSUMER PRODUCT LIABILITY REFORM, THE FACT THAT INJURED PENNSYLVANIANS WILL NOT RECEIVE FAIR COMPENSATION FOR THEIR UNFORTUNATE INJURIES WHILE NOT EVEN BENEFITING PENNSYLVANIA MANUFACTURERS SHOULD MAKE THIS ISSUE EVEN CLEARER TO LEGISLATORS AND OTHERS WHO ARE UNDECIDED ON THE BASIC PHILOSOPHICAL QUESTIONS OF SAFETY AND DETERRENCE!

AND WHAT OF THE SO-CALLED "LITIGATION EXPLOSION" IN PENNSYLVANIA? ACCORDING TO DON HARRIS OF THE PENNSYLVANIA ADMINISTRATIVE OFFICE OF THE COURTS, THE NUMBER OF CIVIL CASES COMMENCED IN PENNSYLVANIA HAS ACTUALLY DECREASED FROM 1987 TO 1988. NO FIGURES ARE YET AVAILABLE FOR 1989. INDEED, THE "LIABILITY CRISIS" HAS APPEARED MORE AND MORE TO BE A FRAUD ON THE PEOPLE OF PENNSYLVANIA AND THE UNITED STATES AND NOT ANYTHING BASED IN ACTUALITY. RALPH NADER LABELLED THE RECENT INSURANCE CRISIS AS THE "GREATEST COMMERCIAL HOAX" EVER PERPETRATED.

AS YOU CONSIDER WHETHER OR NOT IT IS NECESSARY TO "ROLL-BACK THE CLOCK" ON THE RIGHTS OF PENNSYLVANIA CONSUMERS, WORKERS, AND VICTIMS, IT IS IMPORTANT TO REMEMBER WHAT THE PRODUCTS LIABILITY LAW HAS MEANT TO MILLIONS OF PENNSYLVANIANS - SAFER PRODUCTS AND A DETERRENCE FAR MORE EFFECTIVE THAN ANY GOVERNMENT BUREAUCRACY COULD EVER BE.

HOWEVER, SINCE THE SUBJECT OF THIS PUBLIC HEARING ALSO

INCLUDES HOUSE BILL 1012 AND 1013, LET US ALSO SPEAK TO THESE ISSUES OF THE SO-CALLED "WORKPLACE SAFETY LEGISLATION."

WORKERS IN PENNSYLVANIA ARE VULNERABLE TO IRRESPONSIBLE CONDUCT BY AN EMPLOYER DUE TO THE EXCLUSIVITY PROVISION IN PENNSYLVANIA'S WORKERS COMPENSATION LAW. AN EXAMPLE OF HOW SOME EMPLOYERS TAKE ADVANTAGE OF THIS INEQUITABLE SITUATION IS ILLUSTRATED BY A 1987 PENNSYLVANIA SUPREME COURT DECISION IN THE CASE OF POYSER VS. NEWMAN & CO., INC. IN POYSER, AN EMPLOYER ORDERED A DANGEROUSLY DEFECTIVE MACHINE BE HIDDEN FROM OSHA INSPECTORS. AFTER THE INSPECTION, AN EMPLOYEE WAS SERIOUSLY INJURED WHILE OPERATING THE MACHINE BECAUSE A SAFETY DEVICE WHICH HAD BEEN REMOVED BY DIRECT ORDER OF THE EMPLOYER WAS NOT IN PLACE. IN RULING THAT THE EMPLOYEE HAD NO RIGHT OF ACTION AGAINST THE EMPLOYER, CHIEF JUSTICE NIX, WRITING FOR THE COURT, INTIMATED THAT IT WAS THE RESPONSIBILITY OF THE GENERAL ASSEMBLY OF PENNSYLVANIA TO PROVIDE A REMEDY BY STATING: "IT (EMPLOYEE'S ARGUMENT FOR RELIEF) IS ONE THAT MUST BE RESOLVED BY THE GENERAL ASSEMBLY, NOT THIS COURT."

SIMILARLY IN A LATER DECISION, THE SUPERIOR COURT, RELYING UPON POYSER, HELD IN BLOUSE VS. SUPERIOR MOLD BUILDERS, THAT THE WORKERS COMPENSATION ACT PREVENTED TORT ACTION AGAINST AN EMPLOYER FOR TOXIC - RELATED INJURIES. IN THIS INSTANCE AN EMPLOYER DELIBERATELY DECEIVED HIS EMPLOYEES INTO BELIEVING THAT MATERIALS THEY WERE WORKING WITH WERE SAFE. WARNING LABELS WHICH WOULD HAVE REVEALED THE DANGEROUSLY TOXIC QUALITIES OF THOSE MATERIALS WERE REMOVED BY THE EMPLOYER.

WHILE OPPONENTS OF SUCH CONSUMER AND WORKER ORIENTED

LEGISLATION ARGUE THAT PASSAGE OF SUCH BILLS WOULD OPEN A FLOODGATE OF LITIGATION, THESE BILLS HAVE BEEN VERY CAREFULLY DRAWN TO LIMIT ACTION SOLELY TO THOSE INSTANCES WHERE EMPLOYERS ACT IN BLATANT DISREGARD FOR THE HEALTH AND SAFETY OF THEIR EMPLOYEES.

THESE WORKPLACE SAFETY BILLS WOULD PROMOTE BETTER RISK MANAGEMENT IN OUR SHOPS AND INDUSTRIES AND WOULD LEAD TO ADDITIONAL INCENTIVES TO PRODUCE SAFER WORK PLACES FOR PENNSYLVANIA WORKERS. RISK-MANAGEMENT, WE FEEL, IS FAR SUPERIOR IN THAT IT HELPS ELIMINATE INJURIES, RATHER THAN WORRYING ABOUT WAYS TO DENY COMPENSATION AFTER A WORKER OR A CONSUMER IS INJURED.

THANK YOU VERY MUCH FOR OFFERING US THIS OPPORTUNITY TO TESTIFY. WE WOULD BE MORE THAN HAPPY TO ANSWER ANY QUESTIONS.