COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
JOINT COMMITTEES ON JUDICIARY
AND LABOR RELATIONS

In re: Products Liability Issues

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Stenographic report of hearing held
in Room 140, Majority Caucus Room,
Main Capitol Building, Harrisburg, PA

Thursday,
November 2, 1989
10:00 a.m.

HON. THOMAS R. CALTAGIRONE, JUDICIARY COMMITTEE CHAIRMAN

MEMBERS OF COMMITTEES ON JUDICIARY
AND LABOR RELATIONS

Hon. Kevin Blaum	Hon. Ronald S. Marsico
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Hon. Vincent Hughes	Hon. Karen A. Ritter
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Hon. Kenneth E. Lee	Hon. Michael R. Veon

Also Present:

Hon. Nicholas A. Colafella
Hon. Howard L. Fargo
Hon. Ivan Itkin
Hon. David K. Levdansky
Michael Cassidy, Maj. Executive Director, Labor Relations
Nevin Mindlin, Min. Executive Director, Labor Relations
David Krantz, Maj. Executive Director, Judiciary
William Andring, Maj. Counsel, Judiciary
Mary Woolley, Min. Counsel, Judiciary

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CHAIRMAN CALTAGIRONE: We might as well get started. The hour of 10:00 has come and gone.

I just want to share with the members and the public that Chairman Cohen, Chairman of the House Labor Relations Committee, had a death in the family and may not be able to be with us today, I talked to him last night, so that we will proceed with the agenda.

There is one change. There was a William Graham who was going to testify today but he will be testifying at a later hearing, and we do plan to hold two additional hearings. For the benefit of the members, there has been tentatively scheduled hearings for 11-30 and 12-14 on the workplace safety and torts.

We might as well get right down to business and start off with Richard Daynard. And before we do that, if you would settle in to testify, the members and staff that are present, if you'd care to identify yourself for the record. Let's start to my left and work right over.

MR. CASSIDY: Michael Cassidy, Executive Director of the Labor Relations Committee.

REPRESENTATIVE RITTER: Representative Karen Ritter from Allentown.

REPRESENTATIVE BLAUM: Representative Kevin Blaum, city of Wilkes-Barre.

REPRESENTATIVE McNALLY: Representative Chris McNally from Allegheny County.

MR. MINDLIN: Nevin Mindlin, Republican Executive Director for the Labor Relations Committee.

MR. ANDRING: Bill Andring, legal counsel for the Judiciary Committee.

REPRESENTATIVE CHADWICK: Representative Scot Chadwick, Bradford County.

REPRESENTATIVE HECKLER: Representative Dave Heckler, Bucks County.

REPRESENTATIVE MARSICO: Representative Ron Marsico, Dauphin County.

REPRESENTATIVE REBER: Representative Robert Reber, Montgomery County.

REPRESENTATIVE HAGARTY: Representative Lois Hagarty, Montgomery County.

MR. KRANTZ: David Krantz, Executive Director of the Judiciary Committee.

REPRESENTATIVE LEE: Ken Lee from Wyoming County.

CHAIRMAN CALTAGIRONE: And Mike Bortner from York County.

REPRESENTATIVE BORTNER: Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: And we'll proceed.

DR. DAYNARD: Good morning. My name is Richard Daynard. I'm very pleased to have been asked to appear here today to discuss House Bill 916. I've been, for the past 20 years, a law professor at Northeastern University School of Law in Boston, working especially in the area of consumer protection.

Because tobacco products kill many more Americans -- 390,000 annually -- than all other consumer products combined, and because the political power of the tobacco industry has produced an almost complete exemption of tobacco products from consumer protection regulations, my consumer protection interests have, for the past few years, focussed specifically on tobacco products liability suits.

I am chairman and co-founder in 1984 of the Tobacco Products Liability Project, which encourages tobacco litigation as a public health strategy, and I guess I should mention here that we received last year an award from the American Cancer Society honoring our work in this area, and I'm also editor-in-chief of the Tobacco Products Litigation Reporter, which publishes all of the cases, statutes, and other legal developments relevant to this type of litigation.

I'm here to talk about House Bill 916 because it is, in large measure, a very artfully drafted

act for the relief and protection of the tobacco industry. There are no fewer than eight separate provisions of the bill which relieve the cigarette companies from liability for action which they have taken, and continue to take, that puts at grave risks the lives and health of Pennsylvania citizens. And I guess I should mention at this point that with Pennsylvania having about 5 percent of the nation's population, there are about 20,000 deaths each year in Pennsylvania that are caused by cigarettes.

Okay, the eight provisions in the bill, to get down to specifics. First of all, the 15-year statute of repose, this is just one of the eight. These are -- you have to understand, these are backstopped. They are put in here in a way that if any one, two, three, four five, or six of them are dropped out, the cigarette industry is still protected. It's a very neat piece of draftsmanship.

First of all, the 15-year statute of repose, Section 5539, the fact is cancers -- 15 years is neat. Cancers take 20 years or more to develop. This provision might enable tobacco companies to escape all possible responsibility by claiming, plausibly, that the plaintiff's cancers were underway more than 15 years before they manifested themselves and therefore before the plaintiff sued. At the very least, it would free them

from all liability for their total failure to warn, their admitted failure to warn, before the Federally mandated warnings appeared in 1966 and even for their earlier expressed warranties of the sort of "Will not injure nose, throat, or accessory organs," or "More doctors smoke Camels," and so forth and so on, and there were many of them in the '50's and '60's like that.

This is also a terrible policy since it provides blanket immunity for manufacturers of products which contain or which act as slow-acting poisons. The argument for statutes of repose such as it is is that manufacturers of capital goods should not be held liable when their products are kept in service long past their expected useful lives. Many of the existing and proposed statutes of repose in the United States are expressly limited to capital goods. Since House Bill 916 contains no such limitations, it's an extreme measure exceeding its stated purpose for the principle benefit of the tobacco industry.

The second one which I like particularly amends the downhill skiing rule with its, you know, innocuous title remaining and its preface about people understanding the dangers of downhill skiing, as I assume they probably do, and then it just adds the words, "or any other activity or conduct involving known or inherent

risks." Although the tobacco companies to this very day deny that smoking causes cancer or other diseases, if you have any tobacco industry representatives testifying here in the next couple of days, you might try asking them, "Well, really now, doesn't it even cause a few lung cancers?" "Well, we don't know." Okay. They deny it to this day. Nonetheless, they insist in every case that has come to trial and in the pleadings in every case that the risks of smoking were known by the plaintiffs and were known 20, 30 or 40 years ago by the plaintiffs, and in any event were inherent. The tobacco industry's position here is obvious. They're unwilling to pay even a fraction of the medical and personal costs caused by their conduct and products. And equally obvious is their effort to hide their status as beneficiaries of this provision from the legislators as well as the citizens of Pennsylvania.

Third provision. The definition and limitation of product liability actions. The definition excludes any claim for fraud or conspiracy. I mean, basically the definition and limitation excludes claims for fraud and conspiracy, and we should probably look at this very closely because we're talking here about a whole type of product liability reform that the tobacco industry has been successful in getting through in New Jersey and California, and also in Ohio, which is a very different

sort of product liability change than we've ever seen before in the United States.

In the past, if there was something wrong or if the legislature felt there was something wrong with the existing law of tort, product liability, or whatever, and the clearest example has been the old rule of contributory negligence that prevented anybody from recovering from any tort-feasor if they were even 5 or 10 or 15 percent negligent, that law was changed when people realized there was mischief in this law, that this law, as it existed, as it developed in the courts, was not going the right way and that people who should have been recovering weren't recovering, there was a very sort of surgical correction on this that in those States that did it by statute rather than common law changed the statute was very specific, putting in comparative negligence in place of contributory negligence, the rule that barred.

This is a very different and radical type of tort reform. What this kind of tort reform does is to say, and notice the definition says, this means that this statute shall be the only source of law governing any action where someone has been injured by a product. All statutes as well as common law rules that would otherwise have given somebody a cause of action are hereby abrogated, with the exception of the four types that are

specifically enumerated in Section 8373. Notice, as I would guess you probably have not, because the way these things are drafted, they're drafted so you don't notice it, but you should now notice that these four do not include fraud or conspiracy, or any other intentional tort. If this statute were to pass, it would abrogate any intentional tort on the part of product manufacturers. They could now commit any intentional torts they want, and they're also protected from any intentional torts in the past.

Is this purely theoretical? Well, no. Judge Sarokin, in his opinion on April 21, 1989 in the Cipollone against Liggett Group lawsuit, opinion denying defendants' motion for directed verdicts on fraud and conspiracy claims, found that the plaintiffs had produced sufficient evidence of the conspiracy among tobacco manufacturers that he described as a conspiracy "to refute, undermine, and neutralize information coming from the scientific and medical community and, at the same time, to confuse and mislead the consuming public in an effort to encourage existing smokers to continue and new persons to commence smoking." And elsewhere in the opinion he points out the evidence shows the conspiracy began in late 1953 and continues to this date.

While the jury did not find for the

plaintiffs on these grounds, I think no reason has been given or can be given why Pennsylvania should not let some other plaintiff present even more convincing evidence of these intentional torts. The statute just bars them. More generally, the omission of fraud and conspiracy undermines the weakness of approaching tort reform by substituting for the flexible remedies of the common law developed over hundreds of years, substituting a short laundry list of statutory torts. It's easy to miss when you do the process that way and thereby legitimize important types of wrongful behavior. And what this basically does is it vitiates the flexibility and the power of the common law and substitutes instead the imagination or the political will of the drafters, the original drafters of the statute.

Four. The definition of expressed warranty. On one of these four things that the statute would allow recovery is expressed warranty, provision A. This provision doesn't mention that it changes the Uniform Commercial Code. It's supposed to be this very conservative provision. It changes the UCC expressed warranty provision. Under the UCC, all that a plaintiff has to show is that the false representation was part of the basis the of the bargain. Very deliberate change in language by the drafters of the UCC, and this would return

it to the earlier Uniformed Sales Act standard developed around the turn of the century that requires something like specific and justifiable reliance.

The problem with the specitic and justifiable reliance standard is that it's very difficult for a plaintiff honestly to testify, or the surviving widow or widower of a plaintiff to testify, that the plaintiff or the plaintiff's decedent had relied even on very specific false representations in advertisements 20 or 30 year past. The basis of the bargain language was designed to soften the requirements sufficiently to make such expressed warranty claims practicable. This matter is of tremendous import to the tobacco industry, I think that's why it's in here, since the only claims on which the jury in Cipollone, which is so far the only case where there's been a jury finding for the plaintiffs, and the only claims on which they found for the plaintiffs were those involving pre-1966 expressed warranties. So it's real important for them that you folks get this provision passed.

Okay. Five. The nonliability of nonmanufacturing suppliers. This is a technical point and there may be, you know, other reasons for a provision of this sort, but one reason why it's attractive, why I know it's attractive to the tobacco industry, is that it keeps

cases out of State court. What happens is there are no Pennsylvania manufacturers of cigarettes, so if you sue a manufacturer of cigarettes in State court here and you don't sue a distributor, the manufacturer can remove -- the cigarette industry has a policy of removing all cases to Federal court in all jurisdictions. They obviously think they do better there in Federal court in all jurisdictions than they do in State courts. The only thing that has kept cases, in some instances, in State courts is where plaintiffs have also sued local distributors. Not necessarily the Ma and Pa store. I think most plaintiff's attorneys don't sue Ma and Pa stores in this kind of case. They do chain stores if people bought them there or wholesalers, and the effect of suing a local Pennsylvania company as to the technical matter, as a matter of Federal jurisdiction, is this destroys the diversity of jurisdiction, and therefore it keeps the case in State court.

So while nobody mentions this in promoting this provision, this may be the most important reason. This is, I'm sure, the only reason why the manufacturers are pressing, a coalition essentially of manufacturers, are pressing for this. I mean, why don't they want the stores in there with them? Answer: Because if the stores aren't in there, they probably have to hold the stores

harmless anyhow, typically they do hold the stores harmless in these cases. They cover their litigation expenses anyhow. They don't want them in there because they want to be able to remove to Federal court.

Okay, six. The alternative design requirement. The state of the art requirement. This is a particularly extreme form of the state of the art requirement because of the way in which it's drafted. This particular one in particular protects any oligopoly, such as the tobacco industry -- there are only six cigarette manufacturers in the United States -- it protects any oligopoly which prefers not to develop safer technology. If you look at it, I mean, basically it says you need to have -- the safer technology basically has to have been on the market and commercially successful or you can't bring a suit based on defective design, regardless of what could have been done.

Is this purely hypothetical? No. There was evidence presented in the Cipollone case that one tobacco company, Liggett Group, the smallest one, had felt under pressure from another one, Philip Morris, which is the largest one, not to perfect a potentially noncarcinogenic cigarette which it had developed. Its testimony was that the CEO had said to the research man who had developed it, "Listen, we can't market the thing, Philip Morris would be

all over us." Okay. So long as such internal industry pressure keeps a safer cigarette from actually being marketed, no plaintiff could ever meet the burden of this provision in the bill. You'd have to come out and say, "I, cigarette smoker, in my own laboratories, developed--" and obviously nobody can do that.

Okay, seven. The inherent or unavoidably unsafe aspect, part 2 of Section 8374. Although tobacco companies, again, deny cigarettes are unsafe, they also insist, in defending tobacco liability products, that their products are inherently and unavoidably unsafe. They do. In California, courts have interpreted a similar tobacco industry-inspired tort reform provision. In fact, as far as I know, the only cases that have applied this provision at all have been cigarette cases, and they've interpreted them to bar, you know, so far, with this tobacco industry-inspired bill clearly, to bar all liability suits against tobacco companies regardless of the basis, including the basis of fraud, conspiracy, and so forth. This provision goes so far as to bar claims that the companies could have reduced the dangers or made the cigarettes safer.

For example, you know, more safe is a fire matter. Plaintiffs must show that the aspect could have been eliminated or made safe, that the danger could have

been totally eliminated -- plaintiffs have to show that -- before they're allowed to even proceed in the case.

And finally, the tobacco industry's favorite provision, their backup one, but notice they already have seven other ways of protecting themselves, but their final one is the "Comment i" provision, Section 8378. The "consumer products of the kind described in comment i," this lovely locution just happens to include tobacco. It also includes caster oil, butter, I think sugar rather than red meat, and alcohol. When this provision was passed in California, someone who was working with me called the representative, the public relations representative of the leading caster oil manufacturer and said, "Hey, did you guys breathe a big sigh of relief when California passed this statute relieving you of liability?" And the answer, not surprisingly, was, "Huh? What statute?" And the same answer would come from the Meat Board or the Dairy Council. Nobody's suing them. Nobody's going to sue them. They're not there. They're not funding this stuff. Even the alcohol manufacturers, who come closest to tobacco, even they are not much worried about this kind of lawsuit because only a few suits have been filed against them, far fewer than against the tobacco industry, and these suits are weakened by the fact that the alcohol industry has never denied the danger

of drinking, something that the tobacco industry continues to deny to this day. That leaves only the tobacco industry benefited by this bill, and in fact, not surprisingly, they're the ones who here and elsewhere have been insisting on this provision.

I'm available for questions. Thank you.

CHAIRMAN CALTAGIRONE: Thank you.

We've had some other members join us since we started, and those that have, would you please introduce yourselves for the record?

REPRESENTATIVE VEON: Representative Mike Veon, Beaver County.

REPRESENTATIVE HUGHES: Representative Vincent Hughes, Philadelphia.

REPRESENTATIVE FARGO: Representative Howard Fargo, Mercer County.

REPRESENTATIVE PICCOLA: Representative Jeff Piccola, Dauphin County.

CHAIRMAN CALTAGIRONE: Okay. Are there questions?

Yes, Chris.

BY REPRESENTATIVE McNALLY: (Of Dr. Daynard)

Q. Professor, you talked about tobacco. Would these provisions have any effect on other environmental and health problems in Pennsylvania?

A. Sure. I think maybe the clearest way to look at that would be to go through what this would do in the case of asbestos, and you can put yourself back a little bit on this, you know. It may be that most of the asbestos cases that are going to be filed have already been filed, but look at the effect of this, although there are still, I assume, some good ones left there, because you can't file a case until your injury has manifested itself, and that, once again, in the case of lung cancer, can be 20 to 40 years after the time of initial exposure. But you can consider this even more strongly in the context of early on in the area of asbestos litigation.

The 15-year statute of repose, most of the people suing in asbestos, or I'm sure at least half of them, probably hadn't worked with asbestos in the past 15 years. They certainly would have had a difficult time if they had worked with asbestos beginning in the shipyards during World War II, they would have had an awful hard time showing that it was only the last 15 years of asbestos exposure, or principally the last 15 years or significantly the last 15 years of asbestos exposure, that did the trick. So that would have knocked them out.

Downhill skiing provision. Assumption of the risk for "any other activity or conduct involving known or inherent risks." I guess working with asbestos

involves inherent risks, right? So they're out on that one, too.

On the definition, the elimination of fraud and conspiracy claims. Your sister State of Delaware, the Delaware Supreme Court I think unanimously a couple of years ago, in a case called Nicolette against Nutt, held that if somebody has been exposed to asbestos from one or a few of the manufacturers may sue all of the manufacturers if he can prove that they all were engaged in a conspiracy to suppress the evidence of the dangers of asbestos, and there's a lot of evidence out there that they all were, as with the tobacco industry. So that kind of claim would be gone.

Expressed warranty. Well, that one probably might or might not have been available. The alternative design requirement, the state of the art requirement, the asbestos plaintiffs would have been out. Could you prove that in 1940's, '50's, '60s, there was an alternative that was commercially feasible and just as good, and so forth and so on, and did everything that was just as good an insulator as asbestos? Could plaintiffs prove that? I think they'd have an awful hard time proving that.

And then the inherent or unavoidably unsafe aspect of this, once again, that's another way of putting the downhill skiing provision. Yeah. There's no way, I

think, that a plaintiff could show that there was a way to have made asbestos in the '40's, '50s, and '60's that would not have produced the asbestos dust that led to asbestosis and lung cancer.

"Comment i" I don't think would apply because that's really narrowly tailored to protect the tobacco industry. And I think you'll see this with other environmental torts coming up, that if there are various toxic substances used in the workplace, some of them may not yet have been identified by workers or their doctors or plaintiff's attorneys. I think you'll find the manufacturers of them would be protected by this statute just as well.

Q. Maybe one broader question which really goes beyond this particular piece of legislation, one complaint that we've heard is that the courts have just fouled up the tort system in Pennsylvania and it's judges and juries that are causing harm to the economic viability and competitiveness of Pennsylvania businesses, and so that is given as a reason why the legislature ought to intervene and start setting down some rules. And I guess the question I have then, given that premise, is, you know, if you have any opinion as to when it is appropriate for the legislature to intervene in the development of the common law and whether this is an appropriate area for us to

intervene?

A. Yeah, I do. I think this goes back to what I was saying about the ways of doing tort reform, and the example, and I don't -- I'm not a Pennsylvania lawyer so I don't know whether contributory negligence, that doctrine that barred any recovery for a plaintiff who was in any way at fault, was abrogated here by statute or by common law, because both patterns exist in the United States. But in the places where it was done by statute, generally you had a showing. People would come in with plaintiffs who had failed or people, you know, who were seriously injured, where the defendants had clearly been very much at fault, much more at fault than the plaintiffs, and said, listen, either I was advised and correctly advised by my attorney that I had no case here, or I went to court and I lost because the jury found that there was some harm here. In other words, you had a demonstrated harm, what in legal process discussions people called the mischief. Some mischief was shown in the existing common law. People came in and proved there's a real problem here, there's an injustice being done to the citizens of this State, and then they made a law that was narrowly -- a legal change that was narrowly designed to deal with this. As I understand it, you can correct me if I'm wrong, as I understand it, no one has presented any evidence to this

body that there is that kind of abuse of any sort going on here, that anything has happened. This is all sort of armchair analysis by law professors saying, gee, your doctrine sounds funny. They use different verbal formulas, the Pennsylvania Supreme Court uses different verbal formulas than are used in some other States.

Obviously, this problem goes well beyond Pennsylvania and other States because the same coalitions are also pressing for Federal tort reform bills on the basis that there's no uniformity among any States. They don't come in. If you look at what they say there, they say Pennsylvania's way out of line. We've got to do this to pull Pennsylvania in line. They say all the States. You don't have any idea what's going on in any of the States. In other words, even where more or less the same verbal formula is used, the applications of it differ from case to case.

The fact that there's a different verbal formula I think does not in any way show mischief. One of the things when I was in law school in Massachusetts I always thought very quaint was the names of the courts you have here. Courts of Common Pleas, and you had some other quaint court names at the time, I think, also. I mean, was there any rush to change it? I mean, this, presumably, the fact that you do something that's

different from what's done in most other States or you call things differently does not by itself present a problem, and as I understand it, nobody has presented any evidence that there's a real problem here, and if there was a real problem, this isn't doing it.

There is a real problem. The real problem is a real problem for the tobacco industry, and their problem is that when people sue tobacco companies, the price of their stock goes down. This is the one thing they really worry about. So what their real problem is they need legislators throughout the country, because they can't get Congress to do it, to go around and immunize them from tort suits. But that's the only real problem I know about.

CHAIRMAN CALTAGIRONE: Are there other questions from the committee members?

Yes.

REPRESENTATIVE CHADWICK: Thank you, Mr. Chairman.

BY REPRESENTATIVE CHADWICK: (Of Dr. Daynard)

Q. Professor Daynard, I know that most of my colleagues, in fact probably all of them, who cosponsored this bill didn't have tobacco in mind.

A. I'm sure that's true.

Q. The plant manager of the du Pont Corporation

plant in my district which employs 800 people told me just this weekend that our product liability situation is preventing them from introducing new products. Do you oppose the concept of product liability reform or are you just interested in crafting product liability reform so as not to let tobacco off the hook?

A. Well, I'm certainly interested in the latter, and I also don't doubt your initial statement that the people who introduced this, you know, did not see themselves, you didn't see yourselves as representing the tobacco industry. I think the tobacco industry's whole strategy, legislative strategy, here is to try to stay as much as possible in the background just make sure that they have their whole series of traps built into the bill. Whether -- I don't know whether du Pont has a real problem introducing new products. There is some evidence, as I understand, from the conference board report that business leaders, when they're asked about it in a sort of neutral context as opposed to in a context of preparing for legislative testimony, have indicated that the effect has been to make them sort of double-check and triple-check when introducing new products to make sure they are not doing something like A.H. Robins did when they introduced the Dalcon Shield. I mean, that was a new product. It in some way was better than, or was thought at that point to

be better than, other contraceptive devices and they ignored the evidence that was coming in, and sometimes deep sixed the evidence that was coming in, that it also led to infections and possibly deaths on people who used them, that it was a defective design.

So I think one thing that has clearly been shown about existing product liability law is that when it's taken seriously, it makes people, when they do introduce new designs, do it very, very carefully. If somebody were to show somehow in a real case that there was a reasonable product to introduce that would be beneficial, where the risks would be far exceeded by the benefits, if somebody were to show that in a particular case and to say, "We were told by our general counsel, no way, don't introduce it because of the product liability situation," and told what aspects of the product liability situation had led him to that advice, I would certainly be willing to, you know, sort of sit down and talk about it.

That's not the way this kind of product liability reform movement has come up. It has come up as an omnibus attack on product liability. I don't know what the problem is, if there is a problem. I don't see any way in which this particular statute deals with du Pont's problem. I do see how it deals with Philip Morris' problem.

Q. Perhaps in a more related area, my district is primarily agricultural and we produce a lot of butter, eggs, whole milk, red meat, that sort of thing. Is there anything in Pennsylvania's current law that would prevent someone who had a serious case of heart disease, coronary artery disease, from bringing suit based on the failure to warn, the hiding of information about cholesterol problems and that sort of thing?

A. Oh, I think there are probably five or six things that would be present in the law of Pennsylvania, as in any State--

Q. How does it differ from tobacco?

A. Okay, let me focus on just those cases. First of all, you would have to show that the farmers had an obligation, the individual farmer was in a differential situation. That the farmer knew more about the dangers of this product at some point in time than the average consumer did.

Q. What about Acme or A&P? They advertise the products.

A. You'd probably have to show that they knew more about the dangers than the average consumer. You would have to show that somebody's heart disease was caused principally by his drinking milk or eating red meet. I don't think you could get any doctor to testify.

Heart disease is a multi-factorial problem. All you could say is each individual thing the person ate may have slightly increased the risk. This is dramatically different than cigarettes. People who smoke cigarettes have 15 to 20 times, according to the latest study based on a population of over 2 million people sampled, I believe, by the American Cancer Society, 1 to 2 million people sampled, have something like 15 to 20 times the risk of getting lung cancer and some other diseases than people who don't smoke. So it's such a gigantic difference in degree, it's a difference in kind. Also, there's no fraud and conspiracy on the part of these farmers or even A&P to hide or deep six or lie about the dangers of their products.

Q. Not that you know it?

A. If it turned out there was one, you know, it would be a very different case. If your good constituents turned out that they were meeting in little board rooms with a Hill and Nolton, which was the company here that came up with this plan, and said, "Okay, from now on you guys, you just say beginning 1954 on that we don't think--" well, it happened in cigarettes -- "We don't think cigarettes caused any disease but we're researching it." That was their plan. They stuck to it for 35 years. "And you don't answer any questions. Leave it to the

Tobacco Institute or the Council for Tobacco Research to answer the questions because you guys may say the wrong things and get us all in trouble."

If it turns out your farmers did that, well, maybe they did something wrong, but of course they didn't do that.

Q. I appreciate your responses.

I'll just make an observation that in this State, in my view there's no injury for which a cause of action can't be created.

Thank you.

CHAIRMAN CALTAGIRONE: Dave.

REPRESENTATIVE HECKLER: Thank you, Mr. Chairman.

BY REPRESENTATIVE HECKLER: (Of Dr. Daynard)

Q. Professor, maybe I'm just not very knowledgeable about the state of litigation on tobacco products in this country. You made reference to one case that was not a case brought in Pennsylvania, as I recall. Somewhere on the east coast, wasn't it?

A. In New Jersey.

Q. New Jersey. Okay. All right. Has there been any other successful litigation by persons who have been injured by cigarettes against tobacco manufacturers?

A. There has been no other successful

litigation to date, and one of the reasons for it is that the cigarette manufacturers outspend the plaintiffs in these cases by a ratio of something like 100 to 1, so there's estimates, Time magazine, after the Cipollone case, this case that was successful, estimated that the defendants had spent $75 million or more defending the case. There was a memo from the law firm that R. J. Reynolds, sort of in-house or local law firm, when a bunch of cases were dropped in California, a memo that was leaked to me and some other people where the attorney, R. J. Reynolds' attorney, was crowing about that. They said the reason these cases were dropped, there was one technical reason. They said the second reason is, to paraphrase General Patton, that we win these cases not by spending all of RJR's money but by making the other son-of-a-bitch spend all of his.

So these cases are awful hard to bring, even in the existing state of the law. They are hard cases. They are not brought frivolously. You'll discover, if you know any plaintiff's lawyers, most plaintiff's lawyers don't want to get into them. They are too expensive to bring, too hard work, too many possible obstacles along the way, but there are something like 60 or 70 of them pending. And there are always cases that I think are likely to be brought by non-smokers who have developed

lung cancer from second-hand smoke, another danger the tobacco industry denies, and from people who have been burned by cigarettes that totally, unnecessarily, caused fires when they were dropped. In this case, we're talking about suits that would be brought by totally innocent third parties.

Q. Okay. Well, by the way, what was the technical reason that you mentioned that those suits were dropped in California?

A. It involved -- these were synergy cases involving both asbestos and tobacco, and California had passed a referendum that did something about dividing the responsibility, and I forget, there had been a recent California Supreme Court decision I think that basically said the asbestos companies would pick up the whole bill, and, you know, plaintiff's attorneys generally think if you can get the whole bill paid by the asbestos companies, and that's a well-trod path, why go after the tobacco companies, which is so hard?

Q. Well, the difficulty, I guess, that I'm having with this is that my perception, and I'd be happy for you to set me right if I'm wrong, is that once warnings began, once government-mandated warnings began to be displayed with cigarette advertising and on cigarette packs, that from that point forward you pretty

dramatically alter the posture of a plaintiff who, and I'm not a smoker and I don't like cigarettes, but that it's appropriate that we have dramatically altered the posture of a plaintiff who would say, you know, "I've been injured by these things." And so with the prospect of just the universe of potential plaintiffs out there gradually diminishing, I'm just wondering, why all the focus at this juncture on liability against cigarette companies?

A. Okay, well, a number of reasons. First of all, the current Surgeon General's report does an analysis that 99 percent of the deaths -- they were working from 1985 data -- 99 percent of the cigarette-caused deaths in 1985 were among smokers who had started to smoke before the warnings appeared on the packages. And remember, not only weren't there warnings appearing on the packages, but the tobacco companies were advertising, "More doctors smoke Camels," and "Doesn't cause injury to nose, throat, and accessory organs," and so forth, and they had the Council for Tobacco Research and the Tobacco Institute saying, "This is all hogwash. It's just statistics. Smoking really doesn't cause cancer," the position they still take.

You also have the evidence that smoking is highly addictive, that nicotine is highly addictive. So the great majority of the people who would be suing today

or in the next 15 years even would be people who started smoking and became addicted to cigarettes before the first warning ever appeared. And all of them, almost all of them, started smoking as children, and what you see even today is that the age of commencement is going earlier and earlier, so that today more than half of all smokers started smoking before the age of 15. You're talking about children who were starting, you're talking about deliberate advertising campaigns - cowboys, the most successful one - more than half of all kids who smoke smoke Marlboros. Not incidental. Not accidental. So you have campaigns directed at kids, who, after all, think their time horizon is next Saturday night, not what's going to happen when they're 60 and 70.

So the question is, are we going to apply any pressure at all to the tobacco companies, or are we going to let them off scot-free and say, you can do anything you want. You're not going to be sued. We, the legislature of Pennsylvania, are going to go guarantee that whatever the cause of action, whether it's fraud, deceit, misrepresentation, failure to warn, whatever, taking advantage of kids. We have a case in Massachusetts involving a tort for the negligent entrustment of a dangerous instrumentality to a minor. That one isn't listed in this list of four possible ways to sue a

manufacturer. If any of these are successful, what the companies will get out of this bill is to say, no, we're protected. We can do anything we want, and they will.

Q. Well, I thank you. I confess that I still am more persuaded by the testimony we heard from a colleague of yours from Cornell last week that, by all means, if you want to ban cigarettes, fine, but do it straight up. Don't muddy-up the product liability system with it. And when you're talking to me about are we going to put pressure on the tobacco industry at the expense that we're facing in this State with this system, I think that we're sort of taking the long way home.

Thank you.

A. If I could say one more thing in response to that. The way I see it is the muddying-up in response to the tobacco suits is being done by the tobacco industry. In other words, what they're doing is they're pushing this so-called tort reform here. They're financing it in very large measure, and they're doing it to protect themselves. That, in fact, the tort system was doing fine, it was doing fine including the tobacco suits. In fact, I have with me in the latest issue of the American Bar Association Journal. The defense lawyers who won the one case that's gone to trial in Pennsylvania, the Gurdin case, crow about it as one of the 10 great defense

verdicts of the past year. So it's not as if, you know, under whatever they claim about Pennsylvania law, a plaintiff can come in in a tobacco case and just win. They say, "Gee, we won. We went in here and we won," and that's great. So I don't think these cases are particularly muddying up the law. The law worked well enough for them in that case, but I think that their response is threatening to seriously muddy the water.

Q. Well, now, professor, now we're getting into something else that maybe deserves some pursuit here. You mentioned that the tobacco industry is principally or substantially, or whatever your words were, funding the effort in support of product liability reform in this State. How did you come to be here today?

A. I'm here, I was invited or asked to come by Lawyers for Consumer Rights. LCR. I just talked last week at the Association for Consumer Research, so I was getting my R's mixed up.

Q. And that is a Pennsylvania organization?

A. That is a Pennsylvania organization.

Q. Okay. And affiliated with the Pennsylvania trial lawyers, I believe?

MS. DEVANE: No.

REPRESENTATIVE HECKLER: No? Okay. Well, I'm sure we'll hear about that.

BY REPRESENTATIVE HECKLER: (Of Dr. Daynard)

Q. You suggest that this is -- that the efforts at lobbying here are being paid for by the tobacco industry. Do you have any information to support that, any evidence to support that?

A. Well, there were -- I have two types of evidence and one scientific experiment I would propose. In both New Jersey and California there were newspaper articles after the tort reforms there passed which were quite similar to this, the proposed one here, which basically described the huge sums that had been spent. In New Jersey I think it was something like $600,000 or $700,000 that had been spent. I think there was an article in the Philadelphia Inquirer about it, actually.

The experiment I would suggest is that if you would, if the majority of this committee is in favor of this bill, you might consider tacking on an additional provision saying in any case where somebody has been smoking cigarettes for more than 20 years, or make it 15, 15 would probably do the trick, and develops lung cancer, emphysema, throat cancer, peripheral vascular disease, or Buerger's disease, there are probably a few other diseases one could put on this, there is a presumption that these diseases were caused by the cigarette smoking. Just try adding that provision to everything else, you know, and

that such cases shall be permitted to proceed against the tobacco industry notwithstanding any other provisions of this bill. Try adding a provision like this to the bill and see what happens with the coalition that's supporting it. My guess is that they would, you know, throw the throttle 180 degrees in reverse and do everything they could to kill the bill.

Q. Well, that's an interesting guess, so that you have no information about Pennsylvania and the fact that we have hundreds of companies involved, of the major and small firms involved in this, your anecdotal conclusion is that it's the tobacco folks that are doing this?

A. Well, my direct evidence is only of two points. One, that I know in the various forms that the coalition developed, Philip Morris and Brown and Williamson were part of the coalition from the beginning, and the evidence that comes out of this proposed bill, which is that there are eight separate pieces here designed to, you know, all of which protect the tobacco industry and a couple of which protect only the tobacco industry, and all using code words that pick up from earlier cases elsewhere in the country that have been helpful in protecting the tobacco industry. So I think we sort of have archaeological evidence as well as the

historical evidence of the development of the coalition. But aside from that, I haven't watched any checks pass hands or anything like that.

Q. Well, thank you, professor, for your testimony and your tenacity.

CHAIRMAN CALTAGIRONE: Yes.

BY REPRESENTATIVE LEE: (Of Dr. Daynard)

Q. Yes, professor, I'd just like to ask you a couple questions. Is your -- would you like to see cigarettes outlawed altogether?

A. No.

Q. Okay, so you think people should have the basic right to choose whether to smoke cigarettes?

A. Well, more the point I think that addicted smokers should not be forced to cold turkey.

Q. In other words, but you'd stop people from taking up smoking?

A. Well, you have to understand who takes up smoking. More than half of the people taking up smoking today are under 15 years of age. More than 90 percent are under 18 years of age. Yes, I would like to stop children from taking up smoking, and I think in fact it's the policy of Pennsylvania embodied in statutes that children are not supposed to be taking up smoking.

Q. Okay, but--

A. If, in the hypothetical case, an adult were to choose something that I think almost never happens today, an adult were to say, what a good idea. I think I will, you know, light one of these things, start a fire 3 inches from my mouth, develop a nicotine addiction, and run a 1 in 4 chance of dying prematurely from this, yeah, sure, I think he or she should have the right to do that. Yes.

Q. Okay, let's take that hypothetical. I'm the hypothetical adult, I have never smoked a cigarette in my life, which I have not. I would never smoke it. But let's say I make that choice. I say, well, I think I'll take up smoking. I like it. It's the kind of a habit that keeps me busy, or whatever. Then 20 years down the road I develop lung cancer. Do you think I should be able to sue and recover damages from the cigarette company?

A. No, and I can't imagine an attorney in the United States who would ever take the case. Horrible case. Worst possible case. Obviously, for all the reasons you gave, nobody would take the case, and I think that's because they knew that a court would probably not let it go to a jury and a jury would take exactly three minutes to decide for the defendant in these circumstances.

Q. So the cases you're interested in are only

the cases that developed before there was a wide body of knowledge out there concerning the danger of cigarette smoking?

A. Well, not a wide body of knowledge out there. A wide body of knowledge among the people who take it up. Your hypothetical, maybe I read an additional fact in there, I assume you're talking about a well-read person who's familiar with the Surgeon General's reports, and so forth and so on, you're a 23-year-old who chooses to take it up.

I mean, the fact is, most children, when you ask them, there have been surveys done, in two surveys about the kids who start smoking, one is if you ask them, "Will you still be smoking five years from now?" their answer is no. They think this is going to be cool, it will be fine, it will make me look more grown up. I know there's something not good about this thing, so when I grow up, I'll stop. The evidence is the great majority of them fail to stop because they become hooked. That evidence comes from studies of high school seniors who smoke which showed that more than half of the high school seniors who smoke have already tried at least once, unsuccessfully, to quit.

So what we're talking about is the -- I mean, you're giving the polar case, the polar opposite of

what really happens most of the time. I'm concerned about what really happens most of the time, and I assure you, no lawyer would ever take a case that began to approach the hypothetical case you have. The real cases are the other ones.

Q. But I'm just trying to figure out which type of lawsuit you would like to see brought and won. In other words, how many years have I had to be smoking before the bans went on the cigarettes? I mean, what year period are you talking about between the time that the cigarette companies, the big, bad cigarette companies, knew that there might be something wrong with cigarettes that was causing problems and the time that that knowledge became generally aware to the public?

A. Okay, let's get some -- you want some time perspective here. Some of the evidence that came out of the Cipollone case, and this information would be not have been known had there not been this product liability lawsuit, it wasn't in the public domain before then, was that in 1946 a research scientist for Laurelar, which is now owned by Loews, was asked by their executives, "What about this stuff we've heard about, we've been getting reports about, that cigarettes might cause lung cancer?" And this fellow, who later became their head of research, checked out the literature, some of which was in French,

some was in German, some was in Spanish, and all of it was in medicalese. He checked out the literature and he said, "You know, there's enough evidence here now to support the presumption that smoking causes lung cancer." That's 1946. The warnings went on the packages in 1966. That's a 20-year period. Most of the people who are dying today from cigarette-caused diseases started smoking or became addicted during that 20-year period. That's going to be most of the cases you're talking about. Post '66 cases are harder. There are very few of them at this point. Most plaintiff's attorneys who do handle these cases won't touch them for, I think, the same feelings you and the previous gentleman who spoke articulated. But I think in those cases if you have somebody who started as a child, who didn't know about the addiction, who thought he or she could stop and who tried several times to stop, tried hypnotism, tried Nicorette gum, went to the doctors, couldn't stop or couldn't stop in time, I think those might be attractive cases, too. But let me tell you, most plaintiff's attorneys won't touch them.

Q. Now, between that period of time, 1946 and 1966, you know, before the warnings were actually on the label, on the packs, there was a period of time there where it was becoming well known to the public that cigarettes were a possible cause of lung cancer and other

dilatorious effects, wouldn't you say? In other words, today we don't have any warnings on cans of beer, but I think you would agree with me that to a great degree we don't want to allow suits against beer manufacturers because the general public, even though there's no warning on there, does know there's problems with the use of alcohol, that they're kind of running their own risk for using it.

A. Yeah, I think the risk of alcoholism has been known for as long as recorded history. I think it's certainly recorded in the Bible and probably in, you know, in lots of very old documents. That's hardly a new one. We're talking here about risks of lung cancer, coronary vascular disease, coronary heart disease, and a range of other things that risks that have only become known in a scientific way to scientists since the 1940's. Now, you talk about everybody knows about a possible risk. It's a big difference between knowing about a possible risk or an alleged risk and knowing about a risk.

In other words, if there's -- there is, in fact, a 1 in 4 chance or better than a 1 in 4 chance that if you smoke, you will die prematurely as a result of the smoking. And the premature death will, on average, occur something like 15 years before you would have died otherwise. That's the actual risk. The tobacco companies

are still advertising, "Alive with pleasure," and the Tobacco Institute still has people and tobacco lawyers still come out and say, "These are alleged risks. It's all statistical," and so forth.

Let's say you're the average consumer. You hear from the public health side, from one set of guys, that there is a 1 in 4 chance. From another side you hear, "This really doesn't exist at all." That means that what you do as a rational person is to discount the risk, because there might at worst be a 1 in 4 risk or there might be no risk at all. I, the tobacco companies, are right, and their scientists, and they have something called the Council for Tobacco Research and they will tell you that the Council for Tobacco Research is busy checking out this claim that smoking might cause lung cancer or some other disease. So if you hear this, you are going to discount the risks. And certainly before the first Surgeon General's report you just had articles that said so-and-so scientists said such-and-such, and almost every one of these articles would have a statement by the somebody from the Council for Tobacco Research or the Tobacco Institute saying, "Well, it's not a good study. It's just statistical. We're doing studies that say the contrary. We have other scientists who don't believe it."

So in fact people, the tobacco companies,

even though they had plenty of information as early as 1946 to know that there was at least a presumption that smoking caused lung cancer, they were engaged in a disinformation campaign from then on to try to fool people, a campaign that was very successful and has led substantially to the 390,000 deaths a year from their products.

Q. Well, I don't want to take up too much more of the committee's time here, but first of all, I'm going to go to the Dairy Council and tell them to stop advertising milk as "Fitness You Can Drink," because I understand -- I don't approve of what the tobacco industry has done as far as advertising and in trying to cover up the risks of their products, but I think I would agree with Representative Heckler in that the testimony we heard last week that if we wanted to deal with the problem of cigarette smoking and the problems caused by it, I think we should do it directly, legislatively, as opposed to kind of perverting the judicial process through numerous lawsuits. I don't believe it's the way we should go about attacking cigarette smoking.

Thank you.

CHAIRMAN CALTAGIRONE: Representative Bortner.

REPRESENTATIVE BORTNER: Thank you, Mr.

Chairman. Just briefly. Let me just begin with a comment.

I find it incredible that we're even debating the subject of the known risks of cigarette smoking. I mean, we must be the only people in the United States of America that can't see the difference between cigarettes and milk and eggs. And I guess I also find it amazing that anybody on this committee that's been around here for a year or two working on this issue can somehow deny the motives of the cigarette companies, tobacco companies, in supporting this legislation.

Having said that and indicating that I think that such a known fact that we've wasted a tremendous amount of time on it, I'd like to move on to where I think the serious parts of this legislation lie.

BY REPRESENTATIVE BORTNER: (Of Dr. Daynard)

Q. I see a big difference between the manufacturers of durable goods, people that make equipment and make machines, and the people that make consumable products, where the health effects as a result of that don't show up for long periods of time, and that we may be closing the door and denying those people access to the courts. That concerns me a great deal.

I guess my question to you is, is there anything about this legislation, and I mean this -- I

don't mean to be flip -- I mean seriously that is salvageable or is there any way that you can see to deal with the first instance that I referred to without denying those people access to injuries that don't show up for an extended period of time?

A. Well, to get back to the statute of repose, many of the jurisdictions that have passed statutes of repose, and the current one that I think is proposed in Congress limits itself to capital goods. You can clearly make a distinction between capital goods, machinery used in production, if you wish, and toxic substances. So I think one can make that distinction. It may well be that the right thing to do would be to say at some point the burden should shift from the manufacturer of a product used in a workplace to the employer for using a product beyond the period when it's reasonably safe to do so. So that perhaps the right move would be at some point, and I don't think it should be a fixed number of years because it obviously varies machine to machine, but I think, you know, you might say that if a machine has been used beyond its reasonably expectable lifespan or lifespan for which it appears to have been designed or something of that sort, then the manufacturer's free but the employer is no longer protected by workers' comp.

Q. I don't know a lot about the way companies

warrant their equipment, but what about if that would somehow track to the warranty on a piece of equipment or machine?

A. Well, of course, one problem is that warranties tend to be quite short and, you know, 3 years or 5 years is a gigantic warranty and if you're talking about machinery that's used in industry, the depreciation schedules are probably 15 or 20 years, and you probably have a lot of machinery that's sitting there not causing too much problem that's a lot older than that. So I think -- I don't think that particular one would work. You could try, but I don't think it would do it.

Q. Is there anything else about this that you might see that could be useful in dealing with the manufacturers of -- you used the word capital goods, I said durable goods -- that might available?

A. Well, I don't think this particular -- I mean, excuse me. Aside from the statute of repose, I don't see this particular, I guess--

Q. Let me put the question to you this way: There are some other issues out there that aren't in this bill which, frankly, I feel probably better address the concerns of the manufacturers.

A. That's just what I was going to say. Yeah.

Q. Sanctions for frivolous lawsuits,

limitations on punitive damages in certain cases, and I could name a few others. Are some of those things going to be more useful in the situation I referred to?

A. Yeah. I mean, let me agree and then at least raise a--

Q. That's your right as a witness.

A. --a question. The agreement is I'm not sure that this bill is really designed for, you know, somebody who designs a safe machine and then or what reasonably seemed to be a safe machine at the time and then later on it isn't. Maybe the state of the art defense here does that. My part on the state of the art defense is that it's an extreme version of the state of the art defense. All one needs to say in the state of the art defense is that a manufacturer should not be liable for failing to include something which, you know, that a reasonable, a reasonable manufacturer at that point could not have known, you know, was a possible alternative, something like that. That would be a much more moderate form of state of the art defense.

On frivolous lawsuits, I think frivolous lawsuits are a red herring. I mean, I don't think -- I mean, notice the structure of these lawsuits, the financial structure of these lawsuits. To bring a lawsuit, a product liability suit, they're all brought on

contingency fees, which means the lawyer's spending his own money. The last thing in the world that a lawyer will spend his money on is a frivolous lawsuit. In fact, lawyers won't bring a lot of very good lawsuits because they think that there are sufficient difficulties in recovering and not a sufficient likelihood of getting a large recovery to make it worthwhile.

I don't really think that frivolous lawsuits are a real problem. There are certainly going to be some lawsuits that lose, some lawsuits that in retrospect shouldn't have been brought. The same is true of prosecutions. I mean, sometimes a prosecutor comes in and you get through the case and it turns outs the witnesses, the prosecutor was relying on what turned out to be two-faced liars and everybody, you know, just wants the thing to be over fast. I mean, that can happen in civil cases, too. That's very different than frivolous lawsuits. I think that's a red herring.

Punitive damages were very rare and I think punitive damages have to be available for egregious cases like, I would suggest, tobacco cases. If there's some way to craft a punitive damage statute to reassure people that if they're behaving reasonably, are not committing any intentional torts, are not grossly misbehaving in some way that they're not going to be hit, then maybe that would be

a worthwhile thing to do. But I think it's much more in terms of reassurance and its symbolic value than in terms of actually preventing anything that's happening.

Q. Thank you. I didn't mean to get you off the topic of this bill, but I happen to think those are very much related to this topic as well.

REPRESENTATIVE BORTNER: Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Representative Veon.

REPRESENTATIVE VEON: Thank you, Mr. Chairman.

Just very quickly, I just wanted to echo the comments of Representative Bortner about the tobacco industry and suggest that we will have plenty of opportunity to debate that. Some of the amendments that you suggested about the tobacco industry some of us are already drafting and plan to offer amendments as this bill moves through the process, so there will be plenty of opportunity to address that and debate that.

BY REPRESENTATIVE VEON: (Of Dr. Daynard)

Q. Just very quickly, I think one of the successes of the proponents of this bill has been to portray this in a very brief, uncomplicated easy-to-understand way to the legislature, to the public, to the media, as saying the system is out of whack, people

somehow agree with that, and that this bill levels the playing field in a very brief, uncomplicated, easy-to-understand way to the legislature, the public, and the media, and could you tell us why that's not the case?

A. Well, maybe the shortest demonstration of this is in the preamble where the General Assembly finds, and so forth and so on, that it's important to establish limitations, "finds that the establishment of such limitations is consistent with public policy," and so forth, and goes on to say, "This act does not and is not intended to set forth all of the proof required or all of the defenses available in product liability actions, but only to codify, clarify and establish the limiting principles set forth herein."

In other words, this bill announces itself as a defendant's bill. It says what this bill, and they want to make sure that any court reading it understands, the common law is free to do its thing in terms of increasing defenses available to manufacturers in terms of further complicating the process of the plaintiff proving the case. You have to understand, though, court, you're free to do that. What you have to understand this bill is doing is this bill is sitting out limiting principles, limiting what the plaintiff can recover and ways in which the plaintiff can recover. The defendant, under this

bill, has a clear field. All of the arguments made against the Pennsylvania Supreme Court and so forth do not apply in terms of their ability to continue to develop further defenses and complications of proof. It only is here to limit what the plaintiffs can do in the interest of the defendants.

Q. Thank you.

REPRESENTATIVE VEON: Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Chief Counsel Andring.

MR. ANDRING: Yes.

BY MR. ANDRING: (Of Dr. Daynard)

Q. Are cigarettes licensed by the Federal government?

A. No.

Q. Okay. Are they subject to any sort of Federal government agency approval?

A. No.

Q. So it's strictly -- the only licensing that occurs is by State government?

A. Even State governments don't license cigarettes. What cigarette companies do have to do is they have to pay a tax on cigarettes, so they get the tax stamp. The only thing else -- well, they have to do two

other things. One other thing they have to do is they have to put this warning label on the side of the cigarettes and on the cigarette advertisements. These are labels which recent studies in the Journal of the American Medical Association and elsewhere show are generally not read or understood if read. And the second thing they have to do, and this is only recently, is submit anonymously a list of the things they add to the cigarettes. And I say anonymously. Nobody knows in any other product, any other consumer product, you buy some canned good, it says on the side of the can all of the things that are added by the manufacturer, what's in there. That's not true in the case of cigarettes. The only one they have to tell who it's added to is anonymously they have to toss in their list of ingredients to a long list that goes to the Secretary of Health and Human Services.

So there's basically no regulation. They are specifically exempted from the Consumer Product Safety Act, from the Hazardous Substances Act, from the Toxic Substance Control Act, from the Food, Drug and Cosmetic Act, and so forth.

Q. Thank you.

CHAIRMAN CALTAGIRONE: Scot.

REPRESENTATIVE CHADWICK: Thank you, Mr.

Chairman.

BY REPRESENTATIVE CHADWICK: (Of Dr. Daynard)

Q. Professor Daynard, I wasn't going to speak again and take up the committee's time, but something you said really struck me. Are you actively engaged in the practice of law in the area of products liability right now?

A. No, I'm not.

Q. The reason I ask that is because of your statement that you believe frivolous litigation is a red herring. In my practice, I saw much frivolous litigation every day, and I have to say that it wasn't primarily filed by plaintiff's attorneys. It was primarily filed by defense attorneys who were joining additional defendants. No one likes to sit alone at that defense table with the jury staring at them, and you like to have a lot of company when you're a defendant, and I saw defense attorneys do what we call up in our area shotgunning, enjoining additional defendants all over the place on a regular basis, and that costs the manufacturers of this State a lot of money in defense costs, and I think that's what we're after when we talk about frivolous litigation.

A. My guess is the trial bar is probably happy, the plaintiff's bar is probably happy to hear you say that. I think -- I was nodding my head vigorously because

I think there is a lot of frivolous things done by the defendants, and the example I gave of that was this memo where the R. J. Reynolds counsel pointed out that the way they killed these lawsuits, whatever their merits, is by just running the clock on plaintiff's lawyers with limited resources. The tobacco companies are willing to spend their last dollar in defending these suits.

In terms of impleading, the fact is in tobacco cases, companies have been most reluctant to do it. It has been urged for a long time that asbestos companies implead the cigarette companies, who are probably responsible in many of the cases, certainly the lung cancer cases, are more responsible statistically for the deaths than the asbestos companies. The reason they haven't done it is unclear, probably because the insurers who are actually paying this, one of the points is that the insurers who are actually paying for the defense also are defending the tobacco companies. Another reason is they are scared of the tobacco companies. They figure you bring in the tobacco companies, you have not only the plaintiff's lawyers now taking shots at us but you have the limitless funds from the tobacco companies.

So the fact is, there has been almost no impleading done here. So to the extent, and I think it's a very substantial extent, that this statute is basically

designed for the protection and relief of tobacco companies, they don't need it, even from impleading.

Q. Do you deny that there's a lot of frivolous litigation outside of the tobacco area?

A. I think frivolous litigation -- if, by frivolous litigation, you mean plaintiffs in contingency cases suing in cases where they know they're not going to recover--

Q. No, that's not what I mean.

A. Okay, well, then I guess the question is, what do you mean, and I'll then be able to answer.

Q. Exactly what I referred to before, which is joining additional defendants.

A. Impleading of additional defendants. The answer is, I don't know.

REPRESENTATIVE CHADWICK: Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Thank you very much for your testimony. We appreciate it.

DR. DAYNARD: Thank you.

CHAIRMAN CALTAGIRONE: We'll next hear from Julius Uehlein.

If you care to introduce the members at the table with you?

MR. UEHLEIN: I have with me, to my right,

Jerry Gerber, the attorney for the Pennsylvania AFL-CIO, and to my left, Bill George, who is the legislative representative of the United Steelworkers, and my assistant, Dave Wilderman.

Chairman Caltagirone, Chairman Cohen, who I note is not here due to a death in the family, members of the Judiciary and Labor Relations Committee, and committee staff. My name Julius Uehlein. I am president of the Pennsylvania AFL-CIO. It is a pleasure for me to be here today to discuss the interrelated issues of product liability, workplace safety, and product safety.

The 1.2 million members of the Pennsylvania AFL-CIO work in a cross-section of the State's economy. Almost one out of every four working man and women in the Commonwealth are members of our affiliated union. They work in the industrial, public, and construction sectors.

The laws which we will discuss today establish the framework for workplace safety. Whether working with an industrial press, jackhammer, toxic chemical, asbestos, or commercial lift, the liability rules and their relationship to compensation and regulatory schemes together determine safety and the adequacy of compensation to those unfortunate enough to be victims. I know that you have heard a great deal of testimony on these bills. If you remember nothing else

from my testimony, please remember that I was concerned with safety.

There is a tendency for those who first encounter this broad area to get wrapped up in a legalistic discussion about fairness.

The most obvious example is the proposed statute of repose. House Bill 941 proposes a 15-year limitation after which no legal action of any kind can be brought. Normally, this then turns into a debate about how long is long enough? Fifteen years on the simple fairness test is too short. The average airplane in service is 16.4 years, and so on.

Reasonable people can disagree about the exact number of years, but I believe they all miss the point. Taking this statute of repose as the example, any fixed period is a limitation not now found in the law. The direct effect of a fixed period is to artificially cut off individual rights, regardless of the merits of the claim. The first question must be, what is the justification for limiting individual rights?

But even more important is what impact will a statute of repose have on workplace safety? The current unlimited time requires the manufacturer of a product to maintain information on product defect for the life of the product. The manufacturer is in a unique position to know

the defect in product manufacture.

For example, a poorly hinged safety shield on a press would not become known to the purchaser of a single press until an accident occurs. On the other hand, the manufacturer, who produces a thousand shields, is likely to know after the third or fourth defect is brought to their attention. The manufacturer can then notify the purchaser of the defect and take appropriate steps to avoid any future injury. Product recall, improved labeling, and safety notices are an important ingredient in workplace safety.

If you adopt the 15-year statute of repose proposed in House Bill 941, you are, in effect, telling manufacturers they don't have to worry about the product at all after 15 years. Clearly, the useful and intended life of many machines is far beyond 15 years. And much of the equipment in our plants dates back to the '40's and the '50s.

I simply cannot understand why the legislature would, in effect, tell a manufacturer to stop keeping information on a machine which could maim or kill someone simply because a fixed period of time has passed. Does the legislature plan on also mandating that all plant equipment more than 15 years old be replaced or that the employer is then held directly liable?

The impact of this change is to diminish safety in the workplace.

Another serious impact of the statute of repose is to cut off any potential of compensation to victims of occupation diseases. Many industrial diseases - asbestos, black lung, or cancer - takes 15 or more years to evidence themselves. As was true with asbestos, black lung, and the industrial chemical BCME, medical test results were kept secret or falsified and workers were actively misled about the nature and danger of their workplace exposure.

In these and other situations of occupational disease, a statute of repose could effectively knock out any product liability claim. The proposal to cut off the rights of occupational disease victims by a statute of repose is particularly cruel because our compensation system does such a poor job in this area. Nationally, only 5 percent of the occupational disease victims receive workers' compensation. At the same time, there are an estimated 100,000 occupational disease deaths per year.

Artificial rules in the occupational disease area, such as a requirement that the injured party establish a greater prevalence of the disease in the industry than in the population at large, deny victims

needed aid. Admittedly, at stake in the products liability area are only a small number of claims, but they represent, as with asbestos, the most outrageous cases. The parallel implications for safety by tracking and warning potential occupational disease victims with long latency periods is of equal concern. Adopting a 15-year cut-off would end the obligation to notify people who were exposed of the potential dangers and the treatment suggested.

At stake in this cloud of laws governing our basic relationships are the fundamental issues of safety and the related standards of care which govern our daily life and quality of life for injured and disabled victims.

I'd like to come at this point from one other angle to make it abundantly clear that the real issue here is safety. I am attaching to my statement a document from Westinghouse Corporation, one of Pennsylvania's leading employers, entitled "Corporate Statement Of Policy On How To Protect Your Company From Product Liability Losses." The first paragraph of this policy on limiting product liability losses states, and I quote, "Objectives: Action shall be taken to identify and minimize potential product hazards during all phases of the product's life including development, design, manufacture, marketing, installation, service, use and

disposal. All reasonable measures shall be taken to minimize the risk of injury to persons in and damage to property and the environment giving full regard to applicable Federal, State, local, and industry safety standards. Regulatory requirements, technology, state-of-the-art and conventional standards of care and use required by society," end of quote.

Westinghouse should be applauded for this policy because it places the entire emphasis where it should be - on manufacturing safe products. The best way to lower costs is to produce safe products.

The alternative, as proposed in House Bill 941, is to spend your resources trying to change the rules so that injured people cannot recover, even if the product is unsafe. Changing the rules to limit the rights of victims is a wrong-headed approach. Westinghouse has the right approach - design and manufacture products safely.

I encourage you to remember that every single product liability case has one thing in common - a victim. No case is ever brought without a victim. The Westinghouse approach cuts to the core of liability costs by eliminating the victim. Beyond that, the Westinghouse policy is sound public policy for our Commonwealth. Safety first is not only good economics, it says we place the highest value on human life.

Finally, on this issue I would like to quote from a report by the Conference Board, a business information service whose purpose is to assist senior executives and other leaders in arriving at sound decisions. This is an exclusive business group, and they issued a definite report entitled, "Product Liability: The Corporate Response." The Conference Board's major finding was a minor impact from product liability laws. In fact, they quote one manager who said, "There may be less here than meets the eye."

Specifically, the Conference Board report states in their 1986 report, and I quote,

"Major findings: Minor Impact.

"The most striking finding is that the impact of the liability issue seems far more related to rhetoric than to reality. Given all the media coverage and heated accusations, the so-called twin crises in product liability and insurance availability have left a relatively minor dent on the economics and organization of individual large firms, or on big business as a whole. In the words of one manager, `There may be less here than meets the eye.'

"Product liability: For the major corporations surveyed, the pressure of product liability have hardly affected larger economic issues, such as

revenues, marketing share, or employee retention. Liability lawsuits, which are indeed numerous, are overwhelmingly settled out of court, and usually for sums that are considered modest by corporate standards. As a management function, product liability remains a part-time responsibility in most of the responding firms. Where product liability has had a notable impact - where it has most significantly affected management decisionmaking - 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," end of quote.

Let me repeat that last part. "Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit because of our product liability laws."

If labor, business, safety experts and others agree that product liability laws are the equalizing force on safety and believe retreat from this policy is a major mistake.

Let me just acknowledge a recent report paid for by the Products Liability Task Force. This is the most misleading report I have seen in my 23 years in Harrisburg. The authors announce their bias, "rising costs" and "adverse impact," and the legislative advocacy

purpose in the cover letter to a handful of CEO's who were asked a total of 16 questions in the self-serving survey.

The survey, which asks only about their opinion on the product liability law, fails to distinguish between Pennsylvania's product liability law and all product liability laws. Finally, and most importantly, the report fails to ask a single question on the benefit of product liability laws.

This is pure business advocacy propaganda and not research. I have written to the Dean of the Wharton School to question the exploitation of that fine institution's name by these Ph.D.'s for hire.

To put this issue in better perspective, let me share with you a snapshot of our Commonwealth's health and safety record. In Pennsylvania during the past 10 years, on the average, 270 Pennsylvanians are killed by on-the-job dramatic injuries each year. And in the Times up in Scranton, they didn't use the word "kill," they said were murdered by on-the-job traumatic injuries each year.

A staggering 130,00 lost time injuries are recorded to the Workers' Compensation Bureau each year. Approximately half of those injured are seriously injured, many with lifetime earnings impaired and suffering permanent loss and disfigurement.

An estimated 3,000 to 5,000, or over 10

people per day, in Pennsylvania die each year from workplace exposure to toxic agents.

An estimated 20,000 to 30,000 new occupational diseases from asbestos and skin diseases occur annually.

Each death, each injury, causes much unnecessary human suffering to a father, mother, brother or sister, family members who share the personal tragedy.

We have the knowledge and technology to do work safely. That must be our priority. Retreat from safety, that is from the standard of care or from the quality of life for injured victims, is only justified to satisfy other even more compelling interests.

Business ideology to limit the rights of individuals is not sufficient justification to lessen our standard for safety. Ideology, to me, is when the motivation for a change in our basic law has more to do with philosophy than practical impact. The predictable, practical effect of changing our product liability law as proposed by House Bill 941 is to limit the rights of Pennsylvania citizens who are injured.

On the other hand, the benefit of changing Pennsylvania's rules on recovery for injury will have a marginal to no economic gain to Pennsylvania manufacturers. Product liability costs for Pennsylvania

manufacturers are based exclusively on the risk of exposure where the product is sold. Simply put, manufacturers' costs are based on the laws of the 50 States and international law. Changing the law in Pennsylvania would only have marginal cost savings to Pennsylvania employers and would likewise have a marginal impact for all manufacturers in the world.

Our strong defense of the product liability law, as it applies to the workplace, is largely shaped by the failure of the other parts of the legal system to deal adequately with the problem of workplace safety.

Nationally, each year, over 5 1/2 million workers are injured or killed while at work. In Pennsylvania, over 300,000 workers are injured or killed while at work. In addition, it is estimated that each year at least 100,000 workers, as I mentioned, nationally die as a result of diseases contracted through occupational exposure to toxic substances such as asbestos. In Pennsylvania, close to 5,000 workers die from exposure to toxic substances, and hundreds of thousands, if not millions, of additional workers are at serious risk by reason of the exposure to such substances each year in the course of their employment.

In 1970, Congress enacted the Occupational Safety and Health Act to deal with this situation. The

theory of that act is that through regulations promulgated and enforced by the Secretary of Labor, employers would be required to eliminate unsafe conditions and practices and employees would thereby be assured, so far as possible, safe and healthy working conditions.

The theory has never been put into practice, especially during the past eight years. The Department of Labor has done preciously little to require employers to meet the goals of the Occupational Safety and Health Act, and the department has done even less to enforce those rules that have be promulgated. And the drastic cuts that have been made in the budget for the Occupational Safety and Health Administration make it difficult to foresee the day in which the department will have the capacity to adequately enforce the law.

Enforcement of the Occupational Safety and Health Act has been scaled back to the point of almost complete agency paralysis. With 850 inspectors nationwide for 4 million worksites, OSHA has become more of a roadblock than a gateway to protection for the nation's working men and women. In addition, Pennsylvania is one of 25 States which does not provide health and safety protection for our public workers.

The short of it is that Congress' attempts to prevent occupational injuries, diseases, and deaths

through a regulatory system which would outlaw unsafe practices has essentially failed. Just as a regulatory scheme to monitor safety has failed, the very nature of our standard of care is impacted by proposed restrictions on the product liability law. Without a regulatory scheme in a free enterprise economy, the duty of care is established by the potential for being sued. The calculation of risk prescribes the nature of care. Narrowly restricted rights by nature lessen the standard of care.

Unfortunately, corporate managers regularly complete cost benefit analysis on various production and product improvements designed for safety. Either in making the cost of unsafe conditions more easily calculable or by reducing the cost, you alter the standard of care. In essence, you legalize the Pinto design, the Dalkon Shield, Drano cleaner, and similar management decisions. These landmark cases serve as deterrents to unsafe management decisions. They serve as a tool for responsible managers to argue in the boardroom to test, protect, and warn. Lessening the chance of being sued, making it more easy to calculate the cost, or insulating the product from liability, undermines the ability of responsible corporate leadership to advocate for safety.

Barring other mechanisms to insure safety,

such as regulation or criminal prosecution, the threat of being sued is the single most important contributor to safety in our society. Actions which alter the calculations of costs can be directly translated into harm for users and innocent victims. The legal system, putting tort law to one side for the moment, has been no more successful in its attempt to provide compensation for workers who are the victims of occupational injuries or diseases.

In theory, workers' compensation laws were enacted to assure that injured workers and the survivors of deceased workers would receive adequate recompense, but the reality is that the benefit levels under these laws have failed to keep pace with the cost of living. Those benefit levels are today grossly inadequate to support an injured worker and his or her family. Similarly, the coverage provisions of our workers' compensation law have not been updated in light of current knowledge about the relationship between occupational exposure to toxic substances and diseases with long latency periods.

For example, the workers' compensation law requires occupational disease victims to not only establish their own illness but the special prevalence of this occupational disease within the industry. This industry test is impossible to establish, given the

limited amount of testing and knowledge. As a result, many workers suffering from occupational diseases are not even eligible for any workers' compensation benefits at all.

It is against this background that we approach the subject of product liability and the workplace. Because, as just explained, the legal system has failed to assure workplace safety or to provide adequate compensation to injured workers, it has become necessary for employees to turn to the product liability system as a means of promoting safety and securing adequate compensation for workplace injuries. Through so-called third-party suits, many workers have sued the manufacturers of machines, toxic chemicals, or other products that cause occupational injuries and diseases. Indeed, according to a study by the Insurance Service Office, 50 percent of the compensation paid in product liability action goes to workers who have brought such third-party actions. Through these suits, workers have found a means of securing a fairer measure of compensation for their injuries and of providing a financial incentive to encourage the manufacturer of safer products.

This increased reliance, or more precisely dependence, of workers on the product liability system is eloquent testimony to the failure of the regulatory

workers' compensation and criminal law system. Workers have turned to tort law as a means of protection in spite of the fact that tort litigation is slow, costly, and unpredictable in terms of results. The fact of the matter is, however, that there is not presently any workable alternative to the tort system for assuring workplace safety and for providing adequate compensation to injured workers. So long as that is true, any legislation that would restrict the ability of injured persons to recover damages for injuries caused by unsafe products is indefensible.

I have spent a lot of time on House Bill 941 and I would like to turn briefly to the area where we can and must make changes to correct public policy and improve workplace safety. I'd like to come back before the committee and discuss these issues more completely.

First, the Pennsylvania Supreme Court decision which gives employers the right to intentionally harm workers with civil immunity must be reversed by legislative action. Public policy in a civilized society cannot tolerate a standard where intentional harm goes unpunished both civilly and criminally. At issue are a distinct minority, or should I say fringe employers, who compete by concealing known hazards from their employees, actively misleading workers about safety hazards and there

is death or workplace injury. House Bills 1012 and 1013 address this outrageous pronouncement of the Supreme Court. Additionally, the worker and consumer products safety package attempts to create a safer workplace.

I would like to emphasize the need to adopt the High Risk Occupational Disease and Notification Act. Similar legislation has been sought for years at the national level. We will continue to support Federal action, but immediate State action is necessary and with the General Assembly's power to adopt.

Thousands of workers are dying each year from occupational cancer and other diseases that could have been prevented. I believe that workers have the right to know whether they are at risk of life-threatening illnesses. This bill grants them that basic civil right. If workers are informed that they have been exposed to occupational hazards, they can get medical monitoring and counseling before the disease reaches a critical, untreatable stage. That is what this bill is all about - getting information to workers in a timely fashion in order to prevent diseases. High risk occupation will be designated on the basis of scientific information and the workers informed.

Other key elements of the worker and consumer products safety package also aim at the

disclosure of known hazards. Legislation prohibiting the concealment of public hazards will void, as a matter of State policy, agreements to conceal hazardous information where bodily harm to others is likely to occur, commonly known as gag orders. These agreements work counter to public policy and undermine safety.

The Product Identification and Record Retention Act will allow us to trace the trail of the manufacturer's concern with safe products. Currently, victim compensation is not available in cases where the manufacturer destroys key records regarding product safety. These records must be retained to establish the minimum of safety accountability.

Our emphasis must be on prevention. The only sound policy is the one that places the highest value on protecting life. Schemes to limit costs by curtailing rights are misguided and wrong-headed.

I deeply appreciate the opportunity to appear before you, and I would like Bill from the Steelworkers has a short statement to make.

MR. GEORGE: Just briefly, if I may, Julius, distinguished members of the General Assembly. I pass out this article as it appears this morning in the Philadelphia Inquirer in reference to some of the remarks that Julius made as dealing with the USX plant at

Fairless. And here we sit this morning talking, at least from the eyes of labor, passing laws that create, at least in our eyes, a greater unsafe condition, while in Pennsylvania we now, in this great State of ours, have the greatest find that's ever been put forward by OSHA, penalties against a corporation that for years has known about violations concerning the safety of the employees. And I think it's kind of a sad state that we're here this morning and yet this same distinguished panel that I sit with, and like many of you members, have failed to address that particular problem, and we think the easy way out is to create tort reform. I think it's a shame. It's a State disgrace to even be here this morning in knowing that we do not have any standards statewide that forces an employer to do something about citations that have been forwarded by the Federal government.

Turn to that last paragraph in reference to the tort part of it. OSHA also cited the Fairless Works for 91 alleged violations of occupational noise standards, 135 deficiencies in protective guards from machineries and transmission equipment, meaning that they failed to even protect the guards and the transmissions on which employees work on. Crane walkways.

I'd just like to close my remarks by saying that we also sit in a State that last year felt that the

business community was deserving on their efforts by giving them immunity and passed a CEO law two years ago exempting CEOs and directors and gave them immunity in reference to handling the fiduciary problems of their corporations, and I just wonder where the sense of psychology in reference to legislation is coming from this great chamber of ours.

Somebody mentioned that no injury in Pennsylvania -- there isn't an injury that you can't sue for. I'd like to mention that in this case, these people are covered by workers' compensation laws and are prohibited from suing.

Secondly, the thing that bothers me more about the act is that most premiums that are set on employers are based on a national basis, and just what great success do you plan on providing on premium reductions for employers of this particular law when in fact most corporations that we have are on a national basis? That's all.

MR. UEHLEIN: Thank you, Bill.

I would like Attorney Gerber to make a short statement, and then we'll answer any questions that you might have.

MR. GERBER: I'd like to address something which Julius touched on, and the last speaker as well.

There has been a promise made to supporters of this bill that the manufacturers in Pennsylvania are going to see their insurance costs go down when this bill is passed. And the point that Julius has made to you is that is a false promise. A manufacturer in Pennsylvania manufactures products which are marketed in 50 States, which are marketed in Europe, South America, and Asia. His insurance rates are fixed by the laws of all of those communities. Simply lowering his liability in one State will not lower his insurance costs, unless you are able to lower his liability in all of the States and all of the nations in which the products are sold.

On the other side of the coin, by reducing liability in Pennsylvania, you will hurt consumers and workers. You will hurt 100 percent of Pennsylvania consumers and workers. They not only won't be able to sue a Pennsylvania manufacturer and collect for damages, but you are limiting their ability to collect from a manufacturer in Texas or in Tokyo or in Dresden. You are giving a windfall to these manufacturers who have no connection with Pennsylvania. You are costing the Pennsylvania consumers and workers their right to recover and are giving no real, meaningful, corresponding benefit to the Pennsylvania manufacturers whose rates really will never go down.

Julius has touched on the 15-year period of repose, and remember that most of these products are designed and intended to go beyond the 15 years. An airplane crashed in Iowa. There is strong suspicion that there was a manufacturing defect in that airplane. That plane was manufactured over 15 years ago. If you pass your law, the 120 people who were killed as a result of it would have no cause of action in Pennsylvania, but if they lived in another State, they would be able to collect full damages. This is what you're doing in this law.

You're introducing into this law, for really with only one exception, an assumption of risk doctrine and you're saying that this common law doctrine which does apply in some cases, in which the legislature has applied only in cases of downhill skiing, will be a product liability standard and what you are saying is this: The more outrageously unsafe a product is, the more notorious it is, the more press coverage you have, the more people know about it, then they're assuming the risk by using it.

When Ford made the Pinto, after the first one and the second one and the third one exploded at low speed impact and it made the headlines, then, by putting this in law, you said to Ford, the next time you're sued, you have a defense. All those thousands of Pennsylvanians who own that car and who didn't immediately go out and

sell it assumed the risk by continuing to drive it. Who are they going to sell it to if everybody knows it's unsafe? What are you going to do? You are rewarding unsafe products and the manufacturers of unsafe products.

The manufacturers of products now have the technological ability to tailor safety to cost, and they can work it out almost to the exact dollar. We had a situation with automobiles where during the 1970's there was a regulation which required a bumper to withstand a 10-mile-an-hour crash. That's not much, 10 miles an hour, but you'd be surprised how many hundreds of thousands of accidents occur at that speed. Along came the new administration in the early 1980's and said, okay, now lower it to a 5-mile test. The manufacturers of automobiles in America saved a couple of bucks on each car by making a less effective bumper. What happened to American consumers? Every one of those crashes between 5 miles and 10 miles resulted in serious damage, thousands of dollars of additional costs to the consumers because we relaxed a safety standard and immediately the manufacturers responded by lowering the safety level. As soon as you give them an out, unfortunately, many manufacturers in this country will respond by cutting the safety factors. And this bill is a signal to everyone out there, it's now safer to be unsafe.

There was a question before about du Pont's ability to market. I suggest to you that there is nothing in 941 that will tell du Pont now it's okay to go market, because du Pont doesn't sell in Pennsylvania alone. Du Pont is a responsible company, and as Julius read to you, responsible manufacturers realize the best way to reduce product liability costs, the best way to reduce product liability insurance premiums, is to produce safe products which don't hurt people.

Thank you.

MR. UEHLEIN: We will now answer any questions that you may have.

CHAIRMAN CALTAGIRONE: Okay. Members?

Dave.

BY REPRESENTATIVE HECKLER: (Of Mr. Uehlein)

Q. I have just a few questions and I think they mostly center on this mixing the concept of product liability into, and actually I guess we're really not talking too much, as it turns out, about workplace safety today.

A couple of specific questions. The Conference Board whose organization's report was quoted in your testimony, is that a Pennsylvania organization or a national organization?

A. National.

Q. Okay. I'm a little bit confused about the numbers which you cite in terms of workplace injuries. At page 11 of your prepared testimony you indicate that 130,000 lost-time injuries were reported to workers' compensation each year, and I assume that was for the past decade, an average for the past decade. Then a few pages on, page 13--

A. Incidentally, before you go to the next page, Dave has just informed me that's a typographical error. That 300,000 should also be 130,000.

Q. Oh.

A. Sorry about that.

Q. You anticipated my concern. I was wondering what the lapse was there.

Well, that gets me to the question that I have based on just some of the limited experience I have in terms of bringing lawsuits. Do you have any breakdown as to how many of those 130,000 cases involved injuries which were, at least somebody alleges, were cause by a defective product? You know, a piece of machinery that injured a worker or whatever?

A. Dave will answer that.

MR. WILDERMAN: The number 130,000 reports to the Workers' Compensation Bureau.

REPRESENTATIVE HECKLER: Right.

MR. WILDERMAN: I contacted the Workers' Compensation Bureau and talked to a guy named Harry Stecker, who's their chief, to ask that exact question, because it would be very interesting. He said that the information that they collect would not code that and it would be impossible to assign an exact or even a regional number to the percentage that they're related to product injuries.

REPRESENTATIVE HECKLER: Okay. I just wondered because, for instance, I'm involved in a case now which involved a simple slip and fall. The guy has not been able to work at his job since. It was a very serious injury in terms of the worker, but, you know, it's the kind of thing that wasn't unique, doesn't have anything to do with product liability, had to do with somebody who didn't properly maintain their steps in an icy condition, and I just wondered, it kind of lapses over when I look at the Inquirer article which you circulated today. I just skimmed through it, but an awful lot of the conditions they are talking about appear to be matters that were in the control of the employer that undoubtedly should have been maintained, I mean, are a serious problem in terms of workplace safety, but don't -- I don't know whether anything we would have done if we had been considering this product liability legislation 10 years ago and had

passed it, whether that would have had any impact upon whether this situation would be prevailing today with USX, and I suppose it will get at my underlying question of your weaving the two concepts together and saying that the product liability system is a way that we get at workplace safety. It doesn't seem to be the case.

MR. GERBER: I'd like to call your attention to the statistics which President Uehlein quoted. Indeed, and I'm quoting here, "Indeed, according to a study by the Insurance Services Office, 50 percent of the compensation paid in product liability actions goes to workers who have brought such third-party actions."

So while we can't give you numbers on how many of the 130,000 brought these third-party actions, certainly in the product liability arena this is a very, very significant part of all of the cases.

Q. I recall that statistic and I appreciate that end of it, but the problem is that could be 50 percent of 80 cases or it could be 50 percent of 8,000 cases. We just don't know how that relates to the 100,000, and frankly, if I had to guess, you know, I'm just working on my assumptions, the bulk of workplace injuries, the vast bulk, would not be product liability related, they're related to either situations which may involve an unavoidable injury in a slip and fall, things

that do happen whether we're at home or walking down the street or whatever, and then situations which were foreseeable and the employer, working together with the employees or the unions, should be able to avoid by prudent forethought. And, you know, my problem with the thrust of this testimony is trying to weave in the product liability arena into workplace safety. Now, I wouldn't doubt that there may be some relationship in a limited number of cases, but I would like to have more statistics to see how statistically that number relates to the 130,000.

MR. UEHLEIN: Yesterday's newspaper, you might have read it, there was an article there about the difference between Sweden and the United States, and it said there were 10,000 deaths -- I believe it was deaths -- or injuries in this country, and how they come to this conclusion I don't know, but I happen to believe them, they said those same deaths or injuries would have been less than 500 in Sweden. Ten thousand here, 500 there. And I've spent some time there and the things that that government does to protect their workers is phenomenal, and I couldn't believe what I saw. And that's what we're talking about. And if you give a company the right to remove safety equipment after 15 years, you're in effect saying after 15 years they have the right to murder us,

and there's enough of us dying already, and we're crying out for workplace safety. That's my whole interest.

REPRESENTATIVE HECKLER: And I have no quarrel with you on that, and my problem is sort of the weaving in of 941 to that issue. The issue of what responsibilities the employer and government, as a regulator of the employer, have to the worker is, to me, a separate issue, one I don't know as much as I'd like to about.

Let me just raise one other point that I don't want to be overlooked, and counsel may want to respond to this. One of the thrusts I have always seen to this legislation and the need for this legislation in Pennsylvania is not just our manufacturers. I mean, as a practical matter, our manufacturing sector is dramatically shrinking. An awful lot of what we can do in this State in terms of regulating lawsuits it seems to me has to do with the suppliers and the retailers who get dragged, as Representative Chadwick has pointed out earlier, frequently get dragged into suits by defense as well as plaintiff's claims that truly have no reasonable responsibility for whatever the injury was but end up facing very, very substantial defense costs. And basically, that means that all of them are paying insurance bills because of the effect of this in the legal

community as a whole.

Certainly, this legislation would benefit Pennsylvania distributors and manufacturers where these kinds of suits would otherwise have been brought, wouldn't they?

MR. GERBER: But at what cost? If you go into a department store and buy a product, do you know the manufacturer? Do you know where he's located? Do you know what he is or what -- your contact is with the retailer, the distributor. And it's a shame that it has to happen, but what generally happens is that's the guy you go after, and unfortunately, he then goes up the chain of distribution until we get to the bad man way over there in Yokohama who made a defective product. It's a shame that it has to happen that way, but if you say that the man that I dealt with when I went into the store is totally immune, you're cutting off the injured consumer's access to the real culprit. It just isn't going to happen that you'll go up this chain and find the guilty guy. If you can come up with a better system, I think we'll support it, but I just think in the real world that's the way it happens.

REPRESENTATIVE HECKLER: I'm a little confused. It's my understanding of the legislation, first of all, that the provisions protecting the local

distributor are abrogated where you can't get to the manufacturer, but I would also, again, I don't do product liability work on either end of the spectrum, but it was certainly my impression that if I'm a product liability plaintiff's lawyer, I'm going to look, even under the present state of the law, I'm not just going to say, hey, you know, we got this toaster, it started a fire and we don't care who manufactured it, we don't care whether the toaster was, in fact, defective or not, we bought it down at, you know, Joe's Discount Store so we're suing Joe and let him go find out who manufactured it. I mean, we're going to be a lot further along in terms of the knowledge of the product and the knowledge that they did something wrong and that it wasn't a question of my 4-year-old, you know, jamming 14 pieces of bread in the thing or jamming a newspaper in the thing that caused the fire before we get to filing a lawsuit.

MR. GERBER: Well, I'm not a products liability plaintiff's lawyer. I just know that we're dealing in a field of law where you have two years from the date of injury to bring a suit and if somebody comes to you after 18 or 19 months and says, I bought this toaster at Hess's Department Store and it's bad, how much research can you do in the three or four months to get going? And generally what happens in these cases, you sue

the department store, they get out very quickly after saying, it's not me, it's the next guy up the chain. There is involvement, but by saying that you can't sue them in the first instance unless you have already gone up the whole chain, I think that a lot of suits will be blocked. And again, if there's another way, we're not going to oppose it, but we just don't think, as a practical matter, that there is another way. It's one of the unfortunate problems of doing business in a world market where on the shelves of the average department store you're probably marketing products from every continent, every nation in the world, and the consumer has no connection with all these sources. You're the only link in the chain, and unfortunately you get dragged into lawsuits.

REPRESENTATIVE HECKLER: Thank you.

MR. UEHLEIN: Mr. Chairman, Representative Heckler, you said you were confused. I was a little more confused than you were. If you turn to page 17 and change House Bill 941 to 916, that would be a little better.

REPRESENTATIVE HECKLER: Oh. Yes. Thank you.

CHAIRMAN CALTAGIRONE: Scot.

REPRESENTATIVE CHADWICK: Thank you, Mr. Chairman.

BY REPRESENTATIVE CHADWICK: (Of Mr. Uehlein)

Q. Mr. Uehlein, you're testifying primarily on behalf of people who have been injured or made ill by dangerous conditions in the workplace, and I applaud you for that. Last week at the hearing we heard from some of those people, people who have been made ill or the family members of people who have been made ill or injured at the workplace. And their stories were very moving, and one of the things that really struck me, and I mentioned this last week, was that a couple of those victims indicated that one of the reasons that they had it so tough, that they were undercompensated, was that the lawyers got so much of the money. Mr. Matusow, who testified for the Trial Lawyers Association, indicated that he charges one-third as a plaintiff's attorney, plus costs. Unfortunately, it's becomming more and more commonplace for plaintiff's attorneys to charge as high as 40 percent, and that is taking an awful lot of money out of the pockets of the people who have been injured in these suits, and I wonder what your position would be on an amendment to 916 capping plaintiff's fees at one-third plus costs?

A. One-third?

Q. One-third plus costs.

A. I'm not capable of answering that, except to

say to you that we have had, in the past, proposals limiting the costs and they've never got anyplace. And incidentally, our proposals were, I think, less than one-third. I think they were 20 or 25 percent at the time. But that's a legal question. I know that it's hard to cap because you have two different cases, one's a very complicated case, another one is a simple case, yet the cap would be the same, and I'm afraid they have to go by the hours that they have to put in. In many of our unions, we have agreements with law firms that handle our cases and they handle it free of charge for the employee because we pay them a per capita like a penny per member per month. We do those sort of things so that there's no cost involved.

But I agree with you. There are some attorneys that so-call rape people. But where there's a good union there, they stop that. So the answer to that, join the union.

Q. To the best of my knowledge, Mr. Uehlein, there's no union for legislators.

A. I got the cards on me.

Q. We'll have to have an organizing campaign.

But I guess what I'd like to know, and perhaps you're just not ready to do it today, is whether or not the AFL-CIO would support legislation to cap

attorneys fees in this State.

A. I'll have to ask my attorney here.

MR. GERBER: You won't have a problem with me. As a member of the bar, I am somewhat ashamed of many cases in which that occurs. Unfortunately, the other side of the coin is, are you prepared to cap defense costs?

REPRESENTATIVE CHADWICK: Granted.

MR. GERBER: Because you heard someone talk about the tobacco industry. If we start to get to a point where by capping counsel fees we deny these people access to competent counsel and we say the only ones who are willing to work for these capped fees are incompetent counsel or are less competent counsel, then I'm not sure we're helping the system. In many countries of the world we don't see this proliferation of litigation because defendants go in in subtle cases without costly litigation, without costly discovery, without cases that go on for years and year and years. If we could solve that problem, I would be in favor of some very, very low caps.

REPRESENTATIVE CHADWICK: Thank you.

Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Representative McNally.

REPRESENTATIVE McNALLY: Yes.

Mr. Uehlein, and I thought Mr. Chadwick's suggestion about capping attorney's fees is an interesting one and maybe we ought to cap defense attorneys' fees, too, since all the defense attorneys and lawyers for insurance companies that I've ever known always made more money than I did as a plaintiffs lawyer, and they get paid -- the more hours they put in, the more money they get paid and the higher the insurance costs are, and that gets passed on to consumers. So we could probably cut down on insurance costs pretty drastically by putting a cap on the high defense attorneys' fees.

But the one thing that I would like you to produce at a later date, if you could, is about these 3 workers who were killed at the USX plant and the 17 who have died since 1972. I'd really like to find out what their families received for their deaths, and I'd also like to find out if they were able to file a suit for their injuries. I suspect that many of them, if not all of them, were precluded from suing. And the reason it's of interest to me is that, you know, we had a study, a so-called scientific survey, presented to us last week in which chief executive officers, as you might know, in fact you referred to the study, of Pennsylvania companies said that the products liability system is hurting Pennsylvania companies. Well, that came to a grand total of 92 chief

executive officers in the State of Pennsylvania, 92 of the wealthiest, richest men in the State of Pennsylvania, 92 members of one of the most exclusive special interest groups in the State, and I'd certainly like to compare the interests of those 92 with the interests of these 17 families over the last 17 years who have lost one of their loved ones. And at least speaking for myself, I think that those 17 families probably represent the interests of Pennsylvania more than the 92 in that study.

REPRESENTATIVE LEE: Mr. Chairman?

CHAIRMAN CALTAGIRONE: Yes.

REPRESENTATIVE LEE: I just have one real quick question here.

BY REPRESENTATIVE LEE: (Of Mr. Uehlein)

Q. I was struck by what Representative Chadwick said and also a couple of things you said concerning the problems with the workers' compensation system, and I think what's really happening sometimes in the workplace is because employees do not feel they are being adequately compensated by the workers' compensation system, they will look for a third party to sue, not because that third party might be that culpable, just because they're out there and you can at least sue them and you might be able to get a sympathetic jury to compensate you fully for your injuries. And based on that and the fact that there is a

lot more lawyers' fees involved and costs involved in products liability with litigation than in a no-fault system like the workmen's compensation system, I'm just curious about the AFL's feelings about some type of a trade-off where you have like an across-the-board increase in workmen's compensation rates, workers' compensation for various injuries, combined with some limits on product liability suits against those third parties who are really not directly involved with the injury but they are just out there and they are available to be sued.

A. Well, your assumption of third-party suits in industry is completely off base. I'll just give you an example of what a third-party suit is, because they're hard to come by. The only way you can come up with a third-party suit is, let's say for example you work in a plant and you're working under a crane with cables and you have a 3-ton lift to pick up and so the company bought these cables. They're 10-ton cables and they put a ton on it and it busted. That's a third-party suit because the manufacturer of that cable sold it as a 10-ton but it busted at 1 ton. That's a third-party suit. That's the only way you can do it. To think that a person would look around and say, well, now, I'm going to sue somebody, hell, let me just give you what the case that I was referring to here where the company took the piece of

machinery that they were working on, removed all of the safety equipment, removed it all, and the workers objected to that, they said it's dangerous. They said it produces more -- now, this is in the testimony, what I'm saying to you is the facts -- that this produces more, therefore the safety equipment stays off of the machine. They reported it to OSHA. OSHA came in to inspect from that objection, which is unusual, but they informed the company that they were coming ahead of time. The company took this piece of machinery and removed it from the property. OSHA came in and inspected them and said everything is all right, they found nothing wrong. The machine wasn't there. After they left, the company brought that piece of machinery back onto the property and ordered the people to work on it again, which they had to. It was work on it or get fired. A guy had his fingers cut off. He sued the company. Our State Supreme Court ruled you can't sue the company because that's a workmen's compensation case. There was no third-party suit there. But that, by the State Supreme Court, and when I see them personally I'm telling them, that was allowing our people to be murdered with immunity.

Q. And all I'm saying is I've heard of cases like that and what sometimes happens is the employer, who is clearly culpable, can't be sued because of the

workmen's compensation system so a suit is brought against a manufacturer of that piece of equipment saying that they couldn't -- they allowed the equipment to be in such a way that those guards could be taken off, and for one reason or another that suit is successful and therefore you have people that are really not as responsible for that injury paying a large amount of money while the people that were really responsible for the suit not. And I guess your answer to me is, no, the AFL-CIO is not willing to trade off one for the other?

A. We won't trade off our people's safety for anything, if I understand you properly.

Q. Well, that's not what I'm--

MR. GERBER: I think you'll find, if you look at it, you don't get into third-party suits and you don't win third-party suits unless that third party is really primarily responsible. In the example that Julius gave with your selling a cable that's supposed to hold 10 tons and it only held 1 ton, it was the manufacturer of that cable that really caused the injury, and when you go after that manufacturer and the worker collects, the employer gets his workmen's compensation back. And we are really placing the blame on the one who is really responsible for the injury in that system. That's why the third-party system works well and that's why it is a big

incentive that when you market products you market safe products, because you can get sued.

REPRESENTATIVE LEE: Thank you.

BY MR. MINDLIN: (Of Mr. Uehlein)

Q. Good morning. I'd like to, if I could, talk a little bit about the concept of intentional harm which you've gotten to. Can you give me a definition of what you call intentional?

A. I thought I gave you about one of the best that I can think of. If a company intentionally removes the safety equipment, that is intentional. I could give you other cases, but that's a good one.

Q. In other words, intent means that they did knowingly and with purpose. Am I defining it correctly?

A. At least knowingly.

Q. Would you say that a "knew or should have known" standard is an intentional tort standard or a negligence standard?

MR. GERBER: There's a whole body of law there which defines what is an intentional tort. If you give me an example, I'll try and tell you what my judgment is and I'll get you another hundred lawyers who will give you 99 other opinions, and I'll get you 9 judges who don't agree with any of us. But there are clear-cut cases in which everyone would agree that this is an intentional

wrong.

BY MR. MINDLIN: (Of Mr. Gerber)

Q. I'm not asking -- I'm asking, the language in House Bills 1012 and 1013 use the statement that the employer knew or should have known.

A. That's correct.

Q. So let's focus on the "should have known."

A. That's correct.

Q. Does "should have known" imply intentionality?

A. It implies that there is a standard of knowledge out there which anybody in the business would reasonably be expected to know, and therefore we're not going to let the one guy in a thousand come in and say, well, I don't know because I don't read technical journals and I bury my head in the sand, and give a person a chance to escape culpability by feigning or attempting to show lack of knowledge. I think this is what you go to juries for and you say, you know, do you think this man actually knew or should have known?

Q. I can understand why he pays you as well as he does, I'm sure.

A. Thank you.

Q. I'm not a lawyer and I guess--

REPRESENTATIVE PICCOLA: I guess you wish?

MR. MINDLIN: It's guilt by association.

MR. GERBER: Okay, this is the kind of thing that if it goes to a jury, the judge is going to instruct the jurors to what "known or should have known" means.

BY MR. MINDLIN: (Of Mr. Gerber)

Q. But I did take the time to go and look at what was raised as a standard by some attorneys in other elements of this hearing, restatement of torts, and there was a distinction that was made between negligence and intentional tort, and negligence--

A. There is, and, for example, if the manufacturer removed the safety guard for the purpose of cleaning the machine and said, I'm going to put it back tomorrow, and for some reason, there was a fire in the plant and he didn't get around to do it, that may be negligence, but when he said, I'm going to remove the guard from the machine, period, and everybody else in the world knows that if you remove that guard you're going to hurt somebody, I don't think we ought to let this particular guy say, well, I didn't know anybody could get hurt.

Q. Well, no, the person that took it off for the purpose of cleaning it should have known that if he didn't put it on it would have caused harm. Is that so?

A. Well, I'm just saying to you -- let's create

a scenario where the phone rang and he was called to the phone and he should have put it on but he was going to do it five minutes later. That's negligence. But the company that says, we're going to remove all of the guards because we can increase the production of widgets by 50 percent without guards, that's not negligence.

Q. I guess I understand the difference but I'm not sure that we agree on what the difference of language is. Because of that, I don't think we're going any further with this.

A. Okay, thank you.

CHAIRMAN CALTAGIRONE: Representative McHale.

REPRESENTATIVE McHALE: Thank you, Mr. Chairman.

If I can just follow up on both the testimony of Mr. Uehlein and the questions as proposed by Mr. Mindlin. Mr. Mindlin said that in listening to earlier testimony, he's become familiar with the clear distinction between a negligence standard and an intentional tort standard. What Mr. Uehlein had said, quite accurately, is that distinction no longer exists under workers' compensation law. The cases to which he made reference, one with which I'm intimately familiar is Poyser vs. Newman Company that was decided in March of

1987 interpreting some amendments to the workers' compensation statute that the General Assembly adopted way back in 1972, and what that case said, and it unfortunately is exactly as it was described by Mr. Uehlein, is that when an employee is injured by an employer in Pennsylvania, whether that injury was caused by negligence or by intentional misconduct on the part of the employer, the employee's only remedy is to bring a workmen's compensation claim.

Now, that decision was based, to my astonishment, having read the Journals of both the Senate and the House on the issue, upon an interpretation of legislative intent. Fifteen years after those amendments were adopted in 1972, the Supreme Court, I think incredibly, concluded in 1987 that it was our legislative intention in 1972 to prohibit lawsuits based on intentional misconduct. Now, I agree with the principle that if an employer accidentally or negligently injures an employee, the appropriate remedy is workmen's comp. But for the better part of two decades virtually every lawyer in the State believed that there is an intentional tort exception to that general rule, that if your employer hurt you on purpose, you could still sue him. That, unfortunately, is a principle of law that's been rejected by our Supreme Court in 1987 based on the facts as

described by Mr. Uehlein.

So that although Mr. Mindlin may be familiar with that difference in concept between negligence and intentional, regrettably our case law no longer recognizes it. And forgive me for making a long statement on the issue, but I feel very strongly about this because it means that employees in Pennsylvania who are intentionally hurt by employers will be totally lacking in a common law remedy until we pass one of the statutes that has been proposed to overturn Poyser, and from my point of view, as a matter of basic justice, the sooner we do that, the better.

MR. UEHLEIN: And we are begging you all to do that as fast as possible.

REPRESENTATIVE McHALE: Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Thank you, gentlemen. Thank you, Mr. Uehlein.

MR. UEHLEIN: Thank you.

CHAIRMAN CALTAGIRONE: We will recess for lunch and we'll be back here at 1:15.

For the members of the House Judiciary Committee, I would like to meet with you 5 minutes before we come back at 1:10 in the Speaker's office.

(Whereupon, a recess was taken at 12:30 p.m.

The hearing was reconvened at 1:30 p.m.)

CHAIRMAN CALTAGIRONE: Would Jeff Schmidt come to the table? If you would introduce yourself for the record and who you have with you.

MR. SCHMIDT: Mr. Chairman, my name is Jeff Schmidt. I'm the Governmental Liaison for the Pennsylvania Sierra Club. I have with me today Gerry Williams, who is an attorney from Philadelphia who specializes in representing victims of toxic exposure.

While I'm going to be giving the formal testimony, he will be here to answer questions about the real world effects of the legislation being proposed, how it would affect his ability to represent those victims of those toxic exposures.

On behalf of the more than 17,000 members of the Sierra Club, Pennsylvania Chapter, I want to thank the chairmen of both committees for the opportunity to present our views on House Bill 916, a bill we believe seriously undermines consumer rights and threatens environmental integrity and public health.

The Sierra Club, which was formed in 1892 by naturalist John Muir and a handful of other forward-thinking people who recognized even before the turn of the century the need to establish an institution to work on behalf of the environment, believes that this

is not just a consumer issue, this is not just a battle between attorneys for the insurance companies and attorneys for the victims of toxic exposure, this is definitely an environmental issue. To understand our organization's role in this, I'd like to explain a little bit about how we evolved to come to a position on this.

As a direct result of the formation of our organization in 1892, we have many national parks, wilderness areas, national forests, and wildlife refuges which are now established and protected by laws that we actively worked for. But over the decades, our members realized that while protecting these important national treasures was a priority, and they are a tremendous legacy for our future descendants, the environment doesn't end at the parks' boundaries. In fact, many of our precious parks and wild areas face threats created from far beyond the borders of our parks, like acid rain created primarily from pollution from coal-fired power plants from hundreds of miles away, and water polluted by toxic discharges floating downstream hundreds of miles and poisoning wildlife and humans in places like the Chesapeake Bay. So we believe that the environment doesn't end when you get out of the woods. As a matter of fact, we believe that when we're working for environmental protection, we have to work for it in both the great outdoors, in the

community and the workplace and in the home.

We're concerned with the human environment, we're concerned with pollution from its many forms - air, water, and soil - linked to human deaths and debilitating diseases, not to mention the overall environmental effects.

It's clear to us that environmentalists must place a priority on reducing toxic hazards from all sources. This bill does just the opposite, and legislators who vote in favor of this bill will be voting to harm the environment, to increase the chance of toxic exposure and its associated health effects, to increase cancer in effect. This bill will not help the environment.

While many Sierra Club members oppose the bill based on its basic erosion of consumer rights, our Executive Committee's reasoning for its unanimous vote to oppose House Bill 916 centered on concern for victims of toxic exposure. Environmental and human health threats posed by poorly crafted consumer products containing toxic substances are our overriding concern. We do not have a financial interest in this legislation one way or the other. We are concerned about its affects on the public and the environment.

Our objections to the proposed legislation

begin with the statement contained in the finding section that liability limitations are consistent with public policy on product safety. Nothing could be further from the truth. If our public policy goal is protect the public through product safety, the focus should be on eliminating artificial limitations on liability, thus increasing incentives to produce safe products.

The statute of repose section is one of the most objectionable provisions in the proposed bill. This section creates an artificial and arbitrary time limit within which a claim can be made for injuries due to defective products. Many victims of toxic exposure may not become ill or suffer from related illnesses until after the 15-year provision expired.

Recent environmental horror stories include widespread exposure to toxic substances with long latency periods - asbestos, vinyl chloride, trichloroethylene, benzene, PCB's, and array of dangerous pesticides. If House Bill 916 were to be enacted, exposed persons could lose their remedy long before the harm, in many cases cancer, became apparent.

We support recent case law in Pennsylvania which has found that the statute of repose does not apply to manufacturers of products.

Many consumer products containing toxic

substances need special handling. The method of communicating the hazards of the products must allow for all potential users to be warned. House Bill 916 would remove liability for failure to warn if the warning about a product's hazards were generally known by a class of persons to whom the warning would have been provided. This eliminates one of the major outgrowths of product liability law, that is warnings on products. What about the child who can't read, immigrants or illiterates who can't comprehend, or the uninformed who does not know what is generally known? As a matter of fact, this bill clearly goes in the wrong direction, we believe, and an example of the direction that we think we should be going in is enactment of a recent California law which requires not only warnings but goes on to require a list of all hazardous substances included in a consumer product so that the consumer has an opportunity to make a decision on whether or not he or she wants to expose themselves to the dangers of that product.

This bill would go in the opposite direction by creating incentives to hide the dangerous properties of their products. In California, you're required to list all the dangerous substances on a consumer product, and that has, in fact, created a movement to remove hazardous products where there are alternatives available. The most

interesting example I found to date in California is the decision by the company that manufactures the product called Liquid Paper, or Wite Out. Many of us use it all the time when we make mistakes, and if you have ever breathed fumes from Wite Out, there are trichloroethylene products in Wite Out which are a known health hazard. The company has decided to remove trichloroethylene based on the fact that it does not want to have to list trichloroethylene on the list of ingredients in the product, thus removing the potential health hazard they didn't previously have to remove based solely on the fact that they don't want to list it on the label. Thus, we have products becoming more safe because of more information. This bill would take us in the opposite direction. Giving consumers a right to know allows them to make these choices to protect their health and the environment.

Concerning the admissibility of industry standards, this provision is particularly disturbing since it interjects concepts of negligence which have been prohibited by the Pennsylvania courts. The reason for not allowing industry standards to be admissible in a product liability action is to keep the focus on the product safety and not on the conduct of the manufacturer. It does not matter whether everyone in the industry is making

a dangerous product. Not only does this provision allow admission of industry standards, but compliance with State or Federal agency standards are also admissible. The State and Federal regulation of products has always been of a minimal nature and has generally not concerned itself with the safe design of products. The product liability laws have gone beyond those minimum standards established by the Federal and State agencies whose resources allow them oftentimes to be nothing more than licensing agencies.

The threat of lawsuits for faulty or dangerous products is an important and effective deterrent to manufacturers who might not act as cautiously when designing or producing a new product. Such lawsuits become an essential safety net when government agencies charged with product regulation fail to insure that safe standards are met. "Evidence of adherence to government or industry standards," unquote, an evidentiary provision of the bill, overlooks the history of government and industry failure to adopt adequate and meaningful standards to protect workers and the public. Last week you heard some of the victims of some of those products, and we've all heard about the exploding gas tank that the Consumer Product Safety Commission and the auto industry ignored until the lawsuits were brought to force it off

the market. Alterations is another area we're concerned about in the bill. Many dangerous chemical exposures occur in the process of recycling or reclaiming substances. Examples include, again, trichloroethylene, and a variety of dangerous industrial solvents.

Recycling or reclamation do not generally change the dangerous properties of these chemicals. Treating those processes as alterations, which would preclude liability for their dangers, serve no purpose other than to excuse suppliers of their responsibility. Now, we don't mean in saying this that we don't want to encourage the reclamation or recycling of these products, we just don't want to create an artificial exemption from liability because they, many times, do contain their hazardous properties after they have been recycled.

Common consumer products. Finally, the definition of "common consumer products" is so vague that it will likely add to exonerate suppliers of notoriously dangerous products. Perhaps the clearest examples are the pesticides which the consumer may know represent a risk because they are poisons, in effect, and we all know that, but undoubtedly does not and cannot know the full extent of that risk. Chlordane, the manufacture of which is now banned, for example, is one of the most potent nerve toxins ever manufactured. Nevertheless, for years it was

bought over the counter in hardware stores. Simply calling it a poison and putting a skull and cross-bones on the label could never sufficiently warn the consumer of its hazards. It should not be treated as a product with a known risk.

In summary, the Sierra Club opposes House Bill 916 because we view it as an unacceptable erosion of toxic and other victim's rights. Our industrialized society continues to introduce new hazardous substances into the environment. Often we learn too late of the dangers these chemicals represent. Strong product liability laws represent important incentives for manufacturers to do their utmost to make these products safe.

We're both available now for questions.

CHAIRMAN CALTAGIRONE: Are there any questions?

(No response.)

CHAIRMAN CALTAGIRONE: You got off lucky.

Thank you very much for your testimony. We appreciate it.

MR. SCHMIDT: Thank you.

CHAIRMAN CALTAGIRONE: Peter Brigham and Alan Breslau.

MR. BRIGHAM: Good afternoon. I'm the

President of the Burn Foundation based in Philadelphia. We represent five burn center hospitals in eastern Pennsylvania and New Jersey, and our mission is to strengthen burn care and prevent burn injury. In support of this dual mission, the foundation watches carefully the trends in burn admissions both locally and nationally.

We note with optimism that the number of severe burn injuries in the United States appears to be declining slightly but steadily over the past two decades. There are many factors associated with this decline. Some of them, such as a reduction in smoking, were not directly intended to produce this result. We are certain, however, that the conscious employment of a variety of tools in the interest of reducing the toll from fires and burns has played a major role. These include public education, product redesign, legislation, and litigation.

These tools are mutually supportive, and the deletion of any one from the prevention arsenal will weaken all the others. Our concern with House Bill 916 is that it would greatly reduce the potential effectiveness of litigation as both the source of relief for individual victims and as a means of spurring product redesign. This, in turn, would weaken the incentive to use any alternative tools.

As examples, litigation has been extremely

effective with respect to the fire danger represented by two products in recent years. As the previous testifier just said, following a $3.5 million punitive damage award in the 1981 case of Grimshaw vs. Ford Motor Company, the Ford Pinto fuel system was redesigned. And flammable baby clothes made from material only slightly less flammable than newspaper were withdrawn from the market following a million dollar punitive damage award in Gryc vs. Dayton Hudson Company in 1980. Litigation may eventually be effective as well in forcing the redesign or removal from the market of certain brands of disposable cigarette lighters which are responsible for many, many deaths.

To help build the case for preventing burn injury, the Burn Foundation collects data on the relationship between the causes of injury and the charges associated with their treatment in the foundation's five member burn centers. We have data on these charges for the hospital care of 300 patients with flame injuries that were associated with an identified ignition source for the years 1987 and 1988.

An ignition source that comes strikingly to the forefront when you analyze it with respect to cost is cigarettes. Between 5 and 10 percent of the patients and 10 to 15 percent of the patient days in our burn centers each year represent cigarette fires. For 56 such patients

treated in our burn centers in the past two years, total hospital charges averaged just over $100,000. Projecting from national data, we estimate that a similar number of cigarette fire victims may have been treated elsewhere in our area for lesser burn injuries, or for inhalation injury in such fires. There's another group that lies in the other extreme, and that is those that we don't see because they did not survive the original incident.

These are extremely lethal injuries by and large. The national totals are about 1,500 deaths and 4,000 injuries, so 3 out of whatever that is, about 3 out of 10 or so of the injuries from these fires result in fatalities.

For burn center patients, the $100,000 average charges figure, which I quoted, is 50 percent more than the average charges in hospitals for treating burn injuries associated with any other ignition source. This projects to about $4 million in hospital charges each year just in Pennsylvania's seven burn center hospitals for the treatment of an estimated 40 patients burned in cigarette fires. Since our technology and our training are geared to care of the most severely ill or injured patients, these cost figures really understate the true resource costs resulting from cigarette injuries, and of course we're only talking about hospital charges. My colleague,

Alan Breslau, will address both unquantifiable human costs and his experiences with litigation as a means of redressing the wrongs represented by these injuries.

Although the cigarette fire toll, like smoking itself, is declining, the numbers are still staggering. In Philadelphia alone, about 30 deaths, 100 serious injuries, and over a million dollars in property damage still result each year from fires started by dropped cigarettes. For the State as a whole, approximately 75 deaths a year, 300 serious injuries, and some $20 million of property damage are involved. Again, this represents the proportional allocation of 5 percent of the national estimates reflecting Pennsylvania's share of the national population. And that's where the estimate has been made.

We've been slow to take on the most immediate cause of this problem, the cigarette itself. We've tried educating the careless smoker, but the vast majority in these, those who actually drop the cigarette, are compromised by alcohol, drugs, medications, or senility when these accidents occur. We've made children's clothing less flammable, and that has reduced match play injuries, but we have not imposed similar standards on clothing used by adults, notably the elderly. We've put in smoke detectors, which has helped, but

installation has stalled at about 75 percent of our nation's households, and an increasing proportion of these detectors are inoperative because of missing or dead batteries.

We have not taken on the cigarette itself. Twenty-five years ago we expanded our approach to "careless driving," quote, unquote, beyond speed limits and driver education and started addressing the design of cars and highways. A similar approach to cigarettes which have a similar propensity to affect both those who did and did not contribute to their injury is long overdue.

Until two years ago, we had little data to use in any legislative or litigation efforts in this area. This has changed with the publication in 1987 of the report by the Technical Study Group on Cigarette and Little Cigar Fire Safety. That study was mandated by the fire safe cigarette -- excuse me, the Cigarette Fire Safety Act of 1984, whose main sponsor was Pennsylvania Senator John Heinz. The group concluded in its report that it is, and here I'm quoting, "is technically feasible, and may be commercially feasible, to produce a cigarette with a substantially reduced propensity to ignite fires in furniture and mattresses." The report and its conclusions were unanimously approved by the 15-member panel, which included four tobacco industry scientists.

According to the study report, changing the cigarette technically is apparently not very difficult. Federal researchers found that experimental cigarettes, produced by tobacco companies on existing machinery, started far fewer fires in test conditions when they were made with slightly altered physical characteristics, having nothing to do with the chemistry. These characteristics included lower density, smaller circumference, and there were a couple of chemical changes, mainly the subtraction of those that are currently added to standardize the burning time of cigarettes and keep them from going out before their time. Toxicity levels were not significantly different when compared with those of existing commercial cigarettes.

A major outcome of that study was the introduction of two alternative pieces of Federal legislation. The initial one introduced, which has been spearheaded by Congressman Moakley on the House side and Senators Heinz and Cranston on the Senate side, would mandate the establishment of a fire-safe cigarette standard with one year under the auspices of the U.S. Consumer Product Safety Commission and would mandate compliance with that standard by cigarette manufacturers within an additional year.

The other bill which when they say was

produced in response to the threat represented in the first bill is sponsored mainly by Congressmen and Senators from tobacco-producing States. It simply calls for more studies, and we heard this morning about how long that has been the main approach to the tobacco program. It does not so much as identify a Federal agency to even consider development of a standard. There were efforts back in the early 1980's to introduce fire-safe cigarette legislation in a number of States, and that effort quieted down while the Federal study was taking place. Now that the Federal legislation has been introduced but seems to be somewhat languishing, we are again seeing an interest in legislation at the State level. A number of States are in the process of developing, holding hearings, et cetera, and we hope this will also be the case here in Pennsylvania.

Now, if the more progressive of the two Federal measures should pass, there is some hope for an eventual reduction of the toll in lives and property from cigarette fires. However, we cannot be certain that either measure will be successful Federally or that we will be successful at the State level. And even if the bill does pass, we're not sure that the regulatory process, given the current anti-regulatory mindset in Washington, will move promptly or effectively to get a

standard in place.

Given the vacuum in Washington, litigation at the State level is proving increasingly successful as a means of reducing environmental hazards, and it should not be stymied by so-called tort reform. Since the potential for successful litigation remains the major recourse for smokers, for those potentially vulnerable to their dropped cigarettes, and for those who are generally seeking a reduction in the human and property toll from cigarette fires, we feel that the current law should remain.

Litigation without the possibility of damages represents a minor threat to an industry which spends $2.5 billion a year simply to promote its products. We do not see a major threat with so-called frivolous lawsuits in a situation where, as we heard this morning, industry is prepared to spend up to $75 million defending itself. Without this incentive for lawyers to invest substantial resources in drawn-out litigation, large numbers of injured people would have no way to go. Even the cost of successful suits could simply be written off as a cost of doing business in an industry of that magnitude, and again we are concerned that these are a major reason for the promotion of this legislation and our arguments a reason why it should not be supported.

Thank you.

CHAIRMAN CALTAGIRONE: Thank you.

Why don't we hear from Alan next and then we'll open it up for questions.

MR. BRESLAU: Mr. Chairman, my name is Alan Breslau, and I am the founder and Executive Director of the Phoenix Society, which is the only national organization for burn survivors and their families. We have our international headquarters here in Bucks County, Pennsylvania. We have chapters throughout the United States and in many foreign countries. We were founded in 1977, and our membership has grown to almost 5,000 and includes burn survivors, their families, health and legal professionals, and interested members of the general public. I am here to speak on bill 916 as to how it might negatively affect burn survivors, a group already with many ongoing problems and often in great need. I don't plan to offer statistics, but I would like to present the human elements involved with these kinds of accidents.

Very few people have any concept as to what a severe burn injury really is. Time does not permit me to give you a complete education in that area, but I do have with me photographs in these albums of myself during the period after my burns and some other people who have been burned, and if the committee were interested, I would like to pass these out while I'm speaking, if that were

agreeable. I don't pass these out for their shock value because frankly, I could have given you much worse pictures to show what burn injury is like, but you will get some idea in seeing particularly my photographs and see how I am left today.

I survived the crash of a commercial airliner in 1963 which involved in the end a tort action. In my case it was pilot error, among other things, in which a pilot, knowing that a severe storm was approaching the field, decided he would like to take off and make a U-turn to avoid the storm and head back to home so he could have dinner with his wife. This pilot was known at his airline to be a renegade pilot who had done a number of things wrong in the past and who normally would have been fired from his job but because of their investment in his training, they decided to keep him on. He was killed and the co-pilot was killed. Actually, the co-pilot was flying as the pilot on that flight and was not qualified to do so. So we had a very excellent tort action.

But in my own case, I was burned over 45 percent of my body surface area in a degree known as fourth-degree burn. You probably are not familiar with fourth degree. You probably heard first, second, and third. Fourth-degree burn is a deep full thickness burn which not only involves the loss of all the skin but the

bones and organs beneath the skin as well. I lost my entire face. My nose was destroyed, my eyelid was burned off, my eye was burned. This is a plastic ear that I wear, and this is a hairpiece that I wear. I lost fingers. I was a concert pianist. I lost the fingers on my hand. I was burned very deeply over large parts of my body, spent the next five years in and out of the hospital, actually two years in the hospital, and underwent 52 surgical procedures. And that was only with a 45-percent body surface burn. Had I been burned slightly more back in those days, I would not have survived. Fifty percent was the limits of survivability, 50 percent of the body surface burned. Today, burn survivors with over 90 percent of their bodies full thickness burns, 95 percent, are surviving, and because of the prospective payment systems enforced in hospitals, the diagnostic related groups, these patients are being discharged much more rapidly from the hospital than they normally would have been. And so they are going home in terrible physical condition in which families are expected to provide some of the care, and of course these families have stopped working temporarily in order to be at the burn centers while the patient is undergoing treatment, and then to expect them to not go back to work but to continue working on the patients at home is a further

unfair burden that they have to undergo.

Now, a few weeks ago I was asked by the Red Cross -- we have a protocol with the American Red Cross that a burn disaster, the Phoenix Society will be called in to counsel families. I was flown down to the Caribbean to counsel burn survivors of Hurricane Hugo. At that time, they had to, the Red Cross, had to put together their own so-called air force in order to transport their personnel around the islands there. One of the planes they chartered was a DC-3 which was 49 years old and had 51,000 flying hours on it. Now, had this accident happened on that airplane under bill 916, I would have no recourse. And that, again, puts a terrible burden on the patient.

When a burn injury is job related, financial help is limited by workmen's compensation to actual expenses, and even these are severely limited and do not cover many immediate financial needs and cease to do so on the long term. Many burn survivors contact us with their problems, and many aspects of their ongoing care are not covered or workmen's compensation refuses to cover many of these expenses. And, of course, most of the people who do get burned are of the lowest educational and socioeconomic levels and are not in a position to fight the system in any way, so that they accept those decisions by workmen's

compensation and another insurance groups - Blue Cross, Medicare. All of these insurers rarely cover the immediate needs of patients, nor do they cover long-term needs.

Now, as an example, my ear was incinerated and amputated, and because my head was burned not only to the bone but through the bone in the front and you cannot graft skin directly onto bone, they had to drill little holes all over my skull into the marrow layer so that they could get some blood tissue there that they could graft skin onto. So as a result, my skull is kind of bumpy and quite repulsive looking, and so I have to wear a hairpiece. But the hairpiece nor the prosthetic ear are covered by any kind of insurance, workmen's compensation, anything. Nothing will pay for that. Now, fortunately, I had a suit and I won the suit and so I am able to -- at least I was able to afford these things. But there are many people who have no access to the kind of litigation that I went through or the kinds of attorneys that I used.

I discovered one thing early on. My family members, while I was in the hospital, interviewed the five top airline tort attorneys and they found that the very best of them charged the least fee, so that we feel that if you are going to pass any kind of legislation in this area, it might be one that would limit the fees that

attorneys can charge the clients in the tort action, the plaintiffs, because in a number of cases the attorneys get more than the patient gets. We feel that's a gross injustice. So that if you're going to do something in that area, it would be my recommendation that you consider in some way limiting the fees of the attorneys. And if it becomes a problem that the defense attorneys can charge unlimited fees and as a result the defendant would have the better attorney, then you might limit both fees of both the plaintiffs and the defendants and keep the overall costs down for everybody involved.

Now, there are a number of areas where burn survivors suffer not only financially directly, but when one has a stigmatized appearance, when you're disfigured and which is the major problem that burn survivors have to cope with once they are over the surgical procedures is that of a public that rejects them, that stares at them, more importantly that will not hire them because of their appearance. Now, there are many qualified people who do get burned who are unable to obtain employment post-burn because of their appearance, and without their ability to have recourse to litigation in order to keep themselves going, not only places the burden again back on the community to support them but is totally unfair.

Also, and I had an audio visual with me, a

doll that we carry that has a custom made pressure garment. Many, many burn survivors, after they are treated, wear for a period of from six months to two years or more a garment, a pressure garment, that is custom made to every inch of their body. It's measured inch by inch and it's made so it puts pressure on wherever they were burned, on the scar area, in order to keep those scars flat as they heal and mature so that the cosmetic outcome is better. Those garments, which as I say are very expensive, an adult patient needs two garments because he needs one to wear and then one to wash so he can alternate them day by day and he wears them 23 hours every single day, and for children, who must have a number of these garments because they grow over the period that they're being treated, so new garments have to be made for them over a period of time, many of them will not have access to these important adjuncts to care because they, again, are not covered by insurance. So that this is so important for the patients that they be able to redress their grievances.

Now, it has been pointed out by everybody before me, and I'm sure you are aware of this, that tort actions act as a safeguard to the public, all of the public. By penalizing manufacturers and service providers for carelessness, shoddy or dangerous products or

performance, you help to police the marketplace and deter continuing bad practices. In many cases, even with high tort outcomes, companies calculate the cost-effectiveness of changing a product versus paying the penalties and often opt to pay the penalties rather than to correct the product. And many further deaths may still be incurred as a result of that decision. Nevertheless, the deterrent effect is there.

Tort settlements, in the long run, are more cost-effective than allowing those that have been wrong to become public charges in any of a number of ways.

The marketplace is self-regulating. When a jury, in its anger at the defendant's behavior, grants an obviously excessive penalty, the trial judge or appeals judge often reduce it. You hear about the large amounts voted by juries in the media but almost never hear about the final settlement amount because that is not news.

Those who suffer severe trauma have enough to cope with without this body adding to their woes. You can never compensate them for the pain and suffering and the negative changes in their lives, but a reasonable financial settlement will at least let them go on with some dignity in spite of all they must continue to suffer, if not physically than emotionally and psychologically.

Thank you. I'd be happy to answer any

questions.

CHAIRMAN CALTAGIRONE: Members?

Chris.

REPRESENTATIVE McNALLY: Yes.

Mr. Breslau and Mr. Brigham, my dad has been a firefighter in the city of Pittsburgh for over 25 years and I'd be honored if I could be a cosponsor of the fire-safe cigarette legislation when it comes up.

Thank you.

MR. BRIGHAM: Thank you.

MR. BRESLAU: Thank you.

CHAIRMAN CALTAGIRONE: Dave.

REPRESENTATIVE HECKLER: Thank you, Mr. Chairman.

BY REPRESENTATIVE HECKLER: (Of Mr. Brigham)

Q. First of all, Mr. Brigham, has there been any litigation of which you are aware, and I assume you would be, against cigarette companies as alleging a product defect because they start fires?

A. There have been, I believe, some cases, and I don't think any of the cases -- I think there are a couple of cases that are under protective orders as far as the data regarding the performance of cigarette companies.

Q. So you're saying that you believe there have been some recoveries?

A. I believe there have been, but there's nothing out in the public record on it.

Q. Okay. Are you -- can you tell this committee what, apart from the -- well, now, in this case we don't even have to accept the statute of repose. What provisions of House Bill 916 would preclude the ability or harm the ability to bring that kind of litigation?

A. Well, I'm not a lawyer or an expert on the law. My understanding is that the -- let's see, do you have a copy of that bill? I think the limitation of liability for certain common consumer products is certainly one that we're concerned about where there is an inference that by classifying cigarettes along with alcohol, meat, dairy products, caster oil, et cetera, that there's a certain interest on the part of tobacco in becomming associated with that class and thereby gaining a certain immunity.

Q. Well, if I, again, if I could suggest to you my understanding is that that deals with the inherent harm which is recognized to flow from the product and really gets back to an assumption of risk which -- well, we're not here to debate, and I don't mean to be trying to make you a legal expert on this. I suppose the thing that strikes me about your testimony is your comment towards the end of your testimony that the potential for

successful litigation remains the major recourse both for smokers for those potentially vulnerable to the cigarettes. I'm not aware, you mention a couple of cases that may have been settled and have not been made public, but with all of the thousands and thousands and tens of thousands of lawsuits brought on a variety of issues in this State and nationally, I'm just not aware that that's a significant area of litigation, and I wonder, you're dealing with a very legitimate concern, and I join with Chris, I'd like to cosponsor legislation to deal with it, but it seems to me that's the way we deal with the problem, and if we're trying to preserve a litigation option, we plainly haven't dealt with the problem. I mean, the litigation system completely unfettered as it is now has not dealt with the problem.

A. Well, a couple comments on that. One would be I don't think people -- one is to kind of second Alan Breslau's remarks that we're often dealing with a class of patient who is generally unaware of or unable to take action.

Secondly, many of the -- to be candid, many of the victims of these themselves are not particularly attractive people to bring before a jury and they're not likely to cause sympathy. There are, however, significant numbers of people who are more potentially attractive

candidates. I believe -- there may, again, I don't know, there may have been a number of these that have been settled before reaching a jury that are not part of the record. That is something that there's simply no way to know that. And I think the whole movement towards the fire-safe cigarette, I think there was an ethos up until very few years ago, as with careless driving, that if there was an injury it was simply careless smoking, and it still galls me that in fire statistics often you see the category of careless smoking as though it was the behavior that was the issue rather than the item as an ignition source. You don't see careless use of the stove or careless use of the car, or careless use of hot water, but you see careless smoking, which has been the traditional category, and I think that has acted in sort of a subtle way to discourage people from thinking that it maybe something other than just their own behavior that was at fault.

So I think these are some of the reasons that this has not become an area of litigation in any significant number of cases so far, and this is really only in this decade that people have begun to take a look at the cigarette in terms of its fire-starting propensity.

Q. Thank you. As I said, we're just going to have to differ on the social question of how you address

this recognized problem.

BY REPRESENTATIVE HECKLER: (Of Mr. Breslau)

Q. I wonder if I could address a few questions to Mr. Breslau, and let me say that I'm happy to be a fellow Bucks Countian with you and I want to -- well, compliment is much too weak a word -- compliment you on the work that you're doing in the face of your experiences.

A. Thank you.

Q. I wondered, frankly, however, what your testimony, and this isn't a criticism of you but of whoever advances your testimony as having relevance to our deliberations on this bill. I really do have some trouble grasping the relationship, and I specifically -- you've indicated upfront that your injuries were not a function of a product liability situation but rather negligence on the part of the pilot and apparently the airline that employed him and in continuing to do so. If your injury had been the result of, let's say, a defect in an engine or some other structure of the airplane, with the exception of the statute of repose, about which we've heard a fair amount and I think if we get to the point of actually dealing with the substance of this legislation it deserves attention, are you aware of any provisions of this bill which would have prevented you from recovering

as you did, given that there was another theory of liability in your case?

A. Well, first of all, I have to apologize if it was not clear why actually I was speaking today. I have to admit that I had not actually seen the bill until this morning and I was given very short notice about being here, so in that respect, please forgive me.

Q. All right.

A. Also, the fact that mine was not a product liability case, It could very easily have been. I don't think whether it was a pilot error or a defect of the aircraft is pertinent, and of course the 15-year limitation is a very critical item in the bill, and as Peter Brigham has pointed out, I, too, am not an attorney and do not know exactly how the law might affect me or others, might have affected me or others, but I do know that it is getting into areas where you may not be aware of some of the problems that people have with tort actions involving product liability.

To give you an idea, I, a number of years -- well, we have many, many members who were severely burned when they were using flammable fluids in their basements to clean floor tile or lift up floor tile, only to have forgotten that the hot water heater had a pilot light. We asked the Product Safety Commission to have these

manufacturers put a large symbol, the red circle with a line with a flame on it, to remind people that there was an open light inside that device. And the appropriate committees of the commission met and decided that the information written in small print on flammable fluids, on the bottles of the flammable fluids or the cans, was sufficient notification. And so again, people continue to become burned as a result of this same action. It didn't take a large amount of money to correct that action.

A further example, for example, is in the automobile industry. Many American automobile manufacturers put seatbelts in their back seats that are not shoulder belts but only lap belts, and you probably are aware that in a collision, those people in the back seat, because they do not have shoulder belts, may break their spines or become paralyzed. This is a common accident for those who use their seatbelts in the rear of an automobile. Foreign automobile manufacturers do use generally the shoulder belts. American manufacturers have put an anchor post on the sides of the rear seats so that at some point when they had to they could attach the shoulder harness, but because that shoulder harness added $12 to the cost of the automobile, they refused to do so. Now, if 12 years go by and then accidents continue to happen, people will no longer be able to sue for wrongful

acts because the 15-year period will have expired.

Q. Okay. Well, as I said in my question, acknowledging that there are recognized problems with the statute of repose, I'm hard put, I'm satisfied myself, for instance, that the Pinto litigation, about which we hear a lot, and the Dalkon Shield litigation would not have been precluded by any provision, with the possible exception of the statute of repose, of this legislation, and that's why it just -- it's not sufficient for this committee's deliberations to say American manufacturers will do the wrong thing unless we make them do the right thing. You know, I agree with all that. The problem is, what's the matter with this legislation? And if I could frame that, and I don't mean to prevent your ability to respond to it, but in a specific context about which you may have some direct information, I assume that you counsel people throughout the United States, and I'm wondering if you are aware of any specific case that you've encountered personally in which someone who was burned as a result of a product defect situation was precluded from recovering in any of our sister States that have differing theories or have adopted product liability reform?

A. No, I can't say that I have. But on the other hand, I do not see anything in this bill that would be helpful to the victim. And the victim is the one who

had been harmed. To protect those industries who do wrongful acts, after all, this is a tort action, it's to penalize people who do something wrong, then you are -- we may not see it, all of us may not see the long-term consequences of what this act does, but on the other hand, I don't see what benefit it has to those who are a victim.

Q. Well, again, the very essence of the law is to determine whether when, indeed, someone has done something wrong, what standard it is reasonable to expect of them, and that gets to the final question that I'd like to pose to you. You mentioned that this bill -- you were flying down to the Mediterranean in a DC-3 and that this bill would have precluded your being able to sue presumably the manufacturer had you been harmed in a crash. A DC-3 is a remarkable airplane, was remarkably ahead of its time in the '20's, I believe, or early '30's when it was first brought into the market, and I'm sure it was built through the Second World War and discontinued thereafter. Do you seriously think that Douglas Aircraft, or whoever they are now, in their corporate structure should be able to be sued on some theory that their product was defective because of a crash in 1989?

A. But the airline that owned the aircraft, the charter airline, would be precluded from suit.

Q. Well, no. At least it is my understanding

of the law that that's not the case at all. The fact that, I mean, this bill deals with the definition of the circumstances which give rise to liability. And again, I'll yield to others, but it's my understanding that this would certainly not preclude somebody's suit against X Airlines because they did not properly maintain that aircraft, X Airlines because they had a guy who wasn't checked out in DC-3's flying--

A. Yeah, but for 15 years it would preclude their suit. If they didn't replace the skid 15 years ago and it went through metal fatigue, they would be free and clear.

Q. Well, I think we're just differing on the technical language or your understanding of it, but I certainly thank you for your testimony.

A. Thank you.

REPRESENTATIVE STRITTMATTER: Thank you, Mr. Chairman.

BY REPRESENTATIVE STRITTMATTER: (Of Mr. Breslau)

Q. Mr. Breslau, when you said that you weren't given the proper time to prepare today, who asked you to testify today?

A. Well, Mr. Brigham had arranged for me to be here, I having been involved with the Safe Cigarette Act in Washington, D.C., both for the House and the Senate,

and neither of us, frankly, were as prepared as we might have been, but it was a short notice for us.

Q. Thank you.

CHAIRMAN CALTAGIRONE: Gentlemen, thank you.

MR. BRESLAU: Thank you.

CHAIRMAN CALTAGIRONE: Wayne Parsil and Joseph Martin.

(No response.)

CHAIRMAN CALTAGIRONE: We're ahead of schedule. Will they be here, do you think? They will be? How about if we take a short break to see if the two testifiers will be here, and we'll reconvene in 10 minutes, see if they get here.

(Whereupon, a recess was taken at 2:25 p.m. The hearing was reconvened at 2:45 p.m.)

CHAIRMAN CALTAGIRONE: Okay, if we could get started.

Wayne Parsil and Joseph Martin. If you could introduce yourself for the record as to who you represent and get started.

MR. PARSIL: My name is Wayne Parsil. I am a lawyer from Lancaster, primarily a plaintiff's lawyer, and I brought with me today Joe Martin, who is a client of mine. Joe and I are particularly interested in the workplace safety bill and have a case particularly on

point that we think the committee would be interested in, and I also do products liability work, both automobile products liability as well as machine products liability, so I have an interest myself in the product liability bill that's being proposed.

You may be interested in some background in Joe's case because I think it's very germane to what this committee is interested in. Joe, at this point, is a 59-year-old who has worked for 30 years in a battery plant in Lancaster. The battery plant in Lancaster was known as Lancaster Battery and was in operation for somewhere around 30 years.

MR. MARTIN: Since 1924.

MR. PARSIL: All right, since 1924. Joe corrects me on that. At any rate, in any lead environment, and, of course, a battery plant is constantly involved with lead, lead products, the work involved in both making batteries and in remaking batteries or lead products involved, and lead will get in the air and get in the atmosphere, and lead inhalation as well as other lead exposure is a major concern. The hazards of lead have been known through the Middle Ages, when people used to eat off of pewter plates, eat with pewter forks and utensils, they would be affected and often thought to be mad. In many cases, of course, the ultimate effect of

lead toxicity is death.

OSHA was fully aware of this and the industry has been fully aware of this hazard for years, and OSHA, particularly in the early '80's and before, began to put together regulations for the battery industry. And the regulations that they put together basically, although there are many other things involved, were also concerned directly with blood testing and lead levels in blood. So a strict program was put in place, as was put in place at Lancaster Battery Company. And under that program, the employer was required to take blood lead samples from his employees on a regular basis, send them out to an independent laboratory, and then report them back to the employees.

In the case of Lancaster Battery, and probably in the case of the rest of the industry, there were certain guidelines. When your blood lead level got to a certain point, things had to be done, the most extreme being you had to be completely taken out of the environment and removed from the environment. One of the problems with lead is it gets in your system and you never get rid of it, and from that you end up with all kinds of progressive problems, particularly kidney problems, renal problems, and then many other problems which Joe will certainly tell you about.

At any rate, at Lancaster Battery those blood samples were in fact being taken, and those blood samples were being sent to Exide Battery down in Philadelphia, in the Philadelphia area, and then the results were being sent back. But that's where the problem came in Joe's case. Although the reports got back to Lancaster Battery, they found their way, as we allege in our complaint, into the president's office, and we further allege in our complaint that they were altered, and we further allege that these alterations kept from Joe Martin data that was extremely important to him, data that he knew about from Lancaster Battery's own employee manual that his lead levels were so high that his kidney failure was progressing and that he was in some real trouble health wise.

Ultimately, what happened to Joe was that he thought he was having a heart attack. He had chest pains, he went to the hospital, and at the hospital they immediately found that he was suffering from lead toxicity. At that point, there was some conversation with people at the hospital and Lancaster Battery Company. It became an extremely nasty situation, and ultimately OSHA brought criminal accounts against Mr. Manix, and he is at this point serving time in Allenwood for two things: One, for a "Buy American" program where he basically had lied

to the military in regard to batteries that he was giving to them, and then also a suspended sentence on these OSHA counts. So we felt, with this kind of criminal activity involved, with the fact that these blood lead results were being kept from Joe Martin, and because of the situation at the plant, and because of really the intent that the employer had to withhold a known injury to an individual, not the risk of injury but a known injury, that this is the kind of case that ought to go forward in any jurisdiction. So a suit was filed in Lancaster County against Mr. Manix personally and against Lancaster Battery Company.

At this point, the suit has been thrown out of Lancaster County on what are called preliminary objections, basically saying there is no cause of action in Pennsylvania for this kind of thing. Your sole remedy is with the Workers' Compensation Act. At this point, what Joe has gone through is this: His damages really are self-evident. He is functioning with about 29 percent of his kidney capacity. The doctor indicates that he's a definite candidate for dialysis. Because of the compromise in his kidney function and other compromises in his neurological system, he's had heart problems. He now has had a pacemaker implanted which the doctor indicates was definitely caused by lead neuropathy. He had

previously a hip replacement and he fell at home and when he fell at home, this hip replacement loosened, and it was already loose, and the doctor indicated in doing the surgery for a second hip replacement, which puts him on crutches today, that first of all he's not sure that the second hip replacement is going to take, and he also says that the bone tissue is compromised to the point that that's why the hip loosened.

What one goes through when one suffers lead poisoning is not nice at all, and Joe is realizing most of that. And it's a case that absolutely cries out for some kind of change in the present law, because, you know, this is really a situation where his employer committed criminal acts toward him and we're without remedy.

We've appealed this to the Superior Court, but I'm sure the committee has heard about both the Poyser decision and the Barber decision, and basically the Supreme Court is saying, we don't want to hear about this. If you want to do something about this, the legislature is going to have to do it. You know. You see these kinds of cases many, many times doing the kind of work that I do where employers fail to put proper guards in place, fail to do the necessary alterations to the machines that they're required by OSHA, et cetera, et cetera, but even in an extreme situation like we have here where the

employer basically is a criminal and has done criminal acts and those criminal acts impact on this particular employee and we're without remedy, frankly, I'm shocked that the court looks at it that way, but my own personal view is if the court's not going to do something about it, somebody's got to do something about it, and it's for that reason that we have so much interest in the workplace safety bill, as well as the product bill which I understand that you're involved with also.

So with that kind of introduction, we're certainly willing to field and listen to any kind of questions that you may have for me or for Joe.

CHAIRMAN CALTAGIRONE: Would Joe like to make any comments for the record?

MR. MARTIN: No. It starts out with your blood pressure. It starts with blood pressure, and then it gets into the gout and the kidneys, and through the whole combination then, the deterioration of -- the kidneys go. The doc said you could put up with and maybe until you get about 20 percent, and then you really are gone then. But I was fortunate it was 29. And my blood pressure was 245 over 125 when they found it. And then from then on it's been just problems, and that's it. It just leads from one thing to another, you know.

CHAIRMAN CALTAGIRONE: Questions?

BY MR. MINDLIN: (Of Mr. Martin)

Q. How recent is this case in terms of when is the alleged injury? You say that there was some--

A. It wasn't just me, there was a lot of employees there that was being affected at the time but they didn't know it, like I was.

Q. And I understand that. There were criminal charges and OSHA came in. When did that occur?

A. In '85.

MR. PARSILS: Yeah, in about May of 1985 is when Joe became aware that he had the problem to the point that he thought he was having a heart attack, and that's when we're alleging is the date of injury. Obviously the thing was progressing, but that's the day that he certainly discovered. We don't have a statute of -- well, the statute of limitations has been raised, but I don't think that's the--

BY MR. MINDLIN: (Of Mr. Parsils)

Q. The statute of limitations from what, a criminal standpoint?

A. No, from the civil standpoint.

Q. There is no -- there is a limitation in criminal law or not?

A. Not familiar with where that stands with that at all. I have no idea.

Q. The reason I'm curious is that there have been a recent series of cases having do with workplace criminality. The one having gained the most notoriety is the Chicago Magnet Wire case, and I was wondering if that became applicable, that kind of decision becomes applicable in this cases.

A. No, I'm familiar with that and brought that in the statement of the case to the Superior Court's attention, but it really has no application to us.

Q. But that has to do with -- I understand it has nothing to do with you from a civil standpoint, but from a criminal standpoint, has there been any effort or is that at all applicable to you in this case if criminal charges could be brought against the individual?

A. Well, yeah, the district attorney in Lancaster County has been familiar with what's gone on here, as well as the U.S. Attorney in Philadelphia. The U.S. Attorney in Philadelphia was involved with the OSHA counts, falsification counts, and then also the counts involving the batteries to the military. So all of that is past, and as I indicated, you know, Stewart Manix is serving time for those.

Q. From the Pennsylvania criminal law standpoint, recklessly endangering an individual or any of that, there's nothing being done or no intent to do

anything?

A. The only thing that the district attorney in Lancaster County was interested in, and there was a big jurisdictional battle over this, was seeing through on DER counts involving dumping, dumping of sulfuric acid and other hazardous wastes outside the plant. I believe there's been a plea on that and sentencing has taken place on that, too, but that was all. The district attorney in Lancaster County didn't see fit to go beyond that.

Q. Well, that was the administrative decision, essentially?

A. That's right.

Q. All right. Do you, in dealing with the question of intentional tort and workers' compensation, are you suggesting that it be limited to the issue of intentionality or do you think it ought to go beyond into areas of negligence?

A. I think it has to go beyond, yeah, and I certainly think that the two bills that are before you are about where it ought to be. You see, there is the intentional exception for fellow employees under the current law, but it's been construed pretty narrowly, and I don't see that the Superior Court's going to give me or give us any kind of slack on that.

Q. Well, no, I'm asking from the standpoint of

law change, and what you're saying is you would adhere to the concept of going beyond intentionality to a negligence standard as an exception to workers' comp?

A. Absolutely.

Q. What role would workers' comp have in the scheme of things if you had your choice of either tort, for which workers' comp is a replacement? How do you see them, workers' comp and tort, as being compatible?

A. Well, in some jurisdictions, of course, there is the choice that you can either attempt to go forward in tort or that you can take the workers' comp. As you know, the history of workers' comp was that the employee wouldn't have to struggle with negligence principles, would not have to struggle with some of the rules, such as contributory negligence, master servant, and so forth, and that he would get benefits simply because he was injured in the workplace. So it was a trade-off at that point. But at this point I think the trade is really helping industry. It's a near shield, because why should I go out, as an employer, and do anything, particularly in machine guarding cases, and I think this is probably the most -- the time you see it the most. OSHA violations, machine guarding violations, other violations involving machinery that the employer has kind of a cavalier attitude to, nobody has ever said it to me

but I certainly get the feel that they may not like workers' comp, but they sure like the insulation that they are getting from it, and it's certainly saving them from taking the hazards in the workplace very seriously.

I think the employer also sees OSHA as kind of a toothless tiger at this point. And I don't think they take OSHA very seriously, and OSHA has told me in some of these cases that they really only have the mechanics to investigate fatals, and so there's not really much activity. So the hope that some administrative agency, the hope that we may have had in the '60's with those acts that an administrative agency would be able to oversee these things just doesn't work. It seems to me, and unfortunately it sounds kind of old-fashioned and maybe not what industry wants to hear, but if you whack them in the pocketbook, they'll sit up and listen.

Q. I'm aware of States that have an exception to workers' compensation for intentionality but not for simple tort, not for negligence. If you can present me with something on simple negligence, I'd like to know what State that is. My understanding was that generally it's exclusive except for intentional tort, so I'd be interested in that information, if you have it. I'm not aware of any State that offers simple negligence as an alternative to workers' compensation?

A. What has happened in those States where intentionality is discussed, and I think we're really talking degrees, you know, whether it's negligence, pure negligence, gross negligence, willful and wanton, intentional, the States that have the exception that you're talking about are down here on the continuum somewhere in the gross negligence/intentional area, and the courts are looking at the cases in those States more liberally than what we are, because I don't think that their definitions of intent are as strong as, you know, we would traditionally look at them.

Q. It may be to the level of willful. I'm not sure about that. But I know that there, again, in some States, there have been three States where the courts have sought to go beyond the issue of intent as intent, so to speak, the legislature has again returned to the concept of intent as intent through legislative enactment.

So if you have information on States that go to levels below let's say willful at least, I'd be interested in knowing what they are and where they are.

MR. MINDLIN: Thank you.

CHAIRMAN CALTAGIRONE: Gentlemen, thank you for your testimony. We certainly appreciate it.

This will conclude the hearing for today, and we'll adjourn right now. Thank you.

(Whereupon, the proceedings were concluded at 3:02 p.m.)

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me during the hearing of the within cause, and that this is a true and correct transcript of the same.

Ann-Marie P. Sweeney

ANN-MARIE P. SWEENEY

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