



# Products Liability: A Legal Overview

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## Summary

Products liability refers to the liability of a manufacturer or seller for injury caused by his product to the person or property of a buyer or third party. Legal developments starting in the 1960s, particularly the adoption of strict tort liability, have made it substantially easier for persons injured by defective products to recover for damages. Starting in the 1980s, however, many states enacted tort reform legislation that limited the rights of injured parties. Advocates for consumers and plaintiffs view strong products liability law as necessary to ensure adequate compensation for injured workers and consumers and to furnish as incentive for the manufacture of safe products. Manufacturers and their insurers, by contrast, contend that many products liability judgments are unwarranted or excessive and that national uniformity in products liability law is needed. Therefore, they favor replacing the 50 state products liability laws with one federal law. As the 111<sup>th</sup> Congress begins, there has been one piece of legislation introduced pertaining to product liability. However, as Congress moves forward, it may choose to revisit legislation from sessions past that would affect various aspects of product liability law. This report supersedes RL33423, *Product Liability: A Legal Overview*, by Henry Cohen and Vanessa K. Burrows.

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## Background and Analysis

Products liability, which is primarily a matter of state law, is generally based on strict tort liability rather than on negligence. This means that a plaintiff need only prove that the defect was the proximate cause of the plaintiff's injuries. Due care on the part of the defendant is ordinarily immaterial. The purpose of strict tort liability is "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."<sup>1</sup>

The Federal Interagency Task force on Product Liability, under the direction of the Department of Commerce, in its Final Report issued November 1, 1977, found that the cost of product liability insurance had risen dramatically, making it more difficult for some small firms to obtain adequate insurance coverage. The major causes of the dramatic rise in rates, the Task Force found, were irrational premium setting procedures by insurance companies, the manufacture of products that are not as safe as current technologies would allow, and uncertainties as to how personal injury litigation is conducted.

On April 6, 1978, the Department of Commerce released an Options Paper that included a model bill entitled, "Product Liability Self-Insurance Act of 1978."<sup>2</sup> On September 11, 1978, the Department published a summary of over 300 comments submitted to it on its Options Paper.<sup>3</sup>

On July 20, 1978, the Carter Administration unveiled its program to deal with product liability problems. The proposals generally followed those suggested by the Department of Commerce in its Options Paper. The Administration also directed that a model uniform product liability law be prepared to add stability to products liability law, which varies from state to state.

The Department of Commerce subsequently published a Model Uniform Product Liability Act.<sup>4</sup> Although intended for enactment by the states, the draft version was introduced in the 96<sup>th</sup> Congress as H.R. 1676, and the final version was introduced as H.R. 5976 (both by Representative LaFalce). Hearings on the two versions were held, but neither was enacted.

In October 1985, Attorney General Meese established the Tort Policy Working Group, which consisted of representatives of ten federal agencies and the White House. In February 1986, the group issued its report: "Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis of Insurance Availability and Affordability." The report made eight recommendations, including the elimination of joint and several liability and of the collateral source rule, a \$100,000 cap on noneconomic damages, and 25% cap on the first \$100,000 in a lawyer's contingent fees (see "Glossary" regarding terms used in this sentence). In March 1987, the Tort Policy Working Group issued another report: "An Update on Liability Crisis."

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<sup>1</sup> Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963).

<sup>2</sup> See "Options Paper on Product Liability and Accident Compensation Issues," 43 *Federal Register* 14612, April 6, 1978.

<sup>3</sup> Department of Commerce, 43 *Federal Register* 40438, September 11, 1978.

<sup>4</sup> See 44 *Federal Register* 2996, January 12, 1979. for the draft version and 44 *Federal Register* 62714, October 31, 1979. for the final version.

During the 1980s, in response to the liability insurance “crisis,” many states enacted tort reform intended to limit the rights of injured parties. Some states limited the right of the plaintiff to sue product sellers other than the manufacturer; some states permitted awards of punitive damages only upon proof by “clear and convincing” evidence, or required that a portion of punitive damages or on noneconomic damages, such as pain and suffering; some states limited or eliminated joint and several liability or the collateral source rule; and some enacted a statute of repose. (See “Glossary” for an explanation of these terms.) State reforms continued to be enacted through the 1990s and to the present day.

On the federal level, since 1996, when Congress failed to override President Clinton’s veto of broad products liability legislation (H.R. 956, 104<sup>th</sup> Congress), tort reform bills have been less ambitious, being aimed generally at protecting defendants who sell particular types of products or commit particular types of negligence.<sup>5</sup>

Consumer representatives and plaintiffs’ attorneys generally oppose limiting injured parties’ rights in product liability suits; they consider the present system necessary to provide incentives for the manufacture of safe products and to ensure adequate compensation for injured workers and consumers. Insurance companies and product manufacturers, by contrast, hoping to reduce the amount currently paid as the result of products liability suits, and seeking national uniformity in products liability law, have supported federal products liability reform.

A federal products liability statute could bring about national uniformity with respect to some issues; some proposed legislation, for example, has included a federal statute of limitations or federal statute of repose for products liability suits. However, some legislative provisions, such as one that establishes a standard of conduct for the award of punitive damages, are necessarily subject to varying interpretations by every federal and state court, unless the Supreme Court establishes a national interpretation. Even if the Supreme Court does so, such a provision’s application to the facts of particular cases may vary among juries. Therefore, the possibility of uniformity should not be overestimated.

## Glossary

The extent to which each of the following concepts is applicable in particular products liability lawsuits depends upon the relevant state law.

**Alteration of product.** A possible contributing cause to an injury that may be performed by a plaintiff or a third party, such as a plaintiff’s employer; it may reduce or eliminate a defendant’s liability.

**Assumption of risk.** A form of contributory fault by a plaintiff; it may reduce or eliminate a defendant’s liability.

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<sup>5</sup> For a list of federal tort reform statutes, see CRS Report 95-797, *Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes*, by Henry Cohen and Vanessa K. Burrows. For a list limited to products liability statutes, see section below, “Federal Statutes Enacted, 97<sup>th</sup>-110<sup>th</sup> Congresses.”

**Breach of warranty.** A basis for liability that permits the defendant to raise certain contract law defenses to avoid liability, but does not require the plaintiff to prove that the defendant was negligent.

**Collateral source.** A source, such as an insurance company or governmental entity, that compensates an injured party for the injury, and may, through subrogation, be entitled to recover such compensation paid out to the injured party.

**Collateral source rule.** The rule that a plaintiff's damages will not be reduced by amounts he recovered from sources other than the defendant, such as health insurance benefits.

**Comparative negligence.** The rule that plaintiff's recovery will be reduced in proportion to the degree that his own negligence (or other fault) was responsible for his injury. In its modified form, recovery is barred if the plaintiff's responsibility exceeds a specific degree, such as 50%.

**Contributory negligence.** Negligence (or other fault) on the part of the plaintiff that is wholly or partially responsible for his injury. In a few states, any degree of contributory negligence will totally bar recovery.

**Design defect.** A defect resulting from a product that, although manufactured as it had been designed, was not designed as safely as it should have been.

**Economic damages.** Out-of-pocket expenses incurred by the plaintiff, such as medical bills or loss of income.

**Failure to warn.** A defect consisting of the defendant's failure to provide adequate warnings or instructions regarding the use of its product.

**Government contractor defense.** A rule established by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) that enables a defendant whose product complied with federal government contract specifications to avoid liability in some cases.

**Government standards defense.** A rule in a few states enabling a defendant whose product complied with government safety standards to avoid liability or to establish a presumption that its product was not defective.

**Joint and several liability.** The rule that each defendant who contributes to causing a plaintiff's injury may be held individually liable for the total damages.

**Lawyers' contingent fees.** Fees payable only upon recovery of damages, based upon a percentage of the recovery.

**Manufacturing defect.** A defect resulting from a product's not having been manufactured as it had been designed. Compare with "Design defect," *supra*.

**Market share liability.** Liability for the percentage of a plaintiff's damages equal to the defendant's market share of the injury-causing product; a few cases have held market share liability applicable where a plaintiff cannot prove that a particular defendant manufactured the injury-causing product.

**Misuse of product.** A form of contributory fault by a plaintiff; it may reduce or eliminate a defendant's liability.

**Negligence.** Breach of a duty to exercise duty care; it is the traditional non-intentional tort standard in cases not based upon strict liability.

**No-fault recovery.** Recovery permitted in the absence of fault; it is not the law in any state with respect to products liability. If adopted in the product liability context, it would permit recovery in the absence not only of negligence (as strict tort liability does), but in the absence of a product defect.

**Noneconomic damages.** Damages payable for items other than out-of-pocket expenses, such as pain and suffering or punitive damages. Statutory caps on noneconomic damages, however, are generally distinct from statutory caps on punitive damages.

**Patent danger rule.** The rule that a manufacturer is not liable for an injury caused by a design defect if the danger should have been obvious to the product user.

**Periodic payments of future damages.** Payments by a defendant for a plaintiff's future expenses on a periodic basis rather than in lump sum.

**Post-manufacturing improvements.** Improvements in a product's design that occur after an injury and which plaintiffs seek to introduce in court as evidence that an injury-causing product was defective.

**Punitive damages.** Damages awarded, in addition to economic damages and other noneconomic damages, to punish a defendant for willful or wanton conduct. (Also called "exemplary damages").

**Restatement (Second) Torts.** A statement of tort law written by legal scholars; section 402A, which provides for strict tort liability for injuries caused by defective products, has been adopted by most states. On May 20, 1997, the American Law Institute adopted Restatement of the Law (3d), Torts: Product Liability, which is intended to replace section 402A.

**State of the art defense.** The defense that permits a defendant to avoid liability in a design defect case if at the time of manufacture there was no feasible safer design available, or in a failure to warn case if at the time of manufacture there was no reasonable way that the defendant could have known of the danger he failed to warn against.

**Statute of limitations.** A statute specifying the number of years after injury occurs, or is discovered, or its cause is discovered, within which suit must be filed.

**Statute of repose.** A statute specifying the number of years after a product is first sold or distributed within which suit must be filed; it supplements the statute of limitations. Manufacturers favor statutes of repose because they preclude recovery when products are old; consumers oppose them because they result in suits being barred before injuries even occur.

**Strict tort liability.** Liability established if a plaintiff proves that a product defect caused an injury; the plaintiff need not prove that the defendant was negligent.

**Subrogation.** The right of a collateral source, such as an insurance company or governmental entity, that compensates an injured party, to recover the amount paid to injured party, by taking over the injured party's right to recover from the person who caused the injury.

**Useful life limitation.** A period of time set forth by statute after which a product's useful life is deemed over and suit is barred or a presumption that the product was not defective is created; this is similar to a statute of repose.

**Workers' compensation.** Statutes in every state providing for limited no-fault compensation against employers by workers injured on the job. Receipt of such compensation ordinarily precludes from suing his employer; it does not preclude him from suing a product manufacturer.

## Federal Statutes Enacted, 97<sup>th</sup>-110<sup>th</sup> Congresses

The 97<sup>th</sup> Congress enacted P.L. 97-45, the Product Liability Risk Retention Act of 1981. The 98<sup>th</sup> Congress enacted P.L. 98-193, A Clarification of the Product liability Risk Retention Act of 1981. This statute was intended to permit "product manufactures, sellers, and distributors to purchase ... insurance on a group basis or to self-insure through insurance cooperatives called 'risk retention groups.'"<sup>6</sup> Federal legislation was necessary to accomplish this because many states have laws that would make the formation of such groups impractical on an interstate basis. The statute therefore exempts purchasing groups and risk retention groups from most regulation by states other than ones in which they are chartered.

The 99<sup>th</sup> Congress enacted the Risk Retention Amendments of 1986, P.L. 99-563, which expanded the scope of Products Liability Risk Retention Act of 1981 to enable risk retention groups and purchasing groups to provide all types of liability insurance, not only products liability insurance. It renamed the act the Liability Risk Retention Act of 1986.<sup>7</sup>

The 99<sup>th</sup> Congress also enacted the National Childhood Vaccine Injury Act of 1986.<sup>8</sup> As amended, the act requires most persons suffering vaccine-related injuries, prior to filing a tort action, to file a claim in the U.S. Court of Federal Claims for no-fault compensation through the National Vaccine Injury Compensation Program established by the act. Under the Program, compensation for pain and suffering is limited to \$250,000. A party not satisfied with the compensation awarded under the Program may file a tort action under state law, but subject to some limitations. Although recovery under the Program is limited, it was hoped that "the relative certainty and generosity of the system's awards will divert a significant number of potential plaintiffs from litigation."<sup>9</sup>

On August 17, 1994, the President signed into law the General Aviation Revitalization Act, P.L. 103-298, which established an 18 year statute of repose (see "Glossary") for planes with fewer than 20 seats that are not used in scheduled service.<sup>10</sup>

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<sup>6</sup> S. Rep. No. 97-192 (1981).

<sup>7</sup> 15 U.S.C. §§ 3901 *et seq.*

<sup>8</sup> 42 U.S.C. §§ 300aa-1 *et seq.*

<sup>9</sup> H. Rep. No. 99-908, pt. 1, at 13 (1986).

<sup>10</sup> 49 U.S.C. § 40101.



The 104<sup>th</sup> Congress passed a products liability bill, H.R. 956, but failed to override President Clinton's veto of it.

The 104<sup>th</sup> Congress also enacted the Bill Emerson Good Samaritan Food Donation Act (P.L. 104-210), which limits civil liability for a person or gleaner (“a person who harvests for free distribution to the needy”), except in cases of gross negligence or intentional misconduct, who donates apparently wholesome food or an apparently fit grocery product “in good faith to a non-profit organization for ultimate distribution to needy individuals.” It also limits liability of the nonprofit organization that receives the donation, except in cases of gross negligence or intentional misconduct.

The 105<sup>th</sup> Congress enacted H.R. 872, the Biomaterials Access Assurance Act of 1998 (P.L. 105-230), which limits the products liability under state law of biomaterials suppliers, which it defines as an entity that supplies a component part or raw materials for use in the manufacture of an implant.

The 106<sup>th</sup> Congress enacted H.R. 775, the Y2K Act (P.L. 106-37), which limits contractual and tort liability under state law in suits, other than those for personal injury or wrongful death, “in which the plaintiff's alleged harm or injury arises from or is related to an actual or potential Y2K failure....”

The 107<sup>th</sup> Congress enacted the Homeland Security Act of 2002 (P.L. 107-296), three sections of which limit the products liability of various defendants; section 304 immunizes manufacturers and administrators of smallpox vaccine from liability, section 863 limits the liability of sellers of anti-terrorism technology, and section 1714-1717 limit the liability of manufacturers and administrators of the components and ingredients of vaccines.<sup>11</sup>

The 108<sup>th</sup> Congress enacted P.L. 108-7, Division L., § 102, of which repealed §§ 1714-17 of P.L. 107-296 (2002).

The 109<sup>th</sup> Congress enacted the Protection of Lawful Commerce in Arms Act (P.L. 109-92). It prohibits “a civil action or proceeding or an administrative proceeding,” except in six circumstances, against a manufacturer or seller of a firearm or ammunition, or a trade association, for damages “resulting from the criminal or unlawful misuse” of a firearm or ammunition. Section 5 of P.L. 109-92 is a separate law called the Child Safety Lock Act of 2005. With exception, it requires a “secure gun storage or safety device” (as defined in 18 U.S.C. §921(a)(34)) on handguns, and provides that a person who has lawful possession and control of a handgun, and who uses such a device, is entitled to the same immunity as granted to gun manufacturers, sellers, and trade associations by P.L. 109-92.<sup>12</sup>

The 109<sup>th</sup> Congress also enacted the Public Readiness and Emergency Preparedness Act (P.L. 109-148). Division C limits liability with respect to pandemic flu and other public health countermeasures upon a declaration by the Secretary of Health and Human Services of a public health emergency or the credible risk of such emergency. Victims could, in lieu of suing, accept

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<sup>11</sup> See CRS Report RL31649, *Homeland Security Act of 2002: Tort Liability Provisions*, by Henry Cohen.

<sup>12</sup> See CRS Report RS22074, *Limiting Tort Liability of Gun Manufacturers and Gun Sellers: Legal Analysis of P.L. 109-92 (2005)*, by Henry Cohen.

payment under a new “Covered Countermeasure Process Fund,” if Congress appropriates money for this fund.<sup>13</sup>

Although many bills were introduced in the 110<sup>th</sup> Congress that would affect various aspects of products liability law, none were enacted.

## Legislative Developments

In the 111<sup>th</sup> Congress, thus far, one piece of legislation pertaining to product liability has been introduced—S. 45. This bill is patterned on legislation introduced in the previous two Congresses. Following the synopsis of S. 45 is a summary of selected bills that have been introduced many times, most recently in the 110<sup>th</sup> Congress. Some of these bills may be reintroduced in the 111<sup>th</sup> Congress.

### 111<sup>th</sup> Congress

**S. 45 (Ensign) Medical Care Access Protection Act of 2009 (MCAP Act).** Introduced January 6, 2009. Referred to Senate Committee on Health, Education, Labor, and Pensions. With respect to health care liability claims concerning the provision of health care goods or services, S. 45, with some exceptions, would create a three-year statute of limitations from “the date of the manifestation of injury” or one-year statute of limitations from the date the plaintiff “discovers, or ... should have discovered, the injury, whichever [date] occurs first.” The bill would limit liability of health care providers for injuries caused not only by medical malpractice, but also by defective medical products (e.g., drugs, medical devices). Health care providers who prescribe or dispense Food and Drug Administration-approved prescriptions, drugs, biologic products, or medical devices for approved indications could not be named as a party to a product liability suit and would not be liable in a class action against the manufacturer, distributor, or product seller. The bill would impose a cap on noneconomic damages of \$250,000 or a total of \$500,000 in the event that noneconomic damages were awarded against multiple health care institutions, and a cap on punitive damages of the greater of \$250,000 or twice the economic damages, and would set criteria for awarding punitive damages. In addition, the bill would prevent the discounting of an award for future noneconomic damages to present value, set limits on contingent fees for attorneys representing health care claimants, and establish qualifications for certain expert witnesses. S. 45 also would allow the introduction of evidence of collateral source payments, and, with exceptions, would reduce recovery by the amount of collateral source benefits to which the plaintiff is entitled. Joint and several liability would be eliminated, and parties would only be liable for their portion of the damages awarded.

### Selected Bills From the 110<sup>th</sup> Congress

**H.R. 961 (Shuster) The Respirator Access Assurance Act of 2007.** H.R. 961 would have shielded manufacturers and sellers of respirators from liability for defective design or warning in actions involving respirators that were approved by National Institute on Occupational Safety and

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<sup>13</sup> See CRS Report RS22327, *Pandemic Flu and Medical Biodefense Countermeasure Liability Limitation*, by Henry Cohen and Vanessa K. Burrows.

Health (NIOSH) and manufactured in compliance with NIOSH design and labeling standards. This bill was also introduced in the 109<sup>th</sup> Congress.

**H.R. 989 (Boren) Innocent Sellers Fairness Act.** Under this bill, a product seller would not have been liable for damages arising out of an accident unless it had been the manufacturer, had participated in the design or installation of the product, or had “altered, modified, or expressly warranted the product in a manner not authorized by the manufacturer.” This bill was also introduced in the 109<sup>th</sup> Congress.

**H.R. 2067 (Reichert) Good Samaritan Protection for Construction, Architectural, and Engineering Volunteers Act.** The bill would have limited liability for entities and employees, except in cases of gross negligence or willful misconduct, for damages for harm caused by a construction, architectural, or engineering entity, or an employee of such entity, if the entity or employee provided emergency construction, architectural, or engineering assistance on a voluntary basis, in good faith, and without expectation of compensation. The term “construction assistance” in this bill included equipment. The bill also would have preempted inconsistent state laws, except that the bill would not have preclude states from providing a higher amount of protection from liability or from providing reimbursement for costs or expenses as authorized by state or local law. This bill was also introduced in the 109<sup>th</sup> Congress.

**H.R. 2183 (Boren) Commonsense Consumption Act of 2007.** This bill would have prohibited a person from bringing suits in federal or state court against a manufacturer, marketer, distributor, advertiser, or seller of food, or a trade association, alleging that food caused weight gain, obesity, or a health condition caused or associated with weight gain or obesity. S. 1323 introduced in the 110<sup>th</sup> was identical to this bill. This bill was also introduced in the 108<sup>th</sup> and 109<sup>th</sup> Congresses.

**H.R. 2580 (Gingery) Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2007.** This bill would have provided a cap noneconomic and punitive damages and attorneys’ contingent fees, and would have imposed other tort reforms on medical malpractice suits and medical products liability suits against manufacturers, distributors, suppliers, marketers, promoters, or sellers of medical products. This bill was also introduced in the 108<sup>th</sup> and 109<sup>th</sup> Congresses.

**H.R. 4936 (Ackerman) Antifreeze Bittering Act of 2007.** This bill would have limited the liability of manufacturers, distributors, recyclers, or sellers of engine coolant or antifreeze who are in compliance with the requirements of the act for personal and property loss or damage to the environment that results from the inclusion of denatonium benzoate in any coolant or antifreeze. This bill was also introduced in the 108<sup>th</sup> and 109<sup>th</sup> Congresses.

**S. 328 (Menendez) Ensuring Implementation of the 9/11 Commission Report Act.** Section 117 of the bill would have limited civil liability for the donation of fire control or fire rescue equipment to volunteer fire companies, except in cases of gross negligence or intentional misconduct or cases in which the donor was the manufacturer of the equipment. The bill would have also preempted inconsistent state laws. This kind of bill has been introduced in the 106<sup>th</sup>-109<sup>th</sup> Congresses generally under the title of Good Samaritan Volunteer Firefighting Assistance Act.

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