



AMERICAN BAR ASSOCIATION

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**STATEMENT
of
DAVID C. WEINER
Past Chair**

ABA SECTION OF LITIGATION

and

**PETER J. NEESON
Chair**

ABA SECTION OF TORT TRIAL AND INSURANCE PRACTICE

on behalf of the

AMERICAN BAR ASSOCIATION

submitted to the

SMALL BUSINESS COMMITTEE

of the

UNITED STATES HOUSE OF REPRESENTATIVES

on the subject of

**SMALL BUSINESS AND FEDERAL PRODUCT LIABILITY
LEGISLATION**

May 24, 2007

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to present the views of the American Bar Association on federal product liability legislation and small businesses. We are David C. Weiner, Past Chair of the ABA's Section of Litigation, and Peter J. Neeson, Chair of the ABA's Section of Tort Trial and Insurance Practice. The Section of Litigation has approximately 77,000 members, many of whom represent clients on both sides of product liability litigation. The Section of Tort Trial and Insurance Practice has approximately 35,000 members who represent plaintiffs, defendants and insurers.

The ABA is committed to having a legal system in America that is effective and just, one that protects the rights of consumers and manufacturers, plaintiffs and defendants. We continually work on many fronts to develop recommendations and pursue projects aimed at improving our civil justice systems at both the federal and state level.

ABA Policy on Federal Product Liability Legislation

The ABA has long opposed enactment of broad federal product liability legislation. We support the continued right of the states and territories to regulate product liability law rather than having the United States Congress mandate federal legislation. We have adopted an extensive set of recommendations aimed at improving the tort liability systems at the state level. It is attached as Appendix A. The ABA opposes broad federal product liability such as the proposed "Small Business Liability Reform Act," which was introduced in the 108th Congress as H.R. 2813. The ABA also opposes legislation which would limit a product seller's liability for the sale of a defective product such as the proposed "Innocent Sellers Fairness Act," which was introduced in the 109th Congress as H.R. 5500. We understand these bills will be reintroduced in this Congress.

ABA Rationale for Opposition to Broad Federal Product Liability Legislation

The ABA opposes legislation such as H.R. 2813 because we believe broad federal product liability legislation would deprive consumers of the sound guidance of the well-developed product liability laws of their

individual states, as well as the flexibility to refine carefully the law through their state courts, and to make any necessary major improvements in the law through their state legislatures. Today our citizens have available, for the peaceful resolution of disputes, a system of law based on over 200 years of careful analysis of judicial precedent drawn from cases in their own communities of similar factual premise.

Due to alternative forums and the rich diversity of social environment in a huge country, the judiciary of our states has before it a wealth of past legal experience with which to guide deliberations for the fair and just resolution of disputes. The result is a flexible, constantly developing body of law which balances the conflicting needs and demands of the present day as reflected in current disputes. A legal system which results in that balance should not be disturbed by Congress on the pretext of restoring another perception of balance pressured by one special interest group or another. Otherwise, Congress will have effectively rejected a legal system which, after two centuries, continues to demonstrate that it is the best method by which to maintain the confidence in the judicial system of the country by the public as a whole.

Federal legislation such as H.R. 2813 would be an unwise and unnecessary intrusion of massive proportions on the long-standing authority of states to promulgate tort law and, rather than resolve whatever uncertainties now exist, would result in legal chaos. Such legislation would create a federal over-lay on top of the judicial system of the fifty States. This would create endless issues of interpretation and dispute, all of which would needlessly drive up the cost and extend the time to resolve a dispute. Our citizens will be badly served by this additional complexity at a time when the ABA, and other groups representing broad constituencies, are working to drive down the cost and delay inherent in litigation, while at the same time keeping the doors of the courthouse open.

Further, constitutional challenges to such an act, in whole or part, would be raised in the various state courts where jurisdiction would reside under H.R. 2813. Interpretation of various provisions of H.R. 2813 would differ as state courts tailor their decisions according to the situation in their individual states. This would be compounded by the fact that there is no body of law, other than a state's own, to aid state courts in applying a

federal standard to any given set of facts. In addition, unequal results would occur when product liability litigation is combined with other fields of law with differing rules of law, for example, when a product liability claim is joined with an automobile liability claim.

There is no evidence that the number of tort cases is increasing. In fact, tort filings have decreased over the years according to the National Center for State Courts. In 1996, it reported that “[a]lthough tort reform continues to be hotly debated in Congress and in many state legislatures, there is no evidence that the number of tort cases is increasing. In fact, tort filings decreased 9 percent from 1990 to 1993 and have remained stable for the past two years [1994 and 1995]. All states have enacted some type of tort reform in the past decade, though the impact of these reforms is clearer in some states than in others.” See *Examining the Work of State Courts, 1995, a National Perspective from the Court Statistics Project*,” Brian J. Ostrom and Neal B. Kauder for the National Center for State Courts, 1996, p. 7. In 2006, it reported that the number of cases was lower in 2004 than it was in 1995. These statistics are the latest statistics available. See *Examining the Work of State Courts, 2005, a National Perspective from the Court Statistics Project*,” R. Schauffler, R. LaFountain, S. Strickland and W. Raftery for the National Center for State Courts, 2006, p. 27.

Likewise, the number of tort cases has also fallen at the federal level. The most recent statistics from the Federal Justice Statistics Program found that the number of tort trials concluded in U.S. district courts declined by 79 percent - from 3,600 trials in 1985 to fewer than 800 trials in 2003. Approximately nine out of 10 tort trials involved personal injury issues - most frequently, product liability, motor vehicle (accident), marine and medical malpractice cases. The percentage of tort cases concluded by trial in U.S. district courts has also declined from 10 percent in the early 1970s to 2 percent in 2003. See *Federal Tort Trials and Verdicts, 2002-03*, Thomas H. Cohen, J.D., Ph.D., Bureau of Justice Statistics, August 2005, p. 1 and p. 3.

ABA Policy on Narrowly Drawn Federal Legislation

The ABA supports enactment of narrowly drawn federal legislation on

compensation which addresses the issues of liability and damages with respect to claims arising out of occupational diseases (such as asbestosis) with long latency periods in cases where: 1) the number of such claims and the liability for such damages threaten the solvency of a significant number of manufacturers engaged in commerce; and 2) the number of such claims has become an excessive burden on the judicial system. The ABA also supports federal legislation allocating product liability risks between the federal government and its contractors.

Discussion of Product Seller Provisions of H.R. 2813 of the 108th Congress and H.R. 5500 of the 109th Congress

The ABA opposes the product seller provisions of H.R. 2813 because those provisions remove the motivation of the only party with direct contact with the consumer, the seller, to ensure that the shelves in American businesses are stocked only with safe products. Seller liability is an effective way of maintaining and improving product safety. Manufacturers traditionally rely on sellers to market their products. Through their purchasing and marketing power, sellers have influenced manufacturers to design and produce safer consumer goods.

Ambiguity in the language of these bills may result in unintentionally eliminating grounds for liability which promote safety. For example, the bills expressly eliminate a product seller's liability for breach of warranty except for breach of express warranties. The Uniform Commercial Code, long regarded as a reasonable, balanced law, holds sellers responsible for breach of implied warranties as well. By its vague and ambiguous language, the proposed legislation may result in preempting these long-established grounds of liability.

Method of Developing ABA Policy on Broad Federal Product Liability Legislation

ABA policy opposing enactment of broad federal product liability legislation is based on February 1983 recommendations developed by a diverse committee charged by the ABA to study the advisability of broad federal product liability legislation. That entity reaffirmed and expanded on 1981 ABA policy. That committee was appointed by the ABA President in

1982 and was named the Special Committee to Study Product Liability. The Committee included among its members nominees of the Sections of Business Law, Public Contract Law, Litigation and Tort and Insurance Practice and was chaired by a law school dean. Based on the recommendations and report of the Special Committee, in February 1983, the ABA's House of Delegates adopted the resolution appended to this statement as Appendix B.

On February 14, 1995, the ABA's House of Delegates reaffirmed its opposition to such legislation adopting the following policy:

Resolved that the American Bar Association supports the continued right of the states and territories to regulate product liability law and it is further resolved that the American Bar Association opposes federal legislation abolishing strict seller liability and opposes the product seller provision set forth in section 103(b) of H.R. 10.

ABA Recommendations for Improving the State Tort Liability Systems

ABA policy aimed at improving the tort liability system at the state level was developed by a broadly-based entity appointed by the ABA President in 1985. The 14-member commission was called the Action Commission to Improve the Tort Liability System.

The members of the Commission were federal trial and appellate court judges; a state Supreme Court justice; corporate counsel, including those with insurance experience; consumer and civil rights advocates; academicians; and practicing plaintiff and defense lawyers.

In February 1987, the ABA House of Delegates considered the Commission's recommendations and adopted the resolution appended to this statement as Appendix A.

Many state legislatures and state judicial systems have implemented these or similar recommendations to those recommended by the ABA in 1987. For states that have not done so, we believe that these

recommendations to improve the tort system can and should be implemented by the courts and legislatures at the state, and not the federal, level. While not perfect, the tort systems throughout this country are working well.

This is in keeping with the ABA's view that the tradition of state-fashioned tort principles remains fundamentally sound.

The 1987 ABA resolution makes numerous recommendations addressed to the courts and to the lawyers. These recommendations include the following:

1. No ceilings should be placed on pain and suffering awards. Instead, trial and appellate courts should more effectively control pain and suffering verdicts which are either so excessive or so inadequate as to be disproportionate to the injury suffered or to community expectations.
2. Tort awards for pain and suffering should be more uniform. To achieve that goal, the ABA recommends such approaches as objective annual studies of tort awards, public information on those awards, guidelines for use by the trial courts, and study given as to whether additional guidance can and should be given to the jury on the range of appropriate damage awards.
3. Fee arrangements should be written in plain English or appropriate other language; percentage fees should be out of the net amount and not out of the gross amount of any judgment or settlement; and courts or a public body should disallow attorneys fees that are found to be plainly excessive.
4. To protect future claimants, the ABA opposes various forms of secrecy agreements and arrangements that require destruction of information or records as well as agreements that would prohibit a particular attorney from representing other claimants.
5. The ABA has specific recommendations addressed to the courts to streamline the litigation process, to eliminate frivolous

claims and to reduce the long delays currently characteristic of much litigation. These include permitting non-unanimous jury verdicts and use of alternative dispute resolution methods.

There are certain areas in which the ABA believes state legislative action may be needed.

1. The ABA believes that punitive damages are appropriate in certain cases, but their scope should be limited. They should not be commonplace. The basic standard to establish punitive damages should be a conscious or deliberate disregard of a defendant's obligations. The standard of proof should be "clear and convincing" evidence and not a lesser standard such as a "preponderance of the evidence."
2. The ABA is concerned that no defendant should be subjected to punitive damages that are excessive in the aggregate for the same wrongful act. There should therefore be safeguards to prevent the imposition of repeated punitive damages. The purpose of punitive damages is to punish, not to confiscate. The ABA recognizes that the principal responsibility to control excessive awards for punitive damages rests on the courts; however, state legislation may be necessary to assure more effective judicial review of punitive damage awards.
3. The ABA believes that the doctrine of joint and several liability should be limited by legislation to apply only to economic losses in certain cases. Defendants should not be held liable for someone else's share of any non-economic loss when the defendant's responsibility is substantially disproportionate to liability for the entire loss suffered by the plaintiff.
4. The ABA recognizes that allowing non-unanimous jury verdicts may require legislation.

The ABA distributed these recommendations widely. For example, in 1992 the ABA released the *ABA Blueprint for Improving the Civil Justice System* setting forth these and many other ABA recommendations for

improving the fairness, efficiency and effectiveness of the civil justice system. Nearly 5,000 copies of the *Blueprint* have been distributed to legislative and court officials, state and local bar officials, numerous other professional groups, the chairs of all ABA sections and committees; and key journalists. Numerous requests have been received from lawyers, judges, reporters, academicians, law students and the public. I was a member of the ABA entity that developed the *Blueprint*. A chapter highlighting these recommendations was also included in *An Agenda for Justice: ABA Perspectives on Criminal and Civil Justice Issues* that was released in August 1996. The Agenda -- developed by the Ad Hoc Committee on Civil Justice Improvements and the Ad Hoc Committee on Criminal Justice Improvements in conjunction with the ABA's Justice Initiatives program -- was the ABA's first comprehensive and descriptive compilation of recommendations for justice system improvements. Almost 5,000 copies have been distributed in a manner similar to that of the *Blueprint*. I was a member of the Ad Hoc Committee for Civil Justice Improvements when it developed the *Agenda*.

The Coalition for Justice

Lawyers, individually and as members of the organized bar, have long worked with judges and other officials to improve the justice system.

For a number of years, the ABA and numerous state and local bar associations have been working primarily through the ABA's Coalition for Justice to form partnerships with members of the public and community groups so that we can take a fresh look at the problems of the civil and criminal justice systems. The Coalition for Justice helps to coordinate the ABA Justice Initiatives Programs, encouraging access, raising public awareness and developing public/bar partnerships with national organizations and federal agencies on justice system issues. Coalition members include not only bar leaders, but also officials from public interest, business, government, media and senior citizens organizations.

The Coalition's goal is to help restore public confidence in the justice system by developing a broad-based network of organizations that will support and participate in justice system improvements at the state and local level. The outreach efforts of the Coalition have resulted in

partnerships with groups such as the American Association of Retired Persons, League of Women Voters, NAACP and others.

Justice initiatives have included citizen's conferences, the establishment of justice commissions in over two hundred jurisdictions, preparation of National Issues Forums to educate community groups, "hot topics" programs, and a variety of other approaches on access to justice or civil and criminal justice improvements.

Thank you for giving me this opportunity to submit the American Bar Association's views to you on this important subject.

RESOLUTION APPROVED
AMERICAN BAR ASSOCIATION
HOUSE OF DELEGATES

February 16-17, 1987
(Report No. 123)

Be It Resolved, That the American Bar Association adopts the following recommendations:

A. Insurance

1. The American Bar Association should establish a commission to study and recommend ways to improve the liability insurance system as it affects the tort system.

B. Pain and Suffering Damages

2. There should be no ceilings on pain and suffering damages, but instead trial and appellate courts should make greater use of the power of remittitur or additur with reference to verdicts which are either so excessive or inadequate as to be clearly disproportionate to community expectations by setting aside such verdicts unless the affected parties agree to the modification.

3. One or more tort award commissions should be established, which would be empowered to review tort awards during the preceding year, publish information on trends, and suggest guidelines for future trial court reference.

4. Options should be explored by appropriate ABA entities whether additional guidance can and should be given to the jury on the range of damages to be awarded for pain and suffering in a particular case.

C. Punitive Damages

5. Punitive damages have a place in appropriate cases and therefore should not be abolished. However, the scope of punitive damages should be narrowed through the following measures:

a. Standards of Conduct and Proof

Punitive damages should be limited to cases warranting special sanctions and should not be commonplace. A threshold requirement for the submission of a punitive damages case to the finder of fact should be that the defendant demonstrated a conscious or deliberate disregard with respect to the plaintiff. As a further safeguard, the standard of proof to be applied should be "clear and convincing" evidence

as opposed to any lesser standard such as "by a preponderance of the evidence."

b. The Process of Decision

(1) Pre-Trial - Appropriate pre-trial procedures should be routinely utilized to eliminate frivolous claims for punitive damages prior to trial, with a savings mechanism available for late discovery of misconduct meeting the standard of liability.

(2) Trial - Evidence of net worth and other evidence relevant only to the question of punitive damages ordinarily should be introduced only after the defendant's liability for compensatory damages and the amount of those damages have been determined.

(3) Post-Trial - As a check against excessive punitive damage awards, verdicts including such awards should be subjected to close scrutiny by the courts. The trial court should order remittitur wherever justified. Excessiveness should be evaluated in light of the degree of reprehensibility of the defendant's acts, the risk undertaken by the plaintiff, the actual injury caused, the net worth of the defendant, whether the defendant has reformed its conduct and the degree of departure from typical ratios (as reflected in the best available empirical data) between compensatory and punitive damages. If necessary to assure such judicial review, appropriate legislation should be enacted. Opinions issued by trial or appellate courts either upholding or modifying an award should specify the factors which were considered and relied upon.

c. Multiple Judgment Torts

While the total amount of any punitive damages awarded should be adequate to accomplish the purposes of punitive damages, appropriate safeguards should be put in force to prevent any defendant from being subjected to punitive damages that are excessive in the aggregate for the same wrongful act.

d. Vicarious Liability

With respect to vicarious liability for punitive damages, the provisions of Section 909 of the Restatement (Second) of Torts (1979) should apply. Legislatures and courts should be sensitive to adopting appropriate safeguards to protect the master or principal from vicarious liability for the unauthorized acts of nonmanagerial servants or agents.

e. To Whom Awards Should Be Paid

In certain punitive damages cases, such as torts involving possible multiple judgments against the same defendant, a court could be authorized to determine what is a reasonable portion of the punitive damages award to compensate the plaintiff and counsel for bringing the action and prosecuting the punitive damage claim, with the balance of the award to be allocated to public purposes, which could involve methods of dealing with multiple tort claims such as consolidation of claims or forms of class actions. The novelty of such proposals and the absence of any adequately tested programs for implementing require further study before an informed judgment can be made as to whether, or to what extent, such proposals will work in practice. We urge such studies. The concept of public allocation of portions of punitive damage awards in single judgment actions is also worthy of consideration to the extent workable methods of implementation may hereafter be developed.

D. Joint-and-Several Liability

6. The doctrine of joint-and-several liability should be modified to recognize that defendants whose responsibility is substantially disproportionate to liability for the entire loss suffered by the plaintiff are to be held liable for only their equitable share of the plaintiff's noneconomic loss, while remaining liable for the plaintiff's full economic loss. A defendant's responsibility should be regarded as "substantially disproportionate" when it is significantly less than any of the other defendants; for example, when one of two defendants is determined to be less than 25% responsible for the plaintiff's injury.

E. Attorneys' Fees

7. Fee arrangements with each party in tort cases should be set forth in a written agreement that clearly identifies the basis on which the fee is to be calculated. In addition, because many plaintiffs may not be familiar with the various ways that contingency fees may be calculated, there should be a requirement that the contingency fee information form be given to each plaintiff before a contingency fee agreement is signed. The content of the information form should be specified in each jurisdiction and should include at least the maximum fee percentage, if any, in the jurisdiction, the option of using different fee percentages depending on the amount of work the attorney has done in obtaining a recovery, and the option of using fee percentages that decrease as the size of a recovery increases. The form should be written in plain English, and, where appropriate, other languages.

8. Courts should discourage the practice of taking a percentage fee out of the gross amount of any judgment or

settlement. Contingent fees should normally be based only on the net amount recovered after litigation disbursements such as filing fees, deposition costs, trial transcripts, travel, expert witness fees, and other expenses necessary to conduct the litigation.

9. Upon complaint of a person who has retained counsel, or who is required to pay counsel fees, the fee arrangement and the fee amount billed may be submitted to the court or other appropriate public body, which should have the authority to disallow, after a hearing, any portion of a fee found to be "plainly excessive" in light of prevailing rates and practices.

F. Secrecy and Coercive Agreements

10. Where information obtained under secrecy agreements (a) indicates risk of hazards to other persons, or (b) reveals evidence relevant to claims based on such hazards, courts should ordinarily permit disclosure of such information, after hearing, to other plaintiffs or to government agencies who agree to be bound by appropriate agreements or court orders to protect the confidentiality of trade secrets and sensitive proprietary information.

11. No protective order should contain any provision that requires an attorney for a plaintiff in a tort action to destroy information or records furnished pursuant to such order, including the attorney's notes and other work product, unless the attorney for a plaintiff refuses to agree to be bound by the order after the case has been concluded. An attorney for plaintiff should only be required to return copies of documents obtained from the defendant on condition that defendant agrees not to destroy any such documents so that they will be available, under appropriate circumstances, to government agencies or to other litigants in future cases.

12. Any provision in a settlement or other agreement that prohibits an attorney from representing any other claimant in a similar action against the defendant should be void and of no effect. An attorney should not be permitted to sign such an agreement or request another attorney to do so.

G. Streamlining the Litigation Process: Frivolous Claims and Unnecessary Delay

13. A "fast track" system should be adopted for the trial of tort cases. In recommending such a system, we endorse a policy of active judicial management of the pre-trial phases of tort litigation. We anticipate a system that sets up a rigorous pre-trial schedule with a series of deadlines intended to ensure that tort cases are ready to be placed on the trial calendar within a specified time after filing and tried promptly thereafter. The courts should enforce a firm policy against continuances.

14. Steps should be taken by the courts of the various states to adopt procedures for the control and limitation of the scope and duration of discovery in tort cases. The courts should consider, among other initiatives:

(a) At an early scheduling conference, limiting the number of interrogatories any party may serve, and establishing the number and time of depositions according to a firm schedule. Additional discovery could be allowed upon a showing of good cause.

(b) When appropriate, sanctioning attorneys and other persons for abuse of discovery procedures.

15. Standards should be adopted substantially similar to those set forth in Rule 11 of the Federal Rules of Civil Procedure as a means of discouraging dilatory motions practice and frivolous claims and defenses.

16. Trial judges should carefully examine, on a case-by-case basis, whether liability and damage issues can or should be tried separately.

17. Nonunanimous jury verdicts should be permitted in tort cases, such as verdicts by five of six or ten of twelve jurors.

18. Use of the various alternative dispute resolution mechanisms should be encouraged by federal and state legislatures, by federal and state courts, and by all parties who are likely to, or do become involved in tort disputes with others.

H. Injury Prevention/Reduction

19. Attention should be paid to the disciplining of all licensed professionals through the following measures:

(a) A commitment to impose discipline, where warranted, and funding of full-time staff for disciplinary authorities. Discipline of lawyers should continue to be the responsibility of the highest judicial authority in each state in order to safeguard the rights of all citizens.

(b) In every case in which a claim of negligence or other wrongful conduct is made against a licensed professional, relating to his or her profession, and a judgment for the plaintiff is entered or a settlement paid to an injured person, the insurance carrier, or in the absence of a carrier, the plaintiff's attorney, should report the fact and the amount of payment to the licensing authority. Any agreement to withhold such information and/or to close the files from the disciplinary authorities should be unenforceable as contrary to public policy.

I. Mass Tort

20. The American Bar Association should establish a commission as soon as feasible, including members with expertise in tort law, insurance, environmental policy, civil procedure, and regulatory design, to undertake a comprehensive study of the mass tort problem with the goal of offering a set of concrete proposals for dealing in a fair and efficient manner with these cases.

J. Concluding Recommendation

21. After publication of the report, the ABA Action Commission to Improve the Tort Liability System should be discharged of its assignment.

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RESOLUTION OF THE HOUSE OF DELEGATES

OF THE AMERICAN BAR ASSOCIATION

ADOPTED FEBRUARY, 1983

I. BE IT RESOLVED, That the American Bar Association opposes enactment of broad federal legislation that would codify the tort laws of the 50 states as they relate to product liability, and opposes legislation, such as S.2631 reported by the Senate Commerce, Science and Transportation Committee in the 97th Congress, that would attempt to do so.

II. FURTHER RESOLVED, That the American Bar Association supports federal legislation which addresses the issues of liability and damages with respect to claims for damages against manufacturers by those who contract an occupational disease (such as asbestosis) when: (a) there is a long latency period between exposure to the product and manifestation of the disease; (b) the number of such claims and the liability for such damages in fact threaten the solvency of a significant number of manufacturers engaged in interstate commerce; and (c) the number of such claims have become clearly excessive burdens upon the state and federal judicial systems.

III. FURTHER RESOLVED, That the American Bar Association supports enactment of federal legislation allocating product liability risks between the federal government and its contractors and providing, in certain instances, indemnity against those risks.