

NLWJC- Kagan

Counsel - Box 019 - Folder 007

Civil Tort Reform [1]

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Phone No. (Partial) (1 page)	04/24/1995	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8286

FOLDER TITLE:

Civil Tort Reform [1]

2009-1006-F

kc141

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE
WASHINGTON

D. Agnes

Mr. Peter W. Agnes, Jr.
Standing Committee on Dispute Resolution
Massachusetts Trial Court
2 Center Plaza, Room 540
Boston, MA 02108

3 May 1995

Dear Mr. Agnes:

Thank you for your letter and the package of information on dispute resolution. With growing public interest in civil justice reform, ADR is sure to play an significant role in any changes and improvements that are made. I appreciate your sending me a copy of the progress that Massachusetts has already achieved in this important arena.

I have taken the liberty of passing your report on to the Counsel to the President, Abner J. Mikva. I am sure he will be interested in its contents.

Again, thank you for sharing your thoughts and achievements. As we face the challenge of reinventing government for the twenty-first century, we rely on the support, hard work and knowledge of people like you. I am confident that with your help, the Clinton administration will continue to provide strong leadership for our country.

Sincerely,



Mark D. Gearan
Director of Communications

cc: Judge Mikva

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Phone No. (Partial) (1 page)	04/24/1995	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8286

FOLDER TITLE:

Civil Tort Reform [1]

Kim Coryat
2009-1006-F
kc141

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

[001]

STANDING COMMITTEE ON DISPUTE RESOLUTION
MASSACHUSETTS TRIAL COURT

2 CENTER PLAZA, ROOM 540
BOSTON, MASSACHUSETTS 02108
(617) 742-8575
FAX: 742-0968

Chairperson:

PETER W. AGNES, JR., FIRST JUSTICE
Charlestown District Court

Vice Chairperson:

FRANK E. A. SANDER, ESQ.
Harvard Law School

Staff:

BARBARA DIAMOND, ESQ.
Supreme Judicial Court

ANN ARCHER, ESQ.
Administrative Office
of the Trial Court

April 24, 1995

Mr. Mark Gearan
Director of Communications
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20000

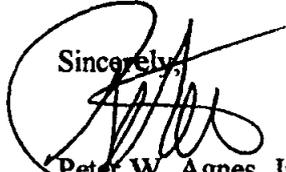
Dear Mark:

I hope that all is well with you and your family.

With all the debate about civil justice reform, I thought you might be interested in a report we just released on plans for expanding access to ADR alternatives in the courts of Massachusetts. Unlike some of the proposals being advanced in Congress such as "loser pays" and artificial limits on damages, our goal is not simply to achieve a form of docket control or to improve case management, but rather to improve the quality of justice by giving consumers more choice. There is a great risk that some of the other civil justice reform initiatives will tend to deny access to the courts to people who are not financially well off. Expanded use of ADR, like what is now taking place in the federal system under the Civil Justice Reform Act of 1990 and in many of the states, will not only produce a better quality of justice, but will serve to equip courts with the tools necessary to manage their growing caseloads.

I'm going to be in Washington from May 18-20th attending a national ADR conference sponsored by the National Institute for Dispute Resolution at the Holiday Inn. **I would enjoy an opportunity to meet with you if you have the time. You may contact me at** P6/(b)(6)

Best wishes.

Sincerely,

Peter W. Agnes, Jr.

STANDING COMMITTEE ON DISPUTE RESOLUTION

ANNOUNCEMENT OF PUBLIC MEETINGS

The Standing Committee on Dispute Resolution will hold the following public meetings to discuss the recommendations in its April 1995 Progress Report:

1. On Thursday, May 11, 1995 from 4:00-6:00P.M. at the Worcester Superior Court at 2 Main Street in Worcester. This meeting will be co-hosted by the Worcester County Bar Association, the Community Mediation Center, Northern Central Court Services, Inc., the Massachusetts Association of Mediation Programs and Practitioners (MAMPP), the New England Chapter of the Society of Professionals in Dispute Resolution (SPIDR), the Massachusetts Office of Dispute Resolution (MODR) and the Massachusetts District Court Mediation Program.
2. On Monday, May 22, 1995 from 4:00-6:00P.M. at the offices of the Boston Bar Association at 16 Beacon Street in Boston. This meeting will be co-hosted by the Boston Bar Association, the Cambridge Dispute Settlement Center, the CORE Family Mediation Project, the Harvard Mediation Program, Metropolitan Mediation Services, Framingham Court Mediation Services, Graduate Programs in Dispute Resolution U-Mass Boston, Urban Community Mediators, MAMPP, SPIDR, MODR and the Massachusetts District Court Mediation Program.
3. On Wednesday, May 24, 1995 from 4:00-6:00P.M. at the Barnstable Superior Court on Main Street in Barnstable. This meeting will be co-hosted by the Barnstable County Bar Association, the Brockton District Court Mediation Project, the Cape Cod Dispute Resolution Center, the Martha's Vineyard Mediation Program, Mediation Works, Inc., Provincetown/Truro Mediation Services, MAMPP, SPIDR, MODR and the Massachusetts District Court Mediation Program.
4. On Thursday, May 25, 1995 from 4:00-6:00P.M. at the Massachusetts School of Law at Woodland Park, 500 Federal Street in Andover. This meeting will be co-hosted by the Essex County Bar Association, the Face to Face Mediation Program at Middlesex Community College, North Essex Mediators, the North Shore Community Mediation Program, MAMPP, SPIDR, MODR and the Massachusetts District Court Mediation Program.
5. On Tuesday, May 30, 1995 from 4:00-6:00P.M. at the Hampden County Housing Court at 37 Elm Street in Springfield. This meeting will be co-hosted by the Berkshire and Hampden County Bar Associations, Berkshire County Regional Housing Authority, Franklin Mediation Services, MAMPP, SPIDR, MODR and the Massachusetts District Court Mediation Program.

For additional information about the public meetings or for directions, please call Ann Archer at the Administrative Office of the Trial Court at (617) 742-8575, ext. 372.

STANDING COMMITTEE ON DISPUTE RESOLUTION

MASSACHUSETTS TRIAL COURT

PROGRESS REPORT

April 1995

The Standing Committee on Dispute Resolution encourages the submission of written comments about the preliminary recommendations set forth in this report. All comments received will be carefully reviewed by the Standing Committee members. Comments should be forwarded to the Standing Committee on Dispute Resolution, c/o Ann Archer, Esq., Administrative Office of the Trial Court, 2 Center Plaza, Boston, Massachusetts, 02108.

STANDING COMMITTEE ON DISPUTE RESOLUTION

Chair:

Hon. Peter W. Agnes, Jr., First Justice, Charlestown District Court

Vice Chair:

Frank E.A. Sander, Esq., Professor, Harvard Law School

Members:

Susanne R. Blatt, Esq., Cosgrove, O'Connell and Blatt

Melissa Brodrick, Executive Director, Massachusetts Association of
Mediation Programs and Practitioners

Cynthia Brophy, Administrator of Mediation Services, Boston Municipal
Court Department

John Dalton, Jr., Esq., Assistant Clerk-Magistrate, Quincy District Court

Albie Davis, Director of Mediation, District Court Department

Bradley Keith Gordon, Esq., Executive Director, Berkshire County Regional
Housing Authority

David A. Hoffman, Esq., Hill and Barlow

Hector Jenkins, Housing Specialist, Housing Court Department

Fredie Kay, Esq., Executive Director, Massachusetts Office of Dispute
Resolution

David E. Matz, Esq., Professor, UMass Boston/Law Center

Hon. Lawrence D. Shubow, Ret., Shapiro, Grace, Haber and Urmy

Jocelynne D. Welsh, Esq., Administrative Office of the Probate and Family
Court

Hon. Catherine White, Associate Justice, Superior Court Department

Staff:

Barbara Diamond, Esq., Supreme Judicial Court

Ann Archer, Esq., Administrative Office of the Trial Court

TABLE OF CONTENTS

PART ONE:	Introduction.....	1
PART TWO:	Report of the Subcommittee on Education.....	11
PART THREE:	Report of the Subcommittee on Structure and Finance.....	17
PART FOUR:	Report of the Subcommittee on Standards.....	23
PART FIVE:	Work Plan and Areas for Further Study.....	34

APPENDICES

Appendix A.....	A-1
Policy Statement on Dispute Resolution Alternatives	
Appendix B.....	B-1
Building the Foundation: FY1996 Budget Proposal for Court-Connected Alternative Dispute Resolution	
Appendix C.....	C-1
Questions Discussed at the Standing Committee Public Hearings	
Appendix D.....	D-1
A White Paper for the Standing Committee and the Task Force on Early Court Intervention	
Appendix E.....	E-1
Excerpt from <i>Reinventing Justice 2022</i> , The Report of the Chief Justice's Commission on the Future of the Courts (1992).	

STANDING COMMITTEE ON DISPUTE RESOLUTION

PROGRESS REPORT

April, 1995

PART ONE

Introduction

Preliminary Nature of the Report. This Progress Report contains the preliminary recommendations and some of the work-in-progress of the Standing Committee on Dispute Resolution. It has not been reviewed or approved by the Supreme Judicial Court ("SJC") or the Chief Justice for Administration and Management of the Trial Court ("CJAM"). The report is not final because we have not completed our work. We are taking the opportunity, however, to reach out to as wide an audience as possible of persons interested in the process of dispute resolution in the Massachusetts Trial Court and to request the benefit of the experience and knowledge of others before we make any final recommendations to the SJC and to the CJAM. Public meetings designed to afford an opportunity for dialogue about the contents of this report will be scheduled soon for early May. We also encourage persons to send us written comments which should be forwarded to the Standing Committee on Dispute Resolution, c/o Ann Archer, Esq., Administrative Office of the Trial Court, 2 Center Plaza, Boston, Massachusetts, 02108. For more information about the public meetings please call attorney Archer (617-742-8575).

The Standing Committee. The Standing Committee on Dispute Resolution was appointed by the SJC in consultation with the CJAM in January, 1994. Three subcommittees

have been established. There is a Subcommittee on Education chaired by Susanne Blatt, a Subcommittee on Standards chaired by Freddie Kay, and a Subcommittee on Structure and Finance chaired by David Matz. The subcommittees meet frequently throughout the month. A Steering Committee chaired by Judge Peter W. Agnes, Jr. includes the Vice-chair Frank Sander, the subcommittee chairs, Albie Davis, and staff. This Committee meets weekly to deal with administrative matters and correspondence, to plan agendas, and to assist the full Committee in organizing its activities.

Staff and Support Services. In June, 1994, the State Justice Institute awarded the Supreme Judicial Court a one year Technical Assistance Grant to enhance the effectiveness and productivity of the Standing Committee. This grant enabled the Trial Court to hire two nationally recognized experts to serve as consultants to the Standing Committee, Margaret Shaw and Elizabeth Neumeier. Margaret Shaw is an accomplished teacher and author in the field of ADR. She is the former director of the Institute for Judicial Administration, and was the Co-Director of the National Standards for Court-Connected Mediation Programs Project. She is a member of the faculty of the New York University School of Law, a consultant to the Center for Public Resources Institute for Dispute Resolution, and a frequent advisor to state and federal judicial organizations on the design and organization of ADR programs. Elizabeth Neumeier is also a frequent consultant to state and federal organizations involved in developing ADR programs. She is the former President of the Society for Professionals in Dispute Resolution, a member of the SPIDR Commission On Qualifications, and has a national arbitration and mediation practice. The Standing Committee has benefitted enormously from the insights and guidance provided by these experts.

Additionally, the Standing Committee has benefitted from the services and counsel of two staff attorneys--Ann Archer, an administrative attorney in the Administrative Office of the Trial Court ("AOTC"), and Barbara Diamond, Counsel for Policy Development for the SJC. They have participated in all of our meetings and deliberations, and have been instrumental in the preparation of this Progress Report. We also wish to acknowledge the assistance of three other members of the staff of the Supreme Judicial Court--Joan Kenny, Public Information Officer; Theda Leonard, Deputy Director of Policy Development; and Robert Lowe, Senior Research Associate. In addition, we would like to thank Dina Beach Lynch, Esq., a former member of the Standing Committee, for her contributions.

Multi-Option Justice and ADR. "Multi-Option Justice," a term used by the Chief Justice's Commission on the Future of the Courts in its 1992 report entitled *Reinventing Justice 2022* ("*Reinventing Justice*"), refers to a system in which consumers of the public justice system have convenient access to a wide variety of methods for resolving their disputes. Some are adjudicatory in nature, such as trials and arbitration, and others, such as mediation, case evaluation, and various forms of facilitated settlement processes rely upon consensual agreement. In such a system, courts take an active role in assisting the parties in choosing the most appropriate method for resolving their dispute. Multi-option justice is characterized not only by a wide choice of dispute resolution methods, but by respect for consumer choice in the selection of the most appropriate method, and by observance of consistent statewide standards as to the quality, integrity and cost of the dispute resolution services. A system of multi-option justice also is one in which the right to trial by jury is preserved. See *Reinventing Justice* at 17-21. The report suggests that multi-option justice services be delivered through a network of

"Comprehensive Justice Centers."

"Alternative Dispute Resolution" ("ADR") is a term that has come to be used in many different and sometimes contradictory ways. Originally, the term ADR served to expand thinking about the methods for resolving disputes in court by reminding us about the variety of cost effective and popular alternatives to the traditional litigation system. Over time, however, ADR has become associated with a variety of specific dispute resolution options such as mediation, arbitration, mini-trial, med-arb, summary jury trial and case evaluation. Some have suggested that the term ADR has outlived its usefulness because it perpetuates the notion that methods of dispute resolution other than the traditional litigation process involving trials enjoy a second class status as "alternatives." Others have suggested that ADR should be replaced by a phrase such as 'Complementary Dispute Resolution,' 'Appropriate Methods of Dispute Resolution,' or simply 'Dispute Resolution' to signify that there is a unity and an equality of value to the various methods by which parties who bring their disputes to the public justice system may achieve a resolution.

Nonetheless, we think ADR is a useful shorthand expression so long as it is understood to refer to a system of multi-option justice in which a wide range of high quality dispute resolution processes are available to parties in the public justice system, regardless of their financial means. It is in that sense that we use the term throughout this Progress Report.

Mission of the Standing Committee

Background. In 1992, the *Reinventing Justice* report recommended, among other things, that a Standing Committee of the court be established to "foster experimentation with and evaluation of dispute resolution methods." *Reinventing Justice* at 21. In 1993, A Task Force of

judges led by then Chief Justice for Administration and Management John E. Fenton, Jr. proposed, and the Supreme Judicial Court approved, a Policy Statement on Dispute Resolution Alternatives (“Policy Statement,” a copy of which is attached as Appendix A to this report) which also included a recommendation to establish a Standing Committee “to give advice concerning alternative dispute resolution issues and programs both to the Chief Justice for Administration and Management and to the Supreme Judicial Court.” *Policy Statement* at 2. These two documents have served as our primary guides in organizing our efforts, and in formulating our mission and work plan.

Early in the process, after receiving the suggestions of Chief Justice Paul J. Liacos of the Supreme Judicial Court and Trial Court Chief Justice for Administration and Management Fenton, as well as others, we participated in a full day retreat with the assistance of our staff and our two consultants (Elizabeth Neumeier and Margaret Shaw), and considered what our mission, goals and objectives should be. We listened to and questioned each other about the qualities and characteristics thought to be of vital importance to a public justice system. It should be noted that since his appointment last year, Chief Justice Irwin has also encouraged and supported our efforts each step of the way.

In reviewing the *Reinventing Justice* report, we observed that its value is not simply as a blueprint for how to arrange the bricks and mortar to build the “Comprehensive Justice Center,” nor how to wire the electronic kiosks. Rather it reveals what justice consumers want and the consequences of not offering services to satisfy those wants. A scientific survey of public attitudes showed that, in the twilight years of the twentieth century, justice consumers desire easy access to a variety of high quality dispute resolution methods, and that they are willing to support

the use of public funds to pay the costs of these services. See *Reinventing Justice* at 21, 111.

Reinventing Justice also cautions that if the public justice system fails to offer variety in its dispute resolution services and to make the services available to all regardless of their ability to pay, it may be condemned in the future to serve only those who are charged with criminal offenses and those who cannot afford to obtain the appropriate variety of services. See *Reinventing Justice* at 74. We heard the same concern voiced at public hearings we conducted in August, 1994 and at an open meeting sponsored by the Flaschner Judicial Institute at the mid-winter meeting of the Massachusetts Bar Association in January, 1995.

Major premises. In formulating our mission we have also drawn from the 1993 Policy Statement. The Policy Statement establishes five bedrock principles to guide the Trial Court in developing a comprehensive dispute resolution system that is consistent with the core recommendations of the *Reinventing Justice* report:

- (1) The Trial Court must institutionalize variety and offer an array of dispute resolution services to justice consumers including both adjudicatory and non-adjudicatory options (*Policy Statement, Point One*);
- (2) Access to the most appropriate method for resolving one's dispute in the Trial Court should not depend on one's ability to pay for it (*Policy Statement, Point One*);
- (3) Consistent, statewide standards must be established by the Trial Court, subject to the approval of the Supreme Judicial Court, that govern the appropriateness of any dispute resolution service to particular types of cases; mandatory referrals to a dispute resolution service; the selection and qualifications of those who provide the services; the quality, integrity, and cost of the services; and the need for confidentiality (*Policy Statement,*

Point Two);

(4) No one employed by or performing services for the Trial Court shall refer a specific case to a specific dispute resolution provider other than in accordance with standards adopted for this purpose by the Trial Court (*Policy Statement*, Point Three); and,

(5) The court's responsibility to regulate dispute resolution services does not extend to services provided in the private marketplace and independent of the courts nor does it restrict the parties' freedom to seek such independent dispute resolution services (*Policy Statement*, Point Three).

Statement of our mission. While the Standing Committee has a responsibility to advise the SJC and the AOTC about issues that may affect the delivery of ADR services throughout the judiciary and to encourage research and experimentation with dispute resolution methods, we believe that our principal mission is to assist the Trial Court with the development of a comprehensive plan for a system of multi-option justice. The plan must give consumers of the public justice system access to a variety of methods of dispute resolution regardless of their ability to pay. The plan must include consistent, statewide ethical and qualifications standards for the providers of the services, and the quality, integrity and cost-effectiveness of the services provided. We believe that this is the unfulfilled promise of Article XI of the Declaration of Rights of the Constitution of the Commonwealth, which provides that "[e]very subject of the commonwealth ...ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

This task will take years to complete. It will challenge the imagination and skills not only of the members of our Committee and the employees of the court system, but of all persons with a

stake in the quality of our public justice system. This task also will require the expenditure of public funds beyond those currently available to the Trial Court if all the consumers of the court system are to enjoy access to the most appropriate dispute resolution method. Finally, while we are concentrating on the development of a Trial Court ADR program, we are interested in the use of ADR throughout the court system including in the appellate courts.

Relationship to the Massachusetts Bar Association Referral Program. While this Progress Report was in preparation, the Massachusetts Bar Association ("MBA") published for comment a draft of a Statewide Alternative Dispute Resolution Referral Program. The Standing Committee has not yet had an opportunity to review the MBA proposal. In particular, the Standing Committee intends to develop a policy position on referrals by the court to ADR providers independent of the court system.

III. Activities of the Standing Committee

Introduction. Our first year has been devoted to developing a set of preliminary recommendations for building a multi-option justice system. The centerpiece of these recommendations is a planning process in which each of the seven Trial Court departments will establish committees broadly representative of all those with a stake in court-connected ADR services and will develop operational plans for delivering these services throughout the Trial Court. We also have completed a draft of ethical standards for neutrals and are at work on the preparation of standards relating to the qualifications of neutrals. And we have outlined a number of initiatives calculated to promote greater awareness and use of court connected ADR services by Trial Court personnel, lawyers, and the public. All of these recommendations are set forth in the Subcommittee Reports contained in Parts Two through Four of this report. We have also

developed a work plan consisting of short-term objectives and areas for further study, set forth in Part Five of this report.

Fiscal year 1996 budget initiative. Anticipating that the Trial Court would be ready to expend public funds in the next fiscal year which begins on July 1, 1995, last fall we prepared a fiscal year 1996 state budget initiative designed to establish a base of public funding for ADR in the Trial Court. At the present time, there is no line item for this purpose in the court's budget, and the very limited support for court-connected ADR in the Trial Court (approximately \$60,000 in fiscal year 1995) comes from a general AOTC account and only partially funds one program in the Superior Court. Our budget proposal requesting \$977,000 in fiscal year 1996 was endorsed by Chief Justice Liacos and Chief Justice Irwin, has received support from Governor Weld who included funding for court-connected ADR in his state budget for fiscal year 1996 [House Document No. One (1995)], and now is before the legislature. (A copy of the proposal is attached as Appendix B to this report.)

Evaluation project. In December, 1994, the Supreme Judicial Court was awarded another grant from the State Justice Institute in order to conduct a study of selected Massachusetts mediation programs. The purpose of the project is to evaluate three aspects of current Massachusetts mediation programs--the screening or intake mechanisms used by the programs, the impact of mediators' qualifications on the outcome, and the effects of offering mediation at different stages of litigation. The results of this study are expected to provide valuable information to the Standing Committee and to the Trial Court about the kinds of program models that are best suited for use in Massachusetts, and about aspects of standards now under preparation regarding the qualifications of neutrals.

Six Massachusetts mediation programs have volunteered to participate in this project. The project start date was January 16, 1995 and the project period will be fifteen months. We are pleased that Professor Richard Maiman of the University of Southern Maine has agreed to join the project as its Research Consultant.

Public outreach. In addition to the Standing Committee's internal deliberations, our work during the past year has been informed by the contributions of many people who have taken time to participate in meetings with us or to correspond with us. The Standing Committee held two public hearings in August, 1994--one in Springfield hosted by the Honorable H. William Abrashkin of the Hamden County Housing Court, and one in Boston held at the offices of Massachusetts Continuing Legal Education, Inc. Invitations were mailed to over 300 interested parties and notice was given to employees of the Trial Court. Notices also were published in Massachusetts Lawyers Weekly. Accompanying these invitations and the notices was a list of ten questions designed to focus attention of some of the basic questions faced by the Standing Committee. (A copy of the questions is attached as Appendix C to this report.)

In addition, during the past year, members of the Standing Committee have participated in formal meetings with numerous organizations and groups including the Massachusetts Association of Mediation Providers and Practitioners, the New England Chapter of the Society of Professionals in Dispute Resolution, the Advisory Committee to the Trial Court, the Massachusetts Bar Association, the Boston Bar Association, the Justinian Law Society, regional bar associations, and smaller groups of lawyers, judges, and neutrals. Every member of the legislature also has received a letter from the Standing Committee regarding the fiscal year 1996 budget and will receive a copy of this Progress Report.

PART TWO

Report of the Subcommittee on Education

Introduction. Guiding the work of the Education Subcommittee has been the premise that a comprehensive system of justice depends on awareness and understanding of all dispute resolution options by the court, the bar, the participants, and all ADR providers. The Subcommittee, therefore, regards as its mission the task of recommending plans for developing awareness and understanding on the part of the intended constituency of all dispute resolution options so as to facilitate choices from among an integrated set of available dispute resolution processes. The following recommendations for long and short term implementation were developed by the Education Subcommittee and are under consideration by the Standing Committee. The Standing Committee actively seeks comments and suggestions regarding these recommendations.

Attorney Education. (a) Questions concerning ADR should be included in Massachusetts bar examinations, and (b) organizations providing continuing legal education programs for members of the bar should be encouraged to include programs about ADR, with the active support and participation of the SJC and in conjunction and consultation with professional ADR organizations such as SPIDR and bar associations.

Commentary. The Standing Committee has not completed deliberations over whether mandatory CLE on the subject of ADR is desirable, and this question is still under review. This question must inevitably be considered within the broader question around which debate would occur, namely whether a mandatory CLE requirement should be imposed on members of the bar in general.

Also being discussed is the question of how best to ensure that law schools in the Commonwealth include ADR as part of their curricula. The Standing Committee recognizes that, although law schools should include ADR as part of their core curriculum, legal education is not currently regulated by the Supreme Judicial Court. Therefore, it also recognizes that perhaps the most appropriate way to influence changes within the legal education institutions and to prepare law students for the justice system that is envisioned is to include questions on the subject of ADR on the Commonwealth's bar examinations. In this regard, the Standing Committee concurs with the Chief Justice's Commission on the Future of the Courts. See *Reinventing Justice* at 76.

The goal of ADR education for the members of the bar should be thorough training in and familiarity with a system of multi-option justice, one that relies on adversarial proceedings as but one of a variety of institutionalized dispute resolution processes, as envisioned in *Reinventing Justice* at 73.

Education about ADR for the General Public. The Supreme Judicial Court and the Trial Court should (a) encourage state and local public and private education authorities and institutions to include information about both adjudicatory and non-adjudicatory methods of dispute resolution in any curriculum about the judicial system, and (b) to the extent possible, assist such authorities and institutions with the preparation of educational materials that reflect the full range of appropriate dispute resolution alternatives available through the courts.

Commentary. The Standing Committee is still discussing what content should be included in educational programs and materials for the general public, and what form the involvement of the SJC and the Trial Court should take. Some community agencies and organizations such as United Way and the Chamber of Commerce would be logical partners for

collaborative efforts in disseminating information about ADR. However, we think it is appropriate for the SJC and the Trial Court to engage actively in information campaigns aimed at "bringing the business of the courts into the community." *Reinventing Justice* at 24.

It is appropriate to encourage inclusion of the topic of ADR in community Law Day programs, law school mock trials, radio and television programming, media public service announcements, etc. Modern technology, such as videotapes, electronic information kiosks and the Internet, should be employed in the dissemination of information by the SJC and the Trial Court for educating the public about ADR. In this time of multimedia, mass media, and the information highway, it seems appropriate to be over-inclusive rather than under-inclusive in the identification of potential educational vehicles. The general public is exposed and receptive to kaleidoscopic informational stimuli in daily life. If our goal is to reinvent justice, it must also be to change how the general public thinks about justice. This takes time and imagination; and will require gradual adjustments in long-held, entrenched perceptions.

It is currently recognized that the general public does not understand the justice system and does not believe that the courts put the users' interests first. *Reinventing Justice* at 11. "In order to regain the public's trust and confidence the courts must dramatically alter their way of doing business. They must enlist the support and assistance of other institutions to demystify and explain the mission of the courts and to address their problems. Programs aimed at justice outreach and public 'inreach' will be necessary." *Id.* at 23.

Role of Attorneys in Promoting the Use of ADR. An ethical obligation should be imposed on attorneys to discuss with their clients various ADR options to accomplish their objectives before filing a civil complaint. As a corollary, the Rules of Civil Procedure should be

amended to require defendants, as part of their responsive pleading, to indicate if they request early court intervention through ADR. It is also recommended that the Civil Cover Sheet accompanying the Complaint include a section on ADR options requiring all plaintiffs to indicate whether they request early court intervention through ADR.

Commentary. The attorney is the traditional gatekeeper to our courts. It is primarily through their attorney that clients learn about the judicial process, including available adjudicatory and non-adjudicatory options. "The lawyer, then, has a critical role to play in informing and educating about the disputing environment." *Reinventing Justice* at 75. The attorney must discuss the full range of adjudicatory and non-adjudicatory options with the client so that together they may seek the appropriate process. To be most effective, the discussion must occur at the earliest possible opportunity.

Examples can be drawn from other states. For example, the Colorado Supreme Court and the Colorado Legislature have adopted measures to ensure that attorneys will discuss ADR with their clients. The Court has included an ADR provision in its Model Rules of Professional Conduct. Model Rule 2.1 states, in part:

In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

The Colorado Legislature has amended its Dispute Resolution Act to grant courts of record the authority to refer cases to any ancillary form of ADR.

This recommendation is related to the recommendation of the Subcommittee on Structure and Finance requiring all trial courts in the Commonwealth to distribute to lawyers and litigants

very early in the litigation process a booklet describing the variety of dispute resolution techniques and to encourage the use of ADR services whenever feasible. While such a requirement imposed upon the courts might lead to an ethical obligation on the part of attorneys to disseminate similar information to their clients, the latter obligation should be independent of the former.

Education and Professional Development of Trial Court Judges, Clerk-Magistrates and Other Employees. The SJC and the Trial Court should act to implement throughout the court system a capacity-building initiative including inservice training and continuing education programs for all court personnel, including judges, aimed at integrating ADR as part of the "court culture." The SJC should also convene a statewide court conference in 1996 to be entirely devoted to the subject of ADR in the courts, providing both practical information related to the delivery of high-quality ADR services and opportunities to reflect on the value and importance of ADR to the court system.

Commentary. The success of the comprehensive justice center approach toward dispute resolution will depend upon the readiness of the Trial Court work force (judges, clerk-magistrates and all employees) to administer such a system. Readiness will be measured in several ways. All members of the judiciary must be knowledgeable about the basic tenets of ADR and the nature of ADR services, just as they now are about adjudication. Employees who provide direct dispute resolution services must be thoroughly trained in theory, practice, and procedure. Case screeners must understand how to evaluate disputes and make appropriate referrals. Program administrators, or those who serve as court liaisons to outside services, must be well-grounded in many areas including the design of service delivery, management information systems, and quality-control methods.

The challenge for the judiciary is to pace the education of its work force to the evolution of dispute resolution options within the system. As a starting point toward reaching these goals a Capacity-Building Committee consisting of employees experienced or knowledgeable about various dispute resolution options should be convened. The Capacity-Building Committee should have members from each department and also include persons from within and outside the court system who are knowledgeable about human resources, ADR qualifications and ADR education.

The Capacity-Building Committee, working in conjunction with the Standing Committee, an AOTC Director of Dispute Resolution (recommended by the Subcommittee on Structure and Finance on pages 19-20), the Trial Court Departmental ADR Committees, the Trial Court Human Resources Department and the Judicial Institute should address the following issues:

- a) *What ADR talent, expertise, responsibility, and interest currently exist within the Trial Court and how should that talent be utilized?* Such people should be identified and a professional development network formed including a newsletter, electronic mail, and special interest task forces. The Capacity-Building Committee should conduct employee focus groups as a way of testing and improving new ideas, sharing information and building both formal and informal networks.
- b) *What functions will Trial Court employees be required to play as various aspects of a comprehensive ADR plan are implemented?* This inquiry must look at both the required functions *and* the skills, qualifications and experience necessary in order to carry out these functions. To the extent that the functions required by the infusion of ADR into the system represent a significant change in job description of union employees, the appropriate unions must be involved in discussions.
- c) *What ADR professional development opportunities should be offered to Trial Court employees and how should the Trial Court provide such services?* The Capacity-Building Committee must identify the type of professional development employees will require and then recommend and/or develop the appropriate approaches. Internal and external resources should be examined. For example, some types of training could be provided by current Trial Court employees. In other instances, outside groups--community mediation programs, university programs, private enterprises--might be best qualified. Basic information about ADR and ADR training opportunities should be distributed to all employees.

PART THREE

Report of the Subcommittee on Structure and Finance

Introduction. These recommendations were developed by the Subcommittee on Structure and Finance and are under consideration by the Standing Committee. The Subcommittee, with the help of consultants and staff, reviewed the current practice and rules in federal and state jurisdictions throughout the country. It also reviewed the current rules and practice for ADR in the trial courts of Massachusetts. Several principles inform these recommendations. First, the long term (i.e. five year) goal of the Standing Committee is to make a full range of high quality ADR approaches available and affordable for all parties in all courts of the Commonwealth. Second, the Standing Committee will encourage the Trial Court to seek a major and stable increase in funding for ADR in the courts; the Committee will make policy recommendations that will accommodate such an increase, but that will also accommodate the inevitable ebbs and flows of funding from year to year. Third, the recommendations are consistent with, and intended to encourage, already existing efforts in court reform, including a strengthening of the Administrative Office of the Trial Court. Fourth, the recommendations are consistent with the larger national trend of making government less bureaucratic, and more within control of individual citizens. The Standing Committee actively seeks comments and suggestions about these recommendations.

Public Funding. Most of these recommendations address the structure which the Subcommittee proposes for the implementation of ADR in the courts, but the Subcommittee has also worked with the full Standing Committee to reach agreement about its goals for financing

ADR in the courts. The long-term goal is that the public justice system should offer an array of high-quality dispute resolution options provided at public expense, just as adjudication is now available. The Standing Committee believes that financial parity between adjudication, which is provided for a simple filing fee, and other forms of dispute resolution is a fundamental principle. Many would argue that the principle of parity follows from the dictates of Article XI of the Massachusetts Constitution's Declaration of Rights, which provides that "[e]very subject of the commonwealth... ought to obtain right and justice freely, and without being obliged to purchase it." Publicly funded processes should be subject to ongoing scrutiny to ensure high quality and cost-effectiveness and should be provided through a combination of public employees working inside or outside the courthouse and contracts between the courts and private providers, including programs which use volunteers.

The Standing Committee realizes that this long-term goal will be accomplished very gradually because of the chronic shortage of public funds, so that the imposition of additional fees upon those able to pay for certain dispute resolution services will be necessary for some time to come. Limited public funds should be allocated so as to (1) maximize access to dispute resolution services, (2) guarantee that no one is denied services because of inability to pay, and (3) ensure that no party must pay for any mandatory service. These guidelines may mean that different parts of the field are funded in different ways and that sliding scale fees or fee waivers are essential features. For example, different approaches may be taken to community mediation or mediation for *pro se* litigants on the one hand, and parties in complex civil litigation on the other.

The recommendations are as follows:

Early Use of ADR. The Trial Court should enact a rule with two parts.

Part One: All trial courts in the Commonwealth will be required to distribute a booklet to all lawyers and litigants very early in the litigation process. The booklet, the same for all trial courts, will describe the variety of dispute resolution techniques, including litigation, and will also indicate how parties can find service providers for mediation, arbitration, neutral evaluation, etc. Because the court has a responsibility to provide information to the public as well as to participants in litigation about ways of resolving disputes, the distribution of the booklet would be the centerpiece of a larger educational campaign as outlined in the Education Subcommittee report. The goal of the campaign would be to urge judges, court staff, the public and the bar to use ADR services whenever feasible. See *Reinventing Justice* at 20-21, 75.

Based on this information, parties would be required to confer with their attorneys and with each other about the use of ADR, and to file a form stating the ADR procedure to be used or the reason why none was selected.

Part Two: In addition to Part One, each court department will be required to implement its own plan to use ADR early in the litigation process. This may take the form of a pilot project, or a project working with only a subset of cases. The Trial Court will distribute guidelines for the development of these early intervention plans. For example: each court department must propose an early intervention plan that does not require the use of "new money" for that department, though of course it may also propose other early interventions that do require additional funds. The Trial Court may also distribute a list of possible early intervention approaches. These could include requirements for parties/counsel to meet and confer with no court intervention; they could require an early conference with a member of the court staff, or they could make court staff available at the request of the parties. In any event, each court department would devise its own

response, and each court department's plan would be part of its annual ADR Plan, described below.

Trial Court Office. The Trial Court will establish an office, with a director, to provide oversight and administrative support for dispute resolution programs. It will have the ability to collect, summarize, and analyze data, act as staff for the Standing Committee, and assist the Trial Court in the management and distribution of funds to various court departments. In order to give the court a quality control capacity and the ability to enforce coherent, statewide standards, the office (for programs run by or sanctioned by the courts) will also monitor and oversee the training and selection of neutrals. It will also provide or monitor technical assistance in establishing and evaluating ADR programs throughout the court system.

Standing Committee Role. The Standing Committee will advise the Trial Court on the policies and practices of the Trial Court's office for ADR functions. It will recommend statewide standards, draft qualifications for Trial Court and individual court department ADR staff, recommend criteria for department ADR plans and reports, review department plans and reports, and recommend criteria for the court's distribution of ADR funds.

Department ADR Committees. Each court department will be required to establish an ADR Committee composed of judges, clerks, ADR providers, community mediators, court staff, attorneys, and other members of the community. The committee will advise that department about ADR policy and practice. Each court department will also designate at least one person to be staff for that committee and to be the ADR specialist for that department.

ADR Plans. Each court department will be required to file with the Trial Court each year an ADR Report and an ADR Plan. The Report will respond to criteria adopted by the Trial Court

based on the recommendations of the Standing Committee and address ADR services provided in the previous fiscal year. The Plan will indicate the court department's plans for ADR services in the new fiscal year. The plans will be reviewed by the Standing Committee, and must be approved by the CJAM.

ADR Appropriations. Each year the Trial Court will seek funds from the legislature which will be designated for ADR. These funds will be divided by the Court into two categories. In the first category, the Court will allocate funds to Trial Court departments pursuant to the Court's regular budget process, primarily to maintain or expand existing ADR efforts. Funds in the second category will be distributed to court departments for the purpose of innovation, improvement, or remediation of ADR services. To distribute this second category money, the Trial Court, using the services of the Standing Committee and its own staff, will develop goals and guidelines that will serve as the basis of an RFP. The RFP will be distributed to the court departments, which will in turn be entitled to file proposals to obtain funds for ADR projects consistent with those guidelines and goals. These goals and guidelines may stay constant over several years, or, subject to annual review, they may change, as the Trial Court deems advisable. Examples of guidelines and goals: coverage of geographic areas unserved by ADR processes; coordination among court departments in a particular region; outreach to particular underserved (e.g. linguistic) populations; training for court staff; service to low and moderate income persons.

Standards. The Trial Court will establish two kinds of standards. First, there will be standards describing the qualifications of individual neutrals the courts may support or use.

(Note: These are the standards being developed by the Subcommittee on Standards.)

Second, there will be standards that describe the qualifications of programs from outside

the court which have a formal referral or financial relationship with the court. Examples (but not an exhaustive set) of such standards: the program must use neutrals meeting the qualifications mentioned in the foregoing paragraph; the program must draw its neutrals from as wide a pool as possible consistent with a commitment to very high quality; the program must be willing to make its financial and service provision records available to the court, consistent with the rules of confidentiality; referrals by the court must reflect only on the merit and fitness of the ADR provider and not suggest favoritism in any form.

Resources for ADR. This structure, as described in the foregoing sections, will be underwritten by a combination of new money and staff reallocation. In all staffing questions, issues of quality will need to be addressed.

PART FOUR

Report of the Subcommittee on Standards

Introduction. The Subcommittee on Standards was created to develop proposed standards for alternative dispute resolution (ADR) programs and practitioners providing services in court-connected programs throughout the Commonwealth. The Subcommittee anticipates the need for at least three sets of standards: Ethical Standards, Qualification Standards, and Program Standards. The Subcommittee recognizes that additional standards may be required in the future.

What follows is a first draft of proposed Ethical Standards developed by the Subcommittee and under consideration by the Standing Committee. The Standing Committee actively seeks comments and suggestions regarding these recommendations. In drafting these standards, the Subcommittee reviewed ethical standards which are proposed or in effect in numerous states throughout the country. The Subcommittee consulted ethical standards of professional organizations providing ADR and national organizations involved in ADR. These included: the American Arbitration Association (AAA), the American Bar Association (ABA), the Academy of Family Mediators (AFA), the Massachusetts Association of Mediation Programs and Practitioners (MAMPP), the Massachusetts Council on Family Mediation (MCFM), the National Standards for Court-Connected Mediation Programs developed by the Center for Dispute Settlement and the Institute of Judicial Administration, and the Society of Professionals in Dispute Resolution. We also reviewed writings on the subject of ethical dilemmas, such as those by Professor Robert Baruch Bush. The Subcommittee is now beginning to embark on its next task -- which is to draft Qualification Standards. We look forward to preparing those and will again seek comments and suggestions once we have completed a draft.

DRAFT
ETHICAL STANDARDS FOR THE PROVISION OF
COURT-CONNECTED DISPUTE RESOLUTION SERVICES

Contents

- I. Introduction
- II. Definitions
- III. Standards
 - A. Impartiality
 - B. Informed Consent
 - C. Disclosure of Fees
 - D. Conflict of Interest
 - E. Responsibility to Non-Participating Parties
 - F. Advertising by Neutrals
 - G. Confidentiality
 - H. Withdrawing from the Dispute Resolution Process

I. Introduction

These Ethical Standards are designed to promote honesty, integrity and impartiality by all neutrals and other individuals involved in providing court-connected dispute resolution services. These standards seek to assure the courts and citizens of the Commonwealth that such services are of the highest quality, and to promote confidence in these dispute resolution services.

These Ethical Standards address issues of impartiality, informed consent, disclosure of fees, conflict of interest, responsibility to non-participating parties, advertising by neutrals, confidentiality, and withdrawing from the dispute resolution process. In addition, these standards are intended as a foundation on which court departments can build their dispute resolution policies, programs and procedures to best serve the public.

These Standards apply to all neutrals as defined in these Standards who are involved in providing court-connected dispute resolution services for the Trial Court including those who are state or other public employees. [The Committee is considering whether these Standards should apply to neutrals who provide services in court-connected programs when they are providing similar services in non-court-connected programs.] State and other public employees are subject to the Massachusetts Conflict of Interest Law, M.G.L. c. 268A, and therefore, to the extent that these standards are in any manner inconsistent with M.G.L. c. 268A, the statute shall govern.

All courts providing dispute resolution services and all court-connected dispute resolution programs shall provide the neutrals with a copy of these Ethical Standards. These Standards shall be made a part of all training and educational programs for providers of court-connected dispute resolution services, and shall be available to the public.

II. Definitions

The following are three definitions that we have developed in connection with the draft Ethical Standards. We envision that the following definitions will be part of a separate comprehensive section on definitions, which will be applicable to the full Committee's report.

"Court-connected dispute resolution services" means dispute resolution services (1) provided by a person approved by or under the control of the Court, whether a paid employee or volunteer, (2) paid for with funds under the control of the Court, or (3) provided by a person or organization independent of the Court but as a result of a specific court referral, whether to a for-profit or not-for-profit provider.

"Immediate family" means the individual's spouse, domestic partner, guardian, ward, parents, children, and siblings.

"Neutral" means all individuals providing court-connected dispute resolution services, including but not limited to mediators, arbitrators, case evaluators, conciliators, and administrators of court-connected dispute resolution programs. "Neutral" also includes masters, clerks, clerk-magistrates, registers, family service officers, housing specialists, probation officers, dispute intervention specialists, other court employees when they are providing court-connected

dispute resolution services. These Standards apply to all of the above-listed individuals except to the extent that the Standards are inconsistent with duties imposed by statute or Court rule.

Commentary: There are certain court employees (e.g., family service officers and housing specialists) whose duties may conflict with these Standards in certain situations – for example, conducting mediations in which the Court may require disclosure of otherwise confidential communications. In those situations, the applicable Court rule or statute will govern.

III. Standards

A. **IMPARTIALITY: A neutral shall provide dispute resolution services in an impartial manner. Impartiality means freedom from favoritism and bias in word, action, and/or appearance.**

1. A neutral shall provide dispute resolution services only for those disputes where she or he can be impartial with respect to all of the parties and the subject matter of the dispute.

2. If at any time prior to or during the dispute resolution process the neutral is unable to conduct the process in an impartial manner, the neutral shall so inform the parties and shall withdraw from providing services, even if the parties express no objection to the neutral continuing to provide services.

3. No neutral or any member of the neutral's immediate family or his or her agent shall request, solicit, receive, or accept any in-kind gifts or any type of compensation other than the court-established fee.

B. **INFORMED CONSENT: The neutral shall make every reasonable effort to ensure that each party to the dispute resolution process (a) understands the nature and character of the process, and (b) in consensual processes, understands and voluntarily consents to any agreement reached in the process.**

1. A neutral shall make every reasonable effort to ensure at every stage of the proceedings that each participant understands the dispute resolution process in which he or she is participating. The neutral shall explain (a) the respective responsibilities of the neutral and the parties, and (b) the policies, procedures and guidelines applicable to the process.

2. If at any time the neutral believes that any party to the dispute resolution process is unable to understand the process or participate fully in it -- whether because of mental impairment, emotional disturbance, intoxication, language barriers, or other reasons -- the neutral shall (a) limit the scope of the dispute resolution process in a manner consistent with the party's ability to participate, and/or recommend that the party obtain appropriate assistance in order to continue with the process, or (b) terminate the dispute

resolution process.

3. Where a party is unrepresented by counsel and where the neutral believes that independent legal counsel and/or independent expert information or advice is needed to reach an informed agreement or to protect the rights of one or more of the participants, the neutral shall so inform the participant(s).

Commentary: This Standard is ordinarily not applicable in arbitration.

4. A neutral may use his or her knowledge to inform the parties' deliberations, but shall not provide legal advice, counseling, or other professional services in connection with the dispute resolution process.

Commentary: The provision in this Standard permitting a neutral to use his or her knowledge to inform the parties' deliberations is ordinarily not applicable in arbitration.

5. The neutral shall inform the participants of their right to withdraw from the process at any time and for any reason, except as is provided by law or court rule.

Commentary: In arbitration, the parties may not have the right to withdraw from the proceedings.

6. In mediation, case evaluation, and other non-adjudicative processes, the neutral shall not coerce the parties in any manner to continue the process or to reach agreement.

C. FEES: A neutral shall disclose to the parties the fees that will be charged, if any, for the dispute resolution services being provided.

Commentary: For purposes of this Standard, fees may include the neutral's fees, administrative fees, and related expenses.

[NOTE: This section is drafted to apply to both volunteer and fee-based court-connected dispute resolution programs, both of which currently exist. This section may need to change to accommodate the ultimate fee structure(s) which emerge from the Structure and Finance Subcommittee and the Full Committee.]

1. A neutral shall inform each participant in a court-connected dispute resolution process in writing, prior to the start of the process, of (a) the fees, if any, that will be charged for the process, (b) if there will be a fee, whether it will be paid to the neutral, court, and/or the program, (c) whether the parties may apply for a fee-waiver or other reduction of fees, and (d) whether the services are being provided by volunteers.

2. If a fee is charged for the dispute resolution process, the neutral shall enter into a

written agreement with the parties, before the dispute resolution process begins, stating the fees and time and manner of payment.

[NOTE: The following are subjects which may be best addressed in the recommendations and proposed plan the Committee makes regarding fee structure.]

3. Fee agreements may not be contingent upon the result of the dispute resolution process or amount of the settlement.

4. Neutrals shall not accept, provide, or promise a fee or other consideration for giving or receiving a referral of any matter, except for a standardized contribution for serving on a referral list, which contribution shall be disclosed to the parties and the program administering the process.

5. If the Court has established fees for its dispute resolution services, no neutral shall request, solicit, receive, or accept any payment in any amount greater than the court-established fees when providing court-connected dispute resolution services.

D. CONFLICT OF INTEREST: A neutral shall disclose to all parties participating in the dispute resolution process all actual or potential conflicts of interest, including circumstances that could give rise to an appearance of conflict. A neutral shall not serve as a neutral in a dispute resolution process in which he or she has such a conflict, unless the parties, after being informed of the actual or potential conflict, give their consent and the neutral has determined that the conflict is not so significant as to cast doubt on the integrity of the dispute resolution process and/or neutral.

1. As early as possible and throughout the dispute resolution process, the neutral shall disclose to all parties participating in the process, all actual or potential conflicts of interest, including but not limited to the following:

- (a) any known current or past personal or professional relationship with any of the parties or their attorneys; or
- (b) any financial interest, direct or indirect in the subject matter of the dispute or a financial relationship (such as a business association or other financial relationship) with the parties, their attorneys, or immediate family member of any party or their attorney, to the dispute resolution proceeding; and
- (c) any other circumstances that could create an appearance of conflict of interest.

2. Where the neutral determines that the conflict is so significant as to cast doubt on the integrity of the dispute resolution process and/or neutral, the neutral shall withdraw from the process, even if the parties express no objection to the neutral

continuing to provide services.

3. Where the neutral determines that the conflict is not significant, the neutral shall ask the parties whether they wish the neutral to proceed. The neutral shall obtain consent from all parties before proceeding.

4. A neutral must avoid even the appearance of a conflict of interest both during and after the provision of services.

- (a) A neutral shall not use the dispute resolution process to solicit, encourage or otherwise procure future service arrangements with any party.
- (b) A neutral may not subsequently act on behalf of any party to the dispute resolution process, nor represent one such party against the other, in any legal proceeding related to the subject of the dispute resolution process.
- (c) A neutral may not subsequently act on behalf of any party to the dispute resolution process, nor represent one such party against the other, in any legal proceeding unrelated to the subject of the dispute resolution process [for a period of one year] [or] [unless the parties to the process consent to such action or representation]. *[Policy question: should this disqualification apply to all individuals with whom the neutral is in business, such as other lawyers in the neutral's firm, or other mental health professionals in a neutral's group practice? Should the disqualification be waivable by the parties? If a period of time must elapse, what is a reasonable period?]*

5. A neutral shall avoid conflicts of interest in recommending the services of other professionals.

E. RESPONSIBILITY TO NON-PARTICIPATING PARTIES: A neutral should consider, and where appropriate, encourage the parties to consider, the interests of persons affected by actual or potential agreements and not participating or represented in the process.

1. If a neutral believes that the interests of parties not participating or represented in the process will be affected by actual or potential agreements, the neutral should ask the parties to consider the effects of including or not including the absent parties and/or their representatives in the process. This obligation is particularly important when the interests of children or other individuals who are not able to protect their own interests are involved.

F. ADVERTISING, SOLICITING, OR OTHER COMMUNICATIONS BY NEUTRALS: Neutrals shall be truthful in advertising, soliciting, or other communications regarding the provision of dispute resolution services.

1. A neutral shall not make untruthful or exaggerated claims about the dispute resolution process, its costs and benefits, its outcomes, or the neutral's qualifications and abilities.

2. A neutral shall not make claims of specific results, benefits, outcomes, or promises which imply favor of one side over another.

G. CONFIDENTIALITY: A neutral shall maintain the confidentiality of all oral and/or written information disclosed during the course of dispute resolution proceedings, subject only to the exceptions listed in this section.

1. The information disclosed in dispute resolution proceedings that shall be kept confidential by the neutral includes, but is not limited to:

- (a) The identity of the parties;
- (b) The nature and substance of the dispute;
- (c) The neutral's impressions, opinions, and recommendations;
- (d) Statements made by or notes of the neutral;
- (e) Any statements made by or documents or other physical evidence disclosed by any party or witness in the dispute resolution process; and
- (f) The terms of any settlement, award, or other resolution of the dispute,

unless the parties consent to such disclosure, or disclosure is required by law or court rule.

2. A neutral shall not reveal information obtained in a private session with one or more of the parties in a dispute resolution process without prior permission from the party from whom the information was received.

3. The following are exceptions to the neutral's duty to maintain the confidentiality of all disclosures made in the course of dispute resolution proceedings:

- (a) When, based upon information disclosed in dispute resolution proceedings, a neutral has reasonable cause to believe that a minor or other person who the neutral believes is incapable of protecting his/her own interests has been subjected to abuse or neglect, or is at substantial risk of such abuse or neglect in the future, the neutral shall, to the extent permitted by law,

disclose that information to appropriate authorities.

Commentary: Such disclosure may not be currently permitted under G.L. ch. 233, § 23C.

- (b) When, based upon information disclosed in dispute resolution proceedings, a neutral has reasonable cause to believe that a person poses a danger of physical harm to himself/herself or to another person(s), the neutral shall, to the extent permitted by law, disclose that information to the person in danger of harm or to appropriate authorities.

Commentary: Such disclosure may not be currently permitted under G.L. ch. 233, § 23C.

- (c) A neutral shall not be required to maintain the confidentiality of any oral or written information disclosed in dispute resolution proceedings (i) where such information is necessary for the defense of any person in a criminal prosecution and where a subpoena has been issued to the neutral for the information sought, (ii) in any other case where the neutral is required by law to disclose such information, or (iii) where the information is offered by the neutral in order to defend himself or herself in a civil action regarding his or her conduct in the dispute resolution process.

4. Neutrals shall maintain the confidentiality of all records of dispute resolution proceedings. Any information or materials disclosed by the neutral for research, training, or statistical compilation shall be adapted by the neutral so as to render anonymous any identifying information contained therein. The disclosure for such purposes of any material rendered anonymous shall not be a violation of the confidentiality obligation of this section G.

5. Neutrals may discuss confidential information with individuals who administer the court-connected dispute resolution program in which they obtained the confidential information.

6. A neutral shall not use information obtained in dispute resolution proceedings for his or her personal advantage.

7. Prior to the commencement of dispute resolution proceedings, the neutral shall explain to all parties the provisions concerning confidentiality, and the exceptions to confidentiality, contained in these Standards.

Commentary: The obligation of the parties to maintain the confidentiality of communications made in the course of a mediation is governed by Mass. Gen. Laws ch. 233, § 23C. As it now stands, § 23C prohibits disclosure of communications made in the course of a mediation (as defined in the statute) even if those communications relate to child abuse or neglect. Therefore, the

provisions in these Standards permitting disclosure of certain communications (see sections 3(a) - (c), above), do not apply in every case to mediations, but do apply to other dispute resolution proceedings, such as arbitration or case evaluation. Other statutes, such as ch. 119, § 51A (the mandated reporter statute) may also govern the obligation to disclose, or maintain confidentiality of, communications relating to child abuse and neglect. [The Committee is considering whether § 23C should be amended to permit disclosure of communications relating to child abuse or neglect, planned commission of a crime, and certain other communications.]

H. WITHDRAWING FROM THE DISPUTE RESOLUTION PROCESS: Under certain circumstances, a neutral shall or may withdraw from the dispute resolution process.

1. A neutral shall withdraw from the dispute resolution process when:
 - a) the neutral is unable to conduct the process in an impartial manner (see section A.2, above);
 - b) in an appropriate case (as described in section B.2, above), the neutral believes that a party to the dispute resolution process is unable to understand the process or participate fully in it;
 - c) the neutral determines that a conflict of interest is so significant as to cast doubt on the integrity of the dispute resolution process and/or neutral (see section D.2, above); or
 - d) the neutral believes that the parties' agreement is illegal or involves the commission of a crime.

2. The neutral may withdraw from the dispute resolution process when the neutral believes that:

- a) she or he lacks the expertise or resources necessary to handle the case, and the necessary expertise or resources are not available to the parties or the neutral;
- b) continuing the dispute resolution process would give rise to an appearance of impropriety or impugn the integrity of the process;
- c) in a non-adjudicative process, one or more of the parties is not participating in good faith;
- d) in a non-adjudicative process, continuing with the process would cause severe harm to one or more of the parties, a non-participating party, or the public;
- e) one or more of the parties threatens to harm the neutral or another party or engages in other conduct which undermines the fairness or integrity of the process;
- f) continuing discussions would not be productive, would result in unwarranted cost to the parties, and/or would result in an unwarranted use of the resources

- of the dispute resolution program; or
- g) the parties' agreement violates public policy.

Commentary: These Standards provide for discretionary withdrawal when it may be possible for the neutral to overcome the problems described in 2(a) - (g) above, or where the neutral determines that the problem may not be severe enough to warrant termination of the process.

PART FIVE

Work Plan and Areas for Further Study

Introduction. The Standing Committee is mindful that substantial additional work is needed for the courts to implement its preliminary recommendations. Given the pending budget request, it is giving highest priority to ensuring that the expansion of ADR will be guided by a workable structure and appropriate standards to protect and serve the public. In addition, although as a "Standing Committee" its work will continue in the future, the current members have set goals to achieve before their terms expire. What follows, therefore, is a brief description of the tasks we believe need to be completed by three deadlines: July 1, 1995 (the beginning of Fiscal Year 1996), September 1995, and December 31, 1995 (the expiration date for current terms). We recognize, however, that this is a dynamic process, and that it is likely that this work plan will change. In particular, we hope that the feedback we receive from the readers of this report will enable us to make the changes and adjustments that are necessary to assist the Trial Court with the development and implementation of the best possible system of court-connected dispute resolution services.

Guidelines. Our plans call for the Standing Committee to complete by July 1, 1995 the drafting of proposed guidelines regulating court-connected ADR services. These guidelines will include definitions of a variety of ADR processes that may be available or may become available in the Trial Court. Based upon the recommendation of the Subcommittee on Structure and Finance, there will be a provision calling for each department of the Trial Court to develop, and with the approval of the CJAM, to implement a plan for the use of ADR, including an experiment with its use early in the litigation process. Another section will spell out the relationship between the Dispute Resolution Office within the AOTC, the Trial Court departments, local courts, and

the Standing Committee. There also will be guidance for Trial Court departments in preparing annual ADR plans and annual ADR reports. These guidelines will also address evaluation and quality control mechanisms, referrals to private providers, and minimal requirements for creating referral panels.

In addition, we plan to include a final version of the draft ethical standards for neutrals developed by the Subcommittee on Standards (contained in Part Four of this report) in the guidelines. We hope that these guidelines will also include standards relating to qualifications of neutrals, and a provision requiring courts to distribute or make available an ADR booklet in accordance with each Trial Court department's "to be developed" ADR plan.

In the next few months, the Committee will consider which of these guidelines we believe should be embodied in court rules and which should take a more temporary form such as administrative directives or guidelines.

If the legislature and the Governor approve public funding for court-connected ADR, as requested in the FY96 budget now pending before the legislature, guidelines must also be developed to enable the CJAM to effectively allocate funds throughout the Trial Court departments. We will have recommended funding allocation guidelines developed prior to July 1, 1995 for consideration by the SJC and the CJAM to enable any public funds to be utilized as rapidly as possible once the next fiscal year begins. In devising an appropriate allocation formula, we believe consideration should be given to rapidly allocating a portion of any public funds to courts which are already served by existing programs. As to the remaining funds, the formula should consider factors such as whether the needs of low and moderate income litigants will be served, whether the distribution will serve populations currently not receiving services and geographic diversity, and whether the allocation will encourage experimentation and innovation.

We will also prepare the necessary job descriptions and a set of qualifications for the AOTC Director of Dispute Resolution and support staff.

By July 1, 1995, we also hope to have a final draft of a proposal to amend the canons of ethics applicable to lawyers to include a requirement that counsel discuss the variety of methods of dispute resolution with their clients prior to filing suit.

Educational Material. By September 1, 1995, our goal is to have developed and ready for use a general purpose pamphlet or booklet for lawyers and justice consumers describing court-connected ADR services in Massachusetts. The booklet will include a description of the various dispute resolution processes that are available in the Trial Court, including adjudication by trial, and how services may be accessed. We also hope to have prepared the first stage of an educational initiative for Trial Court employees in accordance with the Capacity Building Initiative described in more detail in Part Two.

Areas for Further Work and Study. Prior to December 31, 1995, we expect to have developed a second budget proposal and presented it to the CJAM and the SJC for submission to the Governor. Also, we expect to have prepared a draft of a five-year plan for future activities of the Standing Committee and the Trial Court in expanding access to court-connected ADR. We are aware that this Progress Report leaves open a number of important policy issues, and have noted these for further attention after completing the more immediate tasks set forth above.

While the first guidelines will probably embody the current consensus among the courts and the Standing Committee that it is acceptable for a court to mandate attendance at an ADR screening session, the issue of more extensive mandatory ADR (as authorized by G.L. s.211B, s.19 and recommended by the Futures Commission, *Reinventing Justice* at 20) requires further study.

Other unresolved issues include the advisability of excluding certain cases from the purview of

ADR and the need for substantive standards and/or judicial review for some or all agreements reached through ADR, especially where *pro se* litigants are involved.

Early Court Intervention Study. For one critical issue, we are in the process of seeking particular advice and assistance. That is the question whether the Trial Court should adopt a policy of early court intervention as the means to fully integrate ADR into the judicial process. In addition to early consideration by the parties of non-adjudicatory dispute resolution alternatives, it may not be possible to achieve the goal of institutionalizing variety in dispute resolution [*Reinventing Justice* at 73] without some form of early court intervention in the litigation process. In many other jurisdictions, including in the federal system, the concept of early court intervention is a critical feature of procedural reforms that were undertaken both to expand the availability and use of ADR and to improve the court's ability to efficiently and effectively manage its caseload.

We have commissioned a study to determine whether the Trial Court should adopt a rule or policy applicable to any civil case heard in any of the Trial Court departments, that would require courts, in all categories of civil litigation except those exempted by order of the CJAM, to intervene at an early stage in the litigation in order to accomplish one or more of the following objectives: (1) consideration by the parties and their attorneys, if any, of non-adjudicatory dispute resolution alternatives including, but not limited to, mediation, arbitration, mini or summary trials, case evaluation, and complex case management services; (2) a referral by the court to a non-binding dispute resolution process, including a screening session to assess the suitability of the case for an ADR process; and (3) establishment of an

order governing the sequence, timing, and extent of pretrial discovery.

In order to assess fully the implications of a Trial Court wide policy in favor of early court intervention prior to any decision by the Standing Committee to recommend such a change to the SJC and to the CJAM, we have established a Task Force on Early Court Intervention to be comprised of a group broadly representative of the bench and bar. The Task Force will be chaired by the Honorable John Cratsley of the Superior Court and will report back to the Standing Committee with its assessment in September, 1995. A briefing paper outlining the issues is attached as Appendix D to this report.

COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS TRIAL COURT

POLICY STATEMENT ON DISPUTE RESOLUTION ALTERNATIVES

POINT ONE: THE JUDICIAL BRANCH SHOULD MAKE AVAILABLE APPROPRIATE DISPUTE RESOLUTION ALTERNATIVES TO THE TRADITIONAL PROCESS OF ADJUDICATION. THESE ALTERNATIVES INCLUDE, BUT ARE NOT LIMITED TO, MEDIATION, ARBITRATION, MINI OR SUMMARY TRIALS, CASE EVALUATION, AND COMPLEX CASE MANAGEMENT SERVICES. THE AVAILABILITY OF DISPUTE RESOLUTION ALTERNATIVES IN THE COURTS SHOULD NOT DEPEND ON THE FINANCIAL RESOURCES OF THE PARTIES. THE JUDICIAL BRANCH WILL MAKE EVERY EFFORT TO OBTAIN ADEQUATE RESOURCES FOR THESE SERVICES.

Commentary: There is a large body of evidence that establishes that the use of appropriate dispute resolution methods other than adjudication at an early stage in the process substantially reduces the cost, time, and complexity of litigation in our courts, and promotes greater satisfaction on the part of litigants and their attorneys. In defining a vision of the public justice system of the future, the Chief Justice's Commission on the Future of the Courts made this observation:

Traditional adjudicatory justice—based on the advocacy of opposing positions and judgments by impartial decision makers—may continue to play the central role. But it will be a less utilized and less satisfactory role unless bold measures are taken in the next 30 years to correct what the public views as shortcomings in the process and administration of "conventional" justice....Alternative Dispute Resolution (ADR) has evolved in part because in some cases non-adjudicatory conflict resolution techniques produce more satisfying results, swifter resolutions, and lower costs, both social and personal....Institutionalizing ADR means that the Commonwealth's courts must accelerate the incorporation of alternative dispute resolution into the justice system, even as adjudication is improved.

The Chief Justice's Commission on the Future of the Courts, Reinventing Justice, 2022 (1992).

The addition of Alternative Dispute Resolution to the basic mission of the courts is a fundamental change, which cannot be implemented without additional staff, space and training. The purpose of this statement is to set forth a long-range goal, with the understanding that it will be accomplished as resources are obtained for this purpose.

POINT TWO: DISPUTE RESOLUTION SERVICES PROVIDED BY THE TRIAL COURT MUST CONFORM TO CONSISTENT, SYSTEMWIDE STANDARDS WITH REGARD TO: THE APPROPRIATENESS OF ALTERNATIVE DISPUTE RESOLUTION AND OF PARTICULAR PROCEDURES IN PARTICULAR TYPES OF CASES; MANDATORY REFERRALS TO ALTERNATIVE DISPUTE RESOLUTION; THE SELECTION AND QUALIFICATIONS OF SERVICE PROVIDERS; THE QUALITY, INTEGRITY, AND COST OF THE SERVICES PROVIDED; AND THE NEED FOR CONFIDENTIALITY (HEREINAFTER "THE STANDARDS"). THE SUPREME JUDICIAL COURT, IN CONSULTATION WITH THE CHIEF JUSTICE FOR ADMINISTRATION AND MANAGEMENT, SHALL APPOINT A STANDING COMMITTEE ON DISPUTE RESOLUTION ALTERNATIVES COMPRISED OF JUDGES, ATTORNEYS, MEMBERS OF THE PUBLIC, ACADEMICS AND DISPUTE RESOLUTION PROFESSIONALS, WHICH SHALL PROVIDE ASSISTANCE WITH THE DEVELOPMENT OF THE STANDARDS AND THE IMPLEMENTATION OF DISPUTE RESOLUTION ALTERNATIVES THROUGHOUT THE TRIAL COURT. THE STANDARDS SHALL BE SUBJECT TO THE APPROVAL OF THE SUPREME JUDICIAL COURT. TRIAL COURT DEPARTMENTS MAY ESTABLISH ADDITIONAL STANDARDS NOT INCONSISTENT WITH THIS POLICY AND THE STANDARDS.

Commentary: Dispute Resolution Services are considered to be "provided by" the Trial Court under this policy whenever the service, including case screening, evaluation, assessment, or dispute resolution, is (1) provided by a person approved by or under the control of the court, whether a paid employee or volunteer, (2) paid for with funds under the control of the court, or (3) provided by a person or organization independent of the court, but as the result of a specific court referral, whether to a for-profit or not-for-profit provider. Court referrals to private for-profit dispute resolution providers will be subject to regulation under the Standards.

The Chief Justice's Commission on the Future of the Courts recommended the establishment of a Supreme Judicial Court Standing Committee on Dispute Resolution, to "foster experimentation with and evaluation of dispute resolution methods." (Reinventing Justice: 2022, p. 21) The Standing Committee established pursuant to this policy should give advice concerning alternative dispute resolution issues and programs both to the Chief Justice for Administration and Management and to the Supreme Judicial Court.

POINT THREE: NO PERSON EMPLOYED BY OR PERFORMING SERVICES FOR THE TRIAL COURT SHALL DIRECTLY OR INDIRECTLY REFER A PARTY OR HIS OR HER ATTORNEY TO A PARTICULAR ALTERNATIVE DISPUTE RESOLUTION PROVIDER OTHER THAN IN ACCORDANCE WITH THE STANDARDS. THE RESPONSIBILITY TO REGULATE DISPUTE RESOLUTION SERVICES PROVIDED BY THE COURTS DOES NOT EXTEND TO DISPUTE RESOLUTION SERVICES PROVIDED IN THE PRIVATE MARKETPLACE AND INDEPENDENT OF THE COURTS.

Commentary: Under this policy, the term "refer" is intended to be interpreted broadly to include an explicit order, a direction, or a suggestion by the court. The term

"refer" shall not, however, include any of the following actions by the court which do not amount to providing dispute resolution services under this policy: (1) encouraging the parties or the attorneys to consider alternatives to traditional litigation offered by the courts or in the private marketplace; (2) informing the parties of the existence of a directory of dispute resolution services prepared by a bar association or the like; or (3) taking any step such as granting a continuance to enable the parties to explore or receive dispute resolution services in the private marketplace.

It is not the policy of the Trial Court to suppress or discourage the provision of dispute resolution services in the private marketplace, whether offered by any for-profit or not-for-profit provider. However, it is the policy of the Trial Court to avoid conflicts of interest and the appearance of favoritism in providing or referring litigants to dispute resolution services. For this reason, no court funds or resources may be expended to further the interests of any private dispute resolution provider other than in conformance with the Standards.

Nothing contained in this policy should be interpreted to affect the right of attorneys and parties to contract with or to otherwise arrange for dispute resolution services independent of the courts.

Nothing contained in this policy is designed or to be interpreted to limit the authority of the Supreme Judicial Court to regulate further the conduct of attorneys or retired judges who may seek or obtain employment with private sector dispute resolution providers, or to take other steps to regulate further the practice of law.

APPENDIX B

BUILDING THE FOUNDATION FY1996 BUDGET PROPOSAL FOR COURT-CONNECTED ALTERNATIVE DISPUTE RESOLUTION

The Chief Justice of the Supreme Judicial Court has requested an appropriation of \$977,000 to the Trial Court in FY1996 to allow the Judiciary to construct a solid foundation upon which to build, over the next five years, an all-court alternative dispute resolution (ADR) delivery system.

1. WHAT IS ADR?

The term "alternative dispute resolution" refers to methods for settling conflict including mediation, arbitration, case evaluation, conciliation, fact-finding, mini-trial, settlement conference and summary jury trial. ADR services in the Massachusetts courts are called for both by state statutes (G.L.c. 7, §51; c. 211B, §19; c.218, §43E) and by a policy statement adopted by the Supreme Judicial Court (SJC) and the Chief Justice for Administration and Management (CJAM) in October, 1993.

2. WHAT IS THE COST AND HOW WILL FUNDS BE USED?

Delivery of ADR services by judges, clerks, staff, or through contracts with ADR providers, according to plans developed by Trial Court departments in consultation with departmental ADR advisory committees, under Trial Court guidelines recommended by the Standing Committee on Dispute Resolution. **COST: \$667,000**

Legislatively mandated ADR pilot projects. **COST: \$150,000**

Strengthening the judicial ADR infrastructure: **COST: \$160,000**

- \$70,000 for one professional and one support position in Trial Court;
- \$20,000 for clearinghouse functions; and
- \$70,000 for ADR training of judges, clerks and staff.

3. WHAT IS THE LONG-TERM PLAN FOR COURT-CONNECTED ADR?

The Standing Committee on Dispute Resolution is in the process of developing a five-year plan for implementation of ADR throughout the Trial Court which will:

- increase availability of ADR services;
- build on existing programs and encourage innovation;

- institute quality control mechanisms;
- create strong ADR capacity in Administrative Office of Trial Court, Trial Court departments and each local court;
- provide for appropriate combination of court-provided services and contracted services; and
- maintain mixture of public funding, grant funding, party payment of fees, and volunteer services.

4. WHY SHOULD ADR BE FUNDED IN THE STATE BUDGET?

- ADR will improve the quality of justice by providing parties greater involvement in resolution of differences, greater satisfaction with outcomes, stronger commitment to honor agreements, and the potential to mend relationships.
- ADR provides faster dispute resolution with lower costs to disputants and savings to society as a whole.
- Access to ADR should not depend on parties' wealth.
- Funding ADR is an important step towards implementing the vision of the Chief Justice's Commission on the Future of the Courts which called for the creation of publicly funded, comprehensive justice centers where a variety of forms of dispute resolution, including improved adversary justice, would be accessible to any litigant, without regard to financial means.

EXAMPLES OF CASES WHICH HAVE BEEN RESOLVED SUCCESSFULLY THROUGH ADR:

- Two neighbors, once friends but now feuding, file cross complaints at their local District Court. The clerk refers them to a community mediation program where an experienced volunteer mediator helps them to air past grievances, to settle differences and to build a new relationship.
- A complicated civil case with multiple parties and numerous issues is resolved quickly after being sent by a Superior Court judge to a complex case management program offered by a court-connected ADR program.

- Shortly after filing a motor vehicle tort claim, a plaintiff and insurance company accept the recommendation of a case evaluator, trained and supervised by the Massachusetts Office of Dispute Resolution (MODR).
- A divorcing couple meet with a Probate and Family Court Family Service Officer to discuss the best interests of their children, to develop child support and parenting plans, and to agree upon constructive methods of communicating with one another in the future.
- A retired school teacher, who volunteers for a local consumer mediation program, helps a customer and a merchant reach a mutually satisfactory settlement of a small claims suit.
- A mother and her son, whom she has declared a "child in need of services" (CHINS), are finally able to listen to one another and to find a way to live together in the same home with the assistance of a volunteer mediator in a parent-child mediation center.
- A Housing Specialist employed by the Housing Court helps a landlord and a tenant avoid eviction by negotiating a payment plan for back rent.

**BUILDING THE FOUNDATION
FY1996 BUDGET PROPOSAL FOR COURT-CONNECTED ADR**

1. HOW WILL FUNDS BE USED?

The funds appropriated for FY1996 will be used to support three essential, interrelated components which together will create a firm foundation upon which to build an all-court ADR delivery system. The Judiciary's Standing Committee on Dispute Resolution recommends these as essential steps in the first year of a five-year ADR initiative.

Service Delivery - \$667,000

Purpose

The Standing Committee originally recommended that \$1,000,000 be appropriated in order to take the first steps toward creating a coordinated service delivery system for court-connected ADR, but supports the recommendation of the Chief Justice of the Supreme Judicial Court that \$667,000 be appropriated for this purpose in the first year, given likely delay due to start-up issues. The primary purpose of this initiative will be to lay the groundwork for a statewide service delivery system by formalizing the connection between courts and ADR programs and developing a common understanding of ADR services. A statewide system is needed to ensure universal access to high quality ADR services. The initiative will build on existing ADR capacity in Massachusetts so that implementation of the statewide plan will benefit from the continuity of services. It takes several years for a program to develop an effective administrative structure, smooth relationships with the courts, and a pool of skilled mediators or other neutrals. The ultimate plan will be more successful if it is built on a foundation of experience with ADR and acceptance of ADR among the courts.

Activities

The funds appropriated for service delivery will be allocated by the Chief Justice for Administration and Management (CJAM) of the Trial Court pursuant to guidelines recommended by the Standing Committee on Dispute Resolution. The allocation will be based on proposals by the Trial Court departments. In the first year, the Standing Committee anticipates two funding rounds: first, a fast track allocating up to one-fourth of the available funds to courts which have extensive previous experience with ADR and can quickly document their needs; second, a slower track based on department plans developed by soliciting applications from local court divisions and regions and requesting proposals from private providers or the Massachusetts Office of Dispute Resolution created by G. L. c. 7, § 51. These plans will be developed by the various Trial Court departments, in consultation with newly formed ADR advisory committees, so as to create service delivery systems which are both appropriate to each department's caseload and congruent with statewide goals and policies. In order to attain maximum efficiency, priority will be given to proposals which provide for cooperative efforts across departments or on a regional basis and

programs which serve low and moderate income people.

Costs associated with the delivery of ADR services break down into two primary categories: administrative costs and the cost of providing dispute resolution services. For example, an administrator or ADR screener may interview members of the public to ascertain what method of dispute resolution is most appropriate. The party to a dispute will then be referred to a person (or persons) who will provide the dispute resolution service, such as mediation, case evaluation, etc. The administrator may also perform monitoring, data collection and evaluation roles. This budget proposal anticipates utilizing a mixture of public and private funds, including user fees, to finance both of these two integral aspects of ADR. Either aspect may be provided either directly by a court employee or through a contract with MODR or a private provider. These contracted providers will collect fees from the parties in some cases, with fee waivers available where necessary. Parties will pay fees for dispute resolution services in some cases and services will be provided by qualified volunteers in other cases.

ADR programs and services supported through this appropriation will be required to conform to the Trial Court standards for ADR which will result from Standing Committee deliberations during FY 1995. The Administrative Office of the Trial Court will provide technical assistance to Trial Court departments and local courts in the development of applications, monitor ADR activities and disseminate information about model ADR programs and practices.

Appropriation Amount

The sum requested reflects the amount needed to support the maintenance and limited expansion of effective ADR services for the courts in FY1996. The amount originally suggested - \$1,000,000 - represented the level of public funding lost by ADR programs during the fiscal crisis of the late 1980's and early 1990's. It is difficult to estimate how much service will be obtained for \$667,000 in FY1996, given the new ADR planning process outlined above. The amount of public funds needed to provide ADR services varies widely depending on the nature of the case, the nature of the services provided, and the pattern of funding involved. Preliminary analysis drawn from a variety of sources demonstrates the variation. (See Exhibit A.) Based on a crude estimate of \$200 per resolved dispute, the Standing Committee anticipates that approximately 3,335 disputes will be resolved through this appropriation in FY1996. One of the primary goals of the Standing Committee in FY1996 will be to determine the costs of various dispute resolution models and programs and to establish criteria for evaluating their cost-effectiveness.

Judicial ADR Infrastructure

Purpose

The Standing Committee recommends that \$160,000 be appropriated to begin building an ADR infrastructure in the Trial Court work force. As the Trial Court moves toward a comprehensive, integrated dispute resolution delivery system, it is essential that court personnel

be knowledgeable about ADR and the administration of ADR services. By creating the capacity to administer ADR in the Administrative Office of the Trial Court, identifying current ADR expertise and building new expertise, this appropriation will help assure the successful integration of high quality, cost-effective ADR services in subsequent years.

Activities

i) ADR Administrative Capacity. An immediate priority is to establish overall ADR administrative capacity within the Administrative Office of the Trial Court. A professional, knowledgeable about the full range of Dispute Resolution options and their integration into the Judiciary, must be hired and an administrative assistant must be provided to that person. The duties of this Director of Dispute Resolution Services will include support to the Standing Committee on Dispute Resolution, implementation of short and long range ADR goals, technical assistance to Trial Court departments, coordination of departmental ADR activities, identification of critical issues, dissemination of ADR policies and procedures, budget development, monitoring, research and development, and design and execution of a management information system.

ii) Departmental ADR Advisory Committees. Each department will appoint an ADR advisory committee consisting of judges, court staff, ADR providers, and attorneys to advise the department on the use of ADR. These committees will assess the department's current use of ADR, identify new areas of use, examine emerging issues, and help departments develop annual ADR plans for submission to the Chief Justice for Administration and Management of the Trial Court.

iii) ADR Capacity-Building Committee. During FY1996, the Standing Committee will draw together persons from both within and outside the court system who are experienced in providing dispute resolution services. The responsibility of this Committee will be to analyze the types of roles that court personnel should play in a fully operational integrated and coordinated dispute resolution system. In addition, they will examine various other areas of concern such as qualifications, training, continuing education and the possibilities for ADR career tracks for Trial Court employees. The Committee will submit a report outlining its recommendations to the Standing Committee by spring of 1996.

iv) ADR Training for Judges, Clerk-magistrates and Court Personnel. It is essential to begin the process of educating every court employee about the basic tenets of ADR and the nature of ADR services. The Director of Dispute Resolution Services, in cooperation with the Standing Committee on Dispute Resolution, the departmental ADR committees, the ADR Capacity-Building Committee and the Judicial Institute, will develop educational programs. The goal of the programs in FY1996 will be to see that *all* judges, clerks and court employees are informed of the SJC/Trial Court Dispute Resolution policy and the basic concepts behind ADR. Focus groups will be held with employees to ascertain their concerns about the introduction of ADR into the court system and to gather their suggestions for improving services and preparing employees for new roles. In addition, during FY1996, Trial Court leadership (chief justices,

regional judges, presiding judges, clerk-magistrates, chief probation officers, for example) will be provided with more in-depth information about ADR options and applications, and ethical and legal issues surrounding the use of ADR.

Appropriation amount

The Director of Dispute Resolution Services will be compensated at level 20 at a rate of \$46,000. An administrative assistant will be hired at level 12 at a rate of \$24,000. \$20,000 will be required to support the basic clearinghouse and supervisory functions of the ADR administrator. \$70,000 will be used for educational purposes including basic publications and workshops, seminars and conferences.

Research and Development

Purpose

The Standing Committee recommends the creation of an ADR research and development capacity and recommends that \$150,000 be used to initiate three ADR pilot programs. The integration of ADR services such as mediation, case evaluation and arbitration into the court system, which traditionally has focused its resources on adjudication, requires clarity of purpose and a spirit of careful experimentation, as well as systematic data collection, comprehensive service evaluation and thoughtful analysis.

The goal for FY1996 is to: establish base line information about existing services; design and test management information systems (which must be integrated into the computerization initiative now underway); identify and begin examining critical legal, ethical, procedural and design issues; and field test quality control methods. These goals will be accomplished by creating pilot programs required by G.L. c. 211B, §19, analyzing the result of such pilots, and setting an R&D agenda for subsequent years.

Activities

i) SJC Study. During FY1995 the Supreme Judicial Court received a small (\$27,000) evaluation grant from the State Justice Institute which will allow the Standing Committee to better understand models for screening cases for referral to ADR and to gather information about the relationship between the qualifications of ADR providers and the satisfaction of ADR users.

ii) Pilot Programs. During FY1996, the Standing Committee recommends that the Trial Court conduct three pilot programs which examine some of the concepts outlined in the Reinventing Justice: 2022 vision of the user-friendly comprehensive justice center, such as: ADR service delivery systems which are cross-departmental, regional service delivery which draws upon a range of providers (judges, clerks, court employees, community-based programs, universities, bar associations, and private practitioners), provision of services outside normal

business hours, and ways to make ADR accessible to people from diverse linguistic or cultural backgrounds.

iii) Management Information System. During FY1996, the Director of ADR for AOTC should work with the Standing Committee on Dispute Resolution, the ADR Job Analysis Task Force and the Trial Court's information technology staff to design an ADR evaluation process and an ADR management information system.

Appropriation Amount

The Standing Committee is recommending a total of \$150,000 to support FY1996 R&D activities. The funds will be allocated by RFP to the three statutorily mandated pilot ADR programs.

2. WHAT IS THE LONG-TERM PLAN FOR ADR?

Evolution of ADR in Massachusetts

The Judiciary's planning for ADR is based on a lengthy period of experimentation and service delivery. In the mid-seventies, the federally funded and much emulated Urban Court Program was initiated in the Dorchester District Court. Soon thereafter, other mediation programs were started, including the Crime and Justice Foundation Mediation Program, which now serves the Boston Municipal Court and District Courts in Essex County. The concept of community-based mediation spread, and, even though funding has been so unreliable that the full-capacity of these programs has never been realized, there are over thirty such community based programs today. These local community mediation centers recruit, train and supervise over 1,000 volunteer mediators who provide mediation services to local courts—primarily District, but also the BMC, and Juvenile, Probate and Superior Courts. In 1987, the Legislature passed a bill establishing a District Court Community Mediation Advisory Board and the position of director of mediation for the District Court.

In the mid-eighties, mediation, and other less formal methods of dispute resolution, such as case evaluation, were instituted in selected Superior Courts. Two notable examples are: the Superior Court mediation programs operated by the Massachusetts Office of Dispute Resolution (MODR) in Suffolk and Norfolk Counties; and the Middlesex Multi-Door Courthouse, which provides services to the Superior and Probate Courts in Suffolk, Middlesex and Worcester counties. In fact, all motor vehicle tort cases in Suffolk County Superior Court are scheduled for case evaluation, with an option to move for an exception. MODR, which is housed in the Executive Office for Administration and Finance in the Executive Branch, has a legislative mandate to work with the three branches of government to promote the use of ADR through: mediator and conflict resolution training; program design and administration; and ADR process design, facilitation and consultation. (See Exhibit B for a list of current public and non-profit dispute resolution programs.)

In some cases, dispute resolution services are provided by clerks or court employees. For example, in most Probate Courts, Family Service Officers offer "dispute intervention" for divorcing couples to help them agree upon the terms of separation, parenting plans, and financial issues. In the Housing Court, Housing Specialists work with landlords and tenants to develop agreements which preserve tenancies, or, if necessary, end them in the most satisfactory manner. In the District Court and BMC, Clerk-Magistrates settle many disputes informally through the complaint process. The Court Reorganization Act of 1992, calls upon clerk-magistrates to hear small claims suits in hearings which are less formal than traditional trials. Judges often help parties to settle cases in pre-trial conferences.

Equally significant is the emerging, even maturing, private, for-profit ADR sector. As interest in ADR has spread, private practitioners have initiated ADR practices and formed ADR firms. This lively entrepreneurial sector is providing a variety of services including civil, divorce and environmental mediation. To further enrich the ADR mix, many retiring judges have joined ADR firms and are now serving as neutrals in the private sector.

Chief Justice's Commission on the Future of the Courts

In 1992, the Chief Justice's Commission on the Future of the Courts, which included a subcommittee on ADR, issued its final report: Reinventing Justice: 2022. This report, which has received national attention, calls for a network of "user-friendly" comprehensive justice centers where the public has access to a variety of dispute resolution services. The report also calls for the creation of a Standing Committee on Dispute Resolution. The vision painted in Reinventing Justice guides the ADR policy and planning of the Judiciary.

ADR Policy Statement

In October of 1993, at the recommendation of an all-department ADR Task Force, the Supreme Judicial Court and the Trial Court of the Commonwealth of Massachusetts established a policy committing the Judiciary to providing the public with alternative methods of resolving disputes. The policy further stated that ADR services were to be widely available, regardless of ability to pay, and that a standing committee on dispute resolution should be appointed to advise the Judiciary on the structure of an ADR system, standards, and mechanisms for funding. The policy called for the creation of a Standing Committee on Dispute Resolution to advise the Judiciary on how best to accomplish this goal.

Standing Committee on Dispute Resolution

The courts' Standing Committee on Dispute Resolution, composed of knowledgeable people from diverse backgrounds was appointed in January of 1994. During the course of 1994, the Standing Committee has met regularly in order to accomplish its charge. This committee is engaged in a careful, comprehensive planning process for the implementation of ADR throughout the Trial Court. The Committee is in the process of producing a five year plan for court ADR. A

technical assistance grant obtained from the State Justice Institute has allowed the Committee to draw upon the expertise of two nationally respected experts in the field of ADR. The Committee has carefully surveyed the status of ADR both in Massachusetts and in other states. Furthermore, it has begun the process of defining policies, standards and a plan of implementation tailored to the needs, structure and traditions of the Commonwealth. The Committee is also considering the potential for linking ADR implementation to general reform of civil justice. Preliminary formal public hearings have been held, as have a series of less formal discussions with various interested groups.

Three subcommittees are working on specific projects: the Structure and Finance Subcommittee is considering the ADR administrative framework and funding issues, the Standards Subcommittee is focussing on ethical guidelines and qualifications of dispute resolution providers, and the Education Subcommittee is identifying audiences which need ADR education and appropriate methods for meeting those needs.

Five Year Plan

The initial version of the five-year plan will be ready for consideration by the SJC and the CJAM in the spring of 1995, and funds for further implementation will be sought in the FY1997 and subsequent budgets. The Standing Committee has agreed on the goals and elements which will form a framework for the plan. The long-range plan will build on current ADR services, will ensure quality control of ADR providers and programs, and will provide for services tailored to the needs of litigants in the different Trial Court departments. The Committee intends to plan a statewide ADR delivery system which offers parties the maximum possible choice among ADR providers, which is user-friendly and accessible to the public, and which ensures high quality services. The Committee also aims for a system which uses resources efficiently and maintains enough flexibility to accommodate the ongoing innovations which characterize the field of ADR.

By FY2001, the end of the five-year ADR phase-in, ADR will have a firm footing in the Judiciary. While ADR services will not yet be universally available as envisioned in Reinventing Justice:2022, they will be widely available and well-known to the public. The Administrative Office of the Trial Court will have a strong ADR capacity which will ensure quality services and provide guidance and oversight to the entire system. Each department will receive guidance from a diverse ADR Committee and will have a core of employees knowledgeable about ADR who will help to shape the department's use of ADR services. Many local divisions will offer ADR services to the public through an appropriate mix of court-provided and contracted services. All court divisions will have designated employees as ADR liaisons. Examples of cross-departmental ADR service delivery will be numerous. While the need for expansion of services and further innovation will remain, all judges, clerks and court employees will be familiar with ADR and will be able to make sound ADR referrals. With this strong base, the Trial Court feels confident that ADR will continue to grow in appropriate and responsive ways.

This budget request for FY 1996 reflects the view of the Standing Committee that the best

way to integrate ADR services into the Judiciary is to take firm, concrete steps in FY 1996. While some additional funding will be necessary to institute ADR throughout the system, every effort will be made to use existing resources, both human and material, in new ways. The Standing Committee currently favors a funding system which combines public funding, grant funding, party payment of fees and volunteer services.

3. WHY SHOULD ADR BE FUNDED IN THE STATE BUDGET?

Benefits of ADR

ADR techniques produce many benefits, including: greater involvement of the parties in the resolution of their differences, greater satisfaction with outcomes, stronger commitment to honor agreements, the potential to mend relationships, faster dispute resolution, lower costs for disputants and savings to society as a whole. These advantages are widely recognized because of the positive experience of Massachusetts courts and litigants with a variety of ADR programs including community mediation programs, Massachusetts Office of Dispute Resolution (MODR) programs, and the MultiDoor Courthouse. In a few instances, such as the MODR motor vehicle tort programs, ADR is already highly integrated with the normal processing of cases. What began as an isolated phenomenon twenty years ago has in recent years become an expectation, and, according to some views, a right.

ADR has received widespread endorsements from the bench, bar and public. For example, a 1991 public opinion survey taken for the Commission on the Future of the Courts found that 84 percent of those surveyed strongly or somewhat favored the use of mediation, while 69 percent believed that "having the courts provide a variety of options for resolving disputes, such as mediation and arbitration" was either important or very important. (*Reinventing Justice*, p.111, 113)

At least one national poll produced similar results, which point to the link between ADR and civil justice reform. According to an article by Harry N. Mazadoorian entitled "Private Experience Is Solid Evidence of ADR's Effectiveness," appearing in the *National Law Journal* (April 11, 1994), "the costs and uncertainty associated with litigation are so widespread that 62% of chief executive officers responding to a recent Harris poll cited the civil justice system as a major impediment to the international competitiveness of U.S. companies." This article also noted, "in recent study by the DeLoitte & Touche accounting firm, 60% of all ADR users and 78% of those characterized as extensive users reported that they had saved money by using ADR. The amount saved ranged from 11% to 50% of the cost of litigation."

Legislative Directive

As the public's interest in ADR has grown, so too has the interest and concern of the Legislature. G.L. c. 211B, § 19 allows the CJAM of the Trial Court to establish and promulgate rules for a mandatory alternative dispute resolution program for civil cases. This section also calls

on the CJAM to supervise and establish standards for ADR programs, to implement a program of certification of personnel providing ADR in the courts, and to establish pilot ADR programs in three counties. Finally, the CJAM is asked to report annually to the legislature identifying unmet needs and requesting further legislation to implement ADR.

National ADR Movement

It is important to note that the rapid growth of ADR is part of a national, even international, movement. The American Bar Association has long been supportive of the well-thought-out use of ADR in the judicial system and has created an ADR section. Every state bar association has established an ADR committee. In the ABA's 1994 publication, Just Solutions: Seeking Innovation and Change in the American Justice System, ADR (which was renamed "appropriate dispute resolution") is featured prominently. Community conflict resolution centers, multi-door courthouses, judicial training, statewide offices of dispute resolution and widespread public education were all cited as ingredients of a Judiciary that produces "just solutions."

Many states are moving ahead with implementation of ADR in the courts at a faster rate than Massachusetts. There are more than 1,200 separate state court ADR programs across the country, and more than 75 ADR programs in federal district courts. Approximately ten other states fund ADR through state appropriations. For example:

- * Connecticut provides ADR through its Family Court Services division
- * Hawaii's judicial branch Center for ADR distributes about \$500,000 to local ADR centers
- * Minnesota's State Court administrator distributes about \$100,000 to five community mediation centers
- * Nebraska allocates \$180,000 to six community ADR centers
- * New Jersey historically has spent \$800,000 per year for program improvements including ADR
- * New York's legislature appropriated \$3,159,400 for distribution to Community Dispute Resolution Centers
- * Virginia has appropriated \$500,000 for the costs of local ADR centers.

Most funds are used to support program overhead, often through grants to non-profit ADR provider organizations as in New York and Minnesota, but some states also fund the services of mediators and arbitrators. Many states have completed or are engaged in the same kind of planning and policy formulation now under way by the Standing Committee on Dispute Resolution.

Why Public Funding?

Both the policy statement and Reinventing Justice: 2022, the highly acclaimed Report of the Chief Justice's Commission on the Future of the Courts, make the case that public funding of

ADR is essential to the future of the public justice system. A major historic role of the court system is to help the public resolve their differences in constructive ways. "Commitment to the twin goals of improved adversary justice and a range of non-adjudicatory alternatives will go far toward improving the quality of justice in Massachusetts," states the Commission on the Future of the Courts. The Commission cautioned that, without a thoughtful response by the Judiciary, current trends could lead to a two-tier system of justice: speedy, private justice for the wealthy, and slow, poorly funded public justice for everyone else. The principal recommendation of the Commission, therefore, was the transformation of courts into publicly funded comprehensive justice centers where a variety of modes of dispute resolution, including traditional litigation, would be available through a single access point, delivered by judges, clerks, court employees or contracted providers.

The 1993 policy statement echoes the need for public funding, stating in Point One:

The availability of dispute resolution alternatives in the courts should not depend on the financial resources of the parties. The judicial branch will make every effort to obtain adequate resources for these services.

As noted above, the Standing Committee does not anticipate substituting public funding for the user fees which certain programs and providers currently collect for ADR in appropriate cases. Public funds are needed, however, to pay for at least a portion of the administrative overhead both in these programs and in programs which rely on volunteer mediators. Public funds are also needed for those ADR services which are most appropriately provided by employees of the courts.

Public Funding in the Past

ADR has received public funding in the past in Massachusetts, but that funding has decreased dramatically. The earliest funding for ADR was provided by the federal government in the mid-seventies through the early eighties. When federal funds were severely curtailed in the mid-eighties, the state government stepped in to allow the growth of ADR to continue. State funding was primarily provided by the Department of Social Services (DSS), the Department of the Attorney General (DAG), the Executive Office of Communities and Development (EOCD) and the Trial Court. During the fiscal crisis of the late eighties, ADR programs lost almost all state funding - well over \$1,000,000. This sudden and drastic loss in funding has resulted in a decline of services, lost expertise, and in general, a slowing of momentum.

In FY1995, state funding for ADR includes \$60,000 paid to the Middlesex MultiDoor Courthouse from the Trial Court's non-employee services account (line item 0330-0400), \$240,000 from the Attorney General, and small amounts integrated into the budgets of a few Housing Services agencies funded by the Executive Office of Communities and Development. The Massachusetts Office of Dispute Resolution (MODR) expends \$150,000 from its state appropriation to provide services in court programs, but receives only \$90,000 in party fees to

offset this expenditure. MODR's budget was cut by 20 percent in FY1995, with a legislative directive to seek reimbursement by agencies benefitting from its programs.

EXHIBIT A: COSTS OF ADR

A 1987 study by the Crime and Justice Foundation reported that statewide, annual expenditures for court-connected mediation were \$1,280,131, to support 5,726 referrals and 2,776 mediation. The average cost per referral was thus \$223 and the average cost per mediation was \$461, but the individual program figures ranged from \$35 to \$1,163 per referral and \$39 to \$4,251 per mediation. One source of inaccuracy and thus, presumably of variability, was that many programs received in-kind support from institutions of higher education or courts which was not included in the calculation.

Results from a 1994 Standing Committee survey of court-connected ADR programs listed in a directory published by the Boston Bar Association showed similar variability based on similar issues. Altogether, the programs responding to the survey (33 out of 46 sent) employed only 150 staff (including full-time and part-time managers, support staff and neutrals) and use the services of 607 volunteers, to provide ADR services to 9,372 cases per year. For example, expenditures per case screened ranged from zero in a number of the Superior Court programs, to \$44 at the MODR Suffolk Superior Court program, to \$102 at the Cape Cod Dispute Resolution Center, to \$165 at the Middlesex MultiDoor Courthouse, to \$323 in the Somerville Mediation Program. Similarly, expenditures per case provided with ADR varied greatly, as to amount and as to activities supported by program budgets. At the crudest level, this survey showed that the 1994 reported program expenditure of \$1,323,007 for providing ADR services in 8,297 cases amounted to \$159 per case.

The information is interesting, but, because programs are so different from one another and because terms have not been sufficiently defined, it is not an accurate basis for reaching any conclusions about the financial or human resources necessary to handle ADR cases. Clearly, each program has different program configurations. The range includes: a community-based nonprofit model, housed in the court as in Fitchburg or housed elsewhere as in Springfield; one of the executive branch models where cases are screened in group screenings; the multidoor courthouse model where cases are screened individually; and the community program with satellite services. Moreover, neither the Crime and Justice Foundation study nor the Committee questionnaire accounted for ADR work performed by court employees already on the payroll, or covered a new court administered model being implemented in the Lawrence District Court.

EXHIBIT B

NON-PROFIT ADR PROGRAMS
IN MASSACHUSETTS BY COUNTY*

COUNTY	PROGRAMS CURRENTLY IN OPERATION	DEPARTMENTS
BARNSTABLE		
	Cape Cod Dispute Resolution Center	DC
	Cape Cod Human Service Mediation	DC
	Provincetown-Turo Mediation Program	DC
BERKSHIRE		
	Berkshire Mediation Service	DC
	Berkshire County Reg Housing Authority	DC
BRISTOL		
	Comcare Parent-Child Mediation	DC JC
DUKES		
	Martha's Vineyard Mediation Program	DC SC PFC
ESSEX		
	CJF Mediation Program	BMC DC
	Essex Bar Association	DC SC
	Lawrence Conciliation Program	DC
	Lynn Youth Resources Bureau DR	DC
	North Essex Mediators	DC
	North Shore Community Mediation	DC
FRANKLIN		
	Franklin County Housing Authority	DC
	Franklin Mediation Services	DC PC

COUNTY	PROGRAMS CURRENTLY IN OPERATION	DEPARTMENTS
HAMPDEN		
	Dispute Resolution Service, Inc.	DC JC
	Hamden County Bar Association	SC
	Neighborhood Youth Mediation Program	DC
HAMPSHIRE		
	Hampshire Community Action	DC
	Hampshire Community Mediation	DC
	MENDS	DC
MIDDLESEX		
	Cambridge Dispute Resolution Center	DC PFC
	Cambridge Family & Childrens Services	DC JC
	Framingham District Court Med. Program	DC
	Lowell Bar Association	SC
	Middlesex Community College	DC
	Middlesex MultiDoor Courthouse	SC PFC
	Somerville Mediation Program	DC
NANTUCKET		
	Cape Cod Dispute Resolution Center	DC
	Martha's Vineyard Mediation Program	DC PFC SC
NORFOLK		
	Corporate Counsel of Greater Boston	DC
	Emerson College	DC
	Harvard Mediation Program	DC
	Metropolitan Mediation Program	DC JC

COUNTY	PROGRAMS CURRENTLY IN OPERATION	DEPARTMENTS
NORFOLK (cont'd)	Mass Office of Dispute Resolution	SC
	UMass Mediation Clinic	DC
PLYMOUTH		
	Brockton District Court Med. Program	DC
	Mediation Works, Inc.	DC
SUFFOLK		
	CJF Mediation Program	BMC DC
	CORE Family Mediation	DC
	Mass Office of Dispute Resolution	SC
	Metropolitan Mediation Program	DC JC
	UMass Mediation Clinic	DC
	Urban Community Mediators	DC
WORCESTER		
	North Central Court Services	DC
	Worcester Community Action	DC JC

• For information about private, for-profit ADR providers consult the *Boston Bar Association's Directory of ADR Providers*, or the *Lawyers Weekly*. For up-to-date information about community mediation programs, contact the Administrative Office of the District Court (508/746-9010) or the Massachusetts Association of Mediation Programs (671/451-2093).

APPENDIX C

QUESTIONS DISCUSSED AT THE STANDING COMMITTEE PUBLIC HEARINGS

1. Under what circumstances, if any, and through what mechanism should parties be encouraged or required by a court to use alternative dispute resolution (ADR) services? Should the use of ADR be required or prohibited for any particular category of cases?
2. How should standards and plans regarding court-connected ADR be distributed among the following: uniform, statewide policies; trial court department policies; and local court policies?
3. How should the judicial branch coordinate and oversee court-connected ADR programs? What oversight entity should be created in the judicial branch to administer the court-connected ADR programs? What should be its functions?
4. How should court-connected ADR programs be funded? In particular, (a) how should administrative costs be underwritten (e.g., through state appropriations, filing fee surcharge dedicated to ADR, sliding scale fees, reallocation of court staff, or some combination); and (b) how should ADR service providers be compensated (e.g., unpaid volunteers, sliding scale fees paid by parties, state appropriation, filing fee surcharge, court employees, or some combination)?
5. Through what mechanism should a provider of dispute resolution services be selected for a case in a court-connected program? Should courts be permitted to refer cases to particular ADR providers?
6. Who should evaluate the quality and effectiveness of ADR services provided through court-connected programs? According to what standards?
7. What qualifications should be required for providers of dispute resolution services through court-connected programs?
8. What standards of practice should ADR practitioners be required to follow in order to ensure the integrity and quality of ADR services provided through court-connected programs? To what extent and by what means should confidentiality be protected for these services (see GLM Ch. 233, s.23C)?
9. Do courts have an obligation to ensure that agreements reached through court-connected ADR meet any minimum standard of fairness?
10. What information and education about ADR services should be provided to judges, court personnel, the bar, and litigants, in order to ensure a successful ADR system?

APPENDIX D

A WHITE PAPER FOR THE STANDING COMMITTEE AND THE TASK FORCE ON EARLY COURT INTERVENTION

Introduction. In the Report of the Subcommittee on Structure and Finance contained in Part Three of the Progress Report, it is recommended that the Trial Court develop a plan to use ADR early in the litigation process. The recommendation proposes that early in the process the Trial Court provide information to litigants and their counsel about the variety of methods for resolving disputes, and that lawyers assume added responsibility for alerting clients to the variety of methods for resolving disputes. The recommendation assigns to committees, which are to be established by each of the seven Trial Court departments and which are to be broadly representative of all stakeholders, the responsibility for developing plans detailing how each department proposes to use ADR early in the process. The departmental planning process outlined by the Subcommittee on Structure and Finance could result in a proposal by one or more of the departments for intervention by the court at an early stage of the litigation. However, the recommendation does not require court intervention.

Early court intervention. A requirement that the court intervene early in the litigation process may not be necessary to bring about early consideration of alternative dispute resolution options. A court rule or policy that imposes on counsel an obligation to meet and confer or otherwise to discuss ADR options prior to or at an early stage of the litigation may over time result in a substantial change in the litigation culture. And the growing emphasis on the value of dispute resolution alternatives in the law school curriculum and in continuing education programs is likely to contribute to an increased understanding and use of ADR by lawyers and a greater

awareness of ADR alternatives by the public. Even without a rule, a Trial Court department could on its own assign to a court-connected ADR program or to some agent of the court, such as a clerk or probation officer, the authority and responsibility for intervening in the litigation process to conduct a case screening and to insure that the parties and their counsel are aware of ADR options. There already is precedent for this approach in the Superior Court, Probate Court, and District Court departments.

Nonetheless, there is reason to doubt that a meaningful discussion of ADR options in all cases in which it is deemed appropriate for such a discussion to occur will take place without some intervention by the court. In some cases, counsel may resist the invitation or direction to initiate the discussion. Thus, in some cases counsel for one party who is amenable to a discussion about or the use of a non-adjudicatory dispute resolution alternative may be frustrated by counsel for the other party who is uninterested in such alternatives. In other cases, an attorney may feel constrained not to discuss settlement because of fear that it will be interpreted by the other side as a sign of weakness and diminish the prospects for a favorable settlement. In still other cases, the discussion of alternatives by counsel may be perfunctory. And there will be cases in which counsel are impeded in their ability to consider seriously ADR options due to personal antagonisms engendered by the nature of the dispute or by collateral matters.

Another major impediment to greater use of ADR at an early stage of the process is the lack of knowledge. While education of the bar about the value of ADR is a priority of the Standing Committee and while the level of knowledge is undoubtedly growing, the problem cannot be underestimated. "Although lawyers are more likely than their clients to be aware of the existence of alternatives, a surprising number of lawyers know very little about them, frequently

confusing mediation and arbitration; hence they are reluctant to suggest their use. The path of least resistance is to litigate. Lawyer and client are apt to agree that adversary combat in a judicial arena is the normal, socially acceptable, and psychologically satisfying method of resolving disputes. Indeed, most legal education is premised on an adversarial approach to dispute resolution.” Stephen B. Goldberg, Frank E.A. Sander, & Nancy H. Rogers, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER DISPUTE RESOLUTION PROCESSES 422-23 (2d Ed. 1992).

Other jurisdictions have determined that an effective ADR system requires some form of mandatory early intervention. In these jurisdictions, a rule or statute requires that the court or its representative (e.g., a clerk, or some other designated agent of the court) intervene at an early stage of the litigation by conducting a conference or screening session with the attorneys (and sometimes with the parties as well) to explore alternatives to the adjudicatory process such as early neutral evaluation, mediation, summary jury trial or mini trial.

Early court intervention also may be advantageous, if not essential, if the parties are to choose the most appropriate dispute resolution method at an early stage of the process. The imposition of "meet and confer" requirements upon attorneys and the authority for courts to initiate case screening may contribute to early consideration of ADR in many cases. At the same time, the parties may also benefit greatly if they are assisted at an early stage of the litigation process in recognizing that the case is best suited for disposition by adjudication. Early court intervention to explore methods for streamlining the discovery process and for establishing a manageable schedule for completing pretrial events may avoid the expense and delay that sometimes occurs when courts remain in the background until years after a complaint is filed.

Early intervention is discretionary in Massachusetts. Rule 16 of the Massachusetts Rules of Civil Procedure is modeled after its federal counterpart which was introduced in the 1930's. The Massachusetts rule, which unlike its federal counterpart has not since been revised, provides that a court may, but need not, direct the attorneys for the parties to appear before it for a pretrial conference to consider the simplification of the issues, the need to amend the pleadings, the possibility of avoiding unnecessary proofs, limitations on the number of expert witnesses, the possibility of a reference to a master, the possibility of settlement, agreements as to damages, and "such other matters as may aid in the disposition of the case." The rule applies in the Superior Court, the Housing Court, the Probate and Family Court, and, by reference, in the District Courts and the Boston Municipal Court. Rule 16 assigns no specific responsibilities to the court for the progress of the case prior to trial (including the costs to the parties and to the judicial system), makes no reference to the subject of alternative dispute resolution, and reflects what can only be described as a laissez faire approach to caseload management.

Early intervention is the norm in the federal system. By contrast, Rule 16 of the Federal Rules of Civil Procedure has evolved through the years into a device which brings the court into contact with the parties and the dispute at an early stage. *See* Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 *Stanford L. Rev.* 1553, 1563-65 (1994)(hereafter, "A Process Model"). Under Fed. R. Civ. P. 16, amended most recently in 1993, the federal trial courts have a responsibility to promote an expeditious disposition of the action, to establish early and continuing control of the case, to discourage wasteful pretrial activities, to improve the quality of the trial through more thorough preparation, and to facilitate a settlement of the case. Although a pretrial conference is not mandatory under

Fed. R. Civ. P. 16, the court must conduct a scheduling conference with the parties (in person or by phone or mail) within 120 days of the service of the complaint on the defendant. Instead of describing the topics that may be discussed at the conference, Fed. R. Civ. P. 16 describes the actions the court may take such as ordering limits on discovery and the use of ADR processes. Thus, in the federal system, unlike under Mass. R. Civ. P. 16, pretrial case management is a shared responsibility of the court and the legal representatives of the parties, if any.

Numerous federal district courts, acting under the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482, have gone much further in developing the concepts of early court intervention and early utilization of the most appropriate dispute resolution process in each case. For example, under the Expense and Delay Reduction Plan adopted by the United States District Court for the District of Massachusetts in 1991, in all civil cases but a few exempted categories of litigation, the court is required to conduct a scheduling conference no later than 90 days after the appearance of the defendant in the case. The parties are required to meet and to confer 10 days before the conference and prepare an agenda of matters to be discussed at the conference as well as a discovery plan. Local Rule 16.1. ADR must be considered at the scheduling conference. Further case management conferences as well as a final pre-trial conference are scheduled as well. Conferences may be conducted by persons other than Article Three judges. Local Rule 16.3. A separate rule, Local Rule 16.4, deals specifically with ADR. It outlines options such as a mini-trial, a Summary Jury Trial, and mediation. Even in the absence of agreement, a judicial officer presiding over a case management conference may order parties to a summary jury trial. Local Rule 16.4(C)(3)(a)(2).

The impact of early intervention on the adjudicatory process. The changes in federal

civil procedure during the past five years are dramatic and have been described as a paradigmatic shift “transforming civil dispute resolution from a lawyer-driven system to a court-driven one.” R.M. Parker & L.J. Hagin, “‘ADR’ Techniques in the Reformation Model of Civil Dispute Resolution,” 46 SMU L. Rev. 1905 (1993). The greater involvement of courts in the pretrial process raises a number of questions which must be carefully considered. Procedural reforms at the federal level may not be readily adaptable to the state system because of vast differences in the resources available to the courts, and in the nature of the disputes faced by each system. Also, reasonable minds may differ about whether an increase in the court’s responsibility for management of the pretrial process in civil cases requires the concomitant imposition of such severe restrictions on the discretion of the attorneys as some would argue has occurred under the rules adopted by some federal district courts under the federal Civil Justice Reform Act. *See, e.g., A Process Model, supra* at 1566 discussing the alternative, lawyer-driven “meet and confer” model espoused by the American Bar Association.

In addition, at least two other concerns have been raised about the consequences of the judiciary assuming greater control over the management of the pretrial process. Some caution that enlarging the management authority of the court during the pretrial process and requiring judges to assume greater responsibility for case management may imperil the adjudicatory process by encouraging judges to view deliberation as an obstacle to efficiency. Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 380, 425-31 (1982). Institutionalizing ADR into a scheme of early court intervention, especially in circumstances in which the court is empowered to order parties to submit to non-binding dispute resolution processes and in which the court has vast control over pretrial discovery, according to some, may transform ADR from a voluntary,

relationship-building process into a coercive mechanism to achieve settlements by subordinating an individual's rights to achieve cost savings and to reduce delay in litigation. *See A Process Model, supra* at 1570-71. *See also* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 Harv. L. Rev. 668 (1986); Owen M. Fiss, *Against Settlement*, 93 Yale L. J. 1073 (1984). Some even suspect that notions of mandatory ADR and the assumption of greater control over the pretrial process by the judiciary are elements of a movement to suppress conflict, to impose an ideology of harmony in the judicial process, and thereby to threaten basic constitutional rights. *See generally* Laura Nader, *Controlling Processes in the Practice of Law, Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 Ohio St. J. of Dispute Resol. 1 (1993)

Each of these specific concerns has been raised in connection with the procedural reforms undertaken in recent years by the federal courts. The rules changes adopted by federal district courts under the Civil Justice Reform Act of 1990 are still being evaluated, and it is too early to reach a definitive assessment.

The Time Standards system in Massachusetts constitutes a rudimentary early court intervention model. In April, 1986, the justices of the Supreme Judicial Court entered an order applicable to all civil cases entered on or after July 1, 1988 requiring the disposition of all civil cases within 24 months from the date of entry in the Superior Court, District Court and Boston Municipal Court. The deadline was extended to three years by a supplemental order on November 15, 1989 that referred to budget cutbacks as an impediment to the original goal. An accelerated schedule for disposing of contested matters in the Probate and Family Court department and in the Juvenile Court department also was established as a result of the SJC order.

A Special Advisory Committee was established to assist the Chief Justice for Administration and Management in coordinating the efforts of the Trial Court departments in meeting the SJC order. Each department ultimately promulgated a comprehensive departmental implementation plan. 1989 Annual Report of the Massachusetts Trial Court at 2-3.

The Time Standards order has resulted in a series of departmental rules and standards which recognize that the court has a responsibility not only for managing the trial by acting on pretrial motions and objections brought by the parties, but also for reducing the complexity of the case and for promoting settlement earlier and at less cost to the parties than might otherwise be the case. For example, under Standing Order 1-88 applicable in the Superior Court Department, there must be a pretrial conference within five months in cases assigned to the "fast track" and within 32 months in cases assigned to the "average track." Effective December 5, 1994, the Superior Court amended its pretrial order under its time standards rule and strengthened this approach. See "Second Amended Standing Order 1-88 Time Standards," as amended 11/15/94 (Mass. Lawyer's Weekly November 27, 1994 at 27). As a result of this amendment, the order sent to the parties in advance of these pretrial conferences informs them that prior to the conference they must meet and discuss "the possibility of settlement, and the amenability of the case to mediation or other forms of dispute resolution."

The Superior Court Time Standards system certainly can be characterized as an early court intervention model. Moreover, it should be noted that in the Superior Court in Middlesex, Suffolk, Norfolk and Worcester counties, ADR programs operated by the Middlesex Multi-Door Courthouse and the Massachusetts Office of Dispute Resolution approved by and acting under the authority of the court are in many cases undertaking forms of dispute resolution early in the

litigation. However, early access to ADR options is still frequently left to the initiative of the parties or their attorneys, or to the innovations of particular judges.

In the Probate and Family Court department, Standing Order 1-88, II provides that “[a]ll contested matters regardless of anticipated length of trial must be scheduled for a pretrial conference. No trial date shall be assigned until after the pre-trial conference.” Standing Order 2-88(3) explains that the “four way conference” as it is called shall be conducted in accordance with mass. R. Civ. P. 16. Typically, under current practice, this event occurs no sooner than six months after the commencement of the action and frequently much later. ADR programs in Suffolk and Middlesex counties operated by the Middlesex Multi-Door Courthouse are initiating early contact with parties in certain contested actions. However, the timing of court intervention in a case still rests largely with the parties.

In the District Court department, Standing Order 1-88, “Civil Caseflow Management,” states that “an effective caseflow management system should be to dispose as promptly as possible of the vast majority of cases that are not destined for trial and concentrate the court’s resources on the processing and trial of the rest.” Standing Order 1-88 III(B). The order requires counsel to complete pretrial discovery within one year of filing suit unless the court permits further time, and directs that in cases not otherwise disposed of counsel must request a trial date within 10-12 months of filing suit. Standing Order 1-88 IV(C)(1) & (2). If no such request for trial is made, the Standing Order requires the clerk-magistrate to dismiss the action. Standing Order IV(C)(3). The District Court order assigns management responsibility to both clerks and judges for implementation of the order. Pretrial conferences, however, are optional. Standing Order 1-88 IV(C)(4)(g).

The District Court department is served by a network of non-profit community based mediation programs which in some instances enjoy a formal and close working relationship with courts and provide services in a wide variety of civil disputes including tort cases, contract actions, summary process actions, small claims, and in criminal cases. The Chief Justice of the District Court has established an advisory committee to assist in supporting and expanding this network of providers. However, in most cases, access to ADR in the District Court is a function of the willingness of local court personnel to utilize the service, and the ingenuity of local providers to sustain the effort with virtually no public funding.

The Boston Municipal Court department also has a Caseflow Management Rule similar to that applicable in the District Court. Standing Order 1-88 "Civil Caseflow Management."

Although each of the departmental standing orders is different, they have two features in common. First, they represent a shift away from the laissez faire approach to case management that is represented by Mass. R. Civ. P. 16, which makes the holding of a pretrial conference and judicial intervention to promote a settlement entirely optional. However, each of the orders also assumes that up to a point in the life of the case (ranging from 150 days for "Fast Track" cases in the Superior Court, to one year for many classes of civil cases in the District Court and Boston Municipal Court Department, to even longer in certain contested cases in the Probate Court), the lawyers or the parties, and not the court, should determine the schedule of events. There is no mandatory consideration of ADR, and the timing of court intervention in a case still rests largely with the parties. *i.e.*, the parties who file a case (or their attorneys as the case may be) enjoy the right, up to a point, to decide what, if anything, shall be done in the case.

This point is aptly stated in the Caseflow Management order adopted by the Boston

Municipal Court.

“The responsibility for effective caseload management is shared by the Bar and the Court. This order provides for the completion of case preparation by counsel within one year, and meaningful control of the case by the Court thereafter.”

Boston Municipal Court Standing Order 1-88 III(A).

Task Force On Early Court Intervention. In the *Reinventing Justice 2022* Report, the Futures Commission observed that a system of multi-option justice delivered through Comprehensive Justice Centers depends not only on improvements in the adjudicatory and non-adjudicatory systems, but also on forging a connection between the two processes. One method for accomplishing this objective is to adopt a system of early court intervention. One alternative would be to amend Mass. R. Civ. P. 16 to require that pretrial conferences or other such meetings take place between the court and the parties early in the litigation to insure that dispute resolution alternatives are considered and to otherwise assist the parties and counsel in managing the discovery and pretrial process in the most efficient manner possible, consistent with each party's fundamental rights. It also could include an obligation on the court to meet with the parties or counsel at subsequent stages of the litigation as well.

Adoption of an early court intervention model in Massachusetts would represent a major change in policy. It might exact too heavy a toll on already heavily burdened court resources. It might lead to what some would consider to be excessive interference by the court in the pretrial process. And, it might add significant burdens to lawyers without significant benefits to the parties.

On the other hand, it appears that the Massachusetts judiciary already has taken steps to move in this direction under the Time Standards system. Early court intervention across the

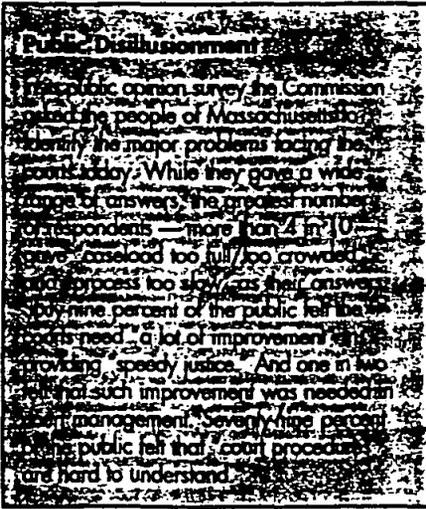
board might result in a substantial reduction in the cost and delay associated with civil litigation by enabling the parties and their lawyers to explore, at an early stage of the proceedings, strategies for the settlement or resolution of the controversy that are often impractical or less valuable when considered at a later stage of the proceedings. It may serve the interests of parties for whom adjudication is the most appropriate method for resolving their dispute by enabling them to streamline the pretrial process and thus preserve their resources and reduce the delay in getting the case ready for trial. In short, a system of early court intervention, may prove instrumental in insuring that in all appropriate cases the parties have access to a comprehensive system of multi-option justice.

Prepared by the Honorable Peter W. Agnes, Jr.

MULTI-OPTION JUSTICE



In seeking to resolve tomorrow's disputes, the justice consumer will demand options as surely as he or she will insist on choices in seeking any other valuable commodity. Then, as now, adversary justice may play the leading role in resolving conflict. For that to be so, however, dramatic improvements must be made in the way the courts operate and in how cases are litigated and tried. At the same time, consistent with strong public support for options, the courts must be prepared to offer non-adjudicatory methods for settling conflict. Teaching constructive, creative approaches to dispute resolution must become part of school curricula at all levels. Commitment to the twin goals of improved adversary justice and a range of non-adjudicatory alternatives will go far toward improving the quality of justice in Massachusetts.



Improved Adjudicatory Justice

The Massachusetts courts should prepare for the future by beginning to improve adjudicatory justice now.

The Commission envisions a future in which a range of conflict resolution options is available to new generations of disputants. Traditional adjudicatory justice — based on the advocacy of opposing positions and judgments by impartial decision makers — may continue to play the central role. But it will be a less utilized and less satisfactory role unless bold measures are taken in the next 30 years to correct what the public views as shortcomings in the process and administration of “conventional” justice.

The challenges that confront today’s courts as they attempt to provide quality justice are not solely the product of heavy caseloads and inadequate resources. While in 1988 the Commonwealth’s courts saw more case filings than the national median, they also had more money to deal with them. In 1988 Massachusetts criminal case filings per 10,000 residents exceeded the national median by 27%; civil cases exceeded the median by 40%. But the state’s per capita expenditures on the courts in that same year (\$33.46) also exceeded the national average by 27%.

In the years ahead the courts will need systemic cures for heavily congested courts, epidemic delays, high costs, and related administrative and management headaches. Adversary justice must be made more efficient, more affordable, and more accessible to the justice consumer.

Streamlined adjudication and court administration are essential to the Commission’s vision of future justice. Strategies to move the courts toward that goal include:

- A single Court of Justice at the trial court level, divided into such statewide, regional, and local functional or geographic divisions as the Supreme Judicial Court deems necessary. Although we take no position on how many different kinds of courts there should be, we believe that some basic divisions, such as between Superior Court and District Court, for example, are sensible, at least at this time. Whether that will be true in the future, however, as the business of the court evolves, is another matter —hence the recommendation that the Supreme Judicial Court be able to make these determinations as circumstances warrant.
- A permanent judicial redistricting function within the courts to study and recommend geographical changes as needed.

- The power to **reallocate resources** throughout the courts as necessary to permit a fairer distribution of resources and to facilitate the mobility of people and the migration of good practices.
- A larger cadre of **magistrates** to handle some of the more routine judicial functions, with their authority defined by the Supreme Judicial Court.
- Additional court-established standards for **active case management**, processing, and disposition. So long as quality control is guaranteed, local standards are acceptable.
- **Individual case responsibility.** Every case entering the system should be the personal responsibility of a **case manager** (a judge, an administrator) accountable for the case's movement and ultimate disposition. An "individual calendar system" is another possible approach. The key to the process is early case evaluation, early intervention in the event of unwarranted delay, and personal accountability.
- **"Managed discovery"** to curb fact-finding excesses and abuses in civil litigation.
- **Differentiated case management** in both criminal and civil cases to sort cases according to type and complexity and assign them to different time tracks for discovery, trial, and other dispute resolution processes.

Strategies to improve criminal adjudication include:

- In certain complex criminal matters involving, e.g., multiple defendants, extensive pre-trial work, or complicated facts and/or voluminous documents, a **single judge** to hear the case from arraignment through sentencing.
- A **comprehensive criminal justice information system** to perform such tasks as scheduling, docketing, and calendaring for every case; arrest, bail, sentencing, and case management reports; universal file sharing; and generation of case histories that provide automatic reporting on the disposition of every case by charge, count, or by whatever means the state requires.

Public Predictions About Future Justice

Asked to look ahead to the future and imagine the biggest problem that will face the justice system, Massachusetts residents expressed a range of opinions. By and large they expect today's problems to continue and grow worse. The greatest number (21%) predicted that heavy caseloads would be the number one problem. The next largest number (14%) felt that drugs, crime, and increasing violence would be the system's greatest challenge. Seven percent of residents of minority communities cited lack of education as the second largest problem, after drugs, crime, and violence (18%). Financial problems, homelessness, and jail overcrowding were identified as problems by the population.

TREND

Alternative Dispute Resolution

In the United States and Massachusetts a wide array of alternative dispute resolution (ADR) processes are employed with increasing frequency in countless settings. They include the familiar: mediation and arbitration; and the not so familiar: med-arb, mini-trial, neutral evaluation, the multi-door courthouse, private judging, ombudspersons, and summary jury trials. Variations abound. ADR programs today are funded by private individuals and institutions, courts, foundations, government agencies, municipalities, and universities.

The trend is toward innovation. The National Institute for Dispute Resolution alone sponsors programs that include: training family mediators at Child Find of America to counsel parents by telephone to help resolve conflicts that lead them to abduct their children; training health professionals at Boston University in mediation to help resolve conflicts in hospital settings; and through the National League of Cities helping city councils focus on common interests rather than differences as a way of reaching agreement on tough issues.

Fitting the Forum to the Dispute

Adjudication alone will not be adequate to accommodate the next century's wide range of disputes and disputants. Multiple public and private paths to justice must be tomorrow's reality.

Alternative dispute resolution (ADR) has evolved in part because in some cases non-adjudicatory conflict resolution techniques produce more satisfying results, swifter resolutions, and lower costs, both social and personal. ADR's defining characteristic is its search for consensus and common ground. It invites the individual to participate more fully in the resolution of his or her own conflicts.

As ADR gathers momentum, there are growing numbers of trained neutrals (mediators and others) providing ADR services. By 2022 judges may be less likely to handle cases alone; they may work in teams that include other dispute resolution facilitators, whose number and nature will depend upon the case at hand. And while lawyers will surely continue to be advocates, in the future they may be known as much for their counseling, advising, and problem-solving skills as for their advocacy. Negotiation and mediation skills will be a staple in law school curricula and other legal education settings. By 2022 full-service law firms will be advising and representing clients in a wide range of dispute resolution forums as a matter of course. Clients themselves, increasingly sophisticated about available dispute resolution options and their costs, will demand no less.

Institutionalizing ADR means that the Commonwealth's courts must accelerate the incorporation of alternative dispute resolution into the justice system, even as adjudication is improved. The network of comprehensive justice centers (see previous section), would go a long way toward meeting this objective.

Other strategies will be needed:

- Increasingly, court clerks and their comprehensive justice center equivalents should be skilled at and committed to **matching problems to the appropriate dispute resolution options.**
- In cases where referral to ADR would aid a more effective disposition, **the parties should be required to participate in an appropriate ADR process,** provided that: the parties' rights to trial are preserved; a judge can allow a disputant to opt-out for good cause; no additional financial burden is imposed on the litigants beyond the normal filing fee; and other conditions are met and certain guidelines for exemption are developed.

- In every appropriate case, **attorneys** should discuss with clients the **advantages and disadvantages** of all available **dispute resolution options**.
- The Supreme Judicial Court should create a **Standing Committee on Dispute Resolution**, composed of judges from each court department, members of the bar, academics, dispute resolution professionals, and the public, to foster experimentation with and evaluation of dispute resolution methods.

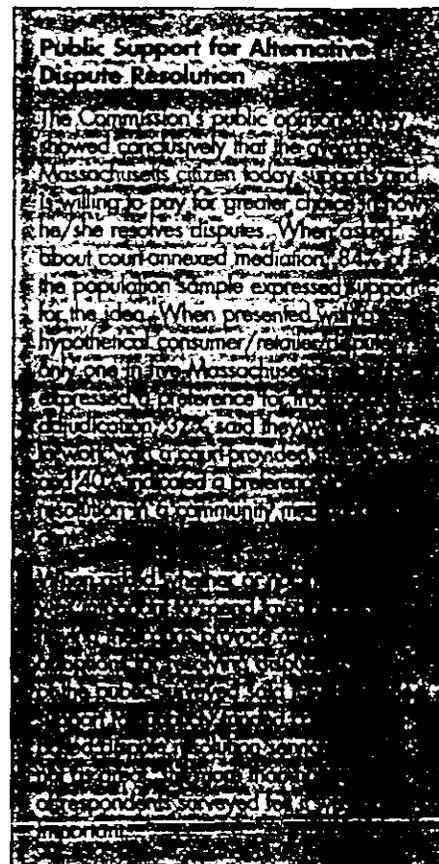
Teaching Win/Win Justice

The courts should promote training and schooling in alternative dispute resolution.

A cadre of professionals will be in the forefront of alternative dispute resolution providers. But the courts can also help ensure that all those who play a role in dispensing adjudicatory justice are provided with high-quality training to increase their understanding of ADR and improve their ADR skills. Three groups seem obvious candidates. First are **judges**, for whom a proficiency in mediation can be a real boon. Many judges mediate as a matter of course but reportedly with uneven results; many feel they lack necessary mediation skills. Second are **attorneys** who must be fluent in a range of dispute resolution techniques. The key to most settlements will continue to be the negotiating

skills of the lawyers involved. Third are **disputants** themselves, who need to know their conflict resolution options.

The central objective of alternative dispute resolution is neither to combat congested court dockets nor to relieve overburdened judges, although it can do both. It is instead to enable people to participate in the resolution of their own disputes. The courts should work with educators to promote the development of academic curricula that incorporate instruction in conflict management and reduction, mutual admission of fault, and the constructive defense of rights and positions. Mediation and negotiation training, together with better education about constitutional rights and the role of the courts, should be integrated into the curricula of all Massachusetts schools at all levels. Teaching problem-solving approaches, fact-finding, and other skills that can help untangle issues and emotions will help prepare the disputants of the future to be active participants in the resolution of conflict.





U.S. Department of Justice
Office of the Associate Attorney General

Deputy Associate Attorney General

Washington, D.C. 20530
March 29, 1995

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL

FROM: Francis M. Allegra 
Deputy Associate Attorney General

SUBJECT: **Joint and Several Liability**

A review of the literature and state codes indicates that the States have taken the following approaches to joint and several liability:

No Comparative Fault/Traditional Joint and Several Liability: Alabama, Maryland, North Carolina, Virginia.

Comparative Fault/Traditional Joint and Several Liability: Arkansas, Delaware, Maine, Massachusetts, Michigan, Pennsylvania, Rhode Island, South Carolina, West Virginia and Wisconsin.

Comparative Fault/Pure Several Liability: Alaska, Arizona, Colorado, Idaho, Indiana, Kansas, Kentucky, North Dakota, Tennessee, Utah, Vermont and Wyoming.

Comparative Fault with Modified Joint and Several Liability. Twenty-four states have hybrid systems that rely on one or more features. The following is a survey of those features (note that certain states appear under more than one heading).

° ***Modifying Joint and Several Liability by Providing for the Reallocation of Loss Among Remaining Parties to the Litigation, Including the Plaintiff in Some Cases***: Connecticut, Louisiana, Mississippi and Missouri. Examples of these systems include:

- Connecticut: several liability, except that a plaintiff who has attempted unsuccessfully for one year to collect from a defendant may apply to the court to have the defendant's share reapportioned among other defendants.
- Louisiana: several liability, except liability is joint and several subject to a cap of 50 percent of the plaintiff's recoverable damages, unless the plaintiff is assessed a greater degree of fault than the tortfeasor.
- Mississippi: several, except that joint and several is retained to the extent necessary for the injured party to recover 50 percent of his damages.

- ***Eliminating Joint and Several Liability, But Preserving It for Certain Types of Actions or Certain Types of Losses:*** Hawaii, Illinois, Nebraska, Nevada, New Jersey, New Mexico, Iowa, Oregon, Texas and Washington. Examples of these systems include:
 - Hawaii: joint and several for economic damages; joint and several for noneconomic damages in actions involving intentional torts, pollution, toxic torts, aircraft accidents, strict and products liability, auto accidents involving highway maintenance and design, if the tortfeasor had notice of a prior similar occurrence. In addition, joint and several liability for all cases in which the defendant's share of fault is more 25 percent or more; otherwise several liability for noneconomic damages.
 - Nebraska: defendants are jointly and severally liable for economic damages, but only severally liable for noneconomic damages.
 - Nevada: joint and several liability only in cases of strict liability, intentional torts, toxic torts, product liability and concerted acts.
 - Washington: several liability, except where plaintiff was not at fault, in tortious interference with contract, certain product liability cases, hazardous waster or waste disposal.

- ***Eliminating or Modifying Joint and Several Liability for Losses Under a Specific Amount or for Defendants Who Are Under a Certain Percentage of Fault:*** Florida, Hawaii, Illinois, Iowa, Minnesota, Montana, New Hampshire, New Jersey, New York, Oregon, South Dakota and Texas. Some examples of these systems include:
 - Florida: several liability, except joint and several liability for economic damages with respect to any party whose percentage of fault equals or exceeds that of a particular claimant. Also joint and several in actions where total damages do not exceed \$25,000.
 - Illinois: in negligence and product liability cases, joint and several liability for plaintiff's past and future medical expenses; a defendant whose negligence is less than 25 percent of the total negligence is severally liable with regard to damages other than medical expenses, except in medical malpractice and certain environmental tort cases.
 - Iowa, Montana, New Hampshire: joint and several liability does not apply to defendants assessed less than 50 percent of the total fault of all parties.
 - New Jersey: any defendant 60 percent or more responsible for damages is joint and severally liable for entire amount. Defendants more than 20 percent

but less than 60 percent at fault is jointly and severally liable for economic losses but severally liable for noneconomic losses. Defendants who are 20 percent or less at fault are severally liable.

- New York: any defendant found to be 50 percent or less at fault is severally liable for noneconomic losses in personal injury cases, subject to certain exceptions.
- Oregon: liability of defendants found to be less than 15 percent at fault for economic damages is several; liability for defendants more than 15 percent at fault is joint and several, except that any defendant whose percent of fault is less than the plaintiff's is liable only for that percent of economic damages.
- South Dakota: a defendant less than 50 percent at fault is not jointly and severally liable for more than twice his percentage of fault.

◦ ***Eliminating or Modifying Joint and Several Liability Only Where the Plaintiff is at Fault or Is More at Fault Than the Defendant:*** Florida, Oregon, Texas, Georgia, Missouri, Ohio, Oklahoma and Washington. Examples of these systems include:

- Georgia: joint and several liability, except that if fault is assigned to the plaintiff, the trier of fact may apportion an award among certain defendants, who are then severally liable.
- Missouri: joint and several if the plaintiff is fault-free. If the plaintiff is assessed some fault -- joint and several except if any party moves for reallocation of any uncollectible amounts, in which case the uncollectible amount shall be reallocated among all other parties including the plaintiff and no amount shall be allocated to any party whose assessed percentage of fault is less than the plaintiffs so as to increase that party's liability by more than a factor of two. Special rule for malpractice cases.
- Ohio: if plaintiff is contributorily negligence, several liability applies among joint tortfeasors for noneconomic damages. Liability is joint and several for economic damages.

I would suggest that we meet with Frank Hunger to discuss how we might distill the various features in these state systems into a Federal statutory proposal. One important observation though -- in light of the above, the provision in Senator Rockefeller's bill drawing a distinction between economic and noneconomic damages clearly represents a minority position.

cc: Frank W. Hunger
Maria Olsen

REPORT
OF THE
DEPARTMENT OF JUSTICE
PRODUCT LIABILITY
WORKING GROUP

August 1994

REPORT OF THE PRODUCT LIABILITY WORKING GROUP

EXECUTIVE SUMMARY

Major products liability legislation is pending in both the Senate and the House of Representatives. The leading bill in the Senate, S. 687 ("the Bill"), was introduced by Senator Rockefeller (D.- W.Va.) on March 31, 1993, and has 9 Democratic and 35 Republican cosponsors. Although Senator Rockefeller recently was unable to obtain closure on the Bill, he may reintroduce the Bill this fall. The Bill, a scaled down version of prior product liability reform proposals, would preempt various features of state product liability law. A companion bill, H.R. 1910, introduced by Congressman Rowland (D. Ga.), contains largely identical provisions and boasts 144 cosponsors, 47 of whom are Democrats.

The attached section-by-section analysis evaluates the provisions of the Bill in detail. This executive summary highlights and discusses the most important and potentially controversial features of the Bill. For the reasons set forth below, the Products Liability Working Group recommends that the Department oppose passage of the Bill in its current form. The Working Group also recommends that the Department consider proposing alternative legislation addressing certain product liability issues discussed below.

PREEMPTION

The Bill is intended to create nationwide standards for the award of damages in product liability cases brought in state and Federal courts. It is premised on the belief that manufacturers whose products move in interstate commerce should not be subject to different and inconsistent liability rules from state to state and that the lack of predictability caused by these different state standards has adversely affected the competitiveness of U.S. businesses.

Section 4(a) of the Bill states that the statute would apply "to any civil action brought against a manufacturer or product seller, on any theory, for harm caused by a product." Section 4(b) of the Bill generally preempts any state law regarding recovery for harm caused by a product "to the extent that this Act establishes a rule of law applicable to any such recovery." The Bill, however, expressly does not preempt applicable state law regarding alternative dispute resolution procedures and offers of judgment.

Federalism analysis. Under current interpretations of the Commerce Clause, the Congress undeniably has the authority to enact national product liability laws. But that does not mean that it should ignore the principles of federalism in exercising that authority. The development of tort law has traditionally been left to the states in the exercise of their police powers. Although the Congress has occasionally enacted legislation in the face of that tradition, it has done so only where there has been a weighty and demonstrable problem of national scope that could not be dealt with effectively by the states either individually or collectively. In the instant case, we do not believe that the proponents of this Bill have met their burden of demonstrating the need for comprehensive Federal legislation that would override critical features of the product liability laws of the states.

Considerable evidence suggests that there never was a widespread product liability "crisis," or at least that any incipient trend towards a crisis has subsided either on its own accord or as the result of state product liability reforms. Raw statistics often cited by proponents of tort reform can be misleading on this count. Thus, according to a report made to the Federal Judicial Conference, while there were 85,694 product liability suits filed in Federal court between 1970 and 1986, only 34 companies were the lead defendants in over 35,000 of these cases. Moreover, about 60 percent of these Federal cases, as well as a significant portion of those filed in state courts, were attributable to a handful of products, notably Benedectin, DES, Agent Orange, the Dalkon shield and asbestos. Several studies citing Federal case filings indicate that once these cases are subtracted, product liability cases increased at the rate of approximately 3 percent per annum during the 1980s -- a rate approximately equal to the increase for all types of tort cases during this period -- and that, aside from asbestos suits, the number of product liability suits filed substantially declined in the latter half of that decade. Other anecdotal claims made by tort reform proponents are not borne out even by raw data. For example, proponents of reform have asserted that punitive damages are often awarded in product liability cases. Yet, the most comprehensive study of punitive damages awards in product liability cases, released by the Roscoe Pound Foundation, indicates that between 1965 and 1990, there were only 355 such awards in both Federal and state cases. Other studies conducted by the General Accounting Office (GAO), the American Bar Foundation and the Institute for Civil Justice of the RAND Corporation suggest that punitive damage awards rarely penalize corporations that take reasonable precautions.

Even statistics somewhat favorable to those seeking national reforms suggest that any product liability problems experienced in the mid-1980s are abating. For example, a lengthy statistical survey published in the U.C.L.A. Law Review indicates that plaintiff success rates in state courts have declined from 55.8% in 1979 to 32% in 1989. During the same period, the success rate for plaintiffs in Federal cases terminated before trial declined from 50.4% to 25.8%; the rate for cases terminated after trial also decreased from 40% in 1985 to 34.5% in 1989. The amount of recoveries won by successful plaintiffs also has dropped considerably since the mid-1980s. For plaintiffs in Federal court, the recoveries rose sharply from a mean of \$615,000 in 1979 to \$2,557,000 in 1986, but dropped back down to \$1,017,000 in 1989. Other studies, including a 1989 study of five states by the GAO, indicate that punitive damage awards in product liability cases are decreasing and that judges frequently reverse or remit even large compensatory awards in post-trial proceedings.

To be sure, an exaggerated fear of product liability suits may be causing some companies to withhold new products and withdraw useful old products from the market. And in some industries, most notably the pharmaceutical and medical device industries, concerns about such suits may not be exaggerated. Moreover, insurance premiums and legal defense costs associated with products liability have grown remarkably over the last fifteen years, shrinking, if not eliminating, the profit margin of certain products. With further research, a good case might be made for limited Federal product liability legislation that addresses a select group of industries and products -- AIDS drugs or materials for medical devices, for example. However, the Bill is not so limited and we believe that the available evidence

neither makes a positive, empirical case for across-the-board national tort reform, nor even begins to demonstrate that the problems that do exist are of such magnitude as to exceed the remedial abilities of state legislatures. Accordingly, we believe that the substantial infringement on state sovereignty that enactment of this comprehensive Bill would necessarily represent is unwarranted at this time.

Interaction with Existing State Law. The sponsors of this Bill argue that it will improve the competitiveness of U.S. businesses by promoting uniformity and, hence, increasing predictability in products liability law. It is highly unlikely, however, that this legislation will accomplish that goal. All fifty states have enacted some type of product liability reform, but those reforms vary considerably. Because the Bill would preempt some, but not all, of these provisions, it would merely replace one patchwork national system of product liability law with another. Enhancing that likelihood, the Bill does not vest any new jurisdiction in the Federal courts, but rather (except in cases of diversity) leaves to the state courts the interpretation of its provisions. Each state thus might develop conflicting interpretations of the Bill's provisions and the manner in which those provisions interact with state law. The American Bar Association (ABA), the National Conference of State Legislators and the Conference of Chief Justices have based their opposition to the Bill, at least in part, upon the differing state contexts in which the law would operate and its differing impact upon each state. We believe that those concerns are well-founded and that the Bill will not produce the national uniformity its proponents desire.

It is difficult to anticipate how this legislation would interact with the state laws that would not be preempted. The Bill would establish substantive principles concerning the liability of defendants that would alter state product liability statutory schemes. Many of these schemes were passed as package reforms by legislatures attempting to strike a careful balance among competing concerns by enacting some provisions favoring defendants and others favoring plaintiffs. By preempting only part of these reform packages, the Bill would disrupt the balance of these state regimes, most likely skewing them in favor of defendants. For example, legislatures in states such as Florida, Georgia and Connecticut, which chose to cap punitive damages instead of enacting the other types of limitations on liability contained in this Bill, would find themselves suddenly with both sets of provisions in effect. In other states, plaintiffs might be denied any relief. For example, in Alabama, wrongful death damages have been held to be exclusively punitive in nature. Because the Bill does not permit the award of punitive damages in the absence of an award of compensatory damages and because no compensatory damages are awarded in Alabama, a plaintiff there might be denied any recovery for wrongful death.

Similar interaction concerns apply in the area of state civil procedures. A preliminary review suggests that the Bill's mandated procedures might not blend well with existing state procedures and might even leave litigants subject to conflicting mandates. For example, the Bill establishes an offer of judgment procedure, under which a plaintiff may make an offer of judgment at the time of filing a complaint and a defendant may make such an offer within 60 days of the service of the complaint. However, it is unclear how a defendant could make or

respond to such an offer in states, such as Illinois, Minnesota and Idaho, which do not allow plaintiffs to plead a specific amount of punitive damages until a judge authorizes the amendment of their initial complaints or that preclude discovery of the defendant's wealth or profits until after a jury has already determined liability for punitive damages. Additional confusion would likely be produced by the Bill's provisions involving the bifurcation of trials to separate the compensatory and punitive damage phases. For example, while the Bill seems to require that the same trier of fact determine both compensatory and punitive damages, several states (including Connecticut, Kansas and Ohio) that currently require a bifurcation allow juries to resolve compensatory damage claims in product liability cases, but require judges to make punitive damage awards.

* * * * *

Our concerns that this legislation is broader than warranted by demonstrated need and would interact poorly with existing state law would, standing alone, lead us to conclude that the Bill should not be passed in its present form. Apart from these global concerns, however, some of the provisions of the Bill are more acceptable and well-drafted than others and could form the matrix for a narrowly-tailored piece of Federal products liability legislation aimed at particular industries or products. Accordingly, in the segments that follow, we summarize our evaluation of the remaining provisions of the Bill, focusing upon their independent merits, while preserving our broader concerns regarding this legislation as a whole.

OFFER OF JUDGMENT PROCEDURE

Section 101 of the Bill would establish a procedure to encourage early offers of judgment and to impose penalties upon parties who refuse such an offer of judgment and then achieve a worse result at trial. While the goal of promoting settlements is laudable, Section 101, as drafted, does not appear to further that goal in a reasonable fashion. This provision would establish widely-disproportionate penalties for plaintiffs and defendants who refuse an offer of judgment and later fail to win a more favorable judgment at trial -- a defendant would be liable only for the payment of up to \$50,000 of the plaintiff's attorneys' fees, while a plaintiff would be subject to losing all "collateral source" benefits (*e.g.*, the proceeds of a life insurance policy) with no limitation. The early timing of this provision -- a plaintiff's offer is due at the filing of a complaint and a defendant's offer within sixty days of service -- would force most parties to either make offers or consider offers from an opponent before being in the position to evaluate adequately the strengths and weaknesses of their cases. We are also concerned that this provision is too mechanical and potentially harsh. Section 101 contains no *de minimis* rule and would substantially penalize a party who rejects an offer even \$1 more than the jury's eventual award. Moreover, unlike similar proposals, this provision is automatic and would afford a judge no discretion to reduce or eliminate a penalty even when manifest justice so requires. The goals of this section might be better served by refining the offer of judgment provisions of Rule 68 of the Federal Rules of Civil Procedure (and its state analogues) and by encouraging the greater use of alternative dispute resolution.

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Section 102 would impose penalties upon defendants who unreasonably or in bad faith refuse to accept a plaintiff's offer to proceed pursuant to an alternative dispute resolution (ADR) procedure and who, thereafter, have a final judgment entered against them. To be covered by this provision, an ADR procedure must be voluntary, nonbinding and "established or recognized under the law of the state in which the civil action is brought or under the rules of the court in which such action is maintained." The provision thus would attach a sanction to the defendant's refusal to participate in an existing ADR procedure, but would not require the use of such a procedure in a state where ADR has neither been established nor recognized. Although we strongly favor efforts to encourage the wider use of ADR procedures, we are unconvinced that it serves the Bill's goal of promoting uniformity to create special ADR rules for product liability cases in states that already have ADR procedures, while having no such rule in other states.

LIABILITY OF A NON-MANUFACTURING PRODUCT SELLER

Section 202 of the Bill would limit the liability of non-manufacturing product sellers by immunizing such sellers from liability unless they were personally at fault or the manufacturer is insolvent or otherwise unavailable to be sued. The section would also immunize a product seller from liability for failing to warn about the misuse of a product unless it fails to pass along to consumers of the product the literature and warnings that were received from the manufacturer. This provision apparently would leave no one liable when a defect arises at some undetermined point in the chain of distribution after the product leaves the manufacturer. By immunizing from liability a seller who passes along all warnings it received from the manufacturer, this provision would immunize the one party in the chain of distribution who may be in the best position to prevent an injury. Finally, although this provision makes the seller liable if the claimant "would be unable to enforce a judgment against the manufacturer," it fails to explain how the statute would work where collection is only in doubt at the time of trial or becomes futile only after a judgment is entered. Depending on how this provision would be interpreted by a court, it would either force a seller to participate in the suit as a protective matter (even though the judgment might ultimately be collected from the manufacturer) or would leave the purchaser without relief where the manufacturer becomes bankrupt after the statute of limitations runs against a product seller. A more reasonable alternative to this provision would be to immunize non-manufacturing product sellers only from liability stemming from design defects of which they were unaware.

UNIFORM STANDARDS FOR AWARD OF PUNITIVE DAMAGES

Section 203 of the Bill would provide a national standard to evaluate punitive damage claims. It would also immunize manufacturers and product sellers for punitive damages arising out of some products approved by the Food and Drug Administration (FDA) and the Federal Aviation Administration (FAA), and would establish procedures for the trial of all cases involving punitive damage claims.

Clear and Convincing Evidence. Section 203(a) of the Bill requires punitive damages to be established "by clear and convincing evidence." This heightened standard of proof appropriately reflects the quasi-criminal nature of punitive awards. A number of states have already embarked on this course, either by judicial decision or by statute, and this heightened burden of proof is also incorporated in the Uniform Products Liability Act. We believe this standard would appropriately constrain the jury's discretion by signaling to the jury that it should have a high level of confidence in its factual findings before imposing punitive damages. We thus agree with the ABA, the American College of Trial Lawyers, and a committee of the American Law Institute, all of which support using the "clear and convincing evidence" standard for punitive damage determinations.

Redefinition of Standard of Liability. Section 203(a) of the Bill requires that punitive damages be awarded only upon a showing of "conscious, flagrant indifference to the safety of those persons who might be injured by the product." Both the American Law Institute and a 1986 special committee of the ABA support a minimum standard for punitive awards requiring a conscious act on the part of the tortfeasor. Given the quasi-criminal nature of punitive damages, we agree that plaintiffs should be required to show more than gross negligence and, specifically, to show that the defendant had some knowledge of the risk of harm. But, it is not clear that this is the import of the Bill's language requiring "conscious, flagrant indifference." The Senate Committee Report states that this standard requires "intentional conduct," and leaves open what additional proof is required to show that such indifference was "flagrant." Further, the legislative history is silent as to whether a plaintiff must prove the requisite state-of-mind directly (*e.g.*, introducing a "smoking gun" memorandum) or may rely on circumstantial evidence. We believe the ambiguities in this section should be cured by deleting the word "flagrant" and by indicating, either expressly in the statute or by way of legislative history, that a defendant is consciously indifferent if it knows of and disregards a substantial risk to health or safety. The legislative history should also make clear that the requisite state-of-mind may be established by circumstantial evidence, including evidence showing that information available to the defendant made the risk obvious.

Regulatory Defenses. Sections 203(b) and 203(c) establish defenses against punitive damages for manufacturers whose products have been approved by the FDA and the FAA, provided that the manufacturers have not bribed Federal officials, made misrepresentations, or withheld required information from the agencies. Some evidence does suggest that the small aircraft and pharmaceutical industries may be withholding products from the market based on liability concerns. But, other provisions of this legislation -- a heightened burden of proof and a more strict standard of punitive liability -- should largely address these situations. Moreover, assuming these other provisions are enacted, it is questionable whether a manufacturer whose conscious indifference to safety is proven by clear and convincing evidence should, nonetheless, be immune from liability under a separate regulatory defense. To be sure, there is something to the notion that when the government has carefully assessed the risk of a product and certified that it meets the safety and efficacy standards established by experts, manufacturers should not be punished by non-expert juries. However, most courts that have addressed the question whether FDA or FAA approval should constitute a defense

to punitive damages have viewed those agencies' regulations and procedures as establishing only minimum standards of safety, not equivalent to the higher standards required by tort law. Those courts have been unwilling to allow sometimes outdated regulations or vague standards of care to supplant state law. Commentators who have studied the proposed regulatory defense also observe that its viability rests on the questionable assumption that the responsible agencies will be adequately staffed and will be permitted to regulate effectively by the Administration then in office. The widespread injuries that thousands of women suffered as a consequence of using the Dalkon Shield, DES or breast implants -- all of which received FDA approval during prior Administrations -- suggest the potential danger in assuming that regulatory agencies will always function effectively. For these reasons, we oppose the regulatory defense provision as currently framed. As an alternative, we would recommend a more narrowly-tailored provision, such as one limited to drugs approved on an emergency "fast-track" basis and "orphan drugs."

Bifurcation of Proceedings. Section 203(d) of the Bill allows a defendant to elect to bifurcate a civil proceeding so as to segregate the resolution of a punitive damage claim from that of a compensatory damage claim. The provision authorizes two types of bifurcation -- either a separate proceeding to determine whether punitive damages are to be awarded as well as the amount of such award, or a separate proceeding to determine only the amount of punitive damages following a determination of compensatory damages and punitive damage liability. We believe that only the second of these options is warranted. The proponents of bifurcation, which include the ABA, have argued that the introduction of evidence of the defendant's wealth -- a necessary element in calculating punitive damages -- is highly inflammatory and may prejudice the jury in determining whether the defendant is liable for compensatory damages. We agree, but feel that the statute goes too far if it is intended to allow a defendant to elect to separate not only the proceedings to determine the amount of punitive damages owed, but also the proceedings to determine liability for such damages. The likely effect of bifurcating both determinations relating to a punitive damage claim (as opposed to only the calculation of the damages) would be to increase greatly the cost of litigating claims. This broader bifurcation might also lead to the exclusion of evidence which, though primarily geared to a punitive claim, would nonetheless be relevant in revealing the full breadth of a wrong committed.

TIME LIMITATIONS ON LIABILITY

Section 204 of the Bill would establish a uniform statute of limitations of two years in product liability actions, which would begin to run when the consumer discovers or should have discovered the harmful nature of the product. In addition, actions involving capital goods (defined as certain items used in trades or businesses) in which a workers' compensation award is potentially available would be subject to a twenty-five year statute of repose. We believe that these provisions would likely have the salutary effect of providing certainty to manufacturers, sellers and their insurance carriers as to the duration of their liability exposure. While a uniform statute of limitations will eliminate some otherwise viable claims (a grandfathering clause is included in the statute to minimize any immediate impact in this

regard), it makes sense to have modern companies that often function in interstate markets be subject to a single statute of limitations. Indeed, where they have been enacted on the state level, product liability statutes of limitations have reportedly reduced insurance costs. They have also precluded plaintiffs from attempting to invoke lengthier statutes of limitations by framing obvious tort claims in contract and by filing suit in a state with which the plaintiff has minimal contacts.

At least seventeen states have statutes of repose that bar the filing of product liability suits beyond a specified period after the delivery of the product. Subject to our general concerns regarding the impact of this legislation on federalism principles, we believe the statute is justified in attempting to promote uniformity on this count.

WORKERS' COMPENSATION SUBROGATION

Section 205 of the Bill would strip employers and insurers of their right to recover, through subrogation claims, their payments of workers' compensation benefits, if the employer or a co-worker of the injured person was at fault in causing the injury. We are concerned that this provision would overturn well-settled law in most jurisdictions concerning an employer's ability to recoup some or all of the workers' compensation payments when the injured employee receives a tort judgment from a product seller or manufacturer. It would also significantly complicate many product liability cases by making it necessary to litigate the question whether an employer or co-worker was negligent. And it could have an adverse impact upon the United States by lessening the Government's ability to recover, by subrogation, benefits paid under the Federal Employees' Compensation Act and by increasing the cost of government contracts under which the Government has agreed to reimburse the contractor for workers' compensation costs. To minimize these adverse impacts, employers, including the United States, would be required to participate actively in litigation to which it is not presently a party.

SEVERAL LIABILITY FOR NON-ECONOMIC LOSS

Section 206 of the Bill would abolish joint and several liability for non-economic losses (*e.g.*, pain and suffering) and instead would make defendants liable for such losses in proportion to their responsibility for the injury. Under this provision, where one or more of several parties who caused a plaintiff's injury are not amenable to suit, the plaintiff's recovery for a non-economic loss would apparently be reduced by the share of the judgment-proof parties, rather than being spread among the remaining responsible defendants. While one could question the fairness of allocating this burden to an injured plaintiff, this provision is otherwise so problematic as to make that point almost secondary. For example, this section does not describe how a court should resolve a situation in which a defendant claims that a party not before the court -- or no longer before the court due to settlement -- is primarily liable for an injury. Under this provision, multi-defendant cases that might otherwise be settled would proceed to trial simply to resolve which defendants (or putative defendants) were more or less culpable. Section 206 also would likely complicate litigation in the forty-

six states that already have comparative fault statutes, which abrogate, either partially or completely, the common law doctrine of contributory negligence as to economic damages. Each of these states has allocated responsibility among plaintiffs and defendants differently, with only a few having chosen to eliminate joint and several liability for non-economic damages. Where joint and several liability remains operable, many of these states also have differing rules concerning contribution or indemnity among tortfeasors. Because it does not govern the allocation of liability for economic losses and punitive damages, Section 206 could produce markedly different results in each of these states.

ALCOHOL AND DRUG CONTRIBUTORY NEGLIGENCE DEFENSE

Section 207 of the Bill provides that a plaintiff whose use of alcohol or drugs makes him or her more than 50 percent responsible for the accident or event that causes his or her injury, is completely barred from recovery. Although there is obvious merit in discouraging persons from consuming alcohol or illicit drugs while using potentially dangerous products, the Bill would appear to permit a manufacturer to escape all liability even if a defective product caused grievous injury in a minor accident that otherwise should have produced no injury at all. For example, the Bill could be read to immunize an auto manufacturer whose product explodes in a fender bender, provided the manufacturer is fortuitous enough to have the driver of the exploding vehicle be chemically impaired. A more appropriate provision might be to preclude a plaintiff from recovering if his or her alcohol or drug abuse was more than 50 percent responsible for the injuries incurred. Even such a provision, however, would run counter to the concept of comparative negligence, which has been incorporated into the laws of many states. Moreover, one must question whether it makes sense to have a plaintiff's use of alcohol or drugs constitute a complete defense, while other reckless and even criminal behavior does not constitute even a partial defense in states that do not allow contributory or comparative negligence to be a defense to a strict liability claim.

REPORT OF THE PRODUCT LIABILITY WORKING GROUP

SECTION-BY-SECTION ANALYSIS

Sections 1 and 2: Short Title and Table of Contents

Function of sections:

These sections set forth the short title of the legislation, and the table of contents.

Comments:

None.

Section 3: Definitions

Function of section:

This section defines the following terms:

(1) "**claimant**" -- Defined as any person who brings a product liability action or on whose behalf such an action is brought, including the parent or guardian when an action is brought by or on behalf of a minor, and including the claimant's decedent when an action is brought through or on behalf of an estate.

Comments:

It is unclear whether this definition of a "claimant" would include such persons as insurance carriers bringing subrogation actions.

(2) "**clear and convincing evidence**" -- Defined as that degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of allegations sought to be established. The clear and convincing evidence standard requires more proof than the preponderance of the evidence standard and less proof than the beyond a reasonable doubt standard.

Comments:

This definition is the one most commonly employed in the states.¹

¹ See, e.g., Ala. Code § 6-11-20(b)(4); Cross v. Ledford, 161 Ohio St. 469, 477 (1954); State v. Turrentine, 152 Ariz. 61, 68, 730 P.2d 238, 245 (Ct. App. 1986). See generally, (continued...)

(3) "collateral benefits" -- Defined as all benefits and advantages accruing to a plaintiff under any law (other than claims for breach of duty), or under any life, health, accident, disability or similar insurance or plan. Excluded from the definition are any benefits with respect to which any person other than the claimant has a right to assert an action for recoupment through subrogation or otherwise.

Comments:

This phrase is used in Section 101 of the Bill, which would reduce certain judgments received by plaintiffs by the amount of their "collateral benefits." The definition of the latter term in the above subsection includes, without distinction: (i) benefits available to a plaintiff as a result of employment; (ii) benefits accruing to a plaintiff as a result of generally applicable law, such as Social Security or Medicare benefits; and (iii) benefits accruing to a plaintiff as a result of the plaintiff's own voluntary actions, such as death benefits obtained through a life insurance policy. In those states that have the "collateral benefits rule," a judgment received by a plaintiff is not reduced by the amount of "collateral benefits" that he or she has received. Some states, however, have statutorily modified this rule to require a judgment to be so reduced. In most of these states, "collateral benefits" include benefits received under employment or Government programs, but do not include those received under private insurance contracts. *See American Law Institute, Enterprise Responsibility for Personal Injury -- Reporter's Study* (Vol. II 1991), which recommends, in all tort cases, reducing a plaintiff's recovery by the amount of collateral source benefits, but which excludes from that rule life insurance benefits and other similar benefits. *See also* Kenneth S. Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 *Md. L. Rev.* 489, 504-06 (1977).²

¹(...continued)

Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 *Ala. L. Rev.* 61 (1992) (appendix surveying punitive damage laws of the fifty States).

² The Report of the Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 203, 103d Cong., 1st Sess. 25 (1993) [hereinafter "Committee Report"] states: "Collateral benefits include all such benefits regardless of any right any other person has or is entitled to assert for recoupment through subrogation, trust agreement, lien, or otherwise." This statement, however, is inconsistent with the language of the Bill, which provides that "[c]ollateral benefits' means all benefits and advantages received or entitled to be received (excluding any benefits any other person has or is entitled to assert for recoupment through subrogation, trust agreement, lien, or otherwise) by any claimant harmed by a product." (Emphasis added.)

(4) "commerce" -- The definition contained in the Bill appears to cover the full extent of the Congress' powers to regulate and promote interstate commerce.

Comments:

None.

(5) "commercial loss" -- Defined as any loss incurred in the course of an ongoing business enterprise consisting of providing goods or services for compensation. As is discussed below with respect to Section 4, a civil action for commercial loss is not subject to the Bill and is to be governed by applicable commercial or contract law.

Comments:

This phrase is used in Section 4(a) of the Bill, which excludes from the Bill's coverage actions for "commercial loss." As defined here, "commercial loss" appears to include losses from damage to the property of a commercial enterprise arising from the existence of a defect in another product. Thus, the Bill would not apply where a building owned by a business enterprise is destroyed by a fire started by a defective product. This provision is inconsistent with the prevailing rule that physical damages (other than those to a product itself) are generally covered by strict liability. **Restatement (Second) of Torts**, § 402A (1965).

(6) "economic loss" -- Defined as any pecuniary loss resulting from harm, (including but not limited to medical expense loss, work loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities), to the extent recovery for such losses is allowed under state law.

Comments:

This definition, which in combination with Section 3(10) draws a distinction between "economic" and "noneconomic" losses, is relevant in two of the Bill's provisions -- the penalty imposed under Section 101 upon some plaintiffs who refuse an offer of judgment is calibrated, in part, to the portion of a judgment allocable to "economic loss;" and under Section 206, liability for a "noneconomic loss" is several as opposed to joint and several.³ The Committee Report, at 26, states that economic losses are "subject to empirical

³ Under the doctrine of joint and several liability, a plaintiff may recover the entire amount of damages from any of the defendants. Under the doctrine of several liability, the plaintiff may recover from a particular defendant only that portion of his or her damages caused by that defendant. See discussion of Section 206 of the Bill, *infra*.

measurement and confirmation," and that noneconomic losses, such as pain and suffering, are those for which there is no objective standard. However, damages for loss of services are frequently as difficult to quantify as those for pain and suffering. Moreover, it is unclear why this provision includes within "economic losses" damages for "loss due to death." In a wrongful death action, damages for such things as loss of guidance and companionship qualify as damages "loss due to death" and yet normally are considered non-economic losses. Under the Bill, however, such losses are characterized as "economic losses."

(7) "**exercise of reasonable care**" -- Defined as conduct of a person of ordinary prudence and intelligence using the attention, precaution, and judgment that society expects of its members for the protection of their own interests and the interests of others.

Comments:

This phrase is used in Sections 202 and 203 of the Bill, which define uniform standards for product seller liability and punitive damages, respectively. It is derived from Section 282 of the **Restatement (Second) of Torts** and is noncontroversial.

(8) "**harm**" -- Defined as bodily injury to an individual sustained in an accident and any illness, disease, or death of that individual resulting from that injury.

Comments:

This word is used in Section 4 of the Bill, which generally defines the legislation's scope of preemption as including any state law regarding recovery for "harm" caused by a product. As the Committee Report notes, the Bill's definition of "harm" does not include loss or damage caused to a product itself or commercial loss. Accordingly, state laws covering these damages would not be superseded by the Bill. Also excluded from the definition of "harm" is damage to property, regardless of whether it is owned by a commercial entity or an individual for non-commercial purposes. By contrast, most states allow for the recovery of property damages under a theory of strict liability.

(9) "**manufacturer**" -- Defined as any person engaged in a business to produce, create, make, or construct any product (or component part of a product) and who designs or formulates the product (or component part of the product) or has engaged another person to design or formulate the product or component part. The term does not include a person who only designs or formulates a product -- such as an architect or engineer. Such persons, although not liable under the Bill, may be liable under traditional tort law for failing to exercise reasonable skill and care in rendering their design services.

A product seller is considered a "manufacturer" of the product in two situations: (i) with respect to all aspects of the product that are created or affected by the product seller's own conduct in designing, formulating, producing, creating, making, or constructing an aspect of a product made by another; and (ii) where the product seller holds himself out as the manufacturer to the user of the product.

Comments:

None.

(10) "**noneconomic loss**" -- Defined as a subjective, nonmonetary loss resulting from "harm," such as pain, suffering, inconvenience, emotional distress, etc.

Comments:

See discussion under Section 303(3), *infra*.

(11) "**person**" -- Defined broadly to include individuals, corporations, companies, associations, firms, partnerships, societies, and governmental entities.

Comments:

None.

(12) "**preponderance of the evidence**" -- Defined in the normal fashion as that degree of proof which establishes that it is more probable than not that a fact did or did not occur.

Comments:

None.

(13) "**product**" -- Defined broadly as any object, substance, mixture, or raw material in a gaseous, liquid, or solid state: (i) which is capable of delivery itself or as an assembled whole, in a mixed or combined state or as a component part or ingredient; (ii) which is produced for introduction into trade or commerce; (iii) which has intrinsic economic value; and (iv) which is intended for sale or lease. The definition specifically excludes human tissue, blood, and organs, unless specifically recognized as a product pursuant to state law.

Comments:

None.

(14) "**product seller**" -- Defined as any person engaged in business to sell, distribute, lease, prepare, blend, package, label, or otherwise place a product into the stream of commerce, or who installs, repairs, or maintains the harm-causing aspect of a product. The definition includes anyone in the chain of distribution, such as a wholesaler, distributor, or retailer. Specifically excluded are: (i) sellers or lessors of real property; (ii) providers of professional services where the sale or use of a product is incidental to the transaction; and (iii) any person who acts only in a financial capacity with respect to the sale and leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the property are controlled by a person other than the lessor.

Comments:

None.

(15) "**State**" -- Defined broadly to include the District of Columbia, all the states, territories, and possessions of the United States, and any political subdivision thereof.

Comments:

None.

Section 4: Applicability; Preemption

General function:

Section 4 states that the Act will apply "to any civil action brought against a manufacturer or product seller, on any theory, for harm caused by a product." It also generally preempts any state law regarding recovery for harm caused by a product "to the extent that this Act establishes a rule of law applicable to any such recovery."

General comments:

Congress has traditionally left to the states the development of tort law. *See* Richard C. Ausness, *Federal Preemption of State Product Liability Doctrines*, 44 S.C. L. Rev. 187, 192 (1993). Originally, much of this tort law was common law, repeatedly interpreted and applied by state courts. In recent years, however, virtually every state has enacted statutes addressing product liability issues. Many of these statutes are comprehensive, while others narrowly address particular areas of concern, such as liability for certain products, the

standards for awarding punitive damages, or the standards for imposing liability upon non-manufacturing sellers.⁴ The diversity of these reforms demonstrates convincingly the role the states can play as laboratories for court reform. These reforms, moreover, reflect carefully balanced attempts to weigh the interests of injured parties and product manufacturers and sellers, as well as the sometimes competing concerns of public safety and business competitiveness.

While Congress has occasionally departed from tradition and preempted state tort law, it has normally done so only where there has been a weighty and demonstrable Federal interest.⁵ In our view, those who advocate the national standards for product liability contained in the Bill are obliged to establish three points: first, that product liability litigation is presenting a national problem that calls for a Federal solution; second, that there is a need for legislation covering critical aspects of all product liability litigation, as opposed to narrowly drawn legislation targeting identified problems affecting specific industries or kinds of products; and, third, that state legislatures lack the ability or the desire to remedy the national problems that do exist. In light of these considerations, we do not believe that the proponents of this Bill have met their burden of demonstrating the need for this broad-reaching reform package.

The primary justification given for adopting Federal standards is that the current patchwork system of state laws has adversely affected the competitiveness of U.S. businesses operating in interstate commerce. Proponents of national tort reform argue that the state-by-

⁴ Among the states that have enacted relatively comprehensive product liability statutes are: Alabama (Ala. Code §§ 6-5-500, *et seq.*); Arizona (Ariz. Rev. Stat. Ann. §§ 12-681, *et seq.*); Arkansas (Ark. Code Ann. §§ 16-116-101, *et seq.*); Colorado (Colo. Rev. Stat. Ann. §§ 13-21-401, *et seq.*); Connecticut (Conn. Gen. Stat. Ann. §§ 52-572m, *et seq.*); Idaho (Idaho Code §§ 6-1401, *et seq.*); Indiana (Ind. Code Ann. §§ 33-1-1.5-1, *et seq.*); Kansas (Kan. Stat. Ann. §§ 60-3301, *et seq.*); Kentucky (Ky. Rev. Stat. Ann. §§ 411.300, *et seq.*); Louisiana (La. Rev. Stat. Ann. §§ 9:2800.51, *et seq.*); Michigan (Mich. Comp. Laws §§ 600.2945, *et seq.*); Missouri (Mo. Ann. Stat. §§ 537.760, *et seq.*); New Jersey (N.J. Ann. Stat. §§ 2A:58C-1, *et seq.*); North Dakota (N.D. Cent. Code §§ 28-01.1-01, *et seq.*); Ohio (Ohio Rev. Code Ann. §§ 2307.71, *et seq.*); Oregon (Or. Rev. Stat. §§ 30.900, *et seq.*); and Tennessee (Tenn. Code Ann. §§ 29-28.101, *et seq.*). See also Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16 *Jus. Sys. J.* 21-34 (1993).

⁵ Professor Ausness cites the following examples of Federal statutes preempting state tort law: the Federal Cigarette Labeling and Advertising Act, the National Traffic and Motor Vehicle Safety Act of 1966, the Federal Insecticide, Fungicide, and Rodenticide Act, the Federal Food, Drug, and Cosmetic Act (FDCA) and the Medical Device Amendments of 1976 to the FDCA. Ausness, 44 *S.C.L. Rev.* at 200. See also Barbara L. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 *Buff. L. Rev.* 181, 224 (1991).

state development of product liability law has left such corporations overly exposed and they support that claim by pointing to raw case statistics purporting to show an "explosion" of product liability litigation. For example, they often cite statistics indicating that between 1980 and 1988, the number of pending product liability cases in Federal courts increased from 9,118 to 32,617, an increase of 257 percent.⁶ Proponents of national reform also assert that punitive damages are "routinely sought" in product liability cases "and, when awarded, tend to be very large."⁷ Product availability is another concern raised by those favoring national legislation. For example, commentators have noted one prominent survey indicating that "36 percent of all respondents reported that liability costs led them to discontinue product lines, 30 percent reported that product liability costs led to decisions against manufacturing new products, and 21 percent said that liability costs led to the discontinuation of product research."⁸

However, many of these arguments for reform rely on episodic or anecdotal information, and are not supported by careful empirical analysis.⁹ Indeed, considerable evidence suggests that there never was a widespread product liability "crisis" affecting the entire manufacturing economy, or at least that any incipient trend towards a crisis has subsided either on its own accord or as the result of state product liability reforms. See Robert A. Goodman, *Proposed Federal Standards for Product Liability*, 30 *Harv. J. on Legis.* 296, 308 (1993). According to a report made to the Federal Judicial Conference, while there were 85,694 product liability suits filed in Federal court between 1970 and 1986, only 34 companies were the lead defendants in over 35,000 of these cases. Ad Hoc Comm. on Asbestos Litig., *Report to the Judicial Conference of the United States* 7-10 (1991). See also Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System -- And Why Not?*, 140 *U. Pa. L. Rev.* 1147, 1204-05 (1992) [hereinafter "Saks"]. Moreover, about 60 percent of the cases filed in Federal court, as well as a

⁶ See U.S. Department of Justice, *Report of the Tort Working Group on the Causes, Extent and Policy Implications of the Current Crises and Insurance Affordability* (hereinafter "Working Group Report") 3 (1986). Examining a different time period, this report highlighted a more dramatic figure: a 758 percent increase between 1974 and 1986 in the number of product liability filings in Federal courts. *Id.*

⁷ *Working Group Report* at 41.

⁸ W. Kip Viscusi & Michael J. Moore, *An Industrial Profile of the Links Between Product Liability and Innovation*, in *The Liability Maze* 81 (Peter W. Huber & Robert E. Litan, eds., 1991).

⁹ A proponent of tort reform has conceded that such anecdotes "provide no assessment of the magnitude and prevalence of the problems. Even the avalanche of anecdotes included in the most comprehensive attacks on the systems do little more than flag a problem that merits closer scrutiny. Anecdotes cannot substitute for analysis." W. Kip Viscusi, *Reforming Products Liability* 3 (1991).

significant portion of those filed in state courts, were attributable to a handful of products, notably Benedectin, DES, Agent Orange, the Dalkon shield and asbestos. *Id.*¹⁰ Several studies relying on Federal case filings indicate that once these cases are subtracted, product liability cases increased at the rate of approximately 3 percent per annum during the 1980s -- a rate approximately equal to the increase for all types of tort cases during this period -- and that, aside from asbestos suits, the number of product liability suits filed actually declined in the latter half of that decade. *Id.* at 1205; *Product Liability: Hearings Before the Subcomm. on Consumer of the Senate Comm. on Commerce, Science & Transportation*, 102d Cong., 1st Sess. 157 (1991) (Testimony of Prof. Marc Galanter).

Proponents of the Bill need not only account for this data, but also for the fact that on other critical points, there is insufficient information to document the need for national reform. Although the Administrative Office of the U.S. Courts has data on every federal civil case, it does not track key issues such as the ratio of plaintiff to defendant success or how awards have changed over time. Saks, *supra* at 1156. Moreover, important categories of data were not entered into the Administrative Office's database until the late 1970's, making it impossible to compare awards from 1976 to 1986, the year the most recent "liability crisis" was declared.¹¹ Further, Federal cases constitute only about 2 percent of the nation's litigation. Much less is known about the 98 percent of tort cases that are litigated at the state level than about the Federal cases. What is known is that all states are not alike. For example, in 1992, the states' tort caseloads varied from a low of 65 tort filings per 100,000 population to a high of 1,139. *See State Justice Institute, Annual Report 1992: State Court Caseload Statistics* 18 (1994). This raises questions as to whether comprehensive national reform is appropriate. As one commentator suggested, "[f]or Kansas to overhaul its civil justice system because of something that might be going on in New Jersey does not make much sense."¹²

Anecdotal claims that large punitive damage awards are rampant are not even borne out by raw statistics. The most comprehensive study of punitive damages awards in product liability cases, recently released by the Roscoe Pound Foundation, indicates that between 1965 and 1990, there were only 355 such awards in both Federal and state cases. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 *Iowa L. Rev.* 1 (1992). Other studies performed by the General Accounting Office (GAO), the American Bar Foundation and the Institute for Civil Justice of

¹⁰ Asbestos alone accounted for 20,888 of the Federal cases. *Id.* at 1204. *See also* Terrence Dungworth, *Product Liability and the Business Sector: Litigation Trends in Federal Courts* 35-38 (1988).

¹¹ *See Working Group Report* at 35-36.

¹² Saks, *supra* at 1206-08 (citing additional statistics from National Center for State Courts, *State Court Caseload Statistics: Annual Report 1989* (1991)).

the RAND Corporation all suggest that punitive damage awards rarely penalize corporations that take reasonable precautions.¹³ Several other studies have concluded that compensatory damages are neither excessive nor have grown dramatically over the recent past.¹⁴ According to one commentator, these studies "refute the largely anecdotal claims . . . that large awards increase the prices of American products, thereby leaving them vulnerable to foreign competition."¹⁵ Another commentator has stated that "[a]lthough it is tempting to pin on product liability the responsibility for the apparent lack of competitiveness of American producers in international markets, the evidence is not there."¹⁶

Even statistics somewhat favorable to those seeking national reforms suggest that any product liability problems experienced in the mid-1980s are abating. For example, a lengthy statistical survey published in the U.C.L.A. Law Review indicates that plaintiff success rates in state courts have declined from 55.8 percent in 1979 to 32 percent in 1989. During the same period, the success rate for plaintiffs in Federal cases terminated before trial declined from 50.4 percent to 25.8 percent; the rate for cases terminated after trial also decreased from 40 percent in 1985 to 34.5 percent in 1989.¹⁷ The amount of recoveries won by successful plaintiffs also has dropped considerably since the mid-1980s. For plaintiffs in Federal court, the recoveries rose sharply from a mean of \$615,000 in 1979 to \$2,557,000 in 1986, but dropped back down to \$1,017,000 in 1989.¹⁸ Other studies, including a 1989 study of five states by the GAO, indicate that punitive damage awards in product liability

¹³ See Stephen Daniels & Joanne Martin, *Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards* (American Bar Foundation Working Paper No. 8705 1987); U.S. General Accounting Office, **Product Liability: Verdicts and Case Resolution in Five States** (1989); Mark A. Peterson, et al., The Inst. for Civil Justice (RAND), **Punitive Damages: Empirical Findings** (1987).

¹⁴ *Product Liability Fairness Act of 1993: Hearings on H.R. 1910 Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Committee on Energy and Commerce*, 103d Cong., 2d Sess. 193 (1994) [hereinafter "*Hearings*"] (statement of Prof. Andrew F. Popper, Washington College of Law, American University).

¹⁵ Goodman, 30 *Harv. J. on Legis.* at 306.

¹⁶ See *Hearings*, *supra* note 14, at 11 (Popper testimony).

¹⁷ Theodore Eisenberg & James A. Henderson Jr., *Inside the Quiet Revolution in Products Liability*, 39 *U.C.L.A. L. Rev.* 731, 797, app. A, tbl. A-1 (1992).

¹⁸ Goodman, 30 *Harv. J. on Legis.* at 308.

cases are decreasing and that judges frequently reverse or remit even large compensatory awards in post-trial proceedings.¹⁹

These trends suggest that the product liability reform packages passed by the states over the last decade have been effective. In addition, a recent extensive study of state appellate and Federal district court opinions postulates that a "quiet revolution" has occurred in product liability. According to this study, since at least the mid-1980's, published opinions have moved towards favoring defendants over plaintiffs, have increasingly dismissed plaintiffs' claims as a matter of law, and have tended increasingly to break new legal ground for defendants.²⁰ Though the authors of this study caution against concluding that the courts have reversed entirely earlier expansionary trends in product liability,²¹ the results of this study, when combined with the recent state legislative activity, suggest that most remaining problems involving product liability can be dealt with effectively by the courts and state legislatures without Federal intervention.

To be sure, an exaggerated fear of product liability suits may be causing some companies to withhold new products and withdraw useful old products from the market. And in some industries, most notably the pharmaceutical and medical device industries, concerns about such suits may not be exaggerated. For example, three major suppliers of raw materials essential for use by medical device manufacturers recently announced that they would limit or cease their shipments because of the risks of huge litigation expenses or damage awards.²² Moreover, insurance premiums and legal defense costs associated with product liability have grown remarkably over the last fifteen years, shrinking, if not eliminating, the

¹⁹ U.S. Gen. Accounting Off., **Product Liability: Verdicts and Case Resolution in Five States** (1989).

²⁰ James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 U.C.L.A. L. Rev. 479, 499 (1990).

²¹ Henderson & Eisenberg, 37 U.C.L.A. L. Rev. at 542.

²² *Hearings, supra* note 14, at 4-5 (statement of Ted R. Mannen, Executive Vice President, Health Industry Manufacturers Association). There is evidence that research into new vaccines and other drugs also has been discouraged. For example, a National Academy of Sciences panel concluded that products liability has been "a major source of the lag in developing drugs for contraception." W. Kip Viscusi & Michael J. Moore, *An Industrial Profile of the Links Between Product Liability and Innovation*, in **The Liability Maze** 81 (Peter W. Huber & Robert E. Litan, eds., 1991). See also Louis Lasagna, *The Chilling Effect of Product Liability on New Drug Development*, in **The Liability Maze** 334 (Peter W. Huber & Robert E. Litan, eds., 1991) ("drugs and medical devices are taken off the market because of the magnitude of the litigation threat to their manufacturers").

profit margin of certain products.²³ With further research, a good case might be made for limited Federal product liability legislation that addresses a select group of industries and products -- AIDS drugs or materials for medical devices, for example. However, the Bill is not so limited and we believe that the available evidence neither makes a positive, empirical case for across-the-board national tort reform, nor even begins to demonstrate that existing problems exceed the remedial abilities of state legislatures. Accordingly, we believe the substantial infringement on state sovereignty that enactment of this comprehensive Bill would necessarily represent is unwarranted at this time.

Section 4(a): Applicability to product liability actions

Function of subsection:

Section 4(a) provides that the Bill governs any civil action brought against a manufacturer or product seller, on any theory, for harm caused by a product. Consistent with the definition of "harm" set forth in Section 3(8), Section 4 states that a civil action for loss or damage to the product itself or for commercial loss is not a product liability action subject to the Bill, but is governed by applicable commercial or contract law.

Comments:

The Committee Report states, at page 30, that traditional law leaves recovery for "purely commercial losses to actions founded on commercial law." This is correct for damages to the product itself and resulting economic damages. For example, when a product defect causes a machine to break down and produces consequential economic damages such as loss of business, the standards of commercial law, rather than those of product liability law, ordinarily apply. However, as a result of the broad definition of "commercial loss" contained in Section 3(5) of the Bill and the narrow definition of "harm" contained in Section 3(8), the Bill does not appear to cover actions for damage to property other than the product itself. By comparison, the product liability laws of most jurisdictions cover this type of damage. Summarizing the prevailing rule, Section 402A of the **Restatement (Second) of Torts** provides: "[o]ne who sells any product in a defective condition unreasonably

²³ According to a 1992 Tillinghast study, **Tort Cost Trends: An International Perspective** 13 (1992), the annual rate of growth of tort costs since 1980 has been 12 percent. Including insured and self-insured costs, Tillinghast estimated that "the U.S. tort system cost \$132 billion in 1991" -- including "first-party benefits (the cost of legal defense and claims handling), benefits paid to third parties (claimants and plaintiffs) and an administrative, or overhead component." *Id.* at 3, 8. However, recent studies have suggested that the relationship between the tort system and insurance costs is less direct than was first believed and that the dramatic increase in premiums experienced during the latter 1980s may have been attributable to companies replacing income lost when the interest rates on invested funds dropped.

dangerous to the user or consumer *or to his property* is subject to liability for physical harm thereby caused to the ultimate user or consumer, *or to his property*" (Emphasis added.) Similarly, Council Draft No. 1 of the proposed **Restatement (Third) of Torts: Products Liability**, § 101 (September 13, 1993), continues to cover "liability for harm to persons *or property*." (Emphasis added).

By excluding actions for property damage from its coverage and thereby limiting its preemptive impact, the Bill would produce a number of anomalous results. For example, while the Bill would generally immunize the non-manufacturing seller of a product that causes serious personal injury or death from liability, it would not affect the liability of the seller of a product that causes property damage. Thus, in some instances and in most states, the non-manufacturing seller of a defective appliance that caused a house to burn down would be strictly liable for damage to the house and its contents, but would be immune from liability for injury or death of the occupants. Likewise, the provisions of the Bill establishing procedures and heightened standards for punitive damage claims would not apply to most property damage claims. As a result, a single action involving property and personal injury claims could be subject to two sets of procedures -- one mandated by the Bill and the other by state or Federal rules.

These problems could be remedied if the definition of harm contained in Section 3(8) were modified to include property damages.

Section 4(b): Scope of preemption

Function of subsection:

Section 4(b) of the Bill generally preempts any state law regarding recovery for harm caused by a product "to the extent that this Act establishes a rule of law applicable to any such recovery." The Bill, however, expressly does not preempt applicable state law regarding alternative dispute resolution procedures and offers of judgment.

Comments:

Breadth of Preemption. Under the Supremacy Clause of the Constitution, Art. VI, cl. 2, federal law preempts state law if preemption is the "clear and manifest purpose" of Congress. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2617 (1992) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Congress' intent to preempt may be either "explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). There are two types of implied preemption: field preemption, where the scope of federal regulation is so pervasive as to make clear the inference that Congress left no room for the states to legislate; and conflict preemption, where compliance with both Federal and state regulations is an impossibility or where compliance with a state law would clearly frustrate Congress' objectives. See Gade v. National Solid Wastes Mgmt., 112 S. Ct. 2374, 2383 (1992);

Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984).

Here, Congress' intent to preempt "state law regarding recovery for 'harm' caused by a product" is explicitly stated in the statute. Yet, for several reasons, the reference to "state law" could be read as not expressly preempting state common-law tort actions. First, the Supreme Court has repeatedly indicated that a strong presumption exists against finding express preemption when the subject matter, such as common law remedies for compensating tort victims, is one that has been traditionally regarded as properly within the states' domain. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Secondly, in other statutes, Congress has expressly referred to state "common law" in preempting state law; the absence of this language thus might lead courts to conclude that the Bill was not intended to reach common law tort actions. *Compare* Section 4(b) of the Bill *with* Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-17(d), 1715z-18(e) (preempting any "state constitution, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. § 301(a) (preempting rights "under the common law or statutes of any State"). Because courts could conclude that Congress has not made its intent to preempt common law actions "clear and manifest," they might engage in an "implied preemption" analysis. *See generally* Ausness, 44 S.C. L. Rev. at 191-200. This could create several problems.

First, although the context and language employed in Section 4(b) create a strong inference that Congress intends to preempt at least some aspects of state common-law tort actions (as well as rules created by statute and regulation), there is the possibility that some courts will find that the Bill does not preempt all common-law actions. In support of this conclusion, a court could rely, for example, on existing caselaw that establishes a presumption against implied preemption of common-law claims where the federal statute does not provide for substitute or alternative remedies for victims of tortious conduct. *See* Marc Z. Edell & Cynthia A. Walters, *The Doctrine of Implied Preemption In Products Liability Cases -- Federalism in The Balance*, 54 *Tenn. L. Rev.* 603, 608-611 (1987). Conversely, the preemption provision might be interpreted more broadly than the drafters of the Bill intend. For example, due to the Bill's limited definition of "harm," *see* discussion regarding Section 3(8) *supra*, a court could conclude that Congress implicitly preempted state law evidentiary rules or trial procedures pertaining to punitive damages for related property damage where a trial court's application of those rules or procedures would frustrate the purpose of, or otherwise impair the rights created in favor of defendants by Sections 203(a) and 203(d). *See* Ausness, 44 S.C. L. Rev. at 197-200 (discussing doctrine of implied preemption).

The Bill differs from other federal statutes applying to product liability litigation in that it would neither establish a federal regulatory scheme pertaining to product liability nor an alternate scheme of federal remedies for victims. *See, e.g.,* Ausness, 44 S.C. L. Rev. at 200-31 (discussing preemption doctrines as applied to federal statutes pertaining to cigarettes, automobiles, pesticides, etc.) Instead, the Bill would merely preempt certain state law rules "regarding recovery for harm caused by" products in interstate commerce. Product liability

law would otherwise remain a creation of the law of the several states. Thus, this Bill might fairly be viewed as interfering with or limiting the states' ability to protect the health and safety of their citizens without providing an alternative federal mechanism to protect that interest.

Interaction with State Laws. The sponsors of this Bill argue that it will improve the competitiveness of U.S. businesses by promoting uniformity and, hence, increasing predictability in product liability law. It is highly unlikely, however, that this legislation will accomplish that goal. All fifty states have enacted some type of product liability reform, but those reforms vary considerably. Because the Bill would preempt some, but not all, of these provisions, it would merely replace one patchwork national system of product liability law with another. Enhancing that likelihood, the Bill does not vest any new jurisdiction in the Federal courts, but rather (except in cases of diversity) leaves to the state courts the interpretation of its provisions. Accordingly, each state might develop conflicting interpretations of the Bill's provisions and the manner in which those provisions interact with state law. The American Bar Association, the National Conference of State Legislators and the Conference of Chief Justices have based their opposition to the Bill, at least in part, upon the differing state contexts in which the law would operate and its differing impact in each state.²⁴ We believe that those concerns are well-founded and that the Bill will not produce the national uniformity its proponents desire.

It is difficult to anticipate how this legislation would interact with the state laws that would not be preempted. The Bill would establish substantive principles concerning the liability of defendants that would alter state product liability statutory schemes. Many of these schemes were passed as package reforms by legislatures attempting to strike a careful balance among competing concerns by enacting some provisions favoring defendants and others favoring plaintiffs. By preempting only part of these reform packages, the Bill would disrupt the balance of these state regimes, most likely skewing them in favor of defendants. For example, legislatures in states such as Florida, Georgia and Connecticut,²⁵ which chose

²⁴ See Committee Report at 60 (minority views). See also *Hearings*, *supra*note 14, at 216 (statement of the National Conference of State Legislators).

²⁵ See Conn. Gen. Stat. Ann. § 52-240(b) (in product liability cases, twice the amount of compensatory damages); Fla. Stat. Ann. § 768.71(1)(a) (three times the amount of compensatory damages); Ga. Code Ann. § 51-12-5.1(g) (\$250,000 limit, except in product liability cases). See also Va. Code Ann. § 8.01-38.1 (\$350,000 limit); Kan. Stat. Ann. § 60-3701 (e)-(f) (punitive damages not to exceed lesser of highest annual gross income for five-year period before the action or \$5 million, unless the court determines that the profitability from the activity in question was greater, in which case damages may be one-and-a-times that profit); Texas Civ. Prac. & Rem. Code Ann. §§ 41.007-.008 (the greater of four times the actual compensatory damages or \$200,000, unless the defendant acted with malice or committed an intentional tort).

to cap certain types of punitive damages instead of enacting the other types of limitations on liability contained in this Bill, would find themselves suddenly with both sets of provisions in effect. In other states, plaintiffs might be denied any relief. For example, in Alabama, wrongful death damages have been held to be exclusively punitive in nature. Because the Bill does not permit the award of punitive damages in the absence of an award of compensatory damages and because no compensatory damages are awarded in Alabama, a plaintiff there might be denied any recovery for wrongful death. *See* discussion of Section 202, *infra*.

Similar interaction concerns apply in the area of state civil procedures. A preliminary review suggests that the Bill's mandated procedures might not blend well with existing state procedures and might even leave litigants subject to conflicting mandates. For example, the Bill establishes an offer of judgment procedure, under which a plaintiff may make an offer of judgment at the time of filing a complaint and a defendant may make such an offer within 60 days of the service of the complaint. However, it is unclear how a defendant could make or respond to such an offer in states, such as Illinois, Minnesota and Idaho,²⁶ which do not allow plaintiffs to plead a specific amount of punitive damages until a judge authorizes the amendment of their initial complaints or that preclude discovery of the defendant's wealth or profits until after a jury has already determined liability for punitive damages. Additional confusion would likely be produced by the Bill's provisions involving the bifurcation of trials to separate the compensatory and punitive damage phases. For example, while the Bill seems to require that the same trier of fact determine both compensatory and punitive damages, several states (including Connecticut, Kansas and Ohio)²⁷ that currently require a bifurcation allow juries to resolve compensatory damage claims in product liability cases, but require judges to make punitive damage awards.

Section 4(c): Effect on other law

Function of subsection:

Section 4(c) provides that nothing in the Bill shall be construed to: (i) waive or affect any defense of sovereign immunity asserted by any state; (ii) supersede any Federal law, except the Federal Employees' Compensation Act ("FECA") and the Longshore and Harbor Workers' Compensation Act ("LHWCA"); (iii) waive or affect any defense of sovereign immunity asserted by the United States; (iv) affect the applicability of chapter 97 of title 28 of the United States Code (that portion of the U.S. Code dealing with jurisdictional

²⁶ *See* Ill. Ann. Stat. ch. 735, para. 5/2-604.1; Fla. Stat. Ann. § 768.72; Idaho Code § 6-1404. *See also* Minn. Stat. Ann. § 549.191; S.D. Codified Laws Ann. § 21-1-4.1.

²⁷ *See* Conn. Gen. Stat. Ann. § 52-240b; Kan. Stat. Ann. § 60-3702; Ohio Rev. Code Ann. § 2315.21(C). *See also* Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. Rev. 23, 61 n.76 (1990).

immunities of foreign states); (v) preempt state choice-of-law rules with respect to claims brought by foreign nations or the citizens thereof; (vi) affect the right of any court to transfer venue, apply the law of a foreign nation, or to dismiss a claim brought by a foreign nation or a citizen thereof on the grounds of inconvenient forum; or (vii) supersede any statutory or common law right, including an action to abate a nuisance, or actions for compensatory or punitive damages, penalties, cleanup costs, or other forms of relief resulting from actual or threatened contamination or pollution of the environment.

Comments:

The Committee Report states, at 31, that "[n]othing in the bill shall be construed to supersede any federal law except the Federal Employees Compensation Act." In fact, however, Section 4(c)(2) provides that the Bill shall not be construed to "supersede any Federal law, except [the Federal Employees Compensation Act] *and the Longshore and Harbor Workers' Compensation Act* (33 U.S.C. 901 et seq.)." (Emphasis added.) In combination with Section 205 of the Bill, this provision would adversely affect, in certain cases, the United States' ability to recover, through subrogation, monies previously paid as workers' compensation benefits in its capacity as an employer under FECA and as trustee of the special fund created under the LHWCA, 33 U.S.C. § 944, when employees recover against third-party tortfeasors. A more complete discussion of this problem is included in the analysis of Section 205, *infra*.

The remaining provisions of Section 4(c) do not require comment.

Section 4(d): Construction

Function of subsection:

This provision requires that the statute be construed and applied to promote uniformity in the various jurisdictions.

Comments:

None.

Section 4(e): Effect of Court of Appeals decisions

Function of section:

The Bill provides that "[a]ny decision of a United States court of appeals interpreting the provisions of this Act shall be considered a controlling precedent and followed by each Federal and State court within the geographical boundaries of the circuit in which such court of appeals sits."

Comments:

We believe this provision would be the first of its kind in Federal law. Although this section would appear to be constitutional, it is, nonetheless, troubling for several reasons.

This provision implicates long-standing principles of Federalism. The vast majority of state courts have concluded they are not bound by the decisions of the lower federal courts. *See, e.g., State v. Coleman*, 214 A.2d 393, 404 (N.J. 1965), *cert. denied*, 383 U.S. 950 (1966); *Casteneda v. Superior Court*, 26 Cal. Rptr. 364 (Cal. App. 2d 1962).²⁸ This conclusion is premised on the principle that state supreme courts are co-equal with the federal courts of appeal and are subordinate only to the United States Supreme Court. However, this provision would subordinate the state courts to intermediate federal courts and would do so in realm of tort law, an area traditionally reserved to the states.

Even if one were to support its intent, this provision might prove a paper tiger. Without the ability to review state court decisions, Federal courts of appeals would be hard pressed to enforce their precedents. Lacking such supervision, state courts that disagree with an interpretation of the Bill would have every incentive to distinguish or even ignore that precedent, particularly where the Federal court's construction clashes with long-standing interpretations of similar state laws. Moreover, state courts that correctly identify an error in a Federal court of appeals' interpretation of the Bill would have no immediate appeal route by which to have that error corrected. Rather, barring the passage of some new certification provision,²⁹ they would have to wait until, by chance, the same issue arose in a diversity action reviewed by the court of appeal. That could take years, all during which the incorrect interpretation, no matter how patently erroneous, would still be controlling precedent.

Section 5: Jurisdiction of Federal Courts

Function of section:

Section 5 provides that the United States district courts would not have jurisdiction over civil actions pursuant to the Act based on 28 U.S.C. §§ 1331 or 1337. While the Bill would not provide an independent basis of "federal question" jurisdiction, the Federal courts

²⁸ At least two federal courts of appeal have agreed. *United States ex rel Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Owsley v. Peyton*, 352 F.2d 804 (4th Cir. 1965). *But see Yniguez v. Arizona*, 939 F.2d 727, 736-37 (9th Cir. 1991) (dicta).

²⁹ The laws of some states currently allow Federal courts to certify questions arising under state law to state courts. *See* Conn. Public Act, No. 85-111, N.Y. Ct. of Appeals Rule 500.7. These procedures, however, do not allow state courts to certify questions arising under Federal law to Federal courts.

would continue to have "diversity" jurisdiction over product liability actions. See 28 U.S.C. § 1332.

Comments:

Because the Bill does not expand the jurisdiction of the United States district courts, the Committee Report indicates, at 32, that it will not expand the caseload of those courts. Although the Bill would not directly expand the caseload of the district courts, it might do so indirectly through the restrictions on product seller liability set forth in Section 202.

Federal court juries are normally drawn from a considerably larger geographic area than are state court juries. Particularly in districts that include large metropolitan areas, federal court juries are considered by many personal injury and product liability litigators to be considerably less "plaintiff friendly" than state court juries in many of the counties within the federal district. In such districts, plaintiffs' counsel tend to bring their cases in state court, while defense counsel are inclined to remove cases to the federal courts wherever possible. To prevent removal to federal court, plaintiffs sometimes join a non-diverse party as a defendant.³⁰ Since product sellers are much more likely than manufacturers to be local businesses, any restriction upon the ability of plaintiffs to sue non-manufacturing product sellers will have a tendency to reduce the ability of plaintiffs' counsel to structure cases to prevent their removal and will, therefore, tend to produce some increase in the caseload of the federal district courts, especially in those districts where the difference between juries in the federal and state courts is perceived to be the most significant.³¹

³⁰ James F. Archibald III, Note, *Reintroducing "Fraud" to the Doctrine of Fraudulent Joinder*, 78 Va. L. Rev. 1377, 1377 (1992); Richard J. Oparil, *If At First You Don't Succeed: Impediments to a Second Removal to Federal Court of a Previously Remanded Case*, 37 S.D. L. Rev. 523, 523 (1991/1992).

³¹ Although the size of the increased caseload attributable to these factors is not likely to be great in most districts, it could be substantial in some. For example, more than 8,500 asbestos cases pending in Maryland state courts were tried to verdict on some issue in July 1992. Mealey's Litigation Reports: Asbestos, Vol. 7, Iss. 12, p. 3. In almost all of these cases, local sellers of asbestos-containing products were named as defendants. Were the plaintiffs precluded from joining non-diverse defendants, it is likely that many of these cases would have been removed to Federal court.

Section 6: Effective Date

Function of section:

The Bill would be effective immediately and would apply to all civil actions instituted thereafter, including those in which the harm and the conduct that caused the harm occurred before the effective date.

Comments:

Many of the Bill's procedural provisions would require state courts to make corresponding changes in state procedures and practices. However, the Bill's immediate effective date would not give the states adequate time to make these changes.

TITLE I -- EXPEDITED JUDGMENTS AND ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Section 101: Expedited Product Liability Judgments

Function of section:

Section 101 is designed to promote early resolution of product liability cases through the use of offers of judgment. Section 101(a) provides that a claimant may, in addition to any claim for relief made pursuant to state law, include in the complaint an offer of judgment for a specific dollar amount. Section 101(b) provides that the defendant may make an offer of judgment within 60 days after service of the claimant's complaint or within the time permitted for a responsive pleading pursuant to state law, whichever is longer. The claimant must respond within 30 days after the date on which the offer is made. A defendant must respond to the offer of judgment within the time permitted pursuant to state law for a responsive pleading or, if the defendant's pleading includes a motion to dismiss, within 30 days after the court's determination regarding such motion. Section 101(c) provides that if an offer of judgment is made, the court may enter an order extending the applicable period for response upon a motion made prior to the expiration of the applicable response period. Courts granting such a motion are required to specify a schedule for discovery of evidence material to the issue of the appropriate amount of relief and cannot extend such period for more than 60 days.

Section 101(d) provides that, if a defendant does not accept the offer of judgment made by a claimant in the time prescribed, and a verdict is entered for an amount equal to or greater than the specific dollar amount of the offer, the court shall include up to \$50,000 of the plaintiff's reasonable attorney's fees (as defined in Section 101(f)) and costs in the judgment entered. Section 101(e) provides that if the claimant does not accept the defendant's offer of judgment in a timely fashion and a verdict is entered for an amount

equal to or less than the specific dollar amount of the offer of judgment, the court shall reduce the amount of the verdict by an amount equal to the amount of collateral benefits the claimant has received or is entitled to receive for economic losses. If a verdict is entered for the defendant, there is no penalty for the claimant. If the claimant does not respond during that time and the verdict is not favorable to the claimant as described above, then the claimant's award will be reduced pursuant to this section.

Section 101(g) provides that offers of judgment that are not accepted are not admissible except in a proceeding to determine attorney's fees and costs.

Comments:

Product liability cases tend to be protracted and to involve extensive discovery. The goal of promoting the early and inexpensive resolution of these cases is laudable. Section 101 of the Bill, however, appears to be a severely flawed effort to achieve this worthwhile goal.

First, there appears to be little precedent for the Federal government to impose procedural requirements upon state courts even where, as here, it appears that the states would be able to "opt out" of the federal procedural arrangement. Given the limited preemption in Section 4(b), the offer of judgment provision might not mesh well with existing state procedures. Under section 4(b)(2), title I of the Bill (consisting of sections 101 and 102) "shall not supersede or otherwise preempt any provision of applicable state or Federal law." If existing law in a particular state permits offers of judgment to be made later in litigation than does Section 101, it is unclear whether the procedures established by Section 101 would be inapplicable or instead would augment the existing state procedures. Similarly, if existing law in a particular state permits more (or less) severe penalties for refusing an offer of judgment than those in Section 101, it is unclear whether the state's procedural penalties would continue to apply to all offers of judgment or only those offers of judgment made under state procedures. Moreover, if state law does not permit offers of judgment, it is unclear whether Section 101 would simply be inapplicable in that state or whether it would apply unless the state "opted out" of the operation of Section 101.

Secondly, while early resolution of cases is a desirable goal, a case cannot be resolved before both parties have learned enough to evaluate that case intelligently. Although Section 101 permits an extension of time for responding to an offer of judgment, it does not permit any extension of time for making such an offer. The early timing of this section makes it less likely that this procedure will be used in many cases. Although it might be possible for plaintiffs' attorneys to make an offer contemporaneously with filing suit, in many cases, particularly those involving toxic torts, some discovery is required to evaluate the relative responsibility of various defendants. Defendants will often be in a worse position to make a reasonable offer during the periods prescribed. In most jurisdictions, the defendant will have had no opportunity for any discovery by the time it is required to make an offer of judgment under this provision. Without knowing any more about the plaintiff's

damages or the circumstances giving rise to his or her injury than appear within the complaint, few defendants will be in a position to make an offer of judgment unless the plaintiff voluntarily provides information through informal discovery. However, given the substantial penalties that can be imposed upon plaintiffs who refuse defendants' offers of judgment, it is unlikely that plaintiffs' attorneys will voluntarily provide information that would allow their counterparts to make realistic offers of judgment. The Bill thus would discourage the early, informal exchanges of information that sometimes occur in cases likely bound for settlement. These problems might be addressed by adopting special discovery procedures applicable to product liability cases -- but there are no such provisions in the Bill.

The penalties authorized by this provision are also problematic. While the penalty imposed upon a defendant is reasonably straightforward,³² the penalty imposed upon plaintiffs is not. Under Section 101, a plaintiff who files suit and recovers no judgment at all pays no penalty, even if he has refused an offer of judgment. The same is true of a plaintiff who unreasonably refuses an offer and has received no "collateral benefits" by which to reduce a judgment. By comparison, the penalty imposed upon a plaintiff who has a meritorious case and who has received collateral benefits is limited only by the amount of those benefits. Thus, the family of a decedent killed by a defective product who has, at his own expense, purchased a million dollar life insurance policy, is subject to a non-discretionary penalty of the full \$1 million in insurance proceeds if the amount of a jury verdict in its wrongful death case is even \$1 less than the amount of an offer of judgment. As this provision is drafted, the court would have no discretion to ameliorate such a penalty, no matter how unfair its application might be in light of the facts. There appears to be no conceivable public policy justification for subjecting plaintiffs with meritorious cases, who have guessed wrong about the size of a jury verdict, to potentially unlimited penalties, when no comparable penalties are imposed upon plaintiffs with non-meritorious cases, plaintiffs who have not bothered to obtain insurance, or defendants. At a minimum, it would seem that the penalty to which a plaintiff is exposed for refusing an offer of judgment should be subject to some reasonable maximum dollar amount or subject to court discretion.

The legislative history does not make a convincing case for utilizing a special offer of judgment procedure for product liability cases. This is particularly true because significant numbers of product liability cases involve non-product liability claims against other defendants. Early resolution of cases in the Federal courts could be more appropriately encouraged by amending Rule 68 of the Federal Rules of Civil Procedure (and its state analogues) and by encouraging the early use of alternative dispute resolution. We recommend continuing to use the states as laboratories for developing new procedures for encouraging the early resolution of product liability cases.

³² Some problem might be created by this provision's definition of reasonable attorney's fees recoverable by plaintiffs in terms of the prevailing hourly rates. In most product liability cases, a plaintiff's attorney receives a contingency fee. For this reason, the Bill might better define "reasonable attorney's fees" in terms of a reasonable contingency fee.

Section 102: Alternative Dispute Resolution Procedures

Function of section:

Section 102(a) provides that either a claimant or a defendant may offer to proceed pursuant to a voluntary and nonbinding alternative dispute resolution (ADR) procedure established or recognized under the laws of the state or rules of the court in which the action is pending. The offer to proceed under this section must be made within the time period established in Section 101 for making a settlement offer.³³ The offer must be responded to within 10 days, except that the court may, upon a timely motion, extend the period for accepting or rejecting the offer for up to 60 days.

Section 102(b) provides that if the defendant refuses to proceed pursuant to such ADR procedures, a final judgment is entered against the defendant, and the court determines that such refusal was unreasonable or not in good faith, the court shall assess reasonable attorney's fees and costs (calculated as set forth in Section 101(f)) against the defendant. There is no corresponding penalty for a plaintiff who refuses an offer to utilize ADR. Section 102(c) provides that, in determining whether a refusal by a defendant to enter into ADR is unreasonable, the court shall consider such factors as it deems appropriate.

Comments:

By applying the penalty for unreasonable refusal to engage in ADR only to a defendant, this provision is apparently designed to obviate concerns that it might otherwise violate an individual's right to a jury trial under the Seventh Amendment. However, one might question whether it is fair to impose potentially harsh penalties on defendants who unreasonably refuse to employ ADR, but not on plaintiffs who unreasonably refuse.

Like Section 101, this section imposes detailed procedural requirements upon state courts, and thus raises substantial federalism concerns. For example, the offer to participate in ADR procedures must be made within the time for making an offer of judgment under Section 101, unless the court upon motion extends the time for doing so. Where a defendant has refused to participate in ADR and later has a judgment entered against it, the court would be required to decide whether the refusal was unreasonable. Both of these requirements would, to some extent, require state court judges to exercise greater supervision over product liability cases.

Moreover, like much of the Bill, there are some questions as to how this provision would interact with state laws. To be covered by this provision, an ADR procedure must be voluntary, nonbinding and "established or recognized under the law of the state in which the

³³ The section reference is erroneously given in the Committee Report, at 35, as section 201.

civil action is brought or under the rules of the court in which such action is maintained." Many jurisdictions, however, have ADR provisions that come into play only well after the time limits set forth in Section 102, while others utilize mandatory, non-binding ADR procedures. Depending on how the courts construe Section 102, these procedures may or may not be augmented by the penalty provisions. One thing is sure -- it hardly serves the Bill's goal of promoting uniformity to create special ADR rules for product liability cases in states that already have ADR procedures, while having no such rule in other states.

TITLE II -- STANDARDS FOR CIVIL ACTIONS

Section 201: Civil Actions

Function of section:

Section 201 provides that a person seeking to recover for harm caused by a product may bring a civil action against the product's manufacturer or the product seller pursuant to applicable state or federal law, except to the extent that such law is superseded by the Bill. For the purposes of title II, this means that such civil actions will be governed by existing liability standards and rules, except to the extent that they are superseded by federal standards.

Comments:

None.

Section 202: Uniform Standards of Product Seller Liability

Function of section:

Section 202 specifies when a product seller, other than a manufacturer, is responsible for harm caused by a product.³⁴ Under Section 202(a), a non-manufacturing product seller would be liable for harm caused: (i) by its own failure to exercise reasonable care with respect to the product or (ii) by a product that fails to conform to an express warranty made by the product seller. Under Section 202(c), a product seller also remains liable if the manufacturer is not subject to service of process or the court determines that the claimant would be unable to enforce a judgment against the manufacturer (*e.g.*, if the court finds that the manufacturer is bankrupt, insolvent, or otherwise unable to pay).

³⁴ Section 3(9) of the Bill defines "manufacturer" to include non-manufacturing sellers who hold themselves out as a manufacturer, or who participate in designing, formulating or modifying the product in ways relevant to the plaintiff's injury.

Section 202(b) sets forth factors that may be relevant in determining whether the product seller failed to exercise reasonable prudence, including, *inter alia*, the effect of the seller's conduct with respect to the construction, inspection, or condition of the product and any failure of the product seller to pass on adequate warnings or instructions about the dangers and proper use of the product. The product seller would not be liable for a failure to warn if it provided to the purchaser any written warnings or instructions it had received up to that time, and made reasonable efforts to provide users with those warnings and instructions it received after the product left its possession and control. Nor would the seller be liable, except for breach of express warranty, if there was no reasonable opportunity to inspect the product in a manner than would have or, in the exercise of reasonable care, should have revealed the product's danger.

Comments:

This section is intended to reduce the exposure of product sellers for design defects and other product-related harms which they did not cause and over which they had little or no control. It represents a substantial departure from the current law in most jurisdictions. Absent an applicable statute abrogating common law, the majority of jurisdictions have adopted a comprehensive theory of strict liability in tort, under which the manufacturer, the final seller, and all intermediate sellers are typically held liable for injuries caused by a defective and unreasonably dangerous product, regardless of their lack of personal fault. *See Restatement (Second) of Torts*, § 402A. In addition, the final sellers (and intermediate sellers in those jurisdictions that have abolished the requirement of privity of contract in actions for breach of implied warranty) are generally liable for breach of the implied warranties of merchantability and fitness for a particular purpose under Sections 2-314 and 2-315 of the Uniform Commercial Code. Even in the minority of jurisdictions that have not adopted the theory of strict liability in tort for injuries caused by defective and unreasonably dangerous products, a seller will generally be liable under an implied warranty theory for injuries caused by a defective product, even in the absence of any proof of negligence on the part of the seller.

Underlying this prevailing rule is the notion that holding a product seller liable for harms caused by a product promotes safety and reduces the risk of harm. Many believe that product sellers will seek to avoid liability by pressuring manufacturers to make safe products and that product sellers who profit from the sale of defective products should be liable for the harms those products cause. In addition, because the knowledge and expertise of product sellers generally exceeds that of consumers, it would appear to be reasonable to encourage them to influence manufacturer conduct. This view is reflected in Council Draft No. 1 of the proposed **Restatement (Third) of Torts: Products Liability**, § 101 (September 13, 1993), which would continue to impose liability upon all sellers of defective products, in part on the basis that non-negligent sellers of defective products will typically be able to pass any liability back to the manufacturer through an action for indemnity.

Those states that have enacted legislation limiting the liability of non-manufacturing sellers have done so on the ground that such sellers have no meaningful opportunity to inspect, much less test, the dozens or even thousands of products they receive for resale.³⁵ The approaches of these statutes vary. For example, Arizona does not immunize the seller, but allows the seller to obtain indemnity from the manufacturer for potential damages and attorney's fees and requires the plaintiff to attempt initially to satisfy its judgment from the manufacturer. Ariz. Rev. Stat. Ann. § 12-684. In states such as Maryland, the seller may assert as an affirmative defense that it had no knowledge of, or responsibility for, the defect and that the manufacturer is amenable to suit and solvent. Maryland allows the seller to be brought back into the case if the manufacturer becomes insolvent after the seller is granted summary judgment. Md. Cts. & Jud. Proc. Code Ann. § 5-311. Some jurisdictions, among them Colorado, have given non-manufacturing sellers a limited immunity from actions based upon strict liability in tort, but have not immunized them from actions based upon breach of implied warranties under the Uniform Commercial Code, *see* Colo. Rev. Stat. Ann. § 13-21-402; others, like Iowa, have given them immunity from actions based upon both strict liability in tort and breach of the implied warranty of merchantability, but have left intact actions for breach of the implied warranty of fitness for a particular purpose, *see* Iowa Code Ann. § 613.18.

To be sure, Section 202 is more favorable to plaintiffs than are state statutes that have endeavored to protect retailers from strict product liability through such devices as "closed container" or "no duty to inspect" rules.³⁶ But, it also lacks some of the safeguards that have been preserved in state laws limiting seller liability. For example, Section 202 might make it impossible for plaintiffs to prevail in cases where it is clear that a product is defective when it reaches the consumer, but where it is unclear whether the defect arose at the time of manufacture, or somewhere later in the distribution chain. Under Section 402A(1)(b) of the **Restatement (Second) of Torts** and Section 101 of Council Draft No. 1 of the proposed **Restatement (Third) of Torts: Products Liability**, a manufacturer is liable only where the product reaches the user or consumer "without substantial change in the condition in which it is sold." An example is an exploding bottle case where the evidence

³⁵ Statutes designed to protect the non-manufacturing product seller include: Ariz. Rev. Stat. Ann. § 12-684; Ark. Code Ann. § 16-116-107; Colo. Rev. Stat. Ann. § 13-21-402; Del. Code Ann. tit. 18 § 7001; Ga. Code Ann. § 51-1-11.1; Idaho Code § 6-1407; Ill. Stat., ch. 735, para. 5/2-621; Iowa Code Ann. § 613.18; Kan. Stat. Ann. § 60-3306; Ky. Rev. Stat. Ann. § 411.340; Md. Cts. & Jud. Proc. Code Ann. § 5-311; Minn. Stat. § 544.41; Mo. Stat. § 537-762; Neb. Rev. Stat. § 25-21,181; N.C. Gen. Stat. § 99B-2; N.D. Cent. Code §§ 28-01.3-03, *et. seq.*; Ohio Rev. Code Ann. § 2307.78; S.D. Codified Laws Ann. § 20-9-9; Tenn. Code Ann. § 29-28-106; and Wash. Rev. Code Ann. § 7.72.040.

³⁶ Under these laws, a retailer of a prepackaged closed container is not held liable if he or she purchased the product from a reputable manufacturer and the imperfections were not readily ascertainable. *See, e.g., Allen v. Delchamps, Inc.*, 624 So. 2d 1065 (Ala. 1993).

supports the proposition that the defect was caused by mishandling at some point in the distribution process after leaving the manufacturer, but where the point at which the defect arose is otherwise undefined. While states applying this rule would immunize a manufacturer, Section 202 of the Bill would apparently immunize the retailer and any member of the prior distribution chain unless the plaintiff could prove the precise point during distribution at which the defect arose. The combination of these rules would, therefore, likely leave no one liable when a defect arose at some undeterminable point during the distribution of a product.

Further, although the Committee Report, at 36, indicates that a product seller is liable for harm caused "by its own failure to exercise reasonable care with respect to the product," this appears to be untrue if the failure consists of a failure to warn. Under Section 202(b)(2), a seller other than a manufacturer is not liable "based upon an alleged failure to provide warnings or instructions" unless the plaintiff establishes that the seller failed to provide to the purchaser "any pamphlets, booklets, labels, inserts, or other written warnings or instructions received while the product was in the product seller's possession or control" or failed to make reasonable efforts to provide warnings and instructions received after the product left the seller's possession and control. This provision appears to immunize a non-manufacturing seller from liability even where the seller is aware of a product's dangers, and is aware that the consumer intends to use the product in an unsafe manner, so long as the seller passes along whatever written warnings it received from parties above it in the chain of distribution. In many cases, however, the final seller is the only party in the chain of distribution with any knowledge of the use to which the consumer plans to put the product, and is thus the party in the best position to prevent injury from the product. Such is often the case with building materials that are normally sold by knowledgeable professionals to much less sophisticated "do-it-yourselfers."³⁷

There are also problems with the provision of the Bill that would not immunize a non-manufacturing seller if the manufacturer is either not subject to service of process or if "the court determines that the claimant would be unable to enforce a judgment against the manufacturer." The Bill is silent as to which party has the burden of proof on this issue. But, more importantly, it does not specify the point at which the decision concerning the manufacturer's ability to satisfy a judgment is to be made. If the decision is made at an early stage of the litigation, the Bill does not address what happens when the manufacturer's inability to satisfy a judgment becomes apparent only after the non-manufacturing seller has

³⁷ Absent a failure to pass along instructions received from parties above it in the distribution chain, a non-manufacturing seller is liable only for breach of an "express warranty, independent of any express warranty made by a manufacturer as to the same product" This appears to preclude any liability for harm caused by breach of either the implied warranty of fitness for a particular purpose or the implied warranty of merchantability, which have been adopted in the Uniform Commercial Code in virtually every state.

been dismissed. If the decision is made only at the time of judgment, then sellers would be required to incur the expense of litigating a case on the possibility that the court might find them liable.

The threat of potentially massive liability for product liability claims, and the litigation costs involved in securing indemnity from product manufacturers, are legitimate concerns for many small retailers, and ones that may well be deserving of federal legislation -- although it must also be noted that this is an area in which the states have been quite active, perhaps because non-manufacturing sellers are frequently local businesses. However, by leaving retailers liable when the manufacturer is either not subject to service of process or is judgment-proof, but immunizing them from the consequences of their own unreasonable failure to warn, the Bill manages both to immunize retailers in precisely those cases in which they are most able to prevent injury, and to leave them subject to liability in those cases where they are without fault but unable to pass liability back to the manufacturer.

Section 203: Uniform Standards for Award of Punitive Damages

Function of section:

Section 203(a) allows punitive damages to be awarded only if the claimant establishes by clear and convincing evidence that the harm suffered was the result of the manufacturer's or product seller's "conscious, flagrant indifference" to the safety of those who might be harmed by a product. It further provides that a failure to exercise reasonable care in choosing among alternative product designs, formulations, instructions, or warnings does not of itself constitute such conduct. Finally, this subsection provides that punitive damages may not be awarded in the absence of an award of compensatory damages.

Sections 203(b) and (c) provide that punitive damages may not be imposed upon manufacturers or sellers of prescription and over-the-counter drugs, medical devices, or aircraft and aircraft components, for harm caused by those products, when the safety of those products has been approved by the appropriate federal agency prior to the marketing of the product, unless the manufacturer: (i) committed fraud during the reviewing process by withholding or misrepresenting relevant information or (ii) made an illegal payment to an official involved in the certification process for the purpose of securing approval of such drug or device.

Section 203(d) of the Bill allows a defendant to elect to bifurcate a civil proceeding so as to segregate the resolution of a punitive damage claim from that of a compensatory damage claim. The provision authorizes two types of bifurcation -- either a separate proceeding to determine whether punitive damages are to be awarded as well as the amount of such award, or a separate proceeding to determine only the amount of punitive damages following a determination of liability.

Section 203(e) provides a list of factors to be considered by the trier of fact in determining the amount of punitive damages to be awarded.

Comments:

Clear and Convincing Evidence. The Committee Report, at 40, indicates that most jurisdictions permit an award of punitive damages based on the preponderance of the evidence. *See also* Kenneth Redden, **Punitive Damages** § 7.2(A)(3) (1980). There is, however, a trend towards permitting an award of punitive damages only upon evidence meeting the "clear and convincing evidence" standard. A number of states have already adopted the "clear and convincing evidence" standard, either by judicial decision,³⁸ or by statute.³⁹ This standard is also employed in the Model Uniform Products Liability Act. Model Uniform Product Liability Act § 120(A), *reprinted in* 44 Fed. Reg. 62,714 (1979). And it has also been endorsed by the Special Committee on Punitive Damages of the American Bar Association Section of Litigation, by the American Bar Association House of Delegates, by the American College of Trial Lawyers, and by a committee of the American Law Institute.⁴⁰

In our view, principles of fairness dictate that given the quasi-criminal nature of punitive awards, the burden of proof should be higher than in the normal civil case. If any federal actions are warranted in product liability cases, adoption of the "clear and convincing evidence" standard appears to be among the most clearly justified.

³⁸ *See* Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 723 P.2d 675 (1986); Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985); Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980). The Supreme Court has also stated that "[t]here is much to be said in favor of a State's requiring, as many do, ..., a standard of 'clear and convincing evidence'." Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1046 n.11 (1991).

³⁹ *See, e.g.*, Ala. Code § 6-11-20; Alaska Stat. Ann. § 09.17.020; Ga. Code Ann. § 51-12-5.1(b) (tort actions); Ind. Code Ann. § 34-4-34-2; Kan. Stat. Ann. § 60-3702(b); Ky. Rev. Stat. Ann. § 411.184(f)(2); Minn. Stat. Ann. § 549.20; Mont. Code Ann. § 27-1-221(5); Ohio Rev. Code Ann. § 2307.80; Ore. Rev. Stat. Ann. § 30.925(1); S.D. Codified Laws Ann. § 21-1-4.1; Utah Code Ann. § 78-18-1. *See also* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 Iowa L. Rev. 1, 7, n. 24, (1992).

⁴⁰ *See* ABA, **House of Delegates Res. on Report No. 123** at 1 (Feb. 1987) (adopting recommendation of the ABA **Report of the Action Commission to Improve the Tort Liability System** 18 (Feb. 1987)); American College of Trial Lawyers, **Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice** 15 (1989); **Reporter's Study Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change** 249 (1991). *See also* Bailey Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 Clev. St. L. Rev. 1, 114 (1989); David G. Owen, *Civil Punishment and the Public Good*, 56 So. Cal. L. Rev. 103, 118-19 (1982).

Standard of Liability. The substantive standard for punitive damages established in Section 203(a) is more problematic. Although virtually all jurisdictions precondition an award of punitive damages upon a showing of conduct that goes beyond ordinary negligence, some permit such an award based upon a showing of reckless indifference to human safety.⁴¹ In those states, a manufacturer or other product seller who deliberately ignores a product's dangers may be liable for punitive damages. By comparison, Section 203(a)'s requirement that punitive damages may be awarded only upon a showing of the seller's conscious, flagrant indifference to the safety of those who might be injured by the product seems to require more than a mere reckless indifference to, or willful ignorance of, the product's dangers. This is suggested by the Committee Report, at page 44, which explains:

[T]o be "conscious" of its flagrant misconduct, a manufacturer or product seller must be aware that its product is legally defective and that its conduct in selling it in such a condition is therefore improper. . . . It is only when a manufacturer consciously leaves in its product a danger that is unreasonable, and sells the product to the public knowing it to be defective, that its conduct can be said to manifest a "conscious, flagrant indifference" to consumer safety.

Both the American Law Institute and the Special Committee on Punitive Damages of the American Bar Association Litigation Section support a minimum standard for punitive awards that requires a conscious act on the part of the tortfeasor.⁴² Given the quasi-criminal nature of punitive damages, it seems reasonable that such damages should not be based upon a finding of gross negligence, but should require a showing that the defendant had some knowledge of the risk of harm. Yet, it is not clear that this is the import of the Bill's language requiring "conscious, flagrant indifference." The Senate Committee Report states that this standard requires "intentional conduct," and leaves open what additional proof is required to show that such indifference was "flagrant." Further, the legislative history is silent as to whether a plaintiff must prove the requisite state-of-mind directly (*e.g.*, introducing a "smoking gun" memorandum) or may rely on circumstantial evidence. We believe that the ambiguities in this section should be cured by deleting the word "flagrant" and by indicating, either expressly in the statute or by way of legislative history, that a defendant is consciously indifferent if it knows of and disregards a substantial risk to health or safety.

⁴¹ See Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 Ala. L. Rev. 61 (1992) (appendix).

⁴² American Bar Association, Section of Litigation, **Report of the Special Committee, Punitive Damages: A Construction Examination** 18 (1986); American College of Trial Lawyers, **Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice** 10 (1989). See also Victor E. Schwartz & Mark A. Behrens, *The American Law Institutes' Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damage Reform*, 30 San Diego L. Rev. 263 (1993).

The legislative history should also make clear that the requisite state-of-mind may be established by circumstantial evidence, including evidence showing that information available to the defendant made the risk obvious.

Further, it should be noted that there are a limited number of jurisdictions (possibly only Alabama) in which wrongful death damages are exclusively punitive in nature. It appears that Section 203 would, in any such jurisdiction, make it impossible to pursue successfully a wrongful death action when the decedent's death was caused by a defective product.⁴³ That some jurisdictions permit an award of only punitive damages in wrongful death actions was recognized in the Federal Tort Claims Act, which, in most circumstances, adopts state law concerning the measure of damages, but which also precludes the award of punitive damages against the United States. Because the effect of precluding the award of punitive damages against the United States would be to preclude any award for wrongful death in a jurisdiction that allowed only punitive damages in wrongful death actions, the FTCA provided its own measure of wrongful death damages in such states. 28 U.S.C. § 2674. Because the Bill neither adopts its own standard for awarding compensatory damages nor permits an award of punitive damages in the absence of an award of compensatory damages, it would appear that plaintiffs in a state permitting only punitive damages in wrongful death cases would be precluded from recovering any damages at all, even if a defendant were guilty of the type of conscious, flagrant conduct described in Section 203(a).

Regulatory Defense. This provision, which is based on several state statutes,⁴⁴ would largely bar punitive damage awards from being entered with respect to pharmaceuticals and aircraft that meet the standards established by governing Federal regulatory agencies. This provision, however, might not provide much relief to the pharmaceutical and aircraft industries because studies suggest that much of their continuing liability exposure

⁴³ At the present time, it appears that Alabama is the only jurisdiction that continues to restrict damages in wrongful death actions to those which are punitive in nature. It bases wrongful death damages upon the degree of the defendants' culpability, rather than the pecuniary loss to the survivors or the estate, but permits the award of such damages on the basis of any culpable conduct, including ordinary negligence. *See* Ala. Code § 6-5-410; *Caterpillar Tractor Co. v. Ford*, 406 So.2d 854, 859 (Ala. 1981).

⁴⁴ *See* Ariz. Rev. Stat. Ann. § 12-701; N.J. Stat. Ann. § 2A:58C-5; Ohio Rev. Code Ann. § 2307.80(C); Or. Rev. Stat. § 30.927; and Utah Code Ann. § 78-18-2. *See also* Kan Stat. Ann. § 60-3304 (applying a general regulatory defense).

exists with respect to compensatory, rather than punitive, damages.⁴⁵ Indeed, one study has revealed that between 1965 and 1990, there were only 53 punitive damage awards in medical cases.⁴⁶ Moreover, with the exception of asbestos cases, the overall frequency of punitive damage awards in product liability cases has been decreasing since the mid-1980's. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 *Iowa L. Rev.* 1, 39 (1992). See also American Bar Association, Section of Litigation, **Report of the Special Committee, Punitive Damages: A Constructive Examination** (1986).

Some evidence does suggest that the small aircraft and pharmaceutical industries may be withholding products from the market based on liability concerns. See Steven Garber, **Product Liability and the Economics of Pharmaceuticals and Medical Devices** 81 (Rand Institute for Civil Justice 1993). Pointing to several examples, proponents of the Bill contend that punitive awards, no matter how few in number, are sufficient to "overdeter" the development of socially useful products. See Committee Report at 38. But other provisions of this legislation -- a heightened burden of proof and a more strict standard of punitive liability -- should largely address these situations. Moreover, assuming these other provisions are enacted, it is questionable whether a manufacturer whose conscious indifference to safety is proven by clear and convincing evidence should, nonetheless, be immune from liability under a separate regulatory defense.

To be sure, there is some merit to the notion that when the government has carefully assessed the risk of a product and certified that it meets the safety and efficacy standards established by experts, manufacturers should not be punished by non-expert juries.⁴⁷ However, many courts that have addressed the question whether FDA or FAA approval should constitute a defense to punitive damages have viewed those agencies' regulations and procedures as establishing only minimum standards of safety, not equivalent to the higher

⁴⁵ See 138 Cong. Rec. S6652 (daily ed. May 14, 1992) (statement of Sen. Tom Harkin); S. Rep. No. 215, 102d Cong., 2d Sess. at 65 (minority views of Sens. Hollings and Gore (citing studies performed by Professor Michael Rustad of Suffolk University Law School and Professor Thomas Koenig of Northeastern University)).

⁴⁶ Michael Rustad, The Roscoe Pound Foundation, **Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts** 8, 23 (1991).

⁴⁷ See Paul Dueffert, Note, *The Role of Regulatory Compliance in Tort Actions*, 26 *Harv. J. on Legis.* 175 (1989); James A. Henderson Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 *Colum. L. Rev.* 1531, 1555-56 (1973).

standards required by tort law.⁴⁸ Those courts have been unwilling to allow sometimes outdated regulations or vague standards of care to supplant state law.⁴⁹ Commentators who have studied the proposed regulatory defense also observe that its viability rests on the questionable assumption that the responsible agencies will always be adequately staffed and will be permitted to regulate effectively by the Administration then in office. *See, e.g.,* Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 *Vand. L. Rev.* 1121, 1146-1163 (1988); Teresa Moran Schwartz, *Punitive Damages and Regulated Products*, 42 *Am. U. L. Rev.* 1335 (1993).⁵⁰ The widespread injuries that thousands of women suffered as a consequence of using the Dalkon Shield or DES -- both of which received FDA approval during prior Administrations -- suggest the potential danger in assuming that regulatory agencies will always function effectively.

Proponents of this regulatory defense argue that it will encourage companies to provide information to the FAA and the FDA. This rationale might support a limited immunity from punitive damages stemming from design defects because the provision of information by the company assists the regulatory agencies in assessing whether a product is safe. Indeed, a recent study by the Rand Corporation concludes that where the FDA has approved drugs that were eventually determined to be unsafe, the flaw in the approval process related to a company's failure to provide adequate testing information to the FDA. *See* Steven Garber, **Product Liability and the Economics of Pharmaceuticals and Medical Devices** 127-28 (Rand Institute for Civil Justice 1993). But this study does not explain why the immunity afforded by the proposed regulatory defense should also extend to manufacturing defects, faulty advertising campaigns and failures to warn. In these areas, the relevant regulatory agencies either play no supervisory role (*e.g.*, manufacturing defects) or are not plagued by any demonstrable lack of information (*e.g.*, warnings).⁵¹ Indeed, this provision

⁴⁸ As Judge Abner Mikva has suggested, "federal legislation has traditionally occupied a limited role as the *floor* of safe conduct [not] a *ceiling* on the ability of states to protect their citizens. . . ." *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1543 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) (emphasis added).

⁴⁹ *See, e.g.,* *Smith v. Atlantic Richfield Co.*, 814 F.2d 1481, 1487 (10th Cir. 1987); *Elsworth v. Beech Aircraft Corp.*, 195 Cal. Rptr. 227, 230-31, 147 Cal. App. 3d 279 (1983); *Wilson v. Piper Aircraft Comp.*, 282 Or. 61, 577 P. 2d 1322, 1324-26 (1978) (en banc); *Southern Pac. R.R. v. Mitchell*, 80 Ariz. 50, 292 P.2d 827, 832-33 (1956).

⁵⁰ These concerns are not theoretical. A recent study of the FDA chaired by former FDA Commissioner, Dr. Charles Edwards, identified the lack of resources as a recurring theme in that agency's history. U.S. Dept. of Health & Human Service, Advisory Committee, **Final Report on the Food and Drug Administration** 39 (1991).

⁵¹ The Rand Institute report suggests that the biggest problem with respect to warnings is that "companies supply extensive, detailed, and descriptive information to physicians and

(continued...)

inexplicably would appear to immunize manufacturers who fail to take corrective action absent governmental directive once serious problems have been discovered with a product.

For these reasons, we oppose the regulatory defense provision as currently framed. As an alternative, we would recommend a more narrowly-tailored provision, such as one limited to drugs approved on an emergency "fast-track" basis and "orphan drugs." Another possibility would be to limit this defense to design defects, where there is at least some credible evidence that improving the flow of information to the FDA and FAA would indeed produce safer products.

Bifurcation of Proceedings. Section 203(d) of the Bill allows a defendant to elect to bifurcate a civil proceeding so as to segregate the resolution of a punitive damage claim from that of a compensatory damage claim. The provision authorizes two types of bifurcation -- either a separate proceeding to determine liability for, and the amount of, punitive damages to be awarded or a separate proceeding to determine only the amount of punitive damages following a determination of punitive liability.

The defendant's wealth is a major factor in determining an appropriate punitive damage award, but is not relevant in determining compensatory liability or damages. *See* James Ghiardi and John J. Kircher, **Punitive Damages: Law and Practice** 5.36 and Table 5-3 (1985 & Supp. 1989). *See also* **Restatement (Second) of Torts** § 908(b) ("In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant."). Many are concerned that the introduction of evidence of the defendant's wealth is highly inflammatory and could prejudice the jury in determining whether the defendant is liable for compensatory damages. *See* American Bar Association, **Report of the Action Committee to Improve the Tort Liability System** 17 (1987). Responding to these concerns, at least five states -- Georgia, Missouri, Montana, Nevada and New Jersey -- have adopted a mandatory bifurcation requirement in at least some cases involving punitive damages.⁵² While we agree that a limited form of bifurcation is probably appropriate, we believe that the statute goes too far if it is intended to allow a

⁵¹(...continued)

almost no information to patients." *Id.* at 195. Although this report suggests that a regulatory defense might encourage better warnings, it also recognizes that a major problem with such warnings currently derives from FDA practices. *Id.*

⁵² Ga. Code Ann. § 51-12-5.1(d); Mo. Ann. Stat. § 510.263; Mont. Code Ann. § 27-1-221(7)(a); Nev. Rev. Stat. Ann. § 42.005(3); N.J. Stat. Ann. § 2A:58C-5. *See also* Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 870 n.96 (1989).

defendant to elect to separate not only the proceedings to determine the amount of punitive damages owed, but also the proceedings to determine the liability for such damages.⁵³

One possible effect of bifurcating, in a second trial phase, both the determination of *whether* to award punitive damages and the calculation of the *amount* of punitive damages which should be awarded, could be to increase substantially the cost of litigating claims. Often there is substantial overlap between the evidence relevant to the question of whether a product is defective (or a defendant is negligent), and the evidence of whether a defendant's conduct is such as to justify an award of punitive damages. The Bill, as drafted, would often require the same witnesses to testify in two different phases of the trial, greatly increasing the cost, for example, of expert witnesses. Moreover, Section 203(d) does not require that a bifurcated case be presented to the same trier of fact, leaving open the possibility that the parties will be required to adduce the same evidence in two different phases of the trial. Thus, mandatory bifurcation could result in a loss of judicial economy in certain circumstances. *See American Bar Association, Section of Litigation, Report of the Special Committee, Punitive Damages: A Constructive Examination* 88-89 (1986).

We believe that any undue prejudice against a defendant associated with introducing the defendant's wealth would be avoided if Section 203(d) were modified to allow a defendant to elect only to bifurcate a proceeding to allow for a separate determination of the amount of punitive damages owed.

Factors. Section 203(e) provides a list of factors to be considered by the finder of fact in deciding whether to award punitive damages. Although these factors are more detailed than those set forth in the statutes of most states, they appear to be generally consistent with most decisions under current law. However, these factors do not address the problem of repetitive awards of punitive damages based upon the same conduct of the defendant. Such repetitive awards, which can threaten both the survival of defendants and their ability to pay compensatory damages to future plaintiffs, have been recognized as one of the principal problems of the present punitive damages system. *See American Bar Association, Section of Litigation, Report of the Special Committee on Punitive Damages, Punitive Damages: A Constructive Examination* (1986). In view of the many state punitive damage reforms that have recently been enacted, we think there is little need for federal legislation in this area and that the better course is to allow the states to continue to experiment with various approaches to this problem.

⁵³ The most reasonable reading of Section 203(d) appears to be that it would permit the defendant to decide whether to bifurcate a proceeding involving both compensatory and punitive damages. It is possible, however, to read Section 203(d) as giving the defendant only the right to decide upon some type of bifurcation, and giving the trial court the ability to determine the issues to be bifurcated.

Section 204: Uniform Time Limitations on Liability

Function of section:

Section 204(a) provides that, in any civil action brought under the Bill, a complaint must be filed within two years of the time the claimant discovers or, in the exercise of reasonable prudence, should have discovered the harm and its cause. If a person with a product liability claim has a legal disability, the person may file his or her complaint any time less than two years after the legal disability ceases. If the filing of a product liability complaint is stayed or enjoined by court order, the running of the two-year period limitations is suspended until the stay or injunction is lifted or ceases.

Section 204(b) provides that, if the claimant has received or is eligible to receive workers' compensation benefits for harm caused by a product, any product liability action alleging harm, other than toxic harm, caused by a "capital good" is barred unless the complaint is served and filed within 25 years after the date of delivery of the product to its first purchaser or lessee who was not engaged in the business of manufacturing or selling the product or using the product as a component part. The term "capital good" is defined to include most property used in a trade or business. However, motor vehicles, vessels, aircraft, and trains used primarily to transport passengers for hire are not subject to this statute of repose.

Section 204(c) provides that if any provision of the Bill would shorten the period during which a manufacturer or product seller would otherwise be exposed to liability, the claimant may, notwithstanding the otherwise applicable time period, bring an action within one year after the effective date of the legislation. Section 204(d) would provide that the time limitations in this section do not affect the right of any person to seek contribution or indemnification from the person who is actually responsible for the harm.

Comments:

Section 204 would provide for both a statute of limitations and a statute of repose for product liability cases. A statute of limitations generally begins to run upon the accrual of a cause of action. By comparison, a statute of repose, which is usually longer in length, runs from the date of a discrete act on the part of the defendant, usually the manufacture or delivery of the product in question. Statutes of repose thus can have the effect of barring actions even before a potential plaintiff has been injured. See Robert A. Van Kirk, Note, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, 1989 *Duke L.J.* 1689.

Statute of Limitations. The statute of limitations in Section 204(a) would alleviate the substantial confusion and the lack of uniformity that currently characterizes the application of state statutes of limitations. In product liability actions, several possible statutes of limitations, each with differing limitation periods and triggering events, may apply depending on

whether an action is brought in negligence, warranty or strict liability, whether the injury is to person or property, and whether a contract was involved. The impact of these differing statutes is, of course, magnified for corporations whose products flow in interstate commerce. These corporations are amenable to suits by plaintiffs who can effectively choose among several statutes of limitations depending not only upon how they plead their case, but also where they chose to file their lawsuit. See Francis E. McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 *The Forum* 416, 420 (1981).

Section 204(a) would replace this patchwork of limitations with a unified national standard, applicable to all types of product liability suits. We believe this provision would have the salutary effect of providing certainty to manufacturers, sellers and their insurance carriers as to the duration of their liability exposure. While a uniform statute of limitations will eliminate some otherwise viable claims (a grandfathering clause is included in the statute to minimize any immediate impact in this regard), it makes sense to have modern companies that often function in interstate markets be subject to a single statute of limitations. Indeed, where they have been enacted on the state level, product liability statutes of limitations have reportedly reduced insurance costs and eliminated the gamesmanship of attempting to frame obvious tort claims in contract or to file suit in a state with which the plaintiff has minimal contacts but which has a lengthier statute of limitations.

The time limits set forth in Section 204 appear reasonable. While there are longer and shorter state statutes of limitations, the period set forth in the Bill is within reasonable bounds. By affording a claimant time to discover both the harm itself (important where the harm is latent or only becomes manifest with repeated exposure) and the actual cause of the harm, this section affords the claimant adequate time to commence his or her lawsuit. This time period is more liberal than that afforded by some states, in which the statute of limitations is triggered by an injury, and not by the claimant's discovery that the injury related to a product defect.

Statute of Repose. The most noted justification for a national statute of repose is that it would alleviate insurance problems for certain industries. Responsibility for older products and latent defects exposes certain manufacturers to long periods of potential liability and a large number of potential plaintiffs. By cutting off a defendant's liability after a set period, statutes of repose lead to a more accurate assessment of risks and thereby allow for greater precision in setting insurance rates. Proponents also claim that a statute of repose will eliminate claims for which evidence is difficult to produce and will prevent manufacturers from being held to current design standards for products manufactured long ago.⁵⁴ While there

⁵⁴ These are essentially the same arguments that have been made in favor of Section 110 of the Model Uniform Product Liability Act, which includes a similar provision. See **Uniform Model Product Liability Act** § 110, *reprinted in* 44 Fed. Reg. 62,714, 62,733 (1979). See (continued...)

are reasonable countervailing arguments to these points,⁵⁵ we believe that, on balance, a Federal statute of repose would provide helpful uniformity.

By one commentator's count, twenty-one states have adopted a statute of repose. See Terry M. Dworkin, *Federal Reform of Product Liability Law*, 57 *Tul. L. Rev.* 602, 604 (1983). At least seven other states have adopted so-called "useful life statutes" in which the expiration of a product's useful life (often presumed to be between 10 and 12 years) is either a factor in determining negligence or a complete defense to suit.⁵⁶ Section 204(b) would harmonize these provisions and, assuming that it is construed to preempt shorter statutes of repose under state law, would actually enhance the ability of many claimants to sue.⁵⁷ This section is also intended to prevent potential hardship by providing that the statute of repose does not apply where the claimant is ineligible for state or federal worker's compensation for

⁵⁴(...continued)

also Laurie L. Kratky, *Statutes of Repose in Products Liability: Death Before Conception?*, 37 *Sw. L. J.* 665 (1983).

⁵⁵ Opponents of this provision counter that plaintiffs also face additional evidentiary problems as time passes and ultimately must carry the burden of proof. Critics also contend that if a defendant's negligence causes damage, the passage of time should be irrelevant. See Josephine H. Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 *Vand. L. Rev.* 627, 633-35 (1985); Patricia J. Maibaneck, Note, *The Utah Product Liability Limitation of Action: An Unfair Resolution of Competing Concerns*, 1979 *Utah L. Rev.* 149, 152.

⁵⁶ See, e.g., Ark. Code Ann. § 16-116-105(c) (using expiration of product's useful life as a factor in comparative negligence determination); Conn. Gen. Stat. Ann. § 52-577a(c) (providing useful life limitations period for plaintiffs not covered by workers compensation provisions); Minn. Stat. Ann. § 604.03 (expiration of useful life is defense to products liability action). See also Robert A. Van Kirk, Note, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, 1989 *Duke L.J.* 1689, 1691 n.13.

⁵⁷ Although it appears that this section is intended to preempt shorter state statutes of repose, this result is by no means certain. Such statutes are sometimes held to negate the existence of a cause of action, not merely the right to a remedy, as is the case with traditional statutes of limitations. Since the Bill does not create a cause of action against manufacturers independent of causes of action existing under state law, it could well be argued that it preempts only statutes of repose longer than 25 years. Moreover, it is unclear how Section 204(b) will work in jurisdictions that currently have a statute of repose applicable to more categories of products than this provision.

the injury at issue. Subject to our general concerns regarding the impact of this legislation on federalism principles, we support attempting to promote uniformity in this area.⁵⁸

Nonetheless, it is unclear why this federal "statute of repose" should be limited to capital goods causing injuries for which the plaintiff is entitled to receive worker's compensation benefits. If the theory is that a product which has been used for 25 years without causing injury is unlikely to be defective, and that it is unreasonable to expose the manufacturer to an indefinite liability "tail," that justification would seem to apply as equally to products used in the home as those used in the workplace.

Section 205: Workers' Compensation Subrogation Standards

General comments:

This section is intended to enhance the safety incentive of the worker's compensation system by reducing the ability of an employer to shift costs from the compensation system to the tort system for injuries caused by the employer or the plaintiff's co-workers. It is also designed to reduce unnecessary litigation by allocating responsibility for payment among potential defendants and employers. The proponents of this provision argue that a sensible, easily applied national rule is preferable to the current patchwork quilt of state provisions.

Section 205(a)(1):

Function of Subsection:

Section 205(a)(1) would allow an employer or its workers' compensation insurer to recover, via subrogation, from a manufacturer or product seller the sum of the amount paid as workers' compensation benefits and the present value of all future workers' compensation

⁵⁸ The various state statutes of repose have been subjected to constitutional challenges by plaintiffs arguing they violate due process or equal protection. However, our preliminary review of these cases indicates that no court has invalidated a state statute based on the Federal Constitution. See, e.g., Thornton v. Mono Manufacturing Co., 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981); Dague v. Piper Aircraft Corp., 513 F. Supp. 19 (N.D. Ind. 1980). Injured consumers, however, have been successful in attacking the constitutionality of statutes of repose under the "Open Court" clause found in many state constitutions. See, e.g., Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (1980). See Laurie L. Kratky, *Statutes of Repose in Products Liability: Death Before Conception?*, 37 Sw. L.J. 665 (1983); Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579 (1981); Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627 (1985). Given this litigation, before the Administration takes a position favoring this provision, it might be advisable to seek further guidance from the Office of Legal Counsel.

benefits in product liability actions filed pursuant to the Act. To assert this right, the employer or its workers' compensation insurer must provide written notice of its right of subrogation to the court in which the action is pending. The employer or insurer need not participate in the employee's product liability action.

Comments:

Under virtually all workers' compensation schemes, a compensation-paying employer, or its insurer, has a right of subrogation to recover the amount of workers' compensation benefits paid to an employee for injuries caused by the negligent or wrongful act of a third-party tortfeasor. Section 205(a)(1) would appear to effect little change in current law as it relates to the United States. The United States presently has a statutory right of subrogation under the Federal Employees Compensation Act ("FECA"). 5 U.S.C. § 8131. Similarly, employers subject to the Longshore and Harbor Workers Compensation Act ("LHWCA") possess subrogation rights against recoveries from third-party tortfeasors. 33 U.S.C. § 933(g) & (h). In addition, the United States acquires subrogation rights against recoveries by claimants against third-party tortfeasors when it pays compensation under the Special Injury Fund of the LHWCA, created under 33 U.S.C. § 944. *See* 33 U.S.C. § 933(g)(3). The exclusivity and subrogation provisions of the state workers' compensation statutes applying to private parties involve similar considerations.

Section 205(a)(2):

Function of subsection:

Section 205(a)(2) recognizes the right of an employer or its workers' compensation insurer to assert its right of subrogation over payments made by manufacturers or product sellers for judgments or settlements. The employer's written consent is required for any settlements into which the employee enters, but such consent is not required "if the employer or workers' compensation insurer is made whole for all benefits paid in workers' compensation benefits."

Comments:

This subsection reaffirms the general practice under workers' compensation schemes. Because of the employer's subrogation rights, the employer is entitled to reimbursement from any monies obtained by the claimant in a judgment or settlement with third-party tortfeasors. Approval of settlements by the employer or its insurer is required, unless the employer or insurer receives the full amount of past benefits. Unlike other portions of Section 205, subsection 205(a)(2) does not appear to require that the employer or its insurer receive, in addition to reimbursement for past payments, the present value of future benefits to which the claimant would be entitled, before the employer's or its insurer's right to approve settlements is extinguished.

This subsection does not appear to affect the United States because FECA expressly provides that the United States has the right to reimbursement of compensation paid and a credit for future compensation payments from judgments or settlements by federal-employee claimants obtained from third-party tortfeasors. 5 U.S.C. § 8132. Similarly, the LHWCA creates a lien upon settlement proceeds obtained from third-party tortfeasors to reimburse the special fund administered by the United States under 33 U.S.C. § 944. *See* 33 U.S.C. § 933(g).

Section 205(a)(3):

Function of Subsection:

Section 205(a)(3) establishes the procedures for manufacturers and product sellers to prove fault on the part of the claimant's employer or coemployees in order to reduce any damages payable to claimant by the amount of past compensation payments and the present value of future compensation payments and, correspondingly, to extinguish the subrogation rights of the employer or the employer's compensation insurer. If the manufacturer or product seller asserts that the claimant's harm was caused by the fault of the employer or a coemployee, the issue would be submitted to the trier of fact. The manufacturer or seller would be required to provide written notice to the employer of its intent to make this proof. The employer would have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses and to argue to the trier of fact. This issue would be the last issue submitted to the trier of fact. If the trier of fact found by clear and convincing evidence, *see* Section 3(2) of the Bill, that the cause of the claimant's harm was the fault of the claimant's employer or coemployees, then the court would reduce the damages awarded by the trier of fact against the manufacturer, and the subrogation lien, by the sum of the amount paid as worker's compensation benefits and the present value of future compensation payments. The manufacturer or seller would have no further right by way of contribution or otherwise against the employer. This section would not extinguish the subrogation rights of the employer or its insurer if the claimant's injuries were caused by an intentional tort committed by claimant's coemployees or by acts committed by coemployees outside the scope of normal work practices.

Comments:

This subsection radically restructures the relationship between compensation-paying employers, employees entitled to workers' compensation benefits for injuries caused by defective products in the course and scope of their employment, and third-party tortfeasors subject to liability for injuries to such employees. If a manufacturer or seller can prove, by clear and convincing evidence, that either the employer or its employees were at fault in causing or contributing the claimant's injuries, then the amount of the judgment would be reduced by the amount of all past compensation payments as well as the present value of all future compensation payments, and the employer or its insurer loses its right of subrogation. Because the reduction would appear to be mandatory if the employer or its employees are

deemed even one percent at fault, *see* Committee Report at 22, this provision has the potential to affect severely the rights of all compensation-paying employers, including the United States government, to recoup monies paid in compensation to employees injured by defective products in the workplace.

This measure has the potential to upset the balance upon which workers' compensation schemes are based without any significant savings in transaction costs or time. As noted in the Committee Report accompanying this legislation:

Workers' compensation statutes are designed to ensure that an employee injured in the course of his or her employment has a fast and inexpensive way to recover for his or her injury, regardless of who, if anyone, is at fault for causing the injury. The employer automatically pays workers' compensation benefits to an employee injured in the course of employment, without regard to fault. As originally conceived, workers' compensation is a tradeoff: While the employer is liable regardless of fault, the employer is immune from tort liability for the injury. Workers' compensation was, thus, intended to be the employee's exclusive remedy against the employer for work-related injuries. The purpose of the system is to provide swift and certain recovery for injured workers, while maximizing the incentives for employers to maintain a safe workplace.

Committee Report, at 51-52; *see* Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 193-94 (1983) (FECA adopts compromise commonly found in workers' compensation schemes). In addition to providing a guaranteed and speedy recovery, without regard to fault, workers' compensation schemes limit the employer's liability and losses. *See* United States v. Lorenzetti, 467 U.S. 167, 177 (1984) ("the purpose of [FECA] § 8132 is not simply to prevent double recoveries but to minimize the cost of the FECA program to the Federal Government); Benton v. United States, 960 F.2d 19, 22 (5th Cir. 1992) ("The government has a legitimate reason for maintaining a federal worker's compensation program in this manner"). The employer's ability to recover a portion of its compensation payments from third-party tortfeasors responsible for workplace injuries creates an important source of funds and further limits the employer's liability. In addition, the United States traditionally has had contractual arrangements with its private contractors whereby the government reimburses them for their net workers' compensation payments (*i.e.*, payments less subrogation).

In offering manufacturers and sellers of defective products the opportunity to reduce judgments by the amount of past compensation payments and the present value of all future compensation payments while, at the same time, extinguishing the employer's or its insurer's subrogation rights, the proposed legislation unduly favors manufacturers and sellers of

defective products at the expense of employers and their insurers. As to the Federal government, the Committee Report acknowledges that "the federal government's workers' compensation program, established under FECA, would, in some instances, be prohibited from seeking to recover FECA benefits paid to a government employee injured in a product-related workplace accident." Committee Report at 22. Although the Congressional Budget Office could not quantify the increases in budget authority and outlays that could be expected by this change, past experience, especially in asbestos litigation, suggests that this exposure could be substantial.⁵⁹

Moreover, the benefit offered by the legislation to employers in exchange for the potential loss of their subrogation rights would largely be illusory. Section 205 would bar actions for contribution or implied indemnity (also known as tort or noncontractual indemnity) by third-party tortfeasors against compensation-paying employers. See Sections 205(a)(3) and 205(b) of the Bill. This provision would not significantly aid employers, however, because, in the vast majority of jurisdictions, compensation-paying employers are not subject to liability for contribution or indemnity to third-party tortfeasors.⁶⁰ Only four states appear to permit any form of contribution against compensation-paying employers: Illinois and New York permit full contribution; Kentucky and Minnesota permit compensation only up to the amount of the employer's subrogation lien.⁶¹ None of those states require that the employer forfeit the entire amount of the subrogation lien, regardless of the degree of negligence. And although some states permit tort indemnity actions in theory, such recovery is not presently available in product liability cases, because the manufacturers'

⁵⁹ Although precise statistics are unavailable, we understand that, in FY 1993, the Department of Labor recouped, through subrogation, about \$3 million in cash and \$12 million in credits against future FECA benefits. Of this \$15 million, an extremely rough estimate is that a third to one half (approximately \$5 million to \$7.5 million) comes from asbestos and other product liability matters.

⁶⁰ This remains true for the United States, despite the Lockheed opinion. See Committee Report at 22. Although Lockheed held that FECA did not bar implied indemnity actions, it held that the United States' obligation to indemnify third-party tortfeasors must be determined with reference to the underlying state law. Lockheed, 460 U.S. at 197-98; see 28 U.S.C. § 2674 ("[t]he United States shall be liable [under the FTCA] in the same manner and to the same extent as a private individual under like circumstances . . ."). Since compensation-paying employers are not currently subject to actions for contribution or implied indemnity in the great majority of jurisdictions, Lockheed effected no significant increase in the United States' tort liability to third-party tortfeasors arising out of injuries to federal employees.

⁶¹ See Doyle v. Rhodes, 461 N.E.2d 382 (Ill. 1984); Dole v. Dow Chemical, 282 N.E. 2d 288 (N.Y. 1972); Burrell v. Electric Plant Board, 676 S.W.2d 231 (Ky. 1984); and Lambertson v. Cincinnati Corp., 257 N.W.2d 679 (Minn. 1977).

liability, if any, cannot be deemed "passive" or "secondary" -- a prerequisite to tort indemnity recovery.⁶²

Proponents of the Bill assert that reducing judgments by the amount of workers' compensation liens when the employer or one of its employees is deemed at fault would provide economic incentives for the employer to minimize workplace accidents and reduce transaction costs. Committee Report at 51. This proposition is debatable, at best. With respect to workplace safety, this issue seems more appropriately handled by an effectively administered occupational safety and health program. Nor will Section 205(a)(3) likely reduce transaction costs.⁶³ In fact, since compensation-paying employers will be forced to participate fully in the underlying litigation in order to defend and preserve their subrogation rights, it probably will increase the size and complexity of such litigation. In addition, the employer's or its insurer's participation in the litigation has the potential to further complicate and delay the proceedings. There has been some experimentation with reducing judgments against third-party tortfeasors in an amount equal to the employer's compensation payments, such as is proposed in the Bill. But those experiments have "set[] off a flood of confusion and litigation that continues to this day," thus leading a number of states to deliberately reject this approach. 2B A. Larson, **The Law of Workmen's Compensation** § 76.36, at 14-803 (1994). Moreover, the authors of the ALI Reporters' Study rejected a proposal similar to Section 205(a)(3) based on their concern that it would increase expense and create undue complexity. American Law Institute, Reporters' Study, **Enterprise Responsibility for Personal Injury**, Vol II, 189-91 (1991).

Section 205(a)(4):

Function of Subsection:

Section 205(a)(4) provides that if the trier of fact finds that the employer or coemployees are free of fault, the manufacturer or product seller shall reimburse the employer or its workers' compensation insurer for reasonable attorneys' fees and costs incurred in resolution of the subrogation claim.

⁶² See, e.g., White v. Johns-Manville Corp., 662 F.2d 243, 250 (4th Cir. 1981); In re All Asbestos Cases, 603 F. Supp. 599, 607-08 (D. Hawaii 1984).

⁶³ Although the Committee asserts (at 51) that the relationship between workers' compensation systems and the product liability systems created by current laws generate substantial and unnecessary legal costs, it fails to document these claims. In fact, the assertion of the employer's or its insurer's subrogation rights over judgments or settlements generally adds no significant expenses to product liability actions between the claimant and the third-party tortfeasor.

Comments:

This subsection would provide reimbursement to employers and their insurers for attorneys' fees and costs if the employer or its coemployees are found to be free of fault. It could also deter frivolous attempts to prove that the employer or coemployees were at fault. Given the ease with which a manufacturer or seller might demonstrate that an employer or its employees were at fault to some minor extent, however, this provision does not offer a significant benefit to employers or provide a meaningful deterrent to frequent attempts by manufacturers and sellers to implicate employers or their insurers. As noted, above, the proposal undercuts the entire "no fault" approach to swift workers' compensation payments.

Section 205(b)(1):

Function of Subsection:

Section 205(b)(1) bars third-party tortfeasors from bringing under this Act an action for contribution or implied indemnity (also known as noncontractual or tort indemnity) against the employer, any coemployee, or the exclusive representative of the person who was injured.

Comments:

This subsection is the *quid pro quo* for reducing judgments against manufacturers and sellers by the amount of the employer's or its insurer's compensation lien. As explained above, in connection with the comments to Section 205(a)(3), however, this subsection does not significantly benefit employers or their insurers, who are not subject to liability for contribution or implied indemnity under current law in the vast majority of jurisdictions.

Section 205(b)(2):

Function of Subsection:

Section 205(b)(2) states that the Bill would not alter state or federal laws establishing that workers' compensation benefits are the exclusive remedy by an individual entitled to receive compensation against an employer, the employer's workers' compensation insurer, co-employee, or the exclusive representative of the person injured.

Comments:

Section 205(b)(2) would simply clarify that, despite changes in the relationship vis-a-vis third-party tortfeasors, the legislation retains the bar to direct actions by injured employees against the employer.

Section 205(b)(3):

Function of Subsection:

Section 205(b)(3) states that the Bill would not affect state or federal workers' compensation laws permitting an action against an employer or the employer's workers' compensation insurer when the injuries were allegedly intentionally inflicted.

Comments:

Several states recognize an exception to workers' compensation exclusivity provisions when the claimant alleges that the injury was intentionally inflicted. See generally 2A A. Larson, Law of Workmen's Compensation § 68.00, at 13-1 (1993). This provision would not affect the United States, however, because the courts have uniformly held that FECA constitutes a federal employee's exclusive remedy for both negligent and intentional torts. See Green v. Hill, 954 F.2d 694, 697, *modified*, 968 F.2d 1098 (11th Cir. 1992) (per curiam); Heilman v. United States, 731 F.2d 1104, 1111 n.6 (3d Cir. 1984); see also Sharp v. Elkins, 616 F. Supp. 1561 (W.D.La. 1985) (same rule under LHWCA). We caution, however, that litigants might seize on this language to assert Congressional support for an intentional tort exception under FECA and the LHWCA.

Section 205(c):

Function of Subsection:

Claimants who are entitled to receive workers' compensation benefits may stay the product liability action until the full amount of workers' compensation benefits has been finally determined under the applicable workers' compensation law. If the claimant elects not to stay the action until this final determination has been made, the court would determine the amount of compensation benefits that has been or would be payable. "The verdict as determined by the trier of fact pursuant to this title shall have no binding effect on and shall not be used as evidence in any other proceeding."

Comments:

Claimants in actions brought under the Bill could, at their sole election, request that the court stay the action pending a determination by the appropriate workers' compensation authority of the full amount of benefits to which the claimant is or would be entitled. If the claimant elects not to stay the proceedings, the court would be authorized to calculate the amount of benefits. The court's finding on this issue would not be binding on and could not be used as evidence in any other proceeding.

Section 205(d):

Function of Subsection:

A claimant would be required to provide written notice of the filing of the civil action under this Act to the claimant's employer within thirty days of the filing.

Comment:

Notice of the action would be necessary to give employers or their compensation insurers the opportunity to assert a right to subrogation under Section 205(a)(1) and (2) and to provide the employers or their insurers reasonable notice and an opportunity to participate when a manufacturer or seller seeks to establish the fault of the employer or its employees for purposes of reducing a judgment by the amount of the past and future workers' compensation benefits, under Section 204(a)(3).

Section 206: Several Liability for Noneconomic Loss

Function of section:

Section 206 provides that the liability of each defendant in a product liability action for noneconomic damages shall be several only and not joint and several. Noneconomic damages, as defined for this purpose, are subjective, non-monetary losses, including pain and suffering awards. Under this section, each defendant would be liable only for the portion of noneconomic damages allocated to it in accordance with its proportionate share of responsibility.

Comments:

This section repudiates a fundamental tenet of the common law of tort -- that joint tortfeasors are equally responsible for the harm that befalls an injured party. The concept of joint and several liability hinges, at least in part, on the theory that so long as a tortfeasor's conduct is found to have been a proximate cause of an indivisible harm, the tortfeasor should be responsible to make full compensation. From an economic perspective, the underlying policy for this rule is to ensure the full compensation of an injured party. By allowing an injured party to collect the judgment fully from a single tortfeasor, this rule places the risk of one joint tortfeasor becoming insolvent upon the other tortfeasors rather than the claimant. See Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141, 1146, 1152-53 (1988).

Within the framework of modern tort law, the doctrine of joint and several liability can lead to results that would appear to be patently unjust. For example, in an oft-cited case, Walt Disney World Co. v. Wood, 489 So.2d 61 (Fla. App. 4th Dist. 1986), Walt Dis-

ney World was found to be only one percent at fault for a mishap on its Grand Prix Raceway. Yet, under the doctrine of joint and several liability, a judgment was entered against Walt Disney World for 86 percent of the damage, including the 85 percent thereof that the jury had attributed to the fault of the plaintiff's fiance (who had limited resources). Full joint and several liability has also allegedly resulted in companies refusing to supply raw material to product manufacturers (including manufacturers of medical devices) because of the potential for unlimited liability if the end product is found to have caused injury.

Hearings, supra note 14 (statement of Victor E. Schwartz). Pointing to such examples, proponents of the abolition of joint and several liability argue that "the extent of fault should govern the extent of liability." See Gregory C. Sisk, *The Constitutional Validity of the Modification of Joint and Several Liability in the Washington Tort Reform Act of 1986*, 13 U. Puget Sound L. Rev. 433, 488 (1990).

The pros and cons of eliminating joint and several liability have been hotly debated, with at least thirty-three states having weighed in on the side of either abolishing or substantially limiting the common law doctrine. See Senator Larry Pressler & Kevin V. Schieffer, *Joint and Several Liability: A Case for Reform*, 64 Denver U.L. Rev. 651, 656-57 (1988). Section 206 of the Bill would attempt to deal with only one piece of this puzzle - that relating to noneconomic damages. At first blush, this provision might be viewed as a moderate proposal. For example, it would, subject to state laws, continue to allow co-defendants to be jointly and severally liable for economic damages. The diverse treatment of economic and noneconomic harm might arguably give both plaintiffs and defendants what they want most. The plaintiff will be assured the recovery of actual costs, while the defendant will be protected from joint liability for the most volatile and unpredictable component of a personal injury award -- noneconomic damages for pain and suffering, mental distress, fear of future illness, and the like.

Yet, even assuming *arguendo* that one agrees with the policy balance struck by this provision, its wording raises serious problems and ambiguities. For example, unlike many similar state statutes, the provision does not address how to determine the percentage of responsibility of potential defendants not before the court. Indeed, the Committee Report seems to suggest that parties that were never before the court would not be included in this calculation, as it states that responsibility "should be apportioned for the purposes of this section among all persons who are parties to the action at the conclusion of the trial and persons who were parties to the action and have entered into settlement agreements with the claimant." Committee Report at 56. Thus, neither the Bill nor its current legislative history indicates whether responsibility may be allocated to persons who either were never parties to the action or who have ceased to be parties because of factors other than settlement, such as bankruptcy or insolvency. Section 206 also does not specify which party has the burden of proving the relative responsibilities of each defendant, and, to the extent relevant, potential defendant. This is not an oversight. The Committee Report notes that the provision "does not specify who has the burden of proof as to apportionment of noneconomic loss." Committee Report at 55. And both the Bill and the Committee Report are silent on the question of how "responsibility" for the injury should be defined. It is unclear whether this

decision would be based upon the culpability of the various defendants and potential defendants, or whether it is to be based upon the strength of the causal connection between the defendant's conduct and the plaintiff's injury.⁶⁴

Because the drafters of Sections 206 have left these important questions unanswered, it is very difficult to assess how this section will operate in a given state.⁶⁵ Complicating this assessment further are questions involving the interaction of Section 206 with existing state laws. The Committee Report, at 56, indicates that this section would not preempt more restrictive state laws that abolish or limit the doctrine of joint and several liability with respect to economic damages. It simply states that "courts should apply existing law with regard to the effect to [sic] on the judgment and the settlor," but fails to address the complexities of this task.

Forty-six states have adopted some form of comparative fault that allocates responsibility for damages among plaintiffs and defendants. In the last few years, the law of joint and several liability has been abolished or modified in at least 37 of these states. See Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 *Tenn. L. Rev.* 199, 304 (1990). Many jurisdictions have recognized that joint and several liability is inconsistent with a comparative fault system and essentially have eliminated joint and several liability entirely. Other jurisdictions have abolished joint and several liability in all cases except those in which the plaintiff is found not to be at fault. Still other jurisdictions have abolished joint and several liability for a defendant whose fault is below a certain threshold. Others have formulated schemes modeled after the Uniform Comparative Fault Act, which retains joint and several liability in the first instance, but reallocates uncollectible damages among all parties at fault, including the plaintiff.⁶⁶ Some jurisdictions have enacted schemes distinguishing between economic and non-economic loss or making similar distinctions. See Deborah Alley Smith & Rhonda K. Pitts, *Comparative*

⁶⁴ Notably, although Section 206(a) is nearly identical to a California provision, Cal. Civ. Code Ann. § 1431.2(a), it provides that each defendant's liability for noneconomic damages shall be based upon its "percentage of responsibility," whereas the California statute bases its determination upon each defendant's "percentage of fault." The Committee Report does not explain the reasons for this difference in language.

⁶⁵ For a discussion as to how such interpretation questions have affected the implementation of a statute eliminating joint and several liability in a single state, see Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 *U. Puget Sound L. Rev.* 1 (1992).

⁶⁶ This is essentially the approach taken by the American Law Institute, which has recommended that the damages attributable to an insolvent defendant be reapportioned to each party's share of the responsibility for the injury. American Law Institute, Reporters' Study, *Enterprise Responsibility for Personal Injury -- Reporters' Study* Vo. 11, 147 (1991).

Fault: A Primer, 54 Ala. Law. 56 (1993). Section 206 would produce markedly different results in each of these states -- in some, having no impact at all; in others, changing dramatically the assumptions upon which those states chose to eliminate contributory negligence in favor of comparative negligence.

Section 206 would also complicate settlement negotiations in multi-defendant cases due to differences in state rules concerning the contribution rights of non-settling defendants.⁶⁷ In the states that retain the 1939 version of the Uniform Contribution Among Tortfeasors Act (UCATA), a settlement with less than all defendants will automatically reduce the judgment against any remaining defendants by the amount of the settlement. However, a settling defendant is protected from a claim for contribution only if the plaintiff agrees that any judgment against non-settling defendants is to be reduced by the "pro-rata share" of the settling defendant. *See, e.g.*, Md. Ann. Code art. 50 § 20. In the states that have adopted the 1955 version of the UCATA, a settlement with one or more defendants simply reduces the judgment against non-settling defendants by the amount paid by the settling parties, and automatically protects the settling parties from liability for contribution. Since, under the Bill, liability for noneconomic damages would no longer be a joint liability, settlements should not affect the liability of non-settling defendants for noneconomic damages. However, the Bill does not make this clear. Moreover, because a settling defendant will presumably have settled its liability for both economic and noneconomic damages, it is unclear how much of any settlement would be applied to reduce the plaintiff's recovery for economic damages from the non-settling defendants.⁶⁸

In sum, Section 206 would not achieve national uniformity with respect to the question of joint and several liability in product liability cases. Rather, it would interject an isolated liability principle into existing state product liability regimes without any indication

⁶⁷ Eight states have adopted, and continue to retain, the 1939 version of the UCATA, while an additional eleven states have adopted the 1955 version of the UCATA. Many of these states, moreover, have adopted amendments to whichever version of the act has been adopted. There are also other statutory approaches to the question of contribution among tortfeasors in effect in some states, while contribution has been adopted as a matter of common law in others. Uniform Laws Annotated, Uniform Contribution Among Tortfeasors Act, Prefatory Note (1955 Revision), 1975 Main Volume.

⁶⁸ It clearly would be unfair to allocate the entire amount of any settlement to the reduction of the claim for economic damages against the non-settling defendants. Moreover, it would not be fair to make any purported allocation in the settlement agreement controlling upon the non-settling parties, because, at least if a settlement did not reduce the claim for noneconomic damages against the non-settling defendants, it would always be in the best interest of the plaintiff to allocate as much of the settlement as possible to noneconomic damages, while the settling defendant who is protected from claims for contribution would be indifferent to how the settlement was allocated.

as to how that principle would be construed by the courts and would interact with other state laws.

Section 207: Defenses Involving Intoxicating Alcohol or Drugs

Function of section:

Section 207(a) provides that in a civil action subject to the Bill in which all defendants are manufacturers or product sellers, such defendants may assert as a complete defense that the claimant was under the influence of intoxicating alcohol or any drug and that such condition was more than 50 percent responsible for the accident or event that resulted in such claimant's harm.

Section 207(b) provides that where some, but not all, of the defendants are manufacturers or product sellers, and the trier of fact determines that no liability exists against those defendants who are not manufacturers or product sellers, the court shall enter a judgment notwithstanding the verdict in favor of any defendant manufacturer or product seller, if it is proved that the claimant's intoxicated condition was more than 50 percent responsible for the accident or event which resulted in the claimant's harm. Thus, if a manufacturer or product seller were barred from invoking Section 207(a) because of the presence of co-defendants who were not manufacturers or product sellers, and those co-defendants were found to be not liable, the manufacturer or product seller could still be released from liability pursuant to this provision.

Section 207(c) provides that the determination of whether a person is intoxicated or under the influence of alcohol or drugs shall be made pursuant to applicable state law.

Section 207(d) defines the term "drug" as any non-over-the-counter drug which has not been prescribed by a physician for use by the claimant.

Comments:

This provision appears to be patterned after Section 5.40.060 in the Washington State Revised Code.⁶⁹ Although there is obvious merit in discouraging persons from consuming alcohol or illicit drugs while using potentially dangerous products, the Bill would appear to permit a manufacturer to escape all liability even if a defective product causes grievous injury in a minor accident that otherwise should have produced no injury at all. For example, the Bill could be read to immunize an auto manufacturer whose product explodes in a "fender bender," provided the manufacturer is fortunate enough to have the driver of the exploding vehicle be chemically impaired. A more appropriate provision might preclude a

⁶⁹ The Washington statute was enacted in 1986 and amended in 1987. It does not appear that a similar statute has been enacted in any other state.

plaintiff from recovering if his or her alcohol or drug abuse was more than 50 percent responsible for the injuries incurred (rather than for the accident in which the injuries were sustained). This would permit the finder of fact to award damages where the plaintiff's conduct is the primary cause of the accident, but where the accident would have resulted in little if any injury absent the product defect. In fact, the Washington State statute is drafted in this manner. *See* Wash. Rev. Code Ann. § 5.40.060 (recovery barred where "such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault.") Even such a provision, however, would run counter to the doctrine of pure comparative negligence, which is the law in many states.

Moreover, the theoretical basis of this provision is problematic. If a plaintiff, for example, attempts to use a lawn mower to trim his hedge, and thereby causes an injury for which a jury finds that he is primarily at fault, it is not clear why a manufacturer should be immune if the cause of the plaintiff's action was intoxication, but liable if it was simply a matter of extreme irresponsibility. One must question whether it makes sense to have a plaintiff's use of alcohol or drugs constitute a complete defense, while other reckless and even criminal behavior does not constitute even a partial defense in states that do not allow contributory or comparative negligence to be a defense to a strict liability claim. There are in fact strong public policy arguments for reducing a plaintiff's recovery for any negligence on the part of the plaintiff, as is recognized by Council Draft No. 1 of the proposed **Restatement (Third) of Torts: Products Liability § 106**.

The Committee Report makes clear that this provision does not preempt more restrictive state laws, such as a contributory negligence standard barring a plaintiff from recovery even if his responsibility for the injury is less than 50 percent. The section thus does not achieve national uniformity even in the sphere within which it operates. In addition, this provision could pose significant problems in preparing jury instructions in jurisdictions which use pure comparative fault to determine the effect of other types of plaintiff negligence. In such a jurisdiction, the jury would presumably be required to determine: (i) the percentage of fault of the defendants; (ii) the percentage of fault of the plaintiff arising from factors other than being intoxicated or under the influence of alcohol or drugs; and (iii) the percentage of fault of the plaintiff arising from being intoxicated or under the influence of alcohol or drugs. The jurors would then need to be instructed to return a defense verdict if the third factor were more than 50 percent. It would also be instructed to add factors two and three and reduce the plaintiff's damages by the resulting percentage if the fault attributable to intoxication is less than 50 percent, even if the plaintiff's overall fault (the combination of factors two and three) totals more than 50 percent. While such calculations are certainly possible, they will significantly complicate the task of juries.