MINUTES OF THE House COMMITTEE ON Judiciary

Held in Room 532, at the Statehouse at 3:30 ~~a.m.~~/p.m., on February 6, 19 78.

All members were present except: Representatives Frey, Gillmore and Hoagland, who were excused.

The next meeting of the Committee will be held at 3:30 ~~a.m.~~/p.m., on February 7, 19 78.

These minutes of the meeting held on _____, 19____ were considered, corrected and approved.

Chairman

The conferees appearing before the Committee were:

Rep. Laird
Mr. Jack Schwartz, KACI
Mr. Larry Sanford, Hesston Corporation
Mr. Richard C. Hite
Mr. Jim Wallace
Mr. Bud Cornish
Mr. Dick Corwin
Mr. Dick Batchelor

The meeting was called to order by the Chairman, who called attention to the packet of product liability bills which are scheduled. He noted that the Senate also has a number of bills dealing with the same subject, and that the Senate Judiciary Committee had been invited to attend the meeting in the hope they might be able to avoid duplicate hearings. He asked conferees to the extent possible, to limit remarks so all conferees might have a chance to be heard.

Rep. Laird appeared and stated that he and Rep. Whitaker had introduced twelve bills, hoping that by dividing the subjects it might be easier to deal with the situation, than in one major bill. Especially, he expressed interest in the bill dealing with the statute of limitations.

Mr. Jack Schwartz of KACI, introduced Larry Sanford, who testified that while the subject is not new to the committee nor to the legislature, the format is somewhat different. He stated that since the committee had last heard the subject, the problems have become greater than ever, and a solution is no closer. He suggested that if the committee wishes to hear additional manufacturers concerning their problems, they will be glad to have them appear. Mr. Sanford offered a printed statement. (See exhibit.)

Mr. Richard C. Hite, representating Kansas Wholesalers and Distributors, of Wichita, testified that his firm is engaged in the sale of materials from surgical supplies to farm implements; that he is representing approximately 4,233 small businesses in

this category. He pointed out that a distributor functions quite differently from the manufacturer, but they are still liable for many of the same things. He pointed out that the distributor has nothing to do with the production or inspection of products, and most often sell the items in the same packing box in which it is received, and there should be some consideration given to this. He testified that the number of suits has increased, and so have premiums for insurance which are sometimes prohibitive. He especially asked that the committee consider making liability for wholesalers and retailers proportionate to their responsibility. He also suggested the committee consider an amendment to HB 2896, Section 1 (a), line 23. He stated he would like to see the words "if the defect were latent" deleted. He also urged the enactment of a reasonable statute of limitations.

In HB 2903, Mr. Hite urged the committee to consider an amendment on page 2, Section 2 (a), line 61 by inserting after the word "upon" the words "negligence or". He stated he felt this would provide the wholesaler and retailer a defense. He stated he had read all of the bills and felt they would provide help, but he did oppose HB 2902.

Mr. Bill Bush, past President of KACI, stated there had been a great deal of discussion the past three sessions of the legislature, about the cost of insurance and its availability or lack thereof. He urged some criteria be established for the misuse of a product, that a measure for the useful life of a product be established, and consider changing the statute of limitations. He stated he felt such legislation would ultimately reduce the cost of insurance.

Mr. Jim Wallace, representing the Kansas Independent Insurance Agents, testified that the role of the agent in the problems of product liability is rather tenuous. He stated that as suits increase, premiums go up and in an effort to keep things somewhat reasonable, the limits and coverage go down, and deductibles go up. He stated they deplore the fact the agent is necessarily becoming less responsive to the client. He noted that some small manufacturers who cannot afford such premiums have opted to carry no insurance, and if there is a lawsuit, the consumer has no recourse. He also pointed out there is no way a manufacturer who is covered by insurance can compete with one who does not carry insurance. He further pointed out that products problems do not lend themselves to self insurance.

Mr. Bud Cornish testified that insurance recognize that there is an affordability and availability problem, which concerns the insurance industry as well as the manufacturer. He recognized that premium rates are based on experience, and noted that a request had been made to comment on the possible impact of proposed legislation on premiums. He stated that it would be only common sense to realize there would be a favorable impact, but it is impossible to supply concrete statistics because records in the past have not been adequate to develop such information. He stated he could not predict whether or not the proposals would affect availability.

Mr. Dick Corwin, Gilmore/Tatge Manufacturing Company of Clay Center, testified this his company is relatively small, with 300 employees. He related his experience insofar as insurance coverage is concerned, by stating that from April 1, 1974 to April 1, 1975, the insurance premium was $1,500.00, the following year, $7,600.00, the next year $54,000.00 and last year $488,000.00. He stated that they manufacture a line of farm equipment.

The Chairman inquired if the company had any claims pending, or if any claims had been made against them. Mr. Corwin stated they had one claim for $180,000, but had not allowed the insurance company to settle it because it was for a part purchased from another company and installed on their equipment.

The Chairman inquired if Mr. Corwin was aware of a disproportionate increase in the number and sizes of claims in the industry in Kansas or nationwide. Mr. Corwin stated they belong to a number of associations; that they are indeed aware of such a trend and will supply further information by mail.

Rep. Stites inquired why they are not self insured and Mr. Corwin explained they cannot deduct self-finsurance costs which is quite a tax disadvantage, but that they are investigating the possibility of a captive insurance company.

With regard to HB 2896, Rep. Martin inquired under Section 1 (a), where it speaks about the seller who has no knowledge of a defect, what would happen if they go ahead and sell before the defect is cured. Mr. Sanford explained that the proposal contemplates notice, and if a lawsuit were filed there would probably be notice, and that if he had notice he should not be protected.

The Chairman inquired if there would be objection to an amendment dealing with problems with foreign products where the only individual in the United States is the wholesaler or retailer who had nothing to do with the manufacture or even packaging. Mr. Sanford stated he would have no objection personally, but there would be technical problems in the drafting because there are some U. S. standards for import.

Rep. Heinemann observed legislation was passed last year to provide statistical information, and the Chairman explained there had been a problem concerning that and it will be addressed next week when the committee considers SB 811. Mr. Cornish stated the companies are "cranking up" to provide the requested information, but it is imparative that SB 811 be passed to give them some additional time.

Rep. Martin noted that a lot has been said about rate base, and inquired if there had been any change in this regard. Mr. Cornish stated that Homer Cowan would be addressing that matter later in the week.

Rep. Roth inquired if Mr. Wallace if SB 408, which was recently passed, would have an impact on product liability. Mr. Wallace stated they had requested the bill which gives a broker access to the total market, because there are some companies which want to write only certain things. He explained there are not many companies wanting to write product liability.

Rep. Baker stated that last year he believed Mr. Cowan testified there would be no change in the rates, and yet later on in Missouri he testified that rates would go down. He inquired what the true facts may be. Mr. Cornish stated that nobody has an absolute handle regarding what might happen to the rates, but he feels it is obvious there there would be some favorable effect. He stated that Mr. Cowan could address this later in the week.

Mr. Dick Batchelor, representing an Emporia manufacturer of graphic arts equipment, testified that about 90% of their product goes outside the United States, and that this legislation is critical for them. He stated their insurance problem is similar to what has previously been mentioned.

The Chairman thanked conferees and announced that opponents to the proposals would be heard on February 9th.

Rep. Baker reported on House Bills 2877 and 2851, noting that the bills are exactly identical. He noted two amendments are needed regarding appeals to the Appellate Court. He suggested the amendments be made and a committee bill introduced. He then moved that this be done. Motion was seconded by Rep. Heinemann, and upon vote, carried.

The Chairman noted from time to time various House members have asked the committee to introduce bills "by request" and that he has a proposal so requested, which defines "open saloon". It was moved by Rep. Hayes and seconded by Rep. Hurley that the proposal be introduced as a committee bill and referred back to committee. Motion carried by a majority vote.

The meeting was adjourned.

Proponents

Judiciary

Feb 6, 1978

Name	Address	Organization
Walter Erickson	638-W. 39th St. K.C.	Western Retail Imp. & Hdw. assoc.
Bill Busch	PO Box 2066 Wichita	self
Jim Walton	917 Topeka, Topeka	[illegible]
Robert Tomlinson	5412 Lowell Overland Park, KS	
Tom [illegible]	5205 [illegible]	KS WHOLESALERS PRODUCT LIABILITY [illegible]
R.C. Hite	638 200 W Douglas Wichita	
Larry Stanford	1208 W 9th Newton Ks	[illegible] Corporation
[illegible]	500 1st Natl [illegible], Topeka	KACI
Dick Batchellor	1709 Coronado Ave, Emporia 66801	Odle-Glaser, Inc.
Herb [illegible]	P.O. 1382	Western Ks [illegible]
Dean Carrica	P.O. 525, Clay Center, Ks	Gilmore/Tatge Mfg Co.
Richard Mackey	500 1st Natl Tower, Topeka	KACI
[illegible]	409 [illegible], Marysville, Ks	Landoll Corp.
Eugene W. Hentz	1210 Otoe, Marysville, Ks.	Hentz Agency, Inc
Don Landoll	1700 May St. Marysville Ks	Landoll Corp.
Sam Foster	1709 Sage Topeka	Martin Tractor
Myron L. [illegible]	2432 Kentucky	Martin Tractor
Dale L. Bonebrake	2533 Sunset Rd	Martin Tractor
Gerry Pichon	2708 Burlingame Topeka	Kansas Trial Lawyers
LYNN R. JOHNSON	126 LAKESHORE W., K.C. KAN	K.T.L.A.
Kathleen Gilligan Sebelius	Topeka	KTLA
Bob Hertzog	Topeka	KTLA
Ken Klein	P.O. Box 1037, Topeka	KBA
Dudley Smith	520 1st Natl Bank Tower, Topeka	Kan Bar Assn

2-6-78

TESTIMONY OF

LARRY E. SANFORD

STAFF ATTORNEY

HESSTON CORPORATION

HESSTON, KANSAS

On behalf of

KANSAS ASSOCIATION OF COMMERCE AND INDUSTRY

-and-

HESSTON CORPORATION

Presented to

HOUSE JUDICIARY COMMITTEE OF THE
KANSAS LEGISLATURE

Feburary 6, 1978

Mr. Chairman, Members of the Committee, my name is Larry Sanford, I am an attorney for Hesston Corporation. I am also the Chairman of a Special Task Force established by the Kansas Association of Commerce and Industry to work in the area of Products Liability.

The subject of Products Liability legislation is not a new one to this Committee, nor the Legislature. Numerous hearings have been held. A substantial number of people have described the problems that are being encountered and a number of legislative proposals have been made. However, the net result of all of this is that no legislation has been passed, the problem appears worse than ever, and a solution appears no closer than it has in the past.

Initially, KACI and the manufacturers and sellers in this state presented considerable testimony to the Legislature about the problems that exist, including the perceived unfairness of the system as it now operates and the rapidly escalating insurance rates resulting from it. There have been assurances from various legislators that there was concern about the problem and that something would be done. As a result of these assurances, it was decided there was general acceptance of the fact a problem existed and that further individual testimony about the effects of the problem was unnecessary. Perhaps this was an erroneous decision. If so, I would request additional hearing dates be set as KACI would be more than willing to make arrangements for a number of Kansas businesses to appear and describe the problems that have been encountered. This decision is up to the Committee.

SPECIFIC NEEDS

Over the legislative history of the various Products Liability proposals, a number of concepts have been added and removed. Everyone realizes that there isn't any total solution and that not everything that has been proposed has to be passed in order for the resulting legislation to be effective. On the other hand, there are certain key elements in the various proposals that are very badly needed. For this reason, I am going to spend the major part of my time today on these particular items.

a. Statute of Limitations.

For most manufacturers the time between the date of manufacture of their product and the time of any injury that might occur is relatively short and they, therefore, wouldn't be affected by the eight (8) year Statute of Limitation being proposed. However, for some manufacturers, particularly those building industrial equipment, this statute of limitations is extremely important as their machines may be used for fifty (50) years or more and the risk of injury exists continuously. The existing system provides a kind of reverse incentive that rewards those who are new in a business or who build a machine that lasts only a short time and operates to the detriment of those who build equipment of great durability or who have been in the industry for a long time.

It is important to remember that the Statue of Limitations proposed does not apply to all products liability actions but only to those brought under Strict Liability theories.

b. Comparative Fault

A serious problem in Kansas and in a number of other states, particularly those having adopted Section 402A of the Restatement of Torts or some other variation of Strict Liability has been that this theory normally results in a 100%, or nothing, kind of recovery. In other words, if the plaintiff establishes a basis for recovery in Strict Liability, then the recovery is 100% even though the plaintiff's acts, or the acts of some third party, may have been significantly responsible for the injury. This problem has been particularly prevalent in situations involving industrial accidents where recovery has frequently been allowed against a manufacturer of some piece of plant equipment when most of the responsibility for the accident is properly attributable to the injured person or his employer. As an added element of unfairness, the employer's insurance carrier is normally able to recover under subrogation rights any workmens compensation benefits paid. This benefits an employer who was mostly responsible for an accident

to the detriment of the person who built the equipment involved. House Bill No. 2816, which would adopt the Uniform Comparative Fault Act eliminates many existing inequities and should be passed. It does need to have added to it a provision covering the workmens compensation problem just described. The addition of such a provision is discussed and recommended in a law review article, University of Michigan Law Review, Vol. 10, Number 2, Winter 1977, written by John W. Wade, who was the chairman of the committee that drafted the Uniform Act, as well as the principal draftsman. It is his recommendation that the employer's fault, if any, be added to the employee's and recovery reduced accordingly. This would seem to be a workable solution.

c. Legislative Definition of Strict Liability and Available Defenses.

At the current time there is much uncertainty about how Strict Liability in Tort is to be applied and how a product is to be judged. This uncertainty has to have had a significant effect in increasing the number of cases filed. To quote from the summary of the Final Report of the Federal Interagency Task Force on Product Liability, ". . . some appellate courts do not view product liability law as a means of apportioning responsibility between parties, but as a compensation

system. Some decisions from these courts come very close to holding that the tort-litigation system should provide a recovery when persons are injured by products." Also from the same document, "It is almost impossible to predict when courts will change product liability rules and broaden the exposure of insureds. The instability in product liability law appears to have increased defense and investigation costs."

There is great fear on the part of insureds and insurors that the direction in which we are moving is toward absolute liability. Much of this fear could be alleviated by legislation defining Strict Liability in Tort and confirming that in all products liability cases, such defenses as ones showing the product has been altered, that personal safety or an adequate warning was disregarded, or that the product meets appropriate standards, will continue to be valid and will operate to prevent or reduce recovery.

d. Subsequent Change by a Manufacturer

Quite frequently during the years a product is manufactured, it is reviewed and modified to improve its function or reliability, or to reduce the cost to manufacture it. This process of design review can also lead to modifications that improve the safety of the product. Products are also modified as the

result of reports which have been received concerning a particular accident or an identified hazard. Under current law, there is frequently much concern about the effect such modifications may have should an accident occur involving a machine of the preceding design. In some instances the accident has already happened and the concern is about how a particular claim may be affected. In either event, the decision as to whether to make a safety modification should not be affected by a fear of increased exposure. If it is, the almost certain result is that all of us are going to be exposed to unnecessary product hazards. There is no doubt that in some cases a statute prohibiting evidence of such modifications may make the plaintiff's burden of proof more difficult, but this effect is far outweighed by the public interest served by reducing or eliminating future accidents.

e. Limits on Liability of Retailers and Distributors

Current Kansas law makes <u>every</u> commercial seller of a product liable for damages resulting from a defect in the product which renders the product unreasonably dangerous. From a practical standpoint, this may not seem like a serious problem because the retailer or distributor can usually look to the manufacturer to pay any judgment that results. However, it doesn't always work that way, and even when it

does, substantial legal fees may still be incurred. Judging from the number of inquiries I receive about products liability costs and problems from agricultural and industrial equipment dealers, many retailers are having problems maintaining products liability coverage, and, for many of them, just the defense costs of one major products case could be a fatal blow. Removing them from liability under Strict Liability in Tort, as has been proposed, should have an immediate effect in reducing their insurance costs. Particularly in view of the fact that most Kansas retailers are going to be subject to suit only in Kansas.

Other Proposals

Other proposals have been made and are still pending, which relate to increasing the amount of evidence admissible concerning the plaintiff's personal and financial circumstances (collateral source rule), providing for installment judgments, prohibiting loan agreements, and raising the burden of proof in punative damages cases. These are important items and should be properly considered by the Committee. However, they relate more to specific problems and abuses and their overall effect would not be as great. Recognizing the time problems that exist during the legislative session, it would perhaps be better to treat the other proposals as first priority and then spend any remaining time on these.

Conclusion

The remaining question is where this matter goes from here. It appears the first step is for the Committee to recognize a problem exists, and then to decide what to do about it. Up to this point in time, there have been too many proposals made, and too much time spent looking at the technical aspects of those proposals, without there ever having been any real commitment to do anything about the problem. Any effective solution is going to have to do one or more of the following:

1. Reduce the number of cases filed.
2. Reduce the amount of recovery in some cases.
3. Apportion damages among involved parties in accordance with their respective dgree of fault.
4. Demonstrate a commitment to a fair and predictable tort system that will not be changed without due deliberation and notice.

If this Committee is unwilling to consider and recommend solutions that do these things, then nothing is going to be accomplished. Hopefully, this is not the case.

Respectfully submitted,

Larry E. Sanford

2-6-78

REPORT OF THE SELECT COMMITTEE ON PRODUCT LIABILITY

INTRODUCTION

The problem of product liability is one of the more complex and serious problems facing businessmen and consumers today, not only in Missouri, but in the nation. In an effort to deal with this problem, the Missouri Senate, on June 15, 1977, adopted Senate Resolution No. 293 establishing a Select Committee on Product Liability. The Committee, created in part because "the cost of product liability insurance . . . has become an intolerable burden on consumers and small businessmen in the State of Missouri," was charged to identify the nature of the problem, determine its causes, consider proposed solutions and "prepare a report together with its recommendations for any legislation it deems appropriate for submission to the Second Regular Session of the Seventy-ninth General Assembly."

The Committee pursued three primary methods of gathering information: 1) Holding a series of public hearings in various parts of the state; 2) Obtaining and reviewing materials - including reports, articles, and surveys - being compiled by others studying this problem; and 3) Conducting its own surveys to compare with and supplement those done by others, and to obtain data not otherwise available.

THE HEARINGS

The Committee held hearings in St. Louis, Kansas City, Springfield, Cape Girardeau and Jefferson City. Witnesses included businessmen, consumers and lawyers from the plaintiff's bar, the defendant's bar and from judicial administration. There was somewhat reluctant participation by the insurance industry. Representatives from the Missouri Department of Consumer Affairs, Regulation and Licensing and the Division of Insurance appeared in the interest of both industry and consumers. In all, the Committee heard testimony from over seventy witnesses, representing a broad cross section of Missouri's citizens.

Soaring Product Liability Premiums

The most clearly demonstrable fact to emerge from these hearings was that premiums for product liability insurance have soared in recent years. Businessman after businessman presented figures to substantiate this fact.

Our company's liability premiums have increased more than 1,000 percent in three years — $69,000 in 1974 to $742,000 this year. We have had only moderate growth in business activity in that period. In addition, and this hurts even more, we now have, for the first time, a $100,000 deductible in our policy.

William Schlerholz, President
Chemtech Industries
July 28, 1977 - St. Louis

Our concern regarding product liability is the increased cost that it represents to us as a manufacturer. In our specific case, we were buying $5,350,000 worth of protection for a premium of $2,807 back in 1975. In 1976, this rose to $11,000 per year and in our current fiscal year our premium is $18,000 . . . . . In addition to the premium having gone up 541 percent in the last three years, our protection has gone down from $5,350,000 to $3,500,000, at our own choice in order to keep the premium down. So when you look at it that way our cost has gone up ten times for each dollar of protection.

Rolf Albers, Vice-president
Brasch Manufacturing
July 28, 1977 - St. Louis

In . . . 1976 . . . and for five years prior to that we carried . . . a rate . . . of approximately $3,000 for our product liability coverage. [Our insurance company] notified us of cancellation of that product liability coverage, and we attempted to seek a carrier . . . . We could not find a standard carrier that would even quote us and had to go to what I believe they call the excess market . . . . We finally received about six or seven quotes from this marketplace and accepted the lowest quote, which was . . .$39,000.

Howard Bobroff, Owner
Lawnmower Parts Manufacturing Co.
August 11, 1977 - Kansas City

I want to appear here today to comment on one facet of product liability, and that is the problem supply distributors, cooperatives in particular, have in attempting to obtain product liability or umbrella insurance coverage. Because of the product liability risk, most companies have attempted to obtain umbrella or excess insurance coverage.

In 1974, Missouri Farmers' Association had a policy [covering its milling operations] providing $15 million in coverage at an annual cost of only $17,150. The cost of this policy was the same in 1975, and again in 1976. However, in 1977, the company that carried this coverage . . . refused to renew the policy - even though we had not had a claim under the policy: in fact, have never had an umbrella claim.

In 1977, our company, Missouri Farmers' Association, sought to obtain a new umbrella insurance carrier. We were finally able to obtain a policy at an annual cost of $840,000 . . .with a one million dollar deductible. We cancelled this policy after one month's coverage when we discovered that it did not cover marine risks . . . . Our company has been without umbrella coverage since February of 1977 . . . .

Now the experience of the Missouri Farmers' Association and the MFA Oil Company is not unique. I am familiar with lawyers of other cooperatives and they are having similar problems.

Alfred J. Hoffman
Vice-president and General Counsel
Missouri Farmers' Association
October 20, 1977 - Jefferson City

Witnesses at each of the hearings testified to huge premium increases, some as great as 5,835 percent in a single year. With these huge increases coming so rapidly, many small companies are faced with a choice of doing without product liability insurance, "going bare," or placing themselves in a non-competitive pricing structure in order to pass costs on to consumers - which threatens their ability to stay in business.

Consumer Crisis?

If the cost of product liability insurance forces a company to "go bare," it may create a situation where a consumer who is injured by a defective product will not be able to recover the damages to which he is entitled. In fact, many witnesses, and many of the articles reviewed, pointed out that the real threat in product liability is the threat of a consumer crisis. One manufacturer, who saw his premiums go from $4,000 in 1974-75 to $12,000 in 1975-76, put it this way when he got a premium quote of $60,000 for 1976-77:

We have manufactured 3,650 units and we have never paid a products liability claim. Now when you compare zero out of 3,650 units produced to a $60,000 premium for only effectively $95,000 worth of coverage, those odds . . . from an insurance company's standpoint ought to be pretty good. Since we are a small company, we are not able to come up with $45,000 to $60,000 out of our pockets, so we are going to take that risk. That is a good risk for us. I am not so sure it is a good risk for the consumer because he might own a manufacturing company. We might have to hand him the keys rather than give him a hundred . . . thousand dollars in damages.

Robert J. Johnston, General Manager
Newstyle Homes, Inc.
August 17, 1977 - Springfield

In all, 12 companies that are not carrying product liability insurance appeared before the Committee. This does not include those companies that have resorted to a large deductible in order to maintain some insurance protection. One recent article, entitled "A Consumer Crisis Around the Corner?" warned:

> *Perhaps it makes little sense to talk about a second-level "consumer crisis" in the product liability context when there is still no general agreement on the extent, [or even] the existence, of an insurance crisis for product manufacturers seeking product liability coverage.*
>
> *True, the full economic impact of a decision to "go bare" on a firm and its employees constitutes a crisis of its own. Too little is known today about the long-range consequences of bankruptcies expected to follow in the wake of decisions to go without commercial insurance coverage.*
>
> *Nevertheless, if there is an availability and affordability crisis, or "problem," can a consumer crisis be far behind? Simply put, "going bare," whether by manufacturing firms or professionals, is not just an insurance or business problem.*
>
> *No one seems to know exactly how many firms are going without any commercial coverage for liability at the present time. Certainly some are. Some are compensating by establishing self-insurance reserve funds. Some are crossing their fingers.*
>
> *When consumers find themselves unable to recover damages for bona fide injuries because the product manufacturer has no commercial coverage or has inadequate self-insurance reserves, perhaps then we will hear about a consumer crisis. That day may not be far off.*
>
> — From *Product Liability Trends*, August, 1977
>
> Published by —
>
> The Research Group International

Economic Aspects of the Problem

The threat of companies being forced to "go bare" is one problem growing out of the high premiums. Another threat is the potential loss of jobs. Although the Committee did not hear from any witnesses who had been forced out of business due to high insurance costs, a few witnesses testified that they had drastically cut back on employees. One stated that he could only get a reasonable premium if he gave up certain of his plastic products. This meant people in that part of his operation were out of jobs. A St. Joseph manufacturer testified that he used to employ 8 to 10 engineers in research and development; now he has 1 or 2. This same manufacturer pointed to a related problem - the possible stiffling of innovation with the result that new products either are not developed or are not introduced. He stated that he had new products sitting on the shelf which he could not put on the market because of the current situation in product liability.

The manufacturer is the first to see and feel the economic impact when he annually buys his product liability insurance policy for his company. Ultimately, this same cost will be passed through to the consumer.

In an attempt to get this cost factor into perspective, the Committee asked each witness who appeared

to provide us with his cost of liability insurance expressed not only in dollars, but also as a percentage of his company's sales. Percentage of sales probably is the clearest and best indicator of cost to consumers. Table I is a listing for the percentages given by witnesses.

TABLE I

St. Louis

Company	Product Liability Premium as % of Sales
Chemtech	1.5%
Emerson Electric	.3%
Brasch Manufacturing	.4%
Gruendler Crusher and Pulverizing Co.	11%*
Courin Industries	5%
Gilliom Manufacturing	5%*
Watling Ladder Co.	4.25%
McCabe Powers Body Co.	3%
Kansas City	
Richards and Conover Steel and Supply Co.	2%
Lawnmower Parts Manufacturing Co.	2.5%
Butler Manufacturing Co.	2%
Kay See Dental Mfg. Co.	10%*
Gray Manufacturing Co	4%
Springfield	
Acro Trailer Co.	.9%
Anderson and Son, Inc.	3%*
Texco Industries, Inc.	1.3%
Newstyle Homes, Inc.	1.5%*
Cape Girardeau	
Atlas Plastics Corp.	.06%
Dunlap Industries	4%*
Mid-South Steel Corp.	.5%
(Company not named - Insurance Agent example)	.7%
Jim Wilson Company	2.5%
Southern Clay	.3%

report: IIAA Annual Meeting, Pages 10-25

National Underwriter

PROPERTY & CASUALTY INSURANCE EDITION

October 21, 1977

'Product' Costs Tied To Defense Fees

The high cost of defending insurance claims is a significant contributor to the product liability problem, according to a countrywide closed claim survey just completed by Insurance Services Office.

Daniel J. McNamara, president of ISO, said: "This survey is the most complete and comprehensive that it has been possible to compile. The detailed information from survey returns by our member companies presents a fully representative picture of insurance industry claims experience for product liability and provides an adequate data base for discussions of remedial action concerning the product liability problem."

The survey shows that the average amount of expense incurred by insurers in defending product liability bodily injury cases is about $3,500.

"For every dollar paid for claims, insurers incur in defense costs an additional 35 cents for bodily injury and 48 cents for property damage, no matter who wins the case," the study showed. "By far the largest item contributing to the cost of handling claims is defense attorneys' fees, which account for about 83% of the defense costs."

ISO Survey Released

In its report, ISO compiled facts and figures defining the character of product liability claims and losses. A total of 24,452 survey forms for claims closed between July 1, 1976 and March 15, 1977 were submitted by 23 major insurance companies which provide a majority of the product liability insurance written in the U.S.

While practically no business is immune from a product liability suit, manufacturers account for 87% of the total claim dollars paid, the ISO survey found. Food claims represent only 2% of bodily injury payments, although food products account for 56% of all paid product liability claims.

Among other key findings:

- About 97% of the bodily injury payments and 89% of the property damage payments in product liability cases are covered by insurance. The remainder, paid by defendants, is accounted for by deductibles, awards exceeding policy limits or lack of policy coverage for product liability.
- Fewer than 1% of the bodily injury claims paid are responsible for more than 50% of the total bodily injury payment dollars. On the property damage side, fewer than 1% of the paid claims account for more than 45% of payment dollars. More than two-thirds of the claims paid are for less than $1,000.
- The average payment for bodily injury claims is $13,911 per claim against each defendant and $26,004 per incident (injury to a single person may result in claims against more than one defendant). For property damage claims, the average payment

Cont'd on Page 81

NAIB Faces Policymakers

Antitrust Chief: McCarran Outmoded?

The McCarran Ferguson Act may have outlived its usefulness, John Shenefield, Assistant Attorney General for Antitrust of the U.S. Department of Justice, told a meeting of the National Assn. of Insurance Brokers at Washington, D.C.

Mr. Shenefield made it plain his department woud prefer to eliminate the insurance industry's exemption from certain provisions of Federal antitrust laws.

'Complicated Language'

"It strikes me as odd," he said, "that a sector of our economy that is so crucial to the average citizen receives comparatively so little attention. You operate behind a curtain of complicated language and difficult concepts to the average citizen," making it all the more remarkable, he indicated, that the business is not more closely regulated in light of that and the "major amount of national wealth you all have some influence over."

Mr. Shenefield made clear, however, that he is not an advocate of more regulation. "I don't want you to get the impression that I think there is some void in the list of great, important national issues that must be filled by insurance questions," he said.

"And I would never for a moment suggest to you that I think the Federal government has been remiss in regulating insurance, or that it has done a perfect job of regulating any

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Nationwide Joins Exodus Of New Jersey Insurers, Cites Regulatory Climate

Citing continued losses in the state, Nationwide Mutual Ins. Co. has withdrawn from New Jersey, heightening the battle between insurers and the New Jersey department in the midst of a bitter gubernatorial race.

Brendan T. Byrne, the incumbent governor who is seeking reelection, characterized Nationwide's action as an effort to "intimidate" the state into granting rate hikes. "My administration," he said, "will not be intimidated by such precipitous action."

Commissioner James J. Sheeran said he felt the company had withdrawn from the state "because I refused to approve its application for a 42% increase in its auto insurance rates."

J. Carroll Bateman, president of the

Senate Votes 2-1 To Uphold Air Bags

By MARY JANE FISHER

Washington Correspondent

WASHINGTON—Victory was claimed by a coalition of medical, consumer, insurance and labor groups for ensuring that Congress did not veto Transportation Secretary Brock Adams' requirement of passive restraints for all new cars by 1984.

However, supporters were surprised when Rep. Bob Eckhardt (D., Tex.) introduced a bill to repeal the Department of Transportation standard, Rep. Shuster said that "unless new evidence supports the air bag, I will take this issue to the floor when the opportunity arises next year.

"The House will eventually have the opportunity to vote on air bags," he predicted.

Rep. Shuster issued a statement following the tabling of his resolution, noting that "while I stood alone

Steers (R.-Md.), a co-sponsor of it, was receptive to NAIB proposals. Regarding inclusion of captives, he said: "Even if the captive is set up only for the reason of providing additional capacity, it still seems to me it ought to qualify."

Mr. Holbrook said NAIB's laws and legislation committee will work directly with Rep. Steers' office and with March Rosenberg, special projects director for Rep. Whalen, to develop these expanded recommendations.

At the same meeting, NAIB noted its deep interest, on behalf of its members' clients, in the Administration's commitment to establishing national workers' compensation standards. The brokers heard an off-the-record report from an expert on that subject, Paul Dwyer, Chief Staff Counsel to the House Subcommittee on Compensation, Health and Safety.

Several other legislators and staff aides were present for more informal exchanges of views with brokers. Said Harry F. G. Wey, vice president of Alexander & Alexander, Inc., and president of NAIB:

"It was obvious from our conversation with all these policymakers that they encourage commercial brokers to take a more active role in Federal affairs." He added:

"NAIB is committed to a more aggressive role in Washington. We mean to be involved directly with those at every level whose actions shape the future of our business before their decisions are set in concrete, rather than merely commenting on them after they are an accomplished fact."

Benefits Hike Affects Nearly Million Workers

Maximum workers' compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act and related laws, affecting nearly a million workers, were raised to $367.22 a week, effective Oct. 1. The new maximum rate will apply to injuries occurring on or after that date.

Also effective Oct. 1, persons already receiving compensation for permanent total disability or death will have their benefits increased by 7.21%.

The previous maximum benefit was $342.54 a week.

ISO Survey Shows 'Product' Costs Are Tied To Defense Fees

Cont'd from Page 1

is $3,798 per claim and $6,871 per incident.

- Claims involving 36% of ultimate bodily injury payment dollars, and 33% of property damage payment dollars, still have not been processed through the tort system four years after first report of the incident.
- For bodily injury, payments tend to be greater than the claimant's economic loss; 10% of bodily injury payments are more than 10 times the economic loss, and 50% of payments are at least twice the economic loss (principally medical expenses and lost wages). In some of these cases there may be additional sources of payments, such as workers' compensation or health insurance. For property damage, payments tend to be equal to or less than economic loss.
- Workers injured on the job make up 11% of product liability bodily injury claimants receiving payment. However, their claims make up 42% of total bodily injury payments, because their average payment is $97,884, much higher than the over-all average.
- About 24% of product liability bodily injury payment dollars are paid in cases involving possible employer negligence.
- Approximately 73% of bodily injury claims and 83% of property damage claims are settled without the filing of a lawsuit. Fewer than 4% go all the way to a court verdict.

The survey was undertaken to fill a recognized information gap. In a report summarizing the findings, ISO explained:

"Price and market apprehensions were heightened by the sparsity of data relevant to product liability tort law and its underlying social climate. . . . Although it [ISO] has statistics which it uses for product liability ratemaking purposes, those data are not specific enough to answer the types of questions currently being asked.

"The most pressing need today," ISO asserted, "is for information con-

EXCESS AND SURPLUS LINES

INTERNATIONAL ASPECTS OF OUR PRODUCT LIABILITY PROBLEM

Recent developments in product liability in the United States have had serious repercussions around the world. Our domestic headaches have affected: 1) foreign manufacturers, 2) exporters to the United States, 3) their home-based insurers, 4) the governments of exporting nations, 5) overseas reinsurers and surplus lines companies, and 6) Bermuda and other tax havens for captives. These reactions abroad are very important to U.S. agents and brokers — and ultimately to the American consumer. At the very end of the line, we must remember that it is the American consumer who suffers.

Foreign manufacturers in the United Kingdom, Germany, Japan, and Italy have been faced with cancellation of their product liability coverage with respect to the U.S., and the imposition of huge increases in their liability premium for the U.S. exposure. In one case, an Italian manufacturer had world-wide product liability protection for the equivalent of $230. After a few bad claim reports from the U.S., there was a request from the insurer to segregate the receipts from U.S. sales and — after getting help from those knowledgeable about current American conditions — the insurer demanded $17,000 for the American portion. Let us admit that the manufacturer had been getting a free ride, but the true cost came as a terrible shock and meant a re-evaluation of the advantages of export to the United States and future pricing.

This was just a small example. There are other cases in which one could add zeros to the figures for larger exporters to the U.S. Under the Consumer Safety Protection Act, importers here, in effect, guarantee the overseas product. They have obviously demanded insurance protection from their manufacturers and want to be held harmless for everything other than what they actually do in adjustments, packaging, or services of their own.

CONFUSION ABROAD

The overseas manufacturer is thoroughly bewildered by our current legal system. Many countries which are regularly accused of being socialistic feel that our courts and juries have far outdone any concept of exaggerated social justice. They know that we are a country of extremes, and hope that eventually we will come back in balance with some rational approach. It is hard to explain to the manufacturer our theory that everyone collects. Strict liability is like an accident policy for every buyer. In addition, we add lottery possibilities — and the recipients of the million-dollar-plus award do not even have to buy a lottery ticket!

In other countries, contributory negligence still has some meaning. Think of the reaction of the automobile importer in a California case. An intoxicated driver destroyed 50 feet of the divider on a Los Angeles freeway. He was found dead outside of his vehicle in the center-divider area. The driver had not worn his lap and shoulder belt and had not locked his door. The owner's manual advised drivers to use both devices. The attorney for the plaintiff claimed that the door handle design was defective because the door unlatched upon impact. The lower court held for the defendant. The California Appellate Court reversed the decision and ordered a new trial. It said it was in error to allow admission of any evidence relating to the intoxication of the driver or his failure to use the safety belt and door locks. The court held to the California concept of strict tort liability and ignored contributory negligence or any theory of other possible causation.

It is bad enough that we have the jury system, in which there is always a willingness to bend over backwards to find some defect and then grant a very generous award. The attitude of our judges is most unlike anything found elsewhere in the world. This is a generalization, but many of them seem to show no restraint. There are those cynics who say that if we took the amount of the award out of the jury system and put it in the hands of judges, the results would be worse. In *Pippen vs. Dennison* (239 N.W. 2nd 704) a 67-year-old man lost part of his arm in a hydraulic press accident. The jury gave one and one-quarter million to him and one-half million to his wife. The trial judge tried to cut these to $675,000 and $100,000, but the Appellate Court reinstated the total of one and three-quarters million on the theory that it was not excessive "in light of today's economics."

Of course, our overseas friends cannot understand the contingency system, with twenty to fifty percent going to the plaintiff's attorney as a "sort of" party plaintiff. They also find the extreme cost of defense litigation in the United States staggering: our discovery procedures, the interrogatories, the cost of tests and expert opinions, trial preparations, the need for supervising counsels and local counsel. In other countries the successful defendant can get an assessment of costs against the plaintiff. Here in the United States, the successful defendant is still a loser.

FOREIGN GOVERNMENTS

The foreign governments of exporting nations have also become involved in our problem. For example, in the United Kingdom questions have been raised in Parliament, and the Department of Trade has been making a study. Some pressure groups from the unions and the manufacturers have put forth the idea that this constitutes a trade barrier, that the inability to get liability insurance or the high price of liability insurance is against Jimmy Carter's avowed purpose of free trade. They have no sympathy for the fact that a similar manufacturer in the United States would have to pay the same price and have the same difficulty in securing product liability coverage.

As has happened in Washington, D.C. with our small business lobby, there has been a U.K. demand for government rescue. It has been suggested that there be a mandatory pool, and that the insurance companies subsidize the excess cost. There is also the suggestion that the Export Credits Guarantee Department of the U.K. be expanded to cover product liability on a subsidized basis.

It has been said that there should be special rules for overseas manufacturers. This is sheer nonsense. American consumer groups would never allow different requirements or legal responsibilities for importers and overseas manufacturers.

In the United Kingdom at the present moment there is a further complication. In October, 1976 there was a draft agreement initialed between the U.K. and the U.S., to have a reciprocal recognition and enforcement of judgments in each other's country. Up to this time a British citizen or his corporation would have to accept U.S. jurisdiction and take part in one of our court actions before he could be pursued in Britain. (Lloyd's takes care of this problem of acceptance of jurisdiction by their service of suit clause.) Because of the product liability situation, there will be a big debate on this U.K.-U.S. agreement. United States manufacturers see no great problem in accepting U.K. verdicts. It is an entirely different matter for the U.K. manufacturer. He may never intend to distribute his product in the United States, but under our theory of law, no matter how it got over here, the manufacturer could be held responsible for any injuries and subject to a $1 million-plus award. About one-third of our jumbo verdicts in the United States are now in the product liability area.

If they reverse themselves and do not sign the reciprocal agreement, one can envisage American consumer groups protesting the introduction of U.K. products into the United States on the theory that such manufacturers had sheltered themselves from the legal responsibility of our courts, and that this was a deception practiced on the unwary public.

If the reciprocal agreement is signed, with all of these legal uncertainties, there will have to be a rise in the cost of imported products, which is further complicated by the current fall in the value of the dollar.

OVERSEAS REINSURERS AND SURPLUS LINES COMPANIES

While local companies overseas have been hurt because of cheap worldwide product covers, those overseas companies who have been engaged in reinsurance and surplus lines activities in the United States have had the opportunity to take advantage of the present crisis in the U.S. It is an old saying in the insurance business that in every problem area there is an opportunity to make money at some point.

After Hurricane Betsy, there were many who came into the United States on the full tide of adequate rates for property insurance. The new risk-takers did not have to pay for the past inadequacies. There is a freedom of rating in reinsurance and excess and surplus lines. It is possible to anticipate inflation and further rises and put the old X factor in for safety and past mistakes. This was a great advantage to those who came in on malpractice at its peak with more restrictive cover and higher pricing.

Large companies in Germany, Japan, Italy, France, Scandinavia, the Middle East, and the Far East have recently come into the United States as reinsurers of surplus lines carriers, and they have the premium income capacity to accept new commitments. They are reliable companies with long-term records of stability and excellent reputations in loss-paying practices. Lloyd's itself is in a good position. While it writes a very large segment of the aviation and marine market, it has only had one or two percent of the non-marine market. There will be a tremendous number of new "Names" going on for January 1, 1978, which will mean substantial additional capacity, perhaps a fifty percent increase. It is merely a question of how much additional capacity the leaders wish to use for a particular non-marine class.