

# CRS Issue Brief for Congress

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## **Products Liability: A Legal Overview**

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## Products Liability: A Legal Overview

### SUMMARY

Products liability refers to the liability of a manufacturer or seller for injury caused by his product to the person or property of a buyer or third party. Legal developments starting in the 1960s, particularly the adoption of strict tort liability, have made it substantially easier for persons injured by defective products to recover damages. Starting in the 1980s, however, many states enacted tort reform legislation that limited the rights of injured parties. Advocates for consumers and

plaintiffs view strong products liability law as necessary to ensure adequate compensation for injured workers and consumers and to furnish an incentive for the manufacture of safe products. Manufacturers and their insurers, by contrast, contend that many products liability judgments are unwarranted or excessive and that national uniformity in products liability law is needed. Therefore, they favor replacing the 50 state products liability laws with one federal law.



## **MOST RECENT DEVELOPMENTS**

On November 25, 2002, H.R. 5005, the Homeland Security Act of 2002 was signed by the President and became P.L. 107-296. It contains three sections that limit products liability of various defendants: section 304 immunizes manufacturers and administrators of smallpox vaccine from liability, section 863 limits the liability of sellers of anti-terrorism technology, and sections 1714-1717 limit the liability of manufacturers and administrators of the components and ingredients of vaccines. These provisions are discussed in CRS Report RL31649.

On February 20, 2003, the President signed H.J.Res. 2, 108<sup>th</sup> Congress (P.L. 108-7). Division L, § 102, of the statute repealed sections 1714-1717 of P.L. 107-296 (2002). These are the sections of the Homeland Security Act of 2002 that amended the National Vaccine Injury Compensation Program to make the program applicable to components and ingredients of vaccines, and which was apparently intended to prevent lawsuits alleging injuries caused by Thimerosal. See CRS Report RL31649.

On April 9, 2003, the House passed H.R. 1036, 108<sup>th</sup> Congress, the Protection of Lawful Commerce in Arms Act. H.R. 1036 would prohibit lawsuits, except in specified circumstances, against a manufacturer or seller of a firearm or ammunition, or a trade association, for damages resulting from the criminal or unlawful misuse of a firearm or ammunition. For additional information, see H.Rept. 108-59, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003), and CRS Report RS21486.

On April 30, 2003, the President signed into law H.R. 1770, 108<sup>th</sup> Congress, the Smallpox Emergency Personnel Protection Act of 2003, P.L. 108-20, to provide benefits for certain individuals with injuries resulting from administration of a smallpox vaccine. For additional information, see CRS Report RL31960.

On July 30, 2003, the Senate Judiciary Committee reported S. 1125, with amendments (S.Rept. 108-118, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003)). For additional information, see CRS Report RS21540, *Fairness in Asbestos Injury Resolution Act of 2003 (S. 1125, 108<sup>th</sup> Congress)*.

## **BACKGROUND AND ANALYSIS**

Products liability, which is primarily a matter of state law, is generally based on strict tort liability rather than on negligence. This means that a plaintiff need prove only that the defendant sold a defective product and that the defect was the proximate cause of the plaintiff's injuries. Due care on the part of the defendant is ordinarily immaterial. The purpose of strict tort liability is "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves" (*Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (1963)).

The Federal Interagency Task Force on Product Liability, under the direction of the Department of Commerce, in its Final Report issued November 1, 1977, found that the cost of product liability insurance had risen dramatically, making it more difficult for some small firms to obtain adequate insurance coverage. The major causes of the dramatic rise in rates,

the Task Force found, were irrational premium setting procedures by insurance companies, the manufacture of products that are not as safe as current technologies would allow, and uncertainties as to how personal injury litigation is conducted.

On April 6, 1978, the Department of Commerce released an *Options Paper on Product Liability and Accident Compensation Issues*, 43 Federal Register 14612. It included a model bill entitled, "Product Liability Self-Insurance Act of 1978." On September 11, 1978, the Department published a summary of over 300 comments submitted to it on its Options Paper (43 Federal Register 40438).

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

The Department of Commerce subsequently published a Model Uniform Product Liability Act. See 44 Federal Register 2996 (January 12, 1979) for the draft version and 44 Federal Register 62714 (October 31, 1979) for the final version. Although intended for enactment by the states, the draft version was introduced in the 96th Congress as H.R. 1676, and the final version was introduced as H.R. 5976 (both by Representative LaFalce). Hearings on the two versions were held, but neither was enacted.

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

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

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

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

## Glossary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Punitive damages.** Damages awarded, in addition to economic damages and other non-economic damages, to punish a defendant for willful or wanton conduct.

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

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

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

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

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

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

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

## **Federal Statutes Enacted, 97th-107th Congresses**

The 97<sup>th</sup> Congress enacted P.L. 97-45, the Product Liability Risk Retention Act of 1981. The 98<sup>th</sup> Congress enacted P.L. 98-193, a clarification of the Product Liability Risk Retention Act of 1981. This statute was intended to permit "product manufacturers, sellers, and distributors to purchase . . . insurance on a group basis or to self-insure through insurance cooperatives called 'risk retention groups.'" S.Rept. 97-192, 97<sup>th</sup> Congress, 1st session. Federal legislation was necessary to accomplish this because many states have laws that would make the formation of such groups impractical on an interstate basis. The statute therefore exempts purchasing groups and risk retention groups from most regulation by states other than the ones in which they are chartered.

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



The 99<sup>th</sup> Congress also enacted the National Childhood Vaccine Injury Act of 1986, P.L. 99-660, which has been amended by every subsequent Congress. As amended, the Act requires most persons suffering vaccine-related injuries, prior to filing a tort action, to file a claim in the U.S. Court of Federal Claims for no-fault compensation through the National Vaccine Injury Compensation Program established by the Act. Under the Program, compensation for pain and suffering is limited to \$250,000. A party not satisfied with the compensation awarded under the Program may file a tort action under state law, but subject to some limitations. Although recovery under the Program is limited, it was hoped that “the relative certainty and generosity of the system’s awards will divert a significant number of potential plaintiffs from litigation.” H.Rept. 99-908, Part 1, 99<sup>th</sup> Cong., 2d Sess. 13 (1986).

On August 17, 1994, the President signed into law the General Aviation Revitalization Act, P.L. 103-298, which established an 18-year statute of repose (see glossary) for planes with fewer than 20 seats that are not used in scheduled service. 49 U.S.C. § 40101 note.

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

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

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

The 107<sup>th</sup> Congress enacted the Homeland Security Act of 2002 (P.L. 107-296), three sections of which limit the products liability of various defendants: section 304 immunizes manufacturers and administrators of smallpox vaccine from liability, section 863 limits the liability of sellers of anti-terrorism technology, and sections 1714-1717 limit the liability of manufacturers and administrators of the components and ingredients of vaccines. These provisions are discussed in CRS Report RL31649. Sections 1714-1717 were repealed by P.L. 108-7 (2003).

## **LEGISLATION**

### **P.L. 108-7, H.J.Res. 2**

Signed by the President on February 20, 2003. Division L, § 102, of the statute repealed 1714-1717 of P.L. 107-296 (2002). These are the sections of the Homeland Security Act of 2002 that amended the National Vaccine Injury Compensation Program to make the program applicable to components and ingredients of vaccines, and which was apparently intended to prevent lawsuits alleging injuries caused by Thimerosal. See CRS Report RL31649.

Other bills that would have repealed sections 1714-1717 include **H.R. 237**, **H.R. 248**, **H.R. 484**, **S. 41**, and **S. 105**.

**H.R. 339 (Keller)**

Personal Responsibility in Food Consumption Act. Introduced January 27, 2003; referred to the Committee on the Judiciary. Hearings held on June 19, 2003, by the Subcommittee on Commercial and Administrative Law. H.R. 339 would prohibit products liability suits against a manufacturer, distributor, or seller of a food or non-alcoholic beverage product intended for human consumption unless the plaintiff proves that, at the time of sale, the product was not in compliance with applicable statutory and regulatory requirements.

**H.R. 357 (Everett)**

Introduced January 27, 2003; referred to the Committee on the Judiciary. Would “prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.”

**H.R. 405 (Andrews)**

Introduced February 3, 2003; referred to the Committees on the Judiciary, and Energy and Commerce. Would “provide that a person who brings a product liability action in a Federal or State court for injuries sustained from a product that is not in compliance with a voluntary or mandatory standard issued by the Consumer Product Safety Commission may recover treble damages.”

**H.R. 865 (Waxman)**

Smallpox Vaccine Compensation and Safety Act of 2003. Introduced February 13, 2003; referred to the Committees on Energy and Commerce, and Energy and the Workforce. Would establish a Smallpox Vaccine Injury Compensation Program under which persons suffering injury or death from a smallpox vaccine may petition for compensation under procedures and standards that follow those applicable under the National Vaccine Injury Compensation Program.

**H.R. 1036 (Stearns)**

Protection of Lawful Commerce in Arms Act. Reported by the Committee on the Judiciary on April 7, 2003 (H.Rept. 108-59, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess.), and passed by the House on April 9, 2003. Would prohibit lawsuits, except in specified circumstances, against a manufacturer or seller of a firearm or ammunition, or a trade association, for damages resulting from the criminal or unlawful misuse of a firearm or ammunition. See CRS Report RS21486 for a legal analysis of the bill.

**H.R. 1114 (Kirk)**

Asbestos Compensation Act of 2003. Introduced March 6, 2003; referred to the Committee on the Judiciary. Would establish, in the Department of Justice, the Office of Asbestos Compensation (AOC), and would establish in the OAC an Asbestos Compensation Fund for the purpose of providing payments to claimants who have asbestos-related illnesses. Except for those filing claims under a workers’ compensation law or veterans’ benefits program, all asbestos claimants would have to found of medically eligible in order to receive compensation. Claimants would name as defendants persons who may be responsible for their asbestos-related illness, except for the federal or a state government. Defendants would be required to make settlement offers, and the Trustee of the Fund would make an offer of compensation to the claimant. If the claimant rejects any defendant’s offer and the Trustee’s

offer, the claimant may elect an administrative adjudication under the bill or may opt out and sue in state or federal court. In an administrative adjudication, a claimant would be entitled to compensatory damages to the extent provided by applicable law, but no damages for enhanced risk of a future condition, and punitive damages would be limited to 3 times compensatory damages. The Fund would be financed by defendants, after a one-time loan of federal funds.

**H.R. 1349 (Burton)**

National Vaccine Injury Compensation Program Improvement Act of 2003. Introduced March 24, 2003; referred to the Committee on Energy and Commerce. Would amend the National Childhood Vaccine Injury Act of 1986.

**H.R. 1586 (Cannon)**

Asbestos Compensation Fairness Act of 2003. Introduced April 3, 2003; referred to the Committee on the Judiciary. Designed “[t]o provide for the fair and efficient judicial consideration of personal injury and wrongful death claims arising out of asbestos exposure, to ensure that individuals who suffer impairment, now or in the future, from illnesses caused by exposure to asbestos receive compensation for their injuries, and for other purposes.”

**H.R. 1737 (Dooley)**

Asbestos Victims’ Compensation Act of 2003. Introduced April 10, 2003; referred to the Committee on the Judiciary. Designed “[t]o provide for the fair and efficient judicial consideration of personal injury and wrongful death claims arising out of asbestos exposure, to ensure that individuals who suffer harm, now or in the future, from illnesses caused by exposure to asbestos receive compensation for their injuries, and for other purposes.”

**P.L. 108-20, H.R. 1770**

Smallpox Emergency Personnel Protection Act of 2003. Signed by the President on April 30, 2003. To provide benefits for certain individuals with injuries resulting from administration of a smallpox vaccine. For additional information, see CRS Report RL31960. Other versions of this bill included **H.R. 1413**, **H.R. 1463**, **S. 15 (Title I)**, and **S. 719**.

**H.R. 2813 (Chabot)**

Small Business Liability Reform Act of 2003. Introduced July 22, 2003; referred to the Committee on the Judiciary and the Committee on Energy and Commerce. In civil actions against small businesses (defined as businesses with fewer than 25 full-time employees), H.R. 2813 would (1) cap punitive damages at the lesser of three times the economic and noneconomic damages awarded, or \$250,000, except that the cap would not apply “if the court finds that the plaintiff established by clear and convincing evidence that the defendant acted with specific intent to cause the type of harm for which the action was brought,” and (2) eliminate joint and several liability. States, however, would be permitted to enact laws to make this provision inapplicable. H.R. 2813 would also, in any product liability action, allow a product seller other than a manufacturer to be held liable only if it had been negligent or made an express warranty, or “if the manufacturer is not subject to service of process under the laws of any State in which the action may be brought,” or “the court determines that the claimant is or would be unable to enforce a judgment against the manufacturer.” See S. 1546, below.

**S. 413 (Nickles)**

Asbestos Claims Criteria and Compensation Act of 2003. Introduced February 13, 2003; referred to the Committee on the Judiciary. Would prohibit lawsuits “alleging a nonmalignant asbestos claim in the absence of a prima facie showing of physical impairment as a result of a medical condition to which exposure to asbestos was a substantial contributing factor.”

**S. 659 (Craig)**

Protection of Lawful Commerce in Arms Act. Introduced March 19, 2003; referred to the Committee on the Judiciary. Would prohibit lawsuits, except in specified circumstances, against a manufacturer or seller of a firearm or ammunition, or a trade association, for damages resulting from the criminal or unlawful misuse of a firearm or ammunition.

**S. 754 (Frist)**

Improved Vaccine Affordability and Availability Act. Introduced April 1, 2003; referred to the Committee on Health, Education, Labor, and Pensions. Would amend the National Childhood Vaccine Injury Act of 1986.

**S. 1125 (Hatch)**

Fairness in Asbestos Injury Resolution (FAIR) Act of 2003. Introduced May 22, 2003; referred to the Committee on the Judiciary, which held hearing on it on June 4, 2003 and reported it, with amendments, on July 10, 2003 (S.Rept. 108-118). Would create a federal compensation program for asbestos victims, funded by asbestos defendants and their insurers. See CRS Report RS21540 for a more detailed summary of the bill.

**S. 1546 (McConnell)**

Introduced July 31, 2003; referred to the Committee on the Judiciary. Text unavailable on the date of this issue brief, but S. 1546 has the same title (“A bill to provide small businesses certain protection from litigation excesses and to limit the product liability of non-manufacturer product sellers”) as H.R. 2813, discussed above.

**FOR ADDITIONAL READING**

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U.S. General Accounting Office. Product liability: Extent of “litigation explosion” in Federal courts questioned. Jan. 28, 1988. [Washington] 1988. (GAO/HRD-88 36BR)

— Product liability: Verdicts and case resolutions in five states. [Washington] September 1989. (GAO/HRD-89-99)

## **CRS Reports**

CRS Report RS21398. *Asbestos Litigation: Prospects for Legislative Resolution*, by Edward Rappaport.

CRS Report RS21540. *Fairness in Asbestos Injury Resolution Act of 2003 (S. 1125, 108<sup>th</sup> Congress)*, by Henry Cohen.

CRS Report 95-797. *Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes*, by Henry Cohen.

CRS Report RL31649. *Homeland Security Act of 2002: Tort Liability Provisions*, by Henry Cohen.

CRS Report RS20126. *Gun Industry Liability: Lawsuits and Legislation*, by Henry Cohen.

CRS Report RS21486. *Protection of Lawful Commerce in Arms Act, H.R. 1036, 108<sup>th</sup> Congress: Legal Analysis*, by Henry Cohen.