FEDERAL PRE-EMPTION OF STATE PRODUCTS LIABILITY LAWS AND LIMITATIONS OF THE STRICT LIABILITY OF MANUFACTURERS

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I. INTRODUCTION

The field of "Products Liability" became a distinct area of tort law with the adoption of the concept of "strict liability." Although various permutations of it with regard to particular products or hazards had been around for years, strict liability gained its toehold in Iowa in 1970 with the case of *Hawkeye-Security Insurance Company v. Ford Motor Company*.[1] In that case the Iowa Supreme Court adopted the rule of strict liability set forth in

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1. 174 N.W.2d 672 (Iowa 1970).

the Restatement (Second) of Torts.[2] The importance of strict liability was that it was now possible to impose liability on a manufacturer on the basis of an "unreasonably dangerous" defect in a product at the time of sale, rather than upon proof of some fault or negligence on the part of the manufacturer.[3] The result of this new doctrine was a profusion of so-called "products liability" cases. Freed of the burden of proving negligence, with its emphasis on establishing a breach of the duty of reasonable care, together with the general liberalization of pleading and procedure, plaintiffs have been able to obtain many more substantial verdicts against manufacturers and sellers of products than had been possible before the genesis of strict liability.

The evolution of the doctrine of strict liability has been accomplished in Iowa through traditional common law development. Although the fundamental aspects of the doctrine have been widely adopted throughout the United States, "products liability" is not an area of law that is uniform among the various jurisdictions.[4] There are many variations on the theme.[5]

It is not surprising that a backlash has developed in response to the increased exposure to liability and differences in state laws that characterize products liability law today. Momentum has built among manufacturer and retailer organizations for legislative relief from an area of tort law perceived as skewed in favor of the injured user of a product.[6] These efforts have achieved little, or at best, mixed, success at the state level, where a varied

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2. *Id.* at 684; RESTATEMENT (SECOND) OF TORTS § 402A (1965). Restatement (Second) of Torts § 402 provides:

> § 402A. *Special Liability of Seller of Product for Physical Harm to User or Consumer*
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> (1) One who sells any product in a defective condition unreasonably 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, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

3. *Id.*

4. *Hearings on S. 2631 Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science and Transportation*, 97th Cong., 2d Sess. 10 (1982) [hereinafter cited as *Senate Hearings*].

5. *Report of the Senate Comm. on Commerce, Science and Transportation on S. 2631*, S. Rep. No. 670, 97th Cong., 2d Sess. 4-5 (1982) [hereinafter cited as *Senate Report*].

6. *Senate Hearings, supra* note 4, at 15-16 (statement of Victor E. Schwartz, counsel, Products Liability Alliance).

pattern of legislation has developed.[7] Some states have enacted statute of repose legislation, while others have created defenses predicated on alteration or modification, state of the art, "original packaging," and various presumptions.[8] Few states have enacted comprehensive products liability statutes. Iowa is among those states that have not codified their products liability law.[9]

The federal government first became seriously involved in the movement for products liability reform in 1976 when President Ford established an Interagency Task Force on Product Liability, which in turn produced a model Uniform Product Liability Act.[10] The Uniform Act was published in October, 1979 and the states were invited to adopt it.[11] To date, however, no state has fully adopted the Act, and it has been partially adopted in only four states.[12]

Frustration with the states set in. The Interagency Task Force had identified two targets for products liability reform: "overly subjective insurance rate-making procedures and uncertainties in the product liability tort litigation system."[13] The first direct federal legislation was aimed at the problem of products liability insurance rates.[14] In 1981 Congress passed the Product Liability Risk Retention Act,[15] which made possible alternatives to commercial insurance for manufacturers, in an effort to address what was thought to be arbitrary and subjective insurance rate-making practices in the products liability insurance area.[16] The Act permitted the formation of self-insurance groups and facilitated the introduction of group products liability insurance.[17]

The Task Force's efforts toward fostering the adoption of a Uniform Product Liability Act, however, proved unsuccessful. The states showed little interest in adopting a uniform products liability law. The inevitable next step was federal legislation directed at reform of the products liability tort litigation system.

In December, 1981 Representative Shumway introduced H.R. 5214, which provided for a "Uniform Product Liability Law" that would have spe-

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7. *Id.* at 83-84 (statement of Malcolm Baldridge, Secretary of Commerce).

8. *Id.* at 145-146 (recommendation of ABA, Section of Tort and Insurance Practice Report to the House of Delegates).

9. *Id.* at 15 (statement of Victor E. Schwartz).

10. *Id.* at 14.

11. 44 Fed. Reg. 62,714 (October 31, 1979).

12. *Senate Hearings, supra* note 4, at 84. Connecticut, Idaho, Kansas and Washington have partially adopted the Uniform Act.

13. *Senate Report, supra* note 5, at 2.

14. Product Liability Risk Retention Act, Pub. Law No. 97-45, 95 Stat. 959 (1981) (codified at 15 U.S.C. §§3901 *et seq.* (Supp. V 1981).

15. *Id.*

16. *Senate Hearings, supra* note 4, at 7, 9.

17. *See* 15 U.S.C. §§ 3902, 3903 (Supp. V 1981).

cifically pre-empted all other federal or state laws inconsistent with its provisions.[18] In June, 1982 Senator Kasten introduced S. 2631 in the Senate, a uniform products liability law.[19] In many respects, S. 2631 was similar to H.R. 5214; it also provided for federal pre-emption of state products liability laws.[20] Unlike H.R. 5214, S. 2631 proposed pre-emption of the entire field of products liability law, not just inconsistent state law.[21] Subsequently, Congressman Shumway amended and reintroduced H.R. 5214 as the Product Liability Act of 1982.[22] With its amendments, H.R. 5214 was made similar to S. 2631 in many respects. In any event, the thrust of both bills was the same.

Neither bill was enacted into law in the 97th Congress, although extensive hearings were held on S. 2631, which, after substantial amendment, was unanimously passed by the full Senate Committee on Commerce, Science and Transportation.[23] On January 26, 1983, S. 2631 was reintroduced in the 98th Congress as S. 44.[24] S. 44 is identical to the version of S. 2631 approved by the Senate Committee on Commerce, Science and Transportation, and was co-sponsored by Senators from both political parties.[25]

It is apparent that there is strong support for federal pre-emption of state products liability laws and that legislation of this nature may very well be enacted in the foreseeable future. Such legislation is at least certain to receive further serious consideration. As noted, the current proposal enjoys bipartisan support, and the present administration has endorsed it.[26] Because enactment of some form of federally pre-emptive products liability legislation is a distinct and very real possibility, it is appropriate to examine what has been proposed, and its effect on products liability law and practice in Iowa. The purpose of this article, therefore, is to examine the most recently proposed legislation, and compare it to Iowa products liability law and practice as it now exists.

It may seem quixotic to the reader to examine legislation that has not been and may never be enacted, but there is a strong possibility that a radical change in Iowa products liability law may be imposed by the federal government, and the subject warrants examination before such a change is wrought. For the purpose of this article, the author has focused on S. 44 because the Senate efforts have traveled furthest down the path toward enactment,[27] and the House bill was amended to make it more like the Senate

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18. H.R. 5214, 97th Cong., 2d Sess. (1982).
19. S. 2631, 97th Cong., 2d Sess. (1982).
20. *Id.*
21. *Id.*
22. 128 CONG. REC. H8483 (daily ed. Oct. 1, 1982) (statement of Rep. Shumway).
23. *Senate Report, supra* note 5, at 1.
24. S. 44, 98th Cong., 1st Sess. (1983) [hereinafter cited as S. 44].
25. 129 CONG. REC. S283 (daily ed. Jan. 26, 1983) (statement of Sen. Kasten).
26. *Senate Hearings, supra* note 4, at 82 (statement of Malcolm Baldridge).
27. Additional hearings were held on S. 44 on April 4, 1983 and April 27, 1983. As of the

bill before the end of the last Congress.[28]

II. Purpose and Scope of the Proposed Federal Act

It is apparent from a reading of S. 44, as well as from statements made in support of its predecessor bill during the course of congressional hearings in the spring and fall of 1982, that pre-emptive federal products liability legislation is born of a deep belief that the judicially-fashioned doctrine of strict liability is characterized by an imbalance that favors plaintiffs and by a confusing array of standards, rules and presumptions that vary from jurisdiction to jurisdiction. This perception is combined with congressional impatience with state legislatures which have, by and large, failed to address the "products liability problem" as perceived by manufacturers' and insurers' groups.[29] This is perhaps epitomized by the fact that no state has adopted the Uniform Product Liability Act. Since the federal legislative effort is born, in large part, of a feeling that the pendulum has swung too far in favor of plaintiffs,[30] it is not surprising that S. 44 tends to be more defense-oriented in its approach than the existing law.

The proposed federal legislation is predicated on a finding that present products liability law hinders interstate commerce, and consequently is a proper subject for federal regulation.[31] The problem is said to have reached " 'crisis' proportions."[32] The essence of this problem lies in the diversity of products liability law. As stated by Senator Kasten: "[c]onflicting product liability rules have made it extraordinarily difficult for consumers to know their legal rights and for manufacturers to know their obligations."[33] The intent of the federal legislation, said Senator Kasten, was "to bring uniformity and certainty to the law and to stabilize what has become a serious burden on interstate commerce."[34] The purpose of the federal legislation, as stated in the Report of the Senate Committee on Commerce, Science and Transportation, is to establish "uniform standards" for all products liability actions in order to "provide clear and reasonable guidelines so that parties can identify their rights and obligations."[35]

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writing of this Article, S.44 had not been amended since re-introduction in the 98th Congress and was pending review by the full Senate Committee on Commerce, Science and Transportation.

28. H.R. 2729, 98th Cong., 1st Sess. (1983).

29. *Senate Hearings*, *supra* note 4, at 15 (statement of Victor E. Schwartz).

30. *Id.*, *supra* note 4, at 15-16.

31. *Senate Report*, *supra* note 5, at 1.

32. *Senate Hearings*, *supra* note 4, at 159 (statement of Sen. Kasten). *See Senate Report*, *supra* note 5, at 2.

33. *Senate Hearings*, *supra* note 4, at 159.

34. *Id.*

35. *Senate Report*, *supra* note 5, at 1.

III. Federal Pre-emption and the Role of State Courts

The proposed legislation is unique in that it would completely pre-empt that area of the common law known as products liability (except where injury to the product itself was the cause of action) and in its place substitute a federally codified law of products liability.[36] The federal law would pre-empt the entire field, not just inconsistent state law.[37] Although the proposed legislation would create a body of federal products liability law, application of the new federal law would still be left largely to state courts, for the proposed legislation does not increase the jurisdiction of federal courts.[38] Thus, although products liability would become exclusively the province of federal law, cases under the proposed statute would not become federal question cases. This type of pre-emption is unprecedented.[39] The interpretation and application of a whole body of federal law would fall largely on the state courts, and the state courts would, in effect, become surrogates of the federal judiciary with respect to the field of products liability.

The scope of the proposed pre-emption is very broad. Section 3(a) of the Act defines products liability actions in a plenary fashion:

> This Act governs any civil action for loss or damages caused by a product, including any action which before the effective date of this Act would have been based on: (1) strict or absolute liability in court; (2) negligence or gross negligence; (3) breach of express or implied warranty; (4) failure to discharge a duty to warn or instruct; or (5) any other theory that is the basis for an award for damages for loss or damages caused by a product. Any civil action brought against a manufacturer or product seller for harm caused by a product is a product liability action.[40]

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36. S. 44, *supra* note 24, § 3.

37. *Id.*

38. *Id.* § 3(d).

39. Proponents of federal liability legislation point to a number of federal compensation acts and statutes creating certain types of federal tort law as precedent for uniform product liability legislation. The analogy, however, is not congruent. Compensation statutes are generally aimed at indemnifying certain classes of victims without regard to the question of fault. Class-based compensation laws that indemnify such groups as the victims of black lung disease are essentially unrelated to the law of torts. 30 U.S.C. § 901 *et. seq.* (1976 & Supp. V 1981). The same may be said of federal statutes that provide discrete federal civil remedies to encourage a particular public policy. For example, federal legislation providing a remedy for people injured as a consequence of a knowing violation of a standard or rule of the Consumer Product Safety Commission is obviously tailored to further public policy in favor of obedience of published standards and rules applicable to consumer products. *See* 15 U.S.C. § 2072 (Supp. V 1982).

Uniform product liability legislation on the other hand, belongs in an entirely different catagory. Its purposes are not compensatory, nor is it designed to further a narrow area of public policy. Federally pre-empted uniform product liability legislation neither provides compensation nor a remedy that was heretofore unavailable, but rather, supplants an entire area of law traditionally considered the province of the states. This is quite different than any previous legislation.

40. S. 44, *supra* note 24, § 3(a).

Only actions for loss or damage to the product itself or for "commercial loss" are excluded from the definition of a "product liability action."[41]

With respect to products liability actions, the federal Act "supersedes any state law regarding matters governed by this Act."[42] Though the field of products liability law would be pre-empted by federal legislation, the statute expressly provides that the Act does not confer federal question jurisdiction on the federal courts.[43] The proposed legislation would thus pre-empt all Iowa products liability law, whether founded on strict liability, negligence or gross negligence, breach of warranty, or any other cause of action for damages for personal injuries, death or damage to property arising out of loss or damage caused by a product, other than damage to the product itself or claims for purely commercial loss. At the same time, Iowa's courts would retain jurisdiction over products liability claims, but would be limited to applying the standards and rules set forth in the federal Act. Federal district court jurisdiction would, as before, be limited to diversity cases.[44] This surrogate role played by the Iowa courts could presumably lead to the peculiar situation in which the Iowa Supreme Court, a court of greater dignity, would feel obligated to follow the interpretation and construction of the federal Act made by Iowa federal district courts or federal appeals courts in the absence of United States Supreme Court authority. If, on the other hand, the Iowa Supreme Court felt unrestrained by the holdings of the lower federal courts, the federal Act might be interpreted differently by the state and federal courts within the same state, thus robbing the Act of the uniformity and certainty it was created to provide.

IV. Limitations on Strict Liability

Apart from pre-emption, perhaps the most important feature of the proposed legislation is that it would severely limit the most fundamental aspect of modern products liability law, the concept of strict liability.[45]

Under the doctrine of strict liability, liability may be imposed on a manufacturer whenever a product is in an "unreasonably dangerous" condition, whether due to a defect in construction, design, or failure to give adequate warnings or instructions.[46] "Unreasonably dangerous" has always been an elusive concept with little or no objective meaning to cabin its application. The Restatement (Second) of Torts defines "unreasonably dangerous"

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41. *Id.* § 3(b).
42. *Id.* § 3(c).
43. *Id.* § 3(d).
44. *Id. See* 28 U.S.C. §§ 1332, 1335, 1342 (1976).
45. *See supra* note 2.
46. *E.g.*, Chown v. USM Corp., 297 N.W.2d 218, 220 (Iowa 1980)(design); Haumersen v. Ford Motor Co., 257 N.W.2d 7, 10 (Iowa 1977)(construction); Restatement (Second) of Torts § 402A comment (1965).

by using an ordinary user standard: "dangerous to the extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[47] Stated otherwise, it need only be shown that the defect is more dangerous than an ordinary person would think it to be. This is an unavoidably subjective standard. Thus, in practice, jurors can be expected to judge the question by their own reaction to the condition.

Once the condition of the product is shown to be unreasonably dangerous, the remaining elements for imposing strict liability are the sale of the product, the identity of the defendant as a seller, the sale of the product in the same condition, causation and damages.[48] Since the doctrine of strict liability focuses only upon the condition of the product, and the dangerousness of that condition is determined with reference to the ordinary consumer,[49] proof of a strict liability claim presents a lesser burden of proof to a plaintiff than does a negligence claim, which focuses on the conduct of the manufacturer.[50] The proposed federal legislation is aimed at restricting the relative ease with which liability may be proven under the doctrine of strict liability.[51] Thus, it is not surprising that the federal legislation radically alters the concept of "unreasonably dangerous" and in the process does away with strict liability in the more common types of products liability claims.

S. 44 provides generally that a "manufacturer" is liable if a claimant shows that the product was "unreasonably dangerous" in construction, manufacture, design, formation, lack of warnings or instructions, or breach of an express warranty.[52] But after providing that a manufacturer is liable for damages and injuries caused by the unreasonably dangerous condition of its product, the Act then defines the concept of "unreasonably dangerous" in the various contexts of construction, design, warning, instructions, and express warranty in a way that restricts strict liability.[53]

A. *Defects in Construction*

Strict liability is left unscathed by the Act only with respect to unreasonably dangerous conditions resulting from construction or manufacture, in which case strict liability may be imposed only on the manufacturer.[54] The proposed Act provides that a product is unreasonably dangerous in construction if it materially deviates from specifications, formula or performance standards of the manufacturer, or from "otherwise identical units of

47. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).
48. Kleve v. General Motors Corp., 210 N.W.2d 568, 570-71 (Iowa 1973).
49. Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 835-36 (Iowa 1978).
50. *Id.* at 835.
51. *See* S. 44, *supra* note 24, § 4.
52. *Id.* § 4(a)(1).
53. *Id.* §§ 5, 6.
54. *Id.* § 5.

the same manufacturing specification or formula."[55] Accordingly, if a product is manufactured and results in something that it is not supposed to be, and that deviant condition causes harm, liability may be imposed. There is no requirement that the plaintiff show a breach of the duty of reasonable care. Thus, at least with respect to construction defects, the federal legislation would retain the traditional concepts of strict liability.

This is not the case, however, with the Act's provisions regarding products that are unreasonably dangerous due to design or failure to provide adequate warnings or instructions. With respect to these complaints, which are the real gist of products liability claims, the proposed federal legislation discards strict liability.[56] The federal legislation retains the term "unreasonably dangerous," but dovetails the concept with negligence principles.[57] Under the federal Act, "unreasonably dangerous" relates not to the condition of the product, but to the conduct of the manufacturer.[58]

B. *Defects in Design*

An "unreasonably dangerous" design, as defined by the federal Act, is a design which "*a reasonably prudent manufacturer* in the same or similar circumstances would not have used."[59] This is really nothing more than a negligence standard. To prove tortious design under the proposed Act, a plaintiff would have to show that a "reasonably prudent manufacturer" would not have designed the product in the way that it was designed.

To meet the negligence standard, the Act provides that a plaintiff must prove the following elements:

> (1) the manufacturer knew or, based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm; and (2) a means to eliminate the danger that caused the harm was within practical technological feasibility.[60]

To prove liability on the basis of inadequate design or formulation, the plaintiff would have to show (1) actual knowledge of the danger on the part of the manufacturer[61] or that the manfacturer should have known of the danger from knowledge "reasonably accepted in the scientific, technical, or medical community", and (2) that elimination of the danger was within

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55. *Id.* § 5(a)(1)-(2).
56. *See id.* § 5(b). There has been some doubt as to whether tort liability applies in warning cases. *Compare* Henkel v. R. and S. Bottling Co., 323 N.W.2d 185, 189-190 (Iowa 1982) *with* LaCoste v. Ford Motor Co., 322 N.W.2d 898, 900 (Iowa App. 1982).
57. *See id.*
58. *See id.*
59. *Id.* § 5(b) (emphasis added).
60. *Id.* § 5(b)(1)-(2).
61. *Id.* § 5(b)(1).

"practical technological feasibility."[62] Whether the manufacturer knew or should have known of the danger, and whether or not elimination of it was feasible, are determined as of the time of manufacture or "Government Certification of the product."[63] These additional proof requirements present new and more burdensome hurdles for products liability plaintiffs.

What constitutes reasonable acceptance in the technical literature is not defined in the proposed legislation. "Practical technological feasibility," on the other hand, is defined as: "the technical, medical, and scientific knowledge relating to safety of a product which, at the time of production or manufacture of a product, was developed, available and capable of use in the manufacture of a product, and economically feasible for use by a manufacturer."[64]

In sum, what the federal Act would do in design cases is require proof of manufacturer negligence and codify a state of the art defense. It does so in terms that will require substantial interpretation by the courts. The question of what is necessary to make knowledge of danger reasonably accepted within the technical community is not addressed by the Act, and the definition of "practical technological feasibility" is ripe with potential issues. Since it will largely be left to the state courts to interpret and implement these concepts, the "certainty" and "uniformity" at the heart of the purpose of the proposed legislation could be a long time in coming.

In some respects, the proposed federal legislation would not dramatically alter Iowa's practice in design cases. Plaintiffs would be required to prove negligence, but the Iowa Supreme Court has previously noted that proof of unreasonable danger is an element in both strict liability and negligence actions.[65] Like the provisions of the federal Act, the Iowa courts determine that element as of the time of manufacture.[66] Iowa, further, follows a "risk-utility" analysis in determining the unreasonableness of a given danger. Such an analysis is related to the question of whether an alternative design was "technologically and practically feasible at the time of manufacture."[67]

C. *Warnings and Instructions*

The proposed federal legislation also makes negligence the sole basis for recovery in failure to warn or instruct cases.[68]

Warnings and instructions are divided into "necessary warnings and in-

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62. *Id.* § 5(b)(1)-(2).
63. *Id.* §§ 2(8), 5(b).
64. *Id.* § 2(8).
65. Chown v. USM Corp., 297 N.W.2d 218, 220 (Iowa 1980).
66. *Id.* at 221; Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d at 837.
67. Chown v. USM Corp., 297 N.W.2d at 221.
68. *See* S. 44, *supra* note 24, § 6(a).

structions" and "post-manufacture warnings or instructions."[69] Liability may be imposed for a failure to give either of these types of warnings or instructions.[70]

A product is unreasonably dangerous for failure to give a "necessary" warning or instruction only if:

> (1) the manufacturer knew or, based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm;
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> (2) the manufacturer failed to provide the warnings or instructions that a reasonably prudent manufacturer in the same or similar circumstances would have provided with respect to the danger which caused the harm alleged by the claimant, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of that harm;
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> (3) the manufacturer failed to provide those warnings or instructions to the claimant or to another person [who would have a duty to tell the plaintiff]; and
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> (4) those warnings and instructions, if provided, would have led a reasonably prudent product user either to decline to use the product or to use it in a manner so as to avoid harm of the type alleged by the claimant.[71]

As with design, the plaintiff under the proposed federal Act would have to show that a manufacturer acted negligently in failing to provide warnings or instructions, *viz.*, that the manufacturer breached a duty owed by a "reasonably prudent manufacturer."[72] Moreover, the proposed federal legislation also has a specific causation rule applicable in failure to warn cases.[73] The plaintiff must not only show a breach of duty to warn, predicated upon actual knowledge of the manufacturer or "reasonably accepted" authorities, but must further show that the warnings or instructions would have led a "reasonably prudent product user" to refuse to use the product or avoid the danger.[74] Presumably, therefore, the presumption in the present law that an adequate warning will be adhered to by the user would not obtain under the proposed statute.[75] The result is that the plaintiff would have to show how the reasonably prudent person would react to a warning that was not given. This could be a somewhat speculative undertaking, particularly in cases where the injured party is a bystander and was not the one in a position to

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69. *Id.* §§ 6(a)(1)-(2).
70. *Id.*
71. *Id.* § 6(b)(1)-(4).
72. *Id.* § 5(b).
73. *Id.* § 6(b)(1)-(4).
74. *Id.* § 6(b)(4).
75. *See* RESTATEMENT (SECOND) OF TORTS, § 402A, comment (1965).

adhere to the warning.

The federal legislation also imposes liability for a failure to give "post-manufacture warnings or instructions."[76] These are warnings or instructions which should have been supplied after manufacture of the product.[77] Under the post-manufacture provision, a manufacturer may be held liable if circumstances subsequent to the manufacture of the product would, in the exercise of care of a "reasonably prudent manufacturer," require a warning or instruction.[78] As with necessary warnings, the plaintiff would be required to show that the manufacturer knew of the necessity of a warning, or, based on the same type of "reasonably accepted" knowledge available in the industry, should have known of the danger.[79] The manufacturer would be required to make only "reasonable efforts" to provide post-manufacture warnings or instructions.[80] Interestingly, unlike the proof requirements for "necessary" warnings, the proposed federal legislation does not expressly require proof that a "reasonably prudent product user" would have heeded a post-manufacturer warning or would have followed the instructions.[81]

The federal Act would provide that a manufacturer's duty to warn is discharged if the warning is given to certain classes of third persons.[82] There are three such groups: (1) persons, including employers, who could reasonably be expected to take action to pass the warning on to the actual user or to otherwise avoid the harm to the user, except where the warning or instruction may be "readily attached" to the product by a reasonably prudent manufacturer; (2) "using or supervising" experts where a product (for example, prescription medicine) may only be used under the supervision of such an expert, and (3) the manufacturer's buyer of component parts to be used in the work place where there is no feasible way to warn the actual user, or where there is no practical or feasible means of warning the non-employee user.[83]

To some extent this portion of the federal statute would codify existing products liability law in many jurisdictions. Warnings to a "using or supervising expert" have often been held to satisfy the duty to warn or instruct in particular circumstances.[84] Similarly, a manufacturer of a component part may discharge his duty to warn by warning the buyer who assembles it into a completed product.[85]

The federal Act would insulate from liability, those manufacturers of

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76. S. 44, *supra* note 24, § 6(c)(1).
77. *Id.*
78. *Id.* § 6(c)(1)(B).
79. *Id.* § 6(c)(1)(A).
80. *Id.* § 6(c)(2).
81. *Id.*
82. *Id.* § 6(d)(1)(A)-(C).
83. *Id.*
84. *See, e.g.*, Jacobson v. Colorado Fuel & Iron Corp., 409 F.2d 1263, 1273 (9th Cir. 1969).
85. West v. Broderick & Bascom Rope Co., 197 N.W.2d 202, 211-12 (Iowa 1972).

capital goods or products customarily used by persons in their employment, if the required warnings or instructions were given to the employer, or other persons similarly situated who could be "expected to assure that action would be taken to avoid the harm or that the risk of harm would be explained to the actual product user," unless such warnings or instructions could be readily attached to the product itself.[86] Present products liability law in Iowa takes a more *ad hoc* approach. A warning given to an employer does not necessarily discharge the duty, and the adequacy of the warning turns on the totality of all of the facts, including a balancing of the severity of the danger, and the ease by which a warning could have been given to the actual user.[87]

The proposed federal statute would also provide that a manufacturer has no duty to warn of obvious dangers, the consequences of misuse or alterations or modifications in the produce which could not be reasonably anticipated.[88]

D. *Breaches of Express Warranty*

As noted, the pre-emption provisions in S. 44 pre-empt all existing state products liability law, whether founded on negligence, strict liability, warranty or some other theory.[89] The proposed federal legislation, therefore, also covers products liability for breaches of express warranty.[90] The proposed federal legislation provides that a product is "unreasonably dangerous" if express warranties concerning a material fact were made regarding the safe performance of the product and were untrue, and "the failure of [the] product to conform to the warranty" caused the injury.[91] "Puffing," or general opinion or praise of a product, is excluded.[92] Liability for breach of an express warranty may be imposed regardless of negligence or fraud.[93] To this extent, therefore, a species of strict liability would remain with respect to express warranty cases, although such cases have never been very numerous among products liability claims.[94]

V. Liability of "Product Sellers"

The proposed federal legislation differentiates between "manufacturers" and "product sellers" with respect to liability for harm caused by a

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86. S. 44, *supra* note 24, § 6(d)(1)(A).
87. West v. Broderick & Bascom Rope Co., 197 N.W.2d at 211; Restatement (Second) of Torts § 402A, comment n, at 308-09 (1965).
88. S. 44, *supra* note 24, at § 6(d)(2).
89. *Id.* § 3(a).
90. *Id.* § 7(a).
91. *Id.*
92. *Id.*
93. *Id.* § 7(b).
94. *Id.* § 7(a).

product.[95] What has been discussed previously about liability predicated upon defects in construction, design, warnings or instructions, or a breach of express warranty applies only to manufacturers.[96] "Manufacturer" exposure would fall on those who "produce, create, make, or construct" a product, or hold themselves out as having done so.[97] A "product seller," on the other hand, is defined as a person who in the course of his or her business "sells, distributes, leases, installs, prepares, blends, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce."[98] Expressly excluded from the definition of a product seller are sellers of real property, providers of professional services, lenders, and lessors of equipment where the selection, maintenance and operation of the product is "controlled by a person other than the lessor."[99]

Generally, the federal proposal would make product sellers such as retailers liable for their own active fault or breach of an independent express warranty and do away with the very nearly vicarious liability which a retailer now has in Iowa under strict liability for the sale of a defective product.[100] There would no longer be any strict liability action available to a plaintiff against most retailers.[101] The retailer would be liable only for his or her own active negligence or breach of warranty.[102] Concomitantly, there would not normally (theoretically at least) be any action over by the retailer against the manufacturer, since the retailer's liability would hinge on his or her own active breach of duty.[103] This would be particularly true in view of the comparative responsibility rules discussed below.[104]

The scope of retailer liability under the proposed federal legislation would thus be much narrower than that which obtains in Iowa today under strict liability.[105] Since strict liability turns on the sale of a product in an unreasonably dangerous condition, a retailer and manufacturer generally have co-extensive exposure.[106] Commonly, where a retailer is exposed to liability under a theory of strict liability in tort, the retailer, absent some active fault of its own, will have an action over against the manufacturer for indemnity, since the retailer's liability in most cases does not depend upon any independent wrongdoing of its own. Nor does the retailer create the

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95. *Compare id.* § 4(a) *with id.* § 8(a).
96. *Id.* §§ 4(a), 5(a), 6(a), 7(a).
97. *Id.* § 2(6).
98. *Id.* § 2(11).
99. *Id.* § 2(11)(A)-(C).
100. *Id.* § 8(a)(1)-(2).
101. *See id.*
102. *Id.*
103. *Id.*
104. *See supra* text accompanying notes 132-53.
105. *See* Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 901 (Iowa 1980).
106. *Id.*

defective condition.[107]

This would be changed by the proposed federal Act. As a practical matter, the proposed federal legislation would exempt retailers from potential liability in the vast majority of cases. Only rarely does a retailer do more than merely purchase a product from a manufacturer and then resell it to a consumer. Only in the unusual circumstance where a defect in the manufacture of the product existed, which could have been discovered by the retailer's exercise of reasonable care in the course of a cursory inspection, is the retailer likely to be charged with any active tortious conduct of its own.

In an apparent effort to insure that there is some responsible party to indemnify a person injured by a product, the proposed federal legislation establishes two circumstances in which the liability of a product seller would be coextensive with, and in fact, would replace the liability of the manufacturer.[108] If the manufacturer "is not subject to service of process under the laws of the State in which the action is brought," or if "the court determines that the claimant would be unable to enforce a judgment against the manufacturer," then the product seller would be deemed liable "in the same manner as the manufacturer."[109]

The first of these circumstances would not often arise in Iowa. Under the long-arm rules, virtually any manufacturer who can be reached by mail any place in the world is subject to service of process.[110]

The second circumstance is a more troubling one. Under the Act's provisions, a product seller's liability would depend, at least in part, on the wealth and insurance status of the manufacturer who sells goods to the retailer. By the simple device of filing a petition in bankruptcy, a manufacturer could thrust liability for its own tortious conduct upon the retailer, who purchased its goods. Retailers would understandably become reluctant under such a threat, to purchase goods for resale from new or struggling manufacturers. To the extent that the proposed federal Act is aimed at helping manufacturers, particularly by protecting small manufacturers and promoting manufacturing incentive, this provision would be counter-productive.[111] The rule would also impose the difficult burden on retailers of defending the impecunious manufacturer's conduct. Perhaps this type of "recapture" of liability is necessary if products liability law is intended to serve a compensatory purpose, but there is a basic injustice in making a party's liability in tort turn, not upon a universally applicable principle, but rather upon the wealth of a co-party.[112]

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107. *See* RESTATEMENT (SECOND) OF TORTS § 886B(2)(e) (1965).

108. S. 44, *supra* note 24, § 8(e)(1)-(2).

109. *Id.*

110. IOWA CODE § 617.3 (1983).

111. *Senate Hearings*, *supra* note 4, at 119.

112. There is a difference between "liability" and "exposure." Where there is joint liability among various defendants, an impecunious defendant unable to satisfy a judgment has the

VI. Alternative Designs, Subsequent Remedial Measures, and Issue Preclusion

A. *Alternative Designs*

The proposed federal legislation has some special rules with respect to evidence of alternative design, subsequent remedial measures, and issue preclusion.[113] The statute would provide that evidence of an alternative design is not admissible unless the plaintiff establishes that at the time of the product's manufacture, four elements existed.[114] The plaintiff must first show that the manufacturer knew, or "based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the alternative design" should have known, of the alternative design.[115] Secondly, the plaintiff must establish that the alternative design "utilized only" science and technology which was "reasonably accepted" in the authoritative literature and "which was within practical technological feasibility."[116] Thirdly, the plaintiff must show that the alternative design would have prevented the injury and would have provided "better overall safety."[117] A "better" design is simply defined as one which eliminates greater hazards than it creates.[118] Lastly, the plaintiff alleging an alternative design must show that the alternative would have "been desirable, functionally, economically, and otherwise, to the person who uses or consumes it."[119]

The effect of these rules would be to formalize a set of criteria which must be shown in order for the jury to consider an alternative design, thereby making it more difficult for a plaintiff to prevail in design cases. Present Iowa law is not as restrictive.[120] An alternative design may be offered in Iowa to show that the design chosen was "not reasonably safe."[121] Many of the elements which would be indispensable prerequisites to evidence of alternative design under the federal statute have long been relevant in Iowa in strict liability design cases,[122] but they have not been required predicates to the consideration of an alternative design as evidence.

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effect of increasing the exposure of the more financially sound defendants. Restatement (Second) of Torts § 886A, comment i (1965). But that does not effect their "liability." Liability occurs when there is a judgment that certain conduct is tortious. One party's liability should not turn on a co-party's wealth.

113. S. 44, *supra* note 24, §§ 4(c), 5(e), 8(c), 14.

114. *Id.* § 5(e).

115. *Id.* § 5(e)(1).

116. *Id.* § 5(e)(2)(A).

117. *Id.* § 5(e)(2)(B).

118. *Id.*

119. *Id.* § 5(e)(2)(C).

120. *See, e.g.*, Chown v. USM Corp., 297 N.W.2d at 220-221.

121. *Id.* at 221 (quoting Wade, *On Product "Design Defects" and Their Actionability*, 33 Vand. L. Rev. 551, 571 (1980)).

122. *Id.* at 220-221 (quoting Baker v. Lull Engineering Co., 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 227 (1978)).

B. *Subsequent Remedial Measures*

Evidence of subsequent remedial measures is also strictly limited by the proposed federal statute.[123] The statute provides simply that subsequent remedial measures are "not admissible."[124] It does provide, however, that exclusion from evidence is not required in design cases, but only if offered to impeach a witness "who has expressly denied the feasibility of such a measure."[125]

This treatment of subsequent remedial measures is narrower than that which is permitted under present Iowa practice. Generally, introduction of subsequent remedial measures has been held inadmissible as an implied admission, but they have been held admissible to demonstrate feasibility or knowledge of a dangerous condition prior to the accident where such feasibility or knowledge is in issue.[126] Under the federal proposal, however, such evidence would be admissible only when the witness for the manufacturer or product seller expressly denies the feasibility of taking the remedial measures in question before the injury occurred.[127]

C. *Issue Preclusion*

Both the "manufacturer" and the "product seller" liability provisions of S. 44 expressly limit the offensive and defensive use of issue preclusion.[128] The Act would provide that a plaintiff could not establish a fact by showing that the identical fact issue was determined adversely to the defendant "in another action brought by another claimant,"[129] unless both actions are based on the same event in which two or more people were injured.[130] The statute also limits the defensive use of issue preclusion by a product seller or manufacturer to the same event, and requires privity between the plaintiff and the party in the prior action.[131] Thus, both offensive and defensive use of issue preclusion would be more restricted by the Act than they are in usual application.

VII. Comparative Responsibility under the Proposed Federal Act

The proposed federal Act adopts a "pure" form of "comparative responsibility" in determining a plaintiff's damages.[132] The federal Act would thus

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123. S. 44, *supra* note 24, § 14.
124. *Id.* § 14(a).
125. *Id.* § 14(b).
126. Sterner v. U.S. Plywood-Champion Paper, Inc., 519 F.2d 1352, 1354 (8th Cir. 1975).
127. S. 44, *supra* note 24, § 5(e).
128. *Id.* §§ 4(c)(1), 8(c)(1).
129. *Id.*
130. *Id.* §§ 4(c)(2), 8(c)(2).
131. *Id.* §§ 4(c)(2), 8(c)(1).
132. *Id.* § 9(a).

broaden the new comparative negligence rule now in force in Iowa to include all forms of product liability.[133] The federal proposal would provide that "comparative responsibility attributed to the claimant's conduct . . . shall not bar recovery in a products liability action, but shall reduce any damages awarded to the claimant in an amount proportionate to the responsibility of the claimant."[134]

The proposed federal legislation adopts the term "comparative responsibility" to describe its apportionment of fault.[135] The operative word here is "responsibility." The fault of each party is to be compared, regardless of its doctrinal source.

The proposed federal Act also outlines the procedure to be followed in submitting comparative responsibility to the jury and in entering judgment on the verdict.[136] The Act would provide that the court instruct the jury to answer special interrogatories, or to make findings if there was no jury, with respect to (1) the total amount of plaintiff's damages disregarding comparative responsibility, and (2) the "percentage of total responsibility" for the injury to be allocated among each defendant, each third-party defendant, the claimant, and any other person whose misuse or alteration of the product contributed to the accident.[137] Comparative responsibility therefore, would be parcelled out among all parties whose conduct had a causal relationship to the injury and to all non-parties whose misuse or alteration of the product also had a causal effect.

The court would then enter judgment based on the special interrogatories, in accordance with each party's determined proportionate responsibility.[138] Thus, a defendant would have judgment entered against him in an amount proportionate to his or her own tortious conduct only. Since under the proposed federal scheme liability is imposed only on the basis of a defendant's own tortious conduct or breach of duty, and not that of others who may have contributed,[139] there would not be joint and several liability nor, correspondingly, actions over for contribution or indemnity. The federal Act would thus adopt comparative responsibility in its logical symmetry. A claimant would recover only to the extent that he or she is not at fault, and each defendant would pay only to the extent to which he or she is at fault. Theoretically, each contributes and receives only what is deserved.[140]

The proposed federal Act also attempts to contemplate problems and unfairness that could arise by reason of the lack of joint and several liability

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133. Goetzman v. Wichern, 327 N.W.2d 742, 744 (Iowa 1982).
134. S. 44, *supra* note 24, § 9(a).
135. *Id.*
136. *Id.* § 9(b).
137. *Id.* §§ 9(b), 10(a)(1), 10(b)(1), 10(c)(1).
138. *Id.* § 9(c).
139. *Id.*
140. *But see* Weeks v. Feltner, 99 Mich. App. 392, ___, 297 N.W.2d 678, 680 (1980).

and adopts a hybrid form of reallocated liability to insure adequate compensation of injured parties.[141] It provides that if a claimant is unable to collect on a judgment, the claimant could, within a year after judgment entry, move the court to determine that the judgment was uncollectible with respect to a particular defendant.[142] Upon a finding of uncollectibility, the court would be required to reallocate the uncollectible portion of the judgment to the remaining parties to the action to whom responsibility was allocated, including the claimant, on the basis of the percentages determined in answer to the special interrogatories.[143] The problem with this type of reallocation is that it does not fit neatly into either the theory of comparative responsibility or joint and several liability. It has the merit, however, of mitigating the injustice of each system to achieve adequate compensation for persons injured by defective products.

One of the areas of products liability law urged upon Congress for correction relates to the perceived unfairness under the present law of imposing the entire liability for work place injuries, which are very often the result, at least in part, of the negligence of a co-employee or an employer upon the product manufacturers and sellers.[144] Employers and co-employees, in the absence of gross negligence, have no liability under present law by virtue of the workman's compensation statute.[145] Not only do the products liability defendants have the entire exposure, but the employer's workers' compensation insurance carrier is also subrogated, and has a lien for its payments, to any payments made by such defendants to the injured party.[146] Products liability defendants under present Iowa law get no reduction in the judgment against them for the amount of workers' compensation payments by virtue of the collateral source rule.[147] Since in theory, and often under the circumstances, the workers compensation payments are made in lieu of the employer's or co-employee's liability for negligence, the net result is that the product manufacturer or seller indemnifies the employer, through his insurance carrier, for the employer's own active negligence which was a proximate cause of the accident.[148] In the congressional hearings on the predecessor bill to S. 44 this was said to be unfair.[149] In an attempt to resolve this inequity,

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141. S. 44, *supra* note 24, § 9(d).

142. *Id.*

143. *Id.*

144. *Senate Hearings*, *supra* note 4, at 37 (statement of Robert Taft, Jr. and Arthur Rosen, counsel, Special Committee for Workplace Product Liability Reform).

145. Iowa Code § 85.20 (1983).

146. *Id.* § 85.22.

147. Grings v. Great Plains Gas Co., 260 Iowa 1309, 1320, 152 N.W.2d 540, 546 (1967); Iowa Power & Light Co. v. Board of Water Works Trustees, 281 N.W.2d 827, 833 (Iowa App. 1979).

148. *See* Stahle, *Contribution from a Negligent Employer: A Problem in Search of a Solution*, 32 Drake L. Rev.

149. *Senate Hearings*, *supra* note 4, at 37 (statement of Robert Taft, Jr. and Arthur

part of the remedy provided in the comparative responsibility provisions of the Act is the allocation of proportionate responsibility to the employer or co-employee, or any other person whose misuse or alteration of the product was a cause of the injury, whether or not they were made parties to the action.[150] Under the proposed federal Act, the fact finder is required to determine what portion of the responsibility for the injury is due to non-party misuse or alteration.[151] "Misuse" is defined broadly to include circumstances in which a "product user" (which includes employers) "fails to adequately train another person in the safe use of the product, or otherwise provide for the safe use of the product. . . ."[152] Failure "to observe the routine care and maintenance necessary for a product [when] that failure was the cause of the claimant's harm" is included in the Act's definition of "alteration" or modification of a product.[153]

VIII. Workers' Compensation Benefits

The proposed federal legislation considers workers' compensation benefits in determining the amount of a judgment entered against a defendant or defendants.[154] If the amount of benefits paid, including the present value of future benefits, is greater than the sum of the amount of proportionate responsibility assigned to non-manufacturers (i.e. non-product sellers and the plaintiff), the judgment against the defendants is reduced by the determined amount of workers' compensation benefits.[155] Stated otherwise, if the amount of damages attributable to the plaintiff and his employer is less than the workers' compensation benefits, the judgment against the defendants is reduced by the amount of the workers' compensation benefits. The result in the typical employment injury case is that judgments against defendants are reduced where there are substantial workers' compensation benefits and low combined plaintiff and employer responsibility, but not reduced where the plaintiff and employer responsibility is high. In these latter cases, the judgment would be reduced under the normal comparative responsibility provision by the proportion of the plaintiff's and employer's responsibility.[156]

The workers' compensation formula under the proposed federal Act is very different from present Iowa practice.[157] For many years, the law in Iowa has been that a products liability defendant's liability is not reduced by the

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Rosen).

150. S. 44, *supra* note 24, § 10.
151. *Id.* §§ 9(b), 10(a)(1).
152. *Id.* § 10(a)(2).
153. *Id.* § 10(b)(2)(B).
154. *Id.* § 11.
155. *Id.* § 11(a).
156. *See supra* text accompanying notes 132-53.
157. *See* Iowa Code § 85.20 *et seq.* (1983).

amount of insurance that a plaintiff has, and the existence of insurance coverage, and the amount of indemnity provided thereby, are not admissible.[158] Moreover, an insurance carrier has a common law, and in the case of workers' compensation insurance, a statutory right, to subrogation for the amounts paid to the plaintiff as a result of any action by the plaintiff to recover for his injuries.[159] This would all be changed under the proposed federal Act.

In addition to considering workers' compensation benefits to reduce judgments, the proposed federal statute also terminates the right of subrogation which a workers' compensation carrier presently enjoys against the product manufacturer or seller. In the absence of an express indemnity agreement, the federal proposal provides that neither the employer nor the workers' compensation insurance carrier has any right of subrogation against a manufacturer or product seller.[160] The proposed Act also prohibits actions for indemnity or contribution against employers or co-employees, and preserves the immunity from suit of employers for injuries covered by state or federal workers' compensation laws.[161]

To avoid the temptation for seriously injured workers to delay or forego workers' compensation benefits in order to avoid diminishment of a product liability judgment, the proposed Act has an exhaustion of remedies requirement.[162] No products liability action may be brought or maintained if the plaintiff has failed to file a workers' compensation claim, or if either the plaintiff or his employer "has failed to exhaust their remedies under an applicable workers' compensation law."[163]

IX. Defenses

Under the proposed federal statute the usual defenses predicated upon the fault of the plaintiff would become matters in mitigation, to be considered and determined under the "comparative responsibility" rules.[164] These defenses traditionally include negligence, assumption of risk, misuse (which is not a defense in Iowa),[165] and alteration of the product. Except on the basis of sole proximate cause, no complete defenses based on these grounds would remain.[166]

The federal proposal would provide that if misuse or alteration by a person other than the manufacturer or product seller is the cause of the

158. *Id.*
159. *Id.* § 85.22.
160. S. 44, *supra* note 24, § 11(b)(1)-(2).
161. *Id.* § 11(c)-(d).
162. *Id.* § 11(a).
163. *Id.*
164. *Id.* §§ 9, 10.
165. *See* Hughes v. Magic Chef, Inc., 288 N.W.2d 542, 545 (Iowa 1980).
166. S. 44, *supra* note 24, § 10(c)(1).

injury, the plaintiff's judgment would reflect apportionment to the extent that such misuse or alteration was a cause of the harm.[167] In Iowa, presently neither misuse nor alteration of the product are available as defenses; rather, they are subsumed in the elements of the plaintiff's case.[168] The plaintiff in a strict liability action is required to prove that the use of the product was reasonably foreseeable and that the product reached the plaintiff without substantial change in its condition.[169] Under the proposed federal legislation, these standard strict liability elements would no longer be elements of the plaintiff's case, but would instead become matters to be urged by the defense to assign a portion of the damage to others under the comparative responsibility provisions of the statute.[170]

The proposed federal legislation also defines misuse and alteration.[171] Misuse occurs if a product is used in a manner "not consistent with the warnings or instructions available to the user," or "not consistent with reasonable practice of users of the product," or when a "product user," such as an employer or co-employee, "fails to adequately train another person in the safe use of a product, or otherwise provide for the safe use of the product."[172]

An alteration or modification of a product is deemed to occur when someone other than the manufacturer or product seller "changes the design, construction, or formula of the product, or changes or removes warnings, instructions, or safety devices . . . ."[173] An alteration also occurs when "a product user fails to observe the routine care and maintenance necessary for a product and that failure is the cause of the claimant's harm."[174] Alterations or modifications made in accordance with instructions of the manufacturer or product seller, or with his or her express consent, as well as alterations or modifications which are "reasonably anticipated conduct" and which are not warned or instructed against, are not deemed to be alterations of the product under the proposed Act.[175]

X. The Federal Statute of Repose

The proposed federal statute contains a twenty-five year statute of repose with regard to "capital goods" which would be applicable to claims predicated upon unsafe design or failure to give adequate warnings or in-

167. *Id.* §§ 10(a)(1), (b)(1).
168. Hughes v. Magic Chef, Inc., 288 N.W.2d at 546.
169. Osborn v. Masey Ferguson, Inc., 290 N.W.2d 893, 901 (Iowa 1980).
170. S. 44, *supra* note 24, § 10(b).
171. *Id.* § 10(a)(2), (b)(2).
172. *Id.* § 10(a)(2).
173. *Id.* § 10(b)(2)(A).
174. *Id.* § 10(b)(2)(B).
175. *Id.* § 10(b)(1)(A)-(C).

structions.[176] A "capital good" is defined as a product, other than a motor vehicle, or a component of any such product, if an allowance could be taken for its depreciation under the Internal Revenue Code,[177] and if it was used in a trade or business, held for the production of income, or "sold, leased, or donated to a governmental or private entity for the production of goods, for training, for demonstration, or for similar purposes."[178] The statute of repose would not be applicable in cases of intentional misrepresentation by the manufacturer or product seller, where the injury was caused by the "cumulative effect of prolonged exposure to a defective product," or where the injury did not appear until after the twenty-five year term.[179]

The Act does not contain a statute of limitations within which a products liability action must be commenced, but presumably, the ordinary state limitations period for filing personal injury or property damage actions, as the case may be, would apply.

It should be noted that the proposed federal statute of repose would not apply in cases where a product is unreasonably dangerous because of a defect in construction,[180] an approach that is consistent with the proposed federal Act's strict liability approach to construction defects. Nor would the proposed statute of repose apply to liability imposed by virtue of a breach of express warranty,[181] an approach that is consistent with the contract theory of express warranty. Where a manufacturer or product seller gives an express warranty covering a long period of time, they should, of course, be bound by it.

Iowa does not have a statute of repose. The federal Act would thus introduce a new concept into Iowa products liability law.

XI. Punitive Damages

The proposed federal Act would permit awards of punitive damages in circumstances where there was "clear and convincing evidence" that the injury was caused by "the reckless disregard of the manufacturer or product seller for the safety of product users, consumers or persons who might be harmed by the product."[182] The term "reckless disregard" is defined very narrowly as "conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by the product and constituting an extreme departure from accepted practice."[183] The statute would require the jury, in determining whether to award punitive damages, to con-

176. *Id.* § 12(a)(1).
177. *See generally* I.R.C. §§ 167-68.
178. S. 44, *supra* note 24, § 12(a)(2).
179. *Id.* § 12(b).
180. *See id.* § 12(a)(1).
181. *Id.*
182. *Id.* § 13(a)(1).
183. *Id.* § 13(a)(2).

sider such things as the manufacturer's knowledge of the risk of harm, the conduct of the manufacturer upon discovery of the defect, any concealment of a known defect by the manufacturer, and the extent to which the claimant's own negligence was a cause of his injury.[184]

Under the federal approach, the jury would determine only whether punitive damages should be awarded.[185] The actual determination of the amount of damages would then be made by the court.[186] In determining the amount of punitive damages, the court would consider the same factors which determine whether punitive damages should be awarded.[187] The court is also to expressly consider "the profitability of the conduct to the manufacturer or product seller" and "the total effect of other punishment imposed upon the manufacturer or product seller as a result of the misconduct, including punitive damages awards to persons similarly situated to the claimant and the severity of other penalties to which the manufacturer or product seller has been or may be subjected."[188] The federal Act does not provide for considering the wealth *per se* of the defendant when determining the amount of punitive damages to be awarded, and thus it is unclear whether consideration of wealth would be a permissible factor to consider under the federal statute.

On the whole, the proposed federal legislation would permit punitive damages, but would narrowly cabin them in order to frustrate excesses.[189] Over all, punitive damages that could be awarded under the federal statute would be much different from those that are now available in Iowa. The chief difference is that in Iowa the jury gets to determine both the propriety of awarding punitive damages and the amount to be awarded.[190] The federal statute apparently has no faith in the vagaries of jury determinations on this subject.

The proposed federal statute also features a very particular definition of "reckless disregard."[191] Such conduct must be "conscious" and "flagrant" and must constitute "an extreme departure from accepted practice."[192] An argument could be made that the proposed federal statute would permit punitive damages to be returned only for knowing and intentional indifference to safety on the part of the manufacturer. Under Iowa law, on the other hand, reckless conduct means conduct more than negligent under circumstances which shows "heedlessness and an utter disregard and abandon" as

184. *Id.* § 13(b).
185. *Id.* § 13(c).
186. *Id.*
187. *Id.* § 13(c)(1). *See also* text accompanying note 184.
188. S. 44, *supra* note 24, § 13(c)(1)-(2).
189. *Id.* § 13(c).
190. Boyle v. Bornholtz, 224 Iowa 90, 94, 275 N.W. 479, 482 (1937).
191. S. 44, *supra* note 24, § 13(a)(2).
192. *Id.*

to the result.[193] The conduct need not be "conscious."[194]

The proposed federal Act also insists on "clear and convincing evidence" of reckless conduct.[195] The statute defines "clear and convincing evidence" as follows:

> that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; the level of proof required to satisfy this standard is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt.[196]

If the federal statute is construed to require a showing of conscious or intentional indifference to safety by clear and convincing evidence, it will be a rare case indeed in which punitive damages would be proven. It is always difficult to show intentional misconduct, except by circumstantial evidence, but it would be very difficult indeed to show it when the circumstantial evidence must rise to the status of "clear and convincing evidence."

XII. Conclusion

In many respects it is difficult to know how to react to the proposed federal legislation. If one were to try to create a reasonable, fair products liability law, it probably would be difficult to do much better than the drafters of S. 44 have done. Although some aspects of S. 44 may seem unwise or inconsistent in theory, and the goal of "uniformity and certainty" difficult to achieve in practice, on the whole S. 44 is a fair effort. If one agrees that manufacturer exposure in design and warning cases has gone too far under the present application of strict liability principals, the federal statutes' insistence on proof of negligence in those types of cases is a reasonable response. If one agrees that traditional strict liability should be limited to cases of defects in construction, then the retention of strict liability only in defective construction cases makes sense. Strong arguments can also be made in favor of a statute of repose, and the twenty-five year federal proposal seems neither too long nor too short.

Similiarly, there is merit to the contention of retailers that they should not be held liable without fault simply because they sell a product in a defective condition when they did not manufacture the product, and may not have had a real opportunity to inspect and discover the defect. In the age of comparative negligence, the proposed Acts' "comparative responsibility" provisions strike a logical and fair balance that is theoretically consistent. If plaintiffs are to be permitted to recover their losses to the extent that they

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193. *See* Iowa Uniform Jury Instruction 3.21; Maland v. Tesdall, 232 Iowa 959, 965, 5 N.W.2d 327, 330 (1942).

194. *Id.*

195. S. 44, *supra* note 24, § 13(a)(1).

196. *Id.* §2(2).

are not responsible, it is only fair that defendants should be required to pay damages only to the extent that they were responsible for the harm. If a judgment against one of the defendants cannot be collected, all of the remaining parties should share in the reallocation of responsibility.

Further, the provisions in the proposed federal Act with respect to workers' compensation benefits would have the salutory effect of ridding products liability law of the abuses inherent in workers' compensation insurance carrier subrogation rights and the collateral source rule. Such subrogation rights are often an impediment to settlement, and very often, in practical effect, require products liability defendants to indemnify an employer for his negligence.

The problem with the proposed federal legislation lies not so much in the contents, but rather in its source. At the root of the federal proposal is a basic lack of faith in the federal system of government. The federal legislation is obviously prompted by dissatisfaction with products liability law as developed individually by states through their legislatures and courts, together with impatience at the refusal of the states to adopt past proposals for a uniform products liability law. Pre-emptive federal legislation is a too-convenient device to remove the whole subject matter from the states' authority. In effect, the proposed federal legislation says to thousands of state judges and legislators: "You have bungled the job, now we will show you how to paint by numbers." Ultimately, legislation of this type degrades the states and further centralizes federal authority.

It cannot be denied that state products liability laws affect interstate commerce. The effect may even be adverse, although the record of the Senate hearings on the proposed legislation includes very little supporting empirical data. Almost any body of tort law affects interstate commerce sufficiently, however, to confer authority on the federal government to pre-empt the field if it desires to do so. One cannot escape the fact, however, that S. 44 represents an unprecedented attempt to use the commerce clause to pre-empt an entire area of state tort law for no better reason than Congress' dissatisfaction with the law developed by the states, as well as its impatience with the refusal of the states to implement the type of proposals represented by S. 44. For this reason, and despite its merits, S. 44 should be searchingly considered, for its enactment could have broad implications going to the fundamental relationship between the states and the federal government.