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PRODUCTS LIABILITY:
MODEL PROPOSALS FOR LEGISLATIVE REFORM

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INTRODUCTION

Over the past decade, the number and cost of products liability claims have increased dramatically, especially in industries such as machine tools, aviation, sporting goods, and recreational vehicles. Surveys conducted by these and other industries and by national associations reflect the serious and ever-increasing problems in the cost of products liability insurance, its availability, and its affordability. A number of these surveys indicate that some companies are without products liability insurance because they cannot obtain it or believe they cannot afford it.¹ The problems are particularly acute for small manufacturers, according to a report of the Small Business Administration.² Further, in target industries studied in 1976 by the Interagency Task Force on behalf of various federal agencies, during the years 1974 to 1976, products liability premiums rose substantially, with the problem being more severe for small firms, and a number of companies, large and small, are going without products liability insurance; further, from 1970 to 1975 the total dollar volume of pending claims increased substantially.³

The purpose of this paper, however, is not to supply statistics to prove the seriousness of the products liability problems, but to

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¹ See, e.g., Bureau of Domestic Commerce, Staff Study on Products Liability Insurance (Mar. 1976); Testimony to United States Select Committee on Small Business (Sept. 8, 1976) (statement of President of Sporting Goods Manufacturers Association).


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consider legislative reforms in products liability law which will help to alleviate or curtail the products liability problems and restore needed balance to the law.

Primarily as a result of the adoption of the doctrine of strict liability in tort by a majority of states, the pendulum of products liability law has swung too far in favor of the plaintiffs and against the manufacturers and sellers. Regardless of the rationale for strict liability in tort, the law as it is being interpreted and applied by the courts and juries has become unreasonable and unrealistic. It should be remembered that no legislature has ever initiated strict liability in tort—strict liability in tort is court-made law. Dramatic changes in the law, such as the adoption of strict liability in tort, should be enacted by the legislatures, and it is time for the legislatures to decide what the law of products liability should be.

Under the doctrine of strict liability in tort, Restatement of Torts section 402A, too little responsibility or duty is placed upon the user or consumer of the product. Aside from proving that there was no unreasonably dangerous defect or that the alleged defect did not cause the injury, the only defenses available to the manufacturer or seller are voluntary assumption of a known risk or open and obvious danger and, in certain instances, misuse of the product. With respect to voluntary assumption of the risk, subjective proof that the user actually realized the danger, but voluntarily proceeded to use the product in that manner, may be required. With respect to misuse of a product, the manufacturer may still be liable under strict liability if the misuse or unintended use of the product was foreseeable. In this writer's view, such "foreseeability" is often imagined by the courts and juries by the

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5 Id.
6 Restatement (Second) of Torts § 402A (hereinafter § 402A) and Comments (1965).
use of hindsight, rather than determined by objective foreseeability. The verdicts being rendered are unwarranted as to the liability imposed by the jury and as to the amount of the verdict. The fault lies not with the jury system but with the law.

The cost of products liability is, of course, borne by the purchaser of the products. In order to secure the enactment of reform products liability legislation, the public and the state legislators must be made aware that the unwarranted and unreasonable costs of products liability claims are being paid by the consumers, because the manufacturers simply add the cost to the price of the product. The average products liability loss increased 686% from 1965 to 1973, whereas there was only a 60% increase in the general price index. Furthermore, the cost of legal defense for products liability claims has increased so drastically that today it accounts for over thirty cents of each dollar in insurance premiums.

KANSAS: COMPREHENSIVE PRODUCTS LIABILITY LEGISLATION

Kansas was the first state to propose comprehensive legislation to reform the law of products liability; Kansas Senate Bill (S.B.) 852 was introduced in the Kansas legislature in February 1976. Since that time, many groups and organizations have become engaged in the drafting and promulgation of products liability legislation.

Kansas S.B. 852 was referred to a joint legislative committee which heard testimony and received evidence during the summer months of 1976. A revised version of S.B. 852 was submitted to the committee, and in September 1976 the legislative committee recommended a comprehensive products liability bill, introduced as House Bill (H.B.) 2007, to the 1977 Kansas Legislature for passage. H.B. 2007, while far from perfect, represents the most far-reaching products liability legislation ever approved by a state legislature committee.

PROPOSALS FOR LEGISLATIVE REFORM

This article will not be limited to a discussion of H.B. 2007

11 Id. at 9.
pending before the Kansas Legislature, although the bill contains a number of the proposals which will be discussed herein. Instead, this paper will discuss the legislative reforms which this writer believes are necessary to restore the proper balance to the law of products liability. Due to the number of proposals which will be presented, space limitations will not permit a detailed discussion of each proposal.\footnote{\textit{See} \textit{Defense Research Institute Monograph, Products Liability Position Paper} No. 9 (1976) (hereinafter DRI). (Frequent references will be made to the generally excellent proposals and discussions, including authorities, which are contained in the DRI Position Paper. The DRI Position Paper is endorsed by the Presidents of the Defense Research Institute, Inc., the International Association of Insurance Counsel, the Federation of Insurance Counsel and the Association of Insurance Attorneys. Quotations from and reproduction of portions of the DRI Position Paper are: Reprinted with Permission, Copyright 1976 the Defense Research Institute, All Rights Reserved).}

I. Limitations of Actions

\textbf{Proposal}: The plaintiff in a products liability action brought under the doctrine of strict liability in tort should be required to commence an action within six to eight years after the date the product was first sold for use or consumption to a person who was not in the business of selling the product. Suit could still be maintained in negligence if commenced within the time limitation for negligence actions. Provisions should be made so as not to affect the rights of a person found liable to seek indemnity from another.

\textbf{Discussion}: The statute of limitations for strict liability in tort, generally, is the same as the statute of limitations for negligence actions.\footnote{Annot., 4 A.L.R.3d 821 (Supp. 1965).} Thus, under strict liability in tort, manufacturers are held liable under strict liability even though many years have elapsed between the date the product was manufactured and sold and the date of the injury. Regardless of the reasons for strict liability in tort, a manufacturer should not be subject to liability forever. After a number of years have passed, the ability of the manufacturer to defend his products becomes quite difficult. The product may have been sold several times, improperly maintained or repaired, or abused, but that evidence is often not available to the manufacturer. This proposal would take away the plaintiff's advantages under strict liability after a certain number of years, but the plaintiff would retain a cause of action in negligence. This
retention by the plaintiff would avoid the possibility of all claims being barred before the accident occurs, and retain a cause of action as to alleged defects, such as a fatigue crack, which may not cause injury or a failure for many years. At the same time, requiring all actions to be brought in negligence after six or eight years will provide the defenses which should be available to a manufacturer in a situation where his product has operated safely for that number of years.14

II. Statutory Codification of Strict Liability, With Modifications

Proposal: In those jurisdictions where strict liability in tort has been adopted, all of the elements of liability should be expressly set forth. The elements should be those originally intended by Section 402A and the Comments, with the following modifications:

1. Within Section 402A, the terms “one who sells” and “seller” should be defined so as to include only those actually engaged in the business of selling a product, and so as to exclude bailors and lessors of the product as well as one who only occasionally sells a product if he is not engaged in that business.

2. “Defective condition unreasonably dangerous” should be specifically defined on the basis of the Comments to Section 402A.

3. It should provide that the rule does not apply to unavoidably unsafe products such as drugs and like products.

4. It should expressly set forth that strict liability does not apply to “defective design” or “failure to instruct or to warn.”

Discussion: The above proposals are in accordance with the intention of the drafters of Section 402A and the Comments, with the possible exception of the proposed provision which excludes failure to instruct and failure to warn from strict liability. Unfortunately, some court decisions even purport to remove the requirement that the product be “unreasonably dangerous.”15 Thus, the requirement that the plaintiff show that the product was in a “defective condition” and “unreasonably dangerous” should be specifically set forth and defined in a statute.

14 See DRI supra note 12, at 20-23, for further discussion, authorities, and a sample statute. The language proposed in Kan. Rev. S.B. 852 provided that no products liability action, as defined, could be commenced “more than six (6) years after the date the product was first purchased for use or consumption.”

Some courts have even extended the application of strict liability beyond those regularly engaged in the sale of products, despite the express requirement in Section 402A and Comment f. The specific definitions of "seller" and "one who sells" should eliminate such decisions.

It is clear from Comment k to Section 402A that strict liability was never intended to apply to "unavoidably unsafe products." There have been examples of courts, however, disregarding the intent of Section 402A, so the intent of Section 402A should be expressed in the statute.

The most controversial portions of the proposal will probably be the elimination of alleged defective design and failure to instruct or warn cases from the doctrine of strict liability. Nowhere in Section 402A or the Comments is there any intimation that Section 402A was intended to apply to design defects. In fact, all discussion in the Comments to Section 402A is limited to the product itself and manufacturing defects.

There are a number of considerations in the manufacturer's choice of design, such as customer preference as opposed to absolute safety, price versus absolute safety, and style and convenience. The question is, how much design safety is enough? Michael Hoenig, of the New York Bar, in an excellent article on the question, concluded that the alleged design defect cases should be left to the field of negligence, pointing out that "design cases actually involve application of negligence techniques and negligence theory," and that the application of Section 402A should be limited to cases involving defects in the manufacturing process.

Failure to instruct or failure to warn also involves the application of negligence techniques and negligence theory and, in this writer's view, it was a mistake to include h to Section 402A which

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19 See note 6 supra, Comment k at 353-54.
22 Id. at 137.
indicates that the seller may have a duty to give adequate warning of a foreseeable danger which would permit a product sold without such a warning to be found defective.\footnote{See note 6 supra, Comment h at 351-52.} Juries should not be confused with instructions to the effect that a failure to warn or instruct is a defect in the product. Since the negligence theory is involved, it should be in a negligence cause of action, and the manufacturer or seller should have the defenses available in a negligence action.\footnote{See DRI supra note 12, at 10-16, for further discussion, authorities, and a sample statute. Kan. H.B. 2007 pending before the Kansas Legislature, contains definitions of “defect,” “defective condition,” and “unreasonably” dangerous.}

III. Duty to Warn

Proposal: The manufacturer’s or seller’s duty to warn should not include warning of safeguards and precautions which a person reasonably should take for himself and others, considering his activity at the time, his training, experience, education or special knowledge, or the fact that such safeguards and precautions would have been taken by a person similarly situated exercising reasonable care, nor to hazards which are patent, open, or obvious. Further, with regard to the defense of assumption of risk, the manufacturer should not be required to prove, subjectively, that the plaintiff actually realized the danger, but only that any reasonable person should have realized the danger with respect to any patent, open, or obvious dangers. In addition, there should be express limitations on the duty to warn with regard to alterations or modifications made by third persons.

Discussion: Strict liability in tort removes too much responsibility and duty on the part of the user, allowing manufacturers to be held liable regardless of how careless the user was, unless the user’s actions were the total cause of his injury, or unless the manufacturer can prove that the danger was open and obvious and, in some jurisdictions, that the user actually realized the danger and voluntarily and unreasonably proceeded to encounter the known danger.\footnote{See Annot., 46 A.L.R.3d 240 (1972); as to the duty to warn see generally Annot., 53 A.L.R.3d 239 (1973).}

As indicated earlier, even though the product is being misused the manufacturer may be liable for a failure to warn if a jury de-
terminates that the misuse could have been foreseen by the manufacturer or seller. As a matter of law, manufacturers and sellers should not be liable for misuse of a product when the misuse or unintended use involves a patent, open, or obvious danger or one which should be obvious to any reasonable person. Arguably, the manufacturer presently has the burden of warning of all possible hazards which could be connected with the use of his product. This is especially true if the manufacturer or seller has knowledge of any previous incident which occurred in the use of his product, regardless of how careless the user or operator was in causing the injury. This is an extremely unreasonable burden to place upon the manufacturer.

The proposal would also preclude any duty on the part of a manufacturer to warn with regard to those safeguards and precautions which a person reasonably should take for his own safety or the safety of others. Is this a return to negligence concepts as to the duty to warn? Yes. As discussed earlier, failure to warn or to give directions for use necessarily involves negligence theory and should never have been made a part of strict liability in tort as a product defect.

The manufacturer would still have the duty to warn of latent dangers or limitations in the use of his product where the user could not be reasonably expected to appreciate the danger. The manufacturer should have the right to expect that the average, reasonable user of his product will recognize hazards which are patent, open, or obvious, and that the user will exercise reasonable care for his safety. The manufacturer should have no duty to warn with regard to alterations or modifications which are made by third persons and which are not made at the direction or with the consent of the manufacturer.

The proposal represents a fair and proper balance between the duty of a manufacturer to warn as to latent, unanticipated hazards and the duty the user should have to recognize certain dangers and to guard against others.44

IV. Alterations Or Modifications By Third Persons

Proposal: A complete defense to a products liability action

44 See DRI supra note 12, at 25-27, for further discussion, authorities, and a sample statute, although the sample statute does not contain all of the elements suggested in this writer's proposal. Kan. H.B. 2007 in substance does contain the entire proposal.
should arise from evidence that the alleged injury resulted from or was substantially caused by the use of a product which had been altered or modified by the plaintiff or by a third person, subsequent to the manufacture or sale of that product. This defense should be available: (1) if the alteration or modification had the effect of altering or modifying the purpose, the use, or the manner of use of the product from that for which it was designed or originally intended by the manufacturer, and (2) if the injury would not have occurred but for the alteration or modification, or, in the alternative, was a substantial cause of the injury. In addition, a defense should arise if the alleged injury would not have occurred but for a third person's failure to maintain, service, or repair the product.

Discussion: The arguments and authorities supporting the proposal are more than adequately set forth in the DRI Position Paper, together with a sample statute. The DRI Position Paper points out that Section 402A provides that the seller of a defective product which is unreasonably dangerous is liable for physical harm "thereby caused," and that the words "cause" and "caused" mean "legal cause." "Legal cause" is defined as conduct on the part of the actor which is a substantial factor in bringing about the harm; "substantial" is defined in terms of the actor's conduct having such an effect in producing the harm as would lead a reasonable man to regard it as a cause, using that word in the popular sense. Therefore, logical argument can be made for using the term "substantial cause" in this proposal as opposed to language such as "if the injury would not have occurred but for the alteration or modification."

The second part of the proposal, which is proposed in the DRI Position Paper, provides a defense if the alleged injury would not have occurred but for a third person's failure to maintain, service, or repair the product. This is an excellent suggestion, especially since it would cover a machine owner's failure to comply

26 Supra note 12, at 14.
27 Id. § 431.
28 Id., Comment a. Kan. S.B. 852 was based upon the alteration or modification being a substantial cause, and Kan. H.B. 2007 is based upon primary cause.
29 DRI supra note 12, at 23-25.
with the Occupational Safety and Health Act standards and practices. Where the employer has violated those standards, the manufacturer would have a defense if the injury would not have occurred but for the violation.

This proposal may be of particular importance to the machine tool manufacturers, but it is also important to other manufacturers, including the aviation industry, where modifications are often made to aircraft subsequent to their manufacture which alter the design, use, and aerodynamics of the aircraft in a manner never intended by the manufacturer. If a modification or alteration was a substantial cause of the injury, the original aircraft manufacturer should not be liable. As the DRI Position Paper concludes, "Reason and equity demand that a manufacturer should be able to assert successfully, as a defense to a products liability action, conduct on the part of third persons."

V. Comparative Responsibility

Proposal: Comparative responsibility, which compares the responsibility of the person injured to the responsibility of all other persons causing the harm, should be applied to a products liability action filed under all theories of liability, including the doctrine of strict liability in tort. This comparison and assessment of responsibility would be made by the trier of facts. The responsibility of the person who sustained the injury should not bar recovery unless that responsibility was as great as the responsibility of the party against whom recovery is sought; however, any damages allowed should be diminished in proportion to the amount of responsibility attributable to the person recovering.

Discussion: The above proposal, in substance, is made in the DRI Position Paper and, beyond question, is a very sensible approach to a products action against a manufacturer or seller, if it

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31 DRI supra note 12, at 24.

32 See generally Brewster, Comparative Negligence in Strict Liability Cases, 42 J. Air L. & Com. 107 (1976), and the Uniform Comparative Fault Act quoted at 116 n.32; see also Feinberg, The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d, 42 Ins. COUNSEL J. 39 (1975).

be assumed that the ultimate judgment in such a case should be fair to the manufacturer or seller. Even if the public policy reasons for the adoption of strict liability in tort are accepted, if others are in part responsible for the injury, such responsibilities should be recognized in the law.

Products liability cases filed under the theory of strict liability in tort are often confusing in many respects, such as whether there was a defect, what is a defect, whether the defect caused the injury, whether the defective condition was unreasonably dangerous, whether the person using the product misused it or failed to follow adequate instructions, and whether contributory negligence is a defense.

As stated in the DRI Position Paper:

After hearing all of the evidence, the jury would simply be instructed to consider the totality of causes producing the harm which has been complained of and to assess a percentage of the total responsibility to each person whose conduct was a substantial factor in bringing it about. . . . [T]he trier of fact would not be confused with definitions of "negligence," "contributory negligence," "assumption of risk" and so on.  

VI. State of the Art, Post Accident Modifications, Improvements or Advances, and Industry Standards

Proposal: Where the design or the method of manufacture of a product conformed with the state of the art or with prevailing industry standards at the time the product was designed and manufactured, the product should not be considered defective. It should not be measured by the industry standards or state of the art prevailing at some later time.

In any civil action against a manufacturer of products, the following evidence should not be admissible for any purpose: (1) evidence of advancements or changes in technical knowledge, in design theory, or in testing or manufacturing techniques which have been developed or have come into common use subsequent to the time of the design, testing, and manufacture of the allegedly defective product; (2) evidence of any change, modification, or improvement made in the design, testing, or manufacture of the

84 Id. at 17.
specific product in issue, or any similar product, subsequent to the injury-producing occurrence in issue.

Where prevailing industry standards or specifications for a product exist, then to the extent to which the product complies with those industry norms, a product manufacturer or seller should not be subject to liability for damages arising out of the sale and use of an otherwise non-defective product.\(^5\)

**Discussion:** Section 12 of Kansas S.B. 852 provided a complete defense based upon compliance with state of the art or industry standards at the time of design and manufacture. It prohibited the admissibility for any purpose of evidence of modification, improvements, or advancements in the design or methods of manufacturing or testing, subsequent to the time the product in issue was designed, manufactured, and tested. The provisions of section 12 of S.B. 852 were adopted by the Kansas legislature committee, and are now a part of H.B. 2007 pending before the Kansas Legislature. In its products liability Position Paper, the Defense Research Institute has endorsed, in substance, the Kansas proposal.\(^6\)

The discussion found in the DRI Position Paper sets forth the reasons state legislatures should adopt compliance with state of the art and industry standards as defenses and should exclude evidence of post-accident improvements, modifications, and advances, regardless of the theory of liability. As stated by the DRI: “The overall effect of this proposal would be to mitigate one of the major problems in products liability litigation—the application by hindsight of the current state of the art or current design, manufacturing or testing standards to a product manufactured years or even decades earlier.”\(^7\)

With respect to the admissibility of evidence of post-accident modifications, improvements, or changes, the admission of such evidence is grossly unfair to the defendant manufacturers. As expressed by DRI:

Defendants thus may be placed in the position of having to anticipate each one of an infinite variety of possible accidents before it happens. There is a real possibility that a jury may infer that a

\(^5\) *Id.* at 27-30 for further discussion, authorities, and a sample statute. Kan. H.B. 2007 contains the proposal, in substance.

\(^6\) *Id.*

\(^7\) *Id.* at 27.
manufacturer was negligent or his product defective, because he made safety improvements or design changes after an accident. This burdens the manufacturer unfairly with a Hobson's Choice—no choice at all. Simple and unexcepted observance of the general rule would save manufacturers from this unfair dilemma and from defending against evidence that is often irrelevant and nearly always prejudicial.\(^3^8\)

VII. Compliance With Governmental Standards

**Proposal:** Evidence that a product complies with applicable federal or state statutes, standards, or regulations with respect to the design, manufacturing, testing, warning, or labeling of a product should be a defense, or at least create a rebuttable presumption that the product was not defective. Evidence that applicable federal or state statutes, standards, or regulations are mandatory requirements, from which a manufacturer cannot deviate, should preclude liability in any respect in which the product complies.

**Discussion:** Section 12 of revised S.B. 852 provided a defense in a products liability case where the design, manufacture, warnings, and instructions for use of the product were governed by state or federal statutes, standards, or regulations. The plaintiff was required to show a violation of the applicable standard in order to prove a case against the manufacturer or seller. Section 12 was not adopted by the committee and is not found in H.B. 2007. Nevertheless, it is believed that there should be some type of a benefit accruing to a manufacturer who complies with applicable government standards and regulations, and an amendment to H.B. 2007 will be offered.

The DRI Position Paper contains two alternative proposals with respect to governmental standards. The first proposal creates a rebuttable presumption in favor of the manufacturer or seller where there has been a compliance with applicable federal or state standards or regulations and provides that if the standards or regulations are mandatory requirements, liability is precluded in any respect in which the product complies.\(^3^9\) The alternative proposal by the DRI would provide a complete defense to the manufacturer in any respect in which the product complies with standards prescribed

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\(^{3^8}\) *Id.* at 29.

\(^{3^9}\) *Id.* at 31.
by federal or state statutes or regulations. The alternative proposal by the DRI is quite similar to the proposal to the Kansas legislature in revised S.B. 852, except that the Kansas proposal properly included warnings and instructions.

Under the present law, violations of governmental standards may result in the imposition of liability upon the manufacturer. Where a governmental agency has the responsibility for prescribing standards, compliance by the manufacturer should at least create a presumption in its favor.

Another proposal in this area might be to include a definition in the state of the art defense which would include compliance with applicable government standards for manufacturing, testing, and design as a compliance with the state of the art.

VIII. Worker's Compensation

Proposal: In actions against manufacturers, liens and subrogation rights of workers' compensation insurance carriers should be barred. The employer should be fully relieved of liability by payment of compensation under the state workers' compensation statutes, where the employer is liable without fault and the employee surrenders his common-law right to sue the employer. The employers' fault, if any, should reduce any verdict in favor of the employee against a product manufacturer.

Discussion: The above is a proposal made in the DRI Position Paper. While the Kansas committee working on products liability legislation has not endorsed the proposal, nor any other proposal dealing with the subject matter, this writer believes that the proposal is a satisfactory compromise between totally barring the injured employee from suing the product manufacturer, and the present law in most jurisdictions which overlooks the rights that should be given the products manufacturer. There have been numerous other proposals with respect to this problem area, such as totally barring any claim by the employee against the products manufacturer or allowing the manufacturer to implead the employer. The DRI proposal would appear to be the best and fairest of the proposals, especially when all of the elements of DRI's

40 Id.
41 Id. at 30-31.
42 Id. at 18-19.
Sample Statute\textsuperscript{43} are considered. These elements include precluding the plaintiff from pleading or proving medical expenses or wage loss to the extent that he has been compensated or is entitled to be compensated under the workers' compensation statutes. Finally, it should be borne in mind that the proposal on workers' compensation must be considered in conjunction with the comparative responsibility proposal previously discussed.\textsuperscript{44}

IX. Periodic Payments of Judgments and Annuities

Proposal: The courts should have the discretion to commute any award of damages to periodic payments and should be required to commute substantial awards of future damages to periodic payments or annuities, preferably the latter.

Discussion: Section 8 of Kansas S.B. 852 permitted the court in any civil action for recovery of damages for personal injury, death, or property damage, to require that the judgment be paid in whole or in part in periodic payments. In section 6 of the revised S.B. 852, it was proposed that where the judgment was for $50,000 or more in future damages, it was mandatory that the court order the judgment paid in periodic payments, specifying in detail how this was to be done. The Kansas legislative committee approved the proposal made in original S.B. 852, which simply gives the court the discretion to order judgments paid in installments and made it a part of H.B. 2007.

In this writer's view, there should be provisions making it mandatory for the court to commute substantial awards of future damages into periodic payments or, better yet, into annuities. The annuities could be along the same lines as those suggested by Sedgwick and Judge\textsuperscript{45} with regard to settlements. The periodic payments, the amount of the payments, the period of the payments, and the details of the annuities can all be tailored to fit the facts and circumstances of the particular case.

The advantages of period payment of judgments or annuities would accrue to both the plaintiff and the defendant. As stated by DRI:

\textsuperscript{43} Id. at 19.

\textsuperscript{44} Id. at 18-19.

\textsuperscript{45} Sedgwick & Judge, The Use of Annuities in Settlement of Personal Injury Cases, 41 INS. COUNSEL J. 584 (1974).
The use of periodic payments would protect the judgment creditor against the intentional or accidental dissipation of moneys necessary for his proper care. Collaterally, it would protect society by assuring that the judgment creditor does not become a ward of the state as a result of the dissipation of the funds provided for his care.\(^{46}\)

In addition, the heirs of an injured plaintiff who dies before his predicted life expectancy, upon which the judgment is predicated, "will not gain a windfall by receiving funds intended for the judgment creditor's maintenance, nor will the judgment creditor exhaust maintenance funds if he lives beyond his predicted life expectancy."\(^{47}\) Obviously, benefits will accrue to the defendant and his insurance carrier. If the defendant is uninsured, the judgment will not have to be paid in a lump sum, preventing imposition of a hardship on small manufacturers who are currently uninsured. If the defendant is insured, there would be an economic savings to the insurance company, in that the insurance company could retain its funds for a longer period of time and earn money from the investment of such funds, which would exceed the interest accumulating on the judgment.\(^{48}\)

X. Punitive Damages

**Proposal:** Punitive damages should not be recoverable in any civil action.\(^{49}\)

**Discussion:** There is no justification for punitive damages being allowed in any civil action. As succinctly stated in the DRI Position Paper:

Punitive damages are an anomaly in civil law. It is recognized that punitive damages serve the dual purpose of punishment and deterrence. However, punishment and deterrence are functions of the criminal law and not the civil law. The defendant in a criminal action is afforded various constitutional and procedural safeguards. Those safeguards are not provided in a civil action in which punitive damages are sought.\(^{50}\)

All of the compelling arguments against punitive damages in civil

\(^{46}\) DRI *supra* note 12, at 33.

\(^{47}\) *Id.*

\(^{48}\) *Id.* at 32-33 for further discussion and authorities.

\(^{49}\) *Id.* at 33-34.

\(^{50}\) *Id.* at 33.
actions have been previously stated and need not be repeated in this paper.  

Proposal: The collateral source rule should be modified with respect to all actions for compensatory damages, so that evidence is admissible as to the nature and extent of all benefits, reimbursements, indemnifications, or services received or to be received by or for the benefit of the party seeking compensation from any source and which were occasioned by the injuries and damages alleged to have been sustained as a result of the accident, occurrence, or event which is the subject matter of the action. In any action for wrongful death, evidence as to the remarriage of the surviving spouse and the income and income-earning capacity of the new spouse should be admissible. In any such compensatory action or wrongful death action, the jury should be required to be instructed by the court that the party making the claim will not be required to pay any state or federal income taxes on any monetary verdict which may be rendered in favor of such party.

Discussion: Revised S.B. 852, section 4, made virtually all evidence of payments received from collateral sources admissible. In addition, evidence of the remarriage of the surviving spouse and the income and income-earning capacity of the new spouse were made admissible in a death action. The jury was required to be instructed that any amounts awarded to the plaintiff for actual damages were not subject to federal or state income tax.

The proposal made in revised S.B. 852 was rejected by the legislative committee, and section 3 of H.B. 2007, pending before the Kansas Legislature, excludes from admissibility into evidence all payments received from insurance paid for, in whole or in part, by the plaintiff or his or her employer. Thus, under the pending Kansas legislation, evidence of payments for group hospitalization, disability policies, workmen's compensation, and virtually any other form of insurance payment would still not be admissible into evidence. In this writer's view, the broad-form modifications of the collateral source rule which were proposed in revised S.B. 852 should be enacted into law.

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51 See Defense Research Institute Monograph, The Case Against Punitive Damages, at 4-14 (1969); Ghiardi, The Case Against Punitive Damages, 8 Forum 411 (1972); with respect to punitive damages in products liability cases see Annot., 29 A.L.R.3d 1021 (1970).
The inequitable results which follow the application of a collateral source rule should be changed. As stated in the DRI Position Paper:

The plaintiff is allowed to introduce evidence of the economic "loss" sustained as a result of his injury. . . . Even if all of these claimed expenses have been paid at the time of trial by insurance or other collateral sources, the defense is prohibited from introducing evidence as to the payment. Thus the jury is led to believe that the plaintiff had to personally pay these expenses or that he has been subjected to continuous financial worry because they are still unpaid at the time of trial. If the jury finds for the plaintiff on the question of liability, this mistaken belief cannot help but be a factor in the jury’s determination of the amount to be awarded to the plaintiff for the pain, suffering and inconvenience which were occasioned by the defendant’s conduct. There is no question that a more equitable attitude would be exhibited if the jury knew that the plaintiff was not financially strapped pending trial, because of the collateral benefits which were available to him.5

The same inequities result from the exclusion of evidence of the remarriage of a surviving spouse. The DRI Position Paper fully discusses these inequities and concludes that portion of its discussion by stating: “Should a jury be misled into believing that the surviving spouse claiming emotional suffering over the death of a husband or wife will carry that grief for life when in fact, at the time of trial, a new home and hearth have replaced the old?”

A statute modifying the collateral source rule is what this writer has often referred to as a “truth statute.” As expressed by DRI:

That, when they [the jury] are charged with finding just compensation for actual, pecuniary loss, or even emotional loss, all material evidence as to the true nature of that loss be presented. We have faith in the jury system and believe that, given all of the evidence, an equitable determination of actual damages will be made.5

XII. Contingent Fees

Proposal: “The following five-point program is proposed for the

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5 DRI supra note 12, at 44-45.
54 Id. at 45. See generally Annot., 87 A.L.R.2d 252 (1963); and Shields & Giles, Remarriage and the Collateral Source Rule, 36 INS. COUNSEL J. 32, 39-40.
5 DRI supra note 12, at 45.
regulation of the contingent fee system:

1. The amount of any contingent fee should be strictly regulated by appropriate local court rule or legislation.
2. Every retainer on a contingent basis should be in writing in a fixed format and should be signed by the client.
3. A retainer statement should be filed with the appropriate judicial authority by a retained attorney within a fixed number of days from the date of the written contingent fee retainer.
4. There should be strict control of the division of fees between attorneys, based only upon work performed.
5. Upon completion of the claim or suit an attorney should file an itemized closing statement with the proper judicial authority and a copy thereof must be delivered to the client.”

Discussion: Section 10 of Kansas S.B. 852 proposed maximum limits on contingent fees in all types of suits for personal injury, death, or property damage where the ad damnum was in excess of $10,000. It further required a written contract and provided that the contingent fee had to be fair and reasonable as determined by the court. The maximum contingent fees, in this writer's view, were quite reasonable.57

The Kansas legislative committee rejected the imposition of maximum limits on contingent fees and merely provided in section 11 of H.B. 2007 that compensation for reasonable attorneys' fees "to be paid by each litigant," which includes the fees of the defendant's attorney, were to be approved by the court prior to final disposition of the case by the trial court. Similar provisions were made with respect to appeals. The statute specifies that the court is to consider "the nature and difficulty of the issues involved in the case and the time reasonably necessary to prepare and present the case."

If section 11 of H.B. 2007 is enacted into law, the results are uncertain. At the very least, the court will be obligated to examine the attorneys' fees, both the contingent fees of the plaintiff's attorney and the hourly charge of the defense attorney, and make a specific determination as to their reasonableness. It would also

56 Id. at 40-41.

57 The maximum contingent fees were 50% of the first $50,000; 40% of the next $50,000; 20% of the next $200,000; 10% of the next $100,000; and 5% of an amount in excess of $300,000.
appear that the written contract between the plaintiff and his attor-
ney will be presented to the court and become a public record.

Contingent fees should be eliminated, because they guarantee
that any individual may obtain competent legal representation in
an action for damages. Nevertheless, there is no reason for not
legislatively prescribing reasonable maximums on contingent fees.
At the present time, unless the state has a statute limiting con-
tingent fees, the plaintiff's attorney can charge any contingent fee
which is acceptable to the client. This writer's experience indicates
that contingent fees in serious medical malpractice cases and prod-
ucts liability cases are often 40% or 50%. Where contingent fees
are unregulated and the settlement or recovery is substantial, the
contingent fee received by the plaintiff's attorney is usually un-
reasonable, in this author's opinion, even when due allowance is
made for the fact that the plaintiff's attorney receives no fee in the
cases where no settlement is made and the case is tried and lost by
the plaintiff. Contingent fees should be regulated.

The five-point program proposed by the Defense Research Insti-
tute\textsuperscript{88} appears to be a good one; however, the Sample Statute\textsuperscript{89} still
allows the plaintiff's attorney to recover a certain percentage of
the entire net recovery. It is submitted that the percentage should be
mandatorily graduated, depending upon the amount of the re-
covery, in a manner such as that proposed in original Kansas S.B.
852.\textsuperscript{90}

XIII. Non-Pecuniary Damages

\textit{Proposal}: The maximum amount recoverable in any civil action
for non-pecuniary damages should be limited to a fixed dollar
amount, or, at least, the rules permitting courts to reduce verdicts
for damages should be modified so that courts will reduce such
damages when the amount is clearly excessive.

\textit{Discussion}: Original Kansas S.B. 852 prescribed monetary limits
for non-pecuniary damages, expressly with respect to pain and
suffering, and contained an overall limitation of $100,000. These
limitations and a revised version of the limitations were rejected
by the Kansas legislative committee. The committee did adopt, in

\textsuperscript{88}DRI \textit{supra} note 12, at 40-41.
\textsuperscript{89}Id. at 41-43.
\textsuperscript{90}Id. at 45.
section 10 of H.B. 2007, a provision granting the courts the discretion to reduce an award for non-pecuniary loss or damage where the amount awarded by the jury "shocks the conscience of the court." In such a case the court may reduce the damages to an amount which the court deems fair and reasonable under the circumstances. Frankly, it is doubted that the provision recommended by the Kansas legislative committee will be of much benefit, but it could give a court the courage to reduce an extremely high sympathy verdict awarded a plaintiff.

The DRI Position Paper apparently opposes any limitations on jury verdicts.\[^1\] Such limitations are unnecessary only if most of the other reforms urged in this paper are adopted. If they are not, interested groups will undoubtedly continue to press hard and diligently for dollar limits on awards for nonpecuniary damages as a short-term solution to the high cost of products liability cases. If the law cannot be reformed, such limits are the only method of reducing costs.

As an alternative, it is submitted that statutes should definitely be developed so that courts will feel obligated to reduce obviously excessive sympathy verdicts for plaintiffs to an amount which is fair and reasonable. After all, the only purpose of any reparation system should be to provide adequate but reasonable compensation to the injured party. When the amount awarded is grossly in excess of what is adequate but reasonable compensation, the courts should be encouraged to reduce such verdicts pursuant to statutes providing greater discretion to do so.

XIV. Ad Damnum

Proposal: Any pleading demanding relief in the form of unliquidated damages may only state a prayer for general relief in damages and state that the amount claimed is within the minimum, if any, and the maximum, if any, jurisdictional limits of the court.\[^2\]

Discussion: In the state of Kansas, the ad damnum has already been eliminated in any pleading demanding damages in excess of $10,000, "except in actions sounding in contract."\[^3\] Thus, the only problem remaining in the state of Kansas with respect to the ad

\[^1\] Id. at 36.
\[^2\] Id. at 46.
damnum in products cases will be the enactment of an amendment to make it clear that actions for breach of warranty, although sounding in contract, are subject to the provision that no specific amount be set forth where damages are being sought in excess of $10,000. Many states, however, have not yet eliminated the ad damnum clause.64

XV. Loan Receipts or Agreements and Guaranty Agreements

Proposal: Loan receipts or agreements and guaranty agreements, which encourage or require litigation against other persons, should be made void and unenforceable.65

Discussion: Section 9 of H.B. 2007, as approved by the legislative committee, makes certain types of loan or guaranty agreements void and unenforceable.66 The prevailing practice of some insurance companies has been to either make a settlement without paying any money, but guaranteeing a certain amount to the plaintiff if recovery of that amount is not obtained from other parties, or to actually pay or "loan" the money to the plaintiff with the understanding that the money will be repaid to the insurance carrier in the event the claimant makes a recovery from some other party. Such practices have encouraged and fostered unnecessary products liability suits. It is neither fair nor equitable for one insurance carrier to totally escape the payment of any money where it insures a party who may be the one most clearly liable for the injury or death.67

XVI. Other Reform Legislation

A. Attorney Fees, Expenses, and Cost to Defendant. Provision should be made for the awarding of reasonable attorneys' fees and

64 See DRI supra note 12, at 46-47.
65 See generally with respect to loan receipts Annot., 13 A.L.R.3d 42 (1967); see also Lageson, Guarantee and Loan Receipt Agreements in Multi-Party Litigation, 42 J. AIR L. & COM. 85 (1976), and Thornton & Wick, Loan Receipt Agreements: Are They Loans, Settlements, Wagering Contracts or Unholy Alliances?, 43 INS. COUNSEL J. 226 (1976).
66 Section 9 makes void and unenforceable those loan or guaranty agreements where the recipient of the loan or guaranty promises to "prosecute or continue to prosecute a claim against another person."
67 See Lum v. Stinnett, 488 P.2d 347, 351 (Nev. 1971) where the court stated, "We deem agreements whereby insurance carriers agree to pay any consideration to foster litigation in which they are not interested, in order to avoid their own liabilities, contrary to law and public policy."
all expenses and costs to the defendant if the court determines that
the suit was instituted or continued by the plaintiff without any just
cause or excuse and with no factual or legal basis. Such a pro-
vision would help to eliminate or discourage the filing of suits
which are: wholly without merit, filed solely for the purpose of
obtaining a nuisance settlement, pure "fishing expeditions," or
filed for the purpose of making the defendant subject to the rules
of discovery as a party.

B. Contribution Among Joint Tort-feasors. In states which do
not allow such contribution among joint tort-feasors, legislation
should be enacted allowing such contribution, specifically allowing
the right of contribution even though the defendants may be liable
to the plaintiff under different theories of liability. In those juris-
dictions which already allow such contribution, legislation should
be enacted, if necessary, to make it clear that such contribution
should be allowed.68

C. Fraudulent Claims. The Defense Research Institute has pro-
posed a statute imposing sanctions upon those who intentionally
make or assist in making false or fraudulent claims for personal in-
jury, death, or property damage.69 Certainly, such claims should
not be allowed and the DRI proposal is endorsed.

D. Efficient Use of Legal Effort. In the Appendix to the DRI
Position Paper, the DRI proposes statutes under the category of
"Efficient Use of Legal Effort." These statutes provide for limits
on voluntary dismissals or non-suits, split trials, and summary
judgment procedures, as well as other proposals.70 If any jurisdic-
tion does not have such procedures by court rules or statutes, they
should be adopted.

D. Summary Judgment. In view of the notice pleading which
most jurisdictions presently have, it is submitted that rules of
practice should be developed which will provide the opportunity
and give the courts the discretion to make an early determination
that: there is no genuine issue as to any material fact, the plaintiff
had no evidence at the time the suit was filed or has developed no
evidence after reasonable discovery, and summary judgment should

68 See DRI supra note 12, at 31-32.
69 Id. at 47-48.
70 Id. at 48-50.
be granted to the defendant. Under the present rules of many jurisdictions, it is virtually impossible to obtain summary judgment, regardless of how nefarious the suit. Too often, multiple defendants are named with no factual basis and in violation of Rule 11 of the Federal Rules of Civil Procedure.\textsuperscript{71}

CONCLUSION

In the Foreword of the Defense Research Institute's Products Liability Position Paper, the statement is made: "We do not see these proposals as a panacea."\textsuperscript{72} The same comment is applicable with regard to the proposals presented in this paper. Certainly improvements can be made in the proposals, and other legislation may be needed. Nevertheless, this writer submits that the proposals discussed in this paper represent a reasonable approach to what the law of products liability should be and that they would have a substantial affect upon products liability costs without destroying the basic framework of strict liability in tort or the adversary or jury systems. On the other hand, if legislation cannot be enacted in most states to require the states to strictly adhere to the original concepts of the doctrine of strict liability in tort, and if the other necessary reforms cannot be enacted, including the placing of more responsibility on the user or consumer of products, then strict liability in tort should be discarded and we should return to the traditional concepts of liability in negligence and breach of implied warranty. If not, then we may ultimately find ourselves with a no-fault system for products liability litigation such as that proposed by Professor Jeffrey O'Connell.\textsuperscript{73}

\textsuperscript{71} FED. R. CIV. P. 11 provides, in part, with reference to an attorney signing a pleading, "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it."

\textsuperscript{72} DRI supra note 12, at 3.

\textsuperscript{73} J. O'CONNELL, ENDING INSULT TO INJURY—NO FAULT INSURANCE FOR PRODUCTS AND SERVICES (1975); see Schwartz, Professor O'Connell's Method for Ending Insult to Injury: Can It Solve the Air Crash Litigation Dilemma?, 41 J. AIR L. & COM. 199 (1975).