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# Special Project

## THE MODEL UNIFORM PRODUCT LIABILITY ACT: PINNING DOWN PRODUCTS LAW

LARRY A. RIBSTEIN\*

THE FOLLOWING student papers deal with the Model Uniform Product Liability Act.<sup>1</sup> The purpose of this brief foreword is to provide a history, a very general critical overview and some comments on the future of the UPLA which will serve as a context for the much more elaborate treatment by these papers of specific aspects of the UPLA.

### A HISTORICAL NOTE

The first step toward the preparation of the UPLA was the creation by the President's Economic Policy Board of the Interagency Task Force on Product Liability in April, 1976, amid widespread dissatisfaction of manufacturers with increased rates and decreased availability of product liability insurance.<sup>2</sup> After a comprehensive study of manufacturing practices, insurance and tort law, the Task Force released a preliminary report on January 4, 1977,<sup>3</sup> and a Final Report on November 1, 1977.<sup>4</sup> The Task Force substantiated the existence of the insurance problems cited by the manufacturers, but found something less than a crisis.<sup>5</sup> It identified three major causes of these problems: (1) insurance rate-making procedures;

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<sup>1</sup> Hereinafter referred to as the "UPLA." The UPLA, together with the drafters' section-by-section analysis, has been published by the Department of Commerce, in 44 Fed. Reg. 62,714 (1979).

<sup>2</sup> FED. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT, I-1 (1977) [hereinafter cited as TASK FORCE REPORT. The Federal Interagency Task Force on Products Liability will be hereinafter referred to as the "Task Force"].

<sup>3</sup> TASK FORCE, BRIEFING REPORT (1977).

<sup>4</sup> TASK FORCE REPORT, *supra* note 2, at I-21-I-31.

<sup>5</sup> See TASK FORCE REPORT, *supra* note 2, at VI-52-VI-56.

(2) uncertainties in tort law; and (3) unsafe manufacturing practices.<sup>6</sup>

On February 24, 1978, the Department of Commerce (DOC) forwarded to the White House a discussion of various options for the resolution of the problems identified in the Task Force Report, together with the DOC's recommendations.<sup>7</sup> Two of the DOC's recommendations have been acted upon. The first of these recommendations to be acted upon involved legislation which would facilitate self-insurance by the industry as an alternative to currently available insurance, and would thus be a possible antidote to inadequate rate-making procedures.<sup>8</sup> A bill styled the Product Liability Risk Retention Act of 1979<sup>9</sup> progressed as far as receipt of overwhelming approval by the House of Representatives,<sup>10</sup> but died in the Senate as the 96th Congress adjourned.<sup>11</sup>

The other DOC recommendation to be acted upon was preparation of the UPLA.<sup>12</sup> A draft law was published January 12, 1979,<sup>13</sup> and a final version was published October 31, 1979.<sup>14</sup> Various provisions of the UPLA have served as the basis of legislation adopted in Connecticut<sup>15</sup> and Idaho<sup>16</sup> and introduced in the United States House of Representatives.<sup>17</sup>

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<sup>6</sup> TASK FORCE REPORT, *supra* note 2, at I-21-I-31.

<sup>7</sup> DEPT. OF COMM., OPTIONS PAPER ON PRODUCT LIABILITY AND ACCIDENT COMPENSATION ISSUES, 43 Fed. Reg. 14,612 (1978) [hereinafter cited as OPTIONS PAPER].

<sup>8</sup> See OPTIONS PAPER, *supra* note 7, at 14,620-21 (discussion of option); *id.* at 14,625 (DOC recommendation); *id.* at 14,627-32 (draft of proposed bill to amend the Internal Revenue Code to provide for deductibility of amounts paid to captive insurers).

<sup>9</sup> H.R. 6152, 96th Cong., 1st Sess. (1979).

<sup>10</sup> See [Dec. 19, 1980], 8 PROD. SAFETY AND LIABILITY REP. (BNA) 904, reporting that the bill is likely to succeed in the 97th Congress.

<sup>11</sup> *Id.*

<sup>12</sup> OPTIONS PAPER, *supra* note 7 at 14,617 (discussion of option); *id.* at 14,624 (DOC recommendation). After publication of the Options Paper, the Administration directed the preparation of a draft law. See DEPT. OF COMM., SYNTHESIS OF PUBLIC COMMENT ON OPTIONS PAPER, 43 Fed. Reg. 40,438, 40,448 (1978) (Appendix A).

<sup>13</sup> DEPT. OF COMM., DRAFT UNIFORM PRODUCT LIABILITY LAW, 44 Fed. Reg. 2996 (1979) [hereinafter cited as DRAFT UPLL].

<sup>14</sup> See note 1 *supra*.

<sup>15</sup> Conn. Publ. Act 79-483, Laws 1979 (App. Pamph. 1979). See discussion in note 44 *infra*.

<sup>16</sup> IDAHO CODE § 6-1401-09 (1980). See discussion note 44 *infra*.

<sup>17</sup> Foremost among the House bills is H.R. 7921, 96th Cong., 2nd Sess. (1980),

## SOME CRITICAL COMMENTS

The goal of the drafters of the UPLA was to bring certainty to product liability law as one way of alleviating industry's insurance problems.<sup>18</sup> Whether or not this goal will be achieved is presently a matter of speculation.<sup>19</sup> It is clear, however, that this quest for certainty has resulted in a law which may substantially reduce the protection of those injured by defective products. The reason for this is that the drafters have sought to attain certainty by replacing the common law's delicate case-by-case balancing of the rights of injured plaintiffs and product sellers with rigid categories of liability and nonliability. Such an approach does not permit sophisticated application by the courts of the policies underlying product liability. A few examples will serve to illustrate this point.

First, the UPLA eliminates consumer expectations as a criterion for defectiveness.<sup>20</sup> This has been done because consumer expectations are deemed to be too "abstract" and because consumers are said to be incapable of evaluating design decisions.<sup>21</sup>

As a result of this drafting decision, the UPLA would leave the courts without a crucial factor in determining defectiveness.<sup>22</sup> As an example of the consumer's plight under the UPLA, suppose injury results when a truck hits a rock in the road and a wheel

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which was introduced by Rep. Richardson Preyer after debate on UPLA-type legislation by the Subcommittee on Consumer Protection and Finance of the House Interstate and Foreign Commerce Committee. See [Aug. 8, 1980] 8 PROD. SAFETY & LIABILITY REP. (BNA) 570.

<sup>18</sup> Model product liability legislation was discussed in the Options Paper as a way of dealing with the problem of "uncertainties in the tort-litigation system." See 43 Fed. Reg. 14,612, 14,616 and references in note 12 *supra*. The Administration ordered preparation of the law "to attack uncertainties in the tort system." SYNTHESIS OF PUBLIC COMMENT ON OPTIONS PAPER, *supra* note 12 at 40,448 (Appendix B). The introduction to the UPLA states: "The Model Law, if enacted by the states, would introduce uniformity and stability into the law of product liability. This, in turn, would help stabilize product liability insurance rates." 44 Fed. Reg. 62,714 (1979).

<sup>19</sup> See discussion at notes 43-50 *infra*.

<sup>20</sup> See 44 Fed. Reg. 62,714, 62,724 (1979) (analysis of § 104).

<sup>21</sup> *Id.* For a discussion of the arguments favoring the UPLA approach, see Comment, *Model Uniform Product Liability Act—Basic Standards of Responsibility for Manufacturers*, 46 J. AIR L. & COM. 389 (1981) [hereinafter cited as *Basic Standards*].

<sup>22</sup> For a comprehensive study of the role of product portrayal in the law of product liability, see Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974) [hereinafter cited as Shapo].

separates.<sup>23</sup> The truck was represented to be "Ford-tough" and was shown in advertisements overcoming great adversity. If the consumer drove the vehicle to his injury or death following the collision with the rock because he reasonably believed it was tough enough to withstand the rock, a strong argument could be made that the plaintiff ought to recover. The seller has deliberately created expectations which led to the buyer's injury and should, therefore, be held responsible. There is reason to believe that this result would be reached under current law.<sup>24</sup>

Under the UPLA, however, the plaintiff in the wheel case would face severe obstacles to recovery. Under a design defect theory, the manufacturer's duty would be measured merely against what constitutes the "reasonable" truck, with all of its design compromises,<sup>25</sup> rather than what the manufacturer seemed to be saying it could produce. Nor could the plaintiff in the above example rely on an express warranty under the UPLA, since that rigidly defined category of liability "does not include a general opinion about, or praise of, the product."<sup>26</sup>

The arguments given by the drafters of the UPLA in support of

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<sup>23</sup> This hypothetical is similar to the fact situation in *Heaton v. Ford Motor Co.*, 248 Or. 467, 435 P.2d 806 (1967). That case is discussed from a representational perspective in Shapo, *supra* note 22 at 1149-50.

<sup>24</sup> See Shapo, *supra* note 22 at 1199-1202, and cases discussed therein. In *Heaton* liability was denied. The majority opinion recognized that products "should be strong enough to perform as the ordinary consumer expects," *Heaton v. Ford Motor Co.*, 248 Or. 467, 474, 435 P.2d 806, 809, but held that there was insufficient evidence to permit the jury to decide that point. There was a strong dissent by Justice O'Connell. It is likely that if the Oregon court had been presented with the additional facts in the hypothetical with respect to product advertising, the case would have been decided differently. *But see Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979) (rejecting consumer expectations test).

<sup>25</sup> 44 Fed. Reg. 62,714, 62,721 (1979). This determination would be made primarily under § 104, which requires consideration of whether "the product was unreasonably unsafe in design," and sets forth five criteria, including "the technological and practical feasibility" of an alternative design. *Id.* This basic determination is subject to § 106, *id.* at 62,727, which exempts from liability "unavoidably dangerous aspects of products," § 107, *id.* at 62,728-729, which provides for consideration by the trier of fact of compliance with industry custom and exempts from liability products which could not be improved "within practical technological feasibility," and § 108, *id.* at 62,730, which provides for presumptions in favor of the seller with respect to products complying with government regulations.

<sup>26</sup> UPLA § 104(D). See analysis of this section, 44 Fed. Reg. 62,714, 62,726 (1979).

ignoring consumer expectations do not justify denial of recovery in cases like these. That consumer expectations may be vague or unrealistic in some cases does not justify ignoring them in all cases.<sup>27</sup> Of course, retaining consumer expectations even as a factor in determining defectiveness would reduce "certainty" to some extent. But the alternative offered by the UPLA achieves certainty at the expense of unduly reducing the protection of injured consumers.

A second example of the problems created by the neat categories of the UPLA is the provision which eliminates a duty to warn as to "obvious" dangers.<sup>28</sup> The drafters feared that an unlimited duty to warn about obvious dangers would reduce the effectiveness of warnings.<sup>29</sup> This problem could have been dealt with, however, by making the obviousness of the danger a criterion for the duty to warn rather than by creating a sweeping exclusion for all obvious dangers. The UPLA's categorical exemption is an invitation to the courts to deny liability whenever a danger lies partially on the surface even if, in view of the consumer's inability to appreciate the full extent of the danger, a warning should be required.<sup>30</sup> For example, the pop of a champagne cork may be said to be an "obvious" danger and therefore one of which no warning is required under the UPLA. The typical consumer, however, whose knowledge of the good life may be based on visions of a suave William Powell opening champagne in a "Thin Man" movie, may not be aware of the potential shotgun-like force of a champagne cork and so may be well served by simple advice from the bottler to hold the bottle away from him when opening it.<sup>31</sup>

Finally, the drafters of the UPLA have sought certainty by defining certain categories of plaintiff's conduct which will result in apportionment of damages, including failure to observe an appar-

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<sup>27</sup> See Twerski and Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 *DRAKE L. REV.* 221, 230-33 (1978).

<sup>28</sup> UPLA § 104(C)(4).

<sup>29</sup> 44 *Fed. Reg.* 62,714, 62,725 (1979) (Analysis of § 104(C)(4)).

<sup>30</sup> See *Basic Standards*, *supra* note 21 at 413. For a general criticism of the "obvious danger" rule, see Marshall, *An Obvious Wrong Does Not Make A Right: Manufacturer's Liability for Patently Dangerous Products*, 48 *N.Y.U. L. REV.* 1065 (1973).

<sup>31</sup> See *Burke v. Almaden Vineyards, Inc.*, 86 *Cal. App. 3d* 768, 150 *Cal. Rptr.* 419 (1979).

ent defective condition,<sup>32</sup> use of a product with a known defective condition<sup>33</sup> and misuse.<sup>34</sup> As is discussed in one of the following papers,<sup>35</sup> there has been a growing recognition that, contrary to the general principle of comparative fault, product manufacturers, because of their greater ability to avoid a product injury, should sometimes bear the entire responsibility for the injury despite the plaintiff's negligence. The problem with the UPLA's categories of plaintiff's conduct is that the use of the categories would result in the apportionment of damages in many situations in which, from a policy standpoint, there should be no apportionment. A buyer who uses an apparently defective product may justifiably be relying on the seller to have produced a safe product.<sup>36</sup> The buyer's unreasonable use of a product with a known danger may be one which is easily prevented by the manufacturer through, for example, the installation of two-handed controls which keep an employee's hands out of moving works.<sup>37</sup> Finally, use of a product which is not "expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances"<sup>38</sup> may still properly be the sole responsibility of the seller. For example, an "ordinary reasonably prudent person" is not "expected" to drive twice the speed limit, but damages arguably should not be apportioned if the car breaks down at a speed which is within the car's anticipated maximum.<sup>39</sup>

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<sup>32</sup> UPLA § 112(A)(2).

<sup>33</sup> *Id.* § 112(B)(1).

<sup>34</sup> *Id.* § 112(C).

<sup>35</sup> See Comment, *Examining the Plaintiff's Conduct under the New Model Uniform Product Liability Act*, 46 J. AIR L. & COM. 419 (1981) [hereinafter cited as *Examining Plaintiff's Conduct*].

<sup>36</sup> See Twerski & Weinstein, *supra* note 27 at 249. See also the discussion of this section in *Examining Plaintiff's Conduct*, *supra* note 35 at 445.

<sup>37</sup> See *Bexiga v. Havir Manufacturing Corp.*, 60 N.J. 402, 290 A.2d 281 (1972) (denying liability under these facts). *Bexiga* is discussed in Marschall, *supra* note 30 at 1087-88 and in Walkowiak, *Reconsidering Plaintiff's Fault in Product Liability Litigation: The Proposed Conscious Design Choice Exception*, 33 VAND. L. REV. 651, 670 (1980). See also the discussion of this section in *Examining Plaintiff's Conduct*, *supra* note 35 at 435.

<sup>38</sup> UPLA § 112(C)(1) (definition of "misuse").

<sup>39</sup> See Twerski & Weinstein, *supra* note 27 at 253-54; Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 816-17 (1977). See also the discussion of this section in *Examining Plaintiff's Conduct*, *supra* note 35 at 440. It should be pointed out that, although the Draft UPLL did not provide for apportionment of foreseeable misuse, § 111(C)(3)

The problems of the UPLA might be tolerable if they were necessary. The background of the law, however, suggests they were not. The manufacturers' insurance problems may have required attention, but not such a radical change in tort law. The Task Force Report pointed out that a large measure of responsibility belonged to the insurers and their rate-making practices.<sup>40</sup> It may well be that all that is needed are changes in how risks are insured rather than changes in the risks themselves.<sup>41</sup> At the very least, measures like the Risk Retention Act<sup>42</sup> should be given a chance to work before tampering with the delicate mechanism of tort law.

### A NOTE ON THE FUTURE OF THE UPLA

All of the alarms sounded above may prove premature in light of the most likely predictions for the future of the UPLA. In the first place, the Act has not yet swept the country. The smoke of discussion has far exceeded the fire of enactment.<sup>43</sup> Even where the UPLA has inspired state legislation, the resulting legislation is quite different from the UPLA in its present form.<sup>44</sup> If the fu-

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and the analysis of the present § 112(C) assume that only foreseeable misuse is apportioned under the Act, 44 Fed. Reg. 62,714, 62,738 (1979), the *language* of the provision does permit apportionment even of some *foreseeable* misuse, such as that involved in the example given in the text. UPLA §§ 111(C)(3) & 112(C).

<sup>40</sup> The Task Force Report pointed out that the rise in insurance rates did not correspond with a rise either in the average size of verdicts or in the number of pending claims; that insurance companies did not rely on claims data to support increases in premiums; that although insurers lost money on product liability insurance in the 1971-74 period, these losses are attributable in large part to amounts set aside in reserves; that the increases in product liability premiums were caused in part by the bear market during 1973-74; and that insurers engaged in "panic pricing." TASK FORCE REPORT, *supra* note 2 at I-22-I-24.

<sup>41</sup> See Twerski & Weinstein, *supra* note 27 at 257. This consideration was given some weight by the Governor of Kansas in his message to the legislature in connection with the veto of a bill modeled on the UPLA. See [Apr. 24, 1980] 8 PROD. SAFETY & LIABILITY REP. (BNA) 317.

<sup>42</sup> See notes 8-11 *supra* and accompanying text.

<sup>43</sup> See notes 15-17 *supra* and accompanying text.

<sup>44</sup> Neither the Idaho statute, IDAHO CODE § 6-1401-09 (1980), nor the Connecticut statute, 1979 CONN. PUB. ACTS 79-483, is nearly as comprehensive as the UPLA. Neither statute, for example, sets forth any of the standards of manufacturer responsibility which are such an important part of the UPLA. Other differences include (1) the Connecticut adoption of comparative responsibility, 1979 CONN. PUB. ACTS 70-483, § 4, see notes 32-39 *supra* and accompanying text; (2) the Idaho adoption of a "not as great as" form of comparative negligence as compared with the pure form in the UPLA, IDAHO CODE § 6-1404



ture of the UPLA is in the states, its history to date would suggest that it is highly unlikely that it will achieve anything like the uniformity which has been brought to commercial law by the Uniform Commercial Code.

It may be that the UPLA will be nothing more than a benign influence on what has been to date a "decidedly anti-consumer"<sup>45</sup> crop of state product liability laws. For example, Utah imposes an absolute bar on suits ten years after manufacture<sup>46</sup> and South Dakota bars suits six years after the first delivery of the product.<sup>47</sup> By comparison, the UPLA merely imposes a rebuttable presumption against liability ten years after delivery,<sup>48</sup> and this provision was enacted in Idaho's UPLA-inspired law.<sup>49</sup> Even if the UPLA becomes federal law, and does, therefore, achieve uniformity, the vicissitudes of the process are such that it is far too early to hazard a guess as to what form the law will take.

Finally, even if the UPLA does become general law in something like its present form, it is questionable how much change it will actually produce. Many of the provisions of the Act, including all of those discussed above, are drafted with the kind of open-ended language which permits the courts to continue the development of the law of products liability the Act was intended to frustrate. Thus, consumer expectations may merge as a *sub rosa* criterion of defectiveness, and "obvious," "apparent," and other terms defining plaintiffs' and defendants' standards of conduct may be interpreted so that the courts may impose on sellers the full measure of responsibility advocated above. In short, the guerrilla forces of tort law may continue their midnight forays against unsafe products despite the establishment of the legislative junta.

Some years ago it was suggested humorously that, from the

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(1980), UNIFORM PRODUCT LIABILITY ACT § 111; and (3) Connecticut's absolute limitation on punitive damages as compared with the more flexible approach of the UPLA, 1979 CONN. PUB. ACTS 79-483, § 8, UNIFORM PRODUCT LIABILITY ACT § 120.

<sup>45</sup> OPTIONS PAPER, 43 Fed. Reg. 14,612, 14,613 (1978). For a summary of this legislation, see 2A FRIEDMAN AND FRUMER, PRODUCTS LIABILITY § 16C (1979).

<sup>46</sup> UTAH CODE ANN. § 78-15-3 (1953).

<sup>47</sup> S.D. COMP. LAWS ANN. § 15-2-12.1 (1980 Supp.).

<sup>48</sup> UPLA § 110(B)(1), 44 Fed. Reg. 62,735 (1979).

<sup>49</sup> IDAHO CODE § 6-1403 (1980).

standpoint of the product manufacturer viewing product liability law, "the most malign forces imaginable have been at work in this country."<sup>50</sup> Despite the efforts of the drafters of the UPLA, these "malign forces" may continue to flourish.

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<sup>50</sup> Parker, *The Most Outrageous Consequences*, in *THE JUDICIAL HUMORIST*, 12 (W. Prosser ed. 1900).

