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An Introduction to Products Liability

The United States has been dubbed the "birthplace of product liability." Developing from the Industrial Revolution, U.S. product liability law is derived from case law and restatements of law anchored in contract and tort. It is based on the belief that consumers need protection from business and that business should bear the costs of harms inflicted on consumers. Every year tens of thousands of product liability lawsuits are filed in Civil and Federal courts throughout the United States, as various parties seek financial compensation from manufacturers and other companies in the distribution chain for what they allege was a defective product that caused property damage or personal injury. There are continuous demands for reform in an attempt to bring under control runaway jury awards and reduce the numbers of frivolous lawsuits, areas that have plagued the U.S. legal process for decades, but such reform is immediately fought by the plaintiff's bar because of the lucrative nature of this field.

Defense attorneys and their corporate clients are stunned by some of the jury verdicts. Many juries seem to have become desensitized to the large amounts of money they are awarding. "It's as if it is some kind of television game show, or they act like it's not real money they're talking about," defense attorneys have been quoted as saying, but this surely is not the case for the manufacturing and insurance companies having to pay these verdicts, or paying the costs to appeal them for many years to follow. It continues to drive once healthy corporations into bankruptcy.

A product liability lawsuit can begin as the result of a personal injury or property damage incident worth any amount, but once the plaintiff's attorney proves negligent actions on the part of the manufacturer and its management team, punitive damage

Lawsuit! Reducing the Risk of Product Liability for Manufacturers. By Randall L. Goodden

awards against the manufacturer can rocket into the tens or hundreds of millions. To the manufacturer's further surprise, many will find out that their insurance will probably not cover the punitive damage award; in fact in many states the courts will not even allow it. The manufacturer will likely enter into debt, even if they survive.

As the United States strives for some level of sanity, other parts of the world are heading away from their highly controlled ultraconservative positions and slowly becoming westernized, modeling the simplicity of initiating legal action in the United States to what they would like to see in their own country, with contingency arrangements and the elimination of other plaintiff barriers and financial burdens, as the plaintiff attorneys overseas really begin to eye the potential gains.

Every citizen in the United States pays a considerable annual cost for the day-to-day products they purchase as the end result of the litigious nation we live in, although most are totally unaware of it. The following are just some of the many statistics related to product liability:

- A study conducted by Tillinghast-Towers Perrin found that overall tort cost in the United States in 2005 amounted to $247 billion, or 1.87 percent of the GDP, based on insurance liability costs not court costs, or $825 per person. Projected costs for 2007 are $253 billion, with slightly higher growth (4.5 percent) estimated for 2008 and 2009.
- In comparison, overall tort costs were $154 billion in 1996, a growth of 60 percent.
- Small businesses (under $10 million in annual sales) bear 68 percent of the liability costs (an average of $150,000 per year). Small business tort liability costs consist of
  - Settlements, awards, and defense costs paid directly by uninsured businesses,
  - Liability insurance premiums and costs incurred by insurance companies on behalf of policyholders,
  - Liability insurance deductibles,
  - Damages excluded from insurance policies,
  - Damages exceeding policy limits,
  - Punitive damages in states where they cannot be insured.
- Class action lawsuits have increased in the past 10 years by over 1000 percent.
- Median awards have risen from just over $500,000 in 1997 to over $2 million in 2003.
- In 2001, the latest year studied by the U.S. Department of Justice, plaintiffs won before judges in product liability trials 50 percent of the time, and 44.7 percent of the time before juries.

It is difficult to determine the actual number of product liability lawsuits that are initiated each year in the U.S. courts, largely because the state courts do not track the actual numbers, but there have been some positive overall trends in Jury

Verdicts to individual plaintiffs up to 2006. The list does not include business-against-business suits, class actions, or consolidated cases, but it does include medical malpractice. These are just individual plaintiffs as a single person, family, or small group of individuals who were injured in a single incident and had their claims tried in one case before the same jury.

- The average verdict in 2006 was one-third of the average in the previous year. The average verdict in 2005 was one-half of the average in 2004.
- The median verdict was less than half of the median the previous year. The median verdict in 2005 was a third of the median in 2004.
- Punitive damages accounted for just 38 percent of the total awards, compared to an average of 70 percent over the previous nine years.
- The average punitive damage award was one-sixth of the average the previous year.
- Two years ago all 10 verdicts were for more than $100 million; in 2006 there were only three.
- The #4 verdict in 2006 would not have even made the list the previous year.
- Texas had the most Top Ten verdicts (3), followed by Florida and California (2 each).
- For the second year in a row, New York had no Top Ten verdicts.
- Texas (22) surpassed New York (21) as the state with the most Top Ten verdicts over the last 12 years. They were closely followed by California (19) and more distantly by Florida (13).
- The total amount awarded in the Top Ten verdicts was $815 million, compared with $2.9 billion in 2005 and $5.2 billion in 2004.

Attorney Victor Schwartz, General Counsel to the American Tort Reform Association in Washington DC believes the dramatic decline in awards has more to do with a variety of restraints that have been put on punitive damages, beginning with a landmark 2003 Supreme Court decision (*State Farm v. Campbell*, 123 S.Ct. 1513).

"The Supreme Court has established guidelines limiting the ratio of punitive to compensatory damages, some states have instituted restrictions of their own and judges are more willing to say, 'That's just too much'," observed Schwartz. The total punitive damages award for the Top Ten verdicts in 2006 was one-sixth of the total in 2005. Punitives also account for a much smaller portion of the overall awards this past year—38 percent of the aggregate award, compared with 70 percent over the previous nine years.

Schwartz also believes the sharp decrease in massive verdicts for individuals is due, in part, to a changing strategy among plaintiffs' lawyers. "Nine-figure verdicts are good for headlines and publicity, but they don't stick," he said. "Plaintiffs' lawyers themselves have learned that outlying verdicts will be reduced, so the smarter ones are going for $20 million to $30 million. That amount is not going to be making your list, but it's much more likely to be preserved."

It is also interesting to note that New York had no verdicts on the Top Ten list for the second year in a row. New York had at least one verdict on the list for 11 consecutive years until 2005. Schwartz has a theory about New York's sudden disappearance from the mega-verdict radar. "I think it might have a lot to do with the efforts of Chief Judge [Judith] Kaye to change jury laws to make sure that everyone serves," he said. "The jury pool is now much more representative of the whole community. It's not just unemployed people. Runaway juries are generally not representative of communities as a whole."

1.1 COURTS AND JURY PERCEPTIONS

According to DecisionQuest, one of the nation's leading trial consulting firms, jurors' views of corporations are both dismal and pervasive. Suspicions are high, trust is low and these attitudes are held by a majority of eligible jurors across the nation. In a DecisionQuest survey conducted in 2002 of over 1000 eligible American jurors, the following surfaced:

- Seventy-six percent are angry with corporate America for various reasons.
- Sixty-three percent have developed a lesser opinion of corporations during the past year.
- Eighty-five percent believe that large corporations tend to hide information about the dangers associated with their products and their waste until the government or a lawsuit makes them tell the truth.
- Seventy-six percent believe that the way senior executives of large companies are paid promotes corporate corruption.
- Seventy-three percent believe corporate auditors tend to do what their corporate clients tell them to do, even if it means being dishonest.
- Seventy-one percent believe managers and senior executives are more prone to lie on the witness stand than lower-level employees and expert witnesses when a large corporation is a defendant.
- Seventy-eight percent believe many companies destroy documents hoping to avoid taking responsibility for things that they have done.
- Eighty-seven percent believe that corporate America must increase their contribution to the community, with minorities demonstrating stronger feelings about this issue than whites.

The research, led by DecisionQuest's researchers, was based on a national phone poll of 1000 jury-eligible subjects in addition to a series of juror perception groups in Texas, Louisiana, Mississippi, Illinois, and California, which were ranked to be the most notorious venues by the U.S. Chamber of Commerce State Liability Systems Ranking Study in January. Juror perception groups were also held in Delaware and Kansas, which were among the states ranked fairest to corporations in the Chamber survey (Fig. 1.1).

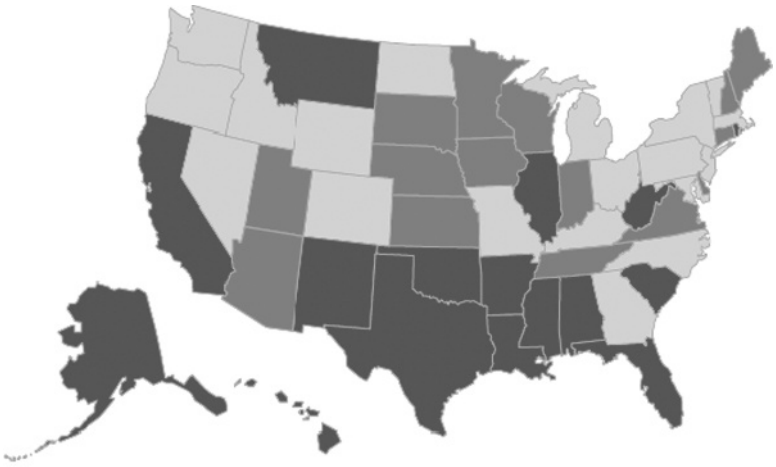

Figure 1.1 *Best to worst legal systems in America. (Source: 2007 ILR/Harris Interactive Ranking of State Liability Systems.) (See color insert.)*

The Harris Poll was based on

- Tort and contract litigation,
- Treatment of class action suits,
- Punitive damages,
- Timeliness of summary judgment/dismissal,
- Discovery,
- Scientific and technical evidence,
- Judges' impartiality and competence, and
- Juries' predictability and fairness.

1.2 JUDICIAL HELLHOLES

The American Tort Reform Association rated the following locations Judicial Hellholes in 2007. These are places where judges systematically apply laws and court procedures in an inequitable manner, generally against defendants in civil lawsuits.

1.2.1 South Florida

South Florida has a reputation for high awards and plaintiff-friendly rulings that make it a launching point for class actions, dubious claims, and novel theories of recovery.

1.2.2 Rio Grande Valley and Gulf Coast, Texas

The Rio Grande Valley and Gulf Coast of Texas have made their way into each and every Judicial Hellholes report since the project's inception. It is recognized as one of the toughest places in America for corporate defendants to receive a fair trial. This year, there was a surge in personal injury lawsuits related to dredging, a judge's pocket veto of an appeal of a $32 million award against a pharmaceutical company in a case where a juror knew and had taken loans from the plaintiff, and several particularly ridiculous lawsuit filings. Despite strong statewide legislative reforms enacted in 2004, this area stubbornly refuses to shed its Judicial Hellholes reputation.

1.2.3 Cook County, Illinois

Cook County, the last standing Judicial Hellhole in Illinois (after the departure of Madison and St. Clair counties), hosts a disproportionate number of the state's large civil cases. Personal injury lawyers know that Cook County is the place to be and this year they blew into the windy city to file massive class actions involving pet food and peanut butter, as well as many asbestos cases.

1.2.4 West Virginia

West Virginia courts have earned a reputation for antibusiness rulings, massive lawsuits and close relationships between the personal injury bar, state attorney general, and the judiciary. It is almost unique among the states in providing civil defendants with no assurance that they will receive appellate review, which can leave a business hit with a multimillion-dollar verdict with nowhere to turn. The West Virginia Supreme Court of Appeals, when it does act, has cast a shadow on the reputation of the state's judicial system. In addition, this year, the U.S. Supreme Court denied review of the West Virginia high court's invalidation of a law designed to stop forum shopping by plaintiffs who came from around the country to sue in Wild, Wonderful West Virginia courts.

1.2.5 Clark County, Nevada

Home to the county's hottest gambling spot, Las Vegas, Clark County has joined the Judicial Hellholes list for the first time. The decks appear to be stacked in favor of local lawyers, who reportedly pay to play in the county's courts. Judges have been criticized for issuing favorable rulings in cases that benefit friends, campaign contributors, or their own financial interests.

1.2.6 Atlantic County, New Jersey

Personal injury lawyers seem to have gained a monopoly in Atlantic County, a new addition to the Judicial Hellholes report. New Jersey is known for particularly plaintiff-friendly laws, admitting junk science in court and hosting lawsuits from all over the country against their state's own economic driver, the pharmaceutical industry. All these elements were on display in the Vioxx litigation in Atlantic County. There is also evidence that litigation fairness is deteriorating throughout the Garden State, leading to the formation of the New Jersey Lawsuit Reform Alliance in October 2007.

High profile issues such as class action abuse, pharmaceutical liability, asbestos lawsuits, and extraordinary awards often dominate headlines. However being cited as a Judicial Hellhole is nothing to celebrate. Litigation abuse ultimately hurts the people living in these jurisdictions, affecting economic growth and access to healthcare, among other things.

1.3 LEGAL REFORM

The litigious nature of the United States can put U.S. manufacturers at a real disadvantage in the world market. Insurance and litigation costs ultimately have to find their way into product prices, which can make U.S. manufacturers less competitive. U.S. manufacturers and their representative organizations call on Congress to initiate various acts of Legal reform and place caps on damages, but are met with strong resistance by other members of Congress and their lobbies.

One of the unfortunate facts of life is that litigation is a primary source of revenue for law firms, whether you are on the plaintiff side or defense. Reforms would have a negative impact on such revenues. And ironically the dominant profession amongst those same members of Congress continues to be law, with 22 percent of members of the House having law degrees, and 58 percent of the Senate. Even looking at the list of 2008 Presidential candidates finds that the following were lawyers: Hillary Clinton, John Edwards, Rudolph Giuliani, Barack Obama, Mitt Romney, and Fred Thompson. One of them, John Edwards, gave the following speech to Iowa citizens as they prepared for the Iowa caucas:

> I walked into courtrooms for 20 years where there was a whole army of lawyers on the other side representing corporate America. And I went into that courtroom, and I fought them, and I beat them, and I beat them, and I beat them again. And I will beat them as president of the United States—you can count on it.
>
> —John Edwards, speaking at a Farmers Union summit in Des Moines Nov. 10, 2007

Attempts to bring about reform on a Federal level is one objective; bringing about reforms on the state level is another, but this is met with resistance as well. The number of attorneys in a state is a strong determinant of their relative influence on

legislation. Thomas J. Campbell made an interesting observation about the relationship between the number of lawyers in a region and their relative influence on tort-reform legislation in that region. According to Mr. Campbell, the greater the number of lawyers, the more power lawyers had to create a legal environment favorable to them, encouraging more litigation, higher awards, and less legal reform. Or, as Clarence Darrow said, "The trouble with law is lawyers."

So, in essence, we are asking lawyers to pass laws that would have a negative impact on lawyers. What are the chances?

It is interesting to note that for every 320 Americans there is a lawyer—indeed, with over 1.1 million lawyers and 44,000 new lawyers entering the field every year (2006), America has the highest proportion of lawyers per capita in the world. In England, there are 694 Englishmen per lawyer, in France 2461 Frenchmen per lawyer, and in Japan 8195 Japanese per lawyer. American manufacturers have learned a lot from the Japanese over the past 20 years, except that the Japanese have little experience with product liability. Citizens of Japan have little access to attorneys. Lawyers for the most part were part of government or corporations, handling contractual issues as opposed to litigation.

In addition, attorney involvement in insurance disputes increases average claim sizes. This is supported by Mark J. Browne and Robert Puelz, who found that when an attorney is brought into an insurance dispute, the average claim size increases by 64 percent. A report by Kevin M. Murphy supports the view that lawyers stunt economic growth. Studies have found that countries with a higher proportion of college law majors relative to engineering majors have slower economic growth.

With all that said, there have been efforts to bring about reform. At the federal level, President George W. Bush signed the *Class-Action Fairness Act of 2005*, which moves most large, interstate class actions into federal courts and requires judges to consider the real monetary value of coupons and discounts so victims receive true compensation for their injuries, and demands that settlements and rulings be explained in plain English.

President Bush also signed the *Protection of Lawful Commerce in Arms Act of 2005*, which protects firearms dealers and manufacturers from a broad swath of civil-liability lawsuits, many of them filed by municipalities. The lawsuits—modeled after litigation against the tobacco industry—hinged on the notion that guns are a public nuisance and that their makers and dealers should take special precautions in selling them. Chicago blamed gun makers for making their products available to criminals and New Orleans said the companies should be liable for not using better safety devices. The Act proscribes such civil lawsuits against the gun industry.

1.4 IMPACT ON MANUFACTURERS

Expenditures for product liability insurance premiums and other defense costs and settlements impact the bottom line and drain the funds that would have otherwise

gone into the profits. The impact of this has in many cases reduced the amount of funds available for research and development, preventing many new products from making it to the marketplace, and added significant cost to many other products that are created.

Part of what continues to drive this pandemonium is the perception attorneys seem to unanimously hold that corporations and their insurance carriers have deep pockets and unlimited funds to take advantage of, and the companies would rather settle such situations early, as opposed to fighting them in court or face negative publicity. This is supported by the fact that 96 percent of the product liability cases settle out of court, and only 4 percent actually go to trial.

To the further dismay of manufacturers, far too many attorneys play a negotiations game, as opposed to fighting for their beliefs in court, or the beliefs of the manufacturing company they were hired to represent (through the insurance company). This is true of both types of attorneys, however, those representing plaintiffs as well as those representing the insurance companies. Negotiating a settlement is so common place that many defense attorneys have little to no real courtroom experience in products liability trials. A plaintiff's attorney puts together the facade of a good case against a manufacturer, which includes the indisputable fact scenario of some hired (alleged) expert, albeit the individual may not in reality be a real expert or may not have spent any real time truly investigating the scene of the accident or analyzing the product in question, and they present their claim and case to the defendant's insurance company.

After the plaintiff's attorney presents their case and findings to the insurance company, the insurance company then forwards it to the attorney they have hired to represent the manufacturer (defendant), and the negotiation game begins. The insurance company immediately asks the hired defense attorney to determine the credibility of the allegation, what it will likely take and cost to defend the case, the complications they could face in that jurisdiction, odds of winning, the amount the plaintiff is requesting or could conceivably win, and what the defense attorney thinks the plaintiff might really be willing to settle for. Granted, this is not how every claim is handled and there are large numbers of cases that undergo substantial preparation, especially the multimillion dollar cases, but again, 96 percent of the cases settle out of court, so many claims will ultimately follow this course of action, whether it takes one or six years.

The problem is that most of the plaintiff attorneys know that if they put up a pretty good front, the insurance companies will try to settle instead of either paying the costs to defend the corporation's reputation and integrity, or running the risk of potentially losing in court and paying several times the early settlement price. And unfortunately too many incompetent defense attorneys have no real trial experience and ability, and present the insurance company with a dismal picture, but save the day by getting the plaintiff to settle for half of what they were pretentiously asking, and they are heroes. Of course the plaintiff's attorneys fully expect this. Unfortunately for the manufacturer, they lose. Having the insurance company settle on their behalf is not representing the manufacturer's best interests, it is representing the insurance company's best interests, unless of course the product really was defective.

The insurance industry claims that it spends as much on defending corporate policyholders against product liability actions as it spends in actual losses. As this trend continues, insurance companies are focusing their efforts on controlling the costs of legal defense and may often pursue early settlements despite the lack of credibility surrounding the case. These actions are definitely to the disadvantage of the manufacturer. This means that manufacturers need to start becoming actively involved in their own destiny.

In my early experience in managing product liability litigation, incidents would surface where our products were blamed for a fire or personal injury, and after a thorough investigation I could determine that the cases lacked any credibility, based on my knowledge as the product expert. The products were merely the victim of the same fire, or the user was doing something with the product that they should never have done, but was not leveling with their own attorney as they told their stories. As the insurance-appointed attorney worked with me, he would share my opinion and be very optimistic of our chances to defend the case and take on the plaintiff. But the company was fully insured, and the insurance company was paying the entire Legal bill, and what I was unaware of was that the same attorney would tell the insurance clients an entirely different story. "The case would be tried in a state and county that would favor the plaintiff over your out-of-state company," "The plaintiff's attorney has facts and reports that the jury is likely to believe," "Although the manufacturer is totally convinced that the product wasn't at fault, I'm (the attorney) not as sure," "If we go forward with a trial and lose, the insurance company could end up paying a considerable jury award," and the doubting feedback goes on and on. The only problem was that as the manufacturer, I wasn't hearing any of this. The attorney is working for the insurance company, not really the manufacturer.

What is really happening is that the defense attorney is getting nervous about the possibility of actually having to present a case in court, and in all probability had no trial experience, so the attorney is attempting to convince the insurance carrier to settle through basic scare tactics. I had two situations where I was in flight to the states where trials were to start the next day, and as I was transferring planes at an airport hub I would receive a call from my secretary that the insurance company settled with the plaintiff. To say the least, I was furious, but it was really the insurance company's money at stake and they reserve the right to handle the case however they see fit. This is one of the many problems you face when you're fully insured and do not carry any deductible, which we changed soon afterward.

1.5 PUBLIC PERCEPTION OF CORPORATIONS

Corporations are no longer trusted as they once were, when generations after generations developed loyalties to large companies in exchange for lifetime employment. Such commitments and loyalties no longer exist. Corporate scandals like Enron make the national news, there are constant reports of CEOs receiving huge salaries as thousands of workers are let go, and it all leads to a jury dislike and distrust for large corporations.

Because of the magnitude of lawsuits and the litigious climate we live in, many new product ideas never make it to the marketplace because the corporations ultimately decide against their launch, not because the products were unsafe, but because of the propensity of the U.S. public to find fault with the products, blame the manufacturers for exaggerated conditions or for their own misuse and abuse of the products. In many other situations products are intentionally not marketed in the United States, but are marketed elsewhere in the world where the manufacturer is far less likely to ever experience such threats.

When plaintiffs pursue a product liability lawsuit against a product manufacturer, they will look for the opportunity to include others, such as dealers, distributors, part suppliers, and other parties that may have participated in the design, manufacture, sales, distribution, or service of the product itself. The more parties involved, the more lucrative the case can become for the plaintiff.

With so much potential risk riding on every product launched into the marketplace, whether it is a commercial product or a consumer product, it is pretty astounding how ill-prepared many manufacturers are in the area of product liability prevention. Not that any manufacturer could totally prevent a potential product liability case from surfacing, but surely with the best efforts in place the chances could be substantially minimized, and the manufacturer would also be in the best position to win much of what might surface.

Some smaller companies may be lucky enough to have never experienced a product liability incident or lawsuit, so the management team does not see the need for the focus. Then one day they launch a new product and unfortunately overlook some critical element, and the next thing they know they have multiple accidents being reported. For companies that may have had a pretty bright future up to that point, they could now be facing bankruptcy. To draw an analogy, do you wait until you have a heart attack before you start exercising and watching your diet; many do, and some of those do not make it either.

The size of the company is no indication of the level of knowledge or expertise within the company. The author's own surveys conducted on engineering and the management teams of large fortune 500 companies even during 2002 show high percentages of employees with a significant lack of knowledge in this area, making them no different than many smaller companies. In numerous audiences comprising many well-known corporations, as well as in-house seminars at the same, more than 50 percent of the attendees had no idea of what the Z535 ANSI standard was (which is the state-of-the-art standard for the development of a warning label); many could not differentiate between the terms "hazard" and "risk," had no idea what "indemnification" meant, nor did they even know who a "plaintiff" is (for those of you wondering the same, the "plaintiff" is the person who is going to sue you. You are going to be the "defendant"), and that is just for openers. There is substantially more to be learned.

In some cases CEOs may have gained a false sense of security because their companies have extremely comprehensive quality programs in place, and may even be certified to the ISO or QS standard. One of the largest recalls and product liability disasters in recent years happened to a company that was both QS & ISO 9002

certified. Such programs offer little protection in this area, and in fact can become a liability themselves, when documented audit records show the company is not even following its own procedures.

CEOs may feel they have a talented team of design engineers, yet in one recent study of over 300 certified engineers, 70 percent of them had never received any training in product safety or product liability. It is quite common to find that a large population of engineers and management personnel, especially as they get older and feel more comfortable in their positions, never attend seminars or seek to further their knowledge in any given field. It becomes an arrogance of sort. The company itself now begins to fall victim to this lack of "state of the art, product safety, and liability prevention" knowledge, and continuously increases its own exposure to risk. These are the people the CEOs are banking on to some degree with the future of the company.

Exposure to product liability does not rest with the Engineering group. Actions, or lack of appropriate actions, by most all of the management team in every area all the way up through the executive ranks can subject the company to product liability lawsuits, or be the significant cause of why the company lost a lawsuit and even ended up being hit with substantial punitive damages. So when a company only sends its Design Engineers to a seminar on the subject, the Engineers will become smarter in areas they control, but the rest of the organization will not gain any of the knowledge they need to have, because the Engineers themselves have no power over corporate procedures that pertain to other areas beyond their own.

To understand what this focus totally entails, one must understand the full realm of Product Liability Prevention (Fig.1.2).

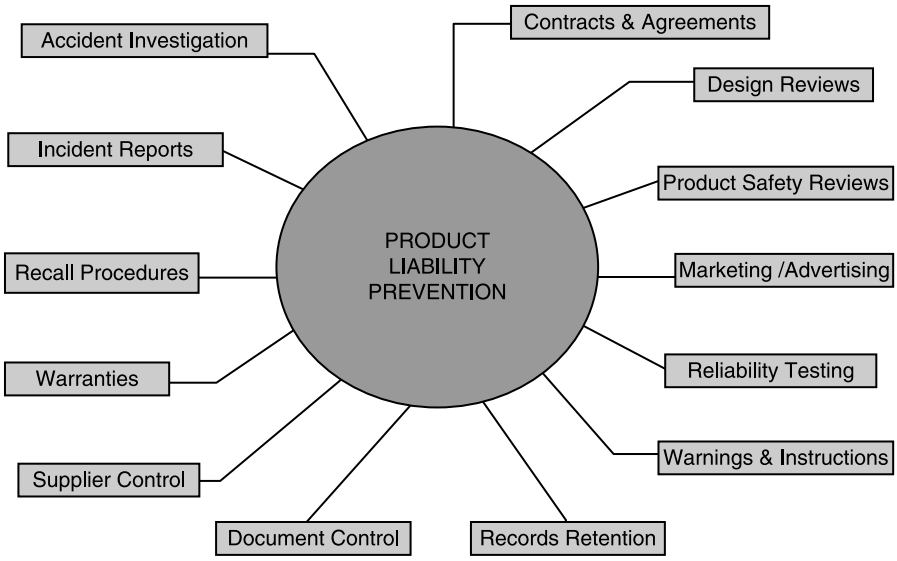

Figure 1.2 *Product liability prevention.*

The following are the questions and objectives of each of the elements displayed in the diagram:

- *Contracts/Agreements.* Does the company have sound contracts and agreements in place to help limit their potential exposure to product liability? These could be between the company and its suppliers, dealers, manufacturing reps, service companies, or even with their customers. Remember, a supplier of a component part could get you into as much trouble as you could do yourself if there are not certain safeguards in place to help shield your company from their negligence.
- *Product Design Reviews.* The design review is the first critical step in a product's lifecycle, and the least expensive time to recognize a potential problem and make changes. Do you maintain design review teams that review all your new products to ensure quality, reliability, manufacturability, and ensure the product will be dependable, safe, and reliable for its intended use and application? Do these teams generate meeting minutes? Do procedures exist that identify the role and expectations of this design review team?
- *Product Safety Reviews.* The design review team largely focuses on the ability to build a high quality reliable product, and having the manufacturing capability of building such a product over and over again. But then there is another question concerning the review and analysis of the safety of the product, a hazards analysis and risk assessment. Are there product safety teams in place that are trained in the science of performing such evaluations of new products?
- *Marketing/Advertising Concerns.* It is not just defective products that could lead to troubles; things that you say to promote a product, things shown in promotional videos, on brochures, even on the packaging, could lead to a product liability lawsuit. It is amazing how advertising and commercials can get a manufacturer in trouble. Sales and marketing can have a tendency to push the envelope a little too far when promoting a product, overstating its features, benefits, or capabilities. Do you know what such liabilities are and what words and things to avoid?
- *Reliability Testing.* Does your company routine test new products to ensure they will be safe and reliable? Some major recent cases were lost because of the lack of adequate testing. Even with such testing, do your people know what to do if the testing produces unfavorable results?
- *Warnings and Instructions.* As stated previously, there are international standards for warning label design. Are your engineers familiar with them? Are the labels you are using in compliance with these known standards?
- *Records Retention Programs.* Records will become a key issue in your defense. In a product liability lawsuit numerous types of records will be demanded by the court, and within a short timeframe. Do you have a sound records retention program in place?
- *Document Control.* Once you produce the required records demanded by the court, what would these documents say? It is reported that 70 percent of product liability cases are lost and punitive damages awarded because the

plaintiff can prove through the companies' own records that they had prior knowledge of a problem or defective condition and failed to react in a responsible manner. What do your records say? Do you and your employees understand what could constitute a "Dangerous Document"?

- *Supplier Selection and Control.* Component suppliers can get you into as much trouble as you can yourself. Without the proper safeguards, both companies will be sued, even though it might have been the supplied component that was really defective. Keep in mind that from a legal perspective, the more companies you can name and sue in a lawsuit, the merrier, especially when your company has the deepest pockets. Do you have adequate indemnification clauses in place? Do some of your smaller suppliers and subcontractors even carry liability insurance? Does anyone in your purchasing group even ask?
- *Warranties.* All products come with some sort of warranty, but does your sales and management team know the difference between full and limited warranties, express and implied warranties? That nicely printed warranty form may not be the only warranty you are going to be bound to, and your sales and management team probably do not even know it.
- *Recall Procedures*. Never wait for a disaster to determine how to initiate a recall. There are numerous ways of handling a potential recall, or a field problem. And if you are producing consumer products, there are other reporting requirements you must follow, or you could face substantial fines. Do you have procedures in place for your management team to follow? Do you know who would be in control? Does that individual know the ways and means of conducting a recall, or the outside resources available?
- *Accident Reporting and Investigation.* Most product liability cases do not start out that way; they start out as an incident being reported and grow to become lawsuits. If you handle it right from the start you could be successful in not only preventing a lawsuit, but also getting the other party to drop the issue altogether. If you have the tendency to just forward everything reported to your insurance company for them to handle, it is almost assured you are going to take a loss. Do your employees know how to handle such a notification of an incident?

As it can now be appreciated by the diagram and this brief outline, product liability involves more than just warning labels and design issues, and is more than just an engineering concern. It involves many aspects of the business and many, if not all the areas of management. In order to effectively limit the possibilities, everyone needs to understand the potential problems a company could face.

Some company Presidents are on the leading edge of this focus and have themselves pursued in-house seminars on *Product Liability Prevention* for their entire management team. This helps make everyone instantly aware of potential issues and gets everyone on the same sheet of music. Each member of management begins to understand their specific role in helping to prevent the possibilities of the company being hit by a product liability lawsuit.

The other alternatives involve sending more of the management team to an outside seminar, or to purchase books on the topic for everyone and meeting on a regular basis to discuss the contents and develop a plan to implement a prevention program. It should be known, however, that there are few books or seminars offered anywhere on the topic, so it will require some searching. Surprisingly, the subject of product liability prevention is not well known or taught by lawyers or law firms, not even universities, but instead by just a few experts and consultants that specialize in the specific topic. Lawyers know how to defend you and handle your case, but most have little to no idea of the inner workings of a manufacturing company, departmental roles and responsibilities, and how to incorporate such safeguards into your procedures and processes.

Unlike many other manufacturing management seminar topics, this subject really captures the attention of most management personnel, and more importantly the information stays with them for a long time. Even for companies with few to no product liability problems, the incorporation of these safeguards and operating practices into your current operating procedures will be effective in reducing quality costs, field warranty problems, scrap and rework, and basically help to build a more reliable product and eliminate bad practices.

1.6 PRODUCT LIABILITY FROM THE INSURANCE PERSPECTIVE

For a manufacturing corporation to make money, it needs to dream up an idea for a new product, design, engineer, manufacture, and market it, and in the end hope they can sell enough of the products for the right price to make a profit. For insurance companies, the process almost works in reverse. The manufacturer pays the insurance company a large amount of money to cover them for product liability, and it is all 100 percent profit to the insurance company and remains that way if there are never any claims. Then if claims do arise, the insurance company pays the claims out of the funds it received from the company's premium payments. At this point the percent of profit begins to fall. If there are significant payouts, then the insurance company exhausts the manufacturer's funds and ends up paying claims out of its own pockets, which comes back to haunt the manufacturer when the policy renews.

The following entities need Products Liability insurance to protect against lawsuits: manufacturers, distributors, reconditioners or rebuilders, lessors, successor corporations and even employers. These can all be held responsible when a product causes injury.

- Manufacturers are required by law to ensure that their products are reasonably fit, suitable, and safe for their designed purpose. Also, the manufacturer may be liable even if its product was altered or misused, if the alteration or misuse is deemed as reasonably foreseeable (when a product's use or change could, and should, be reasonably expected and guarded against).
- A distributor can be held liable because in a strict liability action, liability can be extended to everybody in the chain of distribution. Particularly when the manufacturer is foreign and is not subject to U.S. laws, the distributor becomes next in line for all potential claims. When considering strict liability, the courts

typically view the injured parties as more innocent than the distributor or retailer and less in a position to protect themselves.

- The reconditioner or rebuilder of a product or component part has a duty similar to that of a manufacturer. If the rebuilder or reconditioner fails to incorporate a safety device, when feasible, the rebuilt machine or component part will be deemed a defective product and the rebuilder or reconditioner will be viewed by the courts as the same as a manufacturer of a defective product or part.
- Lessors of products are subject to products liability claims because the lease agreement contains an implied warranty that the leased products are fit for use throughout the duration of the lease.
- When a successor corporation purchases the assets and liabilities from another corporation and undertakes the same manufacturing operations as the selling corporation, the purchasing or successor corporation is strictly liable for injuries caused by defects in units of the same product line, even if the product or component was previously manufactured and distributed by the selling corporation or its predecessor.
- In rare instances, employers can be sued by their employees for product injuries. However, typically, this can only happen when there is a third party indemnity agreement in place. When there is a third party agreement in place, it is possible for employees to circumvent The Workers' Compensation Act and sue their employers for products liability.

As my websites centering around product liability prevention have appeared on the Internet for many years, it is common to receive all kinds of emails and inquiries related to all aspects of the subject, including insurance. Inventors of things like new types of exercise equipment and small upstart manufacturers would ask whether they really need to have product liability insurance, and where they would even get it. It is hard to imagine any type of product manufacturer that probably would not need product liability insurance. If you are placing a product in today's marketplace, you are in all likelihood facing some possibility of a product liability claim, and it would be more of a question of whether your odds were 1 in 50,000, 1 in 100,000, or one in a million. What can product liability insurance coverage cost for a manufacturer or distributor; Table 1.1 presents a few examples in 2007.

Although distributors have product liability exposures from all products they sell, there are additional risks when procuring products overseas. A foreign supplier is often beyond the effective reach of the U.S. courts, dramatically increasing the risk of product liability claims to the distributor. Foreign suppliers do not fully understand the North American environment for product liability claims and often fail to purchase product liability insurance, or accept limitations of coverage that may seriously limit its value to the distributor.

Obtaining valid certificates of insurance is always a challenging and time-consuming process, which can become near impossible when dealing with a foreign supplier who has no tradition of purchasing product liability insurance or may have limited access to markets that can provide it. Even if the distributor

TABLE 1.1 Examples of Product Liability Insurance Coverage Costs for Manufacturers and Distributors in 2007

Manufacturer/ Distributor	Sales, $	Annual Premium, $	Policy Limit for Each Claim (Aggregate), $	Deductible/ Retention, $
Trampoline manufacturer	500,000	14,500	1,000,000 (2,000,000)	5,000
Skateboard distributor	1,000,000	17,063	4,000,000 (5,000,000)	5,000
Motorcycle helmet distributor	1,600,000	41,966	1,000,000 (2,000,000)	15,000
Medical device manufacturer	320,000	5,722	1,000,000 (2,000,000)	5,000
Sports insoles manufacturer	2,000,000	3489	3,000,000 (5,000,000)	5,000
Personal care products	500,000	5,000	1,000,000 (2,000,000)	5,000
Roller skate manufacturer	500,000	17,125	1,000,000 (2,000,000)	5,000
Brushless electric motors manufacturer	2,000,000	3,680	1,000,000 (2,000,000)	0
Walking cane company	500,000	12,500	1,000,000 (2,000,000)	5,000
Receiver/software designer	150,000	12,500	1,000,000 (2,000,000)	5,000

finally receives a valid certificate from an A-rated U.S. insurance company, there is still a fundamental drawback because the certificate has an expiration date. Securing a renewal certificate can be difficult if the distributor is no longer buying from the supplier and impossible if the supplier is out of business.

Manufacturers, importers, and distributors also need to keep in mind that even if an offshore supplier of a product had insurance at the time of the original partnership and business transaction, and supplied the purchaser with a valid certificate of insurance, if the product proves to be defective six months later and results in a lawsuit, the only insurance the purchaser can count on is the insurance the supplier actually has at the time of the claim. So in essence, if the offshore supplier obtained product liability insurance as part of the requirement of being a supplier to the U.S. company, sold the U.S. company thousands of products and completed the transaction, and then dropped the insurance coverage because of the ongoing cost, and one of those products then caused damage or injury months or years later, the U.S. company would find out that there is no insurance to cover the loss because at the time of the accident the original supplier no longer had insurance, and the U.S. company would end up covering 100 percent of the loss themselves. This comes as a shock to all the Purchasing departments that maintain supplier files with one-time insurance certificates.

Many companies that are more advanced in this area will also require that they be named under "Additionally Insured" (AI) on their supplier's insurance certificate, but this too has its problems. The purpose of a certificate of insurance is to provide proof

of insurance only. It does not alter the policy coverage in any way. If the primary company is requesting to be named as an additional insured to the policy, the policy must actually be endorsed with carrier approval to include the appropriate AI language. What typically happens is then the certificate of insurance is issued to include in the description of operations that ABC Co. Inc. is named as an additional insured and subject to the provisions under the AI coverage form CGXXXX XX. Without this policy endorsement, there would be no obligation of the insurance company to grant coverage to the AI in the event of a loss.

Every insurance company has their own process or procedure as to whether they will notify cert holders or additional insureds when an account cancels. Cancellation laws vary by state but there is no statute that mandates notification. Generally speaking, an additional insured/certificate holder is NOT notified of policy cancellation unless the coverage under which an additional insured is named clearly specifies that they are to be notified. The certificate reads that the company will endeavor to mail xxx a notice of cancellation. This language does not change the terms of the actual insurance contract. So no recourse to company is imposed by the statutes if cancellation notification is not sent.

In most cases, the job or work being done for the certificate holder has already been completed and notification becomes an administrative nightmare so companies have moved away from this as general practice. It can be done, if the company agrees to the request and the account is somehow flagged. Again, not all insurance companies treat or handle this in the same manner.

1.7 INSURANCE COMPANIES SUPPORTING PLP PROGRAMS

The major insurance companies are heavily supporting Product Safety and Liability Prevention programs and training, and in addition to recommending the seminars to their manufacturing clients, they are additionally sending their own in-house experts to the same PLP training seminars held around the world by the author.

One of the major insurance companies conducted a study involving a review of 68 high cost accident report write-ups from the claims department. From these reports they developed a database on a spreadsheet that included the insured's name, product involved, date of loss, date reported, nature of loss Bodily Injury/Property Damage (BI/PD), and description of the causal factors. The carrier was able to determine the current loss estimate on 26 of the accidents from a loss run valued by 3/1/06. This portion of the cases amounted to $23.6 million. This would project to $61.7 million for all 68 cases if the value was known for all of the remaining reports.

Statistical data from the study found the following:

- Of the claims, 57 were bodily injury with 8 being fatal. This accounts for 84 percent of the total.
- Of the claims, 9 were for property damage, which accounts for 13 percent of the total.
- Of the claims, 2 were recall related type situations, which accounted for the remaining 3 percent of the total.

TABLE 1.2 The Loss Run Cost Summary

Type of Cost	Amount, $
Indemnity outstanding	40,955,526
Indemnity paid	37,086,033
Legal paid	8,288,482
Additional expenses	2,776,980
Total	88,309,776

The following was observed for the type of products involved:

- General consumer products, 25 percent;
- Recreational products, 24 percent;
- General commercial products, 51 percent.

In addition to this study, the carrier did another study of all product liability claims for the years 2002–2005 with cost estimates greater than $25,000 (415 claims) and took a look at the time delay in reporting and settling those claims. Table 1.2 summarizes this.

What the data confirmed to the insurer are the following.

- Most products claims are bodily injury claims.
- Claimants will most often have alleged poor design, inadequate warnings, and instructions.
- Allegations rarely involve issues concerning quality control.
- When the insured has had a prior recall involving the product or a similar product this will be raised as an issue.
- Products cases are often reported sometime after the actual accident and will take a long time to settle (the tail effect).

The insurance carrier initiated new underwriter risk investigative sections that address design, warnings, and instructions:

- *Design.* What specific codes does the insured design to? Has any independent testing or evaluations been made to determine if the codes used are appropriate and current? When was the last time the insured checked to see if any of the applicable codes had changed?
- *Warnings.* Are warnings meeting applicable codes? Are instructions written to an education level that represents a typical user of the product? Have they been reviewed by anyone or tested on potential users to see that they are understood?
- *Recalls.* If an insured has had a prior recall how successful was it? Do they have any similar products that could have similar exposures or uses that could lead to more claims in the future? What sorts of recalls have occurred in the insured's industry?

From these study findings the insurance company instituted some standard recommendations they planned to use with future insureds when a need is identified in the insured's existing products safety program.

1.8 RECOMMENDATIONS THAT CAN BE USED ON PRODUCTS LIABILITY ACCOUNTS RELATED TO DESIGN, ADVERTISING, INSTRUCTIONS, AND PRODUCT RECALL

1.8.1 Design Standards Review

It is recommended that a periodic review be made of existing standards that relate to your products. This review should be made to determine if any new or revised standards are present that relate to your products. If any are found it will be necessary to adapt your product to meet or exceed these standards. Also depending on your product and the nature of the change, you may also need to complete new independent tests of your product. This design standard review should be conducted at least every three years and more often if your product is already the subject of a number of standards. Records of these reviews should be maintained for 10 years.

1.8.2 Complete Outside Reliability Testing to Validate Safety Claims Made About Your Product or Critical Design Points

Outside expertise and testing is an important component of your ability to prove the claims that you may make about your products. Whenever possible you should conduct tests according to applicable standards related to the product such as ANSI or MIL Standards. Such testing should be repeated whenever you make changes to your design that could impact your ability to prove your claims. Any products that have not been retested in the past three years should be tested or retested as the situation warrants. In selecting an independent testing agency it is recommended that you prequalify them as being right for your product. This can be established by their prior experience as well as any credentials or certifications that they may have. Test records should be maintained for ten years.

1.8.3 Complete a Legal Review of Your Marketing Materials

Your marketing materials should be reviewed by legal council to determine if any claims are being made that could cause a problem in a litigation situation. This includes marketing materials, packaging, use and assembly instructions, print media, and internet advertising. Our review of the materials provided identified the following, which has suggested a need for a more in-depth legal review.

1.8.4 Analyse Customer Service Center Logs to Identify Trends that Could Be a Potential for Future Liability Claims

The logs that you maintain can be a valuable source of information to identify the potential for future product-related accidents. The failure of a critical part that did not result in an injury or property damage can often be a warning that such an outcome could occur in the future.

1.8.5 Develop Product Recall Plan

Product recall can be a difficult if not impossible task when no advance planning or consideration has been given to initiating a product recall. Management should ask how they would institute a recall if needed. The following are some questions to be asked:

- Who will decide when a recall is needed?
- What is the nature of the product problems you could logically expect?
- How would you determine what items to recall?
- Whom would you notify of the recall?
- How would you notify them?
- What would you have the notified parties do when they receive the notification?
- Would you repair or replace the product involved?
- How would you go about remediation of the situation?
- Who would you need to assist with the recall (inside and outside staff or equipment)?

With the answers to these questions a written plan should be developed for handling a recall. In some cases you may be able to test this plan as a joint project with a critical distributor. A helpful reference concerning product recalls can be found on the Consumer Products Safety Commission's web site (www.cpsc.gov). The publication entitled Regulated Products Handbook Document 8001 (January 2005, Chapter 3) can be found in the Publications Section under General Information on the web site.

1.8.6 Develop a Plan for Processing and Investigating Product Liability Claims

A written procedure should be developed for the investigation and processing of product-related accidents and claims. The plan should involve internal notifications, assignment of investigators, and the means to be used to gather information about the incident. Also it should be determined who will report the claim to the insurer as well as which of your internal experts are to work with the insurer on the handling of the claim.

These were the findings and direction just one of the major insurance companies planned to follow beginning in 2006. A number of other insurance companies

confirmed to the author that they too are conducting audits of product liability prevention programs and efforts in place within future insureds' operations, and would especially require that new clients would have to have formal recall procedures in place, or they would not insure the companies.

1.9 TOUGHER REQUIREMENTS FROM THE CPSC

The year 2007 was not kind to the U.S. Consumer Product Safety Commission (CPSC). The year also saw a proliferation of recalls of products made in China, with mounting concerns on Capitol Hill and in state capitols about the risks posed by certain children's products. Consumer groups and former agency officials like former Chairman Ann Brown agitated for congressional action, and for the first time in recent memory Congress held multiple oversight hearings where Acting Chairman Nancy Nord was grilled about agency operations, priorities, and shortcomings. These hearings, sometimes televised, received widespread coverage in the media. Key members of Congress, including Speaker Pelosi, took their turns at agency-bashing and there were few, if any, agency defenders to be found. In the meantime, the morale of the staff seems generally to remain low, and key departures continue.

1.9.1 Consumer Product Safety Improvement Act of 2008 (H.R. 4040)

These events culminated in numerous legislative proposals during 2007 and 2008, ultimately leading to the passage of the Consumer Product Safety Improvement Act of 2008, which President Bush signed into law on August 14, 2008.

In summary, lead will effectively be banned from toys and children's products. So will some phthalates. Toymakers will be required to have independent labs test products before they are sold, and voluntary safety standards would become mandatory. Consumers could eventually see labels certifying toys have been tested before being sold, as well as warning labels, whether they buy a toy online or through a catalog.

Consumers would also be able to look up complaints or accident reports involving not only toys but lighters, electric saws, cribs and other goods in an online database.

The CPSC will also receive a large boost in resources and authority. The agency budget will nearly double to $136 million, from $80 million for the 2007 fiscal year.

The CPSC will have the assistance of state attorneys general who will have the authority to help enforce federal product safety laws. They will be able to take manufacturers to court to keep dangerous products off the market.

Companies that fail to report hazards or violate product safety laws could face as much as $15 million in penalties. Previously, that amount was capped at $1.8 million.

Toys and Children's Products

- Many of the Act's provisions, including bans on phthalates and lead, are tied to new definitions and general rules applicable to all children's products and more specific rules for toys and child care articles.

- *"Children's products"* are defined as "a consumer product designed or intended primarily for children 12 years of age or younger.
- *"Children's toys"* include products "designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays."
- *"Child care articles"* are defined as "a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething."

Ban on Phthalates in Toys and Children's Products

- Prohibits the sale of children's toys and child care articles with concentrations of more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP). Effective 180 days after enactment.
- Establishes an interim (effective in 180 days) ban on the sale of children's toys that can be placed in a child's mouth and all child care articles that contain more than 0.1 percent of diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP). Toys that can be put in the mouth are defined to include toys or parts smaller than five centimeters in dimension, and exclude toys that can only be licked.
- Provides only limited preemption of state laws regulating phthalates and phthalates alternatives—many states have adopted laws banning various phthalates in the past year.

Ban on Lead in Toys and Children's Products

- Mandates a phased-in ban on lead in all children's products, requiring that lead levels be reduced to 600 parts per million within 180 days, 300 parts per million within one year; and 100 parts per million within three years of the bill's enactment.
- Special provisions apply to lead paint (0.009 percent and possibly lower after further studies are conducted). Inaccessible component parts are generally exempt.

Additional Safety Rules Affecting Toys and Children's Products

- Adopts *ASTM F963-07 standard* as a mandatory consumer product safety rule and directs studies that may result in additional rules.
- Mandates *testing and certification of imported children's products* for compliance with safety standards, with detailed requirements for laboratory accreditation, firewalling rules for labs owned or controlled by the manufacturer, and priorities for testing certain products. The testing and certification provisions take effect 90 days after the CPSC has published its requirements for accreditation of third party testing bodies; the CPSC must publish these requirements within 30 days for lead paint, 60 days for cribs, 90 days for small parts, 120 days for metal jewelry, 210 days for baby bouncers, walkers and jumpers, and 10 months for all other children's products.
- Creates new rules for *durable infant and toddler products*, including cribs, high chairs, strollers, infant carriers, bath seats, gates, swings and other items, that

will facilitate owner registration by requiring manufacturers to provide postpaid registration cards and to take other steps that will enable more efficient distribution of recall and safety notices.

- Mandates *permanent tracking labels* on children's products and their packaging with source, production date and batch information that will better enable recalled products to be tracked and identified. These labels must be in place within one year of enactment.
- Expands *warning requirements for choking hazards* for children's toys and games. The Federal Hazardous Substances Act requires warnings on packaging and accompanying descriptive materials for toys and games containing small balls, balloons, small parts and marbles that they present choking hazards and are not for children under age 3. The new Act requires that these choking warnings be included in all Internet advertisements within 120 days of enactment and in all catalogs and other printed materials within 180 days if they provide a "direct means for the purchase or order of the product."

Recalls and Enforcement

- Greatly increases *civil penalties* for violations of the CPSA, as well as the Flammable Fabrics Act and the Federal Hazardous Substances Act, to $100,000 for each violation, with a maximum cap of *$15 million* for a related series of violations (the existing limits are $8,000/$1,825,000).
- Authorizes *state attorneys general* to enforce the CPSA and related laws by seeking injunctive relief, but requires states to give the CPSC advance notice of any intent to initiate a state action. (State enforcement previously was prohibited, and the CPSC objected to this provision of the new Act.)
- Increases *criminal penalties* by permitting larger fines, up to five years' imprisonment, and forfeiture of assets associated with a violation, and *removes* a requirement that directors, officers and agents be aware of violations before being criminally charged.
- Eliminates the right of a party recalling a product to *elect* whether they will offer a refund, repair *or* replacement for recalled products and permits the CPSC to require a refund, repair *and/or* replacement as the CPSC determines to be in the public interest.
- Creates new requirements for the content and dissemination of recall notices and permits the CPSC to require *recall notices in languages other than English*.
- Prohibits any CPSC regulatory activities from *preempting* damage claims arising under common law and state statutes, or from preempting California Proposition 65.
- Establishes *whistleblower protection* for private employees who report violations, testify or otherwise provide assistance in consumer product safety enforcement proceedings.

- Provides stronger prohibitions against selling banned or recalled products, or any products that violate product safety regulations.
- Calls for a study to determine the feasibility of requiring that manufacturers, importers and retailers establish escrow funds, purchase insurance or otherwise provide financial *security to pay for recalls* and/or destruction of recalled products.

Other Products and Substances

- Bans *3-wheeled all-terrain vehicles* (ATVs) and strengthens regulation of other ATVs, especially those intended for use by youth.
- Mandates a study of risks resulting from *formaldehydes in textiles and apparel*.

Import-Export Issues

- Imposes mandatory testing and certification for imported children's products, as discussed above.
- Prohibits the export of recalled or non-conforming products to other countries, subject to certain exceptions.
- Establishes policies to utilize the International Trade Data System established under the Tariff Act of 1930 and to increase cooperation with U.S. Customs and Border Protection to prevent unsafe products from entering the United States.
- Establishes procedures to destroy products that have been refused admission into the United States for failure to conform to safety regulations.
- Authorizes further studies to assess the effectiveness of measures and activities intended to prevent the importation of unsafe products into the United States.

Administrative and Procedural Changes

- Mandates that the CPSC establish a *searchable database*, accessible to the public on the Internet, on the safety of consumer products that will include reports from certain sources on deaths and injuries reportedly caused by consumer products, and which includes manufacturers' names, product names and other information.
- Requires that the CPSC shares information with state public health agencies.
- Bans industry-sponsored travel by CPSC commissioners and staff, and authorizes a travel budget to address the increasingly global market for consumer products.
- Restores the five-member Commission (it has operated with only three commissioners) and authorizes significant budget increases for the agency.
- Provides for expedited rulemaking by the CPSC.

1.10 #1 VERDICT OF 1999: $4.9 BILLION AGAINST GM FOR GAS-TANK EXPLOSION—LIVE DEFENSE DEMONSTRATION BACKFIRES AND TURNS THE TIDE[1]

Two lawyers from a small firm took on the world's largest automaker and came away with a staggering $4.9 billion verdict for six people severely burned when their 1979 Chevy Malibu was rear-ended by a drunk driver and exploded into flames. The impact caused the fuel tank to rupture and explode.

The verdict, which includes $4.8 billion in punitive damages, is the largest personal injury verdict in history. The trial judge subsequently reduced the punitive award to $1.09 billion.

General Motors (GM) continued to deny responsibility for the injuries and appealed the case based on several evidentiary rulings.

"The plaintiffs were innocent victims of a drunk driver (who) barreled into them at a speed in excess of 70 miles per hour," says GM's lawyer Richard Shapiro.

Shortly after the 1993 crash, California Lawyers Brian Panish and Christine Spagnoli set out to prove that GM put profits over safety by leaving the fuel tank in a vulnerable spot directly in front of the rear bumper. They asserted that for a minimal cost GM could have moved the fuel tank to a safer spot over the rear axle.

GM argued that the crash—not a defective fuel system—caused the injuries.

Following several years of contentious discovery Panish and Spagnoli, partners in a 12-lawyer firm, broke GM's back with the help of an infamous 1973 memo written by a GM engineer.

The so-called Ivey memo contained an analysis that fuel tank-related facilities cost GM roughly $2.40 per car, while another GM study indicated that it would cost $8.59 per car to implement the safer tank-over-axle design. The lawyers contended that the two memos demonstrated that GM was willing to risk thousands of lives to save six bucks a car.

Although the Ivey memo had been circulating among plaintiffs' lawyers since 1984, GM managed to keep the potential bombshell out of all its fuel tank cases until 1998, when the plaintiffs' lawyers in another case obtained evidence linking the memo to GM's decision-making.

Panish and Spagnoli were only the second team of lawyers ever to get the memo into evidence.

They had a second big break when GM lawyers brought the jury to a garage to view the results of a crash test they said proved the tank was safe and to the horror of the company's lawyers, the test car's gas tank leaked right before the jurors' eyes.

"At that moment I felt like someone was looking out for us and that the truth was coming out," says Panish, lead trial counsel in the case.

But getting to that point was far from easy. "It took everything we had to do it. It took three full-time investigators, numerous attorneys, expert witnesses, and hundreds of thousands of dollars," says Panish. The plaintiffs filed suit in 1994 and the case went to trial in June 1999. Panish and Spagnoli handled all of the case preparation

[1]By Eric Berkman for Practice Lawyers Weekly USA.

and represented all four children at the trial. During the trial, they brought in Carl Douglas to represent the mother and Attorneys Mark and Jeff Robinson to represent her friend. Panish says that GM used an army of lawyers by comparison.

"They had people from Snell Wilmer (100-plus lawyer firm in Phoenix), in-house people, new people showing up every day helping them prepare witnesses and work on the case," he says. "They even rented suites of offices in downtown LA just for this case. So we needed a little help and it worked. We worked together as a team."

1.10.1 Feel the Pain

According to Panish, the key to obtaining huge verdicts lies in tying the punitive awards to company profiles.

This shifts the focus from what the plaintiffs and the lawyer stand to gain from the verdict to handing out a punishment severe enough to force the company to change its dangerous behavior.

Spagnoli says that she and Panish described GM's financial situation by showing how much the company rakes in on a daily basis and what it spends each year on advertising.

"That way the jury could focus on an amount to send a message that GM couldn't just write this off as a cost of doing business," says Spagnoli.

It is a strategy that has helped Panish win punitive damages in four of the last five cases he's tried.

"What I generally tell the jury is that here's where they really have a chance to make a difference," he says.

Panish usually starts by telling the jury that punitive damages are also known as exemplary damages and for good reason.

"They may be intended to punish, but they're also intended to make an example of someone and to reward those companies or defendants that engage in proper conduct," he explains. "If you allow someone who engages in reprehensible conduct to get away with it, you reward them and punish those who do the right thing."

He also explains to the jury that there should be no limit or cap imposed on punitive damages.

"That would just allow the business to stick punitive damages into their cost–benefit calculations," he says. "They could just throw in the maximum amount they can lose and puts profits over safety all over again." But he also admonished the jury that their job was not to put the company out of business, but to give it some real food for thought.

"It's just like if you have an employee who's not doing the right thing," he says. "You don't necessarily want to fire them, but you do want to discipline them."

So Panish asked the jury to dock GM two weeks' pay—like they might do with an insubordinate employee—to make it hurt a bit. This two-week pay came to $4.8 billion.

"Just hitting them with, say, $500 million would have been less than 1 percent of their net worth, which is no big deal," he says. "But two weeks' pay would be enough to get the attention of GM's high executives who would see it, go out and try to figure what happened."

Panish adds that the only difference between his arguments in this case and his other punitive cases was the size of the company.

A day before the verdict was reduced, the plaintiffs offered to cut $4.5 billion from the award if GM would recall the Malibu and other cars with the same fuel tank design.

"Our client said, 'We don't want this money for ourselves because that's what the compensatory damages are for,' " says Spagnoli. "They also said they wanted GM to use the money for something positive."

GM rejected the offer, but since the reduction Panish has made a similar offer to return $700 million of the $1.09 billion punitive award. "They still maintain there's nothing wrong with the car," he says.

Meanwhile, the plaintiffs have pledged to donate half of their punitives to the State of California for programs benefiting burn victims.

1.10.2 Explosive Crash

On Christmas Eve, 1993, plaintiff Patricia Anderson was driving home from church in Los Angeles with her four children and 10 year old Tigner, a family friend. As she slowed for a red light, a car slammed into her from behind, puncturing her gas tank and causing her 1979 Chevy Malibu to burst into flames.

Bystanders immediately smashed the front windshield with a shopping cart and pulled Anderson and Tigner from the burning car. They suffered severe burns to their face and body.

It took considerably longer to get the children out of the back seat and their injuries were more severe. Three of the children—one-year-old Ty-Shon, seven-year-old Kionna, and eight-year-old Kiontra—suffered third-degree burns to various parts of their bodies.

Alisha, six, suffered the most severe injuries. Her ears were burned down to the cartilage and her face and body were left permanently disfigured, laced with ridges of ropy scar tissue. She also lost all the fingers on her right hand and has undergone 70 surgeries since the accident.

The driver of the other car, Daniel Moreno, had a blood alcohol level of 0.20, twice the legal limit, and was later convicted of felony drunk driving. At the time of impact, he was traveling at 49 mph according to the plaintiffs, and 68 mph according to the defense.

1.10.3 Defense Case

The defense case centered on two primary arguments—that the blame for the victims' injuries should be placed on the drunk driver who caused the accident and that speed, rather than faulty design, was the reason the gas tank ruptured.

Shapiro told Lawyers Weekly U.S.A. that the company is appealing based on a number of evidentiary rulings made by trial judge Ernest Williams. For example, says Shapiro, Williams excluded as irrelevant the following:

- Testimony on the Malibu's safety record;
- A mid-1970s fuel tank location study that allegedly demonstrated that GM engineers concluded the rear location was a safe place to put the tank;
- Evidence of the blood alcohol level of the driver who rear-ended the Malibu.

According to Shapiro, this evidence would have supported the company's argument of a high-speed crash because an impaired driver would be slower to hit brakes.

"There were so many errors committed by the judge that he literally prevented us from putting on a defense," says Shapiro. "We're confident the verdict will be overturned, aside from just the amount which is outrageous and unprecedented."

1.10.4 Survivable Impact

It was clear from the start that the defense would argue that the drunk driver was responsible for the plaintiffs' horrific injuries. But when Panish read the police reports he quickly identified a gaping hole in that argument; the plaintiffs suffered no major injuries beyond the burns. Therefore, they could have walked away from the accident if the gas tank hadn't exploded.

"It was clearly a survivable impact case," says Panish.

To prove this theory, the plaintiffs' lawyers knew they would have to demonstrate the following:

- The fuel system on the Malibu was unsafe.
- GM knew it was unsafe.
- GM had the technology to build a safer fuel system.
- GM had a profit motive for not installing the safer system.

One of the key elements of GM's case was the speed of the drunk driver. GM argued that he was going at 68 mph and that no fuel tank could withstand an impact of that magnitude. The plaintiffs countered with expert testimony, which placed the speed at 49 mph.

The battling experts testified for five days.

"This is a critical point because GM admitted that the tank shouldn't have leaked if the speed was less than 50," says Spagnoli.

Spagnoli argued that the absence of major injuries, only two broken legs among six victims, supported their argument that the drunk driver was going at less than 50 mph.

"We just couldn't see how eight people in two cars, all not seat belted, walk away from a 70 miles per hour crash," says Spagnoli. "It just slaps you in the face. How could this happen?"

The jury decided the issue in favor of the plaintiffs.

Meanwhile, Panish and Spagnoli set out to prove that the Malibu's fuel system was defective even at speeds below 50 mph.

This is where the years of document discovery paid off.

According to Spagnoli, GM had been unwilling to turn anything over without a protective order, which typically took months.

"Then they'd give you so much it was like looking for needles in haystacks," she says. "Or you'd get crash test photos that were illegible Xeroxes. So then we'd ask for stuff we could actually read. And they'd continually give it to you in little pieces. Or you'd get waves of stuff never knowing if you had it at all."

Panish adds that he spent thousands of hours traveling between LA and Detroit, where they pored through boxes upon boxes of documents and microfiche in the offices of GM's local counsel.

"I'd sit there 8 to 10 hours a day with people watching me like a hawk," he says. "And we had to make motions to compel for almost everything. The judge even had to appoint a retired judge to act as a referee who we had to pay—to rule on these motions. It all took an unbelievable amount of time." They hit pay dirt when they unearthed results from GM crash tests conducted between 1978 and 1981. These tests revealed that in approximately 45 tests at less than 50 mph, the Chevy Malibu fuel system encountered 14 leaks and five incipient leaks after GM certified its crashworthiness to the government. An incipient leak is a near-miss that occurs when a hole forms in the tank or when a car part comes in close contact with the tank.

Panish says that these test results showed the jury that the fuel system was defective and that GM knew it, especially when coupled with testimony from GM engineer William Cichowski, who said that since 1968 every GM "!-body" sedan except the 1979 Malibu was designed with the fuel tank further forward than in previous models.

Cichowski admitted on the stand that GM was doing this to improve crashworthiness—proof that GM knew that the Malibu's system was unsafe, says Panish.

But the most dramatic moment came outside the courtroom. GM had consultants conduct a special crash test in 1998 during the pretrial stage to show that the Malibu's fuel system could withstand a 50 mph crash test.

When GM lawyers took jurors to see the crash test results, they were shocked to find the tank leaking.

As part of Cichowski's testimony a year later, the jury and the judge went to GM's garage to look at the test car.

"They lifted it up and there were these reddish-orange drops coming from the tank," says Spagnoli, referring to the solvent used instead of gas during crash tests. "The jurors noticed and one of them (asked) for the tank to be taken out. They could only see the underside, which was basically clean, so they wanted to look at the whole tank, but GM refused."

Cichowski denied that the tank had actually leaked during the test, insisting that the solvent must have appeared as a result of the car's handling after the test. So Spagnoli presented him with pictures of the car that the plaintiffs' accident reconstructionist took right after the crash test. These pictures showed that the underside

of the tank was streaked with solvent. "This was the last slam of the door on their claim that the tank didn't leak," says Spagnoli. "Cichowski seemed like he was caught totally unaware and wasn't prepared for what we had and after the trial, the jurors were very critical of this crash test."

Shapiro, however, contends that the tank never leaked, either during the test or at the jury view.

"During the test there was slight leakage from the gas cap, but it was less than the one ounce per minute permitted under safety standards," he says. "And at the jury view, it was transmission fluid that the jury saw, not solvent from the gas tank."

Furthermore, he contended that the refusal to honor the juror's question to remove the gas tank was a mutual decision by both sides. Neither wanted to drag out an already lengthy trial, he said.

Spagnoli, however, insists the decision was entirely up to the defense.

1.10.5 Lowered Standards

Even with strong evidence that the Malibu fuel system was defective, the plaintiffs could not win without showing that GM could have done something to remedy the situation.

They did this by analyzing GM internal memos, meeting minutes, and test results dating back as far as the 1950s.

Their focal point was 1966, when the federal government first proposed a new safety standard requiring that fuel tanks be able to survive a 30 mph "fixed rear barrier" test, which is roughly equivalent to a car traveling at 60 mph hitting a stationary car.

The National Highway Traffic Safety Administration solicited public comment on the proposed standard at the time and kept it all in a docket. The docket included four boxes of comments, which Panish and Spagnoli sifted through. Amidst the mass of documents they found replies from GM saying the company could not possible meet the standard.

But the internal GM documents Panish uncovered during discovery tell a different story. For example, he obtained the following:

- A 1966 report by a GM safety engineer stating that the company could quickly meet the standard;
- A 1971 memo by GM engineer Jack Ridenour reporting that NHTSA's proposed standards could be met by placing the gas tank over the rear axle;
- A report from GM engineer Fred Aldrich, stating that crash tests indicate that GM cars could meet the proposed standard;
- A 1971 internal proposal for tank-over-axle design;
- A 1959 GM patent on such a design claiming that it would position the tank "beyond the danger of damage."

Panish and Spagnoli introduced all this evidence at trial through the testimony of Paul Mutty, GM's chief fuel system designer.

"It all establishes that GM was saying one thing internally and telling the government another," says Panish. "They were telling the government it wasn't feasible to meet the standard. Yet at the same time, all their documents and tests showed they could."

The plaintiffs' team also delivered a bit of White House intrigue.

Panish and Spignoli obtained a deposition given in an earlier GM case by the late Nixon staffer John Ehrlichman. In the deposition, Ehrlichman described a secret 1971 Oval Office meeting between him, President Nixon, and GM Chairman James Roche. During the meeting, Nixon and Roche allegedly discussed pending NHTSA safety standards. According to Ehrlichman, Roche expressed concern that the proposed standards would hamper GM's ability to compete with foreign automakers.

Ehrlichman testified that after the meeting, Nixon promptly ordered him to speak with the Secretary of Transportation, John Volpe, about tabling all pending standards, including the 30 mph fixed rear barrier test. That standard was never adopted—instead the NHTSA adopted the more lenient 30 mph "moving barrier test," which approximates a car hitting a stationary car at 42 mph.

Spagnoli adds that it was a huge battle getting this into evidence.

"But after a lot of arguments, we were allowed to read Ehrlichman's deposition into the record," she says.

Meanwhile GM called Douglas Toms, the head of NHTSA during the early 1970s, in an attempt to set the record straight.

"He came in very determined to make it clear the he was a public servant who would never bend to any kind of pressure," Spagnoli recalls. "But on cross-examination, he revealed that he had back-door conversations with GM people where he basically told them they need not worry about a higher test speed. He told them this at a time when their safety review board was about to order a tank-over-axle design in 1973 in anticipation of a higher standard."

After that, GM tabled the design. Spagnoli says this all made a huge impression on the jury.

"They said after the trial that they were amazed how polite the process is for government safety standards," she says.

Shapiro, however, says the Ehrlichman testimony should never have been admitted.

"It's hearsay and it's unreliable (the plaintiffs) just tried to create this whole conspiracy with the Nixon administration," he says. "But if you listen to the tapes (of the Nixon meeting) there was absolutely nothing about fuel systems. They were talking mostly about passive restraining systems like airbags and seat belts."

1.10.6 Iveygate

The single most important moment in the case occurred when the trial judge allowed the Ivey memo into evidence.

According to the plaintiffs, the 1973 memo was powerful evidence that GM conducted a cost–benefit analysis and decided that it was willing to risk human life than implement an $8 repair. In this memo, GM engineer Ed Ivey estimates that 500

fatalities occur each year from gas tank fires and calculated that it would cost $200,000 to settle each resulting case. With 41 million GM cars on the road at the time, Ivey estimated the litigation cost at $2.40 per car. The plaintiffs also showed the jury a second memo, written by a GM engineer in 1971, which said it would cost GM $8.59 per car to implement a tank-over-axle design. The plaintiffs then connected the two memos with a series of other documents including:

- A March 1973 directive that the cost–benefit ratio must be evaluated before GM released any components that exceed government standards;
- A June 6, 1973 memo assigning Ridenour to procure a summary of fire-related lawsuits against GM and assigning Mutty to get a breakdown of the cost of the tank-over-axle design;
- A document in Ivey's personnel file stating that his job duties were to analyze designs, prepare mathematical calculations, and report the results.

This all drove the point home that instead of spending another $8.59 to put the tank over the axle, "GM said, 'Forget it, we'll fight the lawsuits,'" said Panish. But none of this would have been possible without getting the Ivey memo into evidence.

A GM lawyer first discovered the Ivey memo in 1981. At the time, the lawyer warned in a memo that the documents that Ivey generated "are undoubtedly some of the potentially most harmful and most damaging were they ever to be produced."

But when the document was first obtained by the plaintiffs' lawyers in 1984, they could not get it into evidence. Ivey gave deposition testimony in more than a dozen cases that he drafted the memo completely on his own and, to his knowledge, nobody else ever saw it. Without any evidence to contradict this, judges ruled that it was too damaging to admit.

"So plaintiffs' lawyers spent more than 10 years searching for evidence to explain why Ivey wrote the memo," says Spagnoli.

The plaintiffs' bar found the crucial link in the 1981 notes of GM lawyers who interviewed Ivey in anticipation that his memo would eventually have to be disclosed. Those notes were discovered by lawyers working on an earlier case against GM.

In the interview, Ivey stated that he wrote the memo "for Oldsmobile management" to "figure how much Olds could spend on fuel systems." He also said he probably distributed the memo to Mutty and five other managers.

Plaintiffs' lawyers knew about these notes for quite some time, but GM characterized them as "deposition summaries" and used the attorney-work privilege to avoid producing them. But in 1998, a judge in a Florida case ordered them released. In that case, the Ivey memo was admitted for the first time. The judge in Anderson followed suit.

"We truly owe a lot to the lawyers who'd gone ahead of us and uncovered a lot of stuff," says Spagnoli. "In this case, it puts things into perspective that the Ivey memo was no orphan phantom project without meaning at GM."

Despite the interview notes, Ivey stuck to his story. So did his boss, Mutty, who testified at trial that he could not have seen Ivey's memo because it was dated the last day of Ivey's assignment in his department.

So Panish quickly presented Mutty with Ivey's employment records, indicating that his assignment did not change for another month.

"It was almost humorous," says Spagnoli. "He's just gotten done saying he can't remember things that happened 20 years ago and here is making an off-the-cuff comment that Ivey wrote the memo on a Friday. He was a likable witness, but this made him look like he was rehearsed. The odd inconsistencies showed a selective memory for things that helped his position, and I don't think the jury believed him."

The plaintiffs' lawyers enhanced the power of the Ivey memo by introducing evidence that Ivey got a 22.5 percent raise in 1983, three days before the memo was first produced to plaintiffs' lawyers. In his previous 14 years at GM, Ivey's average pay raise was between four and five percent each year.

"This is at a time when there's a gas crisis, an oil embargo, and a recession, and GM is laying off thousands of employees," says Panish. "So to me it looks like he got a big raise to get amnesia. He testifies 13 times between 1984 and 1999 that he doesn't remember why he prepared it and doesn't have any knowledge that it was distributed to anyone."

Shapiro, however, insists that the plaintiff never properly connected the Ivey memo to OM's decision on where to put the tank.

"The fact is, there's still absolutely no testimony from anybody that suggests that a design decision was ever based on the Ivey document," he says. Even Ron Elwell, the ex-GM engineer the plaintiffs brought in to testify against GM, couldn't link the memo to the decision-making, Shapiro adds.

"This guy makes his living at $400 an hour testifying against GM and his speciality is the fuel system," he says. "But even he couldn't point to a single decision ever made or influenced by the Ivey document."

1.10.7 Emotional Testimony

Testimonies from Anderson and her three oldest children sealed the compensatory damages award.

For example, the children each spoke of their deformities and how they were teased by classmates and stared at by adults.

"Alisha spoke movingly about waking up in the hospital and seeing that her hand had been amputated," says Panish. "And her sister Kiontra talked about seeing Alisha go through the painful whirlpool treatments where they'd scrape off her dead skin each day."

Anderson talked about being hospitalized for serious burns of her own, but checking herself out of the hospital the next day to visit two of her children in separate Los Angeles County hospitals.

"And she told of how she kept her house decorated for Christmas for five months until the children all came home to finally celebrate the holiday and the fact that they were all still alive," Panish recalls.