SENATE
LEGISLATIVE COMMITTEE ON TRADE & ECONOMIC DEVELOPMENT

March 15, 1979 8:10 A.M. Hearing Room B
Capitol Bldg.

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Members Present: Sen. Lenn Hannon, Chairman
Sen. Ken Jernstedt, Vice Chairman
Sen. Mike Ragsdale (Alternate)
Sen. Richard Bullock
Sen. Dick Groener

Member Excused: Sen. Jason Boe

Staff Present: Patricia K. Middelburg, Executive Officer
Raymond J. Redburn, Sr. Legislative Assistant
Annetta Mullins, Committee Assistant

Witnesses: Ed McKinney, Portland attorney, PCC Liability Task Force
E. Richard Bodyfelt, Portland attorney
Phillip D. Chadsey, Portland attorney
Jim Markee, Oregon Trial Lawyers Assoc.
Clayton C. Patrick, Oregon Trial Lawyers Assoc.
Nick Chaivoe, Oregon Trial Lawyers Assoc.
Scott Reiman, OSPIRG
Lou Wilson, Oregon Insurance Company
David Bangsund, Portland attorney
Mike Schenn, Oregon Trial Lawyers
Dennis Garcia, Oregon Trial Lawyers
William F. Richardson, Fernaughty Machinery Co.
Emerson Hamilton, Eugene Area Chamber of Commerce

0015 CHAIRMAN HANNON called the meeting to order at 8:10 a.m. and announced that we have scheduled this morning a public hearing on SB 422.

SB 422 - Relating to actions in particular cases

0025 ED McKINNEY, representing the Liability Task Force for the Portland Chamber of Commerce, submitted and read a prepared statement (SEE EXHIBIT A) relating to the study of the task force and a prepared statement concerning SB 422 on behalf of the Portland Chamber of Commerce (SEE EXHIBIT B), pages 1 2, and half of page 3.

0167 RICHARD BODYFELT, an attorney in private practice, stated his pracitce is primarily but not solely defense of product liability cases. He is here in support of SB 422. He has a handout (SEE EXHIBIT C). He will address primarily those aspects of SB 422 which would result in codifying Section 402 A of the Restatement of Torts and that portion of SB 422 that would address the question of government standards and of post manufacture improvements.

0180 He reviewed his prepared statement.

0296 SEN. GROENER asked if a Pinto manufactured and marketed in accordance with government codes and regulations was applicable at that time.

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0298 MR. BODYFELT stated he thinks that is a legitimate point and as to what the National Highway Transportation Safety Administration standards, regulations and codes are today with respect to fuel tanks, he is not informed. But he thinks it is important to bear inmind that if the NHTSA had not issued any standards of regulations, that would not affect the outcome of those law suits. It would only be a situation where the NHTSA had promulgated standards that specifically addressed fuel tanks. He doesn't know the answer to Sen. Groener's question and he suspects the earlier Pintos were not subject to it and the later ones are.

0313 SEN. GROENER stated he would presume that if this bill went into law, he would think it would be ligitimate to sue the government if they set up the applicable government codes and regulations to manufacture a product and the manufacturer abides by these, then the government should be at fault.

0330 PHILLIP CHADSAY stated there was a fule tank standard that came in during that period and as he understands the law and the reason for the recall on the Pinto was because they did not meet that standard.

0363 MR. CHADSAY stated a Pinto suit in California lead to the very big judgment and there was a subsequent recall of all Pintos because they did not meet the federal standards.

0365 MR. BODYFELT stated SB 422 would not change that at all.

0482 PHILLIP CHADSAY, an attorney in private practice in Oregon. His firm represents a number of Oregon manufacturers and he personally does some product liability defense work. He is here primarily to talk about the punitive damage and the collateral source portions of the bill, but before he does that he would like to tell the committee about a state of the art case he had about two years ago involving an Oregon manufacturer. This Oregon manufacturer had just gone through a long series of trying to find new products liability insurance. Its agent had contacted, he thinks, 42 carriers before they finally found one to insure them. They were manufacturers who manufactured the fifth wheel on trailers. About two months after it renewed its insurance they were sued in Airzona based on a 20 year old product. So in Oregon that wouldn't happen because we have a eight year statute that would bar it. The allegation in that law suit was that it had failed to heat treat a piece of metal properly and the plantiff's proof at the time of trial was they should have used a method that didn't even come into existence until two or three years later. Furtunately the case had a happy result and the jury find that the drunk driver of the truck was negligent and not the manufacturer. But if they would have lost that case they would have lost their products liability insurance and it would have gone out of business. There was just no way the manufacturer could have stayed in business.

0513 Punitive damages basically in a lawsuit the plantiff is entitled to recover special damages, the lost wages, medical bills, etc. Then they are entitled to recover general damages, the pain and suffering, emotional distress, those damages. On top of that in certain law suits historically, the plantiff has been entitled to recover what is called punitive damages. These are windfalls. They are damages to punish the defendent. In some states such as Washington they have a constitutional provision that there is no punitive damages allowed at all. There never have been. He has had cases where a British Columbia plantiff will come down and file first in the State of Washington seeking punitive damages and find they can't get punitive damages and refile in Oregon.

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The theory of products liability cases is not based on a fault theory. It is based on an enterprise liability theory which means that the manufacturer can better spread the risk of loss than the plantiff. That means that that risk of loss is going to be passed on to all the other consumers of the product. So what we are doing is anytime we awared punitive damages in a products liability case is we are increasing the cost of the product to everybody else who buys it.

There have been cases where punitive damages have been allowed in products liability and usually those cases are the kind that are most dangerous as far as the economic system. Those are cases where you have a design defect or, say a defect in a drug product that caused injury before the manufacturer got it off the market.

0550 The United States Court of Appeals in the Second Circuit which is in New York and is probably the second most distinguished court in the U. S. and in a very good decision by Chief Judge Friendley of that court held that punitive damages were not appropriate in that type of action where a product is involved, particularly a product which is regulated by the federal government and that is the type of products case where you have basically the ability to bankrupt the corporation, put it out of business. It is the hundreds and hundreds of claims that this section would deal with. He thinks you have to keep in mind that the plantiff still, if they have an unfair trade practices cases, they are going to be able to get punitive damages.

0563 The other area we need to keep in mind is the collateral source rule. The basic theory of jury cases is the jury should be informed of all the relevant evidence and then be able to make a decision based on all the relevant evidence. Historically the fact that the plantiff has sources of income coming as a result of an accident, insurance, workers compensation, social security, other sources of income that have come to him as a result of his injury have not been admissable in a civil action. The Oregon Legislature has somewhat modified that rule already as regards to no fault insurance on automobiles, if a person is an employee and has workers compensation coverage, that is an offset. This statute would not create an offset at all. All it would do is say that the evidence of other sources of income as a result of that injury are admissable and the jury can consider it for whatever it is worth. They would not have to create an offset. It is in line with the basic theory that the jury should know all the evidence in order to give a fair judgment in the case.

0584 MR. MCKINNEY, in speaking to Sections 6 and 7 of SB 422, read from the prepared statement previously submitted (SEE EXHIBIT B), pages 10 through 12.

0771 SEN. RAGSDALE stated Mr. McKinney indicated there was a recent federal study that indicates the rates are going to keep going up unless we do something to put a ceiling on this. He asked what that study is because he would like to have a chance to review it.

0774 MR. MCKINNEY stated it is the Interagency Task Force Study. He thinks they can get a copy of it.

The committee and Mr. Chadsay, Bodyfelt and McKinney discussed further the testimony presented by the witnesses including the cost of products liability insurance, the application of hindsight theory in court cases and the effect of

work-related injuries on products liability cases and vice versa.

1035 MR. BODYFELT, in response to a question by Sen. Ragsdale, stated their aim was not to eliminate the specific punitive damages in other acts.

1052 JIM MARKEE, representing the Oregon Trial Lawyers Association, introduced Mr. Nice Chivoe, a trial lawyer from Portland who does a lot of products liability work and also who served on the Portland Chamber of Commerce Task as a representative of the trial lawyers and Mr. Clayton Patrict, Legislative Analyst for the Oregon Trial Lawyers Association.

1058 He just wants to point out a few things. Everybody hears about the $3, $4 and $5 million awards in products liability cases and nobody hears about the little ones. We get it in our heads that all product liability cases cost a lot of money. He would like to make reference to a report from Congress "Product Liability Insurance, a Report of the Subcommittee on Capital Investment and Business Opportunities of the Committee on Small Business", House of Representatives 95th Congress. The subcommittee studied this problem for approximately a year and one-half. The subcommittee learned "that the terminology used within the insurance industry is often confusing. For example, the Insurance Contractors's Study, the study conducted by insurance people indicated that the average product liability settlement was $19,500. When questioned by the Chairman, however, it was indicated that it was not that it was not the settlement that was being referred to but rather the claim. Moreover, further questioning by the Chairman indicated that claims included not only amounts paid, but reserves as well. This still was not a complete definition since the term 'claims' used was ultimately determined to include all lost adjustment expenses as well as the development factor in addition to the foregoing. The potential for confusion can be seen by stating at this point that the subcommittee subsequently learned the average paid claim over a recent amounted to slightly less than $3,600." That was based on an eight and one-half month study done by that subcommittee nationwide and involved some 24,000 claims. The actual figure was $3,592.08 per claim untrended. The insurance companies like to trend their information to include a lot of other things. This involves two reports. One which included 12,382 incidents and another which included 12,524 claims.

1077 There are other things that drive rates up in products liability cases. Lester Rawls, Insurance Commissioner from Oregon at that time testified in front of that subcommittee and pointed out an example of panic pricing.

1104 MR. MARKEE, in response to a question from Sen. Groener, stated nobody really knows, including state insurance commissioners, the federal government or manufacturers, if the rates that are being charged are too high or low or just right. The only people who have any information is the insurance industry. It is very difficult to get that information. They don't have to report their reserves broken down into such things as Incurred, but Not Reported to the insurance commissioners.

1111 It is estimated in the report, ISO is the national rating organization which publishes a manual of rates that should be charged for various risks, it is estimated in products liability insurance that only 10% of all premiums are manually rated. 90% are judgment rated.

1120 There are two states that have enacted legislation requiring such reporting to the insurance commissioners, Florida and Kansas. He would be happy to supply the committee with those statutes and he also has the

first report that was filed by the insurance companies for Kansas. That is a step in the right direction. Also, he thinks, we need to create some incentives for self-insurance in the way of tax deductions for reserves for self-insurance.

1127 In regard to the question asked previously relating to third-party liability suits, Mr. Markee stated he would like to point out that for the latest period for which they have figures which he thinks is 1977, but it could be 1976, 10% of all product cases in terms of numbers of cases, arose from job placed industries, nationally. But those 10% actually constituted 42% of the monitary awards in products cases because job place injuries are much more severe as a rule.

1132 CLAYTON PATRICK, representing the Oregon Trial Lawyers, stated he doesn't try products liability cases himself but he has been working with the trial lawyers during this session. He just wants to make a few brief comments in response to the testimony that was offered earlier and will allow other people who have expertise in the particular areas to speak.

1136 The basic problem with the section that provides there is no products liability if the manufacturer has complied with government rules and regulations is simply the way the bill is written on page 2, line 23, the words "unreasonably dangerous" are the key words. It would seem to him as an attorney reading that statute, if there are any government codes or regulations in effect governing the manufacture, whether they were adequate or inadequate or if they were outdated or not, if the product was marketed in accordance with those, then there wouldn't be any strict liability even if the manufacturer knew there was a design defect, but it hadn't been caught up yet by the applicable governing agency. That is very broadly drafted.

1150 As far as Section 3 on page 2 of the bill is concerned, subsection (2), the people who are testifying in favor of this bill made a large point that they felt this evidence should not be introduced if it came after the product was sold. They repeated that several times. He would simply point out that that is not the way the bill is drafted. If you look on lines 30 and 31 evidence would not be allowed if it became available after the design or manufacture of the product. It would simply mean that once a product is designed then there wouldn't be any obligation to make changes after that point, at least evidence of changing the state of the art wouldn't be admissable to show that such changes should have been made as long as the design isn't changed. He would also point out that as far as evidence of this material, the current law simply allows evidence of changes of the state of the art to be introduced as evidence. It does not automatically determine that it was feasible for the manufacturer to make such a change. Often it is the only kind of evidence that a consumer who isn't privy to all of the inside information the manufacturer has, it is often the only kind of evidence they can have.

1166 As far as the punitive damages section, he understands there has been some suggestion of a change, but as it is currently worded on page 2, lines 36 through 38, it abolishes punitive damages in all civil actions. The double or treble damages--the only example of those are timber trespass. He disagrees this is a general statute which would not overrule the specific punitive damages statutes that it seems to him the later legislation would control. Even if you allow double, treble and statutory punitive damages, you are prohibiting punitive damages in all cases, products liability or not. The bill goes much farther than simply products liability.

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1174 The same is true with regard to the third party actions in workers compensation. It applies to all third party actions, not just products cases.

1179 SEN. GROENER stated he would know if this was the intent of the proponents of this bill who just testified if this is the way it should be according to their interpretation, or whether it would be their interpretation.

1181 MR. CHADSAY stated he has been told the intent is to insert the words "punitive damages" after the words "or treble damages" in Section 4 of the bill.

1184 MR. PATRICK stated that only solves the problem with regard to unfair trade practices and those sorts of things and he thinks there are plenty of other situations that don't regard products where punitive damages are appropriate because the actor is acting in total disregard for safety and there isn't a criminal statute that will take care of the problem. Even with the amendment, the statute still goes further than products cases and he thinks those ramifications should be very closely studied.

1191 MR. NICK CHIVOE stated he thinks he was the minority token member on the task force. He thinks he can agree on one item that was before them and that was the question of exemption from income taxes, money set aside, for the reserve fund for payment of products liability cases. There is federal legislation on that point and he did agree with them. The Association of Trial Lawyers of America also agreed to support that type of legislation so long as it wouldn't consist into a windfall for the industry that was trying to put away the reserves, that they wouldn't get too excessive in their reserves. They felt the manufacturers certainly needed some assistance in that field.

1199 Something that Mr. MCKenney said about their concern about profsssional liability coverage as well as products liability kind of sparked something in his memory. He just got the request to come down and testify the other day and he doesn't have all the material he would like to have. They heard about the medical malpractice crisis that existed and how insurance premiums are sky-rocketing because of the tremendous costs generated by medcal malpractice cases. The ISO figures for 1976-77 for Oregon showed that the average payout per doctor in the state of Oregon was somewhere around $1,100 or $1,200.

1207 MR. CHIVOE, in response to Sen. Groener, stated the carriers were charging anywhere from $3,000 to $12,000 to $16,000. He thinks the same type of propaganda is being put out on the products liability insurance--that they are making guestimates as to what they are going to need to supply the coverage to the manufacturers, distributors, whether they are retailers or wholesalers or whatever, and they are not based on actual statistical figures.

1218 He came primarily to talk about Section 7 of the bill. He thinks there are some other members from their organization who will talk about other factos.

1220 Our present statutes cover most of the problems that 402A does with one exception. If 402A is adopted the way the bill is phrased, we get a assumption of risk as defense back into Oregon, which was abolished by the Legislature. He thinks that is one of the dangers of this bill.

1239 Mr. McKenney made a great point of the tremendous costs involved because of third party actions in workers compensation cases. We had from the Dept. of Commerce, Insurance Division , presented to the task force in

Portland a note from a Mr. R. Michael Lamb, Casualty actuary, dated April 21, 1978 in which he states "early returns from my contacts indicate insurers recoveries of all types run about 2 to 3% of claim costs for workers compensation. Most of these are automobile cases. Only a slur, perhaps 1/4 at most could be products cases, hence the increased cost from loss of these recoveries would not likely be greater than one-half of 1% .". There is not really a stistical viable figure to affect workers compensation rates one way or another. He also supplied the task force with information that in 1976 there was a recovery of $2.5 million out of third party claims back to the insurance carriers. This is from the State Accident Insurance Fund figures and there was $78 million paid out, so the recovery was 3.2%. In 1977 the recovery dropped to 2.2% of the actual cost of workers compensation from rights of recovery against third parties. That is not a significant figure at all.

1257 An employee who looses an arm in employment as a result of negligence or as a result of a defective product of someone other than the employer, that arm is worth less than $17,000 in workers compensation. Under this legislation all he could get would be his medical costs, his temporary total disability benefit payments and a maximum of close to $17,000. The employer could turn around and recover that for the insurance carrier from the party at fault. The worker would not benefit it by one bit. He doesn't think there is anybody in this room who would give up his right arm for $17,000.

1268 Another factor that disturbes him in this case--he is a professional corporation, so he is covered by workers compensation in the course of his work. A lot of his work is out of Portland. Let's assume he is driving his vehicle down the road and has as a passenger a client who is not in the course of his employment, and they are injured as a result of somebody else's negligence. All he can get is workers compensation benefits. His passenger can recover for the injuries he has incurred. There is really a lack of equal protection of law involved.

1288 He thinks anything that takes away the urge to have a safe place to work is bad and frankly the passage of this bill, taking away the right of the employee to sue a third party, whether it is a products liability or anything else, this bill would wipe out all third party cases of every kind. He thinks this will discourage safety measures rather than encourage safety measures in our industries.

1299 He submits that the majority of products liability cases that arise out of a work place are not against Oregon manufacturers, not against Oregon suppliers, but are out of state defendents. What we are doing with this type of legislation is protecting those out of state manufacturers and distributors at the expense of Oregon citizens. He thinks that is something we should take into consideration. Most of the lawsuits against the Oregon manufacturers are not in Oregon, they are in states around Oregon. He asked why then do we limit the right of the Oregon worker when the workers of other states are not limited in that way. We are not going to protect the Oregon manufacturers and distributors from out of state lawsuits. Almost every state now has a long-arm statute. They don't have to come to Oregon to sue the Oregon manufacturer because they can sue in the state where the injury occurs. He says we are denying people in our state equal protection of the law if we pass this kind of legislation.

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1373 MR. PATRICK, in response to a question from Sen. Jernstedt, stated Oregon has abolished by Legislative action implied assumption of risk. But the Oregon cases show that actual assumption, where somebody actually knows about a defect in a product or condition and knows the danger and assumes them in some form of consent, that is still alive in Oregon.

1376 MR. CHIVOE stated he hates to take issue with his collegue, but the Hornbeck case in which a fireman was injured because of a possible defective grab bar on the fire engine, in that case the manufacturer claimed the defense of actual assumption of risk and the Oregon Supreme Court said that wouldn't apply. The Legislature has knocked out the assumption of risk and the only way you can have an expressed assumption of risk is by some agreement between the injured party and the manufacturer or supplier of the product. So for all purposes now we don't have any assumption of risk as a defense in Oregon.

1383 SEN. RAGSDALE stated Mr. Chivoe was on the task force that studied this issue. He asked if he is correct in assuming that Mr. Chivoe is recommending that the bill be tabled.

1385 MR. CHIVOE stated he would recommend the bill be tabled.

1386 SEN. RAGSDALE asked Mr. Chivoe if he personally arrives at the feeling that there is any legislation needed, does he concur that there is a problem that requires some legislative remedy.

1388 MR. CHIVOE stated he doesn't think anything is needed except perhaps some control over insurance companies, their rates and the way they do their rating and the way they set their premiums on particular types of risks.

1394 SEN. RAGSDALE stated he doesn't know what his feeling is on the provisions of this bill, but he is developing very rapidly a feeling that we ought to take a look at possible amendments or a new bill as it relates to the insurance situation. That is just his personal observation.

1405 SCOTT REIMAN, a resident of Euegne and a student at the University of Oregon School of Law, stated he is here to testify this morning concerning SB 422 and he thinks his comments in this regard will be usefult to the committee because there have been a number of statements by previous witnesses offered in support of this bill and in opposition concerning the insurance aspect of this problem. He originally got interested in SB 422 out of a concern of the effect it would have on Oregon consumers and users of products that were manufactured both within and without this state, but in the course of his examination of the area, he has become concerned as he thinks some of the members of this committee and the witnesses that have been here, over the rising insurance rates being faced by Oregon businessmen, primarily those of a rather small nature, those perhaps having something under $2.5 million gross sales in a year.

1415 He would like to comment about the fact that SB 422 really does not offer a legitimate form of relief to the people who are facing the increasing burdens brought about by these rising insurance rates. He thinks the argument that has proceeded him has generally tended to argue that if we can establish a greater predictability within the area of products liability

by the laws that are applicable in these sorts of cases that therefore the insurance companies will be better able to estimate their future liability and therefore the rates charged to the insurance companies will therefore be reasonable and hopefully will not increase at the pace they have shown over the previous five or seven years, since 1970. In his personal opinion, he does not see this bill as offering any hope of that form of relief. He does not see that there will be an obligation on the part of insurance companies to pass on in the form of lower rates to their insureds the effects of decreased liability that will be caused by this bill and derivitably in consumers who ultimately bear the burden of the insurance costs.

1428 He thinks he should offer some analysis of why he has arrived at these conclusions. He thinks he can help the committee to understand why the insurance companies in this situation stand to be the only guaranteed beneficiaries of SB 422 and why these benefits will not then trickle down to the local businessmen and consumers. To understand this he thinks the committee people should have some understanding of how these insurance rates are set. He thinks off the top they should make allusion to a comment that was made by Lester Rawls when he was the Insurance Commissioner for the State of Oregon. This comment was made before the House Subcommittee that has been referred to previously as having studied this subject in 1976-77. He stated "one of the fundamental characteristics of the products liability insurance problem is the tremendous uncertainty inherent inthe products liability rate making process." The source of this uncertainty stems from what has already been conceeded to be an absence of information concerning the actual claims experience of these insurance companies in products liability cases. What this has led to has been essentilly a subjective style of determining the insurance rates which are then charged to the local businessmen. The reason this is subjective is because the insurance services office which has been mentioned previously is the national ratemaker in products liability insurance lines. They have a certain number of product categories, something over 400. For approximately 65 to 75% of these, the insurance services office has generated statistical data to justify the rates that are assessed within those product categories. However, these 65 to 75% of the product categories only account for less than 10% of the total premium which is charged in product liability insurance policies. The remaining 90% of that premium is generated through writing the product insurance for the remaining categories where there is not a statistical basis on which the rates can be set. How are the rates then set in these areas? Extrapulation from similar products for which statistical data is known, subjective assessment of what the risk is for a given product within the best competence of the underwriter plus a conservative approach to insure that the company will be making an adequate profit on the insurance policy. So all of these elements go into the remaining 90% of the product liability premiums. This by itself does not mean that these rates, the 90% that is essentially subjective, are too high, too low or just right. However, he feels there are indications that would substantiate a claim that there is a certain element of panic pricing going into the establishment of these insurance rates. He thinks panic pricing has been somewhat defined earlier. Essentially it is an exaggeration of estimated future liability that will be faced by the insurance companies and this exaggerated estimation of future liability is then reflected within the rates that are intended to cover that misperceived future liability.

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1461 The evidence he can offer as one specific example of why this element of panic pricing can, he thinks, be suspected to be present with on some reasonable grounds. It is that the Insurance Services Office itself conducted what is called a closed-claim survey between July 1, 1976 and Mrch 15, 1977. This survey was an attempt to consider data from 23 of the largest products liability underwriters for claims that were closed within this period. In planning the survey, a claims base of at least 20,000 was desired. By the estimates of the participating companies it was thought there would be at least 30,000 claims reported by Dec. 31, 1976. Howver, because the rate of reporting fell well below that estimated, the period was ultimately extended to March 15, 1977, virturally doubling the length of time at which time there was slightly in excess of 24,000 claims reported. He thinks from this sort of evidence, if product liability rates are being based on that gross a misperception of what the future liability, at least in terms of the number of claims that are being brought in, that there is a reasonable grounds for suspecting that this misperception is being carried forward into the insurance rates in that the rates that are being charged are in fact overpriced in relation to the actual risk exposure that is involved for the businessmen. Particularly this is a burden upon the small businessmen who have a gross sales figure of $2.5 million or less.

1482 If he is willing to accept the fact that is an excessive figure, the question is whether SB 422 will serve to correct and reverse those figures and start a downward trend. He doesn't believe that is true because even though these insurance rates are very largely determined through subjective calculations, this could be controlled if there were an adequate regulatory mechanism at the state level through the State Insurance Commissioner's office demanding greater accountability for these figures through a developed statistical basis. It would do a great deal to eliminate these misperceptions of future liability, but that simply is not in place. So what we are going to have through SB 422 is an rough outline a situation in which a good number of claims which currently could be brought under Oregon law relating to products liability will be either barred or severly restricted in their ability to recover. This will be to the benefit of the insurance companies who are writing the products liability insurance in that they are not going to have to pay such a frequency of claims or perhaps there will be a greater tendency toward out-of-court settlements producing lower figures per claim and yet without the regulator mechanism in place at the state level, there is no assurance that this decreased liability is going to be reflected and passed on to local businessmen through lower insurance rates. Primarily this is going to be a continuing problem for the small businessmen who simply are not in a financial position to negotiate with large insurance companies over what they should actually be paying.

1499 Here in Oregon the small businessman are facing the problem of their insurance rates going up dramatically. They are not being determined on their own loss experience. The insurance companies are saying what do they see as being the liability prospect for a group of people as a whole. They aren't looking to see if an individual is doing a good job, poor job or simply a fair job at quality control of his products, at adequate labeling of the products that warrant of dangers inherent in the product--none of these things are being taken into consideration. None of these things will be taken into consideration after SB 422 passed and without adequate supervision at the state level there simply is no assurance that individual treatment will

accrue to these businessmen and they will reap any sort of deritive benfits from this bill in terms of lower insurance rates. If they will not be benfited by this bill, then it is impossible for him to conceive how the consumer can be benefited through lower prices which would simply be a reflection of the lower insurance rates.

1518 He sees SB 422 as offering relief to insurance companies who are not in need of that relief and not as holding out any legitimate hope of relief if such is needed to local businessmen, Oregon consumers and users of products. He sees no compensating benefit to Oregonians deriving out of SB 422 that would justify this sort of restrictive legislation on the rights of injured parties who may not have any other adequate source of making them whole following injuries stemming from products liability defects.

1582 LOUIS V. WILSON, President of North Pacific Insurance Company and Oregon Automobile Insurance Company, submitted written testimony and stated he will hit the highlights of that written testimony (SEE EXHIBIT D).

Following that he would like to make a few comments in light of some of the questions of the panel. One of the best things probably for the purposes of the committee is the discussion in several testimonies over the past two or three years on these kinds of bills that they have no statistical information. The last page has the last seven years of his company's experience in products liability.

1589 He summarized his prepared statement (SEE EXHIBIT D).

1640 Mr. Wilson added that people ask why this insurance as escellated so drastically--why would it go from $3,000 to $79,000 in one year. If he takes on a new customer and he is a machinery manufacturer, he has six loss prevention engineers that travel the state and work with his accounts to help in anything they can see that will help an insured reduce the exposure and risk for his worker, any kind of fire prevention device they can see that could be installed to keep rates down. They spend their entire time doing this, but if he goes on that risk and says he thinks this is a good one and they have manufactured say a cherry picker crane that had a defect maybe five years ago, and it has been sold all over the United States and maybe all over the world, and they find out suddenly that it is bad and it creates losses and creates injuries and deaths, he picks up all of the losses and he has to protect him and defend him. So when he goes on that line with products --and the law says you pay for almost anything that happens now--they have to be very carefuly of what they are accepting and they have to charge what they think is an appropriate rate. They may have the wrong rate. He doesn't think it is panic pricing. It is a situation where they have found they are paying losses they never anticipated before and 10 years ago they did not keep statistical information separating products from the general liability. They don't keep separate statistics on completed operations which is the worker who goes out and does a service such as the carpet layer, the carpenter or the electrician and he creates some terrible losses at times. Now the industry is keeping them separate.

1657 In Oregon ISO doesn't have enough companies reporting to it directly to really give them an adequate measure of what is right for a rate. He subscribes to ISO and follows them because they have a huge base but he does not necessarily use their rates for his company.

Sen. Bullock left at 10:50 a.m.

Sen. Jernstedt left at 11:05 a.m.

1842 SEN. RAGSDALE, following a lengthy discussion with Mr. Wilson of insurance terms and the insurance industry in general, asked Mr. Wilson to what degree he believes his rates reflect negatively on the inability of the small businessman to be able to provide that information to reduce the rates.

1844 MR. WILSON stated they don't write any large accounts. They deal with the small businessman. That is one of the primary reasons they are only operating in the three northwest states.

1856 TURN TAPE, TAPE 15, SIDE 2

Sen. Groener left at 11:11.

0096 DAVID BANGSUND, Oregon Trial Lawyers, stated he would like to limit his comments to Section 5 of the bill. This relates to the rule of law that is generally referred to as a collateral source rule. The present status of that rule in the Oregon courts is that evidence is not admissible in court of benefits received by a plantiff from a collateral source. A collateral source would be, for example, medical insurance payments, workers compensation, etc. This statute would effectively remove that rule and would substitute in its place a rule stating that evidence of those benefits would be admissible in all cases. It should be noted that the language of the Section indicates it would be admissible and does not have any sort of limitaion as to the relevance.

0118 The way the rule would apply is in two instances. The first one is the instance where the individual has recieved benefits but is obligated to repay those benefits to the insurance company that paid them to him. This bill does not indicate that in that instance, the evidence would not be admissible. Obviously, the intent of this is to put the defendents in the position to come in and say this man is claiming $1,000 in medical bills which has already been paid by the insurance company, where in fact if that injured party does recover $1,000 he has to take that same $1,000 and turn around and repay the person who paid it. So the benefit is not to the injured man. The only benefit would be to the defendent in causing prejudice to the plantiff. The purpose of the rule at the present time is to avoid unnecessary prejudice because juries are prejudiced by the fact that the injured person does have insurance to cover certain losses or was on Welfare during that period of his loss or was on workers compensation during the period of his injuries. The courts have ruled fairly uniformly that prejudice can be created by this information and far outweighs any relevance of the information to the jury in determining the claim. This bill would require that that prejudicial information be admissable regardless of any relevance that it has. Clearly there is no relevance in a circumstance where the man has incurred bills that have been paid by insurance and he has to repay them to the insurance company. There is no reason why the jury would need to know that. He does need to be paid that money so he can repay his insurance company. Even if he is not compensated for those bills specifically by the jury, he has to repay his insurance company out of the general damages because when you

Tape 15, Side 2

have a general verdict the individual recovers a $5,000 for an injury and if the jury says he was paid his $1,000 in medical bills so we will subtract that out before we give him any money and so they give him $4,000. He still has to pay the $1,000 whether the jury thinks he should have been awarded that or not. So the only effect this would have is in the case were a man would be prejudiced. Where a person has purchased insurance and does not have to repay those benefits he has received, there is a policy question raised. Somebody is going to get what the insurance companies refer to as a windfall. That is an individual has been paying $20 a month in case he or she is unable to work and the incident arises where he is unable to work and say he is out of work two months and receives a total of $1,000 to compensate him for the amount of money he would be loosing by not being able to work. Somebody is going to get that $1,000. It is purely a policy question of who should be benefited by the foresight in the industry of the injured man.

0190 By passing this staute we would essentially be saying that the industry and the foresight of the injured person should go to the benefit of the tort feaser and the tort feaser should get the windfall.

0225 He thinks there is no policy reason supporting this section and all of the equities would indicate that this information has no relevance and no bearing on these lawsuits and should not be admissable evidence.

0231 MIKE SHINN, representing the Oregon Trial Lawyers Association, stated in listening to the testimony during the last hour or so it occurred to him that one of the things that is getting lost in the testimony relating to the technical aspects of this bill and particularly into the problem with the insurance ratemaking process, is the fact that the reason this bill exists and the reason products liability exists is because people are being mamed and injured and killed by defective products. These are the people he represents. He works in a firm of four people.

0258 The jury system itself is something that hasn't been mentioned throughout the course of the last comments he has heard. The jury system protects these defendents to an extreme degree. The committee heard testimony from Mr. Bodyfelt and Mr. Chadsay. They defend many if not most of the cases that they bring. They are extremely competent lawyers. So when they file a products liability case, they don't do so in the hope they are going to obtain a nuisance result. They are brought after great foresight.

Sen. Groener returned at 11:37 p.m.

0280 MR. SHINN stated he doesn't completely understand why 402 A is part of this bill. To a great degree it is already the law of the State of Oregon. He thinks the statement was made that the reason it was going to be introduced is because it will presumably provide a greater certainty in the law. That is a mythe. 402 A was introduced, he thinks, originally in 1962. It has been adopted by most of the states to some extent or another. There have been literally thousands of decisions from all of these states and from federal courts trying to interpret what this means. In these cases and in their efforts to interpret the language, they also have referred to the comments addended to 402 A which according to this proposal would become a statutory part of the law. The end result of all of this is still uncertainty. Products liability law is a recent development and it is going to take probably a little more time before the courts get a firm grasp that is concrete enough so they can have greater certainty but it is a necessary process and it is not unique to the common law.

Tape 15, Side 2

It is the genius of the common law and he thinks if you look historically back through law in all other fields including business and insurance industry they also went through periods of time in which there was tremendous change and periods of uncertainty after which certain rules became established enough that they could rely very predictably upon them. 402 A being adopted here is not in any way a solution to the problem that allegedly we are concerned with.

0311 The only thing that is added by section 2 of this bill is the phrase under 5. That is not part of 402 A. He thinks this phrase would have a devastating effect. The proponents of this bill are trying to substitute the conscience of the industry for that which the jury represents. The jury represents the entire society and the industry represents the manufacturers, the tort feasers and the insurance companies. The real problem with the phrase is applicable codes, governmental codes or regulations are established essentailly by the industry itself.

0393 He asked that the committee not be mislead by this bill because it not introducing a true, fair objective standard of due care. It is replacing what the industry is already doing.

0459 This bill says you can't introduce changes if the equipment or machinery was made or learned or was placed into use after the design or manufacture of the product. In this case they are protected. They are insulated from liability and he doesn't see possibly what public policy that fosters.

0471 The punitive damages part of the bill is not limited to products liability. It is not a products bill and he doesn't think it is appropriate really to consider it in conjunction with an overall products statute because the vast majority of the punitive damage cases that have come in in Oregon do not involve products. He is not personally aware of any that did. Punitive damages serve a very important purpose in particular situations.

0496 SEN. GROENER asked Mr. Shinn if he would object to the elimination of punitive damages for product liability.

0496 MR. SHINN stated yes. Just because it is a rare remedy doesn't mean it is not a fair one.

0517 DENNIS GARCIA, an attorney in Portland, stated he is also a member of the Oregon Trial Lawyers Association. He added that many of the matters he had intended to speak about have been adequately covered by other speakers. He has become aware that all of the committee members are very much aware of the Pinto decision. He further reviewed the California Pinto case involving a 1971 Pinto. Based on his recollection of the standards that were in effect at that time he thinks Section 5 of this bill would bar a Pinto case in Oregon under this particular statute proposed modification.

0577 Another type of effect this bill would have on a Pinto-type case would be the effect of workers compensation. If that collision occurred while someone was in the course of their business, they would not have a remedy against Ford Motor Co. for an injury.

0593 A related matter having to do with Section 3 of the bill has to do with changes that occurred after the design of the product-causing injury or death. He thinks this is probably addressed directly at the design defect type of case.

Tape 15, Side 2

0640 In the state of Oregon, when there is a third-party claim and there is workers compensation benefits that have been paid, it is really the claimant who is financing the litigation. The workers compensation carrier benefits from any recovery and for the most part incurrs no expense while the claimant is attempting to obtain that recovery. Under the proposed bill the carrier would be entitled to go back and seek recovery for those injuries caused by a third party, but not the worker. The worker would simply be denied those benefits that he or any consumer should have when seriously injured due to a defective product.

0660 SEN. RAGSDALE, acting as Chairman during a short leave from the committee room by the Chairman, requested those witnesses who are signed up to testify to delay their testimony to the subsequent hearing if at all possible.

0683 ALDER THURMAN stated he will present the testimony for the Associated Oregon Industries. This morning he attended a meeting at AOI and was handed the copy of the prepared statement (SEE EXIBIT E).

0688 ACTING CHAIRMAN RAGSDALE asked Mr. Thurman if he would like to defer AOI's testimony to the next hearing.

0690 MR. THURMAN agreed to delay presentation of their testimony until a later date. He added their main concern is with the workers compensation part of the bill.

0694 DUANE RICHARDSON stated he worked with the Portland Chamber of Commerce Task Force and they are an independent business coproration in Portland dealing with heavy construction equipment. They are the distributor for several manufacturers. The task force was made up of many forces of industries. They had architects, distributors, manufacturers, attorneys, representatives from insurance companies and over the monthly meetings they had during the last two years, they thought they had refined down to these five proposals contained in this bill that which would bring equity to this industry. It will also bring, they feel, predictability which is an insurance term meaning that if they can predict what their costs will be then they can set their rates accordingly. This products liability area is certainly one that needs to have a look at of the rates.

0710 At the present time they have three choices as to insuring themselves. You can either go bare, you can self insure and hope you don't have a products liability suit before you have enough money set aside to cover the liability or you can pay the high premiums and try to pass on the increased cost to the consumer if it is at all possible. In their business, which is a very highly competitive business, there is not much chance of doing that. He read a letter from a supplier telling them if they don't cover themselves with product liability insurance, they can't represent them any longer. Their company has been in business for the 78th year. As far as he can remember they have never had a product liaibility suit brought against them. Even with that the odds make him a little scared. They handle very large equipment. If they do not have written permission from a manufacturer to modify the equipment they are absolving the manufacturer of liability and are taking the liability on themselves. If they, by act of omission fail to have a 30, 90 or 100

day inspection of the machine, they are by act of omission opening themselves up to liability. In SB 422 they felt that it would bring a little bit of predictability and a little assurance to the insurance companies so they can modify their premium rates. They have never had a case against them, but their premium rates are extremely high. It has increased significantly in the last seven or eight years. They feel this law should be passed and they feel in doing so it will bring down their costs so they can continue to do business in Oregon.

0761 EMERSON HAMILTON, an electrical contractor from Eugene, stated he is the immediate past president of the Eugene Chamber of Commerce and the current governmental affairs Chairman of the Chamber of Commerce in Eugene, stated he will summarize their comments and provide written copies of his testimony (SEE EXHIBIT F) in support of SB 422.

0785 CHAIRMAN HANNON stated we will be rescheduling this bill for additional hearings in about two weeks.

0789 CHAIRMAN HANNON declared the meeting adjourned at 12:06 a.m.

The Preliminary Staff Measure Analysis on SB 422 is hereby made a part of the record (SEE EXHIBIT G).

Other materials submitted to the committee include:

An explanation of SB 422 prepared by Blanche Schroeder of the Portland Chamber of Commerce (SEE EXHIBIT H),

A letter from Milwaukee Crane & Equipment Co. (SEE EXHIBIT I),

A letter from Oregon Mutual Insurance Company (SEE EXHIBIT J), and

A memorandum from Roland F. Banks, to the Portland Chamber of Commerce Taks Force on Tort Liability (SEE EXHIBIT K).

Respectfully submitted,

Annetta Mullins

Annetta Mullins
Committee Assistant

Exhibit Summary

A - Prepared statement, Mr. Ed McKinney, Portland Chamber of Commerce Task Force re SB 422
B - Prepared statement, presented by Mr. McKinney, Portland Chamber of Commerce Task Force re SB 422
C - Prepared statement, E. Richard Bodyfelt, Portland Chamber of Commerce Task Force re SB 422
D - Prepared statement, Louis V. Wilson, President, North Pacific Insurance Company re SB 422
E - Prepared statement, Associated Oregon Industries re SB 422

Exhibit Summary (Cont'd)

F - Prepared statement, Emerson Hamilton, Eugene Area Chamber of Commerce re SB 422
G - Preliminary Staff Measure Analysis on SB 422
H - Explanation of SB 422 prepared and submitted by Blanche Schroeder, Portland Chamber of Commerce
I - Letter from Milwaukee Crane & Equipment Co. re SB 422
J - Memorandum to all Oregon agents from the Oregon Mutual Insurance Company re SB 422
K - Memorandum from Roland F. Banks, Jr. to Portland Chamber of Commerce on Tort Liability (SB 422)

Tape 17, Side 1

0728 DENNIS ALLEN, President, Oregon Watch and Clockmakers Guild, submitted and read his prepared statement (see Exhibit E). He stated they are definitely in favor of the law as a form of preventive protection.

0763 GEORGE YSHIA indicated he was a watchmaker and on the Oregon Jewelers Board. They would like to see this bill pass. He stated that the quality of work can be controlled.

0770 SEN. GROENER stated he feels after hearing the testimony given today, he thinks it is essential that the committee pass SB 574.

0773 CHAIRMAN HANNON asked for a motion.

0773 SEN. GROENER moved that the committee forward SB 574 to the Senate floor with a do pass recommendation.

0777 SEN. RAGSDALE indicated that Legislative Research has several recommendations of statutory changes that they advise would be appropriate. He asked if the bill included those recommendations.

0787 ROBERT GRUNSTAD, Legislative Research, stated SB 574 would contain one recommendation that we made. This would be the recommendation relating to removing the requirement that a watch be disassembled for cleaning.
0792 There would be no requirements for age or experience in training or other recommendations that we proposed.

0797 SEN. GROENER withdrew his motion.

0799 CHAIRMAN HANNON appointed Sen. Bullock, Dennis Allen, and Robert Grunstad to a subcommittee on SB 574.

SB 422 - RELATING TO ACTIONS IN PARTICULAR CASES

0815 CHAIRMAN HANNON stated prior to beginning the hearing on SB 422, it is the Chairman's intention to assign a subcommittee. He appointed Sen. Groener, Sen. Jernstedt and himself to that subcommittee. He indicated the chairman of the subcommittee will be Sen. Jernstedt. A meeting will be scheduled for next week.

0838 SUSAN WIENS, Oregon AFL-CIO, submitted and read a prepared statement to the committee (see Exhibit F). She also made a comment in reference to testimony that was given at last Thursday's hearing on SB 422 by Lewis B. Wilson.

0896 BERNARD JOLLES, Attorney, stated he was representing OTLA and the Western Council of LTIW. His testimony primarily related to punitive damages and third party cases.
0904 He commented that we all have heard how terrible this punitive damage thing is. He stated that for some reason, there never has been any move by the insurance industry for big business firms to eliminate it. Now, all of a sudden, there has been a move-on and some people think it has something to do with insurance rates and possibly it does. He continued discussing and giving examples, such as the Pinto case, of punitive damages.
0987 He indicated that the Chamber of Commerce is supporting this bill.

Tape 17, Side 1

He stated that there are no punitive damages that have been recovered in Oregon in products cases and almost none in any other case. It is there for a reason. We have malicious, vicious conduct that needs to be deterred.

0998 He stated he is opposed to eliminating third party cases. He stated that no need has been shown or demonstrated. He continued discussing third party cases.

1024 SEN. GROENER asked if it was correct that the third party claims where there is joint custody control has been in the statutes for years in Oregon.

1028 MR. JOLLES stated yes.

1028 SEN. GROENER stated he thought we passed this third party claims where there is joint custody control in 1973.

1029 MR. JOLLES stated what was done in 1973 is you eliminated a defense to a third party case. But the right of a plaintiff to sue a third party has been in the law.

1038 SEN. GROENER asked if it was correct that prior to 1977, the Supreme Court ruling was the insurance carrier wasn't liable for punitive damages.

1039 MR. JOLLES stated there was a contention.

1041 There was further discussion between the committee and Mr. Jolles in regards to punitive damages.

1064 SEN. JERNSTED asked if we are trying to punish, how about creating a situation where the state collects the punitive damages.

1068 MR. JOLLES stated that was a possibility too. He pointed out that punitive damages are not only for punishment, they are to deter. There has been talk about giving it to the school board. Punitive damages are so rare, so rarely asked for, and even more rarely awarded that there really isn't any need to tamper with the system.

1089 REP. JOHN KITZHABER stated he was representing Verdo Ligon, business representative for the International Woodworkers of America. He stated that Mr. Ligon wanted to appear at todays' hearing but was unable to attend and asked him to make some comments for them. He stated that they wanted to be put on the record as opposing this bill for several reasons. First of all, they feel that under the bill, an injured worker would loose the right to bring legal action against a negligent third party who may, in fact, been responsible for the injury. Secondly, they feel that the proposed bill would raise workmen's compensation premiums for employers primarily because the employer would have to pay in some cases for the injury caused the third party. Thirdly, they feel that since some on-the-job injuries are not compensable since they do not directly cause a loss of earning capacity, the injuries may not be classified and compensable under workman's compensation. Next, they feel that workman's compensation benefits do not always compensate fully for economic losses. Most third party suits usually do, in fact, compensate for such damages. Finally, they feel that the manufacturer that faces a threat of third party action would have a higher incentive to produce a safer product.

Tape 17, Side 1

1118 ROY DWYER, Attorney, stated he is legislative chairman for the Oregon Trial Lawyers. He indicated it appears to him that what is being asked of the committee is really to pass some special interest legislation to help the insurance industry to make even more profits that it is making now. There is no question in his mind that the manufacturer, producers, and employers of this state are paying excessing amounts of money for premiums. He finds it hard to reconcile that with the fact that the insurance companies profits are higher than they have ever been.

1136 He gave some examples of insurance facts which were put out by the insurance information institute.

1192 He explained a situation that occurred in Kansas which related to products insurance premiums.

1208 He discussed further the insurance industry.

1235 He stated that in Oregon, punitive damages has been used on a very modest level. He can't understand the big problem. He indicated that a case came out that if you didn't exclude it in your insurance policy, it could be covered. He thinks what the insurance companies really want is insurability of punitive damages.

1261 He begged the committee to find some of these answers. He asked to find out if it is the lawsuits that are creating the problems for the manufacturers or is it the panic pricing by the insurance industry that is causing the problem for the manufacturer and then make a determination.

1268 CHAIRMAN HANNON announced that on Wednesday, March 28 at 1:00 p.m. in Hearing Room A, there will be a subcommittee meeting on SB 422. He also announced that on March 26 at 8:00 a.m. in Hearing Room S326 there will be a subcommittee meeting on SB 435. Sen. Ragsdale, Sen. Bullock and himself are the members of that subcommittee. Sen. Ragsdale is the chairman.

1274 The meeting was adjourned at 9:54 a.m.

The following exhibit submitted to the committee but not presented at the meeting in personal testimony is hereby made a part of the committee record: letter to Blanche Schroeder, Portland Chamber of Commerce, from Andrew H. Ulven, Ulven Forgining Company, Inc., dated March 19, 1979, regarding SB 422.

Respectfully submitted,

Carole M. Van Eck

Carole M. Van Eck
Committee Assistant

EXHIBIT SUMMARY:

A - Prepared statement from Richard Colvin, Alder Street Clock Shop, Inc., regarding SB 574
B - Prepared statement from Inman Akin, International Jewelry Workers Union, dated March 22, 1979, regarding SB 574
C - Letter to Robert Seiler from Bernard A Muller, Portland Better Business Bureau, Inc., dated March 20, 1979, regarding SB 574
D - Prepared statement from Arthur D. Schade, B. W. Cobb Watch & Clock Shop, Inc., dated March 22, 1979, regarding SB 574
E - Prepared statement from Dennis Allen, President, Oregon Watch & Clockmakers Guild, regarding SB 574

1064 SENATOR RAGSDALE moved the adoption of amendements to HB 2402 dated 4/13/79, with the exception on ine 17 the word "project" will be changed to the word "port".

1068 CHAIRPERSON HANNON asked for objection. There was none. Motion carried.

1171 SENATOR RAGSDALE moved HB 2402 as amended to the floor with a do pass recommendation and offered to carry it on the floor. He recommended that it not be engrossed since there is an urgency on the bill.

1175 Roll call vote with Senator Hannon, Ragsdale and Jernstedt voting "aye". The motion carried. SENATOR RAGSDALE will carry.

SB 422-(worksession)Relating to actions in particular cases

1081 RAYMOND REDBURN, Senior Legislative Assistant, gave a staff report. (SEE EXHIBIT H, which is a hand engrossed version.) There have been two public hearings and a subcommittee meeting. The subcommittee recommends separating the bill into four separate bills.

1090 SENATOR JERNSTEDT moved that the action of the subcommittee be recended.

1094 CHAIRPERSON HANNON asked for objection. There was none. Motion carried.

1097 RAYMOND REDBURN reviewed the amended version and described the changes.

1130 JOE BARKOFSKI, Legislative Counsel came forward and reviewed the specifics of Section 4 of Exhibit H.

1150 SENATOR RAGSDALE stated that he is concerned with holding down the cost of insurance by making it easy to get punitive damages,yet open enough to punish and be a deterant.

1192 SENATOR JERNSTEDT moved to adopt the amendments to SB 422.

1195 SENATOR HANNON asked for objection. There was none. Motion passed.

1200 The meeting adjourned.

1045 GLEN STADLER, EWEB, declined from presenting testimony in order to save time. He added that he would submit a written memo.

1050 ROBERT STANDFIELD, Oregon State Building Trades Council, testified in support of the bill. He said that lines 5,6,7, & 8 are in the best interest of all taxpayers.

1065 ADRIEN E. GAMACHE,consultant to Association on Oregon Counties, testified against the bill. The answer is not to beef up a statute but to rewrite it. He agreed to send material later.

1140 SENATOR RAGSDALE asked how many counties actually comply with the proceedure.

1142 GAMACHE said that the a survey of 27 counties shows that eight have a formal proceedure, and two of these are models of complience.

1152 SENATOR RAGSDALE asked if he had(Gamache) had recommendations for rewritting the statute.

1157 GAMACHE said he would work on recommendations and send the materials.

1159 CHAIRPERSON HANNON closed the hearing on HB 2057.

SB 540- Relating to auctioneers.

1160 SENATOR RAGSDALE announced that althought he introduced this bill at the request of the Oregon Auctioneer's Association this does not imply advocacy

1165 RICHARD HURLEY, Actioneer, testified in support of the bill. There are 300 licensed autioneers in the state and regulation will prevent abuse by get rich quick business people.

1205 JACK HANN, State Forestry Department, testified from a neutral stance. The Department wants the names of timber sale autioneers to be public. Hann presented a proposed amendment, (SEE EXHIBIT J.) and justified the change.

1240 RICK LANG, Auctioneer, testified against the bill. Lang read from a letter that he had sent the committee members. There is no demonstrated need for the lisencing of autioneers. This was confirmed by an interim staff report which found that the Board is not needed.
He was founder of Oregon Autioneers Association and is still active in the organization.

1315 CHAIRPERSON HANNON closed the hearing on SB 540.

1318 SENATOR RAGSDALE moved that SB 422 be engrossed and rereferred back to committee, with no recommendation on passage of amended version.

1320 COMMITTEE ASSISTANT called the roll. SENATORS RAGSDALE, BULLOCK, GROENER, JERNSTEDT AND HANNON voted "aye". Senator Boe was excused.

1325 CHAIRPERSON HANNON announced that HB 2062 which was on the agenda would be postponed because of that late hour.

SENATE
LEGISLATIVE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT

April 25, 1979 1:00pm Hearing Room A
State Capitol Building

Tape 23, Side I

Members Present: Senator Hannon, Chairperson
Senator Jernstedt, Vice Chairperson
Senator Groener
Senator Ragsdale, Alternate

Members Excused: Senator Boe
Senator Bullock

Staff Present: Pat Middelburg, Executive Officer
Dennis Mulvihill, Sr. Leg. Assistant
Ray Redburn, Sr. Leg. Assistant

Witnesses: Richard Bodyfelt, Portland
Jim Markee, Oregon Liquor Agents Association
Dean Smith, Administrator Oregon Liquor Control Commission
Dr. Larry Foster, Health Division
Trevor Jacobson, Department of Commerce
Don Morishy, Department of General Services
Joe Sandall, Chield Building Inspector, Dept. of General Services
Gary Hawk, Chief Pluming Inspector

0025 SENATOR HANNON started the meeting at 1:08.

SB 422 relating to actions in particular cases

0032 RAYMOND REDBURN presented a staff report. He reviewed the A-engrossed version of SB 422.

0170 RICHARD BODYFELT, Portland., testified that negligence is not covered in this bill.

There was a general discussion of the application and language of the bill.

0350 SENATOR HANNON announced that SB 422 will be rescheduled for next week because of Senator Groener's reservations.

HB 2062 A-engrossed-Relating to OLCC

(SEE EXHIBIT A, proposed amendments to A-engrossed HB 2062.)

0370 RAY REDBURN presented a staff report.

0385 SENATOR JERNSTEDT reported on the subcommittee meeting of April 23.

0420 SENATOR JERNSTEDT moved adoption of the amendments dated 4-24-79. There were no objections. Motion carried.

0435 SENATOR JERNSTEDT moved HB 2062 to the floor with a "do pass" recommendation.

SENATE
LEGISLATIVE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT

APRIL 30, 1979 8:00am Hearing Room B
State Capitol Building

Tape 23, Side II

Members Present:	Senator Hannon, Chairperson Senator Jernstedt, Vice-Chairperson Senator Bullock Senator Ragsdale (Altenate)
Members Excused:	Senator Boe Senator Groener
Staff Present:	Dennis Mulvihill, Senior Legislative Assistant Ray Redburn, Senior Legislative Assistant Ellen Duke, Committee Assistant
Witnesses:	Bill Nelson, Oregon Winegrowers Association Dean Smith, Administrator Oregon Liquor Control Commission Bill Johnson, Deputy Administrator Oregon Liquor Control Commission Trevor Jacobson, Building Inspector, Dept. of Commerce Gene Kunckel, Dept. of Agriculture Doug Pike, State Health Department Bill Cross, Oregon Restaurant & Beverage Association Fred Van Nattq, Oregon Hotel and Motel Association Diana Spies, Oregon Federated Organizations

0030 SENATOR HANNON started the meeting at 8:08 am.

SB 422- Relating to actions in particular cases (Worksession)

0035 SENATOR HANNON announced a brief worksession on SB 422. He appointed a subcommittee of Senator Ragsdale, Blanche Schroeder, Portland Chaber of Commerce and Jim Markee of Oregon Trial Lawyers Association.

HB 2317-Relating to alcoholic beverages

(SEE EXHIBIT A, the preliminary staff measure analysis)

0050 BILL NELSON, OREGON Winegrowers Association, testified in support of the bill.

0108 DEAN SMITH, Administrator OLCC, explained the current inspection procedure.

0140 BILL CROSS, ORBA, testified in support of the bill. (SEE EXHIBIT B, prepared statement.)

0220 BILL JOHNSON, Deputy Administrator OLCC, answered questions pertaining to various language used in the bill.

0240 SENATOR RAGSDALE questioned the need for three agencies, sharing the responsibility, to be used in this bill.

SB 422-Relating to product liability (WORKSESSION)

I245 SENATOR RAGSDALE gave a subcommittee report.

I246 BLANCHE SCROEDER & JIM MARKEE came to the witness table.

I249 SENATOR RAGSDALE moved to take from the table SB 422. No objection. So ordered.

I250 Each of the witnesses presented their compromises and their viewpoint. General discussion of proposed amendments.

I338 SENATOR RAGSDALE moved the adoption proposed amendments. (SEE EXHIBIT F.) Motion failed 2 to 2.

I345 Worksession closed.

HB 2248-Relating to liquor licenses

I350 NANCY McKAY, League of Oregon Cities, testified in support of the bill and proposed amendments. (SEE EXHBIT G.)

I360 SENATOR RAGSDALE moved the adoption of HB 2248 as amended and on to the floor. Roll call vote.SENATOR JERNSTEDT, BULLOCK, GROENER, RAGSDALE, HANNON voted "aye". SENATOR BOE excused. Motion passed. Ragsdale will carry.

I365 The meeting adjourned at IO:00 am.

EXHIBIT LIST

A-Preliminary staff measure analysis on HB 2967
B-Fiscal Analysis of HB 2967.
C-Prepared statement from City of Corvallis on HB 2967.
D-Prepared statement from Oregon Council of Outdoor Advertising on HB 2967.
E-Prepared statement from Portland Chamber of Commerce on HB 2967.
F-Proposed amendments on SB 422.
G-Proposed amendments to HB 2248.

Respectfully submitted,
Ellen K. Duke
Ellen K. Duke
Committee Assistant

0337 ELAINE BENTKOVER, Senator Kulongoski's Staff,testified in support of the bill.(Spoke for a constituent that was ill and could not make it to the hearing.)

0370 SENATOR GROENER moved the adoption of amendments (Exhibit B) to A-engrossed HB 2248. No objections. So ordered.

0395 SENATOR HANNON reported that the bill will be held in committee until Monday because of possible conflicting legislation.

SB 422-Relating to actions in particular cases (product liability)

BLANCHE SCHROEDER and JIM MARKEE came forward and sat at the witness table.

0415 SENATOR RAGSDALE gave a subcommittee report.

0442 The witnesses discussed the unsettled issues.

0508 CLAYTON PATRICK, came forward to discuss the application of Section 3.

0553 SENATOR RAGSDALE stated that the sub committee also decided to require insurance companies to report. Senator Brown has drafted legislation to this issue. It is a priority.

0581 SENATOR RAGSDALE moved the adoption of amendments. (See exhibit C.) No objection. So ordered.

0660 SENATOR GROENER stated that if the insurance companies have not reduced their rates in two years that the legislature will take action.

0668 SENATOR JERNSTEDT moved SB 422 as amended to the floor with a "do pass" recommendation.

SB 435-Relating to judicial review

0670 PAT MIDDELBURG gave a staff report on the sub committee compromises. Introduced EXHIBIT D, E. (SEE EXHIBIT D, SEE EXHIBIT E)

ELIZABETH STOCKDALE AND MICHAEL REYNOLDS came forward and sat at the witness table for discussion, and questions.

0720 SENATOR JERNSTEDT moved SB 435 be engrossed, including the proposed amendments, and be returned to the Trade Committee for a meeting Wednesday. Roll call vote. SENATORS RAGSDALE, BULLOCK, GROENER, JERNSTEDT, HANNON all voted "aye". SENATOR BOE excused. Motion passed.

0730 SENATOR RAGSDALE complimented the staff and participants of the subcommittee on their work.

SB 915- Relating to air pollution

0745 PATRICIA MIDDELBURG gave a staff report, reviewing each section of the bill. (SEE EXHIBIT F. SEE EXHIBIT G, the amended bill.)

SENATE
LEGISLATIVE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT

SUBCOMMITTEE ON SB 422

March 28, 1979 | 1:51 p.m. | Hearing Room A, State Capitol

Members Present: Sen. Ken Jernstedt, Chairman | Tape 1, Side 1

Members Excused: Sen. Dick Groener
Sen. Lenn Hannon

Staff Present: Raymond Redburn, Sr. Legislative Assistant
Carole Van Eck, Committee Assistant

0017 CHAIRMAN JERNSTEDT called the meeting to order at 1:51 p.m. He indicated that both Sen. Hannon and Sen. Groener were unable to attend the meeting due to other commitments. He stated that after discussion with Legislative Counsel, this bill will probably be broke down to four separate bills. The bill will be divided as Sections 1, 2, and 3 being SB 422, Section 4 being the second bill, Section 5 being the third bill, and Sections 6 through 15 being the fourth bill. He indicated that hearings on SB 422 will be announced at a later date.

0036 SEN. JERNSTEDT adjourned the meeting at 1:54 p.m.

The following exhibit submitted to the subcommittee but not presented at the meeting in personal testimony is hereby made a part of the subcommittee's record: letter to Rep. Nancie Fadeley from Arthur D. Eastgate, 24562 Paradise Drive, Junction City (see Exhibit A).

Respectfully submitted,
Carole M. van Eck
Carole Van Eck
Committee Assistant

EXHIBIT SUMMARY:

A - Letter to Rep. Nancie Fadeley from Arthur D. Eastgate, dated March 16, 1979

SENATE
LEGISLATIVE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT
SUBCOMMITTEE MEETING ON SB 422

May 2, 1979 3:30 pm Capitol Building S-326

Tape I, Side I

Members present: Senator Ragsdale

Staff present: Ray Redburn, Sr. Legislative Assistant
Ellen K. Duke, Committee Assistant

Witnesses: Blanche M. Schroeder, Portland Chamber of Commerce
Jim Markeee, Trial Lawyers
Joseph Barkofski, Legislative Counsel
Michael Westwood, Representative Gardner's office

0022 The meeting started. SENATOR RAGSDALE stated that the meeting will not officially conviene. The purpose is to visit. The goal is to bring the major sides together and discuss product liability, arriving at a concensus. Also talk about insurance if time allows.

There was a general discussion of needs and positions.

BLANCHE SCHROEDER wants predictability.
JIM MARKEEE wants flexibility
in insurance standards.

0175 SENATOR RAGSDALE summarized that what we have here is SB 422 which has polarized the two sides (Chamber & Lawyers). Both of the lobbyist have orders not to change on certain aspects. Therefore let's move on to insurance.

0200 MARKEE intoduced EXHIBIT A. Four states require that information be filed with the insurance commissioners. This is needed in Oregon.

0250 SENATOR RAGSDALE asked how do we get criteria from insurance companies and at the same time liability insurance at a rate business can afford?

There was a general discussion. The problem is length of time to see results. SCHROEDER has a immediate problem. MARKEE says the real long term solution takes longer and lies in exposing information.

0320 SENATOR RAGSDALE questioned that if we have informational legislation then how to deal with the real problem of his reserves begin accmulated.

The alternative of promoting self insurers was discussed.

0400 SENATOR RAGSDALE asked Ray Redburn to review the Kansas language (EXHIBIT A) with the insurance Commission as it relates to the problems and the value of such legislation. If statutorially the Commission had the authority what impact might it have on stronger rate regulation.

The group began to review the bill section by section.

0690 SENATOR RAGSDALE stated his intentions for future action. I will report to the CHAIR that we have agreed to disagree. I will ask for new representatives from both sides to meet in good faith and arrive at a way to reduce the cost for product liability. The new representatives will help to minimize polarization. We know it will be difficult to find common ground. Then he will be willing to reconviene as a subcommittee.

0730 The meeting broke up at 4:40pm.

EXHIBIT LIST
A-copy of legislation from four other states brought by Jim Markee.

Respectfully submitted,

Ellen K. Duke

Ellen K. Duke
Committee Assistant

McKinney SB 422

SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 15, 1979
EXHIBIT A

3pg exhibit

After the close of the 1977 Oregon State Legislature, the Portland Chamber of Commerce Liability Task Force was given the mission of studying the whole issue of product and professional liability insurance with a goal of proposing reforms that would make product and professional liability insurance more affordable. While it is very hard to get exact data on loss experience, the following conclusions are inescapable:

1. The problem is acute for that segment of the business community that deals in high exposure products such as industrial machinery, school designs, ladders, etc.

2. Firms dealing in these high exposure products are having trouble getting product and professional liability insurance and when they can find it, the price is very high. Insurance premiums of 5 to 8 percent of a firm's gross sales are not uncommon.

3. Because of this a considerable number of firms are either electing, or being forced to go without product liability insurance. There is reason to believe that close to 50% of small fabricated machinery manufacturers are going without product liability insurance.

4. Product liability is a very inefficient way of taking care of injured parties. Less than a third of product liability premiums end up in the hands of injured parties. The balance goes for insurance company administration, attorneys, both plaintiff and defense, expert witnesses, etc. To add insult to injury, if a product liability case goes to court, the injured party will wait 3 to 5 years to find out whether or not he gets any money. Product liablity legal cases are very time consuming and very expensive. If the case goes to court, defense costs will exceed $15,000.00..

5. Product liability and professional liability insurance are bought for the benefit of consumers and users. No one begrudges the money that goes to injured parties with legitimate claims. It is the tremendous overhead, uncertainties and inequities in the system that are causing the collapse in product and professional liability coverage.

6. The situation with industrial accidents is especially inequitable. The workers compensation system takes care of injured workers and protects employers from legal action, as it was designed to do. In addition, workers compensation system is financing lawsuits against manufacturers and distributors of industrial products. These firms have no recourse against a negligent employer.

7. High product liability insurance rates for those companies dealing with products that have a high degree of exposure appear to be primarily because most of the large regulated insurance companies have either dropped out of the business altogether, or will not take on a new high risk customer. Much of this appears to be due to the lack of predictability in product liability litigation due in no small part to the fact that too often courts have adopted the attitude the injured party got hurt - somebody has to pay.

The objective of the Liability Task Force was to study the product and professional liability situation and recommend legislative changes that would increase the predictability of the system. This should reduce litigation because, if everybody knows what the rules are, there will be a much greater tendency for all sides to reach out-of-court settlements. Potential reform areas studied included:

1. Contingency fees
2. Punitive damages
3. Holding plaintiffs responsible for defense costs
4. Elimination of jury determination of money damages
5. Use of standardized injury or loss schedules

6. Placing a limit on pain and suffering
7. Restatement of torts
8. State of the art
9. Equity in workmens compensation
10. Collateral source rule

Result of this study was to recommend passage of legislation including restatement of torts, state of the arts, elimination of punitive damages, collateral source rule and equity in workers compensation. Senate Bill 422 addresses these issues.

Copies of our background study have been sent to all Chambers of Commerce in Oregon, all the legislative candidates, Ospirg, University of Oregon Law Professor Vetri and Oregon Consumer League. Unfortunately, except for Chambers of Commerce, we have not received the amount of feedback that we would have liked.

Portland
CHAMBER OF COMMERCE
824 TH AVE., PORTLAND, OREGON 97204 U.S.A. / AREA CODE (503) 228-9411

McKinney

SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 15, 1979
EXHIBIT B 31 pg exhibit

STATEMENT CONCERNING SENATE BILL 422

March 5, 1979

Oregon dramatic and far-reaching court rulings over the last 15 years have greatly expanded the "rights" of individuals to recover money for personal injury or property damage. Although much of the expansion of liability has been the result of court action, some stemmed from the attempts of legislatures to correct inequities in the law, or establish certain social policy objectives. Some of the changes have been good, but many have had the unfortunate result of placing an excessive and unconscionable burden on individuals, businesses and governmental bodies who have suddenly found themselves legally and financially responsible where they were not at fault.

Our legislators are expected by the public, to balance two conerns: The right of people to expect safe products and financial protection in the event they are injured, versus the impossiblity of the manufacturer or seller of a products to anticipate every injury and how it might be caused. The key policy question is whether we are to have a system of "compensation" where the injured always recovers from someone else.

Much of the debate surrounding products liability involves the relationship between the law, losses and insurance rates. Insurance is merely a funding mechanism to spread losses. A recently completed federal study indicates that insurance rates will continue to increase, though at a more modest pace, until there is discernable evidence that the trend towards absolute liability and overly generous products liability awards has been halted.

Faced with the uncertainty of court rulings and jury awards, insurance companies have little choice other than to be prepared for the worst. Hence the skyrocketing premiums charged for liability coverages.

The unpredictability of the exposure and risk of those insured for product liability have caused premiums to be so high that they can no longer be afforded by many businesses and professionals. Many insurers are refusing to write such coverage at all. An increasing number of businesses and professionals are playing "Russian roulette" by going uninsured and taking their chances, thus jeopardizing the availability of compensation to injured persons.

Spiralling costs of liability premiums result in increased costs to consumers and taxpayers. One architectural firm, for instance, estimates their premium costs at approximately 58¢ per man hour. Most of their projects are schools and hospitals, and one example of how product liability costs impact project costs follows.

Ed McKinney
0133

Project: Jefferson High School

Estimated Construction Costs: $2,650,000

Estimated Architects' & Engineers' Costs: $170,000

Architects' liability premium cost for job: $6,800

Another example is that of an Oregon wood product manufacturer who estimates premiums to be 6.7% of this year's sales volume, up from 1.8% in 1973, adding approximately $1.50 for each $25.00 item.

Some businesses that cannot pass on their price increases just give up and cease doing business.

The confusion and uncertainty on the part of manufacturers, product users and sellers about their respective legal rights and obligations has created other serious problems, beyond that of increased prices of consumer and industrial products.

The fear of suit has acted as a deterrent towards development of high risk but potentially beneficial products, improving the safety of products, and innovative product development. Some products are no longer available or have limited sources -- such as re-built auto parts, skateboards and other sports equipment.

The Portland Chamber of Commerce established a task force in 1977 to look at the liability problem and seek some answers. The members are volunteers and encompass every aspect of concern in this area - manufacturers, wholesalers, distributors, insurers, attorneys, architects, a number of associations and a resource person from the Interim Judiciary Committee

The result of this effort is the five proposals incorporated in Senate Bill 422, which focuses on establishing more uniformity and predictability in court rulings.

Improving the level of certainty as to how Oregon Product Liability law will deal with claims for injuries caused by allegedly defective products should in time promote greater availability and affordability in product liability insurance and greater stability in rates and premiums.

SENATE BILL 422

SECTIONS 1 and 2 would:

1. require Oregon courts to follow the Restatment rule in product liability cases and,
2. Preclude liability of a defendant in a products liability action <u>if</u> the product involved was designed, manufactured and marketed in full compliance with applicable governmental codes, regulations and approvals, <u>unless</u> the claim against the defendant is based upon negligence or unless there is some proof of fraud or nondisclosure of relevant information by the defendant which affected the governmental action.

RATIONALE:

"Strict liability", as that term is used in product liability actions, is a form of liability imposed generally upon sellers of products that are in a defective condition. The use of the term "strict liability" is an unfortunate one, because that term would normally connote liability without fault. As a matter of fact, under this theory, while the injured party is not required to prove any negligence on the part of the seller, he still must prove that the product as sold was defective and that that defect caused his injury.

This theory was adopted in the early to mid-1960's in order to give injured parties a remedy against manufacturers who normally could not be reached by traditional negligence grounds. In 1964 the American Law Institute published in its Restatement of Torts 2d, a section referred to as 402A. This was the Institute's attempt to set forth in writing this new principle of law

Most of the states adopted this Restatement rule by court decision during the next ten years. Most product liability actions were filed upon this theory.

The interaction of two things have been the substantial cause of the so-called insurance crisis in the products liability field. The first factor is that during the last five years there has been a dramatic increase in the filing of design product liability cases. These are cases where there is nothing wrong with the product from a manufacturing standpoint. The product functions and performs just as intended, but it does contain some inherent conditions that are dangerous, just as all products do. In the design product case, the plaintiff is claiming that the product was defectively designed and that it should not have contained that particular dangerous condition which injured him. Present estimates are that close to 80% of the product liability cases are based on such a theory.

Under the Restatement rule, the condition involved in order to be a basis for recovery had to be "unreasonably dangerous." In effect, there would be no liability in a design defect case unless the condition complained of was hidden or latent so that it could not be appreciated by the average user. Where courts held to the Restatement rule and comment i., most of these design cases failed, because most of them involved open and obvious conditions, which the plaintiff was trying, in hindsight, to claim should have been guarded against. As a result, in the early seventies we saw most courts refusing to sustain cases based upon alleged defects in the design of open and obvious conditions.

The second of these interacting factors was that some courts decided that this Restatement rule was too restrictive in this regard, and they eliminated the need for the plaintiff to prove that the condition was unreasonalby dangerous. This occurred in the mid-seventies, originally in a California decision, and numerous states have followed. This and other recent court decisions, liberalizing the Restatement rule in other areas, have destroyed much of the predictability in products litigation, which the Restatement rule had established. When predictability disappears, insurance companies react, since that factor is the cornerstone of their rating structure. They reacted in this instance with mammoth increases in rates, because they could no longer predict what to expect, and they did not want to be caught short.

One conclusion is obvious. If insurance rates could be predicted for ten years under the application of the Restatement rule, the rule should remain or be returned as the law, depending upon the jurisdiction involved. This can only be accomplished reliably by legislation. It should be accomplished in Oregon because there is some question whether the Oregon Supreme Court still strictly follows the Restatement rule or whether it might liberalize it further in the future.

NOTE: Corrections should be made as follows:

1. The words "(1958, et seq.)" on line 19 of page 2, should be deleted.
2. Subsection 5 of Section 2, should be changed to Subsection 4, and Subsection 4 should be changed to Subsection 5. The new Subsection 5 (the old 4) should then be changed so that the beginning wording is as follows: "Nothing in Subsections (1), (2), (3) or (4) of this Section."

Subsection 5 of the bill is not a part of the re-statement. It is a protion of the "sate of the art" (Section 3) but was placed in Section 2 as it is more appropriate since the intent was that the compliance with government codes and regulations only insulate the manufacturer, et al., from strict liability and not from charges of negligence.

The new Subsection 5 provides a defense if the product is designed, made and marketed in accordance with governmental codes, regulations or approvals. Here again, the idea is to establish predictability, where there is substantial assurance of the reliability of the product.

Our recommendation is not extreme. Some legislative proposals would prohibit products liability under any theory if governmental standards were followed. Our recommendation is limited to governmental standards and to the theory of strict liability. If the plaintiff can prove negligence, the standards would remain as minimum requirements of due care. If the plaintiff can prove fraud or nondisclosure in connection with procurement of federal standards, no defense is available.

In light of the fact that governments often lack a sufficient number of personnel to enforce such standards, it is suggested that this defense may benefit consumer, since it would create an economic incentive toward compliance.

Section 3 would:

1. Require in a product liability action that the product be judged by the technology at the time that it was made and sold, and not by hindsight.

RATIONALE:

One of the biggest problems facing business and industry in the products liability area is the unpredictability of the law.

The proposals for State of the Art legislation which we recommend are in two categories. One recommendation relates to the evidence that can be produced in the products liability trial. The other recommendation deals with the substantive liability of the defendant.

Our recommendation would not allow the evidence of subsequent changes or advancements in technology to be used to judge whether the defendant should be held liable for injuries received from the products supplied. It also would prohibit evidence of subsequent changes in the product, which would have prevented the injury.

Recent rulings are allowing the product to be judged by hindsight, so that the ever-increasing beneficial advancements of our society's technology have become the manufacturer's Achilles heel in the products liability trial. In Oregon our court has suggested that improvements made by the manufacturer later on for reasons unrelated to the injury may be considered by the jury in determining if the design of the product at the time of the injury was adequate. California, as usual, has gone the utlimate step in a case decided in January of this year entitled Barker v. Lull Engineering Company, Inc. In that case, the court, twice in its opinion, stated that the jury should be instructed to use hindsight in evaluating the product. Consequently, development of new products, innovative changes, improved safety techniques or devices is stifled for fear of being sued.

SECTION 4 would abolish Punitive Damages in any civil action.

RATIONALE:

Punitive damages are monies requested by an injured party above and beyond compensation for costs incurred by an injury. It is intended to monetarily punish an individual for perceived minor wrongdoing. The underlying premise is that such awards deter socially obnoxious conduct. There appears to be little evidence to support the premise.

The amount of monetary "punishment" requested is generally directly related to the wealth of an individual or corporation. This raises the question of deterrence for those who may be acting equally socially obnoxious but who are not wealthy enough to sue.

Many small suits become formidable with the addition of punitive damages, which then require costly defense - a $5,000 general damage suit may not seem too serious, tacking on $25,000 for punitive damages changes the whole aspect of the suit.

Often punitive damages fall in the realm of being a subtle form of blackmail. In many instances the defendant will settle - even if the claim is more than likely to be unsuccessful, rather than go through a costly defense.

Presently, punitive damages are frequently asked for but seldom awarded. When awarded, punitive damages are a windfall to the plaintiff and his or her attorney because, in theory, the plaintiff has already been fully compensated by the damage award. When corporations pay large damage awards - the cost of the awards is most likely to be passed on to the consumer in form of a higher priced product - thus we all help pay for the "windfall" which is awarded to an injured party.

Currently for specific reasons, Oregon law requires double or triple damages--Section 4 does not change those parts of Oregon law.

SECTION 5 would:

Allow evidence as to compensation the plaintiff has or is receiving, such as insurance, social security, workers' compensation or employee benefits and to allow in rebuttal the plaintiff to introduce evidence showing the amount paid or contributed to secure those rights.

RATIONALE:

Under the current law the defendant is not allowed to introduce facts showing the plaintiff has been compensted for loss. The primary basis offered by courts in support of the exclusion of evidence of benefits received is possible minuse by the jury. The courts assumed that the jury would reduce the damage award by offsetting the benefits against the plaintiff's loss. Since juries appear to be quite sympathetic to the plight of injured parties, we feel this concern is negligible.

0584
mc Kinney

SECTIONS 6 - 7 would:

Provide equity to manufacturers and others in the chain of products distribution by restricting third party suits to employers and carriers only, limited to recovery of losses. This section bars any thid party, suits by an injured workers who receives workers' compensation benefits.

RATIONALE:

Among the groups hit hardest by the rise in product liability insurance premiums are manufacturers of industrial products. Insurers justify these rate increases on the basis of product liability claims brought by employees who are injured in the workplace.

While workers' product liability claims represent only 11 percent of the product liability incidents, these tend to be larger claims, accounting for almost 50 percent of the total insurance "payouts." (see ISO Survey, 12/76) (attached). A recent survey of Oregon's major carriers bears this out.

0621

The original intent when the workers' compensation laws were passed was to automatically provide immediate compensation to the injured party for losses and damages incurred. In return the injured party gave up the right to sue. Employers are specifically exempt from suit -- manufacturers, distributors, installers, or others in the chain of products are not. Suing them started slowly, mushrooming, until now it has become a nearly automatic procedure if products can be connected in any way with an injury. Yet, those sued cannot take action against negligent employers-- raising a question of constitutionality.

Thus, an injured woker may collect workers' compensation benefits and still collect under product liability from a third party. The worker cannot sue his employer however negligent with respect to the accident. But, the worker (or his representative in death cases) can obtain 100 percent of

losses if successful in a suit against the manufacturer of the product alledged to have caused the injury. In addition, damages can be obtained for pain and suffering. These may represent two, three times or more of the amount of actual loss.

It was pointed out by members of the Under Secretary of Commerce's Advisory Committee to the U.S. Department of Commerce's Interagency Task Force on Product Liability that "the workers' really have nothing to lose: They have already collected once and they may be able to collect more. They spend no money for an attorney since they obtain counsel on a contingent basis." (See Task Force report p. VII-85). These suits are often brought at the at the instigation of the carriers to recover their losses.

This practice also raises another very sensitive issue, that of providing built in incentive for the injured party to stay disabled in order to assure a maximum award by the courts -- negating the very goals for which the workers' compensation program was established; namely, to adequately compensate an injured party and to encourage return to work as quickly as possible.

In addition, the employer also may sue the manufacturer or seller to recover amounts he has already paid the worker under workers' compensation. But the manufacturer or seller cannot countersue the employer even if the employer's negligence is believed to have caused or contributed to the injury.

The ISO survey disclosed that about 24% of the total dollar amount paid for all bodily injury claims was paid in cases involving possible employer negligence. In most cases, recovery or some contribution to the payment would have been sought from the employers by the product liability insurers if such recovery were not prevented by the sole remedy rule.

Taking a different perspective, claims involving 13% of the total bodily injury payments are reported to have been instigated by employers in order to recover payments made under Workers' Compensation.

0678 In order to provide equity for both workers and manufacturers, the task force felt that every covered injured worker, regardless of fault, should have workers' compensation as their immediate and sole remedy. To make certain that manufacturers would still be held accountable for deliberate or careless manufacture of unsafe products, the task force felt that suit by the employer/carrier should be allowed to the extent of the loss incurred.

This provision assures that manufacturers will be held responsible for any negligence on their part.

0709 Much of the uncertainty in product liability for manufacturers of industrial equipment and industrial products and those in the chain of products distribution would then be eliminated, resulting in more predictable and more reasonable product liability insurance rates.

PORTLAND CHAMBER OF COMMERCE
LIABILITY TASK FORCE 1977-78

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Architects feel bite of insurance

By PAUL PINTARICH
of The Oregonian staff

Architect Ron Shewbridge likes to chuckle over the film "The Towering Infer-\" imagining what would really happen to or-architect Paul Newman if he took off, leaving behind a 135-story funeral pyre.

In real life, Shewbridge maintains, Newman would be involved in litigation that would probably prevent him from designing anything but bird houses for the rest of his life.

Architects are finding liability insurance premiums are gobbling big chunks from their monthly incomes as lawsuits against them increase.

Robert C. Broshar, vice president-elect of the AIA, last year told a House Ways and Means subcommittee that the frequency of claims is increasing nationally at the rate of 20 percent a year.

Shewbridge said in 1965 an average of only 10 out of 100 firms had suits filed against them, while last year the figure averaged 33 out of a 100 — 90 percent of the claims in the first year of the project.

So critical is the problem that some firms have cut back on manpower and others have decided to "go bare," dropping their insurance completely and risking a fight in court.

Twice burned, Bend architect Gil Helling said, "I ended up dropping mine. I used to have a 13-man office, but I realized 'to hell with this,' paying $5,000 in premiums, and went back to a one-man office. Sometimes 're better off without insurance. People less apt to sue if they know you don't ave any money."

Portland architect Roger Yost, president of the Oregon Council, American Institute of Architects (AIA), has 23 persons in his firm and is paying premiums of $2,000 a month — "Almost higher than our rent," he said, remembering that about 10 years ago premiums were $3,000 to $4,000 a year.

Yost and others don't feel comfortable doing away with insurance but would rather find alternatives, including proposed state and federal legislation to cut premiums and limit responsibility.

Shewbridge, partner in the Wilsonville firm of Balsiger Petersen Shewbridge & Associates, has been working on the problem for some time and has been appointed to a national AIA committee urging relief legislation.

The committee seeks a bill allowing architects and engineers, who have much the same problem, to slowly build tax-free cash reserves to cover costs of deductible expenditures.

According to Shewbridge, this would allow low premiums and help new and single architects to have liability protection.

Shewbridge, Yost and others say the public, in many instances, indirectly pays the higher cost of premiums. This is often reflected in additional costs of schools and other public buildings, where the margin, according to one architect, can be increased as much as 58 cents an hour.

Shewbridge said small, one- or two-man firms can get by fairly well without insurance, while monster corporations can afford to pay the bill.

The middle-size firms, however, take the brunt of costs nationally, and J. Warren Carkin, who has a six- to 10-man firm in Salem, said flatly, "It's just too doggone expensive. It costs you $1,000 a month just to open the door. It's painful, one of the risks of being in business today."

Harold Boone, partner in the Portland firm Annand-Boone & Associates, which was sued after a fatal floor collapse at La Grande Middle School in 1975, will not discuss details of the unsettled case, but he emphasized the need for interpretation of who is liable: the architect, engineer or one of several subcontractors.

Hank Crawford, lobbyist for the Oregon Council, said the council was preparing to send questionnaires to architectural firms and commented, "The most frightening thing is Oregon's rate is low, and we're not really interested in underwriting architects around the nation."

Paul Genecki, vice president of the Victor O. Schinnerer Co., Washington, D.C., a major underwriter of architectural firms since the 1950s, admits the problem areas are in the East and feels premiums began to rise with the tight money in 1974.

While some architects charge there would be fewer suits if insurance companies instigated countersuits, Genecki said, "The courts just don't want to entertain that kind of action, which appears to be an abridgement of an individual's right to file a suit."

Genecki feels premium costs are leveling off but won't drop in the near future. He advises everyone to have insurance and is a strong supporter of the proposed AIA congressional legislation.

Locally, architects and engineers are working to pass legislation aimed at tightening workers' compensation to put limits on areas of liability, particularly to eliminate third-person suits, according to Blance Schroeder, Portland Chamber of Commerce lobbyist.

The chamber's Liability Task Force, which includes Shewbridge, has adopted five proposals it hopes to introduce in bills before the 1979 session of the Oregon Legislature.

Architects in Oregon are also considering another insurance plan and hope someday to have premiums established on merit.

"The Oregon Council is in the business to deal with these matters," Yost said, "and we mean to bring architects together and see what we can open up."

According to Helling, "People are suit-happy. The general concensus of the people is architects are gods and don't make honest mistakes. I'd like to make the public think twice before they sue somebody."

Shewbridge says, "It used to be an architect was a 'master builder.' But now this has changed, and we're charged with doing service documents and working with a number of subcontractors. How do you fix the blame? There's a whole different standard now, and nobody trusts anyone anymore. If you provide anything less than perfection, then you'll pay for it."

ORE 1/8/79

FIRST FARWEST LIFE BUILDING, 400 S.W. SIXTH AVENUE, PORTLAND, OREGON 97204 / (503) 224-7745

FIRST FARWEST CORPORATION

October 13, 1978

Ms. Blanche Schroeder
Portland Chamber of Commerce
824 S.W. 5th Ave.
Portland, OR 97204

Dear Ms. Schroeder:

Confirming the conversation we had at one of the recent Product Liability Task Force meetings, I'm giving you details of two suits in which the punitive damage aspect is obviously a tactical measure rather than being a ligament basic for action in the matters. They confirm our experience in a number of cases in California where the attorney for opposition adopts the same tactic, and distort the nature of the claims.

Jack Simpson vs. Don Butterfield and First Farwest Transportation
Circuit Court Case #A-7804-06187
General Damages-$2,500,000, Punitive Damages, $5,000,000

Jones vs. First Farwest Transportation
Circuit Court 77-4891, in Lane County
Attorney's fees $15,250, Loss of Earnings $2,600, Loss of Vehicle $23,331
Down time $12,000
General Damages $60,000
Punitive Damages $75,000

Both of these cases are still in litigation and no conclusion has been reached regarding the possible results.

Yours truly,

Charles Sikes
Vice President
Transportation Group

CS:mg601-3B29

Balsiger Petersen Shewbridge & Associates, P.C. A.I.A. Architects/Planners
30450 S.W. Parkway Avenue
P.O. Box 388, Wilsonville, Oregon 97070
(503) 682-3023

PROFESSIONAL LIABILITY QUESTIONNAIRE
OREGON COUNCIL OF ARCHITECTS
PARTIAL SUMMATION OF RESULTS

February 14, 1979

Partial returns (58) from questionnaire show following:

		Yes	No	Total
1.	Liability insurance carried	30	28	58
2.	Claims against	8	4	12
3.	Third Party Claims (included in 2 above)	3	1	4

4. Financial data on insured members (based on 30)
   a. Claims payouts members under deductible = $51,260
      insurance companies = 325,905*
   *one loss was for $247,000

   b. Premiums
      Total paid since firm carried insurance = $840,419 plus five firms
      Total paid 1978 = 225,830 plus three firms
      Note! Some firms didn't complete as result above figures are on low side and could increase by from 5 to 10 percent.

Suit filed by widow

A $9 million wrongful death suit has been filed against Teledyne Wah Chang by the widow of a Vancouver, Wash., truck driver who died of injuries suffered from exposure to anhydrous ammonia.

Nina L. Pilcher filed the suit in Multnomah County Circuit Court last week, alleging that rupture of a hose used during the unloading of the chemical last June 5 resulted from negligence on the part of the company.

James L. Pilcher died June 12 from massive burns he suffered when enveloped in vapors from the hazardous cargo. Pilcher, employed by Widing Transportation of Portland, is survived by his wife and four minor children.

The suit seeks $3 million general damages, and $6 million in punitive damages.

FIRE FIGHTING
EQUIPMENT

SERVICE & REPAIR
FOR ALL TYPES OF
FIRE EXTINGUISHERS

Carbon Dioxide, Inc.

3357 S.E. 22ND
PORTLAND, OREGON 97202
PHONE 232-6646

March 07, 1979

Mr. Steven Kafoury, Senator
State Capitol Building
Salem, Oregon 97210

Dear Mr. Kafoury:

In response to a request from the Portland Chamber of Commerce on the status of our firm's product liability problems the President of our firm responded to their request. After seeing the figures in writing we find it a shocking realization what a strangle hold on our small business product liability has. We are a distributor and service firm of fire protection equipment with twelve employees. The following is a breakdown by year of the cost of our product liability insurance:

Year	Cost	% of Volume	Limits of Coverage	Amount Deductible
1973	200.00	.002	500,000.00	0
1974	200.00	.001	500,000.00	0
1975	210.00	.0007	500,000.00	0
1976	850.00	.0024	500,000.00	100.00
1977	8000.00	.02	500,000.00	250.00
1978	8500.00	.02	500,000.00	250.00

It should be realized that we have had absolutely no product liability claims made against our policy. Yet, we find each year that the insurance companies have cancelled our coverage and made it necessary to "shop around" each year.

Businesses in Oregon must have relief from these excessive costs. It should be evident to all concerned that these outrageous prices are passed on to the consumer, thus escalating all costs.

Sincerely,

Carolyn L. Gaudry

Carolyn L. Gaudry
Secretary - Treasurer

CLG/jn
bc: Blanche Schroeder

(64)

January 1979

PUNITIVE DAMAGES SUITS

From: Daily Journal of Commerce, "Circuit Court, New Suits"

HANNEMEN vs. NORTHSIDE FORD TRUCK SALES; fraud, nondisclosure, pun dmges, $12,000
BEMERS vs. BERGEY, EAGLE PROPERTIES & CENTURY 21-THUNDER REALTY; breach of contract, unfair trade practices, pun dmges, $18,771
RUDWICK vs. STAN WILEY, INC. & MBA PROPERTIES & DIEHL; unlawful trade practices, interference with contract, fraud, misrep, etc., pun dmges, $113,000
4) WILLIAMS vs. GOMEZ & AMERICAN GOLD & SILVER & WESTERN STATES REFINING DIVISION; misrep & pun dmges, $27,000
ROGERS vs. INTERNATIONAL SOCIETY FOR KRISHNA CONCIOUSNESS; pers inj-fall, assault, pun dmges, $30,000
COY vs. STARLING; misrep & pun dmges, $116,600
5) CAPUTO vs. HALSEY AUTO IMPORTS; unlawful trade practices, pun dmges, $8350
WALKER vs. CRAWFORD; pers inj, pun dmges, $151,998
6) HOWELL vs. U.S. TANK & CONSTRUCTION; negligence, Employers Liability Law, $120,412
BEATON vs. JOHNSON & PUGET SOUND FREIGHT LINES; pers inj-auto, pun dmges, $100,017
BEATON vs. JOHNSON & PUGET SOUND FREIGHT LINES; pers inj-auto, pun dmges, $131,248
LENSKE vs. FERNANDEZ; libel, pun dmges, $105,000
SUND vs. POP'S HOMES INC. & KNAKAL; conversion, unlawful trade practices, pun dmges, $206,750
9) RODENBAUGH vs. MERCEDES OF N. AMERICA & DON RASMUSSEN CO.; product liability, $7,677
FREDRICKS vs. FARMER; trespass, interference with ppty, etc., pun dmges, $229,500
WALTON vs. LAMB'S INC.; failure to reinstate after injury, pun dmges, $41,400
VAN BEMMEL vs. 3M CO. & 3M BUSINESS PRODUCTS SALES; pers inj-product, $750,000
PUBLIC POWER COALITION vs. PGE & PP&L CO. & R.E. RINKE & ASSOCIATES; false publication relating to ballot measure, pun dmges, $1,047,031
10) CARTER vs. MARV TONKIN FORD; rescission of contract, unlawful trade practices, pun dmges, $10,200
ABRAMS vs. MIKE SALTA PONTIAC; misrep, pun dmges, $12,500
PASSERO vs. N. AMERICAN CONTRACTORS & PAJUTEE & SOUTHER SPAULDING et al.; unjust enrichment, pun dmges, $698,233 & $2,374 per mo. & $691 & change of venue
NELSON vs. LOPEZ, assault & battery, pun dmges, $75,000
FELONENKO vs. SIOMKA; set aside ppty transfer, pun dmges, $10,000
12) BOTTRILL vs. ALBERT & TRI-WEST PROPERTIES & CORMITT & COOPER; misrep, pun dmges, $9916
AMERICAN STATES INS. CO. vs. HOOD & BOOKER; ppty dmges, pun dmges, $6,400
ZEEK vs. KELLEY & SWEET & PRUDENTIAL PROPERTIES & PRUDENTIAL INVESTMENT LTD.; malicious conduct, invasion of privacy, pun dmges, $60,250
15) ALIEN vs. ANDERSON & E.G. STASSEN'S INC.; misrep, pun dmges, $28,830 & $20,000
16) GREENWALD vs. THORNE, pers inj-auto, pun dmges, &126,750
17) JENNINGS vs. SCHAEFFER & RON TONKIN CHEVROLET; assault & battery, pun dmges, $339,000
WERTZ vs. LANG & STARK; unlawful trade practices, pun dmges, $15,550
BURNS vs. STAN WILEY INC.; deceit, pun dmges, $6,700
18) ROBINSON vs. TREND BUSINESS COLLEGES; unfair trade practices, breach of warrenty, pun dmges, $9,990
BURKE vs. NISSAN MOTOR CO. IN AMERICA; unlawful trade practices, pun dmges, $8,000
RUZANSKI vs. INTERNATIONAL PAINT CO.; product liability, $280;000
ROBERTSON vs. INTERNATIONAL PAINT CO.; product liability, $50,150
19) DAVIS vs. FLUID-AIR COMPONENTS; breach of contract, pun dmges, $135,710
TUPPER vs. SUPERIOR CHRYSLER-PLYMOUTH CO.; pers inj-product, $37,885

(continued)

22) CHRISTENSEN vs. JOHNSON & ATHMANN & FITCH; misrep, pun dmges, $33,630
KOBERTSTEIN vs. MIDAS INTERNATIONAL & KIPERS; breach of warrenties, unfair trade practices, fraud, pun dmges, $112,373 & $50,000
MALAFOURIS vs. OMEGA SECURITIES & MONROE & SMITH; violation Oregon securities laws, pun dmges, $207,000
CUNNINGHAM vs. OREGON INDUSTRIAL SUPPLY & CON-VEY INTERNATIONAL & STURSA; pers inj-product, $1,038,500
MEDAK vs. LEE; fraud, pun dmges; $15,000
MEYER vs. STATE FARM MUTUAL AUTO INS.; misrep, pun dmges, $1,042,500
FISHER vs. PATTERSON; impose constructive trust, pun dmges, $25,000 or specific performance & pun dmges, $25,000
COLUMBIA TREE FARMS vs. WISCHNESTY; breach of contract, pun dmges, $16,163
24) BURROWS vs. LYMAN SIACK CHEVROLET; breach of warrenty, deceit, unlawful trade practice, pun dmges, $6,781
WEBER vs. RONNE; pers inj-auto, pun dmges; $45,000
25) SCHULZ & DOUBLE RS ENTERPRISES vs. MC INNIS & MC INNIS ENTERPRISES LTD.; money had & received, pun dmges, services rendered, injunctive relief re accts, $131,940
VIGIL vs. HOIMAN'S FUNERAL SERVICE; breach of contract, pun dmges, $36,500
FREEMONT vs. ALBERTSON'S INC. & O'NEILL; false imprisonment, battery, pun dmges, $75,000
TERRELL vs. HARRINGTON & S.J. POUNDER REALTY CO.; misrep, pun dmges, $17,006
SUTTER vs. HALEY; pers inj-auto, pun dmge, $192,385
TOIMIE vs. HANEY; pers inj-auto, pun dmge, $111,000
26) WILSON vs. RIK & CO. & KOHNSTAMM; breach of contract,unlawful trade practices, interference with contractual relations, pun dmges; $510,000
GARNER vs. GARNER; assault & battery, pun dmges, $15,125
29) BROWN vs. PIAID PANTRY & PORTLAND BOTTLING CO.; pers inj-product, $15,045
DRAKE vs. PORTLAND ENGINE CO.; unfair trade practices, fraud, negligence, pun dmges, $3,495
THOMPSON vs. ARMSTRONG & FRATTO; fraud, pun dmges, $55,000
GRIFFITH vs. OSTRANDER; assault & battery, pun dmges, $75,605
30) KITZEL vs. U.S. NATIONAL BANK; breach of agreement, conversion etc., pun dmges, $50,154
SCHINOWSKY vs. MARKANTONATOS; slander, pun dmges, $15,000
EPTON vs. HENRY & SMITH & SCHMIDT & DONALD P. NELSON REALTY; unfair trade practices, fraud, pun dmges, $15,000
MAXWELL vs. GOODYEAR TIRE & RUBBER CO.; breach of contract, negligence, pun dmges, $128,198
SAWYER vs. RICE & FREISINGER; ppty damage-auto, pun dmges, $4,131

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January 1978

PUNITIVE DAMAGES SUITS

From: Daily Journal of Commerce, "Circuit Court, New Suits"

3) BEUMBLE vs. MORROW; wrongful death-auto, pun dmges, $97,359

*REPPETEAUX vs. FINANCIAL COLLECTION AGENCIES & LUBOTTS & ROSS; Unlawful collection practices, outrageous conduct, invasion of privacy, pun dmges, $400,532

4) SKINNER vs. MC BRIDE; ppty dmge-auto, loss of bsn, pun dmges, $161,579

5) WIRFS vs. HOFFMAN-LAROCHE, INC. & GRAHAM & RHOTEN; product liability resulting in birth defect, $3,500,000

CHAPIN vs. LUDVICKSEN & FIREMAN'S FUND INS. CO.; money had & received, pun dmges, $25,191

6) COURTNEY vs. YATES AMERICAN MACHINE CO. & PORTLAND MACHINE CO.; pers inj- defective products, $650,000

HERRON vs. LEDERLE LABORATORIES & KAISER PERMANENTE CLINIC & KAISER FOUNDATION HOSPITALS; negligence, pun dmges, $182,000

GUYOT vs. MULTNOMAH COUNTY & NIZDIL & CALIAS & LOMPOCK LAND CO. & WHITHAM & WHITHAM & GREENE; deprivation of ppty & restitution, pun dmges, $1,035,000 & $1,035,000 & $500,000 & $1,035,000 & $1,035,000 & $640,000

* KNIGHT vs. NIBLER & ALLUISI & NIBLER; creditors bill, set aside transfer, pun dmges, $6,131

9) AMERICAN LINEN SUPPLY CO. vs. RENTEX CORP.; tortious interference with contractual relation, pun dmges; $26,610

LANG vs. SCHERER; revocation of gift, pun dmges, $65,000

10) DEMORESTvs. MEISLAHN; defamation, pun dmges, $60,000

CASSITY vs. FOX; conversion, pun dmges, $15,500

11) FREEMAN vs. LADDEN; outrageous conduct, pun dmges, $150,000

MAC DONALD vs. JENSEN & THE OREGON STATE BOARD OF FUNERAL DIRECTORS & EMBALMERS; harassment, pun dmges, $35,000 & $10,000

MASON vs. KANAKEL & POP'S HOMES INC.; ouster, conversion, trespass, pun dmges, $31,506

12) ODRLIN vs. RODAKOWSKI & GOUDGE; misrep, pun dmges, $33,234

13) HEIDRICH vs. FORD MOTOR CREDIT; breach of contract, wrongful repossion, pun dmges, $49,368

17) ISHMAEL vs SINGER; conversion, pun dmges, $8,200

JOHNSON vs. HARRISON & COPE; battery, pun dmges, $125,000

OADES vs. WAKEHOUSE MOTORS; misrep, pun dmges, $1,700

REMAILY & JOB vs. GERMEROTH; misrep, pun dmges, $9,000 & $16,000

SLEEGER vs. LAURITZEN & SEAPORT MARKETING CO.; enjoin frm competition, dmges & pun dmges, $200,000

WALTERS vs. WHITTLE; pers inj-auto, pun dmges; $45,350

MC COY vs. NEILSON; assault, pun dmges, $10,000

MC COY vs. NEILSON; assault, pun dmges, $20,000

*MARTINEZ vs. BISHOP & TEAMSTERS LOCAL UNION 162; assault, pun dmges, $78,681

18) RICH vs. MASON & ELINIFF & DOE; real ppty dmge, poss pers ppty, pun dmges, $111,200

19) LELLESS & HAYES vs. WHITWORTH & HOWER; assault, battery, trespass, pun dmges, $78,681

20) HOLMAN TRANSFER CO. vs. CREMEEN; conversion, pun dmges, $89,621

HILTY vs. FARMERS INS. GROUP & PAGE; unpaid claim, pun dmges, $2,999

*SANCHEZ vs. MONTGOMERY WARD INC.; fraud, conversion, trespass, outrageous conduct, pun dmges, $21,800

*ALBRIGHT vs. BROWN & SAFEWAY STORES INC.; assault & battery, pun dmges, $55,000

(CONTINUED)

23) HOOKS vs. COAST VENDING MACHINE CO.; trespass, coversion, pun dmges, $5,899
ROSS vs. FORD MOTOR CREDIT CO. & OREGON RECOVERY CO.; conversion, defamation, pun dmges, $240,000
REYNOLDS vs. FUTZBAL INC. & ALHADEFF & ALLEN; pers inj-auto, involving service of alcoholic beverages, pun dmges, $ 256,069
GROVER vs. SEARS, ROEBUCK & CO.; pers inj-product, $5,081
STROBEL vs. MARTIN; money had & received; pun dmges, $5,500
LARNS INVESTMENT CO. vs. FORNI; fraud, breach of contract, unlawful trade practices, breach of warrenty, pun dmges, $212,500 & rescind agreement

24) ZATTERBURG vs. HOMEMAKER'S FIN SERVICE; invalid judgement 7 garnishment, pun dmges, $135,150
TAYLOR & VENABLE vs. HALBORG; pers inj-auto, pun dmges, $110,000

25) RIVER'S SECURITY PATROL & WILEY vs. SHIFTON; fraud, att to obtain money under false pretenses, pun dmges, $10,100
THOMAS vs. G.D. SEARLE & CO.; pers inj-product, $500,000

26) TYSON vs. FORD MOTOR CREDIT CO.; conversion, pun dmges, $53,000
GREWE vs. LOTT & RYDER INC. & TALENT PLUS INC.; wrongful death, pun dmges, $1,001,500
COOK vs. KANE: false imprisonment, malicious prosecution, pun dmges, $12,485
THE LINCOLN BANK vs. BROWNE; conversion, pun dmges, $550
POLLOCK vs. ETIER; real ppty dmge, pun dmges, $3,822

27) FORCE vs. DEAN VINCENT, INC. & LUEBKE; breach of employment agreement, pun dmges, $25,390
TATRO vs. PATON; assault & battery, pun dmges, $5,518
FRANKLIN vs. TIM'S TRUCKS INC.; misrep, breach of warrenty, pun dmges, $149,000
KOLIN vs. PORTLAND LABOR CENTER; declatory relief re liquor license, pun dmges, $20,000
TAYLOR vs. FARR; pers inj-auto, pun dmges, $36,008
E.A. FARNBAUM CO. vs. ARMOUR CHEMICAL INC.; misrep, unfair trade practices, breach or warrenty, pun dmges, $40,692

- HAYES vs. WILLIAM MANUFACTURING CO. & BLAKE & SCHMIDT; pers inj-product, $250,000
WILLOUGHBY vs. BANKS; defamation, pun damages, $375,000
- BRAXMEYER vs. THE MILLER BREWING CO. & ELLIS; pers inj-product, $12,665

Insurance Services Office Product Liability Closed Claim Survey:

A Technical Analysis of Survey Results

Highlights

Insurance Services Office Product Liability Closed Claim Survey:

A Technical Analysis of Survey Results

Highlights

Introduction

Background

Concern about product liability developed in the business community and government when members of the business community, particularly manufacturers, experienced substantial increases in the cost of their product liability insurance and, also, when some had difficulty in obtaining desired product liability coverage.

While market problems have been alleviated where state regulators have brought buyer and seller together by implementing Market Assistance Programs, the federal government is still involved in the product liability issue. Under the lead of the Department of Commercie, a Federal Interagency Task Force studied all aspects of the problem and will recommend possible remedies. Three consultant reports were released by the Department of Commerce early in 1977 and a final Task Force Report is expected in late October or early November of 1977.

These price and market apprehensions were heightened by the sparsity of data relevant to product liability tort law and its underlying social climate. The most pressing need today is for information concerning causes of product liability claims, the types of products involved, the place of occurrence—whether at home or at work—as well as for other quantifiable facts which are required in order to put things in proper perspective.

Insurance Services Office (ISO) is an insurance industry statistical and rating organization which compiles data for product liability insurance. Although it has statistics which are used for product liability rate making purposes, those data are not specific enough to answer the types of questions currently being asked.

Objectives of the ISO Survey

These emerging developments in product liability were recognized by Insurance Services Office in early 1976 and, in order to obtain the needed information.ISO initiated the Product Liability and Completed Operations Closed Claim Survey.

This definitive study is now complete. Twenty-three major property-liability insurers, representing most of the product liability insurance business written in the United States, participated in the survey which contains the most extensive data base of product liability claims information ever compiled.

This industrywide survey was designed to provide the kinds of detailed information necessary to make a quantitative analysis of the causes of the problem, and to provide insight for action which might be taken to alleviate the situation.

The compilation of this comprehensive base of product liability claim data will be useful in evaluating various legislative alternatives to the present tort liability reparations system. Also, for those who have been seeking to alleviate the complex problems arising from the product liability issue, there is now a definitive reference document to help formulate answers to the most commonly asked questions and to lend assistance in determining the effectiveness of possible remedies.

Scope of the Study

The twenty-three participating insurers submitted a total of 24,452 survey forms covering all their product liability claims which were closed between July 1, 1976 and March 15, 1977. The final report generated from this information consists of discussion and presentation of 39 summary compilations, plus 276 statistical exhibits and 117 tables to assist the reviewer in interpreting the results. The complete technical presentation and analysis (about 500 pages) is available for those interested in reviewing the findings in depth and those wishing to pursue further analyses (see page 9 for details).

The following pages present highlights of the survey.

Major Findings

Types and Amounts of Claims

An injured party may bring a claim against an insured if he thinks the insured's product was responsible for either bodily injury (BI) or damage to his property (PD), or perhaps both. Of the total number of claims paid, about 61% involve only bodily injury, 37% only property damage, and 2% involve both. However, of the total dollars paid for all claims, bodily injury incidents account for a larger proportion, 83%, of the total.

Table 1

TYPE OF PAID CLAIMS

	% of Paid Claims	% of Claim Payments
BI only	60.6%	83.0%
PD only	37.0	13.4
Both BI and PD	2.4	3.6
Total	100.0%	100.0%

Although the large majority of payments are relatively small (more than 2/3 are under $1,000), the bulk of the overall payment amount is spent in the few larger cases. Fewer than 1% of the bodily injury paid claims are responsible for more than 50% of the total BI payment dollars. Similarly, for property damage, fewer than 1% of the paid claims account for more than 45% of the total PD payment dollars.

A product liability incident involving a single injured party may result in claims against more than one defendant. As might be expected, the average payment calculated on a per incident basis turns out to be higher than the average payment on a per claim basis. Average payments for both bodily injury and property damage are shown in the following table.

Table 2

AVERAGE PAYMENTS

	Per Claim	Per Incident
Bodily Injury	$13,911	$26,004
Property Damage	3,798	6,871

The claim payments analyzed in this survey include both those in which insurance payments were made and those in which no payment was made. The total amounts paid to claimants, whether through settlement or through award, were considered. Not all of this amount was covered by insurance because some awards exceeded the limits of the insurance policy. In some cases, coverage for the particular incident may not have been included in the policy, and some insureds have policies involving deductibles. The survey results show that about 97% of the total bodily injury payments and 89% of the total property damage payments were covered by insurance.

Additional Costs

In addition to paying claims on behalf of the insured, the insurance company bears the expense of investigating the claim and all defense costs associated with the case. Typically, these costs include defense attorney and expert witness fees, travel expenses and other items directly related to the particular claim. For product liability claims, these costs are considerable.

For every dollar paid for claims, insurers incur in defense costs an additional 35¢ (BI) and 48¢ (PD), no matter who wins the case. By far the largest item contributing to the cost of settling claims is defense attorneys' fees, which account for about 83% of the defense costs.

The average amount of expense per bodily injury claim is about $3,500 regardless of how the claim is settled. However, this ranges significantly, from about $25 for cases in which no suit is filed, to an average of almost $25,000 for cases which go all the way to a court verdict.

The Time Factor

The average length of time between the occurrence of a product liability incident and an initial report to the defendant or his insurer is relatively short. Within 12 months of the occurrence, about 86% of bodily injury and 90% of property damage claims have been reported. These claims ultimately involve 52% of the total payment dollars in bodily injury cases, 75% in property damage cases.

The time from the first report until closing of the claim file, however, is typically much longer. Four years after the first report, claims involving 36% of the ultimate bodily injury payment dollars and 33% of the total property damage payment dollars still have not been closed.

The time a product may be in use before any incident occurs may be quite long. Some 4% of the bodily injury claims, involving 10% of ultimate payment dollars, still have not occurred 8 years after the date of manufacture of the product. Where capital goods are involved, the average time lapse from manufacture to occurrence is more than 3 years longer than the overall average.

Payments Compared With Economic Loss

One section of the Report compares payments received by product liability claimants with the claimants' actual economic loss. Economic loss for bodily injury claims includes such out-of-pocket expenses as medical bills, housekeeping expenses and rehabilitation costs, as well as lost wages. For property damage claims, economic loss includes the cost of the direct physical damage to the claimant's property, the expenses resulting from the loss of use of that property, or from recall of products.

In most instances, a portion of the award or settlement paid to the injured party goes to his attorney under a prearranged agreement. Thus, it is entirely possible that where the final claim payment exceeds the actual amount of economic loss, in some cases it may still be insufficient to reimburse the claimant's expenses and lost wages because of his legal fee commitments.

Several factors may cause the product liability claim payment to be either higher or lower than economic loss. For example:

- Under the laws of some states, the principle of comparative negligence limits payment to a portion of economic loss. This occurs if it is determined that the claimant's own negligence contributed to the accident.
- Cases where the evidence is not clear-cut may end in a compromise settlement out of court.
- In some cases involving more than one defendant, one or more defendants may be sued on some basis other than product liability. For instance, a manufacturer of medical equipment may be sued under product liability, while a surgeon involved in the same case may be sued under professional liability. Product liability would represent only a portion of the total settlement in such cases.
- Policy limits, if known by the claimant or his attorney, may in some cases influence the payment amount.
- Punitive damages may be awarded over and above economic loss.
- Payments for pain and suffering may be awarded over and above economic loss.

In this connection the survey shows that:

- For bodily injury, payments tend to be greater than economic loss.
- The tendency of payment to exceed economic loss is stronger for the lower amounts of economic loss, and diminishes as the level of economic loss rises. For cases involving a great amount of economic loss (more than $500,000), the product liability payment tends to be less than economic loss.

- Ten per cent of all paid claims in bodily injury cases are for more than 10 times the economic loss; 50% are at least twice the economic loss. On the other hand, 5% of all claimants who are ultimately paid something receive 50% or less of their economic loss. As noted, there may be sources of payment other than product liability in some of these cases.

- On the average, the economic loss experienced by those who receive payments for bodily injury claims is made up of 23% medical costs, 72% lost wages and 5% miscellaneous expenses such as housekeeping and rehabilitation costs. These proportions vary, with medical expenses predominating at lower levels of economic loss and wages at the higher levels.

- More than 50% of the claims for property damage are equal to the economic loss. A large portion of the remaining claim payments tend to be below economic loss as there is seldom reason, such as is common in bodily injury cases, for payments above the economic loss.

Workers' Compensation

Workers injured on the job are involved in 11% of product liability incidents resulting in claim payments. However, these incidents account for 42% of total bodily injury payments. That is explained by the fact that the average payment of $97,884 for these incidents is much higher than the overall average. It should be emphasized that the $97,884 represents product liability claim payments only.

An injured worker may collect Workers' Compensation Benefits and still collect under product liability from a third party. A worker injured on the job would routinely receive payment from his employer or the employer's insurance carrier under the Workers' Compensation Law. In most states, a legal "sole remedy rule" bars the worker from suing the employer for any further amounts.

However, if a defective machine or other product is believed to have caused the injury, the injured employee may have a cause of action against the manufacturer or seller of that product. In turn, the employer may have a cause of action against the manufacturer or seller to recover amounts he has already paid the worker under Workers' Compensation. As a further complication, the sole remedy rule operates to prevent the manufacturer or seller from countersuing the employer even if the employer's negligence is believed to have caused or contributed to the injury.

The survey discloses that about 24% of the total dollar amount paid for all bodily injury claims was paid in cases involving possible employer negligence. In most of these cases, recovery or some contribution to the payment would have been sought from the employers by the product liability insurers if such recovery were not prevented by the sole remedy rule.

Taking a different perspective, claims involving 13% of the total bodily injury payments are reported to have been instigated by employers in order to recover payments made under Workers' Compensation.

Who Is Liable Under Product Liability

Almost any business may be liable for a product liability incident. Practically no one in the stream of commerce is immune from suit. However, some businesses are more frequent targets than others.

Manufacturers account for 87% of the total amount paid for product liability claims.

Food products account for 56% of all paid product liability claims. However, since food claims tend to be small, they represent only 2% of total bodily injury payment dollars.

Grounds for Claims

The legal basis for the claim or suit is breach of warranty in slightly more than 1/3 of both the bodily injury and property damage incidents. The remainder of the bodily injury cases are based, in about equal numbers, on negligency and on strict liability (defect without negligence) while about 48% of property damage cases are based on negligence. It appears to be easier for a plaintiff to win a case based on strict liability than on negligence, because negligence does not have to be established under the doctrine of strict liability. It is sufficient that the product was defective and the defect caused the injury.

How Claims Are Settled

Approximately 73% of the bodily injury claims and 83% of the property damage claims are settled without the filing of a lawsuit. These cases, not surprisingly, account for only a small portion of the total payments made (7% for bodily injury and 33% for property damage).

Fewer than 4% of all claims go all the way to a court verdict, and in those cases, fewer than 25% of defendants are found liable.

Using the Survey Findings

The data collected and analyzed in the ISO Closed Claim Survey provide a firm statistical base which can and will be used in evaluating various legislative alternatives to the current tort liability reparations system. However, caution is recommended and the reviewer should clearly understand what a closed claim survey can and cannot do.

A closed claim survey, by definition, reveals nothing about adequacy or inadequacy of insurance rates, or profits or losses of insurers. The survey was not designed nor intended to gather this type of information and no premium or rate information was requested. Consequently, no conclusions should be drawn nor inferences made from the survey regarding these aspects.

What the closed claim survey does is to give very detailed information, obtained from careful review of insurer claim files, about the nature and extent of actual claims which were closed during the specified time period. Previously, such detailed information was not available because it is not the type of information routinely gathered for standard actuarial determinations.

Another inherent characteristic of a closed claim survey should be noted by reviewers who will do analyses beyond those presented in the Final Report. The information submitted by the participating insurers presents data on claims closed during an 8½ month period in 1976-77. But, many of the incidents upon which those claims were based occurred years ago, some more than 10 years ago. Because these incidents took place at various times over many years, conclusions or comparisons could be misleading because the value of the claim settlements or economic loss items reflects the value of the dollar in those various time periods.

For this reason the data were adjusted by recognized actuarial techniques to a common cost level. The procedures used to adjust the data to a common cost level are explained fully in the Technical Analysis. The report also contains all of the statistical exhibits in both adjusted and unadjusted forms. It should be noted that the findings as presented in these highlights, as well as in the Final Report, are drawn from the adjusted data base.

Conclusion

The Final Report of the ISO Product Liability Closed Claim Survey is a valuable reference document that undoubtedly will be read and studied by many. It offers a great deal of statistical information, not available from any other source, which should be extremely helpful to those wishing to pursue additional study of this complex subject.

Companies Participating in the ISO Product Liability Closed Claim Survey

Aetna Casualty and Surety Company
Aetna Insurance Company
Chubb & Son Inc.
Commercial Union Insurance Company
Continental Insurance Company
Continental Casualty Company
Crum & Forster Insurance Group
Employers of Wausau
Fireman's Fund Insurance Company
Hartford Insurance Group
Home Insurance Company
Insurance Company of North America
Liberty Mutual Insurance Company
Lumbermens Mutual Casualty Company
Maryland Casualty Company
Pennsylvania Manufacturers' Association Ins. Co.
Reliance Insurance Company
Royal Globe Insurance Company
SAFECO Insurance Company of America
Sentry Insurance Company
St. Paul Fire and Marine Insurance Company
Travelers Insurance Company
United States Fidelity and Guaranty

Availability of Reports

Copies of the complete Final Report-Technical Analysis may be obtained by sending $10 for each copy requested to: Accounting Division, Insurance Services Office, Two World Trade Center, 19th Floor, New York, New York 10048. Additional copies of this 'Highlights' document are available free from the ISO Product Distribution Division, 160 Water Street, New York, New York 10038.

SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 15, 1979
EXHIBIT C 5 pg exhibit

STATEMENT IN SUPPORT
OF
S. B. 422 (1977)

Senate Trade and Economic Development Committee

By E. Richard Bodyfelt

March 15, 1979

Section 402A

Section 2 of S. B. 422 would adopt the American Law Institute's Restatement (2d) of Torts §402A (1965) as the law of Oregon. This doctrine or its substantial equivalent has been adopted by virtually every state, either by court decision or by legislation. Under this theory, the plaintiff is entitled to recover by establishing that at the time the product left the defendant's hands, it was unreasonably dangerous and that that condition caused the plaintiff physical harm. The plaintiff need not prove that the defendant was negligent. The thousands of decided cases interpreting and applying §402A are of invaluable aid to those who must concern themselves with products liability.

Subsection (3) of Section 2 would declare the Legislature's intent that the codified §402A be interpreted in accordance with the detailed Official Comments. These comments are reliable guides to intelligent and consistent application of the doctrine.

Since neither the Restatement nor its Official Comments have received Legislative sanction in Oregon, they can be accepted or rejected, or modified, in whole or in part, by our courts as they see fit. Although our Supreme Court has "adopted" §402A, see Heaton v. Ford Motor Co., 248 Or 467 (1967), from time to time, the court has engrafted its own variations onto the doctrine. See, e.g., Phillips v. Kimwood Machinery Co., 269 Or 485 (1974). Indicative of our Supreme Court's attitude towards §402A is a footnote appearing in its very recent decision in Allen v. The Heil Company, 285 Or 109 (1979), n. 5:

> "It should be remembered that §402A is not a statute and that as an attempted restatement of common law it is binding upon this court only so long and in such particulars as we may find appropriate."

Similar fluid attitudes towards §402A have produced rather drastic modifications to the doctrine. See, e.g., Cronin v. JBE Olson Corp., 501 P2d 1153 (Cal Sup Ct 1972) (eliminating the "unreasonably dangerous" requirement) and Barker v. Lull Engineering Co., Inc., 143 Cal Rptr 225 (Cal Sup Ct 1978) (permitting the jury to judge the product by hindsight analysis).

Codifying §402A would contribute greatly to predictability and a stable product-judging environment.

Government Standards and Post-Manufacture Improvements

Under Section 2 of S. B. 422, if a product met or exceeded any applicable government codes or regulations, the strict products liability theory would not be applicable (although the plaintiff could invoke negligence, warranty, fraud or other theories). Government agencies, such as the Food and Drug Administration, Federal Aviation Administration, Occupational Safety and Health Administration, Consumer Products Safety Commission, National Highway Transportation Safety Administration, etc., aided by elaborate tests, studies, and hearings, and very considerable expertise, are much more qualified to determine the safety requirements of products than are highly-biased litigants, attorneys and hired experts, and judges or juries. Once society has invested so heavily in the development of governmental codes, standards and regulations, society should not have to pundle up time and again for repeated litigation of the same factual questions. As a practical matter, adoption of this rule would not affect the outcome of any appreciable number of suits, but would very likely reduce the number of actions filed.

In large part, governmental standards, codes and regulations are well published, understandable and reasonably objective. Simply stated, it is relatively easy to ascertain whether one has, or has not, complied, and for these reasons, such adoption would contribute greatly to prediction of outcome and stability within the products environment.

The argument is often made that such matters are "minimum standards." I have never, however, heard of a "maximum" safety standard. The observation is also frequently heard that there often are no codes or standards that apply to the alleged product defect in issue. Whereas that may be true, in those instances the statute would permit the litigants to fall back on common law standards.

0426 Section 3 of S. B. 422 would prohibit evidence of advances or changes in the standards and practices of industry or in government codes or regulations, or of changes or improvements in the design, manufacture, labeling, etc., made in, of or to the product involved, if such advancements, changes or improvements occurred subsequent to manufacture. Elementary fairness and common sense dictates that a product be judged by the standards in effect at the time it was manufactured and sold, and not by "hindsight" drawing upon post-sale innovations which, at the time of sale, were not known, developed or implemented. In the absence of such legislation, however, courts are likely to apply a hindsight rule. See, e.g., Barker v. Lull Engineering Co., Inc., supra.

Further, the admissibility into evidence of post-manufacture improvements has a definite chilling effect upon product innovation and/or improvement. A manufacturer's knowledge that it will be tarred and feathered with its own post-sale improvements (be they in design, materials, workmanship, instructions, warnings and/or packaging) often will disincline the manufacturer from making the improvement, at the expense of the consuming public. Such

improvements can relate not only to safety, but also to cost, utility or aesthetics.

0470 It is often argued that such post-sale changes must be admitted to establish "feasibility," that is, that it was practicable to have manufactured and sold the product in a different manner. However, if at the time the product was manufactured and sold, it was feasible to design the product in the manner contended, that fact can be established by introducing evidence of the then existing state of the art.

Several other states have adopted legislation regarding government standards and post-manufacture improvements similar in nature to that contained in S. B. 422, including:

Arizona - Ariz. Rev. Stat. Sec. 12-683 (1978).
Colorado - Colo. Rev. Stat. Sec. 13-21-402 (1977).
Indiana - Sec. 4 of Indiana Code Ch. 33-1-1.5 (1978).
Kentucky - KRS Ch. 411 (1978).
Nebraska - Sec. 25-21,182 (1978).
New Hampshire - N. H. Code RSA 507-D:4 (1978).

E. Richard Bodyfelt

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SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 15, 1979
EXHIBIT D 5 pg exhibit

TESTIMONY OF LOUIS V. WILSON Before the Senate Trade and Economic Development Committee

15 March 1979

Chairman Hannon and Honorable Members of the Committee:

My name is Louis V. Wilson and I am the President of North Pacific Insurance Company and Oregon Automobile Insurance Company, headquartered in Portland, Oregon.

I wish to give testimony today in favor of Senate Bill 422. As the president of the approximately fourth largest insurance company in the state, I have been very sensitive to the criticisms of increasing costs for products liability insurance, workers' compensation insurance, and automobile insurance.

Because of my position, I have been quite deeply involved in various attempts to change the things that cause increasing insurance rates and premiums. Consequently, I have been overjoyed to be able to assist in the formation of Senate Bill 422. I think Senate Bill 422, for my purposes, exemplifies the return to the American way of fair play, apple pie, motherhood, and the American flag all rolled into one. I cannot for the life of me believe that anyone could seriously be in opposition to the passage of this bill. If they are, then they are misunderstanding the goals or twisting the goals to selfishly benefit themselves in some fashion.

My specific interest in the bill is to pass legislation that will enable us to reduce insurance costs to the public or, at least, enable the insurance industry to not raise rates any further, with the exception of allowances for normal inflation costs in the future.

TESTIMONY OF LOUIS V. WILSON Before the Senate Trade and Economic Development Committee

15 March 1979

Ten years ago, we didn't have this problem. We didn't need Senate Bill 422. Most insurance carriers provided products liability insurance or coverage, automobile insurance coverage, and workers' compensation coverage at reasonable costs. Why would this suddenly change? About ten years ago we saw the passage of legislation and the following rash of judicial interpretations of legislative mandates that created the situation that the public and business are complaining about today. If this is what society permits and allows, then I have to charge an appropriate insurance rate and insurance premium for what society demands. The industry does not make the rates; the public makes the rates and we merely apply them.

Senate Bill 422 still preserves the rights of the public to take action against the seller or lessor of a product that does damage or causes harm, if there is negligence involved. However, it does not permit recovery if someone alters the machine in a manner which causes the injury. That is only fair play. It also does not permit recovery forty years later because the machine doesn't meet today's requirements. As long as the machine was designed and manufactured in accordance with all prevailing standards and practices in the industry, then recovery should not be allowed against the designer or manufacturer if it doesn't meet today's standards. An example is the worker who tied down the safety valve on a machine so it would go faster and lost some fingers because of this change. The fact that two or four more safety devices being installed on a machine so they could not be changed should not take away from the fact that the operator was the negligent one and not the designer or manufacturer.

Workers' compensation is there to provide for the injuries and wage loss. The employee should not be allowed to sue the designer or manufacturer if you ever hope to reduce insurance costs.

TESTIMONY OF LOUIS V. WILSON Before the Senate Trade and Economic Development Committee

15 March 1979

There, again, is an excellent part of this bill that will help reduce insurance costs: that workers' compensation should be the sole remedy in any of these situations.

This bill deals with the elimination of punitive damages in severe actions. Punitive damages were designed to punish a wrong-doer. I do not necessarily find any reason to quarrel with that; but if the damages are assessed against the wrong-doer's insurance carrier, then the wrong-doer has received no punishment and the cost must be spread through other policyholders. Therefore, the punishment is meted out to almost everyone except the wrong-doer, thereby violating the very intent of punitive damages. The threat of these awards has become an actual practice, and insurance companies are starting to consider including a loading in their rates for this potentiality. A California Appeals Court issued a verdict several weeks ago that does not allow punitive damages to be considered an insurable hazard. This will save a lot of money in insurance costs in the future in California.

Senate Bill 422 came to have a nickname of a "product bill." To me, the passage of this bill would do more to possibly reduce the cost of automobile insurance and liability insurance than anything I can recall since I have been in the business--which is 25 years. This comes about in Section 5 of the bill which deals with what we call the collateral source rule. Juries are advised by the plaintiff and the plaintiff's attorney that there has been injury, damage, and expense in a certain amount--let's say $20,000 as an example, with $10,000 for wage loss, $6,000 for hospital and medical, and $4,000 for incidentals. A jury, with proper justification, feels this person has had out-of-pocket expenses of $20,000 and therefore should be reimbursed in that amount plus some additional for pain and suffering, inconvenience, etc. The jury, therefore, zeros in on that amount, $20,000, and many times may award a duplicate amount. The problem is that the defense cannot

admit into evidence that the entire $20,000 has already been paid by various means. If you want to cut insurance costs, this must be made admissible so the jury knows the circumstances. It will affect their decision on how much additional to give, yet it will not alter the fact that the injured party was entitled to whatever insurance programs had been purchased to pay the bills and reimburse wages.

If you in your wisdom feel that juries should not be aware of that, then don't listen to people's complaints of high insurance premiums. Insurance is designed to replace and re-habilitate and reimburse; but it is not designed to give additional large sums as betterment or as reward. If society disagrees with me and says "we think insurance should do this", then society is not justified in complaining about the present cost of insurance.

As a result of the legislation passed in the last session, House Bill 3039, Oregon Mutual Insurance Company has reduced their rates on that coverage by 5% to 10%.

I have included the Oregon only experience for products insurance written by my company for the years 1972 through 1978. You will note that we have had no increase in rates for the past two years, nor do we contemplate one in the near future.

Thank you for allowing me to testify and I will attempt to answer any questions you may have for me.

Louis V. Wilson, President
North Pacific/Oregon Automobile Insurance Companies

NORTH PACIFIC / OREGON AUTOMOBILE INSURANCE COMPANIES

PRODUCTS EXPERIENCE - OREGON

Year	Direct Written Premium	Direct Earned Premium	Net Incurred Losses Incl. IBNR & Additives	Loss Ratio
1972	$ 197,566	$ 172,251	$ 157,146	91.2
1973	240,756	227,827	77,659	34.1
1974	224,746	222,709	223,112	100.2
1975	343,162	263,606	324,813	123.2
1976	555,742	501,370	233,248	46.5
1977	1,266,579	1,055,000	376,257	35.7
1978	1,292,080	1,281,190	81,937	6.4
TOTAL	$4,120,631	$3,723,962	$1,474,172	39.6

RATE ADJUSTMENTS / PRICE ADJUSTMENTS

Year	Rate Increase	Inc/Limits Increase	Pricing
1972	Nil	Nil	No Change
1973	Nil	Nil	No Change
1974	Nil	Minimal	Down 20%
1975	+43.2%	25% up	25% Increase
1976	+32.0%	9.8% up	12% Increase
1977	Nil	Nil	No Change
1978	Nil	Nil	No Change

SB 422

SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 15, 1979
EXHIBIT E 2 Pg Exhibit

STATEMENT OF ASSOCIATED OREGON INDUSTRIES
TO
SENATE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT
MARCH 15, 1979

Associated Oregon Industries is supportive of Senate Bill 422 and urges its passage. The previous witnesses for the Portland Chamber of Commerce have addressed the major portions of the bill dealing with product liability reform. We are in accord with their evaluations and comments. However, we would like to touch briefly on the sections of the measure restricting third party actions.

Unfortunately, Oregon took a step backward in 1975 by opening the gate for increased third party activity when the legislature repealed the "joint supervision and control" provisions of the Oregon Workers' Compensation Law. Under that provision no action could be brought against a third party if he or his worker causing the injury was, at the time of injury, on premises over which he had joint supervision and control with the employer of the injured worker. Additionally, the third party also had to be an employer subject to the Act.

Oregon's joint premises statute had been a part of the workers' compensation law for many years. Its principal purpose was to permit the worker of two or more covered employers to work side by side without claims between the employers or claims from workers of other employers.

In our opinion, the change in the law in 1975 was regressive, not progressive. Under the old statute, there really was no burden or hardship on the injured worker who was guaranteed compensation benefits regardless of the joint supervision and control situation. The only thing missing was a windfall opportunity to get more money from the same injury through a negligence action.

Superficially it may have seemed inconsistent to have permitted third party negligence claims by injured workers in some situations while denying this approach in the joint premises cases. However, the determination of negligence among various entities working in close proximity on the same job is notoriously complex. The only guaranteed result is a lot of expensive conversations. The attorneys who pushed to open up this area always pointed out that Oregon was the most restrictive state with respect to third party actions. Perhaps so -- but I don't think Oregon should have "apologized" by changing its law!

Associated Oregon Industries feels that it is a desirable social objective to remove industrial injury cases from the courts and handle them exclusively on a no-fault administrative basis. We should have expanded the law we had prior to 1975 with respect to third party cases, not contracted it. At a minimum, we would like to see the joint supervision and control defense reinstated in Oregon's Workers' Compensation Law. Of course, at the other end of the spectrum -- and as is outlined in Senate Bill 422 -- we would like to see workers' compensation become the sole remedy for any individual injured on the job.

I would suggest that a 1977 "Report of the California Citizens' on Tort Reform" defined the problem I have been talking about:

> "To the degree that work-related injuries burst out of the workers' compensation system and become standard staples in the tort mechanism, the technique that has successfully dealt with these injuries over the last 60 years will deteriorate. Dual application of the two systems to the same injuries may then create a worse situation than existed prior to the institution of workers' compensation."

In summary, we again urge the passage of Senate Bill 422 as a step forward in an attempt to reduce litigation.

SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 15, 1979
EXHIBIT F 3 pg exhibit

EUGENE
AREA CHAMBER OF COMMERCE

March 15, 1979

TESTIMONY OF EUGENE AREA CHAMBER OF COMMERCE IN SUPPORT OF SB 422.

The Eugene Area Chamber of Commerce has been very active in the product liability field in the past two years. We have a subcommittee of the Governmental Affairs Committee which deals strictly with product liability issues. This committee has followed the activities of the Portland Chamber of Commerce Liability Task Force, has met with members of the Task Force, and has held its own discussion of SB 422 and the drafts leading to this bill. The Eugene Area Chamber of Commerce supports SB 422 based on a March 7, 1979 vote, and urges that this committee send it to the Senate floor with a do pass recommendation.

Increasing product liability insurance premiums and the difficulty in securing proper insurance coverage have caused severe economic burdens for some businesses in our area. Premium costs have continued to escalate creating increased consumer prices and reducing the competitiveness of those manufacturing businesses that are most affected by the product liability problem. This has contributed to the inflationary problems that our economy has recently faced. In some cases product liability insurance premiums have proved to be a disincentive to the production of new products. If SB 422 is adopted we believe that it would tend to stabilize insurance premium rate making because of its predictability.

P. O. Box 1107 ■ Eugene, Oregon 97440
503/484-1314

SB 422 addresses five areas of concern in the product liability area. 1- Equity in workers' compensation, 2- abolishment of punitive damages, 3- state of the art, 4- restatement of Section 402A, 5- collateral source. We would like to address each of these areas briefly.

Equity in workers' compensation

It is the feeling of the Eugene Area Chamber of Commerce that the original intent of Workers' Compensation was to allow the injured worker immediate compensation for injury and damages. However, we are seeing a growing number of third party suits in which the worker sues the manufacturer, installer or others, until it has become a common practice. These suits have resulted in large insurance premiums on the part of the manufacturer and thus resulting in an increase in the product cost to the consumer.

Abolishment of punitive damages

We regard punitive damages as "windfalls", because, in theory, the party has already been compensated. Even though punitive damages are seldom awarded, when they are, again the cost in ultimately borne by the consumer.

State of the Art

This defense provides for predictability of the law. This would help both the insurance companies in establishing premiums, and the consumer in being assured of the reliability of the product, thus keeping insurance premiums in line.

Restatement of Section 402A

Again this would establish predictability and would keep insurance rates from increasing.

Collateral Source

The Chamber feels that the jury has the right to know the benefits already

being recieved by the plaintiff, and that full disclosure is vital to enable the jury to make a just decision.

Even though this bill does not address all areas of concern in the product liability field, we feel that it is a step in the proper direction, in that it provides protection for the business that is involved, while at the same time addressing providing just compensation for the injured consumer.

OREGON STATE SENATE

60th Legislative Assembly

SENATE LEGISLATIVE COMMITTEE ON TRADE & ECONOMIC DEVELOPMENT
MARCH 15, 1979
EXHIBIT G 1 Pg exhibit

STAFF MEASURE ANALY...

PRELIMINARY

Measure: Senate Bill 422

Committee: Trade & Economic Development

Hearing Dates: March 15, 1979

Explanation Prepared By: Raymond Redburn

Title: Sr. Legislative Assistant

Problem addressed.

Many business and industry people in Oregon perceive inflating business costs stemming from rapid increases in cost of liability insurance. In turn, it is alleged that these insurance increases result from a growing tendency for injured parties to seek large settlement awards from sellers of products.

Function and purpose of measure as reported out.

1. Specifies the general conditions under which a sellor or leesor is liable.
2. Prohibits the admission of evidence relating to technological improvements after the design or manufacture of a product alledged to have caused injury.
3. Prohibits the award of punitive damages in civil actions (expecting those already specified by statute to involve double or treble damages)
4. Prohibits worker receiving compensable injury due to third-party negligence from seeking remedy against that person. Authorizes paying agency only to bring action for recovery of expenses incurred.

POTENTIAL ISSUES.

1. Is it desirable to exclude punitive damages from civil actions not authorized by statute for double or treble damages?
2. In a case of negligence by a seller where a worker is injured, are the interests/ rights of the injured party adequately protected?
3. Could passage of this bill weaken the incentives for manufacturers and others to design, produce and distribute safe products?
4. Is one possible outcome of this measure that entire industries would be setting the standards by which their own negligence might be judged?
5. Is the basic problem best addressed by limiting liability or might it also be handled by examining the problem of insurance rates?

(Attach additional sheets as necessary)

SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 15, 1979
EXHIBIT H
11 Pg Exhibit

SB 422

January 1979
Schroeder

The priority of the Portland Chamber of Commerce for the 1979 Legislative session is a bill being introduced at our request. The bill is the result of an 18 month effort by a 50 member Liability Task Force established to look at the product and professional liability problem and to seek solutions.

Five proposals were adopted which the task force feels will help restore the balance and purpose of legal action; provide some uniformity and predictability in court rulings; foster settlement and reduce the probability of questionalbe law suits.

This and following bulletins will carry a detailed explanation of each of the five proposals so that you can become familiar with the content and rationale for the bill.

PROPOSAL #1 - EQUITY IN WORKERS' COMPENSATION LITIGATION:

The Portland Chamber of Commerce supports the concept of providing equity to manufacturers and others in the chain of products distribution by restricting third party suits to employers and carriers only, limited to recovery of losses.

BACKGROUND AND RATIONALE:

Among the groups hit hardest by the rise in product liability insurance premiums are manufacturers of industrial products. Insurers justify these rate increases on the basis of product liability claims brought by employees who are injured in the workplace.

While workers' product liability claims represent only 11 percent of the product liability incidents, these tend to be larger claims, accounting for almost 50 percent of the total insurance "payouts." (See ISO Survey, 12/76)

The original intent when the workers' compensation laws were passed was to automatically provide immediate compensation to the injured party for losses and damages incurred. In return the injured party gave up the right to sue. Employers are specifically exempt from suit -- manufacturers, distributors, installers, or others in the chain of products are not. Suing them started slowly, mushrooming, until now it has become a nearly automatic procedure if products can be connected in any way with an injury. Yet, those sued cannot take action against negligent employers-- raising a question of constitutionality.

Thus, an injured worker may collect workers' compensation benefits and still collect under product liability from a third party. The worker cannot sue his employer however negligent he may have been with respect to the accident. But, the worker (or his representative in death cases) can obtain 100 percent of his losses if he is successful in a suit against the manufacturer of the product alledged to have caused the injury. In addition, he can obtain damages for pain and suffering. These may represent two, three times or more of the amount of actual loss.

It was pointed out by members of the Under Secretary of Commerce's Advisory Committee to the U.S. Department of Commerce's Interagency Task Force on Product Liability that "the workers' really have nothing to lose: They have already collected once and they may be able to collect more. They spend no money for an attorney since they obtain counsel on a contingent basis." (See Task Force report p. VII-85). These suits are often brought at the at the instigation of the carriers

to recover their losses.

This practice also raises another very sensitive issue, that of providing built in incentive for the injured party to stay disabled in order to assure a maximum award by the courts -- negating the very goals for which the program was established; namely, to adequately compensate an injured party and to encourage return to work as quickly as possible.

In addition, the employer also may sue the manufacturer or seller to recover amounts he has already paid the worker under workers' compensation. But the manufacturer or seller cannot countersue the employer even if the employer's negligence is believed to have caused or contributed to the injury.

The ISO survey disclosed that about 24% of the total dollar amount paid for all bodily injury claims was paid in cases involving possible employer negligence. In most cases, recovery or some contribution to the payment would have been sought from the employers by the product liability insurers if such recovery were not prevented by the sole remedy rule.

Taking a different perspective, claims involving 13% of the total bodily injury payments are reported to have been instigated by employers in order to recover payments made under Workers' Compensation.

In order to provide equity for both workers and manufacturers, the task force felt that every covered injured worker, regardless of fault, should have workers' compensation as their immediate and sole remedy. To make certain that manufacturers would still be held accountable for deliberate or careless manufacture of unsafe products, the task force felt that suit by the employer/carrier should be allowed to the extent of the loss incurred.

This provision assures that manufacturers will be held responsible for any negligence on their part.

Much of the uncertainty in product liability for manufacturers of industrial equipment and industrial products and those in the chain of products distribution would then be eliminated, resulting in more predictable and more reasonable product liability insurance rates.

PROPOSAL #2 - ABOLISHMENT OF PUNITIVE DAMAGES

The Portland Chamber of Commerce supports legislation that would abolish Punitive Damages.

BACKGROUND AND RATIONALE:

Punitive damages are monies requested by an injured party above and beyond compensation for costs incurred by an injury. It is intended to monetarily punish an individual for perceived minor wrongdoing. The underlying premise is that such awards deter socially obnoxious conduct. There appears to be little evidence to support the premise.

The amount of monetary "punishment" requested is generally directly related to the wealth of an individual or corporation. This raises the question of deterrence for those who may be acting equally socially obnoxious but who are not wealthy enough to sue.

Many small suits become formidable with the addition of punitive damages, which then require costly defense - a $5,000 general damage suit may not seem too serious, tacking on $25,000 for punitive damages changes the whole aspect of the suit.

Often punitive damages fall in the realm of being a subtle form of blackmail. In many instances the defendant will settle - even if the claim is more than likely to be unsuccessful, rather than go through a costly defense.

Presently, punitive damages are frequently asked for but seldom awarded. When awarded, punitive damages are a windfall to the plaintiff and his or her attorney because, in theory, the plaintiff has already been fully compensated by the damage award. When corporations pay large damage awards - the cost of the awards is most likely to be passed on to the consumer in form of a higher priced product - thus we all help pay for the "windfall" which is awarded to an injured party.

Currently for specific reasons, Oregon law requires double or triple damages--we would not change those parts of Oregon law and would suggest additional areas to cover circumstances such as the highly publicized "Pinto" case. In that instance the jury felt that compensatory damages were not sufficient in light of what the jury apparently believed was intentional misconduct by the defendant.

PROPOSAL #3 - STATE OF THE ART

The Portland Chamber of Commerce supports legislation that would

1. Require in a product liability action that the product be judged by the technology at the time that it was made and sold, and not by hindsight.
2. Preclude liability of a defendant in a products liability action if the product involved was designed, manufactured and marketed in full compliance with applicable governmental codes, regulations and approvals, unless the claim against the defendant is based upon negligence or unless there is some proof of fraud or nondisclosure of relevant information by the defendant which affected the governmental action.

BACKGROUND AND RATIONALE:

One of the biggest problems facing business and industry in the products liability area is the unpredictability of the law.

The proposals for State of the Art legislation which we recommend are in two categories. One recommendation relates to the evidence that can be produced in the products liability trial. The other recommendation deals with the substantive liability of the defendant.

In both cases, the recommendations are made because the courts have eroded the law to such an extent that insurance companies and manufacturers have no way of predicting their exposure. This unpredictability has contributed greatly to the so-called "Insurance crisis," since insurance companies attempt to rate risks, and thus establish premiums, based upon the predictability of those risks.

Our recommendation would not allow the evidence of subsequent changes or advancements in technology to be used to judge whether the defendant should be held liabile for injuries received from the products supplied. It also would prohibit evidence of subsequent changes in the product, which would have prevented the injury.

Recent rulings are allowing the product to be judged by hindsight, so that the ever-increasing beneficial advancements of our society's technology have become the manufacturer's Achilles heel in the products liability trial. In Oregon our court has suggested that improvements made by the manufacturer later on for reasons unrelated to the injury may be considered by the jury in determining if the design of the product at the time of the injury was adequate. California, as usual, has gone the utlimate step in a case decided in January of this year entitled Barker v. Lull Engineering Company, Inc. In that case, the court, twice in its opinion, stated that the jury should be instructed to use hindsight in evaluating the product. Consequently, development of new products, innovative changes, improved safety techniques or devices is stifled for fear of being sued.

The second recommendation provides a defense if the product is designed, made and marketed in accordance with governmental codes, regulations or approvals. Here again, the idea is to establish predictability, where there is substantial assurance of the reliability of the product.

Our recommendation is not extreme. Some legislative proposals would prohibit products liability under any theory if governmental standards were followed. Our recommendation is limited to governmental standards and to the theory of strict liability. If the plaintiff can prove negligence, the standards would remain as minimum requirements of due care. If the plaintiff can prove fraud or nondisclosure in connection with procurement of federal

standards, no defense is available.

In light of the fact that governments often lack a sufficient number of personnel to enforce such standards, it is suggested that this defense may benefit consumer, since it would create an economic incentive toward compliance.

Much of the uncertainty in product liability for manufacturers of industrial equipment and industrial products and those in the chain of products distribution would then be eliminated, resulting in more predictable and more reasonable product liability insurance rates.

PROPOSAL #4 - ADOPTION OF RESTATEMENT SECTION 402A AND COMMENTS

The Portland Chamber of Commerce supports legislative adoption of restatement section 402A and comments.

BACKGROUND AND RATIONALE:

A theory was adopted in the early to mid-1960's in order to give injured parties a remedy against manufacturers who normally could not be reached by traditional negligence grounds. In 1964, the American Law Insitute published in its Restatement of Torts 2d, a section referred to as 402A. This was the Institute's attempt to set forth in writing this new principle of law.

Most of the states adopted this Restatement rule by court decision during the next ten years. Most product liability actions were filed upon this theory.

In the mid-seventies a crucial California decision, and other recent court decisions have been made, liberalizing the Restatment rule, thereby destroying much of the predictability in products litigation which the Restatment rule had established.

When predictability disappears, insurance companies react, since that factor is the cornerstone of their rating structure. They reacted in this instance with mammoth increases in rates, because they could no longer predict what to expect, and they did not want to be caught short.

The Task Force feels that since there is some question whether the Oregon Surpreme Court still strictly follows the Restatement rule or whether it might liberalize it further in the future, it would support legislative adoption as the most reliable way to resolve the question.

60

Introduced by comm. last session

PROPOSAL #5 - COLLATERAL SOURCE

The Portland Chamber of Commerce supports legislation which would allow the defendant to present evidence as to the collateral source benefits the plaintiff has received, such as insurance, social security, workers' compensation or employee benefits and to allow in rebuttal the plaintiff to introduce evidence showing the amount paid or contributed to secure those rights.

BACKGROUND AND RATIONALE:

Under the current law the defendant is not allowed to introduce facts showing the plaintiff has already been compensated for loss. The primary basis offered by courts in support of the exclusion of evidence of benefits already received is possible misuse by the jury. The courts assumed that the jury would erroneously reduce the damage award by offsetting these benefits against the plaintiff's loss. Since juries appear to be quite sympathetic to the plight of injured parties, we feel this concern is outweighed by the need for full disclosure.

Evidence of what it cost to buy coverage would be allowed to balance the disclosure of what benefits the injured party had received.

In order to assure that courts would have as much information available to them as possible for use in making their decisions, the task force is supporting this change in the collateral source rule.

my P Collateral Law.

insurance Co's has no problems.

101

SB 422

SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 15, 1979
EXHIBIT I

3 pg exhibit

MILWAUKEE CRANE & EQUIPMENT CO.
10250 S.W. NORTH DAKOTA STREET • TIGARD, OREGON 97223 • 503-639-8891

FEBRUARY 6, 1979

BLANCHE SCHROEDER
PORTLAND CHAMBER OF COMMERCE
824 S.W. 5TH AVE.
PORTLAND, OREGON 97204

SUBJECT: PRODUCT LIABILITY

DEAR BLANCHE:

PLEASE SEE ENCLOSED COPY OF WHAT MY COMPANY HAS FACED IN SEARCH FOR LIABILITY INSURANCE CARRIERS.

BEAR IN MIND THAT MY LOSS RECORD IS ZERO. THE BEST QUOTE I WAS ABLE TO GET FROM A COMPANY NOT LISTED WAS 60,000 PREMIUM FOR 300,000 OF PROTECTION. OBVIOUSLY, I HAVE CHOSEN TO NOT CARRY ANY INSURANCE RATHER THAN PAY THAT SIZE OF PREMIUM.

I TRUST THAT YOU WILL BE ABLE TO PUT THIS LETTER TO GOOD USE.

YOURS VERY TRULY,

MILWAUKEE CRANE & EQUIPMENT CO.

ARTHUR PASCUZZI,
MANAGER

AP:WR

ENCLOSURE

200 Market Building, Portland, Oregon 97201 / Telephone 503 224-9700

May 5, 1977

a subsidiary of
ROLLINS BURDICK HUNTER

Milwaukee Crane & Equipment
10250 S. W. North Dakota
Tigard, Oregon 97223

Attention: Mr. Art Pascuzzi

Re: Products Liability Insurance

Dear Art:

Pursuant to our telephone conversation as of this date, the following is a list of insurance companies that would be willing to consider your business insurance program. However, they are unwilling to provide any products liability coverages.

Aetna Cravens, Dargan
Aetna Casualty & Surety
Atlantic Mutual Company
CNA
Canadian Indemnity Company
Chubb/Pacific Indemnity Company
Continental Insurance Company
Employers Insurance of Wausau
Fireman's Fund Insurance Company
Great American Insurance Company
Hartford Insurance Company
Industrial Indemnity Company
Insurance Company of North America
J. G. Newman Company
Kemper Insurance Company
Maryland Casualty Company
Rathbone, King & Seeley, Inc.
Sayre & Toso, Inc.
St. Paul Insurance Company
United Pacific Insurance Company
Unigard Insurance Company
United States Fidelity & Guaranty Company

Several months back, we attempted to market your exposure on a "products only" basis with several specialty products liability markets. At that time, the proposal presented to you was, in your particular case, extremely high.

We will continue to research our markets and hopefully come up with a feasible program. If I can be of any further assistance, please get in touch with me.

Best regards,

JOHN D. TEJADA

JDT/lb

SB 422

OREGON MUTUAL INSURANCE COMPANY

McMINNVILLE, OREGON

SENATE LEGISLATIVE COMMITTEE ON TRADE & ECONOMIC DEVELOPMENT
MARCH 15, 1979
EXHIBIT J
1 Pg exhibit

COMMERCIAL LINES BULLETIN NO. 7

JANUARY 29, 1979

TO: ALL OREGON AGENTS

FROM: COMMERCIAL LINES CASUALTY DEPARTMENT

RE: PRODUCT/COMPLETED OPERATIONS LIABILITY RATES

In recognition of the passage of House Bill 3039 (Product Liability), which went into effect January 1, 1978, Oregon Mutual is making a reduction in our Product/Completed Operations Liability rates.

As you are aware, our company writes, primarily, the average "Mainstreet" type of Product/Completed Operation Liability business, such as smaller retail or wholesale businesses, service type contractors and subcontractors, and this legislation should be a benefit to our Oregon policyholders.

We have had an opportunity to monitor the activity and trends of other companies and find that the market is more competitive and available than previously.

We are, therefore, reducing the specific Product/Completed Operations Liability rates through use of an additional 5% increase in rate deviation. A corresponding rate reduction will be given in applying the Guide "A" rates.

The effective date of this change will be February 1, 1979 on new business, and April 1, 1979 on anniversary or renewal transactions.

Ted H. Hansen
Casualty Manager

SB 422

SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 15, 1979
EXHIBIT K

2 pg exhibit

March 8, 1978

MEMORANDUM

TO: Chamber of Commerce Task Force on Tort Liability

FROM: Roland F. Banks, Jr.

The following is a beginning quote in the conclusion of a recent products case out of the Supreme Court of the State of California entitled Barker v. Lull Engineering Company, Inc., (Cal. 1978). CCH Products Liability Reporter, Section 8101:

> "The technological revolution has created a society that contains dangers to the individual never before contemplated. The individual must face the threat of life and limb not only from the car on the street or highway but from a massive array of hazardous mechanisms and products. The radical change from a comparative safe, largely agricultural, society to this industrial unsafe one has been reflected in the decisions that formerly tied liability to the fault of a tort feasor but now are more concerned with the safety of the individual who suffers the loss."

Needless to say, with that philosophy, it is not surprising that the California Supreme Court has now rendered a decision in the products field that goes far beyond its previous liberality, and, in spite of comments to the contrary, has effectively made the product's supplier an insurer against injury. In an earlier case of Cronin v. JBE Olson Corp., 8 Cal. 3d 121 (1972), the California Supreme Court became a pioneer and took the element of unreasonable danger out of the definition

of strict liability in a products case. This is what we are seeking to prevent by legislation with our Restatement 402A legislative proposal. In the recent Barker case, the court has now reiterated that position and gone on to define how the plaintiff need prove a defect in design in order to recover in such a case. The bottom line of this decision is that a product may be found defective in design if the plaintiff merely demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in the light of relevant factors, that, on balance, the benefits of the challenged design outweigh the risks of danger inherent in such design. The court specifically finds that the burden is upon the defendant to outweigh the benefits over the risks and holds that the plaintiff makes a prima facie case of liability by merely showing that he was injured from the product. The court also goes on to provide that the trier of fact is to judge the risk benefit issue on the basis of hindsight considerations.

OREGON AFL-CIO TESTIMONY

SB - 422

The Oregon AFL-CIO does not support Senate Bill 422.

SB 422 is in response to a nation-wide campaign to reduce product liability suits and the costs incurred by property-casualty insurers. The panic button has been pushed by the insurance companies and is being held down by the manufacturers. It seems that the working people of this nation are once again being victimized by the efforts of "big money" interest to insure higher profits.

A nation-wide advertisement campaign has been initiated to aid in the effort to reduce manufacturer responsibility for their products. One such add claims that over one million product liability cases were filed in 1976. Other adds depict judges and juries as irresponsible and reckless in awarding large damages in liability suits. Still others depict the attorney and his plaintiff gleefully "ripping off" the manufacturer and his insurance company. While these examples are extreme and represent but a few campaigns initiated by the Insurance Industry, they are indicitive of the position taken by the industry and their attempts to create a crisis situation.

National statistics on product liability cases filed in 1976 show that somewhere between 60 and 70,000 cases were filed, not one million. Very few of those cases filed ever received a court verdict. About 1 in 20

actually reach a verdict and 3 out of 4 of those verdicts favor the manufacturer or defendent. Mr. Chairman, members of the committee, are these figures indicitive of an, irresponsible jury and a crisis situation?

Costs of property-casualty insurance are high, over the past 4 years premium rates have increased almost 200%. The insurance industry is continueing to request rate increases, but they have yet to substantiate these requests. What is most interesting is that the property-casualty industry is currently experiencing a windfall in profit increases. In 1977 the industry posted arecord 21% return in net worth. This high rate of return is due to the increased premium rates over the past 4 years and a high return on investments. It would seem that the present "crisis" situation lacks sufficient evidence, it doesn't hold water.

Labor opposes SB 422 in its entirety, however we will focus our arguements on Sections 6 & 7 of the bill. The proposed amendments illiminate any third party suits by an injured worker who receives worker's compensation benefits.

An employer insured by a Workers Compensation Insurance carrier is relieved of liability to the extent of Oregon's Workers Compensation law. In turn, the employers subject workers are entitled to compensation for injury or illness resulting from employment. The employer pays premiums to insure his protection against liability and to benefit his or her injured workers. Manufacturers involved in third party liability actions have no basis for such an immunity. In cases where a manufacturer is

guilty of producing a defective product which causes injury to an employee, the manufacturer must accept the responsibility for his or her product. While it is true that the injured worker receives compensation for these on-the-job injuries, in cases where product liability is a party to the injury he does not receive double compensation. Oregon statutes require the recepient of monies awarded in liability actions to reimburse the agency who has paid his or her benefits.

Scheduled disability awards in this state are not adequate to fully compensate the injured worker for his or her loss. Deducted from the disability award are for example, time loss payments, medical fees, attorney fees that are incurred as a result of the accident. When the award is finally received by the worker a good portion of it is already gone. There is no consideration for loss of earning power, no provision for the workers loss of fringe benefits provided by the employer. These fringes often include medical and dental coverage for family members, legal aid services, paid vacations and "perks." An example of a perk is the discount on merchandise or service made available to most retail clerks by their employer or airline ticket discounts to flight attendents.

Because of a permanent disability an injured worker may never again reach a standard of living equal to that enjoyed before the injury. Benefits once made available by the employer are denied to the injured worker simply because he or she can no longer afford them. To take away the injured workers right to sue a third party for negligence is to deny that worker an avenue to obtain adequate compensation for his or her injuries.

ever occurred, that such a suit was ever filed, or that any settlement was ever made.

Until fairly recently, it was commonly believed that the number of product-liability claims had reached one million a year. Now there's evidence that the correct number is less than one tenth of that.

Most of the commentary on product liability has been directed to corporate executives, lawyers, and legislators. But in the last year or so, a few insurance companies have raised the issue in their advertising to the public. For instance, one ad for Crum & Forster Insurance Companies (above) is headlined, "The jury smiled when they made the award. They didn't know it was coming out of their own pockets." Another Crum & Forster ad repeats as fact the story about the man who tried to cut his hedge with a lawn mower. The same ad states, "In 1976 an estimated one million product liability claims were filed."

Aetna Life & Casualty has also tried the direct approach. One of its ads is headlined, "Too bad judges can't read this to a jury," referring to these words: "When awarding damages in liability cases, the jury is cautioned to be fair and to bear in mind that money does not grow on trees. It must be paid through insurance premiums from uninvolved parties, such as yourselves."

These ads are insulting and misleading. Insulting because they imply that judges and juries are irresponsible. Misleading because they imply that it's easy for a plaintiff to win a

ULVEN forging company inc.
rt. 1 box 114A
post office box 425
hubbard, oregon 97032
telephone (503) 651-2101
logging/marine forgings
custom forgings

SENATE LEGISLATIVE COMMITTEE ON
TRADE AND ECONOMIC DEVELOPMENT
March 22, 1979
EXHIBIT G (SB 422)
2 pg. exhibit

March 19, 1979

Blanche Schroeder
Portland Chamber of Commerce
824 S.W. Fifth Avenue
Portland, Oregon 97204

Dear Blanche:

The following is the product liability information I mentioned during the Senate Committee Hearing last week.

Since the Incorporation of Ulven Forging Company (Sept. 1, 1973) we have always carried product liability insurance, or at least until we were dropped by our regular carrier in early 1977. For a period of three to four months, 3 different insurance agents looked for coverage on our products and the only quotation we came up with was an overseas bid. Their premimum (based on our sales of $350,000) was in the neighborhood of $27,000 for $100,000 worth of coverage with a $10,000 deductable clause. Needless to say we did not take the policy. This proposal was issued knowing that we had never had any claims or payouts in the existence of Ulven Forging (the original company started in 1971 with one employee).

Some time later we were able to secure a limited products policy for $300,000 worth of coverage with a $10,000 deductable. The premimum is about $10,000 on $500,000 sales and the limitations are such that I still do not understand what coverage I have. I do know this company denied their liability on a claim brought forth for damages incurred from a failure of our product that was manufactured during the 3 months we were without coverage (what a coincidence that the only claim would be on a failure or product sold during that 3 months). The claimant has admitted overloading the product and with luck will drop the claim.

ULVEN
forging
company inc.

rt. 1 box 114A
post office box 425
hubbard, oregon 97032
telephone (503) 651-2101
logging/marine forgings
custom forgings

I have received an offer to sell Ulven Forging Co., Inc. to a company in Seattle, Washington. With the problems of securing good product liability insurance coverage and the worry of not being able to protect the assets we have built up over the last 8 years, it's a very serious consideration to forget the 20 people we employ and sell out.

Thank you, Blanche, and if I can be of further assistance in convincing anyone we "need Senate Bill 422, please let me know.

Sincerely,

Andrew H. Ulven

AHU:ms

cc: Edward McKinney
Senator Day
Senator Meeker

SENATE LEGISLATIVE COMMITTEE ON
TRADE AND ECONOMIC DEVELOPMENT
SUBCOMMITTEE ON SB 422
March 28, 1979
EXHIBIT A
2 pages

Arthur D. Esgate
24562 Paradise Drive
Junction City, Oregon 97448
March 16, 1979

Representative Nancie Fadeley
House of Representatives
State Capitol Building
Salem, Oregon 97310

Dear Representative Fadeley:

I have heard about Senate Bill 422, and I want to tell you that I think this law would be very unfair to people who have been hurt on the job. I have a wife and four children in school. Workers' compensation benefits are just barely adequate to survive and when someone else is at fault in causing a severe injury, I don't think it is fair to take away a workers' right to get full compensation from the party at fault.

I was injured on the job on September 9, 1976, when my left arm was caught in the unguarded gears of a new log loading machine. I essentially lost 100% use of my hand. I am enclosing a picture of it as it looks now.

As a result of this injury, I have been receiving workers' compensation benefits and retraining at Lane Community College since I will not be able to return to any type of work I previously did.

I am 36 years old and I worked as a log loader for over 10 years. As a result of my experience and abilities, I was able to earn $20,000 or more per year. I only receive $896.00 per month in workers' compensation benefits which is barely enough for me to support my family while I am being retrained. I am also going to have to have additional surgery this Sunday to remove another one of my fingers.

When I finally finish my junior college course in forestry and my surgeries, I will have to start a new career from the bottom. If I ever do return to my previous level of earnings, it will be years from now. I doubt if I'll ever catch up to where I would have been if I wasn't hurt considering what inflation is doing.

When my workers' compensation claim is closed, I will receive a percentage award for partial loss of my left

arm. The maximum award I would receive if my hand had been amputated would be $10,500 under the Oregon Law, so I will receive some percentage of that amount.

I have hired a lawyer to represent me in a claim against the manufacturer of the log loader. Hopefully I will be able to recover enough in that case to compensate me for all of the pain I have suffered and for the disfigurement of my arm. I also hope to recover a reasonable amount to compensate me for my present earnings loss, and the future earnings losses that I will have.

My case has already been filed so this law isn't going to affect me, but after what I have been through, I don't think it would be fair to take away these rights for people hurt in the future.

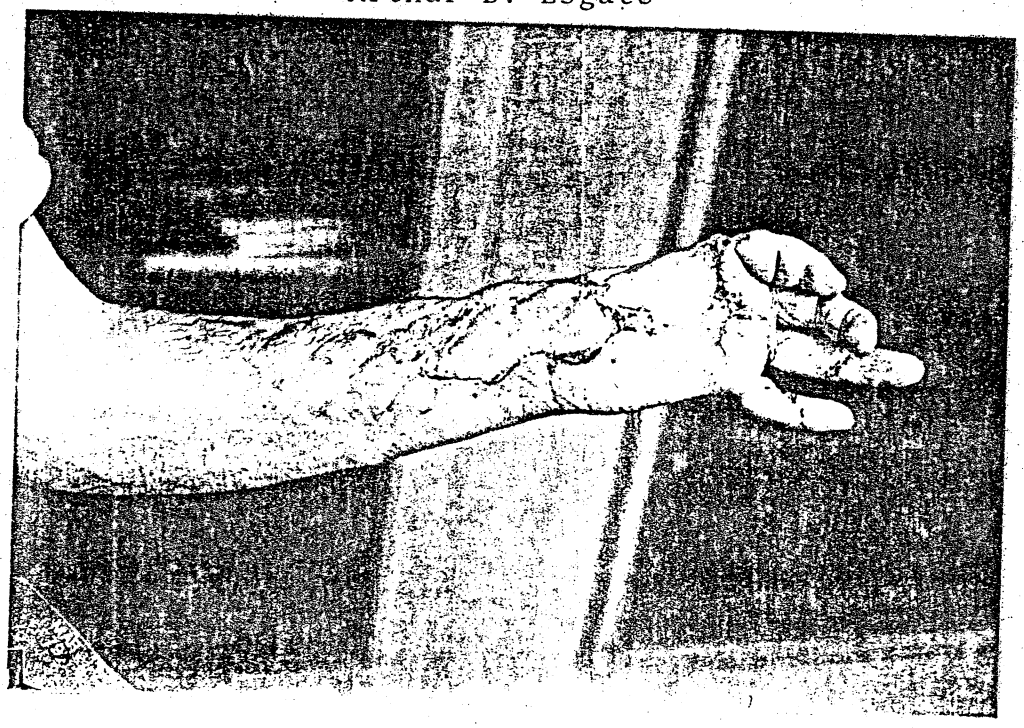
I am sending this letter to the representatives and senators from the Eugene and Springfield areas, but I dontt care if you show my letter and picture to anyone else who you think might be interested.

I hope you vote against this law because it is just not right.

Sincerely,

Arthur D. Esgate

Arthur D. Esgate



SB 422

SENATE
LEGISLATIVE COMMITTEE ON TRADE & ECONOMIC DEVELOPMENT
April 16, 1979
SB 422 4 page exhibit
EXHIBIT H

A BILL FOR AN ACT

Relating to actions in particular cases.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 and 3 of this Act are added to and made a part of ORS 30.900 to 30.915.

SECTION 2. (1) One who sells or leases any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm or damage to property caused by that condition, if:

(a) The seller or lessor is engaged in the business of selling such a product; and

(b) The product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold or leased.

(2) The rule stated in subsection (1) of this section shall apply, even though:

(a) The seller or lessor has exercised all possible care in the preparation and sale or lease of the product; and

(b) The user, consumer or injured party has not purchased or leased the product from or entered into any contractual relations with the seller or lessor.

(3) It is the intent of the Legislative Assembly that the rule stated in subsections (1) and (2) of this section shall be construed in accordance with the Restatement (Second) of Torts Sec. 402A, Comments a to n (1965). All references in

these comments to sale, sell, selling or seller shall be construed to include lease, leases, leasing and lessor.

(4) A product is not in a defective condition unreasonably dangerous to the user or consumer or to his property if it was designed, manufactured and marketed in accordance with applicable governmental codes or regulations in effect at that time.

(5) Nothing in this section shall be construed to limit the rights and liabilities of sellers and lessors under principles of common law negligence or under ORS chapter 72.

SECTION 3. In a product liability civil action, the following evidence is not admissible for any purpose:

(1) Evidence of any advancements or changes in the generally recognized or prevailing state of the art or the generally recognized or prevailing standards and practices in the industry, when such advancements or changes have been made or learned, became available, or were placed into use after the design or manufacture of the product causing injury, death or damage.

(2) Evidence of any changes made in the design, testing, inspecting, manufacture, warnings, labeling or instructions for use of the product causing injury, death or damage, or in or for any similar product, when the changes were made or placed into use after the design or manufacture of the product causing injury, death or damage.

SECTION 4. (1) Punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wilful and wanton disregard for the health, safety and welfare of others.

(2) During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover under subsection (1) of this section.

(3) Punitive damages, if any, shall be determined and awarded by the court based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant; and

(g) The total deterrent effect of other punishment imposed or likely to be imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

SECTION 5. In any civil action wherein compensatory damages for injury to the person are sought, evidence is admissible

concerning the nature and extent of any benefits or services received or to be received by the party seeking compensation which were occasioned by the injuries sustained as a result of the occurrence which is the subject matter of the action. The party seeking compensation in such action may also present evidence showing the amounts paid to secure the right to such benefits or services.

SECTION 6. This Act does not apply to an action or other proceeding commenced before the effective date of this Act.

KANSAS

healing arts or engaged in a postgraduate training program approved by the state board of healing arts, a person who holds a temporary permit to practice any branch of the healing arts, a licensed dentist, a licensed professional nurse, a licensed practical nurse, a licensed optometrist, a registered pharmacist, a licensed medical care facility, a health maintenance organization issued a certificate of authority by the commissioner of insurance, a registered podiatrist, a professional corporation organized pursuant to the professional corporation law of Kansas by persons who are authorized by such law to form such a corporation and who are health care providers as defined by this section, a registered physical therapist or a community mental health center or mental health clinic licensed by the secretary of social and rehabilitation services.

History: L. 1975, ch. 241, § 1; L. 1976, ch. 216, § 1; L. 1977, ch. 160, § 1; L. 1978, ch. 178, § 1; July 1.

Cross References to Related Sections:
Kansas healing arts act, see ch. 65, art. 28.

CASE ANNOTATIONS

1. Referred to in upholding constitutionality of malpractice insurance act (40-3401 et seq.). State, *ex rel.* Schneider v. Liggett, 223 K. 610, 611, 576 P.2d 221.

40-1127. Same; contents; copies of report provided to certain agencies of the state. The reports required by clause (1) of subsection (a) of K.S.A. 1978 Supp. 40-1126 shall contain: (a) The name, address, and specialty coverage of the insured; (b) the insured's policy number; (c) date of occurrence which created the claim; (d) date of suit if filed; (e) date and amount of judgment or settlement, if any; and the parties involved in the distributions of such judgment or settlement and the amount received by any such party; (f) date and reason for final disposition if no judgment or settlement; (g) a summary of the occurrence which created the claim; and (h) such other information as the commissioner may require. The commissioner of insurance shall provide a copy of each such report relating to health care providers to the board which licenses or registers such health care provider or to the secretary of health and environment in the case of a licensed medical care facility.

History: L. 1975, ch. 241, § 2; L. 1976, ch. 216, § 2; L. 1977, ch. 160, § 2; L. 1978, ch. 178, § 2; July 1.

40-1128. Same; disclosure. The commissioner of insurance shall make such reports available to the public in a manner which will not reveal the names of any person or facility involved.

History: L. 1975, ch. 241, § 3; L. 1976, ch. 216, § 3; April 20.

40-1129. Same; no liability. There shall be no liability on the part of and no cause of action of any nature shall arise against any insurer reporting hereunder or its agents or employees, or the commissioner of insurance or the commissioner's employees, for any action taken by them pursuant to this act.

History: L. 1975, ch. 241, § 4; July 1.

40-1130. Annual reports to commissioner by product liability insurers; contents. Every insurer authorized to transact business in this state and providing product liability insurance shall on the first day of January of each year or within sixty (60) days thereafter file with the commissioner of insurance a report containing the information hereinafter specified. Such report shall be made upon forms provided by the commissioner of insurance and shall request the following information:

(a) The name of the insurance company.

(b) The name of all other companies associated with the company submitting the report, as either a holding company, parent, wholly owned subsidiary, division, or through interlocking directorates.

(c) The various lines of insurance a company offers.

(d) The states in which the company has been admitted for product liability insurance.

(e) The total premium dollar amount collected for all lines of insurance in Kansas and in all states in each of the six years next preceding the initial report or in the year next preceding the filing of each annual report thereafter.

(f) The dollar amount collected in product liability premiums in Kansas and in all states beginning with calendar year 1977.

(g) The amount in dollars of product liability premiums for primary coverage and for excess coverage in Kansas and in all states.

(h) The amounts shown in answer to subsection (f) which include premises and operations insurance or any other insurance

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(i) Each company
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vered as part of a package which cannot be considered exclusively product liability insurance and the amounts which are non-product liability insurance. Such amounts shall be listed separately for amounts relating to experience in all states and amounts relating to experience in Kansas only.

(i) Each company shall report to the commissioner of insurance for the period July 1, 1977, to December 31, 1977, at the time of filing its annual report for the year 1977 and for the year next preceding the filing of each annual report thereafter any claim or action for damages for personal injury, death or property damage claimed to have been by reason of a defect in such insured's product under a product liability policy, if the claim resulted in: (1) A final judgment in any amount; (2) a settlement in any amount; or (3) a final disposition not resulting in payment on behalf of the insured. Every insurer authorized to transact business in this state shall be subject to the provisions of this section in regard to claims adjudicated, settled or disposition made pursuant to the laws of this state.

(j) The reports required by subsection (i) shall contain: (1) The name and address of the insured or the insurer's claim number or file number; (2) type of product; (3) rating classification code of products liability coverage; (4) the date of occurrence which created the claim, including the state or other jurisdiction under whose jurisdiction the claim was adjudicated, settled, or disposition made; (5) date of suit if filed; (6) date and amount of judgment or settlement, if any, and the number of parties involved in the distributions of such judgment or settlement and the amount received by each; (7) date and reason for final disposition if no judgment or settlement; (8) a summary of the occurrence which created the claim; (9) total number of claims; (10) total claims closed without payment; (11) total claims closed with payment; (12) total amount of payments; (13) total number of suits filed; (14) total number of verdicts or judgments for defendants; (15) total number of verdicts or judgments for plaintiffs; (16) total amounts for plaintiffs; and (17) such other information as the commissioner may require.

(k) The commissioner of insurance shall make reports required hereunder available to the public in a manner which will not reveal the names of any person, manufacturer or seller involved.

(l) There shall be no liability on the part of and no cause of action of any nature shall arise against any insurer reporting hereunder or its agents or employees, or the commissioner of insurance or the commissioner's employees, for any action taken by them pursuant to this act.

(m) Whether or not the company sets reserves for product liability claims filed.

(n) Whether or not the company sets reserves for product liability claims for losses which have been incurred but not reported (IBNR).

(o) All reserves established in connection with the company's product liability line.

(p) How dollars reserved are treated in each of the categories listed in subsections (m), (n), and (o) for federal income tax purposes.

(q) With respect to amounts paid in claims for the year next preceding the filing of each annual report, each company shall provide the following information: (A) Total amounts reserved with respect to those claims; (B) the year in which the reserves were set; and (C) the amounts set in each year.

(r) The value of the securities held in your investment portfolio as of December 31 of the year next preceding the filing of each annual report. Such information should be submitted in the same manner as provided by K.S.A. 40-225.

(s) Any published annual reports to shareholders or policyholders shall be submitted with the report.

History: L. 1977, ch. 156, § 1; L. 1978, ch. 179, § 1; March 1.

40-1131. Definitions. As used in K.S.A. 1978 Supp. 40-1130, "product liability insurance" or "product liability policy" means (1) any policy of insurance insuring only the insured's legal obligation arising from the product liability exposure of the insured; (2) any other policy of liability insurance in which the premium computation includes a specific premium charge for product liability exposures of the insured; and (3) any other insurance policy designated by the commissioner of insurance as providing product liability insurance.

History: L. 1978, ch. 179, § 2; March 1.

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(b) Such additional special deposits shall be deposited with the commissioner in trust for the protection of all policyholders of the insurer and all others entitled to the proceeds of its policies except in the case of foreign or alien insurers, in which case such additional special deposits shall be deposited with the commissioner in trust for the protection of all of the insurer's policy holders in Georgia and all others in Georgia entitled to the proceeds of its policies.

(c) The deposits provided for under this section shall be administered by the commissioner in accordance with the provisions of Chapter 56-11.

(Acts 1977, p. 878, eff. March 23, 1977.)

56-319 Reports of insurer's business affairs and operations; forms; verification; publication

ANNOTATIONS

Cited. Op. Atty. Gen. 76-89.

56-319.1 Insurers providing product liability insurance or other lines of insurance in this State; reports required

On or before March 1 of each year commencing in 1979 or at such other dates as the commissioner may require, each insurer authorized to transact product liability insurance or to provide excess insurance above self-insured retention to one or more manufacturers, wholesalers, distributors or retailers or to transact other lines of insurance in this State shall provide the commissioner with such reports of its affairs and operations regarding insurance covering insured persons, resident or located in this State, for the last preceding calendar year ending on December 31 or for other periods of time as the commissioner may require. These reports shall be made in such form and shall contain such information as the commissioner may by regulation or by order from time to time prescribe which as to product liability insurers may include but shall not be required to be limited to the following information:

(1) The total number of product liability claims, broken down by:

(A) The type or category of claims; and

(B) Whether the claims were:

(i) Reported during a prior period and closed during the reporting period.

(ii) Reported and closed during the reporting period.

(iii) Reported and not closed during the reporting period.

(2) The total amount paid in settlement or discharge of the claims for each type or category of claims.

(3) The total amount of reserves available to pay those product liability claims which were reported for the last preceding year: Provided however that the information on reserves shall be required to be maintained by the Insurance Commissioner in confidence except that summaries of the combined totals of such reserves shall be subject to inspection by members of the General Assembly upon request.

(4) The total amount of premiums received from insured persons, resident or located in this State, which is attributable to product liability

insurance and which must be classified separately with respect to manufacturers, wholesalers or distributors, and retailers.

(5) The total number of insured persons, resident or located in this State, for which such product liability insurance has been provided which must be classified separately with respect to manufacturers, wholesalers or distributors, and retailers.

(6) The total number of insured persons, resident or located in this State, whose product liability insurance coverage the insurer cancelled or refused to renew and the reasons therefor which must be classified separately with respect to manufacturers, wholesalers or distributors, and retailers.

(7) The total number of insured persons, resident or located in this State, who failed to renew their product liability insurance policies during the reporting period which information must be classified separately with respect to manufacturers, wholesalers or distributors, and retailers.

(Acts 1978, p. 2023, eff. April 5, 1978.)

56-322 Lending institutions and bank holding companies prohibited from transacting insurance

ANNOTATIONS

Exemption

Although section prohibits all lending institutions in sizable Georgia communities from selling insurance (other than credit life, accident, or health insurance), section exempts lending institutions through grandfather clause. 535 F. 2d 224.

56-323 Farm Credit System institutions prohibited from transacting insurance

(a) No institution included in the Farm Credit System, as set forth and identified in 12 U. S. C. A., Section 2002 (Pub. Law 92-181, Sec. 1.2, Dec. 10, 1971, 85 Stat. 583) or any subsidiary or affiliate thereof doing business in this State, nor any officer or employee of any institution included in the Farm Credit System, or any subsidiary or affiliate thereof, may directly or indirectly be licensed to sell or solicit any type of insurance, except the following: (1) Credit life and accident and health in an amount appropriate to insure repayment of the loan; (2) Crop hail, hail or wind damage to crops; (3) Insurance against loss of any collateral securing a loan extended by an affiliate bank or association of the Federal Credit System for the full value of such collateral. The right to place collateral insurance, however, shall continue only so long as the underlying loan remains outstanding, or until the expiration of the policy, but in no event longer than 12 months from the last day the loan was outstanding. The purposes of this section "collateral securing a loan" shall include only that property which is subject to the formal security interest granted in connection with the secured loan and duly filed and recorded in the county where the debtor resides. The purposes of this section "collateral securing a loan" shall not include any property acquired by the debtor after the date the underlying loan was made unless the secured party shall make an advance to the debtor, or otherwise given new value which is to be secured in whole or in part by after-acquired property.

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CHAPTER 56

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374.405. Reports of premiums and loss data required, when—director may review

1. The director shall establish statistical bases for the reporting of premium and loss data under policies of homeowners' insurance, dwelling-owners' insurance, renters' or tenants' insurance, or residential fire insurance.

2. Each insurer shall annually report to the director all premium and loss data under policies of homeowners' insurance, dwelling-owners' insurance, renters' or tenants' insurance, or residential fire insurance as the director may require.

3. The director shall have the authority to review and verify the accuracy of the data reported.

Laws 1978, p. ——, H.B. No. 1302, § 2.

374.410. Director to be notified of changes in town grading schedules—may set aside, when

Whenever any insurer, group, association or other organization of insurers, or rating organization shall change any town grading schedule used in connection with the development of rates under policies of homeowners' insurance, dwelling-owners' insurance, renters' or tenants' insurance, or residential fire insurance written upon property located within this state, such change shall be filed with the director of the division of insurance. The director of the division of insurance may set aside any change in town grading schedules that he finds is not supported by substantial evidence and credible data acquired under sections 374.400 to 374.410.

Laws 1978, p. ——, H.B. No. 1302, § 3.

374.415. Product liability insurance reports required—when—contents—certain information not to be disclosed

1. As used in sections 374.400 to 374.425 "product liability insurance" or "product liability policy" means:

(1) Any policy of insurance insuring only the insured's legal obligation arising from the product liability exposure of the insured;

(2) Any other policy of liability insurance in which the premium computation includes a specific premium charge for product liability exposures of the insured; and

(3) Any other insurance policy designated by the commissioner of insurance as providing product liability insurance.

2. Every insurer authorized to transact business in this state and providing product liability insurance shall on the first day of January of each year in which said insurer actually provides product liability insurance in Missouri or within sixty days thereafter file with the director of insurance a report containing the information hereinafter specified; provided, however, insurers are not required to report product liability information pursuant to sections 374.400 to 374.425 for business incidental to the operation of affiliated companies or organizations. Such report shall be made upon forms provided by the director of insurance and shall request the following information:

(1) The name of the insurance company;

(2) The names of all other companies associated with the company submitting the report, as either a holding company, parent, wholly owned subsidiary, division, or through interlocking directorates;

(3) All the lines of insurance a company offers in all states;

(4) The states in which the company has been admitted for product liability insurance;

(5) The total premium dollar amount collected for all lines of insurance in Missouri and in all states in each of the five calendar years next

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preceding the initial report or in the year next preceding the filing of each annual report thereafter;

(6) The dollar amount collected each year in product liability premiums in Missouri and in all states beginning with calendar year 1978;

(7) The amount in dollars of product liability premiums for primary coverage and for excess coverage in Missouri and in all states;

(8) The amounts shown in answer to subdivision (6) which include premises and operations insurance or any other insurance delivered as part of a package which cannot be considered exclusively product liability insurance and the amounts which are nonproduct liability insurance. Such amounts shall be listed separately for amounts relating to experience in all states and amount relating to experience in Missouri only;

(9) Whether or not the company sets reserves for product liability claims filed;

(10) Whether or not the company sets reserves for product liability claims for losses which have been incurred but not reported;

(11) All reserves established in connection with the company's product liability line;

(12) How dollars reserved are treated in each of the categories listed in subdivisions (9), (10), and (11) for federal income tax purposes;

(13) The value of the securities held in the company's investment portfolio as of December thirty-first of the year next preceding the filing of each annual report.

3. In addition, each company shall report to the director of insurance for the year next preceding the filing of each annual report, beginning with the annual report for 1978, any claim or action for damages for personal injury, death or property damage claimed to have been by reason of a defect in such insured's product, if the claim resulted in:

(1) A final judgment in any amount;

(2) A settlement in any amount; or

(3) A final disposition not resulting in payment on behalf of the insured.

Every insurer authorized to transact business in this state shall be subject to the provisions of this section in regard to claims against policies issued to Missouri insureds, regardless of the jurisdiction under which these claims were adjudicated, settled or otherwise disposed of. Every insurer authorized to transact business in this state shall be subject to the provisions of this section in regard to claims adjudicated, settled or disposition made pursuant to the laws of this state regardless of the domicile of the insured.

4. The reports required by subsection 3 shall contain:

(1) The city and state of the insured;

(2) Type of product;

(3) Rating classification code of product liability coverage;

(4) Date of occurrence which created the claim, including the state or other jurisdiction under whose jurisdiction the claim was adjudicated, settled, or disposition made;

(5) Date of suit if filed;

(6) Date and amount of judgment or settlement, if any, and the parties involved in the distributions of such judgment or settlement and the amount received by any such party;

(7) Date and reason for final disposition if no judgment or settlement;

(8) A summary of the occurrence which created the claim;

(9) Total number of claims;

(10) Total claims closed without payment;

(11) Total claims closed with payment;

(12) Total amount of payments;

(13) Total number of suits filed;

(14) Total number of verdicts or judgments for defendants;

(15) Total number of verdicts or judgments for plaintiffs;
(16) Total amount for plaintiffs; and
(17) Such other information as the director may require.

5. With respect to amounts paid in claims for the year next preceding the filing of each annual report, each company shall provide the following information:

(a) Total amounts reserved with respect to those claims;
(b) The year in which the reserves were set; and
(c) The amounts set in each year.

6. The director of insurance shall make reports required hereunder available to the public in a manner which will not reveal the names of any person, manufacturer or seller involved.

Laws 1978, p. ——, H.B. No. 1302, § 4.

374.420. Insurers not liable because of compliance

There shall be no liability on the part of and no cause of action of any nature shall arise against any insurer reporting hereunder or its agents or employees, or the director of insurance or [1] the director's employees, for any action taken by them pursuant to sections 374.400 to 374.425.

Laws 1978, p. ——, H.B. No. 1302, § 5.

[1] Word "of" appears in original rolls.

374.425. Time for compliance may be waived or extended

The director may waive or extend time of compliance for reporting requirements under sections 374.400 to 374.425 for any insurer upon showing that such requirements would cause the insurer undue expense or that an unreasonable amount of time would be required to comply with the requirements.

Laws 1978, p. ——, H.B. No. 1302, § 3.

CHAPTER 375. PROVISIONS APPLICABLE TO ALL INSURANCE COMPANIES

POLICY CANCELLATION [NEW]

GENERALLY

UNFAIR PRACTICES AND FRAUDS

MINNESOTA

CHAPTER 72A. PROHIBITIONS; PENALTIES; REGULATION OF TRADE PRACTICES; UNAUTHORIZED INSURERS FALSE ADVERTISING PROCESS ACT

PROHIBITIONS AND PENALTIES IN GENERAL

72A.05 Failure to make report or comply with law

Examination of insurers, penalties, see § 60.031.

72A.06 Repealed by Laws 1977, c. 316, § 3, eff. July 1, 1977

See, now § 72A.061.

72A.061 Mandatory filings; failure to comply; penalties

Subdivision 1. Annual statements. Any insurance company licensed to do business in this state, including fraternals, reciprocals and township mutuals, which neglects to file its annual statement in the form prescribed and within the time specified by law shall be subject to a penalty of $25 for each day in default. If, at the end of 90 days, the default has not been corrected, the company shall be given ten days in which to show cause to the commissioner why its license should not be suspended. If the company has not made the requisite showing within the ten day period, the license and authority of the company may, at the discretion of the commissioner, be suspended during the time the company is in default.

Any insurance company, including fraternals, reciprocals, and township mutuals, wilfully making a false annual or other required statement shall pay a penalty to the state not to exceed $5,000. Either or both of the monetary penalties imposed by this subdivision may be recovered in a civil action brought by and in the name of the state.

Subd. 2. Articles of incorporation; bylaws. Any insurance company licensed to do business in this state, including fraternals and township mutuals, which neglects to file amended bylaws or related amendments within 30 days after date of approval by shareholders or members of the company shall be subject to a penalty of $25 for each day in default.

Any insurance company licensed to do business in this state, including fraternals and township mutuals, which neglects to file amended articles of incorporation or related amendments within 30 days after date of approval by shareholders or members of the company shall be subject to a penalty of $25 for each day in default, provided that foreign insurers shall be allowed 60 days in which to file.

If after 90 days the filings required under this subdivision are still in default, the company shall be given ten days in which to show cause why its license should not be suspended.

Subd. 3. Other filings. Any insurance company licensed to do business in this state, including fraternals, reciprocals, and township mutuals, which neglects to comply with any other mandatory filing in the form prescribed and within the time specified by law or as specified on the document shall be subject to a penalty of $25 for each day in default. If after 90 days a default has not been corrected, the company shall be given ten days in which to show cause why its license should not be suspended.

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Subd. 4. Suspension, discretionary powers. Any company which writes new business in this state, including fraternals, reciprocals and township mutuals, while its license is suspended and after it has been notified by the commissioner by a notice mailed to the home office of the company that its license has been suspended shall pay to the state the sum of $25 for each contract of insurance entered into by it after being notified of its license suspension. The notification shall be mailed by registered letter and deemed to have been received by the company at its home office in the usual course of the mails.

Subd. 5. Extensions. The commissioner may grant an extension of any filing deadline or requirement specified by this section, if he receives, not less than ten days before the date of default, satisfactory evidence of imminent hardship to the company.

Subd. 6. Penalties; deposit to general fund. All penalties recovered pursuant to this section shall be paid into the general fund.

Added by Laws 1977, c. 316, § 1, eff. July 1, 1977.

Transitional provisions: Laws 1977, c. 316, § 2, as amended by Laws 1978, c. 644, § 1, provides:

"Subdivision 1. On or before March 15 of each year each insurer licensed to write general liability insurance and each surplus line insurer shall file with the commissioner of insurance a report which shall contain, but need not be limited to, the following information for product liability policies written in Minnesota for the one year period ending December 31 of the previous year: the total number of product liability policies issued, the amount of product liability coverage issued, the total number of product liability claims, broken down by the type or category of claims, the total amount paid in settlement or discharge of the claims for each type or category of claims, and the total amount paid for attorney's fees, court costs and any other litigation-related expenses for each type or category of claims.

"Subd. 2. On or before March 15 of each year each insurer licensed to write general liability insurance and each surplus line insurer shall file with the commissioner of insurance a report containing the following information for the one year period ending December 31 of the previous year:

"(a) The total amount of premiums received from policies written in Minnesota, which are attributable to product liability insurance whether written as a separate policy or as part of a package policy covering other risks of loss;

"(b) The total number of persons, resident or located in Minnesota, for which the insurer provided products liability insurance; and

"(c) The total number of persons, resident or located in Minnesota, whose product liability insurance coverage the insurer cancelled or refused to renew and the reasons therefor.

"Any manufacturer, seller or distributor which is uninsured or wholly self-insured or which has only excess insurance coverage for claims exceeding $50,000 or for the total of all claims exceeding $50,000 shall be considered to be an insurer for the purposes of this section and shall comply with the reporting requirements of this section, and any data reported by a self-insured person pursuant to this section may be reported by the commissioner only in the form of summary data, as defined in Minnesota Statutes, Section 15.162, Subdivision 9.

"Subd. 3. Any insurance company required to file reports under this section which fails to file a report, containing the data and within the time prescribed by this section, shall be subject to a penalty of $10 for each day in default."

Laws 1978, c. 644, § 2, provides:

"This act is effective the day following final enactment and shall apply only to reports required to be filed after March 15, 1978."

Library References
Insurance ⇐4.2.
C.J.S. Insurance § 57.

72A.062 Mandatory filings

Subdivision 1. On or before March 15 of each year, each insurer licensed to write general liability insurance and each surplus line insurer, providing insurance covering liabilities under section 340.95, or excess insurance above self-insured retention to one or more persons licensed to sell at retail intoxicating liquor in this state, shall file with the commissioner of insurance a report of the liability claims under section 340.95, made against its policies written in Minnesota, which have been closed during the one year period ending December 31 of the previous year, provided, however, that closings occurring prior to July 1, 1978, need not be reported. The report shall contain, but need not be limited to, the following information.

(a) The total number of liability claims under section 340.95, broken down by the type or category of claims;

(b) The total amount paid in settlement or discharge of the claims for each type or category of claims; and

(c) The total amount paid for attorney's fees, court costs and any other litigation-related expenses for each type or category of claims.

For purposes of this section, "category of claims" shall include (a) whether the claim was based on an alleged sale to an intoxicated person, (b) whether

EXHIBIT C
SENATE LEGISLATIVE COMMITTEE ON
TRADE AND ECONOMIC DEVELOPMENT
MAY 24, 1979
SB 422 I page exhibit

Portland
CHAMBER OF COMMERCE
824 S.W. FIFTH AVE., PORTLAND, OREGON 97204 U.S.A. / AREA CODE (503) 228-9411

May 21, 1979

STATUS OF SB 422

In sub-committee meetings with the trial attorneys we agreed to do the following:

1. To help draft and support a bill to require reporting by insurance companies of all product liability data;

2. To amend Section 2 by taking out comment "n" pertaining to assumption of risk and deleting ss 4 which would have allowed, as a defense, conformity to government standards;

3. To amend Section 3 by restricting the language to date of "first purchase or consumption." (Any evidence of changes made to a product after it was sold would not be admissable);

4. To amend Section 4 by returning to the jury the decision on punitive damages instead of "by the court" and to limit consideration of the deterrent effect of other punishment to that imposed not "or likely to be imposed."

5. To delete entirely Section 5 pertaining to collateral source.

We support these amendments to SB 422 and feel that these changes will improve chances of its' passage.

Blanche Schroeder

EXHIBIT F
Senate Leg. Committee on Trade & Economic Development
MAY 21, 1979
SB 422 I page exhibit

AMENDMENTS TO A-ENGROSSED

SB 422

As a result of the meeting between Mike Shinn and Dick Bodyfelt, the following amendments to SB 422 are suggested:

1. Section 2. Subsection (3) - change letter "n" in line 17 to "m." Delete Subsection (4) and make Subsection (5) into (4).

2. Section 3. Change Subsections (1) and (2) as follows:

(1) Evidence of any advancements or changes in the generally recognized or prevailing state of the art or the generally recognized or prevailing standards and practices in the industry, when such advancements or changes have been made or learned, became available, or were placed into use after (the design or manufacture of) the product causing injury, death or damage.) was first purchased for use or consumption.

(2) Evidence of any changes made in the design, testing, inspection, manufacture, warnings, labels or instructions for use of the product causing injury, death or damage, or in or for any similar product, when the changes were made or placed into use after (the design or manufacture of) the product (causing injury, death or damage.) was first purchased for use or consumption.

3. Section 4. Delete the words "by the court" in line 15 of Subsection (3). Delete the words "or likely to be imposed" in Subsection (3)(g).

4. Section 5. Delete

0194 In response to a roll call vote, the CHAIR declared the motion passed. Voting aye: Bugas, Cohen, Frohnmayer, Gardner, Lombard, Mason, Smith (reluctantly). Excused: Richards, Rutherford.

HB 3083 - Relating to product liability actions

0197 CHAIRMAN GARDNER stated that HB 3083 and SB 422B deal with the same subject. It was his intention to deal with one vehicle, SB 422B.

0198 CHAIRMAN GARDNER moved to table HB 3083.

0205 In response to a roll call vote, the CHAIR declared the motion passed. Voting aye: Bugas, Cohen, Frohnmayer, Gardner, Lombard, Mason, Smith. Excused: Richards, Rutherford.

0206 CHAIRMAN GARDNER closed the work session and opened the public hearing on SB 422B.

SB 422B - Relating to actions in particular cases

0214 ED McKINNEY, Chairman of the Portland Chamber of Commerce Liability Task Force, spoke in support of SB 422B.

The increasing unpredictability of the exposure and risk of those who need liability insurance due to the liberality of court rulings in jury awards has caused insurers to react with major increases in liability policies and in some instances policy cancellation. These increases have put many into the position of dropping their insurance, thus jeopardizing the availability of compensation if someone were injured. Those who must insure pass the cost on to their consumers. Those who cannot pass on the cost factor are going out of business or reducing their work forces.

The fear of suit has acted as a deterrent to manufacturing of high risk but potentially beneficial products, to improving the safety of products and innovative product evelopment. Improving the level of certainty as to how Oregon product liability law will deal with claims for injuries caused by allegedly defective products, should in time promote greater availability and affordability in product liability insurance and stability in rates and premiums.

0238 JERRY BANKS, representing the Portland Chamber of Commerce, stated this is the second session the Portland Chamber of Commerce has made efforts to reform the product liability situation in Oregon. At the last session of the legislature, the Chamber and certain industry groups sponsored a house bill for product liability reform. Unfortunately, the bill was a product of a national organization of wholesalers and distributors and was not really tailored for the Oregon situation. As a result, it had to be stripped down dramatically in the process of work sessions before the committee. The total picture was not addressed. The only things that survived were some changes to the statute of limitations to be of some assistance to the retail industry and a couple of evidentiary rules.

During the hearings before this committee last session, there was some suggestion by the Chamber that the legislature should give consideration to adopting the strict liability rule set forth in the American Law

Institute restatement of Torts number 2, section 402(a). Because it was not a part of the original bill and because of time factors, that really never got off the ground. When the bill got over to the Senate, the same consideration was given and there was some very serious talk about it. It was so late in the session, there was a fear that if the bill came back to the House, there would be some difficulty with it.

After the last session, the Chamber of Commerce decided to continue its task force of liaibility tort reform and to study whether or not there should be additional legislation in the area of products liability reform and also to study whether there should be additional legislation in the area of tort reform in general.

The task force was made up of business, insurance industry, certain members of the plaintiff bar and members of the defense bar. It was a fairly representative group of the people who were concerned about the problem in the last session.

The task force started meeting in July of 1977 and it met at least monthly thereafter until the first part of this year.

A good deal of study was given to the various problems that the committee heard in the last session. The question of whether there were any real statistics to show why the insurance companies reacted to the products liability situation the way they did. The task force found that there really weren't any such statistics.

The task force tried to see if it could come to some conclusion as to just exactly what was the reason for this severe reaction. The premiums had just gone out of sight. The studies found that during the early 1960's there was an effort in the courts around the country to make it easier for the injured consumer to reach the manufacturer rather than just the retailer, who probably wasn't the person at fault in the first place. A series of court made doctrines arose in various states which made it easier for a consumer who was injured to reach the manufacturer. The traditional negligence rules just didn't seem to cover the sitution and didn't seem to give the consumer what he neeeded. Some courts adopted what was called implied warranties that were outside the sales act or the commercial code. California then came along with strict liability in torts.

Professor Prosser and a number of other people who were working for the American Law Institute began a study to determine if there wasn't some way to put all of these thoughts together and establish a rule that would be a rule that consumers could use, that would not involve negligence, and that would allow an action against manufacturers. That was eventually adopted in 1964 by the American Law Institute and that is what is called today the Restatement of Torts Section 402(A).

This, in its original form, was a product of the liberal end of the bar and plaintiffs' attorneys. The argument against it was basically the defense bar. The Supreme Court adopted this rule as the law in Oregon in 1967 and it specifically stated in its opinion that it was adopting that as the law of strict liability in Oregon.

Almost every other state adopted this at one time or another by court made decision. The situation seemed to be very stable. Insurance premiums did

not go out of sight as was predicted when the rule went into effect. Plaintiffs were able to come into court and get to the manufacturers. All one has to do is look at the Supreme Court decisions from the various states to see how often a product liability case was even getting as far as the appellate court.

What seemed to happen according to what the task force saw was that for some reason in the mid-1970's, the insurance companies got spooked. The task force looked to see what the reason was. If found that some of the courts in this country were not satisfied with that rule anymore and they were beginning to erode it. California was the first to do this. In the restatement rules, it required in order to recover against a manufacturer that it be proved the product was defective. Of course if it was a defect in manufacture, that wasn't any problem and usually there are not cases like this because if a manufacturer puts out a product that is not the way he intended it to be, he is usually very amendable to settlement. Most of the cases involved situations where the claim was against the design of the product so it affects the whole product line, not just one particular product. The restatement rules provided that it must be shown that whatever the defective design was being complained about was "unreasonably dangerous". Under the restatement rules, that meant that it was dangerous beyond the extent to which the consumer could appreciate it. In other words, the consumer was given the benefit of saying that he did not appreciate that danger and therefore it is unreasonably dangerous. The manufacturer could not put out a product that had a condition in it that would be dangerous to the normal consumer if the normal consumer would not appreciate that danger unless there was enough utility in the product that it was allowed to be produced with appropriate warnings and directions so that the consumer who wouldn't normally appreciate this danger appreciated it because of the warning and directions. Then, of course, there was the question of whether the warnings were adequate.

California abandoned the rule as to unreasonably dangerous. No longer did a plaintiff in California have to prove that element.

Washington and a number of other states followed that. Arizonia, New Mexico and a few others refused to follow it.

All of a sudden this predictable, calm sea of product liability that was servicing both sides was no longer the calm sea that the insurance industry had been used to and the insurance industry reacted. The task force could find no other reason except the beginning of an erosion away from what had been a very predictable, useful and easy tool for everybody to work with.

The Oregon Supreme Court eroded away the rules when it refused to accept the consumer oriented rule anymore. Instead, it substituted what is called a seller oriented rule for the definition of unreasonably dangerous. The Supreme Court stated that it is not what the consumer expcets that is important; it is what a reasonably prudent manufacturer would do, knowing the potential danger. Some people think that is a much more liberal rule. Some consumers think it is a much more restrictive rule, and not the rule that they would like.

Some states looked at that and followed Oregon. As recently as this year, the State of Washington and Idaho have refused to follow that rule because they think it is more important that the rule be consumer oriented rather than seller oriented.

In 1978 in January, California went to the ultimate step and in effect abolished the rule of the Restatement altogether and established a rule which now provides that if a person is injured by a design feature of the product, then the burden is on the manufacturer to prove that the utility of his design outweighs the injury. If a person is injured by cutting his finger, he is injured by a design feature of the knife. A jury question is then presented on the injury and the manufacturer of the knife must come forward in California and prove that the utility of the sharpness of the knife outweighed the injury to the person's finger. Of course he is going to win in that battle because most everyone is going to say that the utility of the sharp knife outweighs the injury of the cut finger. If it is carried beyond that situation and the injuries get severe, such as an arm lost by a forklift truck, and the manufacturer has to prove that the utility and the benefit of that forklift truch outweigh the lost of two arms of a man who made the error of putting his arms through the mast of the forklift and then hitting the control lever, it is an entirely different situation. When insurance companies are talked about in wanting to insure against that sort of a risk, one can see why the reaction exists.

The task force decided after many months of consideration that the Restatement of Torts would be a good piece of legislation for the State of Oregon to pass as the rule and would be worth putting into a bill. The Restatement of Torst works so well that it should be the law in this state. It will be a law that the insurance industry will feel comfortable with.

Some people can say that there is no need to worry about California because the Oregon Supreme Court has already been asked whether it would follow this California decision. The Oregon Supreme Court recently in denying a rehearing in Wilson v. Pfifer Aircraft refused to follow the California extention.

It is important that this be adopted by law because in an even more recent Oregon Supreme Court case in the footnote, the Supreme Court made the statement when talking about whether the Restatement of 402(A) was still the law in this state that it should be remembered that 40](A) is not a statute and that as an attempted restatement of the common law it is binding on the court only so long and in such particulars as the court may find appropriate.

He suggested, as a practicing lawyer, that it is extremely difficult to advise the client, and particularly one involved in manufacturing, concerning what to expect of the law in Oregon with a statement of that type. There was no difficulty in advising clients what the state of the law was when the Restatement of Torts was followed consistently by the state.

The bill before the committee is not unique. This bill was passed in South Carolina about three or four years ago, including all of the comments to the Restatement. It is not unique for legislatures to attempt to adopt the Restatement rule in the statutes. At least four or five have already adopted statutes that require the courts to consider "unreasonably dangerous" as a part of the Restatement rule.

This bill includes more than just the Restatement rule. The Restatement rule is section 2. It also includes two evidentiary rules in section 3 which some people talked of as state of the art rules. Basically it provides that a product cannot be judged by hindsight. The reason for section 3 is that the Supreme Court has said that in negligence actions the plaintiff must prove more culpable conduct. In the strict liability, the plaintiff does no need to go that far, negligence does not have to be proved. It would seem that if strict liability is going to be the liability that requires less proof of fault that it should be the more restrictive liability. The guidelines ought to be stronger, rather than weaker. It turns out that in this state that in the negligence product liability actions, none of this evidence can be introduced. In a strict liability action, it can. It seems that rather than to try to make strict liability any easier for the defendants than it was, that at the very least they ought to be the same. If this kind of evidence cannot be produced to prove a manufacturer more culpable or negligent, the evidence should not be able to be produced to prove him less culpable or strictly liable. That is the sole purpose for section 3.

Other areas of tort reform that were brought to the task force's attention were also reviewed. When the bill was originally introduced in the Senate, it contained three areas that affected products liability, sections 2 and 3 and also a section that would have eliminated in workers' compensation cases what is called third party claims that arise out of product injuries. This would be a case such as if someone were injured on the job because of some product. It would have eliminated the ability of that worker to sue the product liability manufacturer and he would have been relegated solely to his workers' compensation as other people are. That portion did not survive in the Senate and is no longer part of the bill.

There was another provision in the bill which did not survive which was called the abolishment of the collateral source rule. In the court rooms at present, a person is not able to bring out in a lawsuit that a person has his own private insurance that paid the medical bills. There was a suggestion that this provision should be abolished and that provision did not come out of the Senate.

The other portion which involves the general tort law is still a part of the bill. It is a provision affecting punitive damages. When SB 422 was introduced the provision provided for abolition of punitive damages altogether except in those areas where the legislature had already created statutory double or triple damamges. In effect, the bill provided for the same thing for private citizens that the Tort Calims Act already provides for public citizens. The Tort Calims Act already abolishes punitive damages for government employees. The attempt was just to abolish it for nongovernmental employees so that the rule would be the same. This was attempted on the theory that punitive damages are penalty rather than compensation and that the proper way to approach a situation of penalties and to control the conduct of citizens is with criminal law not with civil law. That was amended in the Senate to substitute for the abolition of punitive damamges the language in a draft from Rep Gardner. It provides that punitive damages can still be recovered but it increases the burden of proof on the party who is seeking punitive damages from a preponderance or greater weight of the evidence to clear and convincing which is the kind of evidence required to prove a claim of fraud. The bill in effect changes the burden of proof.

It also adds an element for the juries to consider in determining whether to award punitive damages. Most of this came from the suggested uniform act that came from the Department of Commerce. It is very similar to that with the substitution.

The Department of Justice is concerned about the bill now because it does affect the burden of proof in the consumer products area and the consumer protection area, but it seemed to the Chamber that the rule should be the same across the board. There should be no reason to pick different rules for different areas and that to require by clear and convincing evidence would not be too much of an undue burden in the case of punitive damages. If that could be proved, it would give everybody some confidence that punitive damages were justified.

When the bill was first introduced in the Senate there were other suggestions about amendments. In the hearings two years ago, the main dispute was between the plaintiff's bar and the Chamber and its industry groups. The Chamber this session did not agree to change the bill in every respect that the plaintiff's bar suggested, but in the work sessions in the Senate, those suggestions that were made in a positive manner were almost all consented to by the Chamber. For example, in section 2, in sub A (3), it now says "a through m". The bill originally said "a through n". "N" is the provision in the Restatement that refers to contributory negligence and provides the manner in which contributory negligence can be a defense. It basically defines assumption of the risk. The plaintiff's bar pointed out that the legislature abolished assumption of the risk several sessions ago and substituted comparative fault. It seemed like a positive statement made by the plaintiff's bar that if the legislature abolished assumption of the risk by statutes, it should not be sneaked back in. The Chamber agreed to delete this from the bill.

The plaintiff's bar does not accept either one of the sections in section 3 that relate to the state of the art, but id did make some suggestions which the Chamber did comply with, short of eliminating them altogether. The way that they were originally worded they dated from the date of the design or manufacture. It was changed to the date of first sale for use or consumption. That was a positive suggestion also because that conforms to the language that the legislature used in passing the amendment to the statute of limitations bill last session.

There were some deletions requested in the punitive damages section. One very important one would have required the court to have allowed them rather than the jury. The Chamber agreed to delete that.

The Chamber agreed to delete collateral source. The workers' compensation section was deleted also.

His understanding is at the Senate meetings, the only real opposition came from the palintiff's bar.

He feels that the way the bill is now it can be a very productive, useful bill for the citizens of Oregon and that if it is adopted, it will set a standard for a number of other states. There are other states looking at this particular proposal as a way to correct the situation in their states.

0537 CHAIRMAN GARDNER stated that he has no pride of authorship in section 4 as it appears in the bill. He did have a clerk in his office that he had asked to look in to products and to produce sample drafts. One of the drafts that the clerk did was picked up by the lobbyist of the Chamber and did end up in the bill in at least some form.

One year ago, he represented the State of Oregon in a products liability conference in Missouri. He had a desire to find out more about the subject in light of some of the actions that were taken by the 1977 session. He was greeted by a camera crew from ABC and a representative of the conference introduced him as the expert from Oregon.

He commented that when people said that Oregon was a leader, it may be a leader but it isn't always sure where it is going.

Of the information he got from that conference, the most compelling statistics were that in 75% of the cases, there were no actuarial statistics in premium dollars upon which those premiums were based in products liability cases, otherwise known as the A Rated Category. What is being dealt with to some extent is the paranoia of the insurance companies. If the insurance industry thinks or perceives that there is a problem then there is a problem. One of the things he would like to see in this bill or in some legislation this session is at least the beginnings of an attempt to try to develop an actuarial basis. If the statistics were available as to what has been paid out, what suits are being filed, and what the costs of those suits are in the various categories of the products cases, there will be a statistical and actuarial basis upon which an underwriter can say this is what the risk really is and this is what the experience of the risk has been. To some extent, over the long run, that would do much more than tort reform in determining what the amount of premuims are. No matter what is done, there is always that subjective decision at least in 75% of those cases as to what the risk is. Some things may be done in the area of tort reform to ease the minds of the underwriters, but to some extent that paranoia will exist until there is an actuarial base to look at to see what the risk is and what the risk will be.

0576 MR. BANKS stated that he thought there was no reason not to have a provision to require such reporting. As long as the law is stable and the insurance companies have records to show what that stability is doing, there will be something to work with. The records will not do any good though if the law is everchanging.

He was the moderator on a panel on products liability at the American Bar Association convention last August. One of the speakers was a lady by the name of Mavis Walters who is an actuary for the Insurance Service Organization. She said that the organization was in the process of trying to set something like this up. Apparently the insurance industry sees the need so he did not see why the legislature could not help it along with having the need go forward. He thought this was a positive suggestion.

0589 CHAIRMAN GARDNER stated he would only take issue with Mr. Banks' remarks in one respect. At the conference, he was shown documents from the insurance trade. One document stated that there were one million product liability cases filed in 1976. Actually, there were about 50,000 nationwide. Even if nothing is done to change the law, the mere fact that the number of cases being filed is known when the underwriters are making their decisions may create some stability.

0595 MR. BANKS stated that Ms. Walters had to answer a question about that.

0596 REP MASON stated that this is the third time this session that the same story has been heard. The story goes something to the effect that the nasty old court brought down a nasty old decision and because of the nasty old court decision, insurance premiums have skyrocketed and would the legislature please change the goalposts.

Rep Gardner has a very good point. There have been no hard figures presented. The fact does exist that a court has made a decision sometime in another state and that the insurance companies are afraid and therefore their premiums are going up even though they don't know why and they would like the law changed to protect them against the court decision. The dialogue has almost always been that the premiums are going up for some other decision. REP MASON believes that it is beginning to wear a little thin.

This is the third time this committee has dealt with this kind of issue. It has passed out a bill for ski areas and then one more liability for tavern owners. Now it is because of a California Supreme Court decision and that the Oregon Supreme Court failed to endorse 402(A) to the full extent.

0614 MR. BANKS replied that he was not suggesting that this would not be good legislation. He thinks it would be excellent legislation. It has been extremely workable for a number of years and he would like to see the system stabilized.

0617 REP MASON stated that Mr. Banks has stated that punitive damages should only be recoverable on clear and convincing evidence and that was analogous to a fraud case. However, in a conversion case, one does not need to establish conversion by clear and convincing evidence, not in negligence or trespass. Instituting clear and convincing evidence on punitive damages would take a standard of proof from one court action, fraud, and apply it to all court actions where punitives might be applicable.

0623 MR. BANKS stated it would only be applied to the award of punitive damages. It would not be changing the standard of proof for proving conversions for general damages or proving negligence for general damages. All it would be doing is to say that if noncompensable damages are wanted to punish the person, it must be proved by clear and convincing evidence, all across the board.

0629 REP MASON stated that in conversion one has to prove punitive damages by preponderance, not by clear and convincing.

0630 MR. BANKS stated it was the same thing in fraud. Fraud has to be proved by clear and convincing evidence and the punitive damages by a preponderance of the evidence.

0632 REP MASON stated that Mr. Banks had said that he believed that the criminal law should be relied on for effective deterrents.

0634 MR. BANKS stated that if there was a problem that required deterrence, it seemed to him that it was the baliwick of the criminal. He was not saying that there are criminal laws to take care of all of the problems that exist, but he was just saying that if the problem is so bad that it requires an imposition of punitive damages, then it is a sugject of public interest sufficient that is should be dealt with by the criminal law.

0639 REP MASON stated that is seemed like everyone who has one remedy wanted the other. Those who have the criminal remedy want the civil remedy. Those who have the civil remedy, want the criminal.

0642 MR. BANKS stated that there is one error in the bill which Ms. Robinson brought to his attention. He had thought the bill was amended to delete from line 4, page 2, the words "the design or manufacture of" after "after". That was where it was trying to be changed to the date of first sale for use or consumption rather than the date of the design. It was a technical error that it stayed in.

0650 REP RICHARDS asked about the probable outcome of the criminal charges brought against the Ford Company officials in the Pinto case.

0642 MR. BANKS stated that case in Indiana was still pending. Ford attempted to have it dismissed and the motion for dismissal was denied. He was not sure the case was against the officials but it was definitiely against the company.

0655 JOAN ROBINSON stated she was not sure what the purpose was of including subsection 3 of section 2 or what the effective date is. To the extent that the comments were written in 1965, is this intended to freeze the law of strict liability for 1965?

0659 MR. BANKS stated that it was not an attempt to freeze the law of strict liability to any particular dates. Those comments, with the exception of one, are still in use in some states as the definition ofstrict liability. It is not an attemtped to freeze the law at all. It is an attempt to define the parameters of the liabilities that this section creates. Those parameters are not rigid guidelines. They are statements of law by some very fine college professors who put them together. The attempt is not to reach back and do anything to a particular date. The attempt is just to put in parameters for an area of liability that does not require very culpable conduct.

0670 MS. ROBINSON asked if this could lead to an argument in an appellate court court about what each comment means and how would it be proved what it meant.

0673 MR. BANKS stated that good lawyers will always argue over what all the comments mean and there will be Supreme Court decisions as there already have been as to what each comment means. There is no way to prevent that. At least there is an established body of law to point to the meaning of these comments. There is an established body of case law that tells a lawyer what the duty to want is under the Restatement of definition.

0679 MR. ROBINSON asked why the section about the court construing it in accordance with the comments was needed.

0681 MR. BANKS replied that the problem has been that the court continues to say that it follows the Restatement but it keeps eroding away the court-made definitions which are the comments of how to apply it. That is where the problem has been. The consumer expectation rule some courts feel is important for the consumer. That is comment (I). That is the comment that the Washington and Iowa courts said was important. They refused to follow the Oregon Supreme Court's redefinition of that comment because Oregon went to a seller-oriented test.

0691 REP RICHARDS asked what the experience was of the Portland Chamber of Commerce and its members in 1978 and 1979 with products premiums in terms of the changes made last session. What has the percent of increase been?

0696 MR. McKENNEY replied that they have approximately stabilized. Some companies are down; others are still going up. At the Senate hearings, he made public the fact that he does not have product liability insurance anymore. There were a lot of insurance people in the room and nobody tried to sell him products liaibility insurance.

0701 REP RICHARDS stated that the problem that the Chamber brought before the committee last session about companies writing products coverage still exists despite the changes that were made last session.

0702 MR. McKENNEY replied that it has eased, but it is still not as good as it should be.

0705 REP RICHARDS aksed Mr. McKenney to survey his members to get information on what the products premium and coverage was in 1977 and in 1979. She wanted some standard of the people who have drafted the bill to see if there has been any change in the premium.

0708 MR. McKENNEY stated he could do that.

0717 JAMES REDDEN, Attorney General, testified against section 4 of SB 422B, at least section 4 as writtent at present. He submitted proposed amendments and testimony (Exhibit A, SB 422).

The bill is called a products liability bill but section 4 rewrites the law of punitive damages in Oregon. This section is not limited to products liability cases. It applies to all common law causes of action and many of the statutory ones as well. It mandates a wholesale change in the law of punitive damages without widespread notice to the public. These changes will adversely affect the public's rights in court.

There may be justifiable concern over the large punitive damage awards in products liability cases, however they are only one of the countless number of fields where punitive damages are awarded. They have been granted in a host of different common law actions in the State of Oregon--slander, libles, malicious prosecution of assault and battery, false imprisonment, fraud, conversion, trespass. Moverover, this legislature over the past several decades has enacted statutory rights for punitive damages in discrimination of public accomodation, intentional violation of disclosures on files, inmates and patients, suits charging false publications relating to candidates or measures, unlawful trade practices, allegations of unlawful debt collections

practices, allegations of unlawful employment practices and many others.

The major reason for punitive damages in deterrence and the current standards are set forth in Millican v. Green. Punitive damages are awarded in those instances where the violations of societal norms are 1) of an aggrevated nature, and 2) of the kind that sanctions would tend to prevent. Stated another way, there are instances where punitive damages are justified because an award of compensatory damages may not be adequate. Punitive damages assist the current public cry to limit government. In the unlawful debt collections act, no state agency was given the power of enforcement, but the deterrent was built into the statute with the availability of punitive damages. Despite the fact that a threat of award of punitive damages serves as an undeniable deterrent in various forms of anti-social behavior, the legislature is now poised to rewrite the standards for punitive damages. These standards have evolved through countless Appellate Court decisions and have resulted in a uniform jurty instruction as well as countless cases that everyone looks to for guidance.

There has been no testimony justifying a change in the standards applied. Those changes at the beginning just showed up in the bill.

He is also concerned because the proposed amendments to the law of punitive damages were tucked away in a products liability bill that many interested persons and organizations may have missed because they are not aware that the law of punitive damages is to be changed.

The proposed changes in the law of damages are unjustified and ill-advised. Section 4 sub 1 provides that punitive damages are recoverable where a plaintiff can demonstrate the defendant has shown wanton and wilful disregard for the health, safety and welfare of others. This language is subtly different from the language contained in the present uniform jury instruction. The language included in section 4 sub 1 combined with the criteria included in 4(3)(a), which includes the language desires to limit punitive damages to situations where the defendant's actions have caused or threatened physical harm. Punitive damages have never been so limited, nor should they be.

Much of the language of section 4, such as the above cited provisions, seems more appropriately directed towards products liability actions than punitive damage actions in general.

He is also concerned about the criteria allowed in section 4 sub 3. They attempt to overrule previous rulings by the Supreme Court on the issue of relevancy. For instance, they would overrule Byers v. Santiam Ford. It is also unclear whether the criteria listed in SB 422 replace existing criteria or merely add to the current list of criteria to be considered.

He suggested that if the committee believes that the proponents of the bill have justified the need for a change in the law of damages in product liability that the legislature do just that and limit section 4 to product liability cases. The legislature may also choose to adopt the criteria suggested in the Senate version of the bill for application in product liability. He doubted that there was justification for altering plaintiff's burden of proof from a normal civil standard of preponderance to clear and convincing as included in section 4 sub 1.

He urged the committee at a minimum to amend section 4 sub 1 to preface the section with an amendment that it only apply to product liability and to delete the phrase "by clear and convincing evidence".

If the law of damages is to be changed, that fact should be advertised and the bill should be limited to that area alone.

There is also some concern over the effect this bill will have in awards in antitrust cases brought under the state action.

He presented the committee with suggested amendments (Exhibit A, SB 422). The amendments would merely insert on page 2, line 10, after sub 1, "In any products liability action". This would limit it to products liability action. Also delete "by clear and convincing". This would keep it at a preponderance of the evidence which is the present standard.

0783 CHAIRMAN GARDNER asked if it was just maintained at a preponderance of the evidence would Mr. Redden still have objection to the bill.

0785 MR. REDDEN replied "yes"; he thought it should be limited to products liability cases. That is the thrust of the bill and pretty much what people have taken it for. Very little has been said on the other side about the punitive damages section. There was apparently more than one hearing before anyone admitted that it would be a general change in the law.

0789 CHAIMRAN GARDNER asked if anyone from Mr. Redden's office appeared in the Senate hearings.

0790 MR. REDDEN replied that no one did.

0790 CHAIRMAN GARDNER asked what criteria in section 4, sub 3, did Mr. Redden disagree with as far as being criteria for punitive damages.

0791 MR. REDDEN stated that he disagreed in particular with the liklihood at the time that serious harm would arise from defendants' conduct which may get into the area of physical injury.

0797 CHAIRMAN GARDNER asked if the serious harm might not also be economic.

0799 MR. REDDEN replied that it might very well be economic.

He stated that he was not really sure about (G). He thinks there is a copy of the instruction that is given now in the courts which has developed after years and years of appellate decisions. By imposing these new standards across the board, those standards are being changed for all punitive damage cases. He did not think there was testimony to justify the change in consumer protection actions or trespass actions if it is warranted in the product liability section. Testimony today indicated that it should be the same in all cases. This would be telling the judges to give a different instruction in every case, not just products liability.

0812 CHAIRMAN GARDNER asked if there was anything in that list of things that is missing that, as far as wholesale punitive damages across the board, should be considered.

0813 MR. REDDEN stated that he thought this included pretty much what is in the current instructions. It would make proof more difficult. He did not think anything was omitted. The instruction now speaks in terms of finding whether the defendant was guilty of wanton misconduct which is a deliberate disregard of the rights of others or a reckless indifference to such rights. That is included within section 4 sub 3, which then goes on and establishes additional things that might be found.

0826 REP LOMBARD asked that other than the fact that in a number of statutory actions, the legislature has said that punitive damages could be collected was there anywhere in the Oregon code that the legislature has in fact legislated the standards and the conditions for the award of punitive damages.

0830 MR. REDDEN replied that in some of the statutes punitive damages are expressed as treble damages, such as trespass. He is not certain that it would come within this amendment.

0835 REP LOMBARD stated that whatever law on punitive damages that has developed is court made law, not legislative policy.

0836 MR. REDDEN stated that was true.

0836 REP LOMBARD asked if it wasn't appropriate that the legislature establish the policy as to how and under what conditions punitive damages ought to be awarded.

0839 MR. REDDEN stated that he thought that would be appropriate, but only if the legislature decided to do just that. He was concerned that this has been regarded as a products liability bill by everybody. At least one member of the Supreme Court has told him that some standards would be welcomed. He feels that type of testimony should come from the court, the citizens and the Bar and just have a punitive damages bill.

He felt that many of the standards in this bill are written for product liability cases.

There is nothing wrong with the legislature setting standards on damages for the court.

0850 REP LOMBARDS asked if Mr. Redden meant that rather than to have this encompassed in another bill, should it be a bill all of its own.

0852 MR. REDDEN replied that he thought so. This is a significant area of the law and is growing more and more significant. If the law of damages is going to be changed, it should be done in a bill doing just that. He did not think changing the whole law of punitive damages in a products liability bill was a wise course.

0859 CHAIRMAN GARDNER asked if section 4 was limited to product liability cases, would Mr. Redden still take exception to the clear and convincing standards.

0862 MR. REDDEN replied that he did not think the standards should be changed.

0871 CHAIRMAN GARDNER asked why Mr. Redden disagreed with the standard of clear and convincing evidence.

0872 MR. REDDEN replied that it was sort of between beyond a reasonable doubt and a preponderance of the evidence. He did not see any need to establish and set a new standard for punitive damages.

0874 CHAIRMAN GARDNER stated that the attitude of the law, at least as far as criminal punishment is concerned, is that when someone is going to be punished as opposed to making a determination as to whether or not they are entitled to recover for general damages, there is a higher standard of proof--beyond a reasonable doubt. He asked if punitive damages is closer to criminal punishment than it is to the concept of making someone whole.

0879 MR. REDDEN stated that what is done in the area of punitive damages is to raise the level of the conduct necessary to award punitive damages. It is not negligence; it is wanton and wilful. The level of the conduct is raised, not the proof of it.

0883 CHAIRMAN GARDNER asked if the jury instruction didn't say that punitive damages are awarded to the plaintiff in addition to general damages in order to discourage the defendant and others from engaging in wanton misconduct. He asked if that wasn't really the basis for the criminal law. Punishment is basically to deter people from engaging in certain kinds of conduct. When someone abuses that, the basic standard of proof required is proof beyong a reasonable doubt because someone is in fact being punished, not someone being made whole.

0889 MR. REDDEN stated that he disagreed. He thought that in a typical case where negligence was being proved and punitive damages were being sought, negligence has to be proved by a preponderance of the evidence first. To get the punitive damages, the burden of proof is not raised; the type of conduct would have to be proved by a preponderance of the evidence to be not only negligence, but wilful, wanton and reckless disregard.

The test for fraud is sometimes a criminal action. The same type of conduct can warrant either civil or criminal. Perhaps that is the history of the different tests for fraud. He did not have the quarrel with that or for that amendment that he did with the other. He just does not think that it is warranted. The proponents of the bill are trying to make punitive damages more difficult. That is the objective.

0901 REP FROHNMAYER stated that given punitive damages are a windfall in the sense that they are over and above what is required to make a person whole, it seems appropriate to him to say that they should be guided by some more explicit standards than he believes are in the law now. He feels that they do tend to punish; there is an element of deterrence and a fairly significant component of punishment.

The commentaries are full of mostly questions about why should there be punitive damages without some of the trappings of procedural due process to protect a person in the criminal proceedings. Whether the committee is prepared to act on that in this bill is a whole other issue. It seems to him that this is a significant issue and that most of the commentators on court law are now moving in that direction.

The second point he had was that he disagreed that the courts have carefully fashioned a unified law of damages. In the opinion of the Supreme Court two years ago in whether or not punitive damages could be insured against, the

legislature was more or less explicitly invited to rationalize the helter-skelter development of the law of damages.

He said that Mr. Redden was saying one of two things: 1) the law of damages does not need the kind of work that the court thinks it does, or 2) it ought to be done in a separate bill with an up or down vote on that component.

0918 MR. REDDEN stated that he thought the discussion of punitive damages or legislation in that area should be just in that area. He did not think it should be part of a products liability bill or any other piece of legislation in a specific area. It just does not seem appropriate to him.

He realized that it was late in the session and there would not be time for sufficient discussion on such a bill.

0925 REP FROHNMAYER stated that his third concern was that the bill has been around for a couple of months in this form. The trial lawyers, the defense bar and the insurance companies know about it. At least some of the people who are subject to damages know about it.

0927 MR. REDDEN replied that in the Senate hearings, it was the second or third hearing before this question came up. It was stated that the intention of the bill is to change the law of punitive damages in a general way.

0930 REP FROHNMAYER asked that assuming the committee decided to go with the damages component, is there anything in the test of the law of damages, other than the standard of proof by which it established, that is either there and shouldn't be or ought to be there and has been omitted.

0935 MR. REDDEN stated he would like to give that some thought and would defer to the other attorneys presnt.

One other point was his concern about the effect on treble and double damages in antitrust actions, which are in fact punitive damages. He would hope that at the very least that there would be some language in this bill stating that these antiturst damages were not being talked about.

0943 REP FROHNMAYER stated that he would think that in every case where this has been an explicit legislative policy declaring what the law of damages is that this bill would not be messing around with them.

0944 MR. REDDEN stated that the problem was that the legislative history of the bill will show that this was discussed on the Senate side and there was an amendment offered to make it clear that antitrusts are not being talked about, but the amendment was rejected (either that or the language was put in and then taken out). If the bill passed in this form, this subject would be argued. He did not think the sponsors intended that.

0949 REP MASON stated that when he was first contacted about the bill he was asked by an attorney what he thought about the idea of abolishing punitive damages for products liability. He was under the impression, and he feels a lot of people are, that this is a modification of punitive damages for product liability only. That is what bothers him. It is not quite as simple as it was presented.

0957 MR. REDDEN responded that some of the attorneys that he talked to are still not aware of the change in damage law; they regard this as a change in products liability law.

He was not accusing anyone and did not think the bill was for that purpose, but the fact is that it is in a bill dealing with products liability rahter than a bill dealing with punitive damages or damages in general.

0964 REP LOMBARD stated that in the original SB 422 there are basically four paragraphs that set out the summary. The third paragraph says "Prohibits the award of punitive damages in civil actions". That is pretty clear notice to people who are concerned about legislation that is being introduced.

0968 MR. REDDEN responded that in spite of that there was considerable discussion in the Senate hearings on whether or not the bill was in fact designed to or would restrict the award of punitive damages in civil actions.

0970 REP LOMBARD stated that section 4 of the original bill says "An award for damages in a civil action shall not include punitive damages". He finds it hard to accept the issue of notice. That seems to him to be a big red flag.

0974 MR. REDDEN stated that it was to him, but for some reason it was not to many attorneys.

0976 REP LOMBARD asked if Mr. Redden was stating that he had not spent that much time in the Senate committee on that issue.

0977 MR. REDDEN stated that he had the committee hearings mon ored. He had not known if it was intended to, but testimony revealed that it was intended to. He did not testify in the Senate committee.

0979 REP LOMBARD asked if Mr. Redden had alerted members of the plaintiff's bar about that.

0980 MR. REDDEN stated he had talked to several attorneys. The Senate committee finally became aware of the issue and those questions were asked.

0981 REP LOMBARD stated that he was a little amused because he thought the meassage was pretty clear. Mr. Redden might have a good point that the issue should be considered in a separate bill, but people, especially lawyers, never seem to come down for issues until the closing days of the session to complain.

0992 JIM GRISWOLD, lawyer, stated that he does primarily plaintiff's work and product liability cases. He wanted to discuss some of the provisions of SB 422 and presented the committee with a proposed amendment (Exhibit B, SB 422).

Clear and convincing evidence would be changing the rule in punitive damages as it exists now. The proponents of this bill are attempting to change the entire law of punitive damages in Oregon.

If punitive damages are going to be in the bill, they should be limited to products liability.

There is language in this bill that does not appear anywhere else in any of the statutes. It talks about wilful and wanton disregard of the rights of others. He was referring specifically to the word "wilful". "Wilful" by court determination means intentional. He does not think the drafters of the bill recognized the import of using that expression. The Falls v. Mortenson case was one of the first cases to come up using the "wanton disregard from the rights of the plaintiff" phrase. This preserved for the plaintiff his rights to recover against the defendant's insurance company if a judgment was obtained. Since that time the courts have been very careful in the use of "wilful". He feels it would be appropriate to strike that word from section 4 if this section remains a part of the bill.

He feels that 1) the bill should be limited to products liability, 2) "clear and convincing" should be deleted, and 3) "wilful and" should be deleted.

If section 4 stays in the bill and is appropriately limited to products liability, it is setting insurance carriers and the manufacturers and sellers of products in a separate class. They would be the only ones who have particular privileges, immunities and protections as far as punitive damages are concerned. All other people might be subjected to damages for injuries or possibly for punitive damages.

The uniform jury instruction that was read to the committee did not have the word "wilful".

As far as the criteria mentioned, he thinks they are somewhat indefinite.

About Rep Lombard's thought that the punitive damages should not be a surprize to anyone, the first sentence of SB 422's summary sets forth the rule relating to rights and liabilities of sellers and lessors. That makes it confusing.

One thing that has caused those trying products liability cases difficulty since the legislature acted in 1977 is the statute of limitations. Circuit courts have rule both ways. There is a question as to whether ORS 30.905, time limitations, means that the plaintiff has eight years plus two within which to file his action or whether the two years within which to file his action after injury must be within the eight years of the date the product was first sold. Circuit court judges around the state have ruled both ways which would indicate that either the plaintiff has eight years or ten years to file his action. It would behoove the committee to spend a moment to consider that and clarify it.

He does object to a 10-year statute of limitation or any statute of limitation on products liability. One of the reasons is the DC 10 that went down in Chicago. Time magazine says that the aircraft went on the market and began to fly in 1970. If that accident happened at the Portland Airport, there would be no cause of action in Oregon because that product was more than eight years old. This is just one example.

He suggested as far as 30.905 that the eight years be changed to 10 years and that subsection 2 of 30.905 read "Notwithstanding subsection (1) of this section, a product liability civil action shall be commenced not later

than two years after the date on which the death, injury or damage complained of occurs." (Exhibit B, SB 422.)

He stated that he would differ with some of the comments made by Mr. Banks on the history of this bill. He has discussed products liability with Mr. Banks and they have not agreed on too much yet and probably never will. MR. GRISWOLD thought that Mr. Banks misread the impact of the California decision on the Oregon court. As it stands now, California first took out the word "unreasonable". This is in section 2, line 5 of the bill, "defective condition unreasonably dangerous to the user or consumer". California and New Jersey first complained about the use of the word "unreasonable". This is liability without fault. He asked why "unreasonable" was talked about at all. This was the attitude of the court in California when it struck the word "unreasonable". The question is whether the product is dangerous. Everything else was applied in the court interpretation.

Oregon was asked to do that in Johnson v. Clark Equipment and follow the Cronen case out of California. The Supreme Court refused to do so and has continued to refuse to do so. "Unreasonably dangerous" is a part of the law in Oregon.

California did come up with a new decision which placed even a greater burden on the defendant and the Oregon court has rejected that in the Wilson v. Pfifer case.

402(A) as interpreted by the Oregon courts is being followed. The adoption of section 2 of SB 422 is a Restatement of Tort 402A. He does not think the law will be changed a great amount and has no objection to that being done.

Subsection 3 on line 16 is where the comments (a) through (m) are going to be adopted. He cautioned the committee that under Hilman v. Wasco County this would probably be an unconstitutional action. It delegates to those who write and put out section 402(A) and its comments the power and rights of the legislature to enact the bill for the State of Oregon. If this bill were adopted, six months from now those who publish 402(A) could change subdivision (b).

1088 REP LOMBARD asked if the reference to that 1965 date did not tie this in with the 1965 version of the comments.

1089 MR. GRISWOLD stated that he questioned that. If the language in Hilman, 213 Or 264, was read, he fears there is a chance this would be rendered unconstitutional.

Section 3 is the state of the art situation. Mr. Banks stated this was an evidentiary rule. MR. GRISWOLD thinks that it is more than an evidentiary rule; he thinks it is the crux of a products liability case where the defendant manufacturer does not do all that he knows to do and all he should do. Even though state of the art is talked about, buried in there is the standards and practices of the industry. What the effort really is as presented here is to present a state of the industry. If all the manufacturers design the same product improperly, it is then okay according to section 3. The evidence of chages following an accident is permitted in two types of cases in the State of Oregon. That is to show feasibility

in a products liability case and it is limited to that as to the defendants. The other type of situation in which it is permitted is in a master and servant case under the employer's liability law where the defendant employer is required to take every device, care and precaution. Then it can be shown that there was something more that could have been done such as another device or precaution that the employer should have taken.

He would object strenuously to inclusion of section 3 within a products liability bill.

He emphasized that Mr. Banks has indicated that the Restatement definition of "unreasonably dangerous" has been interpreted as being a consumer oriented test--more dangerous than the reasonable consumer would anticipate--rather than a seller's test. This has not been done in Oregon. In Oregon the consumer test has existed since Heaton v. Ford Motor Co., the case that adopted 402(A). The seller's test was gone to in Phillips v. Pimwood which is where it is said that one must presume that the manufacturer knew of the dangerous or defective condition and knowing of that danger, did the manufacturer act reasonably in placing the product on the market. He felt Mr. Banks was not correct when he said that was the test that applies in Oregon because in Rice v. Hyster which has been since Phillips v. Pimwood, the Supreme Court said that the trial court can give either or both tests to the jury. Both are viable tests in Oregon.

1137 REP BUGAS stated that in the example of the DC 10's, Mr. Griswold's assumption that the manufacturer was at fault is one of the things that frightened Rep Bugas. He did not think it was at all clear that the manufacturer was at fault.

1143 MR. GRISWOLD stated that he did not mean to imply that automatically because of the accident there was a valid calim against McDonald-Douglas. He just meant that in Oregon, the case could not be presented.

1148 REP BUGAS asked if Mr. Griswold disagreed with sections 3 and 4 in the inclusion of the comments in section 1.

1149 MR. GRISWOLD replied that he disagreed with the inclusion of the comments and the state of the art in seciton 3. He also felt that clear and convincing evidence should be removed. The plaintiff still has to show under the present statute that the defendant acted in wanton disregard for the rights and safety of others.

Punitive damages are not commonly sought. There has probably been more discussion in this hearing on this subject than in all the courts in Oregon for the last six months.

1166 REP BUGAS asked what the question of unconstitutionality was.

1167 MR. GRISWOLD replied that it was the delegation of this committee or the legislature to another body to enact laws or rules which would be binding upon the courts of this state. That is what Hilman v. Wasco County said could not be done. He fears this is what would be done by the bill, even if it were limited to the comments of 1965.

1171 REP BUGAS stated that it dealt with the separation of powers.

1172 MR. GRISWOLD replied that was what it did in effect. That was the basis for the reversal in the Hilman case.

1173 REP BUGAS asked if there were any way Mr. Griswold could visualize the use of the comments.

1174 MR. GRISWOLD replied that every part of every law in the state has grown as the state has grown. Yet one thing this bill would attempt to do according to the sponsors would be to create certainty. He feels that it would stagnate the devlopment of the products liability law in Oregon. Stagnating any law is an inappropriate thing to do.

The products liability and the way it has developed has been good for everybody. It has been both restrained and controlled by the Court of Appeals and the Supreme Court.

1190 REP BUGAS stated he was trying to ascertain the degree of cooperation between the plaintiffs and the side represented by Mr. Banks.

1192 MR. GRISWOLD stated that he has not personally met with Mr. Banks and Mr. Bodyfelt. He was the token individual on the plaintiff's side in the Chamber of Commerce Committee but was not able to attend all the meetings and did not take part in drafting the bill.

1200 REP MASON asked when the next Restatement was due.

1201 MR. GRISWOLD replied that he did not believe there was any such things.

1203 REP FROHNMAYER stated that Torts has just been completed and he did not contemplate that for another 30 years.

1204 MR. GRISWOLD stated that there was no definite publication period for any Restatements on agency, restitution, torts, or whatever.

1205 CHARLES BURT stated that many of the concerns he has are the same as Mr. Griswold's. He believes the statute of limitation thing is a real trap because this is an age in which many products are created and go for many years before it is discovered that a terrible mistake has been made in the product.

Mr. Griswold pointed out that if the DC 10 crash was caused by a bad design, there was no way for the plaintiff or the plaintiff's estate to recover in Oregon. If the nuclear plant were to blow up tomorrow because of a bad design, it would be the same situation because the plant is too old. This is the problem with casuing an aritificial barrier to people who are injured by a dangerous product. The danger may lie dormant for years and years, and it is not until someone is hurt that the cause is determined.

That argument can be carried over into the state of the art. Why should the growth of safety devices in products be limited. Safety devices in products have been brought on because plaintiff's lawyers prove people make dangerous products. This may be a harsh way to remedy it, but if the person does not want to be sued, he should make a safer product. There is no better way to insure safety than to make the people who make these things and service them responsible if they injure someone. Such products will still be on the market and people would be killed right and left if it were not for punitive damages and product liability actions.

In talking about punitive damages, how would Ford Motor Company be punished. If anyone in this room were to say that because he was making $1,000,000 he could intentionally burn 100 people to death because it would cost less to pay for their deaths than to change the product, he would be held guilty of homicide. Ford Motor Company cannot be found guilty of homicide and sent to the pen. If a criminal action is taken against Ford, it will only get a fine. Punitive damages serve the purpose of controlling people and corporations who cannot otherwise be controlled.

Products liability is one of those areas where it is very important that there be such a control. Products are only made safer because companies who make them fear the consequences of not keeping up with the state of the other manufacturers.

It became obvious that the committee, the Chamber, the plaintiff's bar, the defense bar, and this legislature are all dealing in the dark. The insurance company raises its premiums saying it has a paranoid fear that it is going to be sued because New Jersey was. The manufacturer comes in and says he is hurt. The question is why did the company jump its premiums. It can't and won't tell. If reporting is required from insurance carriers, it could be determined whether the additional premiums are needed. An example was the medical malpractice of two sessions ago when 3017 was passed. Not one doctor joined it. There really wasn't the problem. One of the reasons was that the insurance companies were forced to bring in the premiums and loss schedules. When this happened, the problem was suddenly not so acute.

The State of Kansas, when it required reporting on the premiums paid and the claims paid on product cases for 1978, discovered that the companies took in $13,000,000 worth of premiums and paid $1,000,000 worth of claims for a $12,000,00 profit.

Requiring claims made and premiums paid statements are one sure way of settling this problem. There is absolutely no evidence of a real need for overhauling products liability. If punitive damages are being talked about, why make products the scapegoat by changing the law only in that field. If it should be changed, it should be changed across the board.

He feels that it shouldn't be changed. The standards are already quite difficult. There are very, very few punitive damage awards. They are rare and only given in extreme cases. They are really given when someone should be punished.

He agreed with Mr. Griswold on the use of the word "wilful" because it has been ruled to mean "intentional".

The entire products field serves the purpose of making it safe for consumers to use products and protects them from risks that they cannot appreciate for themselves. It has been well thought out. The punitive damages aspects serves the purpose that nothing else can in this society.

1267 CLAYTON PATRICK, representing the Oregon Trial Lawyers Association, presented the committee with proposed amendments (Exhibit C, SB 422). The proposed amendments amend the relating clause to deal with the reporting

section and add sections 4, 5, 6 and 7. The other changes proposed are to delete all of section 3, the state of the art evidentiary rule, to change punitive damages to apply only to products cases, to eliminate the reference to clear and conivincing evidence, and to delete "wilful and".

Not deleting "wilful and" would severely limit the standard to only intentional conduct and not to conduct which shows a reckless indifference to the rights of others.

It is also suggested in the amendments to make it clear, on line 11, page 2, that punitive damages apply only to products actions.

The amendment from the Oregon Trial Lawyers given by Mr. Griswold (Exhibit B, SB 422) will clearly state what the intent of this legislature was last session in enacting an eight plus two statute of limitation. This amendment would make it clear that not only does the action have to be commenced wihtin a total of 10 years, but it also has to be brought within two years after the injury occurs.

1287 REP RICHARDS stated that she really liked the insurance reporting amendments (Exhibit C, SB 422).

1288 REP FROHNMAYER stated that he liked them too, but they did not fit the relating clause. The relating clause will have to be amended in order to add them. He asked if there was an insurance bill this could be put into.

1289 CHAIMRAN GARDNER stated that he would check.

1294 ART RANDALL from Columbia Ladder Company in Portland stated, concerning the state of the art, that his industry was not asking for anything other than the protection of having the opportunity of making improvements on products. Not too long ago, there was litigation over an extension ladder that had a certain rubber foot on it. The company was faced with trying to improve this pad to retain its adhesion on all surfaces and make it longer wearing. His ladder company could not make the slip-resistance any greater, but it did lengthen the usability life. The company was criticized in the litigation for making that change. He feels that it was not a change in design; it was just the company trying to do something more than the industry.

There is just no such thing as a safe ladder.

As to products liability cases, about four years ago his company was paying about $12,000 a year for products liability insurance. It has leveled off now, but they pay over $160,000 a year. There is also a $5,000 deductible on that. This takes care of about 7% of his products in sales.

The time has come for something to be done to protect the manufacturers at least in improvements and state of the art should be taken into consideration.

1327 CHAIRMAN GARDNER stated that the bill would be carried over. He closed the public hearing and adjourned the meeting at 3:35 p.m.

Submitted,
Pearl Bare
Pearl Bare, Committee Assistant

Exhibits
Exhibit C, HB 2842 - Proposed Amendments
Exhibit A, SB 422 - Proposed Amendments from Jim Redden
Exhibit B, SB 422 - Proposed Amendments from OTLA presented by Jim Griswold
Exhibit C, SB 422 - Proposed Amendments from OTLA presented by Calv Patrick

SB 422 - Relating to actions in particular cases

0101 MS. ROBINSON passed out proposed amendments (Exhibit D, SB 422).

The proposed amendments delete section 3 of the bill which is the state of the art section. They limit the punitive damages to product liability actions. They also delete "wilful" from that. They insert the insurance recording sections that were proposed by the Oregon Trial Lawyers Association. That is the bulk of the amendments. On the last page, there is an amendment to the guest passenger statute which deletes the words "a motor vehicle."

There is a technical amendment left off which should be on line 21, of page 2, delete "5" and insert "9."

0124 CHAIRMAN GARDNER moved the deletion of section 3 of the bill dealing with the state of the art.

0127 REP. SMITH stated this made him nervous,but he would not object.

0128 REP. BUGAS stated there was objection,but there were not the votes. He stated he did not want to be counted as a "no" vote.

0131 Hearing no objection to the motion, the CHAIR so ordered.

0135 CHAIRMAN GARDNER stated that the next amendment was that the punitive damages section only apply to products liability cases. He moved this amendment.

0137 REP. RICHARDS stated she did not think it was good public policy to take one exception like this and change a consideration of how punitive damages apply. She thought this was bad public policy.

0143 CHAIRMAN GARDNER stated that the problem was really one of lack of knowledge. He feels very comfortable with this particular section as it relates to punitive damages in products liability cases, but he did think the Attorney General made some excellent points that there were perhaps some areas where a differing standard was wanted or at least should be looked at before this approach was taken across the board. He feels that this approach is perhaps right for this problem and perhaps at some future point this particular approach may be taken in all cases. Damages have been requested as an interim study.

0157 REP. FROHNMAYER stated that it is necessarily a self-contained definition to know what a product liability civil action is.

0160 MS. ROBINSON stated she had that problem. As she originally drafted the amendment it said in an action under this section or act. Jim Markee objected to that on the grounds that this might be more limited than people wanted it to be. She does not think it would be.

0166 REP. FROHNMAYER asked if a MacPherson v Buick action in negligence is a products liability civil action.

0168 MS. ROBINSON stated that was the kind of question she had.

0169 REP. FROHNMAYER asked if it was a breach of warranty which involves products.

0170 MS. ROBINSON stated that if it says an action under this 1979 Act, she thinks this would cut out the MacPherson type case from the operation of this punitive damages section.

0173 REP. FROHNMAYER stated it should be established for legislative history one way or the other what it is the committee is doing.

0175 REP. SMITH asked how a court that is presented with the argument that this statute exists can resist looking at the criteria for punitive damages even though it is limited per this Act.

0182 MS. ROBINSON stated there is apparently a definition of product liability action in the statute.

0189 CHAIRMAN GARDNER stated he would like to see the statutory definition that is in ORS 30.095.

0198 MS. ROBINSON stated a product liability civil action means a civil action brought against a manufacturer, distributor, seller, or lessor of a product for damages for personal injury, death, or property damage arising out of any design, testing, manufacturing or other defect in a product, any failure to warn regarding the product, or any failure to properly instruct in the use of the product.

0202 CHAIRMAN GARDNER stated that would cover a negligence theory.

0204 REP. FROHNMAYER stated he thought the definition was broad enough. He just wanted to know if there was any common meaning.

0208 REP. SMITH asked if a products liability case was brought, was a second count normally pleaded in common law negligence.

0212 JERRY BANKS stated that normally when a complaint is received, there is a strict liability claim and a negligence claim. As a practical matter, by the time of the trial, the negligence count is normally dropped. The only one that goes to jury is strict liability. This is not always so.

0218 REP. SMITH stated that under common law negligence theory, punitive damages are received. The test, if two counts are pleaded, would be under preponderance of the evidence for punitives in common law and a clear and convincing standard for punitives in the other.

0225 CHAIRMAN GARDNER stated he thought the definition as read of a product liability civil action was broad enough to include the negligence theory as well as the strict liability theory as far as punitive damages being awarded. He feels if this language is adopted, it is the kind of action and the products that are involved, not really the question of which theory of law is used that is going to determine whether it is two different standards.

0232 REP. SMITH asked, if for some reason the products cause of action was dropped out and only the common law negligence theory was left, what would be the test for punitive damages.

0234 CHAIRMAN GARDNER stated it would be this bill.

0235 MR. BANKS stated that he agreed with Rep. Gardner. MR. BANKS feels that dropping the product cannot be said without saying both are being dropped.

Negligence is just a form of products liability because it is a form of relief.

0238 REP. FROHNMAYER stated that as long as the definition is in Chapter 30, his question has been answered.

0240 REP. RUTHERFORD stated that he wanted to echo the comments of Rep. Richards. It seems to him that there are members on the committee who feel there should not be punitive damages. There are other members of the committee who think punitive damages are important. He cannot find a rational basis for saying they should be applied in some cases and not in others. He recalls that during the interim there was a lot of discussion by the insurance industry with respect to problems they were having over insuring punitive damages. The Interim Judiciary Committee recommended that there be a statute saying that punitive damages would not longer be insurable and that they would have the effect that they were intended to have. That seemed to be the general approval, but he has not seen that bill.

0252 MS. ROBINSON stated it met with subcommittee approval, but not with full committee approval.

0254 CHAIRMAN GARDNER stated he thought the senators blocked that.

0255 REP. RUTHERFORD stated he thought that would be the appropriate approach rather than to carve these exceptions out of the law.

0256 REP. MASON stated that if the committee did adopt this section, he intended to make a motion on the burden of proof question. He tended to agree with Rep. Rutherford about carving out exceptions, but he thought the committee was going to put an exception in for punitive damages in products liability actions. He would like the committee on a later motion to consider changing the burden of proof.

0264 CHAIRMAN GARDNER stated he did not know what the committee was going to do.

0265 REP. FROHNMAYER stated the motion he might have made would have been the diametric opposite of Rep. Mason's. REP. FROHNMAYER would have moved to delete "clear and convincing" but have made this applicable to punitives across the board.

0274 REP. BUGAS stated this was talking about manufactured products. It does not apply anywhere else in the law.

0278 CHAIRMAN GARDNER stated that was what the amendment would do.

0287 In response to a roll call vote, the CHAIR declared the motion passed. Voting aye: Bugas, Cohen, Frohnmayer, Gardner, Mason. Voting no: Richards, Rutherford, Smith. Excused: Lombard.

0290 REP. MASON moved that on page 2, line 6, of the bill, the words "clear and convincing" be deleted and that "a preponderance of the" be inserted.

The effect of that would be to change the burden of proof under subsection 4 from clear and convincing to a preponderance of the evidence.

He is not too uncomfortable with limiting the statutory punitive damages section to products liability. He really does not like it. He is very

uncomfortable with raising the burden of proof in punitive damages even in one case. He foresees that next time there will be a multi-faceted move in a lot of areas to change this. The argument is going to be that the clear and convincing standard of proof exists for products liability and fraud actions. With the exception of fraud cases,in civil actions, it is a preponderance of the evidence.

0323 REP. FROHNMAYER stated he was going to oppose the motion now that the applicability of punitives has been limited. He thinks that punitive damages are a windfall and are also quasi-criminal in their application and ought to be treated similarly to that. In almost every case in these kinds of actions, the defendant is going to be impersonal, and therefore the ordinary view of the psychology that the jury might have in looking at an individual eyeball-to-eyeball might not operate when there is simply a corporate defendant. That kind of protection is at least arguably desirable.

0333 REP. SMITH stated that is the same reason he was going to oppose the motion and will support the maintenance of clear and convincing.

0340 CHAIRMAN GARDNER stated he was in agreement with the last two speakers.

0342 REP. MASON gave one illustration of punitive damages in a preponderance situation. In a nursing home, the nursing home operator was withholding cirgarette money of 40 patients. Actually damages only amounted to $12,000; however, the jury brought back a punitive damage verdict of $500,000. That was a preponderance situation. He is arguing for preponderance in all punitive damage situations. The punitive damages are, in a way, quasi-criminal, but they are a little more. In many cases, punitive damages are the only real way of recovery. Although it is argued that they are not totally compensatory, in that type of situation, it was the whole lawsuit.

0354 CHAIRMAN GARDNER stated he had to agree with Rep. Mason but that is an argument basically against the motion. The very argument that Rep. Mason made is the reason that CHAIRMAN GARDNER cannot put this across the board. The compensatory versus punishment point, particularly in products liability, is one where the point is more towards the punishment than to the compensatory. That is why he feels more comfortable with the clear and convincing evidence standard.

0362 REP. MASON asked if it could be stated for legislative history that the reason, if the motion should fail, behind the clear and convincing standard is as stated that in products liability there tends to be a corporate of faceless defendants.

0368 REP. SMITH stated that he would not be satisfied with that as the legislative history on this matter because if the general statute was going to be applied to punitive damages, he would feel that generally it should be clear and convincing evidence.

0372 CHAIRMAN GARDNER said that the legislative history could be argued after the vote was taken.

0373 REP. FROHNMAYER replied that the legislative history could not be argued after the vote was taken. He was not going to expand beyond remarks he already stated. He believes there may well be other policy reasons and that the vote should not necessarily be limited to those explanations.

0376 CHAIRMAN GARDNER stated he agreed.

0384 In response to a roll call vote on Rep. Mason's previous motion, the CHAIR declared the motion failed. Voting aye: Cohen, Mason, Richards, Rutherford. Voting no: Bugas, Frohnmayer, Gardner, Smith. Excused: Lombard.

0385 REP. RICHARDS moved to delete "wilful and" on line 7, page 2.

0390 REP. FROHNMAYER stated he thought the case was made fully for that based upon Oregon case law. He would support the motion.

0392 REP. BUGAS stated he tended to feel the same way. He asked Rep. Frohnmayer to expand on his remarks.

0394 REP. FROHNMAYER stated that at least one construction given the committee by a plaintiff's attorney was that the construction of "wilful" in the Oregon courts has been tantamount to "intentional," and therefore if the requirement is included that it be intentional and wanton disregard, conscious intent to injure has practically got to be shown as opposed to behavior that so far deviates from the norm that it is inexcusable although it does not rise to the full level of intentional.

0403 REP. SMITH added that if the word "wilful" is taken out an insurance company is open to potential liability for punitives because a policy usually excludes any wilful conduct. If the person is found guilty by reason of wilful conduct, the insurance policy does not have to cover it, however if it is merely wanton conduct, it is arguable that the coverage is there.

0410 CHAIRMAN GARDNER added that most policies have a specific exclusion for punitive damages regardless of the basis upon which they are awarded.

0412 REP. SMITH stated he believed there was one case in Oregon, however, that speaks to that.

0415 REP. RUTHERFORD stated this brought the committee back to the interim recommendation that never got passed the Senate.

0418 CHAIRMAN GARDNER stated maybe that could be partially adopted by this motion.

0419 REP. RUTHERFORD stated he was thinking about inserting it in this bill.

0421 Hearing no objection to Rep. Richard's previous motion, the CHAIR ordered the motion adopted.

0427 JIM MARKEE, representing the Oregon Trial Lawyers Association, stated that the language of the next proposed amendment (Exhibit D, SB 422) was taken out of a bill that Senator Walter Brown introduced. It was a potpourri of four statutes from other states which have adopted similar language and was drafted after meeting with the Insurance Commissioner and his staff. He thinks the Insurance Commissioner is happy with this language as is the Portland Chamber of Commerce.

0435 In response to MR. MARKEE, BLANCHE SCHROEDER, representing the Portland Chamber of Commerce, replied that the Chamber did not have any objection to the language.

0437 MR. BANKS stated that the committee might give some consideration in section 6, subsection 7 as to whether these reports would be admissible in a products liability action. There is an awful lot of information being made public record. He can see the trial of a products case being filled up with this sort of information in one way or the other. It does give the names of the manufacturer, etc. It might make some sense to say that the report itself, not the information, would not be admissible. The information, if it is obtained from some other source, could be admissible. This was just a remark; he is not supporting it but just raising it as an issue.

0455 CHAIRMAN GARDNER stated that he had been in Kansas City on this and felt the one thing that will have the most benefit as far as lowering products liability insurance premiums is the attempt to start to get an actuarial base and get data to make available to all parties concerned as to really what the risks are and what the premiums should be. He is very supportive of this.

0464 REP. RICHARDS asked if the report generated was a public record under ORS 192.

0465 CHAIRMAN GARDNER replied that it would be a public record.

0466 REP. RICHARDS asked if the Insurance Commissioner's office would approve the language.

0467 CHAIRMAN GARDNER stated he believed so.

0468 REP. FROHNMAYER stated he thought there would be a lot of paperwork involved in trying to code out the names or identities of the persons involved. He hoped this was not going to impose something on the Commissioner that would be unduly burdensome when members of the public seek information.

0473 REP. BUGAS stated that Mr. Banks had suggested that subsection 7, section 6, be modified to say that the report not be available as evidence.

0476 REP. FROHNMAYER stated he thought it would be useful to clarify that.

0477 CHAIRMAN GARDNER stated his intent would be to adopt the amendment and then the modification could be done if there were a subsequent motion to do so.

0479 REP. SMITH stated that he would almost rather see this section noncodified and have an expiration date on it, say within the next two sessions of the legislature and to have the information made available only to the legislature. What is really trying to be required is some useful information relating to products liability. He does not think an on-going burden should be created either on the insurance industry or the Commissioner.

0485 REP. RICHARDS stated she would disagree that this was what the committee was after. The committee is really after helping the individual manufacturer. She hoped the primary function of any legislative effort would be to reduce those premiums and the rate of escalation of those premiums. The experience in Kansas and some other states has shown that when a report is filed with the executive branch, there is a marked decrease in those premiums. She would oppose narrowing the action to just a legislative report.

0493 CHAIRMAN GARDNER stated that one thing that is staggering to him in this area is the fact that 75% of the total premium dollars in product liability cases have no actuarial experience at all. It is just a guess on the part of

the underwriter when he receives the request for insurance. What happens and what the insurance industry has admitted has happened is that it is a self-generating vicious cycle. Suddenly there is one big case with one big judgment or someone talks about a fact situation that did not even occur, such as in the lawn mower case, and this gets circulated to the insurance industry, and the next thing all these subjective decisions are being made about the premium dollars and the premiums are then much higher. The legislature is then forced to come in to try to restrict people's right of entry into the system to try to solve a problem.

0510 REP. SMITH asked if this would create a fiscal impact that could jeopardize the bill.

0513 CHAIRMAN GARDNER stated that both sides of the issue, the manufacturers and the Trial Lawyers indicated from the audience that it would not.

0514 TOM BESSONETTE, representing Oregon Mutual Insurance Company, stated that the Insurance Commissioner is not totally satisfied with the proposed amendments. There is a fiscal implication to the Commissioner's office that he has reviewed. MR. BESSONETTE is not aware of what it is. This should be considered and will be brought to light on the floor.

0521 REP. SMITH stated that was his concern about the breadth of this.

0522 JIM MARKEE stated that he met with the Insurance Commissioner's office to talk about this language. There is no requirement in this language that the Insurance Commissioner do anything other than gather this information and have it on file for any person who might want to see it. Given that, the Insurance Commissioner's office felt that there was no problem with the fiscal impact and that the office could handle it as long as the office was not required to compile this information and provide a large report to the legislature. The Portland Chamber was also represented at this meeting.

0532 CHAIRMAN GARDNER stated that Mr. Bessonette seemed to have a different impression.

0533 MR. MARKEE stated that maybe the Commissioner's office had changed its mind, but he did not know of it.

0535 CHAIRMAN GARDNER asked legal counsel to contact the Insurance Commissioner's office and ask about the fiscal impact of the insurance reporting requirement.

He stated that action could be taken on the bill and the committee report could be held to find out if there was a problem with that particular section. If there is, the issue could be brought back to the committee for determination on how to proceed.

0549 CHAIRMAN GARDNER stated that the motion was to adopt the insurance reporting section, section 5, section 6 and section 7 on pages 1 and 2 of the amendments. He would then take a separate motion on section 6, subsection 7 if there were one.

0552 Hearing no objection to the motion, the CHAIR so ordered.

0553 REP. RICHARDS asked how the relating clause was being dealt with.

0554 CHAIRMAN GARDNER stated that the CHAIR was going to rule that the amendments are germane.

0555 REP. MASON stated that by the relating clause, the committee could do just about anything it wanted.

0567 CHAIRMAN GARDNER stated that he had no problem putting in an exclusion as far as allowing this report into evidence, because the purpose of the report is not to be used in any particular product liability case but as an information gathering center that will allow some public debate on what the premiums should be, based upon the risk.

He moved that the report contemplated in section 6 not be admissible into evidence.

0573 REP. RICHARDS stated that she believes the search for truth in trials ought to be of the broadest possible scope and she has consistently opposed motions that attempt to limit information available during the trial. She was going to oppose the motion.

0577 REP. SMITH stated that it could get down to a single action against a single insurance company and that the evidence included in that report would be the evidence necessary for the trial. He does not know if there is any middle ground, but it seems to him that if he wanted to take on an insurance company for a reason and that information was within the Commissioner's file and was public information, it ought to be admissible.

0581 REP. MASON stated it was possible to modify the amendment with some language saying unless it were particularly germane or relevant to.

0584 REP. FROHNMAYER stated he would be reluctant to use that.

0585 REP. RICHARDS stated that this amendment might end up barring from introduction into evidence some key information to the particular facts of a certain case.

0587 CHAIRMAN GARDNER stated that his feeling was that for purposes of this section, it is not to be used in a particular action or suit.

0591 REP. FROHNMAYER stated he would hope the motion could be supported without requiring any more members to be at this meeting.

Item Q says what the insurer ought to report. It has added that the Commissioner can require such other information as the Commissioner may require. Given that this is an open-ended mandate to the insurer, it is possible to get highly prejudicial information of a confidential nature. If that is opened to discovery, it is not being fair about the criteria under which that information is required to be submitted.

0601 CHAIRMAN GARDNER stated that the manufacturer and seller have been given confidentiality. That information would not be available to a trier of fact in some kind of suit against that particular manufacturer.

0605 REP. RICHARDS asked if that protection of identification from the public automatically includes protection from scrutiny by the court and a trial. Identification of the parties involved is all that has been removed in subsection 7. The facts of the report have not been removed.

0612 REP. FROHNMAYER stated that was his concern. He thinks that some of these cases may be unique enough that the companies or persons would be identifiable without the name.

0617 REP. SMITH stated that his concern was that if he were a manufacturer who had a products liability policy and the insurer refused to indemnify him in a case, he would then have a right of action against the insurer for the indemnification. If he were trying to show through records that the insurer had already indemnified three other manufacturers on the exact same fact situation, he would need these records to do that, unless he could subpoena the records themselves of the insurance company.

0623 CHAIRMAN GARDNER stated he thought Rep. Smith just answered his own question. That information is within the province of the insurer, the insurer is a party of the action, the information is relevant, therefore it is discoverable.

0626 REP. MASON suggested insertion of the phrase "unless the insurer is a party to the action." If the records were subpoenaed under the present language, the insurer could make a fairly persuasive argument that if the information cannot be gotten from the Insurance Commissioner, it is inadmissible through the insurer.

0632 REP. FROHNMAYER stated he thought this section just preserved the status quo. If the record can be gotten from the insurer, fine. All this says is that if a special report is made up and given to the Insurance Commissioner, there is no greater right of access or nonaccess to that material than there was prior to the enactment of this statute. This is simply whether a person can go to a public officer and get a report. It does not affect any rights to get that information directly from the party if that right already exists.

0639 REP. RICHARDS stated all that was being said, then, is that this uniquely gathered body of information that informs actuarially about products shall not be entered in the court record in the trial on products liability.

0641 CHAIRMAN GARDNER and REP. FROHNMAYER stated that was right.

0642 REP. FROHNMAYER stated that if the information could be otherwise gotten pursuant to court process, it could still be gotten. It is just that it cannot be gotten from the Insurance Commissioner.

0644 REP. RICHARDS asked how much more difficult and expensive was it for all parties in the case to get.

0645 REP. FROHNMAYER stated the point is that it is neither easier or more difficult than it is now.

0648 CHAIRMAN GARDNER stated the CHAIR'S motion was to add additional language to subsection 7, section 6, that the report that is contemplated under this section of the bill not be admissible in evidence at trial.

0650 REP. RICHARDS asked Mr. Banks why he wanted this amendment.

0651 MR. BANKS stated that he did not have any feeling one way or the other. He was just concerned when this matter came up as late as it did that people might have concern about the type of information being gathered together for the purpose Rep. Gardner talked about and that it might cause some problems

as to being introduced into evidence. He agrees with Rep. Smith that there may be cases where it would be pertinent where the insurer and the insured were in dispute.

0658 REP. RICHARDS stated she still did not understand why he wanted the amendment.

0659 MR. BANKS stated he had no feelings about the amendment. He just raised the question.

0662 MS. ROBINSON proposed some language. She stated that instead of being a part of subsection 7, it could be a new section 8. The language she suggested was "The reports required by section 6 of this act will not be admissible in evidence in any trial for products liability civil action."

0665 CHAIRMAN GARDNER stated that was fine as the motion.

0673 In response to a roll call vote, the CHAIR declared the motion passed. Voting aye: Bugas, Cohen, Frohnmayer, Gardner, Rutherford, Smith. Voting no: Mason, Richards. Excused: Lombard.

0675 CHAIRMAN GARDNER moved adoption of the last proposed amendment (Exhibit D, SB 422) which is listed as section 8--but would now be section 9--which is adoption of a partial repeal of the guest passenger statute.

0680 REP. SMITH stated the thrust of this was to mesh with the repeal of the guest passenger statute so that if the other bill is successful in the senate, this portion shall remain.

0684 CHAIRMAN GARDNER stated that a conflict amendment will probably not be necessary because HB 2306 is in Senate Transportation and that committee is shutdown.

0692 REP. BUGAS asked if there was going to be an amendment to the relating clause.

0693 CHAIRMAN GARDNER stated he did not think an amendment to the relating clause was necessary.

0695 REP. SMITH asked what this amendment did.

0696 REP. BUGAS stated it repeals the guest passenger statute.

0697 REP. SMITH stated the way he read the amendment, motor vehicle was dropped out.

0699 MS. ROBINSON stated an amendment to the relating clause might be needed because it is relating to actions in particular cases and an amendment has just been adopted which specifically says the information report cannot be used in evidence.

0702 REP. FROHNMAYER stated he thought it was related to product liability actions generally because it facilitates the legislative study of them in addition to what happens in them.

0706 REP. BUGAS stated germaneness is in the eye of 31 beholders, or 16, as the case may be.

0711 Hearing no objection to his motion, the CHAIR ordered the amendments adopted.

0713 REP. RUTHERFORD asked if there was any interest to include an amendment which would provide that punitive damages would not be insurable.

No one made a motion.

0720 REP. RUTHERFORD stated that the insurance industry was very supportive of that concept during the interim.

0725 REP. FROHNMAYER moved SB 422 as amended to the floor with a "do pass" recommendation and that it be printed engrossed.

0731 In response to a roll call vote, the CHAIR declared the motion passed. Voting aye: Bugas, Cohen, Frohnmayer, Gardner, Mason, Richards, Rutherford, Smith. Excused: Lombard.

SB 435 - Relating to judicial review

0739 ELIZABETH STOCKDALE, legislative counsel, stated that sections 1 through 12 of the bill relate to the Land Use Board of Appeals, that is created in the bill to pick up the writ of review of local government land use decisions and also to cover appeals from state agency orders that involved the statewide planning role.

The Land Use Board of Appeals created by the bill would be of not more than five members. How many members will be up to the governor. The board will have the authority to hear land use appeals and decide them. It will be able to operate somewhat like the Court of Appeals in that the board can sit together or individually to review the cases. The board will have final decision-making authority on any appeal that does not have in it an allegation of the violation of a statewide planning goal.

In the case of an allegation of a statewide planning goal violation, that issue alone will be referred to the LCDC court. In its review, the court will hear any argument and review the records on appeal. It will prepare a recommendation and send that to LCDC. LCDC will consider the recommendation and have the option of hearing oral arguments and will then make a determination which it will send back to the board. The board must incorporate those findings in its final order on the appeal. The board's order will then be reviewable in the Court of Appeals. This is very similar to a state agency order under the Administrative Procedure Act.

The board will be independent of LCDC. It will be appointed by the governor and serve at the pleasure of the governor. Members will be subject to confirmation by the senate.

The board would receive its administrative support services from the Department of Land Conservation and Development.

The second half of the bill, starting with section 13, is changes that were made in various sections of ORS that relate to writ of review. They are pretty much the original work of the Writ of Review Advisory Committee that originally wrote SB 435.

The sections that relate to the Board of Appeals have a sunset clause. The sections would take effect on January 1, 1980 and would be repealed July 1, 1983.

1022 REP. RUTHERFORD stated he thought the purpose was to discourage sales to minors.

1023 REP. SMITH stated he thought the administrative remedies for sales to minors were so harsh there is an economic interest in not selling to minors. The law now punishes a person who does not observe that act.

SB 422 - Relating to actions in particular cases

1030 CHAIRMAN LOMBARD stated SB 422 was back in the committee for a minor technical amendment.

1032 MS. ROBINSON stated that the problem is that in amending the guest passenger statute to take out motor vehicles, the committee did not take out the language "and or other means of conveyance." There is some concern that this means that eventually someone is going to say that cars are other means of conveyances. She does not believe that will be a problem with the courts, but it would make a cleaner bill to do this.

1038 REP. RICHARDS moved the proposed amendments (Exhibit E, SB 422).

1048 Hearing no objection to the proposed amendments, the CHAIR ordered the amendments adopted.

1050 REP. RICHARDS moved SB 422C as amended to the floor with a "do pass" recommendation.

1056 In response to a roll call vote, the CHAIR declared the motion passed. Voting aye: Bugas, Cohen, Gardner, Lombard, Mason, Richards, Rutherford. Voting no: Smith. Excused: Frohnmayer.

SB 695 - Relating to motor vehicles

1073 REP. BUGAS moved that on the adopted amendments (Exhibit A, SB 695, June 26, 1979) the "20" be changed to "15", "21" be changed to "16" and to conform any necessary language.

1087 CHAIRMAN GARDNER stated this would have the habitual offender statute trigger in on the 15th conviction instead of the 20th.

1089 REP. BUGAS stated he asked MVD for figures on how many people might be involved if it were changed to 15. He was told that this would approximately quadruple the number of people involved. In May 1976, 900 people were classified under the 20. About 3600 were classified under the 15. If it were changed to 10, it would involve 17,000 people.

1113 In response to a roll call vote, the CHAIR declared the motion passed. Voting aye: Bugas, Cohen, Lombard, Mason, Richards, Rutherford. Voting no: Gardner. Excused: Frohnmayer, Smith.

1114 REP. BUGAS moved that SB 695 as amended be sent to the floor with a "do pass" recommendation.

In response to a roll call vote, the CHAIR declared the motion passed. Voting aye: Bugas, Cohen, Gardner, Lombard, Mason, Richards, Rutherford. Excused: Frohnmayer, Smith.

House Committee on Judiciary
Exhibit A, SB 422
June 19, 1979 1:30 p.m.
6-pages

A

AMENDMENTS TO A-ENGROSSED SENATE BILL 422

Presented by the Department of Justice
June 19, 1979

On page two of the printed bill, line 10, insert after (1) "In any products liability action," and delete "by clear and convincing".

In line 11, delete "evidence".

TESTIMONY OF ATTORNEY GENERAL JAMES A. REDDEN

BEFORE HOUSE JUDICIARY COMMITTEE

ON SENATE BILL 422

June 19, 1979

Senate Bill 422 is called a "products liability" bill, but Section 4 would re-write the law of punitive damages in Oregon. As written, it applies to all common law causes of action and many statutory ones as well. It mandates a wholesale change in the law of punitive damages without widespread notice to the public. These changes will adversely affect the public's rights in court.

There may be justifiable concern over awards of large sums of money in punitive damages, particularly in the products liability field. However, products liability is only one of a countless number of fields where punitive damages can be awarded. Punitive damages have been granted in a host of different common law actions in the State of Oregon such as slander, liable, malicious prosecution, assault and battery, false imprisonment, invasion of privacy, fraud, conversion and trespass.

Moreover, a series of Oregon legislatures over the past several decades have enacted statutory rights for punitive damages, such as:

ORS 30.680 -- Actions for discrimination in public accommodations

ORS 179.507 -- Intentional violations of disclosures of files on inmates or patients in state institutions

ORS 260.532 -- Suits charging false publications relating to candidates or measures

ORS 646.638 -- Unlawful trade practice allegations

ORS 646.641 -- Allegations of unlawful debt collection practices

ORS 659.121 -- Allegations of unlawful employment practices

The list is by no means exhaustive.

The major purpose of punitive damages is deterrence, and the current standard for an award is:

> "Punitive damages are awarded in those instances where the violations of societal norms are (1) of an aggravated nature and (2) of the kind that sanctions would tend to prevent." Millikin v. Green, 283 OR 283, 286 (1978).

Stated another way, there are instances where punitive damages are justified because an award of general damages may not be an adequate deterrent to discourage the defendant's conduct.

Punitive damages fit the current public cry to limit government. For instance, although no state agency was given the power to enforce the Unlawful Debt Collections Act, deterrence was built into the statute with the availability of punitive damages in a private action. Restricting punitive damages would significantly reduce the effectiveness of these statutes.

Despite the fact that the threat of an award of punitive damages serves as an undeniable deterrent to various forms of antisocial behavior, the legislature is now poised to re-write

the standards for the imposition of punitive damages. These standards have evolved through countless appellate court decisions, and have resulted in a Uniform Jury Instruction as well as countless cases that we look to for guidance.

There has been no testimony justifying a change in the standards applied. Those changes just "showed up" in the bill.

I am also concerned because this proposed amendment to the law of punitive damages was "tucked away" in a products liability bill that many interested persons and organizations may have missed because they are not aware that the law of punitive damages is to be changed.

The proposed changes in the law of damages are unjustified and ill advised. Section 4(1) provides that punitive damages are recoverable where a plaintiff can demonstrate that the defendant has shown "wilful and wanton disregard for the health, safety and welfare of others." This language is subtly different from the language contained in the present Uniform Jury Instruction.

> "Punitive damages are awarded to the plaintiff in addition to general damages in order to discourage the defendant and others from engaging in wanton misconduct. Wanton misconduct is conduct amounting to a deliberate disregard of the rights of others or a reckless indifference to such rights."

The language included in Section 4(1) combined with the criteria included in Section 4(3)(a) which includes the language

"serious harm" could be construed, and is intended, to mean that the legislature desires to limit punitive damages to situations where defendant's actions have caused or threatened physical harm. Punitive damages have never been limited to such situations nor should they be. Much of the language of Section 4, such as the above-cited provisions, seem more appropriately directed toward products liability actions than to punitive damage actions in general.

I am also concerned about the criteria included in Section 4(3). They attempt to overrule previous rulings by the Supreme Court on the issue of relevancy. For instance, Section 4(3)(e) contradicts the holding in Byers v. Santiam Ford, Inc., 281 Or 411, decided by the Oregon Supreme Court last year. It is also unclear whether the criteria listed in Senate Bill 422 replace existing criteria or are merely added to the current list of factors to be considered. I suggest that if this Committee believes that the proponents of the bill have justified the need for a change in the law of damages in product liability cases, that the legislature do just that and limit Section 4 to products liability cases. While the legislature may also choose to adopt the criteria suggested in the Senate version of the Bill for application in products liability cases, I doubt that the justification for altering plaintiff's burden of proof from the normal civil standard

of "preponderance" to "clear and convincing" as included in Section 4(1). At the minimum, then, I urge this Committee to amend Section 4(1) of the Bill to preface the section with an amendment that it only apply in products liability actions and to delete the phrase "by clear and convincing evidence."

If you are to change the law of damages, all of these years in the making, then you should advertise that fact, limit whatever bill you choose to that area alone, and let the public have at it.

I believe that your constituent consumers will be greatly alarmed to find out that passage of this bill will limit their right to punitive damages and their private actions under the consumer protection statutes of the State of Oregon.

Thank you.

PROPOSED AMENDMENT TO SB 422

Section __. ORS 30.905 is amended to read:

"30.905. (1) Notwithstanding ORS 12.115 and 12.140 [and except as provided in subsection (2) of this section], a product liability civil action shall be commenced not later than [eight] ten years after the date on which the product was first purchased for use or consumption.

"(2) Notwithstanding subsection (1) of this section, a product liability civil action shall be commenced not later than two years after the date on which the death, injury or damage complained of occurs."

House Committee on Judiciary
Exhibit C, SB 422
June 19, 1979 - 1:30 p.m.
3-pages

PROPOSED HOUSE AMENDMENTS TO SB 422 June 19, 1979

On page 1 of the B-Engrossed bill:

In line 2 after "cases" insert: ", and liability insurance".

On page 1 of the bill delete lines 22 through 25, and on page 2 of the bill delete lines 1 through 5.

On page 2 of the bill, delete line 6 and insert:

"SECTION 3. (1) In a products liability action punitive damages shall not be recoverable unless it is proven".

In line 7 delete "evidence" and after "shown" delete "wilful and".

In line 11 after "damages" insert: "in a products liability action".

After line 20 insert:

"SECTION 4. Sections 5 and 6 of this Act are added to and made a part of the Insurance Code."

SECTION 5. As used in section 6 of this 1979 Act, "product liability policy" means:

(1) Any policy of insurance insuring only the insured's legal obligation arising from the product liability exposure of the insured;

(2) Any other policy of liability insurance in which the premium computation includes a specific premium charge for product liability exposures of the insured; and

(3) Any other insurance policy designated by the commissioner as providing product liability insurance.

SECTION 6. (1) Every insurer authorized to transact business in this state and providing product liablility insurance shall, on the first day of January of each year or within 60 days thereafter, file with the commissioner a report containing the information specified in this section. Such report shall be made upon forms provided by the commissioner and shall contain the name of the insurance company and the name of all other companies associated with the company submitting the report, either as a holding company, parent company, wholly owned subsidiary, division or through interlocking directorates.

(2) When filing the report required under subsection (1) of this section, each insurer shall provide, for the period January 1 to December 31 of the year next preceding the filing of the report, information relating to any claim or action for damages for personal injury, death or property damage claimed to have been caused by a defect in an insured's product under a product liability policy, if the claim resulted in a final judgment in any amount, a settlement in any amount or a final disposition not resulting in payment on behalf of the insured. Every insurer authorized to transact business in this state shall be subject to the provisions of this subsection in regard to claims adjudicated, settled or disposition made pursuant to the laws of this state.

(3) When a claim described in subsection (2) of this section has been made against an insurer, the report of that insurer required under subsection (1) of this section shall contain:

(a) The name and address of the insured or the insurer's claim number or file number;

(b) The type of product;

(c) Rating classification code of products liability coverage;

(d) The date of occurrence which created the claim, including the state or other jurisdiction under whose jurisdiction the claim was adjudicated, settled, or disposition made;

(e) Date of suit, if filed;

(f) Date and amount of judgment or settlement, if any, and the number of parties involved in the distribution of such judgment or settlement and the amount received by each;

(g) Date and reason for final disposition if no judgment or settlement;

(h) A summary of the occurrence which created the claim;

(i) Total number of claims;

(j) Total claims closed without payment;

(k) Total claims closed with payment;

(L) Total amount of payments;

(m) Total number of suits filed;

(n) Total number of verdicts or judgments for defendants;

(o) Total number of verdicts or judgments for plaintiffs;

(p) Total amounts for plaintiffs; and

(q) Such other information as the commissioner may require.

(4) With respect to amounts paid in claims for the year next preceding the filing of each annual report required under subsection (1) of this section, each shall provide the following information:

(a) Total amounts reserved with respect to those claims;

(b) The year in which the reserves were set; and

(c) The amounts set in each year.

(5) Any published annual reports to shareholders or policyholders shall be submitted with the report required under subsection (1) of this section.

(6) There shall be no liability on the part of, and no cause of action of any nature shall arise against, any insurer reporting under this 1979 Act, its agents or employes, the commissioner or the commissioner's employes for any action taken under this 1979 Act.

(7) The commissioner shall make the reports required under this 1979 Act available to the public in a manner which will not reveal the names of any person, manufacturer or seller involved.

SECTION 7. The reports required under subsection (1) of section 6 of this Act shall first be submitted on January 1, 1980, or within 60 days thereafter.

SECTION 8. ORS 30.115 and 30.130 are hereby repealed.

House Committee on Judiciary
Exhibit D, SB 422
June 23, 1979 - 10:10 a.m.
3-pages

On page 1 of the B-engrossed bill, line 2, after "cases" insert ", and liability insurance; and amending ORS 30.115.".

Delete lines 22 through 25.

On page 2, delete lines 1 through 5.

In line 6, after "(1)" insert "In a product liablity civil action,".

In line 7, after "shown" delete "wilful and".

After line 20, insert:

"SECTION 5. As used in section 6 of this 1979 Act, "product liability policy" means:

(1) Any policy of insurance insuring only the insured's legal obligation arising from the product liability exposure of the insured;

(2) Any other policy of liability insurance in which the premium computation includes a specific premium charge for product liability exposures of the insured; and

(3) Any other insurance policy designated by the commissioner as providing product liability insurance.

SECTION 6. (1) Every insurer authorized to transact business in this state and providing product liablility insurance shall, on the first day of January of each year or within 60 days thereafter, file with the commissioner a report containing the information specified in this section. Such report shall be made upon forms provided by the commissioner and shall contain the name of the insurance company and the name of all other companies associated with the company submitting the report, either as a holding company, parent company, wholly owned subsidiary, division or through interlocking directorates.

(2) When filing the report required under subsection (1) of this section, each insurer shall provide, for the period January 1 to December 31 of the year next preceding the filing of the report, information relating to any claim or action for damages for personal injury, death or property damage claimed to have been caused by a defect in an insured's product under a product liability policy, if the claim resulted in a final judgment in any amount, a settlement in any amount or a final disposition not resulting in payment on behalf of the insured. Every insurer authorized to transact business in this state shall be subject to the provisions of this subsection in regard to claims adjudicated, settled or disposition made pursuant to the laws of this state.

(3) When a claim described in subsection (2) of this section has been made against an insurer, the report of that insurer required under subsection (1) of this section shall contain:

(a) The name and address of the insured or the insurer's claim number or file number;

(b) The type of product;

(c) Rating classification code of products liability coverage;

(d) The date of occurrence which created the claim, including the state or other jurisdiction under whose jurisdiction the claim was adjudicated, settled, or disposition made;

(e) Date of suit, if filed;

(f) Date and amount of judgment or settlement, if any, and the number of parties involved in the distribution of such judgment or settlement and the amount received by each;

(g) Date and reason for final disposition if no judgment or settlement;

(h) A summary of the occurrence which created the claim;

(i) Total number of claims;

(j) Total claims closed without payment;

(k) Total claims closed with payment;

(L) Total amount of payments;

(m) Total number of suits filed;

(n) Total number of verdicts or judgments for defendants;

(o) Total number of verdicts or judgments for plaintiffs;

(p) Total amounts for plaintiffs; and

(q) Such other information as the commissioner may require.

(4) With respect to amounts paid in claims for the year next preceding the filing of each annual report required under subsection (1) of this section, each shall provide the following information:

(a) Total amounts reserved with respect to those claims;

(b) The year in which the reserves were set; and

(c) The amounts set in each year.

(5) Any published annual reports to shareholders or policyholders shall be submitted with the report required under subsection (1) of this section.

(6) There shall be no liability on the part of, and no cause of action of any nature shall arise against, any insurer reporting under this 1979 Act, its agents or employes, the commissioner or the commissioner's employes for any action taken under this 1979 Act.

(7) The commissioner shall make the reports required under this 1979 Act available to the public in a manner which will not reveal the names of any person, manufacturer or seller involved.

SECTION 7. The reports required under subsection (1) of section 6 of this Act shall first be submitted on January 1, 1980, or within 60 days thereafter. "

SECTION 8. ORS 30.115 is amended to read:

30.115

"No person transported by the owner or operator of a motor vehicle, an aircraft, a watercraft, or other means of conveyance, as his guest without payment for such transportation, shall have a cause of action for damages against the owner or operator for injury, death or loss, in case of accident, unless the accident was intentional on the part of the owner or operator or caused by his gross negligence or intoxication. As used in this section:

(1) "Payment" means a substantial benefit in a material or business sense conferred upon the owner or operator of the conveyance and which is a substantial motivating factor for the transportation, and it does not include a mere gratuity or social amenity.

(2) "Gross negligence" refers to negligence which is materially greater than the mere absence of reasonable care under the circumstances, and which is characterized by conscious indifference to or reckless disregard of the rights of others. ".

House Committee on Judiciary
Amendments to SB 422 C
6/27/79

House Committee on Judiciary
Exhibit E, SB 422, 1 page
June 27, 1979 - 1:50 p.m.

On page 3 of the C-Engrossed bill, line 29, after "aircraft" delete the comma and insert "or" and in the same line after "watercraft" delete the rest of the line.

In line 30, delete "other means of conveyance,".