

Spring 1985

## The Proposed Federal Product Liability Act: The Substantive Impact of S.100 on Establishing a Cause of Action for Product-Caused Injury in Illinois, 18 J. Marshall L. Rev. 659 (1985)

William Foreman

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Torts Commons](#)

---

### Recommended Citation

William Foreman, The Proposed Federal Product Liability Act: The Substantive Impact of S.100 on Establishing a Cause of Action for Product-Caused Injury in Illinois, 18 J. Marshall L. Rev. 659 (1985)

<https://repository.law.uic.edu/lawreview/vol18/iss3/4>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact [repository@jmls.edu](mailto:repository@jmls.edu).

## COMMENTS

### THE PROPOSED FEDERAL PRODUCT LIABILITY ACT: THE SUBSTANTIVE IMPACT OF S.100 ON ESTABLISHING A CAUSE OF ACTION FOR PRODUCT-CAUSED INJURY IN ILLINOIS

Since the adoption of strict liability<sup>1</sup> for product-related injury, Illinois consumers have enjoyed increased protection against the hazards of injury caused by defective products.<sup>2</sup> Now that the umbrella of strict liability has spread over virtually the entire country, business and insurance interests are complaining that the current state of product liability law has spawned a crisis.<sup>3</sup> The symptoms of this crisis are excessive increases in product liability insurance premiums, business failures, and an explosion in the number of claims filed.<sup>4</sup> The business community is attempting to escape the mantle

---

1. Modern strict liability theory as applied in the product liability context stems from the seminal case of *Greenman v. Yuba Power Prods.*, 59 Cal. 2d 57, 377 P.2d 897 (1962). *Greenman* held that a manufacturer is strictly liable in tort when it places a product on the market, with the knowledge that it will be used without inspection by the consumer, and where such product proves to have a defect which results in injury to the consumer. *Id.* at 59, 377 P.2d 899. Justice Traynor, who wrote the *Greenman* opinion, stated that the purpose behind imposing strict liability on the manufacturer is to ensure that the manufacturer bears the cost of injuries resulting from defective products, rather than placing the burden on the injured consumer who is powerless to protect himself. *Id.* at 600, 377 P.2d at 900.

2. See *infra* note 25.

3. S. REP. NO. 476, 98th Cong. 2d Sess. 2 (1984). See generally Dworkin, *Product Liability Reform and the Model Uniform Product Liability Act*, 60 NEB. L. REV. 50, 52 (1981) (describes the concerns which led to the drafting of the Model Uniform Product Liability Act); Elfin, *The Changing Philosophy of Products Liability and the Proposed Model Uniform Product Liability Act*, 19 AM. BUS. L.J. 267, 268 (1981) (notes problems which exemplify the product liability crisis); Schwartz, *The Uniform Product Liability Act-A Brief Overview*, 33 VAND. L. REV. 579, 581 (1980) (lists problems which elicit concern over the current state of product liability law); Twerski & Weinstein, *A Critique of the Uniform Product Liability Law - A Rush to Judgment*, 28 DRAKE L. REV. 221, 222 (1979) (includes a discussion of the problems leading to the drafting of the Uniform Act).

4. *The Product Liability Act, 1983: Hearings on S.44 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science and Transportation*, 98 Cong., 1st Sess. 1 (1983) (statement of Senator Robert Kasten, Jr., chairman of the Subcomm. on the Consumer) [hereinafter cited as 1983 *Hearings*]. See also W. PROSSER, J. WADE, V. SCHWARTZ, *TORTS, CASES AND MATERIALS* 737

of strict liability by calling for new product liability legislation at both the state and federal levels.<sup>5</sup> Pitted against these proponents of federal product liability legislation is a coalition of consumer, labor, and legal groups, including the American Bar Association.<sup>6</sup> These groups point to the fairness inherent in the application of strict liability to the manufacturers and sellers of dangerously defective products. Opponents of federal legislation claim that the changes suggested by the product liability reform lobby would in reality turn the clock back to the time of fault-based recovery, thereby placing an unduly harsh burden upon consumers injured by defective products.<sup>7</sup>

The response to the demands of the business and insurance lobbies has been federal product liability legislation, currently pending in the United States Senate. The bill, S.100,<sup>8</sup> proposes to regulate interstate commerce by "providing for a uniform product liability law."<sup>9</sup> If enacted, S.100 will supersede current state product liability laws, including laws based on Section 402A of the *Restatement (Second) of Torts*.<sup>10</sup> State-made products law would be replaced

---

(7th ed. 1982). (authors note explosion of product liability case law); Twerski, *National Product Liability Legislation: In Search For The Best Of All Possible Worlds*, 18 IDAHO L. REV. 411, 412 (1982) (notes that manufacturers believe they bear enormous liability despite care in marketing products).

5. In partial acknowledgment to these influences, at least 30 states have enacted some form of product liability legislation. The content of nearly all state-enacted product liability legislation is procedural in nature. Most of the legislation was enacted to establish statutes of limitations and statutes of repose. Other typical statutes address defenses including "state of the art," alteration of the product by someone other than the defendant, and unforeseeable misuse of the product. See Twerski, *National Product Liability Legislation: In Search For The Best Of All Possible Worlds*, 18 IDAHO L. REV. 411, 412 n.7 (1982) (lists statutes enacted by the states).

6. The American Bar Association went on record in 1981 as opposing federal product liability legislation. In 1982, the association's sections of Corporation, Banking and Business Law and Public Contract Law called for support in principle of such uniform legislation. As a result, a Special Committee was appointed to study the question of whether federal product liability legislation was warranted. The Committee concluded that the need for such broad reform was not demonstrated and urged the adoption of a resolution opposing the enactment of federal product liability legislation. Included in the resolution was the Bar Association's specific opposition to S.2631, the predecessor to S.100. The resolution passed by a vote of 185-111 at the midyear session in 1983. Product Liability, 51 U.S.L.W. 2475 (March 15, 1983). See also Dentzer, *The Product Liability Debate*, Newsweek, September 10, 1984 at 56.

7. See 1983 *Hearings*, supra note 4, at 332 (statement of Public Citizens' Congress Watch).

8. S.100, 99th Cong. 1st Sess. §§ 1-18 (1985) [hereinafter cited as S.100]. S.100 was previously designated as S.44, 98th Cong., 2d Sess. §§ 1-18 (1984) [hereinafter cited as S.44].

9. S.100, supra note 8, at § 1. See *infra* note 14 and accompanying text (discussion of the application of the commerce clause to federal product liability legislation).

10. S.100, supra note 8, at § 3(b)(1). See S. REP. NO. 476, 98th Cong. 2d Sess. 22 (1984) (preemption of state law).

with a federal statute which radically alters many commonly accepted theories of recovery. The federal statute would be interpreted and applied in the state courts and would form the basis of any product liability cause of action.<sup>11</sup>

The resulting conflict over passage of S.100 has been termed the "Super Bowl of lobbying."<sup>12</sup> Proponents of S.100 claim that the uncertain and continually changing nature of state-made product liability law causes confusion among manufacturers, product sellers, and consumers.<sup>13</sup> As a result, they contend that this lack of uniformity has had a serious impact on interstate commerce and an adverse effect on the national economy and society in general.<sup>14</sup> Critics of federal product liability legislation attack its constitutionality, claiming that Congress does not have the authority to exercise its commerce power to preempt such a large body of state tort law.<sup>15</sup> The bill's critics further argue that the stated goal of uni-

---

11. S.100, *supra* note 8, at § 3(b)(1). See S. REP. NO. 476, 98th Cong. 2d Sess. 2d (1984).

12. Dentzer, *The Product Liability Debate*, Newsweek, September 10, 1984 at 54. See *infra* note 55.

13. See *Product Liability Reform: Hearings on S.2631 Before the Subcomm. for the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. (1982) [hereinafter cited as 1982 *Hearings*]. These hearings extensively document the perceived problems, and the need for federal product liability legislation. See also 1983 *Hearings*, *supra* note 4, at 300 (arguments favoring federal preemption of product liability); S. REP. NO. 670, 97th Cong., 2d Sess. 7 (1982) (federal preemption of state-made product liability law).

14. See S. REP. NO. 476, 98th Cong., 2d Sess. 6 (1984). The commerce clause of the United States Constitution gives Congress the power to enact legislation which regulates interstate commerce. U.S. CONST. art. I, § 8 cl. 3. See, e.g., *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982) (discussion of the scope of the commerce clause); *Fry v. United States*, 421 U.S. 542 (1975) (commerce power applied to enact the Economic Stabilization Act); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (commerce clause used to negate racial discrimination in restaurant service); *Wickard v. Filburn*, 317 U.S. 111 (1942) (local activity may be reached by commerce power if the activity exerts a substantial economic effect on interstate commerce). The drafters note several examples where diverse laws were considered to be a burden on interstate commerce for the purpose of enacting federal legislation. E.g., *Longshoremen's and Harbor Workers' Compensation Act*, 33 U.S.C. §§ 901-950 (1978) (imposing liability without regard to fault); *Price-Anderson Act*, 42 U.S.C. § 2210 (Supp. 1982) (limiting liability for nuclear power plant accidents); *Federal Employer's Liability Act*, 45 U.S.C. §§ 51-60 (1972) (governing the liability of interstate railway carriers to their employers and altering state tort law on available defenses). The supremacy clause is also cited by the drafters as justification for preemption of state laws. See U.S. CONST. art. VI, cl. 2. The supremacy clause binds state courts to apply federal law and to follow the decisions of federal courts where applicable. *Id.* The clause also accounts for differences between state and federal law. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95 (1962) (incompatible doctrines of local law must give way to principles of federal law).

15. See Coccia, *Uniform Product Liability Legislation: A Proposed Federal Solution*, 27 TRIAL LAW. GUIDE 236, 258 (1983). The author notes three arguments advanced against federal preemption of product liability law: (1) that

formity will not be achieved by a federal statute open to interpretation by fifty separate state courts.<sup>16</sup> They point out that the states will invariably interpret the new standards embodied in S.100 in different ways because the bill rejects any form of federal administration of the product liability system.<sup>17</sup> The bill's critics note the irony of passing a bill predicated on a "pressing need" for uniformity when the bill itself makes no provision for either a federal administrative mechanism or concurrent federal and state court jurisdiction.<sup>18</sup>

Whether S.100 achieves its designated purposes or not, one fact is clear: S.100 would substantially redefine many aspects of Illinois product liability law. To accomplish its stated goal of national uniformity, the bill preempts "any state law regarding recovery for any loss or damage caused by a product."<sup>19</sup> In Illinois, the cause of action created by S.100 would supplant the theories of strict liability, negligence, defective warning, and breach of express and implied warranty currently in use.<sup>20</sup> S.100 would cast into doubt several of the consumer-oriented premises that form the core of Illinois products law.<sup>21</sup> This questionable result would be accomplished by altering the substantive content of the "product liability" causes of action with the removal of strict liability theory from several key areas.<sup>22</sup>

The need to analyze the provisions of S.100 becomes increasingly necessary as the debate over federally-enacted product liability law intensifies<sup>23</sup> and S.100 moves closer to passage in the Senate. This comment provides an analysis of the potential impact of S.100 on Illinois product liability law. The analysis begins by tracing the history of federal interest and attempted intervention into the tort

---

preemption would destroy the flexibility of the common law approach; (2) that if codification is necessary, it should occur at the state level to ensure that it meets each state's unique needs; (3) that uniformity would not be achieved by federal legislation to be interpreted in 50 separate state courts. *Id.*

16. *Id.* at 259. 1983 *Hearings*, *supra* note 4, at 344.

17. 1983 *Hearings*, *supra* note 4, at 345.

18. *Id.* at 344, 345. The critics also note that section 3, the preemption section, avoids the additional direct expenditure of federal revenues by placing enforcement of the product liability statute within the purview of the state courts. Because the bill increasingly shelters manufacturers from liability for injury caused by defective products, someone else must eventually bear the cost of these injuries. The critics contend that the lack of federal involvement in the form of an alternate compensation mechanism will cause these costs to be shifted to existing, overburdened federal programs such as Social Security or Medicaid. This, in turn, will result in a large, indirect drain on federal resources. *Id.* at 345.

19. S.100, *supra* note 8, at § 3(b)(1). See *infra* notes 55 and 94.

20. See *infra* note 94.

21. See *infra* text accompanying notes 106-160.

22. See *infra* text accompanying notes 106-160.

23. See *infra* text accompanying notes 42-52.

field of product liability. Next, the scope of the bill, and its perceived purpose are discussed. The thrust of the analysis is directed toward the substantive changes inherent in the new "product liability" cause of action created by S.100. Specifically, a comparison of substantive aspects of the cause of action established by the bill, with the several causes of action currently used in Illinois, is provided.

#### HISTORY OF FEDERAL PRODUCT LIABILITY LEGISLATION

Federal government interest in the field of product liability stems directly from the dynamic growth of this area in tort law.<sup>24</sup> This growth has been due, in large part, to development of the theory of strict liability for product-caused injury.<sup>25</sup> Concern has been expressed over increases in the number of claims filed,<sup>26</sup> over the growing transactional costs of product liability litigation,<sup>27</sup> and in some instances, over the unavailability of product liability

---

24. See Coccia, *Uniform Product Liability Legislation: A Proposed Federal Solution*, 27 TRIAL LAW. GUIDE 236, 238 (1983); Walters, *Federal Pre-emption of State Products Liability Laws and Limitations of the Strict Liability of Manufacturers*, 32 DRAKE L. REV. 961, 963 (1983).

25. Prior to the development of strict liability, recovery for product-caused harm depended on a showing of fault or negligence on the part of the manufacturer of the product. After adoption of strict liability it became possible to impose liability on the manufacturer by simply establishing that the injury was caused by an unreasonably dangerous defect in the product which existed at the time the product left the manufacturer's control. The practical result was a less onerous burden of proof for the injured claimant which sparked an increase in the number of suits filed. This growth is demonstrated by an increase in the amount of damages awarded by juries in product liability actions. A study published by the Rand Corp. in 1982 noted that product liability awards rose from an average of \$143,000 in the early 1960's to an average of \$377,000 during the period from 1975-1979. Dworkin, *Federal Reform of Product Liability Law*, 57 TUL. L. REV. 602, 602 (1983) (citing *The Rand Corp., Civil Jury Verdicts and Awards . . . A Look at Twenty-Year Trends in Cook County, Illinois . . . A Summary of Research Results* (1982)). When placed against a twenty year backdrop of relatively stable awards for most other areas of law, the increase in product liability awards during this same period becomes even more dramatic. *Id.* The study also indicates that during the twenty year period both the overall number of products cases and the plaintiff's success rate increased as well. *Id.*

26. See U.S. DEPT. OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY, FINAL REPORT XXXVII (1977), reprinted in 5 FRUMER & FRIEDMAN, 585, 627 (1982) [hereinafter cited as TASK FORCE I] (the *Final Report* extensively documents the rising tide of product liability litigation throughout the United States.)

27. In its report on S.44, the Senate Commerce Committee included the following facts and figures. For every dollar received by the claimant, an average of 33 cents was paid to the claimant's attorney in contingent fees. Likewise, for every dollar paid to the claimant, an average of 42 cents was paid by the insurer in defense costs. Thus it appears that by adding together defense and contingent fee costs, the product litigation system currently in place costs more in litigation and transaction costs than the net recovery by the claimant. S. REP. NO. 476, 98th Cong., 2d Sess. 7 (1984).

insurance.<sup>28</sup>

In response to these assertions, a federal *Inter-Agency Task Force on Products Liability (Task Force I)* was created by the Ford Administration in 1976.<sup>29</sup> *Task Force I* published its *Final Report* in May, 1977.<sup>30</sup> The *Report* identified three causes of the problems encountered by the manufacturers: (1) overly subjective rate-making procedures used by the commercial insurance companies;<sup>31</sup> (2) a lack of incentives to produce safer products;<sup>32</sup> and, (3) inherent uncertainty in product liability litigation resulting from fifty separately developing systems of product-related tort law.<sup>33</sup> While *Task Force I* did not recommend specific legislative proposals,<sup>34</sup> it did suggest that any product liability reform should include two basic changes.<sup>35</sup> To counteract the uncertainty caused by the common law development of products law, *Task Force I* recommended that some form of uniform legislation be developed.<sup>36</sup> Next, it was suggested that the principal focus of any uniform legislation should be the creation of a single "product liability" cause of action that would incorporate the various theories of recovery in use throughout the states.<sup>37</sup>

---

28. S. REP. NO. 476, 98th Cong., 2d Sess. 8 (1984). An interagency task force was created by the Ford Administration to investigate the alleged product liability crisis. See *infra* note 29 and accompanying text. The task force found that no widespread problem existed as to the availability of product liability insurance. FINAL REPORT, *supra* note 26, at XXXV. The task force did report that insurance costs rose substantially between 1974 and 1976, thus causing many small businesses to forego purchasing insurance because of its unaffordability. *Id.* at XXXV. Average percentage increases were 280% between 1971 and 1976, with a large increase of 210% between 1974 and 1976. *Id.* at III-2. Some companies experienced increases of more than 1000% during the period between 1974 and 1976. *Id.* at VI-32.

29. The task force was created by the Ford Administration's Economic Policy Board. TASK FORCE I, *supra* note 26, App. 627.

30. *Id.*

31. It concluded that "[f]or most products coverage, neither the insurance companies nor the Insurance Service Office (ISO) have more than subjective estimates of the probable risk upon which to predicate premiums. The result is that most premiums, in the final analysis, amount to 'informed best guesses' of the individual underwriters." TASK FORCE I, *supra* note 26, at V-10.

32. The Task Force found that the unavailability of reliable data and the unpredictable nature of product liability litigation provided little incentive to direct manufacturers toward liability prevention. The Task Force also noted that rules requiring manufacturers to "foresee the unforeseeable" had the result of discouraging manufacturers from attempting to produce safer products. TASK FORCE I, *supra* note 26, at I-25, 26. It must be noted that to take this approach to its logical conclusion would result in a situation where the onus of foreseeability is placed on the consumer rather than the manufacturer who is normally held to the standard of an expert.

33. *Id.* at I-28.

34. *Id.* at VII-19.

35. *Id.*

36. *Id.*

37. *Id.*

Upon reviewing the findings of *Task Force I*, the Carter Administration commissioned a second task force to prepare an options paper describing specific legislative proposals.<sup>38</sup> *Task Force II* published its options paper in April, 1978. The options paper recommended the drafting of a uniform product liability act to be submitted to Congress.<sup>39</sup> The Carter Administration agreed that the legislation should be drafted, but rejected the notion that it should be introduced in Congress.<sup>40</sup> Accordingly, it directed the Department of Commerce to draft a model uniform product liability law to be adopted individually by the states.<sup>41</sup>

Congress was also quick to respond to the mounting furor of the product liability reform lobby.<sup>42</sup> After publication of the first draft of the *Model Uniform Product Liability Act*, several bills based on its provisions were introduced in the 95th and 96th sessions of Congress.<sup>43</sup> These bills were never referred to congressional committees for study and, therefore, generated little support.<sup>44</sup>

Building on this growing wealth of information, Senator Robert Kasten, Jr. introduced a product liability bill into the 97th Congress.<sup>45</sup> After extensive hearings held in March, 1982, the bill,

---

38. U.S. DEPT. OF COMMERCE, TASK FORCE ON PRODUCT LIABILITY AND ACCIDENT COMPENSATION, OPTIONS PAPER ON PRODUCT LIABILITY AND ACCIDENT COMPENSATION ISSUES, 43 Fed. Reg. 14, 612 (1978) [hereinafter TASK FORCE II].

39. See Coccia, *Uniform Product Liability Legislation: A Proposed Federal Solution*, 27 TRIAL LAW. GUIDE 236, 242 (1983).

40. *Id.* at 243.

41. See, e.g., MODEL UNIFORM PRODUCT LIABILITY ACT, reprinted in 44 Fed. Reg. 62,714 (1979) [hereinafter UPLA]. To date no state has fully enacted this model law. S. REP. NO. 476, 98th Cong. 2d Sess. 6 (1984). The drafters perceive this lack of response from the states as an argument for the enactment of S.100. In reality, the states' decision not to adopt the UPLA is an argument against enactment of S.100 because S.100 is modeled after the UPLA and borrows extensively from its provisions. See *infra* note 45.

42. The first major step taken was the passage of the Risk Retention Act, 15 U.S.C. §§ 3901-3904 (Supp. V 1981). The Act was created to solve the problem of obtaining affordable product liability insurance. See Shea, *The Product Liability Risk Retention Act of 1981*, 28 PRAC. LAW. 9, 10 (1982). This was accomplished by allowing product manufacturers and sellers to form risk retention groups to provide for group self-insurance. The Act establishes risk retention groups in the form of corporations which spread product liability risks among the groups. *Id.* at 10. The risk retention corporation is the equivalent of a captive insurance company. *Id.*

43. For a recent compilation of these bills, see Coccia, *Uniform Product Liability Legislation: A Proposed Federal Solution*, 27 TRIAL LAW. GUIDE 236, 243 n.1-5 (1983).

44. *Id.* at 243.

45. The bill was designated S.2631, 97th Cong. 2d Sess. (1982). S.2631 was based in part on H.R.7921 introduced in the House in mid-1980. S. REP. NO. 476, 98th Cong. 2d Sess. 10 (1984). Both bills retained provisions from the draft of the Model Uniform Product Liability Act. In fact some of the most crucial language of the Model Act is retained, in substance, in S.100. Compare Model Uniform Product Liability Act § 104 (1979), reprinted in 44 Fed. Reg. 62,714, 62,721



numbered S.2631, was formally introduced by Senator Kasten on June 16, 1982.<sup>46</sup> Reintroduced into the 98th Congress on January 26, 1983, the bill, now numbered S.44,<sup>47</sup> boasted twenty-six bi-partisan sponsors, as well as the support of the business and manufacturing sectors.<sup>48</sup> The Reagan Administration endorsed the concept of creating federal product liability law as early as September, 1982, and on July 20, 1983 specifically endorsed S.44.<sup>49</sup> As the 98th Congress drew to a close in 1984, opponents of the bill successfully blocked its passage with a threatened filibuster.<sup>50</sup> The bill, renumbered S.100, was reintroduced into the 99th Congress on January 3, 1985.<sup>51</sup> As of this writing, S.100 is again under consideration in the Committee on Commerce, Science and Transportation.<sup>52</sup>

### SCOPE AND PURPOSE OF S.100

The purpose of S.100 is to regulate interstate commerce by providing a uniform product liability law.<sup>53</sup> This exercise of Congress' commerce power is predicated on the drafters' belief that conflicts among the product liability laws of the fifty states have made it difficult for manufacturers and sellers to anticipate what the law might be in a given jurisdiction.<sup>54</sup> To alleviate this problem, S.100 is designed to be broadly applied in all product liability actions arising

---

(1979) (basic standards of responsibility for manufacturers) with S.100, *supra* note 8, at § 4 (responsibility of manufacturers).

46. S. REP. NO. 476, 98th Cong. 2d Sess. 10 (1984).

47. See *supra* note 8.

48. S. REP. NO. 476, 98th Cong. 2d Sess. 11 (1984). Two additional hearings were held during the first session of the 98th Congress. As of this writing, the most recent hearing was held on March 5, 1984. *Id.*

49. S. REP. NO. 476, 98th Cong., 2d Sess. 11 (1984). The Reagan Administration supported S.2631 until the first draft was published. After reviewing the first draft of S.2631, the departments of Justice and Labor were both critical of several provisions. *Administration Gives Yellow Light for Senate Passage of Tort Reform*, 10 PROD. SAFETY AND LIAB. REP. (BNA) 625 (1982). The ambivalence toward the bill is reflected in a draft memorandum from H. Steven Holloway, associate general counsel of the United States Department of Commerce, to Secretary of Commerce Malcolm Baldrige. The draft memorandum details the substantive provisions of the bill with which the Administration took issue. These provisions include: worker compensation, preemption of state law, the barring of collateral estoppel, and the removal from juries of the responsibility for determining the amount of punitive damages to be awarded to the plaintiff. Draft Memorandum at 1-3. (copies of this memorandum are available in the law review office). However the Administration officially endorsed S.2631, the predecessor to S.44 by October 1982, despite the possibility that the bill might be interpreted as being in opposition to the Administration's policy of New Federalism. *Senate Commerce Committee Approves Product Liability Reform Measure*, 10 PROD. SAFETY AND LIABILITY REP. (BNA) 677 (1982).

50. *Product Liability*, 70 A.B.A.J. 48 (December, 1984).

51. S.100, *supra* note 8, at 1.

52. *Id.*

53. *Id.* See *supra* note 14.

54. S. REP. NO. 476, 98th Cong. 2d Sess. 1 (1984). See *supra* note 14.

in the state courts.<sup>55</sup>

The drafters of S.100 traced the perceived crisis in product liability law to three interrelated factors. The first factor is primarily historical, and stems from the development of products law as a hybrid of the theoretical concepts of both tort and contract law.<sup>56</sup> In most states, including Illinois, a product liability claim can be brought on the tort theories of strict liability and negligence, and also on the contract theories of breach of express or implied warranty.<sup>57</sup> The drafters contend that this doctrinal mixture of contract and tort law results in serious inconsistencies which pose conceptual problems for both the parties involved in the litigation, and the trier of fact.<sup>58</sup>

---

55. The proposed bill would supersede all state product liability law and replace it with a cause of action "applicable to any civil action brought against a manufacturer or product seller for loss or damage caused by a product." S.100, *supra* note 8, at § 3(b)(1). Where the bill does not establish a rule of law, state law will apply. *Id.* at § 3(b)(1)(e). The bill expressly provides that United States district courts do not have jurisdiction over civil actions arising under it based on 28 U.S.C. §§ 1331, 1337 (1982). *Id.* at § 3(e). Therefore, under S.100, a product liability action may be brought in federal court only on a diversity of citizenship basis. *Id.* See 28 U.S.C. § 1332 (1982). One commentator notes that this may lead to a situation in which a state supreme court is obligated to follow interpretations of the bill made by local federal district courts, or federal courts of appeals, in the absence of direction from the United States Supreme Court. However, if the state supreme court elects not to follow the holdings of the lower federal courts, the situation might arise in which the bill is interpreted differently by state and federal courts within the same state. This result would undermine the certainty and uniformity which the bill seeks to provide. See Walters, *Federal Pre-Emption of State Products Liability Laws and Limitations of the Strict Liability of Manufacturers*, 32 DRAKE L. REV. 961, 967 (1983).

56. S. REP. NO. 476, 98th Cong. 2d Sess. 3 (1984). See, e.g., W. PROSSER, J. WADE, V. SCHWARTZ, *TORTS, CASES AND MATERIALS* 743 (7th ed. 1982) ("[t]he action . . . for breach of warranty is a freak hybrid, 'born of the illicit intercourse of tort and contract,' and partaking the characteristics of both.") The combination of tort and contract law into a single cause of action for product-related harm began with the "prolonged and violent national agitation over defective food, which at times reached a pitch of hysteria." Prosser, *The Assault Upon the Citadel, Strict Liability to the Consumer*, 69 YALE L.J. 1099, 1104, 1105 (1960). To protect innocent consumers, an implied warranty theory based on public policy was developed that allowed non-contracting consumers to sue the manufacturer for injuries suffered from eating defective foods. *Id.* The result was an implied warranty of wholesomeness for human consumption, actionable by any person without regard to privity of contract. *Tiffin v. Great Atlantic and Pacific Tea Co.*, 18 Ill. 2d 48, 162 N.E.2d 406 (1959).

57. S. REP. NO. 476, 98th Cong. 2d Sess. 3 (1984). The similarity between tort and contract law in products cases is underscored by the facial similarities between the tort cause of action for misrepresentation, and the contract cause of action for breach of express warranty. See 1983 *Hearings, supra* note 4, at 102. Both causes of action are based on the detrimental reliance of the plaintiff on an express representation made by the defendant. Both causes of action also share the common historical origin of the action on the case. See W. PROSSER & W. KEETON, *PROSSER AND KEETON ON TORTS* 740 (5th ed. 1984).

58. S. REP. NO. 476, 98th Cong. 2d Sess. 3, 4 (1984). The inconsistencies surface in the current codifications of warranty and tort law governing product liability actions. The UNIFORM COMMERCIAL CODE § 2-316 [hereinafter cited as

The second factor noted by the drafters is that diverse and ever-changing common law rules breed inherent uncertainty among manufacturers and sellers who must determine in advance to what degree they may be held liable in each state in which a product is marketed.<sup>59</sup> Businesses engaging in interstate commerce are often unable to predict the extent of their potential liability.<sup>60</sup> In order to avoid liability, the manufacturer who conducts business on an interstate basis is given the difficult and expensive task of ascertaining and conforming to the product liability laws of each state in which it does business.<sup>61</sup>

The third factor to which the drafters attribute the uncertainty in products law, is the conflicting philosophy about the nature of tort law, and specifically, the theory of strict liability.<sup>62</sup> The drafters identify two basic approaches to the application of strict liability in product liability cases.<sup>63</sup> The "traditional" approach limits the use of strict liability to cases where a product fails to conform to the standards established by the manufacturer.<sup>64</sup> This is the so-called construction, or manufacturing defect, and is exemplified by the er-

---

U.C.C.] permits warranties to be excluded or modified by agreement between the parties. The RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965) forbids such disclaimers of liability. The U.C.C. also allows for the modification of the limitation of remedies for breach of warranty under § 2-719. Again, such modification or limitation is not available under § 402A. Yet another such inconsistency occurs with respect to the notice of breach. The U.C.C. requires that notice of the breach be given to the seller prior to any attempt at recovery under § 2-607(3)(a). Again this requirement is rejected by comment m of § 402A. See Note, *Pa. Glass Sand Corp. v. Caterpillar Tractor: Abuse of Pa.'s Products Liability Symmetry*, 43 U. PITT. L. REV. 1181, 1189-90 (1982).

59. S. REP. NO. 476, 98th Cong., 2d Sess. 4 (1984). The drafters point to the basic issue of determination of the manufacturer's responsibility for harm caused by a defective product. *Id.* For example, depending on which state's law is applied, the test for design defect may include: (1) whether the product performed safely as expected by an ordinary consumer when used in a reasonably foreseeable manner; *Caterpillar Tractor v. Beck*, 624 P.2d 790 (Alaska 1981); (2) whether the product would have been placed into the stream of commerce by a reasonable person if such a person were aware of the harmful nature of the product; *Wilson v. Piper Aircraft*, 282 Or. 61, 577 P.2d 1322 (1978), *Phillips v. Kimwood Mach.* 525 P.2d 1033 (Oregon 1974); (3) whether the product left the manufacturer's control in an unsafe condition for its intended use; *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978); (4) whether the product was unreasonably dangerous, determined by applying a risk-utility analysis; *Turner v. General Motors*, 584 S.W.2d 844 (Tex. 1979). See S. REP. NO. 476, 98th Cong. 2d Sess. 4 (1984).

60. S. REP. NO. 476, 98th Cong. 2d Sess. 4 (1984). The fallacy of this argument is that if the product is truly not defective, in that it does not cause injury, then no liability should attach regardless in which state the claim is brought.

61. *Id.*

62. *Id.* at 5.

63. *Id.*

64. *Id.*

rant mouse in the pop bottle.<sup>65</sup> According to the drafters, the theoretical basis for this approach is that it is reasonable for a consumer to expect the product to conform to the manufacturer's own specifications.<sup>66</sup> In these circumstances the test for assessing strict liability is an objective one.<sup>67</sup> The trier of fact need only compare the individual product in question with other products produced by the same manufacturer to determine whether the product is defective.<sup>68</sup>

The second theoretical approach to strict liability identified by the drafters is its application to design defect and failure to warn cases.<sup>69</sup> Here, the drafters contend that the use of strict liability is not predicated on objectivity, but rather on the manufacturer's ability to pay claims and distribute the risks of liability.<sup>70</sup> Under this approach the manufacturer is held responsible for product-caused injuries regardless of the standard of care used in designing the product, or in warning against its potential danger.<sup>71</sup> The drafters perceive this approach as "subjective" because they claim that no objective measure exists for determining warning or design defects.<sup>72</sup> They classify this objective/subjective dichotomy as a "philosophical" difference which results in "blurred and confused" standards of responsibility for manufacturers.<sup>73</sup>

Coupled with the drafters' conviction that uncertainty of the law is the primary evil behind the perceived crisis, is their belief that the states cannot effectively resolve the uncertainty.<sup>74</sup> The drafters point out that no state has completely adopted the Model Act.<sup>75</sup> While numerous states have enacted some form of product liability law, the drafters claim that most of these statutes are not comprehensive and that they fail to address the key issues that arise in product liability litigation.<sup>76</sup> Even if a state enacted a clear and predictable statute, the drafters contend that the product laws

---

65. See 1983, *Hearings, supra* note 4 at 129 (statement of Monty L. Preiser on behalf of the West Virginia Trial Lawyers Assoc.).

66. S. REP. NO. 476, 98th Cong. 2d Sess. 5 (1984).

67. *Id.*

68. *Id.* See Wade, *On Product 'Design Defects' and Their Actionability*, 33 VAND. L. REV. 551, 551 (1980).

69. S. REP. NO. 476, 98th Cong. 2d Sess. 5 (1984).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* See *infra* note 116 and accompanying text.

74. *Id.* at 6.

75. *Id.* See *supra* note 41.

76. *Id.* The majority of product liability legislation enacted by the states is procedural, and is directed at placing a time bar on the claimant's ability to bring the claim. See *supra* note 5. The drafters do not state which key issues remain unaddressed by the state legislatures, but presumably the key issues are substantive in nature. See S. REP. NO. 476, 98th Cong. 2d Sess. 6 (1984).

could still vary from state to state and thus remain uncertain.<sup>77</sup> Given that most products manufactured within a state are used outside that state, the burden on interstate commerce becomes very real.<sup>78</sup> The drafters, therefore, argue that a federal product liability law will reduce this burden by creating uniformity among the states.<sup>79</sup>

#### APPLICATION OF S.100: REDEFINING THE SYSTEM

Current Illinois product liability law provides for a variety of theories which an injured consumer may use to establish a cause of action.<sup>80</sup> The careful formulation of these theories reflects the needs and concerns of Illinois consumers and business interests in providing the flexibility and openness to change inherent in a common law system.<sup>81</sup> This is borne out in part by the relatively modest incursions made by the Illinois legislature into the common law realm of product liability law.<sup>82</sup> If enacted, S.100 would be applied and interpreted in the Illinois courts.<sup>83</sup> In essence, the courts would be starting anew the task of redefining product liability law according to the previously uninterpreted standards contained in S.100.<sup>84</sup> The effect would be to erase over twenty years of concerted effort by the Illinois courts and legislature to define the scope and nature of liability for product-related injury. These efforts would be re-

---

77. S. REP. NO. 476, 98th Cong. 2d Sess. 6 (1984).

78. *Id.* at 6. See 1982 *Hearings*, *supra* note 13, at 77.

79. S. REP. NO. 476, 98th Cong. 2d Sess. 6 (1984).

80. See *infra* notes 86-93 and accompanying text.

81. See 1983 *Hearings*, *supra* note 4, at 180 (statement of the Ass'n of Trial Lawyers of America) (discussion of the dangers of federal codification of common law).

82. Illinois has statutes of limitation and repose for product liability actions. ILL. REV. STAT. ch. 110, § 13-213 (1983). In addition, Illinois has excluded blood and related products from being subject to strict liability. *Id.* at § 5102. The remainder of Illinois product liability law is determined in the Illinois courts. See Herrmann, *An Overview of State Statutory Product Liability Law*, 27 TRIAL LAW. GUIDE 1, 17 (1983).

83. See *supra* note 55.

84. See 1983 *Hearings*, *supra* note 4, at 302 (statement of the National Ass'n of Independent Insurers). In its discussion of the arguments against federal preemption of common law the Ass'n made the following statement:

It is doubtful that each jurisdiction considering these questions will arrive at exactly the same tests and guidelines. It is fairly well established that societal attitudes, and the judicial decisions influenced by these attitudes, differ from region to region (indeed they often differ significantly from rural to urban areas within a state). The practical result of the legislation's preemption of state law will not be a significant degree of uniformity. Rather, it can be expected that each state will again develop its own unique case law, but only after an interim period during which there will be significant confusion with a tremendous waste of court resources relitigating old issues.

*Id.*

placed with a new law which in some instances carries a different substantive theoretical basis for recovery.<sup>85</sup>

### *Redefining "Unreasonably Dangerous"*

Depending on the facts in a given case, the Illinois claimant may find the theoretical basis for his claim in either the common law doctrines of tort or contract law.<sup>86</sup> Whatever the underlying substantive theory, the Illinois claimant must prove the existence of a "defect" in the product,<sup>87</sup> that the defect existed at the time the product left the manufacturer's control,<sup>88</sup> and that the defect was the proximate cause of the claimant's harm.<sup>89</sup> Despite the difficulty of defining "defect" in such a way as to "resolve all cases,"<sup>90</sup> Illinois courts have identified several types of actionable defects.<sup>91</sup> To render a defect actionable, the claimant must show that the defect caused the product to be "unreasonably dangerous,"<sup>92</sup> or unfit for the purpose for which it was sold.<sup>93</sup>

---

85. See *infra* text accompanying notes 102-105.

86. See *infra* notes 106-60 and accompanying text. In Illinois, "the strict liability theory is essentially the liability of implied warranty divested of the contract doctrines of privity, disclaimer and notice." *Dunham v. Vaughan & Bushnell Mfg.*, 86 Ill. App. 2d 315, 323, 229 N.E.2d 684, 693 (1967), *aff'd*, 32 Ill. 2d 339, 247 N.E.2d 401 (1969).

87. Compare *Van Winkle v. Firestone Tire and Ruber*, 117 Ill. App. 2d 324, 330, 253 N.E.2d 588, 590 (1969) (recovery for breach of implied warranty requires a showing of the defective product, and that the damage resulted from the defect) with *Suvada v. White Motor*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (recovery in strict liability requires a showing of the defective condition of the product, that the defect caused the injury and that the defect existed at the time the product left the manufacturer's control).

88. *Suvada*, 32 Ill. 2d at 621-22, 210 N.E.2d at 187.

89. *Id.*

90. As noted by Justice Traynor, there is no definition of "defect" which resolves all cases. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965). The term 'defect' must therefore remain an "open-ended term." See Kessler, *Products Liability*, 76 YALE L.J. 887, 930 (1967).

91. A product may fail to perform in the manner it was reasonably expected to; such failure is called a manufacturing or construction defect. *Dunham v. Vaughan & Bushnell Mfg.*, 42 Ill. 2d 229, 247 N.E.2d 401 (1969). If the product performed in a reasonably expected manner, but was lacking in safe design and so resulted in injury, the failure of the product is attributed to defective design. *Kerns v. Engelke*, 76 Ill. 2d 154, 390 N.E.2d 859 (1979). The product may be properly constructed and designed, yet fails to carry a warning of a particular danger of which the manufacturer is aware. The manufacturer may also fail to include instructions for the safe operation of the product. Both of these failures each constitute a defective warning. *Illinois State Trust Co. v. Walker Mfg.*, 73 Ill. App. 3d, 585, 392 N.E.2d 70 (1979). Unsafe packaging of a product results in a packaging defect. *Lewis v. Stran Steel*, 57 Ill. 2d 94, 311 N.E.2d 128 (1974).

92. *Suvada*, 32 Ill. 2d at 618, 310 N.E.2d at 188.

93. *Van Winkle v. Firestone Tire*, 117 Ill. App. 2d 324, 325, 253 N.E.2d 588, 590 (1969). The distinction between the term 'unreasonably dangerous' and the phrase 'unfit for the purpose for which it was sold,' while underscoring the theoretical origins of tort and contract product liability causes of action, has been

In contrast, S.100 establishes a single cause of action for all product liability claims. This is accomplished by first superseding prior state products laws,<sup>94</sup> and then filling the void with the substantive content of the statute.<sup>95</sup> The cause of action proposed by S.100 requires the claimant to prove by a preponderance of the evidence that the product was unreasonably dangerous, and that the unreasonably dangerous aspect of the product was a proximate cause of the claimant's harm.<sup>96</sup>

To satisfy the "unreasonably dangerous" element, the claimant must prove that the product was defective in at least one of four ways. S.100 provides that a product may be found unreasonably dangerous: (1) in construction or manufacture;<sup>97</sup> (2) in design or formulation;<sup>98</sup> (3) in the failure to provide adequate warnings or instructions;<sup>99</sup> and (4) in the failure to conform to an express warranty.<sup>100</sup>

---

described as "more semantic than real." *Sills v. Massey-Ferguson Inc.*, 296 F. Supp. 776, 779 (N.D.Ind. 1969).

94. S.100, *supra* note 8, at § 3(b)(1):

§ 3(b)(1) This Act supersedes any State law regarding recovery for any loss or damage caused by a product to the extent that this Act establishes a rule of law applicable to any civil action brought against a manufacturer or product seller for loss or damage caused by a product, including any action which before the effective date of this Act would have been based on (A) strict or absolute liability in tort; (B) negligence or gross negligence; (C) breach of express or implied warranty; (D) failure to discharge a duty to warn or instruct; or (E) any other theory that is the basis for an award for damages for loss or damage caused by a product.

*Id.*

95. *Id.*

96. *Id.* at § 4. In any product liability action, a manufacturer is liable to a claimant if:

- (1) the claimant establishes by a preponderance of the evidence that—
  - (A) the product was unreasonably dangerous in construction or manufacture, as defined in section 5(a);
  - (B) the product was unreasonably dangerous in design or formulation, as defined in section 5(b);
  - (C) the product was unreasonably dangerous because the manufacturer failed to provide adequate warnings or instructions about a danger connected with the product or about the proper use of the product, as defined in section 6; or
  - (D) the product was unreasonably dangerous because the product did not conform to an express warranty made by the manufacturer with respect to the product, as defined in section 7; and
- (2) the claimant establishes by a preponderance of the evidence that the unreasonably dangerous aspect of the product was a proximate cause of the harm complained of by the claimant.

*Id.*

97. *Id.* at § 4(1)(A).

98. *Id.* at § 4(1)(B).

99. *Id.* at § 4(1)(C).

100. *Id.* at § 4(1)(D).

Superficially, this language seems to trace the common law requirements currently practiced in Illinois because all of the defects enumerated in S.100 are also accepted in Illinois practice.<sup>101</sup> However, the bill qualifies this list of defects by redefining "unreasonably dangerous" within the context of the defect being alleged. In this redefinition, S.100 employs both strict liability and negligence concepts, depending on the type of defect. Liability without regard to fault is retained only in manufacturing and construction defect cases,<sup>102</sup> and in cases where the claimant alleges a breach of express warranty.<sup>103</sup> A negligence or fault-based standard is used to determine design<sup>104</sup> and failure to warn defects.<sup>105</sup>

### *Construction Defects*

S.100 substantially retains the concept of strict liability in its treatment of construction and manufacturing defects. The bill defines "unreasonably dangerous" in terms which ignore the manufacturer's conduct, but which focus on the defective condition of the product itself. This treatment is predicated on the drafters' belief that it is reasonable for a consumer to expect products to be free from manufacturing or construction flaws.<sup>106</sup> In turn, this reasonable expectation stems from what the drafters term an "objective comparison" which allows the product that caused the injury to be evaluated against other same or similar products that the manufacturer has produced.<sup>107</sup> If the objective comparison reveals a defect, fault on the part of the manufacturer need not be established.<sup>108</sup>

This is essentially the theoretical basis for assessing strict liability in Illinois with one major difference. The drafters of S.100 have consciously removed a crucial expression of public policy from the reasoning which underlies the use of strict liability in Illinois.

---

101. See *supra* note 91. The Illinois definition of "unreasonably dangerous" is derived from pattern jury instructions. The instructions define "unreasonably dangerous" in the following manner: "[w]hen I use the expression 'unreasonably dangerous' in these instructions I mean unsafe when put to a use that is reasonably foreseeable considering the nature and function of the product." ILLINOIS PATTERN JURY INSTRUCTIONS, *Civil* § 400.06 (West Supp. 2d ed. 1977). If enacted, S.100 would require four separate jury instructions to define "unreasonably dangerous;" one for each type of generic defect recognized in the bill.

102. S. REP. NO. 476, 98th Cong. 2d Sess. 26 (1984).

103. *Id.* at 26.

104. *Id.* at 28.

105. *Id.* at 34.

106. *Id.* The drafters of S.100 feel that the strict liability standard works in cases of this type because the product that caused the injury can be compared objectively to the manufacturer's own product standards by looking at other products it produced. S. REP. NO. 476, 98th Cong. 2d Sess. 30 (1984). See *supra* text accompanying notes 64-73.

107. S. REP. NO. 476, 98th Cong. 2d Sess. 30 (1984).

108. *Id.*



This public policy was first expressed in Illinois in the landmark case of *Suvada v. White Motor Company*.<sup>109</sup> In *Suvada*, the Illinois Supreme Court cited "invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit" as reasons for assessing strict liability upon the manufacturer of a defective product.<sup>110</sup> This means that Illinois products law is based in part on the policy that those who produce and place a product into the stream of commerce can better afford to absorb and redistribute losses caused by an unreasonably dangerous condition in the product.<sup>111</sup>

In acknowledging the reality that those who place a defective product on the market and then encourage its use are in a better position to reallocate the loss later caused by the product, the Illinois courts are making a *subjective* public policy decision. The decision comes not as the result of an "objective comparison" between the physical propensities of one product with another. Rather, the decision reflects the needs and concerns of Illinois consumers that the products they purchase will indeed be safe.<sup>112</sup>

In its application to construction defects, enactment of S.100 would alter Illinois law in two respects. First, although on its face it appears that S.100 applies strict liability to construction defects, the theoretical basis for this application, the "objective comparison," bears little relationship to the subjective public policy reasons which form the core of the application of strict liability to product-caused injury in Illinois.<sup>113</sup> Second, if enacted, S.100 would remove from Illinois courts, and ultimately from Illinois citizens, the ability to continue to make this type of subjective public policy determination.<sup>114</sup> As a result, the Illinois courts would be saddled with a new and previously uninterpreted statute, amenable to change only at the federal level.

---

109. 51 Ill. App. 3d 318, 201 N.E.2d 313 (1964), *aff'd*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

110. *Id.* at 616, 210 N.E.2d at 186.

111. *White v. Galion*, 326 F. Supp. 751, 754 (1971); *Dunham v. Vaughan & Bushnell Mfg.*, 42 Ill. 2d 339, 344, 247 N.E.2d 401, 404 (1969); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1966). Yet the policy reasons behind assessing strict liability against the party most able to reallocate the loss does not place the manufacturer in the role of absolute insurer of the defective product. The plaintiff must still prove that the product was unreasonably dangerous, that this condition existed at the time the product left the manufacturer's control, and that the unreasonably dangerous condition was the proximate cause of the injury. *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 623, 210 N.E.2d 182, 188 (1965); *Shramek v. General Motors & U.S. Rubber Co.*, 69 Ill. App. 2d 72, 81, 216 N.E.2d 244, 248 (1966).

112. The drafters of S.100 candidly admit to this line of reasoning. See S. REP. NO. 476, 98th Cong. 2d Sess. 5 (1984). See *supra* text accompanying notes 69-73.

113. See *supra* text accompanying notes 109-110.

114. See *supra* note 84.

*Design Defects*

The drafters of S.100 carry this objective/subjective distinction with them in their determination of an appropriate standard to be applied to design defects.<sup>115</sup> They draw a "philosophical" distinction between the objective comparison test applied to construction defects, and the lack of such a test for design defects.<sup>116</sup> The distinction between these two types of defects, however, is more than merely philosophical.

A construction or manufacturing defect often involves only a small number of products relative to the number produced by the manufacturer.<sup>117</sup> Design defects, however, may frequently involve an entire product line.<sup>118</sup> To hold a particular product design defective may result in the withdrawal from the market of the manufacturer's entire line of products, often an expensive proposition.<sup>119</sup>

S.100 would have two major effects on Illinois design defect law. First, under S.100 the claimant would no longer be able to establish a cause of action based on a theory of strict liability.<sup>120</sup> Instead, the injured Illinois claimant would have to overcome the more difficult burden of proof contained in the bill's negligence standard by showing direct fault on the part of the manufacturer.<sup>121</sup> Second, the negligence standard embodied in S.100 would alter negligence theory as practiced in Illinois.<sup>122</sup>

---

115. See S. REP. NO. 476, 98th Cong. 2d Sess. 5 (1984). See *supra* text accompanying notes 69-73.

116. If the bases for changing the standards applied to design defects are truly philosophical, then the drafters are really doing little more than imposing their perceived philosophy of fairness upon the state by seeking to enact S.100. Critics of this approach suggest that the state courts are more appropriate forums for this type of value judgment resolution because the state courts are more flexible in assimilating changes in the common law. Product Liability, 51 U.S.L.W. 2475 (March 15, 1983).

117. See *Sweeny v. Mathews*, 94 Ill. 2d 64, 264 N.E.2d 170 (1970) (a mis-manufactured nail which broke when struck by the plaintiff); *Spotz v. Up-Right Inc.*, 3 Ill. App. 3d 1065, 280 N.E.2d 23 (1972) (lack of proper welding caused a scaffold to collapse); *Noncek v. Ram Tool*, 129 Ill. App. 2d 320, 264 N.E.2d 440 (1970) (a mis-wired drill shorted thus injuring the plaintiff); *Adams v. Ford Motor*, 103 Ill. App. 2d 356, 243 N.E.2d 843 (1968) (a missing bolt caused the cab and chassis to separate on a one-month-old pickup truck).

118. S. REP. NO. 476, 98th Cong. 2d Sess. 26 (1984). To state that a product incorporates a defective design means that all products incorporating that design are also defective. *Id.*

119. *Id.*

120. See *infra* text accompanying notes 123-131.

121. See *infra* text accompanying notes 123-131. The more difficult burden of proof is evident in cases where the plaintiff seeks to present evidence of the defendant's post-occurrence modifications of the defective product. Evidence of post occurrence modifications is generally excluded in negligence cases, but allowed under strict liability. See *Kerns v. Engelke*, 76 Ill. 2d 154, 390 N.E.2d 859 (1979).

122. See *infra* text accompanying notes 132-136.

S.100 provides for the establishment of a cause of action predicated on an unreasonably dangerous design defect.<sup>123</sup> The provision denies the manufacturer's liability unless it is proven that the manufacturer knew or should have known about "the danger which allegedly caused the claimant's harm."<sup>124</sup> Here the bill defines "unreasonably dangerous" by focusing on the manufacturer's knowledge of the defective design rather than on the presence of the defect itself, as is required in the case of a construction defect. This appears to be a negligence or fault-based standard, because it directs the inquiry to the defendant's knowledge, and thus, his conduct in placing the product on the market as designed.<sup>125</sup>

This is, again, a marked departure from current Illinois law. Illinois has long recognized the application of strict liability to cases of defective design.<sup>126</sup> In generic terms this means that Illinois courts assess liability without regard to fault when a product is proved to be defectively designed.<sup>127</sup> Liability without regard to fault (strict liability), demands only proof of the deficiency of the product itself, or put another way, proof of a design which renders the product unreasonably dangerous.<sup>128</sup> The claimant is not required to show any wrongdoing on the part of the manufacturer. Rather, such wrongdoing is inferred from the defective or unrea-

---

123. S. 100, *supra* note 8, at § 5(b)(1):

§ 5(b)(1) A product is unreasonably dangerous in design or formulation if, at the relevant point in time—(A) the manufacturer knew or, through the exercise of reasonable prudence, should have known about the danger which allegedly caused the claimant's harm; and (B) a reasonably prudent person in the same or similar circumstances would not have manufactured the product or used the design or formulation that the manufacturer used. (2) A product is not unreasonably dangerous in design or formulation if the manufacturer proves by a preponderance of the evidence that, at the relevant point in time—(A) a means to eliminate the danger that caused the harm was not within practical technological feasibility, and the benefits and usefulness of the product to the public outweighed the likelihood and probable seriousness of the harm; (B) the harm was caused by an unavoidably dangerous product; or (C) the harm was caused by an unsafe aspect of a product which was an inherent characteristic of the product and which would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community.

*Id.*

124. *Id.* at § 5(b)(1)(A).

125. The drafters contend that "the vast majority of courts apply fault-based principles and hold a manufacturer to a standard of reasonable care of [sic] prudence." *Id.* The drafters state that while many courts claim to use strict liability for defective design, they are actually applying the fault-based principles of negligence. *Id.*

126. See *Wright v. Massey-Harris, Inc.*, 60 Ill. App. 2d 70, 215 N.E.2d 465 (1966) (action in strict liability for a defectively designed cornpicker).

127. *Id.* See W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS 534-538 (5th ed. 1984).

128. See W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS 534-538 (5th ed. 1984).

sonably dangerous design of the product itself.<sup>129</sup> Fault-based recovery, (negligence), requires the claimant to trace the defective condition of the product directly to the manufacturer.<sup>130</sup> Therefore the general proof requirements of strict liability for defective design as practiced in Illinois are less onerous than those of negligence under S.100 because the claimant need not prove any wrongdoing on the part of the manufacturer. As a result, a claim founded under current Illinois law may preserve a case against a manufacturer where a requirement of proof of the manufacturer's fault or negligence, as required under S.100, would otherwise fail.<sup>131</sup>

S.100 goes further than merely changing the cause of action for defective design to a fault-based standard. Close scrutiny of the language used to describe the new standard reveals that it is actually harsher than the negligence standard currently applied in Illinois. Specifically, the clause, "danger which allegedly caused the claimant's harm," qualifies the bill's design defect test by limiting the defendant's culpability. This is accomplished by restricting the scope of judicial inquiry to the specific danger which caused the claimant's injury.<sup>132</sup> The effect is that causation is defined within the boundaries of the foreseeability of the claimant's specific injury, rather than within the boundaries of the defendant's duty to all who might foreseeably use the defectively designed product.<sup>133</sup> Put another way, S.100 excludes from liability risks which are not identical to those which the defendant should have foreseen.<sup>134</sup>

This formulation is in clear derogation of Illinois common law. It is recognized in Illinois that a manufacturer's duty to use ordinary care extends to any person who foreseeably may come into contact with the product.<sup>135</sup> Foreseeability is defined as "that

---

129. *Id.*

130. *Id.*

131. *E.g.*, *Bollmeier v. Ford Motor*, 130 Ill. App. 2d 844, 265 N.E.2d 212 (1970) (plaintiff was unable to show negligence by defendant which resulted in steering failure of plaintiff's auto, yet recovered on a theory of strict liability); *Dunham v. Vaughan & Bushnell Co.*, 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967) (plaintiff unable to prove negligence by defendant which resulted in the chipping of a hammer, yet recovered on a theory of strict liability) *aff'd*, 32 Ill. 2d 339, 247 N.E.2d 401 (1969); *Cunningham v. MacNeal Memorial Hospital*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970) (the undetectable presence of serum hepatitis in transfused blood was insufficient to bar the plaintiff from recovery on a theory of strict liability).

132. *See* 1983 *Hearings*, *supra* note 4, at 91 (response of W. Page Keeton, Professor, School of Law, Univ. of Texas, to a question from Sen. Kasten).

133. *Id.*

134. Product Liability Act: Hearings on S.44 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation, 98th Cong. 2d Sess. 485 (1984) (letter of Aaron D. Twerski, Professor of Law, Hofstra University) [hereinafter cited as 1984 *Hearings*].

135. *See Pitts v. Basile*, 55 Ill. App. 2d 37, 204 N.E.2d 43 (1965), *rev'd*, 35 Ill. 2d 49, 219 N.E.2d 472 (1966).

which it is objectively reasonable to expect, not merely what might conceivably occur.<sup>136</sup> Thus the causation element of the defendant's negligence is determined by examination of the defendant's duty to the class of persons whom it is objectively reasonable to expect will use the product, and not on the basis of foreseeability of the injury suffered by the individual claimant as specified by S.100.

Such a major change would promote confusion rather than the clarity which the drafters of S.100 claim as their goal, because presumably Illinois would then have two conflicting definitions of negligence. One definition would apply to other types of personal injury actions while the definition espoused by S.100 would apply exclusively to product liability actions. This is the very problem which the drafters are seeking to cure by imposing uniform law.

### *Warning Defects*

S.100 also imposes a negligence standard for assessing warning defects.<sup>137</sup> Again, the major substantive difference between the

---

136. *Winnett v. Winnett*, 57 Ill. 2d 7, 11, 310 N.E.2d 1, 5 (1974).

137. Warning defect cases arise from two basic scenarios: (1) where the omission of a warning of a product's dangerous propensities caused the injury; and, (2) where the injury is caused by the inadequacy of a warning given by the manufacturer. W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS 697 (5th ed. 1984). The defective warning provision of S.100 reads as follows:

Sec. 6(a) A product is unreasonably dangerous because of the failure of the manufacturer to provide warnings or instructions about a danger connected with the product or about the proper use of the product if—

(1) adequate warnings or instructions were not provided, under subsection (b); or

(2) adequate post-manufacture warnings or instructions were not provided, under subsection (c).

(b) A product is unreasonably dangerous for lack of adequate warnings or instructions if, at the time the product left the control of the manufacturer—

(1) the manufacturer knew or, through the exercise of reasonable prudence, should have known about the danger which allegedly caused the claimant's harm;

(2) the manufacturer failed to provide the warnings or instructions that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger which caused the harm alleged by the claimant, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of that harm; and

(3) those warnings or instructions, if provided, would have led a product user in the course of reasonably anticipated conduct either to decline to use the product or to use it in a manner so as to avoid harm of the type alleged by the claimant.

(c)(1) A product is unreasonably dangerous for lack of post-manufacture warnings or instructions if, after the product left the control of the manufacturer—

(A) the manufacturer knew or, through the exercise of reasonable prudence, should have known about the danger which allegedly caused the claimant's harm; and

cause of action created by S.100 and that as currently practiced in Illinois can be found in the limited scope of the bill's provision concerning warning defects. As in its test for design defects, S.100 confines the manufacturer's foreseeability requirement to the specific "danger which caused the claimant's harm."<sup>138</sup> This differs dramatically from the Illinois requirement that the manufacturer give adequate warning of *any* dangerous propensity about which it knows or should have known.<sup>139</sup> S.100 would therefore narrow the scope of the manufacturer's knowledge requirement by focusing only on the individual danger that caused the claimant's harm.<sup>140</sup>

---

(B) adequate post-manufacture warnings or instructions would have been provided by a reasonably prudent person in the same or similar circumstances, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of that harm.

(3) A product is not unreasonably dangerous under this subsection if the manufacturer made reasonable efforts to provide adequate post-manufacture warnings or instructions to a product user or to another person, in accordance with subsection (d).

(d) Where warnings or instructions are required under subsection (b) or (c), such warnings and instructions shall be given to the product user, unless—

(1) in light of the practical and economic difficulties of giving the warnings or instructions directly to the product user, the likelihood that the product would cause harm of the type alleged by the claimant, and the probable type alleged by the claimant, and the probable seriousness of that harm, a reasonably prudent person would have given such warnings or instructions to a third person, including an employer, who could be expected to take action to avoid the product user's harm or to assure that the risk of harm is explained to the product user; or

(2) the product is one which may be legally used only by or under the supervision of a using or supervising expert, in which case the manufacturer shall act with reasonable prudence to warn or instruct the expert.

(e) A product is not unreasonably dangerous for lack of warnings regarding—

(1) dangers that are obvious;

(2) the consequences of product misuse, as defined in section 9(c); or

(3) the consequences of product alterations or modifications, as defined in section 9(d).

As used in paragraph (1) of this subsection, "dangers that are obvious" are those dangers, including the magnitude of the danger, of which a product user in the course of reasonably anticipated conduct or a person identified in subsection (d), if applicable, would have been aware without a warning and dangers, including the magnitude of the danger, which were a matter of common knowledge to persons in the same or similar position as the claimant.

*Id.*

138. S. 100, *supra* note 8, at § 6(b)(1). See S. REP. NO. 476, 98th Cong. 2d Sess. 35 (1984).

139. *Dunham v. Vaughan & Bushnell Mfg.*, 86 Ill. App. 2d 315, 325, 229 N.E.2d 684, 689 (1967) (adequate warning must be given about any dangerous propensity about which the manufacturer knows or should have known), *aff'd*, 32 Ill. 2d 339, 247 N.E.2d 401 (1969).

140. See 1984 *Hearings*, *supra* note 134, at 489.

If enacted, S.100 would drastically reduce the manufacturer's exposure to liability by expanding the knowledge required of the manufacturer before the duty to warn is imposed.<sup>141</sup> In this sense, practical manufacturers will no longer be held to the same stringent warning requirements for which they are currently responsible.<sup>142</sup> The end result is that if S.100 is enacted, Illinois consumers will no longer enjoy the same protection in selecting a safe product because the warning of the product's potentially dangerous propensities need not be as comprehensive.

### *Breach of Warranty*

Illinois would likewise experience changes in the manner in which its injured consumers establish a cause of action for breach of warranty. Current Illinois law allows a product liability action to be initiated for a breach of express warranty,<sup>143</sup> a breach of an implied warranty of merchantability,<sup>144</sup> and for a breach of implied warranty of fitness for a particular purpose.<sup>145</sup> The claimant's burden of proof is similar to the burden of proof required for strict liability.<sup>146</sup> The major difference lies in the current origins of the respective theories. While strict liability theory is the result of judicially-made common law,<sup>147</sup> contemporary warranty theory comes as the result of Illinois' adoption of the Uniform Commercial Code.<sup>148</sup>

The drafters of S.100 failed to include an implied warranty theory into the text of the bill.<sup>149</sup> S.100 only makes provision for recovery based on a breach of express warranty.<sup>150</sup> If enacted, S.100

---

141. *Id.*

142. See 1983 *Hearings*, *supra* note 8, at 332-335 (statement of Public Citizen's Congress Watch). In Illinois the duty to warn is imposed where there is unequal knowledge between the manufacturer and the ultimate consumer. *Illinois State Trust v. Walker Mfg.*, 73 Ill. App. 3d 585, 589, 392 N.E.2d 70, 73 (1979). The warning requirement is imposed upon the manufacturer whether the manufacturer's knowledge is shown to be actual or constructive. *Id.*

143. ILL. REV. STAT. ch. 26, § 2-313 (1983) (breach of express warranty).

144. *Id.* at § 2-314 (breach of implied warranty of merchantability).

145. *Id.* at § 2-315 (breach of implied warranty of fitness for a particular purpose).

146. See *supra* notes 86 and 87.

147. See *supra* text accompanying notes 109-116.

148. See *supra* notes 143-145. The warranty provisions of the U.C.C. apply to Illinois personal injury actions involving defective products through the Buyer's Incidental and Consequential Damages provision section 2-715. Section 2-715(2)(b) permits recovery for "injury to person or property proximately resulting from any breach of warranty." *Id.*

149. See 1983 *Hearings*, *supra* note 4, at 101 (response of Victor E. Schwartz, counsel, Prod. Liability Alliance).

150. S.100, *supra* note 8, at § 7(a). The bill's warranty provision states that: § 7(a) A product is unreasonably dangerous because it did not conform to an express warranty made by the manufacturer if—(1) the product failed to

would remove outright the establishment of a product liability cause of action grounded on a breach of an implied warranty.<sup>151</sup> This means that in the absence of an express representation by the manufacturer that the product was safe for its intended use, the injured purchaser of a defective product would be barred from recovery under a warranty theory.<sup>152</sup>

The drafters seem to have ignored the historical origin of the theory of strict liability. Strict liability traces its origins directly from implied warranty theory; first as applied to defective food,<sup>153</sup> and later, after *Henningson v. Bloomfield Motors, Inc.*,<sup>154</sup> as an implied warranty of safety in personal injury actions.<sup>155</sup> The reason given for the removal of implied warranty is that as a contract doctrine it has no place in the tort realm of personal injury.<sup>156</sup> The drafters treat the removal of implied warranty as a mere clarification.<sup>157</sup> This is curious because S.100 retains breach of express warranty as a theoretical basis upon which to establish a cause of action.<sup>158</sup> The logic behind retaining breach of express warranty is that it is a form of misrepresentation and therefore is actually more akin to tort law.<sup>159</sup> The inconsistency in this approach lies in the terminology applied. The drafters claim to be removing implied warranty because of the unnecessary addition of contract law which accompanies it, yet they retain express warranty, a theory at least as deeply steeped in the law of contract.<sup>160</sup> The natural conse-

---

conform to such warranty; and (2) the failure of the product to conform to such warranty caused the claimant's harm

(b) A product may be unreasonably dangerous for failure to conform to an express warranty although the manufacturer did not engage in negligent or fraudulent conduct in making the express warranty.

*Id.*

151. See 1984 *Hearings*, *supra* note 134, at 408 (statement of Charles B. O'Reilly, counsel, on behalf of Asbestos Victims of America).

152. *Id.* Enactment of S.100 would have the immediate effect of negating the implied warranty provisions of the U.C.C. as applied to product liability actions. The bill's preemption clause, § 3(b)(1), specifically supersedes implied warranty as a theory of recovery. See 1984 *Hearings*, *supra* note 134, at 407 (statement of Sen. Howell Heflin). See *supra* notes 55 and 94.

153. See W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS 690 (5th ed. 1984). See *supra* note 56.

154. 32 N.J. 358, 161 A.2d 69 (1960).

155. *Id.*

156. 1983 *Hearings*, *supra* note 4, at 102 (response of Victor E. Schwartz, counsel, Product Liability Alliance to a question from Sen. Heflin).

157. *Id.*

158. S.100, *supra* note 8 at § 7. See *supra* note 150.

159. 1983 *Hearings*, *supra* note 4, at 102 (response of Victor E. Schwartz, counsel, Product Liability Alliance to a question from Sen. Heflin). See *supra* note 57.

160. The notion that contract liability should be imposed for the breach of an express warranty can be traced back to the early case of *Chandelor v. Lopus*, 79 Eng. Rep. 3 (1603).



quence of such a system is that manufacturers will rarely make nonexculpatory express warranties, precluding liability under any warranty theory.

The impact of this provision of S.100 on substantive Illinois product liability law is again negative. As in the previously discussed sections of the bill, S.100 would change Illinois warranty law for product-caused harm by removing the grounds for establishing a cause of action for breach of implied warranty as now allowed in Illinois. Again, the result of this restriction is that Illinois law, and thus public policy, is abrogated in favor of a new, inflexible and previously uninterpreted federal statute.

#### CONCLUSION

Enactment of S.100 bodes serious consequences for Illinois product liability law. Illinois products law carefully reflects the concerns of both the consumer and manufacturing segments of the state's economy. It is also demonstrative of the flexibility and sensitivity to the need for change inherent in a large industrial and agricultural state. If enacted, S.100 would remove this flexibility, and replace it with a new law that changes the substantive nature of the product liability law currently in place in Illinois.

In more general terms, S.100 would operate to preempt a field of law previously relegated to state courts and legislatures. In many states, including Illinois, product liability laws are grounded in public policy considerations of fairness toward the innocent consumer.<sup>161</sup> These needs often differ from state to state, and from jurisdiction to jurisdiction. S.100 would remove the flexibility necessary to maintain these needs in the changing environment of contemporary manufacturing and consumer practices. The resulting limitations would remove from Illinois lawmakers, and ultimately from Illinois citizens, the power to solve product liability problems both now and in the future. Therefore, it is recommended that Illinois' federal legislators take active participation in defeating S.100.

*William Foreman*

---

161. See 1983 *Hearings*, *supra* note 4, at 179 (statement of Howard Specter, President, Ass'n of Trial Lawyers of America).

We are appalled, too, at the proponents' studied indifference to the cherished history and development of the common law of product liability, a body of law which has developed over centuries on a case by case, person-by-person basis. Apparently that kind of individual analysis is too humane, too studied, too progressive, too kind, too altruistic, too everything good and American for this nation's danger-makers. We should for their sake deteriorate to the level of an east European code country. I hope not.  
*Id.*