Testimony of

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Testimony before the Senate Judiciary Committee:
Title 18, chapter 28 Sec. 561:
INTRODUCING DEFECTIVE PRODUCTS INTO INTERSTATE COMMERCE
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I. Preemption?
As written, sec. 561, Introducing defective products into interstate commerce, may be interpreted to preempt state law. The three most important cases on preemption involve tobacco, Cipollone v. Liggett Group, 505 U.S. 504 (1992) air bags, Geir v. Am. Honda, 529 U.S. 861 (2000) and pacemakers, Medtronics v. Lohr, 518 U.S. 470 (1996).
The point of these three cases is that preemption is a new defense. The concept of preemption is vague and undefined, like proximate cause in torts. Taking the three cases together, it appears that the federal courts use preemption to decide (at will) whether to allow the state suit or to forbid it (preempt).
To avoid preempting state law: the bill should clearly state: "It is not the intent of Congress to preempt state statues, regulations or common law with this act (Sec. 561)."

II. A Trojan Horse is Pulled up the Potomic.
The worst possible result would be for the statute to be passed and not enforced, but nevertheless courts would hold that the intent of Congress is to preempt state law, including punitive damages.
There are numerous reasons why the act would not be enforced. Because prosecutors are under funded - and undermanned, they must be selective in their enforcement. Prosecuting corporate executives will be complex, expensive, and time consuming, therefore there would be a strong likelihood that these criminal suits would not be brought. Or, low level employees, would be prosecuted, but not high ranking C.E.O's, and the corporation would see this minor expense as merely a cost of doing business.
Regardless of whether the Act is enforced, the courts might hold that the intent of Congress, in passing the Act, was to preempt all state law.
The Trojan horse analogy is suggested because many safety advocates will likely embrace the theory of the Bill, but only later realize that it has taken all of what they hold dear: state statutes and common law products liability cases (including punitive damages).
To avoid this unintended result, the Bill must clearly state that it is not intended to preempt state statutes, regulations, state common law nor the theory of punitive damages.

III. In order to reduce the sale of defective products, is this bill aimed at the appropriate "persons"?
The term "person" is defined as the employees of any corporation, company, association, firm, partnership, or other business entity or a sole proprietor. Later "person" is expanded to include person who has authority to introduce a product into interstate commerce, withdraw or recall a product from interstate commerce, or has the authority over the manufacturer, assembly, importing or sale of a product.
This definition of "person" is sufficiently broad to catch all those who know the product is defective and capable of causing death or serious bodily injury. The persons ensnared by this net would include: engineers, designers, team leaders, line workers, sales staff, presidents, vice presidents, and corporate C.E.O's.
This broad definition of "person" will encourage whistle-blowers to step forward and speak to the press or the appropriate agency. Examples that come to mind are Jeffrey Wigand in the tobacco litigation and Professor Roger Tuttle in the Dalkon Shield case.

Example: What if the drug causes vaginal cancer in the daughter of the consumer? Cancer can lead to death. In the DES cases the manufacturers were held liable for the resulting cancer under the strict liability cause of action. It is not clear that the pharmaceutical executives "knew" at the time of sale that cancer would result in third parties, and therefore the executives would not be subject to prosecution under the Bill.
In the cases of MER-29 and Oraflex, however, the executives knew of the risk of serious bodily injury (MER-29) and death (Oraflex) and would have been subject to prosecution under this Bill. See appendix.

IV. The introduction to the Bill says "knowing and reckless", but the remainder of the Bill only uses "knowing". Is "knowing" the proper standard for Mens Rea?
The use of these two terms seems appropriate. Professor Wayne La Fave concludes in his criminal law text: "the word 'intent' in the substantive criminal law has traditionally not been limited to the narrow dictionary definition of purpose, aim or design, but instead has often been viewed as encompassing much of what would ordinarily be described as knowledge". (La Fave, Criminal Law, 4th ed. at 246.)
Clearly, knowledge is a higher standard (and more narrow) than reckless. La Fave presents the following example:
We have seen that crimes defined so as to require that the defendant intentionally cause a forbidden bad result are usually interpreted to cover one who knows that his conduct is substantially certain to cause the result, whether or not he desires the result to occur. "Recklessness" in causing a result exists when one is aware that his conduct might cause the result, though it is not substantially certain to happen. One may act recklessly if he drives fast through a thickly settled district though his chances of hitting anyone are far less than 90%, or even 50%. Indeed, if there is no social utility in doing what he is doing, one might be reckless though the chances of harm are something less than 1%. Thus, while "knowledge" require[s] a consciousness of almost-certainty, recklessness requires a consciousness of something far less than certain or even probability. (La Fave, Criminal Law, 4th ed. at 269)

More people will be brought into the net if the term "reckless" is used. The Committee needs to decide whether they only want to prosecute those who know death is a substantial certainty, or want to also include those who know death might result (reckless).
The standards of negligence (reasonable care), and strict liability (liable without knowledge or negligence), are not mentioned in the draft and are not in issue here.
The Model Penal Code defines "knowingly" as follows:
A person acts knowingly with respect to a material element of an offense when:
(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result. [Model Penal Code (2002) ed., at pg. 304]

V. Could a whistle-blower be subject to punishment under the Bill?
The whistle-blower fits within the definition of a person who knows the defective product could cause death or serious bodily injury and therefore appears to be subject to prosecution. This is good because it will encourage employees with such knowledge to come forward and complain to the media or to the appropriate agency. However, the whistle-blower will not be prosecuted because she is protected by federal legislation, Whistle-blowers Act of 2002, 5 U.S.C. Sec. 2301 (Public Law Number 107-1744). See for example, Pearson v. Dodd, 410 F.2d 701 (1969).

VI. Bad Results, Under the Bill
A serious problem with the Bill is that it could create a whistle-blower culture. Large numbers of employees could be found complaining to the press or agencies for all manner of "trivial" problems with products. This could lead to substantial expense for the corporation as it sifts through the stack of complaints. It could strain employer-employee relations.
On the other side, the Bill could save lives by preventing the manufacture and sale of dangerous and defective products. Because of the threat of criminal prosecution, products would be designed more safely.

VII. The Size of the Fine is Important.
The Bill mentions a "fine" at several points, but does not set an amount. The size of the fine is important, if the fine is small, the corporation will disregard it or perhaps even pay the fine for some of its executives. Therefore, high ranking executives in major corporations will have to be fined large amounts to get their attention.

If the word "person" is interpreted to include the corporation, then the fine must be truly substantial to avoid being ignored. When death results, I suggest that 1% of the firm's profits for the year would be a starting point (see appendix). In the Pinto case the fine would have been 16 million dollars in 1981. But clearly the victims must also have a parallel civil suit to compensate them for their losses. Jail-time or a fine does nothing for the survivors of the crime.

VIII. Technical Problems with the draft of the Bill

A. "Reckless" is used in the introduction but not later in the Bill. To avoid confusion, "reckless" should be deleted from the Bill.

B. Does the Bill apply to all "products".

As drafted all produces are covered. Clearly it would apply to SUV's televisions, airplanes and tires. Seemingly prescription drugs such as Vioxx and Oraflex would be covered.

Does the Committee intend that tobacco products would be within the Bill? Clearly tobacco kills, but there is substantial debate as to whether tobacco is "defective."

What about handguns? Do you want handgun CEO's and sales people, who know that handguns are sold beyond the saturation point -in the South- to "strawmen", who sell them on the black market in New York City and Chicago, to be prosecuted under the Act? Handguns kill and some are defective, but handgun manufacturers were recently immunized by Congress. Should this immunity be replicated in the Bill?

Above ground swimming pools - They kill several people each year. Are they defective? The same can be said for four wheel ATV's.

IX. Problems created by specific language in the draft.

In (a)(1), line 6. The term "instruction" is used. This word should be replaced with "warnings." A product can be found to be defective if it has a flawed warning; it fails to explain how to use the product safely.

The word "accepted" in (a)(1) line 8 is confusing and should therefore be deleted. A person may know of a risk or be aware of a risk, but that does not mean it is "accepted".

(a)(3), line 14. Should "person" include the corporation itself? Often the employee will be unable to pay a hefty fine, but the corporation will have the needed funds. The corporation may encourage a culture of ignoring serious risks to the consumer and it should therefore be prosecuted and fined.

(a)(3), line 24. Does impairment of mental faculty include emotional distress? Is emotional distress intended to be a recoverable damage under the Bill?

(b)(2) line 7. What does "recall" mean? Does that refer to the power to recall the product, or merely send out a "recall" letter. The two may be different.

(b)(2) lines 5-15. A person who fails to disclose the defective product to "the appropriate agency". There may be no agency designated to receive the complaint.

When the Ford Explorer/Firestone tire litigation began, the chair of DOT said, I did not know of the rollover problem. The American public learned that Ford had no duty to inform DOT of the problem. Worse, Ford said they did not keep statistics on Explorer roll-overs and did not know of the number of roll-overs.

The Bill should be clear in stating that a "person" can complain to the media, as well as an agency, and there is no intent to quell free speech. The agency may collect the complaints and do nothing more. Therefore, the employee must be encouraged to inform the media.

(2)(2), line 15. Reporting serious defects to an "agency" is a fine idea, but perhaps Congress should identify the "appropriate agency" to receive the complaints.

X. Conclusion

The Bill fills an important need that exists because of two legal developments: first the explosion of tort reform; second the erection of procedural and substantive hurdles to products litigation (see, F. Vandall, "Constricting Products Liability": Reforms in Theory and Procedure," 48 Vill. L.R. 843 (2003).

A serious flaw in the proposed Bill, however, is that once enacted the statute may not be enforced. Nineteen years ago I was able to argue that courts will not lock-up corporate executives (see, F. Vandall, "Criminal Prosecution of Corporation for Defective Products," 12 International Legal Practitioners 66 (Sept. 1987), Reprinted in J Abell & E. Sheehy, Criminal Law and Procedure 91 (1995, 1998, and 2004). Reprinted in 14 Verdict 9 (April, 1989). [Attached as an appendix]

But perhaps that view needs to be revisited since Health South, Enron,
Martha Stewart, and similar recent cases involving executive prosecution and imprisonment.