Testimony of

Hon. John Engler

March 10, 2006

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of John Engler
President

on behalf of the National Association of Manufacturers
before the United States Senate Committee on the Judiciary
on Defective Products: Will Criminal Penalties Ensure Corporate Accountability?

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Executive Summary

The National Association of Manufacturers (NAM) appreciates that the proposal to make knowingly placing a defective product into the stream of interstate commerce a criminal offense is well intentioned. While the NAM neither condones nor would support someone intentionally releasing a defective product onto an unsuspecting public, we are strongly opposed to the proposal since it will have numerous negative consequences.

Most importantly, it will delay justice for the victims. Civil litigation will have to wait until the criminal process is concluded. This is especially true if the individuals involved invoke their Fifth Amendment right against self incrimination.

The Constitution's Fifth Amendment protections will also postpone discovering what happened and why. Every lawyer with knowledge in this field that the NAM has spoken with has said that the first advice of a criminal lawyer will be to not talk to the employer nor any federal, state or local agencies involved. If the individuals involved do otherwise, they will have waived their right to Fifth Amendment protections at a very early stage. Thus, the public will be denied vital information about the incident and what to do about it.

Moreover, while subjective judgments are appropriate for civil litigation, the increased severity (most especially including jail time) of criminal penalties demands objective criteria. Manufacturing a product that will eventually be placed into interstate commerce requires innumerable decisions at many turns. Having employees concerned about whether they need to talk to a lawyer while weighing these decisions would be a major disruption to productivity.

In addition, punitive damages were created as a heavy-deterrent civil substitute for actions that would be difficult to make criminal. If product liability were criminalized, punitive damages should be eliminated as there would no longer be a need for the civil substitute.

The proposal also raises other, more technical problems including the mens rea (criminal intent) requirement, defining what a defective product is and is not, the delay or non-research into making current products safer, how to engage in best practices for quality production without establishing a basis for "knowing" about defective products, and international implications.

TESTIMONY OF

JOHN ENGLER
PRESIDENT

NATIONAL ASSOCIATION OF MANUFACTURERS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

MARCH 10, 2006

Mr. Chairman, members of the committee, my name is John Engler and I serve as president and CEO of the National Association of Manufacturers (NAM). I appreciate your asking me to testify on the very important issue of making the act of knowingly allowing a defective product to be introduced into the stream of interstate commerce a criminal offense. This proposal may be well-intended, but is fraught with many counter-productive consequences.

The NAM is the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 states. Through our direct membership and our affiliate organizations -- the Council of Manufacturing Associations, the Employer Association Group and the State Associations Group -- we represent more than one hundred thousand manufacturers.

It is important at the outset to understand that although the NAM has strong concerns about the idea of making it a criminal offense to knowingly place a defective product into the stream of interstate commerce, we certainly would not condone nor defend a manufacturing employee, including -- and perhaps especially -- a high-level executive, who intentionally committed such a horrendous act. Our concerns center on the real-world and practical difficulties of criminalizing what is, at its core, a subjective judgment concerning how safe a product must be to be reasonably safe, judgments that are routinely made by people acting in good faith with no true intent to do harm. Further, to the extent that an individual engages in plainly unlawful conduct with the intention of inflicting injuries on purchasers of a product, there are other criminal statutes based on objective criteria such as murder, manslaughter, reckless endangerment or even terrorism at the disposal of a U.S. attorney.

The issue of criminalizing product liability has been explored by Congress twice in the recent past: first, in the immediate aftermath of the Ford-Firestone incidents in 2000 that resulted in enactment of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act; more recently, a criminal penalties provision for maritime products somehow made its way into the Coast Guard Authorization Act of 2004.

In both cases, the NAM unsuccessfully made the argument that the committees with jurisdiction over criminal penalties -- the respective Committees on the Judiciary -- needed to explore the issue more carefully. In the case of the TREAD Act, time was running out before adjournment and in the case of the Coast Guard Authorization Act the criminal provision was removed in conference. Thus, the NAM is at least pleased that the issue is being considered by the appropriate committee of jurisdiction.

We will be concerned, however, with all of the unintended consequences that criminalization would put in place if the committee were to make a favorable recommendation to the full Senate. Nevertheless, we are hopeful that the members of this committee will carefully weigh the arguments and conclude that however well-intended the proposal to criminalize a product liability action may be that it is not a good idea. This would send a signal to the other committees that they should not be so quick to adopt a similar provision on an authorization or other bill in the future.

To set the stage for what this discussion really is about, let me quote from an article penned by Marion Blakey, who served as National Highway Traffic Safety Administrator during the Administration of the first President Bush. The article appeared in the September 26, 2000, edition of The Wall Street Journal. Ms. Blakey wrote the article during consideration of the TREAD Act and framed the arguments rather succinctly:

[With civil penalties a] jury need not find the company guilty beyond a reasonable doubt, but can penalize a company if it concludes that it is more likely than not that the company's product is responsible for death or injury. . . .The criminal process, by contrast, is based on conflict and coercion, not cooperation and openness.

For the record, I note that the False Statements Act, which covers making statements to federal agencies that are not true, already contains criminal penalties. Unless superseded by another statute, this law applies to all agencies and for an individual imposes a fine of up to $250,000 and up to a five-year federal prison sentence. Corporate fines can run as high as $500,000. In the case of the TREAD Act, the False Statements Act penalties were incorporated into

the National Highway Traffic Safety Act and trebled; in the case of the Coast Guard Authorization Act of 2004, criminal penalties were imposed of not more than $10,000, or imprisonment for not more than one year, or both. Importantly, both provide for a safe harbor if the persons involved are cooperative and make a good-faith effort to rectify the situation. They also rely on objective criteria, such as failure to file a truthful report, rather than subjective criteria such as a "product defect."

The primary danger of turning a product liability matter from a civil issue to a criminal issue is that you would criminalize a subjective judgment. Thousands of decisions are made in a manufacturing company every day by the R&D staff, the engineers, product quality personnel, and assembly line and factory floor workers. In her Wall Street Journal article, Ms. Blakey noted that "no statute or regulation clearly defines a safety-related defect." Defining "product defect" is one of the most complex and varied aspects of product liability law as evidenced by the many variations of product defect standards among the states. Think of what would happen to productivity if each of the people involved in the manufacturing process decided that they needed to talk to a lawyer before allowing a product to be placed into interstate commerce.

The definition of what constitutes a "defective product" is extremely important for constitutional reasons. Criminal laws are unconstitutional if they do not provide defendants with adequate notice about what an offense entails. As noted above, determining what is and is not a "product defect" is complex and open to interpretation, as witnessed in the many conflicting jury decisions regarding even the same product when used in an identical or nearly identical manner. As Professor David Owen, one of today's leading experts on product liability law, has observed, "The very notion of how much design safety is enough . . . involves a morass of conceptual, political, and practical issues on which juries, courts, commentators, and legislatures strongly disagree. . . . . For [design defects], there probably cannot in the nature of things be a bright line separating good products from bad to guide the engineer or the judicial forum reviewing his work years hence." David G. Owen, Problems In Assessing Punitive Damages Against Manufacturers Of Defective Products, 49 U. Chi. L. Rev. 1, 37?38 (1982).

Beyond that, the legal concept of what constitutes mens rea -- dealing with the intent of one who commits a criminal act -- is being whittled away by the courts. In just one example of this trend, the NAM filed an amicus brief urging the Supreme Court to hear the appeal in McNab v. United States. Seafood importers in this case are serving time in federal prison (two for eight years) for convictions of violating the Lacey Act, which makes it a U.S. crime to import seafood or wildlife in violation of foreign law even though the government of Honduras said in court briefs that the Honduran regulation in question was not even valid. In addition, and perhaps more egregious, they were also convicted of money laundering based on the simple fact that they sold the lobsters to seafood wholesalers in the normal course of business, and were also charged with smuggling simply because the lobster tails were packed in clear transparent plastic bags instead of cardboard boxes as allegedly required by the invalid Honduran regulation.

The mens rea requirement would become highly important, for example, in the case of a manufacturer that keeps very good records about the percentage of products that are returned because they turned out to be defective. Even if the rate is extremely low such as one or two percent, would the manufacturer "knowingly" be placing a defective product into the stream of interstate commerce? His real goal is to try to get the percentage down to as close to zero as possible so as not to inflict harm on anyone. Would the mens rea requirement of a new law to criminalize product liability provide for a certain percentage of products to "knowingly" be defective? If so, what is acceptable in order to differentiate a criminal from a law-abiding manufacturer?

Currently, if someone is harmed by the defective one or two percent that make their way into the marketplace, he or she will have grounds for a civil lawsuit. The company could try to avoid future lawsuits by using the statistics about product quality by motivating front-line workers and managers to do a better job to spot the defects before they hit the market. But if corporate executives and other employees could find themselves facing jail time because these very statistics "proved" that they "knew" a certain percentage (albeit small) of a product was being placed into interstate commerce, they would have a motivation to stop collecting the data.

Similarly, would warning labels demonstrate criminal intent if the label stated that the product was harmful if used in a certain way but was not clear enough for a certain segment of the population to comprehend? Indeed, every product is capable of causing injury under some circumstances; as Justice Breyer has recognized, "over the next 13 years, we can expect more than a dozen deaths from ingested toothpicks." Stephen Breyer, Breaking the Vicious Circle at 14 (Harvard University Press 1993), quoting Corrosion Proof Fittings v. E.P.A., 947 F.2d 1201, 1223 n. 23 (5th Cir. 1991). Will toothpick manufacturers be subject to prosecution because they intentionally distributed a product knowing that deaths could occur?

That is why it is a very important consideration that agencies such as the Consumer Product Safety Commission (CPSC), the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) all have objective criteria in their statutes before criminal penalties can be assessed. Section 19 of the Consumer Product Safety Act, for example, requires a violation of a set standard, the manufacture or sale of a banned product or not complying with established reporting requirements. This is a far cry even from "knowingly" placing a "defective

product" into the stream of interstate commerce. In addition, before the CPSC can prosecute someone criminally, the full commission must vote to do so. This acts as a check on a rogue prosecutor out to make a name for himself or herself following the failure of a well-known product to perform properly and/or safely.

This is not to say, however, that simply ensuring that the criteria that could be placed in a statute are objective would be sufficient. Consider the case of Jim Knott, president and CEO of Riverdale Mills Corporation in Northbridge, Massachusetts, who serves on the NAM Board of Directors. Nine years ago, an EPA SWAT team (yes, they have one) of 21 armed men swooped in on his plant offices. They hauled out boxes of files seven feet deep, plunging Mr. Knott into a legal odyssey of seven years costing hundreds of thousands of dollars. Three years into it, "60 Minutes" exposed the EPA for what it had done: created incriminating evidence by forging Riverdale Mills documents to indicate that the company had discharged criminal levels of wastewater. Mr. Knott won his case and is now suing the EPA for its fraudulent enforcement.

What does Mr. Knott's story tell us? That perhaps criminalization raises the stakes for the agencies and agency employees so that they could be willing to alter documents simply to make it appear as if the agency involved was not in the wrong even when it was.

I want to clarify that the NAM understands that the EPA action in Mr. Knott's case may be an aberration, although he has spoken to numerous others who have similar experiences. Nonetheless, it is something that has happened, is not a hypothetical and that should be kept in mind as you explore this issue. And, in the end, we appreciate that at least the standards of EPA criminal enforcement are objective, and are not based on subjective decisions. Nevertheless, the actions of the EPA SWAT team members in Mr. Knott's case should cause pause in any rush to judgment that criminalization is a panacea.

Beyond the problem of criminalizing a subjective decision, you quickly get into the quagmire of what happens following an incident. Agencies -- and, any company that is protective of its reputation -- will want to conduct an immediate investigation into how the problem arose, who was involved and how best to rectify the situation.

Every knowledgeable attorney with whom the NAM has consulted has agreed that the first advice that would be given to employees with knowledge of the situation would be to not talk to either the agency or even their employer. It would be paramount for those employees to not waive their Fifth Amendment rights under the Constitution and, as we all know from "Dragnet," anything that they say to either the investigating agency or their employer "can and will be used against [them] in a court of law."

Certainly, in employment-at-will situations, the employee could be discharged by his or her employer. But to what purpose? This will not force the employee to waive his or her constitutional right against self-incrimination. The agency will still be left in the dark. And the company is no closer to determining how its product became defective and, if it knew that, how it entered the stream of interstate commerce.

Would it not, therefore, be better to free the employee from facing jail time so that he or she would be willing to talk and to share his or her engineer's notebooks or other documents? One could argue that the documents and other work product belong to the employer. But if a new criminal penalty possibly protected by the Fifth Amendment is imposed, how long would it take for the courts to sort this out? Would it not be better to not find out?

The Fifth Amendment issue also brings up consideration for victims involved. While the NAM has decried the problems in the U.S. civil litigation system, we have always maintained that civil litigation, when not abused or misused, serves an appropriate function. But what would happen if product liability violations were criminalized? The actual victims would be forced to wait out the criminal system. Thus, to the extent that the Fifth Amendment right -- which is appropriate for any United States citizen to use when confronted with jail time -- is invoked, civil litigants will have to wait until the criminal proceedings are concluded. No judge presiding over civil litigation would force an individual involved to foreswear his or her right to Fifth Amendment protections as this could be a ruling subject to appeal. (And one where the judge would be likely to lose.)

In addition to the Fifth Amendment problems that a criminalization proposal would raise, there is also the issue of subpoena authority. Let the record note that, in the case of the Ford-Firestone incident in 2000, the companies cooperated and did not require a subpoena. If either the company or individuals within the companies involved in a future incident are facing criminal charges, either or both are likely to require a subpoena, which is likely to be challenged. How long would it take to adjudicate this?

Moreover, criminalization of product liability law could actually serve as a deterrent to making products safer. To begin with, companies might delay the "new and improved" version of a product currently on the market due to an overabundance of caution that they have covered all bases. Or, the company may decide that even researching how to make the product safer, including the consideration of after-market devices, could be seen as an admission that executives "know" that the current product is inherently dangerous even when it is completely safe. In the meantime, users of the current, less-safe version could get harmed or worse. In addition, safer often means more expensive and some useful products may either be withheld from the market because the potential sales are not outweighed by the risk of prosecution or they will be priced out of the reach of less affluent customers.

You further have the problem even now of trial attorneys who are quite content for taxpayer-paid prosecutors to do most of the hard work of discovery and framing of the issues. The potential awards are high, as are the fees, and all with little work. This is with prosecutions based on objective criteria, and will only get worse if a rogue prosecutor were allowed to start using his or her power based on subjective judgments. If the prosecution succeeds, a rush to the courthouse by the trial bar is a foregone conclusion.

Thus, a law purporting to help victims by criminalizing the act of introducing a defective product into the stream of interstate commerce would only serve to delay true justice to the very victims who were actually hurt or traumatized. It would also forestall finding facts, including how and why the problem occurred. In addition, it would only worsen the U.S. comparative disadvantage in legal costs, which currently are twice as high as a percentage of GDP as other industrialized countries.

International considerations bring up several other concerns. What would happen, for example, if a manufacturing firm based overseas decided to put a product on the market in spite of known dangerous defects, but U.S. management and other employees were never told about the situation? First and foremost, there likely would be problems in serving the arrest warrants and then extradition. Would you then go after the U.S.-based management if there were clues and the advantage of hindsight allowed a U.S. attorney to allege that they should have known? Would the presence of this law make it more difficult to recruit highly trained employees to work in the United States?

As you consider this matter, please remember that the genesis of punitive damages in the common law is that they were to serve as a substitute punishment and deterrent for acts that would be difficult to criminalize. As it is, they loom large in the minds of company executives in making decisions about products. Little good and much harm would come out of adding the prospect of jail time in addition to the possibility of punitive damages. On the other hand, if the reason for creating punitive damages in the first place were overridden with a new law that would criminalize product liability actions, would it not therefore make sense to eliminate punitive damages entirely?

The NAM does not question the sincerity of anybody who wants to increase the safety of the American public. Nor do we wish to defend an individual or company that is interested solely in potential profit without any care to known public risks. We do, however, want to be sure that the issue of criminalization of product liability law raises serious concerns not to be pondered lightly. We are pleased that at least -- and finally -- the appropriate committee is investigating this issue.

In the case of the TREAD Act, for example, we did not support the bipartisan compromise reached in the House of Representatives, although we did not think it was nearly as threatening as the Senate version. We were concerned that the criminal penalties that the TREAD Act imposed could be extended to other industries. Indeed, the NAM's prophecy came true during consideration of the Coast Guard Authorization Act in 2004 (which originally sought to use subjective standards). Now it appears that some would want to extend criminal penalties to all industries.

The NAM hopes that the thoughtful, legal-oriented minds on this committee will consider ALL of the legal ramifications that the proposal to make a criminal offense out of introducing a defective product into the stream of interstate commerce would entail. First, we want you to keep in mind that NOT criminalizing a product liability action is in the best interest of true victims and society at large. We also hope that you remember that the False Statements Act already applies to all agencies. We further encourage you to not forget that current criminal laws can be applied where appropriate and that the Consumer Product Safety Act already contains criminal penalties, albeit limiting the ability of a self-promoting prosecutor to take advantage of a situation due to the oversight of the Consumer Product Safety commissioners exercising the application of objective standards. Finally, we hope that the committee will offer guidance regarding the full, unintended consequences of criminalization to other authorizing committees for their consideration should they decide, once again, to try to appease the media or other constituencies in their quest to quell whatever crisis is at hand.

Thank you, Mr. Chairman. I will be pleased to take whatever questions the committee has.