Testimony of

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March 10, 2006

TESTIMONY BY

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"CRIMINALIZING PRODUCT LIABILITY:
A ROAD TO UNINTENDED CONSEQUENCES"
ON BEHALF
OF
THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
&
THE AMERICAN TORT REFORM ASSOCIATION

BEFORE
THE SENATE JUDICIARY COMMITTEE
UNITED STATES CONGRESS

ON

MARCH 10, 2006

PENALIZING PRODUCT LIABILITY:
A ROAD TO UNINTENDED CONSEQUENCES

Good morning, Chairman Specter, and Members of the Committee. Thank you for your kind invitation to testify today about the merits of criminalizing product liability law. I am testifying today on behalf of the United States Chamber of Commerce's Institute for Legal Reform and the American Tort Reform Association. The views stated today are my own, based on my experience in the product liability field.

In that regard, since 1976, I have co-authored PROSSER, WADE & SCHWARTZ'S TORTS (11th ed. 2005), the most widely used torts casebook in the United States. I served as dean of Cincinnati Law School, and worked with other counsel on behalf of injured persons for more than fourteen years. I am a life member of the American Law Institute, and one of the only defense lawyers to serve on the Advisory Committees of the three most recent RESTATEMENTS OF TORTS, the most important of which for today's hearing being PRODUCTS LIABILITY.

For more than twenty-five years, I have worked on public policy issues, including jury service reform, addressing problems related to baseless claims, and other civil justice issues, many of which have been considered by this honorable Committee.

I have counseled clients regarding warnings on their products, design and other issues that are directly involved in the proposal to criminalize product liability.

Tort and Crime - Basic Differences

When I taught tort law, I often would invite as a guest teacher the professor who taught criminal law. In a couple of hours, we would address some of the differences between a tort and a crime. Key differences arise in the proposed bill that attempts to criminalize product liability law.

All definitions of the word "defect" are filled with some ambiguities, and that is part of tort law, not criminal law. Tort law has room for error. That is why there are defense verdicts, plaintiff verdicts, high verdicts and low verdicts in

many product liability cases, all with respect to the same product.
Just look at what is happening with VioxxÔ. The first verdict in a Texas court (in a local jurisdiction particularly friendly to plaintiffs) was for the plaintiff in the amount of $253 million. In the second trial in Atlantic City, where many legal rulings favored the plaintiff, there was a verdict for the defendant. In the third trial in a Texas Federal District Court, again the same product and virtually the same evidence, there was a hung jury. When the exact same case was tried again in a New Orleans Federal District Court, there was a verdict for the defendant.
The lack of predictability of standards in tort law, especially involving the word "defect," has been a continuing problem. The RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) attempted to provide more definition to what is "defective." It is useful and more precise than earlier incarnations, but it is still filled with ambiguities. Nevertheless, in tort law, there is room for self-correction. A second or third case can correct the first. There is no such room in criminal law. If a person were fined or imprisoned, there is no room for a second case to come along and restore a person's freedom. Even if the defendant prevails, the product's name value would be devastated. This fact is well documented in an article describing the only well-known product liability criminal trial that took place in the last fifty years.

A Long Thirty-Year March
The reason the RESTATEMENT (THIRD) was drafted was based, in part, on the fact that the famous (or infamous) RESTATEMENT (SECOND) OF TORTS § 402A that introduced so-called "strict product liability" to the world had ambiguities. It stated that a product was "defective" if a product was "unreasonably dangerous to the user or consumer" (attached). My casebook and other books are replete with various attempts to define design flaws or failure to warn under Section 402A.
Section 402A spawned a torrent of conflicting cases about the meaning of defect in design and warnings cases. This occurred over a thirty-year period. The definition in this bill also discusses "defect" with respect to "instructions." As was true with "design" defects, hundreds of products liability cases have created battlegrounds over whether instructions were "flawed," or whether instructions failed to be "reasonable" or "adequate." Again, while the cost of product liability cases has almost bankrupted companies (and in some cases, it has) and removed useful products, such as BendectinÔ, from the marketplace, at least there were no prison sentences or criminal fines against those who produced the products.
Some have suggested that ambiguities with respect to punitive damages should be abolished, and that all punishments for defective products should be imposed under criminal law. The proposed bill does not follow that path; it adds ambiguous criminal sanction to existing, ambiguous tort law. In point of fact, there has really been no showing that punitive damages, with their "ambiguous" power, are needed to assure product safety.
About a decade ago, then Senator Slade Gorton of Washington asked a variety of consumer groups if they could demonstrate that there were more harmful products in his state, Washington (which has no punitive damages), than there were in California (which had such damages). There was absolutely no showing that was the case.
Similarly, there has been no showing that there is a need for additional power in our legal system to deter the manufacture and distribution of dangerous products. In point of fact, the Supreme Court of the United States has stated that punitive damages have been so extreme and unpredictable that the Due Process Clause of the Constitution must contain them. As Justice Sandra Day O'Connor has recognized, "[T]ime and again, this Court and its Members have expressed concern about punitive damages awards 'run wild,' inexplicable on any basis but caprice or passion." If such reining in of punishment has occurred in civil tort law, there should be a steel gate against applying criminal law sanctions with ambiguous standards, and the threat of imprisonment or fine.
The proposed bill refers to a product "known by the person to be defective" that would be introduced into interstate commerce. This "knowledge" standard, while seemingly fair, does not solve the problem, because at the core of the alleged "knowledge" is still "defect." Since that term is highly ambiguous, it creates a contradiction in terms that one would "know" that a product is "defective" when that key word is vague. One knows when someone steals something; one knows it is a crime when someone sets fire to a house; and we know it is a crime when someone burglarizes an apartment. One cannot meaningfully "know" when a product is "defective," as defined in the proposed bill, or the panoply of definitions that have been used to define "defect" in two RESTATEMENTS OF LAW and case law over the past thirty to forty years.
Congress's Past Experience with Vague
Criminal Sanctions and "Defective" Products
In the midst of the Bridgestone Firestone tire recall, the 106th Congress considered legislation to improve automobile safety with criminal penalties similar to the bill now before this Committee. The Motor Vehicle and Motor Vehicle Equipment Defect Notification Improvement Act, S. 3059, was introduced by then Commerce Committee Chairman John McCain with the best of intentions. It would have subjected a director, officer, or agent of a motor vehicle or motor vehicle equipment manufacturer who introduces a vehicle or equipment knowing that a defect or

noncompliance with safety standards "created an imminent or serious danger of death or grievous bodily harm" to criminal sanctions. Similar to this bill, S. 3059 would have jailed executives for up to five years if the product caused grievous bodily harm, and up to fifteen years if the product caused a death if a jury, in hindsight, found that he or she knew of a defect.

The McCain bill was moved quickly through the Senate Commerce Committee, receiving a favorable report in less than two weeks of introduction. Soon thereafter, the problem with authorizing vague criminal penalties of this nature became apparent. As Senator Jeff Sessions (R-AL) recognized, for example, "We are really blurring the line between criminal liability and civil liability, and that's a dangerous trend." Marion C. Blakely, a former administrator of the National Highway Transportation Safety Administration (NHTSA), suggested that such criminal penalties would "actually lead to less safety, not more" because they would create a disincentive for companies to investigate potential safety hazards, as they might avoid the possibility of "knowing" anything that could place them at risk of committing a felony.

Due to concern among Members of the Senate over criminalizing product liability, S. 3059 was put on hold. As an alternative, the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act moved forward in the House and was ultimately signed into law. In enacting the TREAD Act, Congress, wisely, did not criminalize product liability law. Instead, it included criminal penalties against auto executives who make false or misleading statements to the Secretary of Transportation with the intent to mislead the government with respect to a potential defect, an area where an individual's and corporation's responsibility is much more clearly defined and understood.

Current Proposals to Criminalize Products Liability Law

At the core of the current proposal to criminalize the introduction of defective products into the stream of interstate commerce is the definition of the term "defective." Curiously, it follows a pattern that is different from that set forth in an appendix to my testimony, which was included in RESTATEMENT THIRD, TORTS: PRODUCTS LIABILITY § 2. The RESTATEMENT spells out liability in separate rules for design, warnings and mismanufacture (attached).

It is instructive that the tripartite definition in the RESTATEMENT, which took hundreds of hours and more than five years to produce, is very different from the definition in the proposed bill. There are many definitions of "defective," and each one has its own ambiguities.

For example, in the core of the proposal, the definition discusses defective meaning a "flaw in design." Perhaps most courts regard product "flaw in design" as one where there is a "reasonably feasible alternative design." Other courts consider a "flaw in design" as "unreasonably dangerous from the perspective of the user or consumer." Many lawyers view the word "flaw" as a reference to a "manufacturing defect," which is a failure in quality control, where a product is produced that does not follow the manufacturer's own standards; for example, a foreign object in a soda pop bottle.

The proposed bill's definition suggests that a crime would occur because the product would be "dangerous to human life and limb beyond the reasonable and accepted risks associated with such or similar products lacking such a flaw." (emphasis added)

With respect to any product, there are usually similar products with various degrees of safety. Some have excellent safety records; some are not as good. The proposed bill's definition could be interpreted to mean that the one on the bottom of the safety list could result in a criminal penalty for someone who made it, designed it, or wrote instructions that accompanied the product. If such a person were convicted, then the bottom of the list would change, and the next product would come along and that would be deemed a product that could expose employees of a company to criminal sanctions if similar products up the safety chain lacked such a "flaw."

Whether it is automobiles, lawnmowers, or even toaster ovens, there are various degrees of safety in products. This scale of safety occurs with virtually any mass product. Often, products with more expensive costs have more built-in safety features. This does not mean that products lacking those safety features should be subject to tort law sanctions and certainly should not be subject to punishment under the criminal law.

Conclusion

While there may be specific, wrongful acts of conduct that should be subject to sanction, the ambiguities of product liability placed into criminal law do not achieve that goal. When Congress considered the TREAD Act just a few years ago, this very problem was pointed out to Congress and it was corrected. Early bills created ambiguous sanctions; the later bills were highly specific with respect to what was deemed "wrongful conduct."

Over the past four decades, on both sides of the aisle, I have brought and defended product liability cases. There are problems with the current product liability system, but under-deterrence is not one of them. To the contrary, over-deterrence, as recognized by the Supreme Court, has infiltrated the system. Criminalizing this area of law will not cure that problem; it will exacerbate it. The risks of further deterring the conduct, judgment and innovation will outweigh any benefits such an effort to criminalize product liability law would produce.

I commend the Chairman for highlighting this important issue. It is one that does need to be discussed. Tort law, with all of its flaws, should be left to deal with product liability. Criminal law should address specific crimes and punish

them appropriately.
I would be pleased to answer any questions you may have.