

Federalism and the Limits on Regulating Products Liability Law, 1977–1981

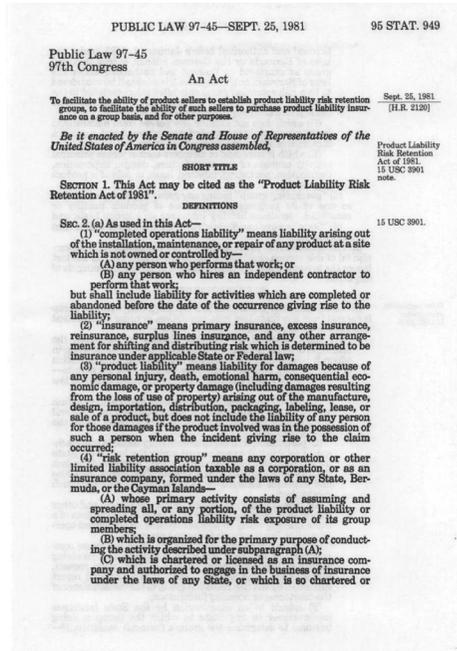
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The political movement of the early 1980s that sought to increase manufacturer liability for defective products by converting state tort law into federal law raised core questions about federalism. The effort at wholesale federalization failed, and tort law has been (and largely remains) within the purview of the states. However, the tort federalization movement of the early 1980s, which by the end of that decade would become popularly known as “tort reform,” did result in federal legislation affecting tort law in America. This article attempts to explain why tort law was never fully federalized during this period and how the legislation that was enacted reduced the chances of tort law ever being federalized.

In the early 20th century, William Prosser famously described tort law as “a battleground of social theory.”¹ Prosser’s description was prophetic regarding the modern postwar history of a sub-field of tort law: products liability law. Although the early decades of the 20th century saw federal reforms of areas of tort law, such as the Pure Food and Drug Act (1906), the Federal Employers Liability Act (1908), and the Longshore and Harbor Workers’ Compensation Act (1927), those efforts were specific interventions in

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¹ William L. Prosser, *Handbook on the Law of Torts*, 3d ed. (St. Paul, MN: West Publishing Co., 1964), 14. Prosser first used this phrase in a review of a torts textbook in 1935. Prosser, Book Review, *Minnesota Law Review*, Vol. 19, No. 2 (January 1935), 257.



The first page of the 1981 law that would allow companies to pool funds to form “risk retention groups” for products liability insurance coverage.

discrete areas of law theretofore governed by state law. Some of those federal laws would spur states to alter their own laws, such as the establishment of the state-based workers' compensation systems after the Federal Employers Liability Act of 1908. The federal debates about whether to fully nationalize tort law and commercial general liability insurance law in the late 1970s and early 1980s were proposed on an altogether larger scale, with a much greater potential impact on interstate commerce. In the 1960s, state courts and legislatures led a products liability revolution, expanding manufacturer liability from a contract-based system, to a (fault-oriented) tort-based system, and ultimately to a no-fault strict liability system.² Prior to the late 1970s, the federal government had little to do with crafting policy on manufacturer liability for defective products. State courts had jurisdiction over tort claims, which, like criminal law, have been traditionally within the purview of states. Yet, with the expanded liability of the 1960s, manufacturers and their liability insurance carriers experienced dramatically increased premiums. What caused the increased premiums remains a contested matter. Nevertheless, the costs associated with expanded manufacturer liability led both manufacturers and consumer protection advocates to seek an abandonment of the traditional state-based tort systems and seek a new federal system of products liability law. Prior to the 1960s, products liability was a low-visibility issue handled mostly by state courts. By the early 1980s, it had become an emergent national issue that tested the nature of federalism and contributed to partisan divisions in the post–New Deal state. Consumer protection groups, which originated as part of the Progressive period in the late 19th century, rose to prominence in the 1960s after the notoriety of Ralph Nader's litigation efforts against General Motors and the enactment of federal consumer protection laws and regulatory entities, such as the Consumer Product Safety Commission in 1972.³ In this period, reformers acted on the New Deal philosophy that viewed the federal government as the key instrument to alleviate burdens upon and protect the citizenry, and institute social and political reform on a mass scale.

In the mid-to-late-1970s, product manufacturers and insurers demanded federal protective legislation, including a wholesale federal takeover of tort law. Between 1977 and 1980, multiple tort reform bills were defeated in Congress. In short, they

² In the mid and late 1960s and throughout the 1970s, state courts expanded liability for defective products from a contract-based system (which allowed only liability between the contracting parties, the buyer and seller, but not third parties), to a tort system (which allowed liability based on fault, not only contract), to a strict liability system (which held the manufacturer liable regardless of fault, even if the utmost care was used in the making of the good). This strict liability standard was a boon to plaintiffs and their attorneys, allowing new opportunities for recovering from manufacturers, wholesalers, and retail merchants.

³ Lizabeth Cohen, *A Consumer's Republic: The Politics of Mass Consumption in Postwar America* (New York: Knopf, 2003), 360.

were defeated because they were too ambitious; the bills usually sought the complete federalization of tort law, or at least a substantial federal role in how the states treated tort law. But in 1981 Congress succeeded in passing a much narrower law that targeted a specific problem: the cost of products liability insurance. This reform effort, though modest in its reach, marked the beginning of the modern political conflict called “tort reform,” which has remained an ongoing matter of debate about the proper state and federal roles in products liability and medical malpractice law. This article examines the effort to enact this first successful federal tort reform law and evaluates the success of the first federal products liability legislation of the early 1980s.⁴

After the initial attempts to pass legislation in 1977 failed, products manufacturers renewed their lobbying efforts, and legislators introduced new legislation and held hearings in order to find some politically viable route to creating federal protections for manufacturers. Since federal action had not been forthcoming, manufacturers continued to grapple with finding affordable liability insurance. The insurance industry’s response proved to be a failure. In 1977 insurers established “market assistance programs” (MAPs) to “assist only those few businesses who could not obtain a premium quotation for product liability insurance at any cost.” Unfortunately, MAPs were only available to businesses that had not received a premium quote from an insurer. If a quote had been given, no matter how high, the business was ineligible for the MAP. Accordingly, manufacturers considered the MAPs “irrelevant” and unhelpful. As one manufacturer trade group representative testified to Congress, their “members stopped trying to acquire coverage by the [insurance industry’s] MAPs[,] concluding it was a waste of time.”⁵

Both manufacturers and congressmen were mystified as to how liability insurance premiums were set. The Insurance Services Office (ISO), the chief information

⁴ This article is a successor work to my article “The First Attempt at Federalizing Tort Law and Why It Failed,” *Federal History* No. 6 (Jan. 2014): 11–34, <http://shfg.wildapricot.org/page-18287>, wherein I reviewed the initial federal lobbying efforts of the interested parties and investigated the reasons those efforts failed at the federal level. In that article, I described how the expansion of liability for defective products at the state level in the 1960s led to proposals to federalize tort law in the 1970s. That federalization effort failed because the state workers’ compensation systems were considered sufficient substitutes for a federal law and some federal legislators feared the possible unintended consequences of taking tort law from the states. The renewed reform effort described in the current article was a continuation of the debate about what kind of role the federal government should have in state tort law and to what degree federal action could produce desirable results.

⁵ House Reports, 96th Cong., 2nd sess., Vol. 2, Misc. Reports, Report No. 96-791 of the Committee on Interstate and Foreign Commerce, (1980) (hereinafter H. Rept. 96-791), 1. Trade group representative statement of Anthony Schop, Executive Vice President, Machinery Dealers National Association, Hearings on Miscellaneous Tax Bills III Before Subcommittee on Taxation and Debt Management of Senate Committee on Finance, (Aug. 25, 1978), 98, quoted in H. Rept. 96-791 at 10.

clearinghouse for the insurance industry, claimed that only 10 percent of product liability insurance premiums were based upon published rates, which in turn had been based upon “reported claims experience.”⁶ This appears to be an accurate reflection of most insurers’ underwriting methods. Surprisingly, very few premiums for product liability insurance were based upon the claims histories of manufacturers. This meant that manufacturers with no prior claims were often subjected to greatly increased premiums based upon risk calculations not correlated to the manufacturer’s history of risks and performance. In 1977 the Commerce Department produced an Interagency Task Force that investigated the increase in products liability insurance rates. The report appears to have been correct in concluding that the individual reactionary responses of underwriters were partly responsible for the sharp increases in premiums, at least in the mid-1970s.⁷ The Commerce Department was ambivalent about whether insurance companies, if left to market-based competition, would use actual claims histories to set rates. If so, then premiums would likely be correlated to the known risks of particular manufacturers. One of the key goals of manufacturers was enacting a federal requirement that claims histories be used in setting rates. Accordingly, the so-called Risk Retention bills of 1980 and 1981, with which this article is concerned, sought to reduce insurance premiums by incentivizing competition among insurers.⁸

The Historical Role of Insurance

In the late 19th century, state courts and legislatures expanded employers’ liability for employees’ injuries, which resulted in a market for employer-liability insurance policies. But insurers had “little statistical data on which to base refined calculations” of risk and to set their premiums. For example, Fidelity and Casualty Company of New York wrote the first employers’ liability policy in 1888. But it was not until 1909, when 27 companies were selling such policies, that the first manual to “assist [insurance companies] in establishing rate classes and fixing premiums” was published.⁹ New legal rules can exist for a long time before insurance companies can accurately assess risk and set premiums that closely correspond to the known risks. Any lack of knowledge can mean volatility in the premiums charged, which is what happened in the mid-1970s among product liability insurers.

⁶ H. Rept. 96-791, 13–14.

⁷ U.S. Department of Commerce, *Interagency Task Force on Product Liability: Final Report*, (Washington, DC: 1978).

⁸ H. Rept. 96-791, 14.

⁹ Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law From the Progressive Era to 9/11* (Cambridge, MA: Harvard University Press, 2008), 32–33, 37.

The commercial insurance industry, although it had existed since the early 20th century, was still subject to panics, which appears to be what happened in the 1970s regarding capital goods industries. As one set of insurance experts has noted, uncertainty in regard to near-term future losses, especially the fear that large losses would be “concentrated in a few large payoff cases,” can lead to insurance premium increases.¹⁰ This was certainly the case in the mid-1970s, with famous cases of drugs that harmed some patients, such as thalidomide in the 1960s and 1970s, and products, such as the Dalkon Shield contraceptive device in the 1970s and 1980s, and asbestos in the 1980s. This otherwise mature industry had failed to adapt to the threat posed by the strict liability doctrines created by state courts in the late 1960s and had simply resorted to panic pricing.

The insurance industry was susceptible to panic pricing because its ratemaking mechanism lacked sufficient data about the products that were subject to lawsuits under the relatively new strict liability system. By the 1960s and 1970s the ISO was the primary ratemaking entity of the casualty and property insurance industry. The ISO created classifications for thousands of products based on information submitted by its member companies. It provided rating recommendations (“manual rates”) to its members for only about one-third of its classifications. Prior to 1974, the ISO only required its members to give detailed claims data on its manually rated classifications. Therefore, the ISO’s rate recommendations, which many underwriters used for setting premiums rates—thereby making some ISO-recommended rates standard rates across the industry—existed for only a fraction of the products in existence.¹¹ In 1978, the ISO claimed only 10 percent of its members’ premiums were based on its ratings. One scholar has estimated that only one-third of the known consumer and capital goods were based on the ISO’s ratings recommendations by 1976.¹² Individual employees at insurers set the rates on the remaining product classes, which involved a great deal of subjectivity and variation, and allowed for panic pricing.¹³ A federal General Accounting Office (GAO) study published in September 1991 noted that the ISO’s insurance rates

¹⁰ W. Kip Viscusi and Michael J. Moore, “An Industrial Profile of the Links between Product Liability and Innovation,” in Peter W. Huber and Robert E. Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (Washington, DC: The Brookings Institution, 1991), 86.

¹¹ H. Rept. 96-791, 13–14. Arthur Joel Levine, Ph.D. diss., “Mercenary, Mendacious Mythology? Assessing the Insurance Industry’s Explanation for the Product Liability ‘Crisis’ of the 1970s,” (Claremont, CA: Claremont Graduate University, 2004), 139.

¹² Levine, 135–40.

¹³ U.S. Department of Commerce, *Interagency Task Force on Product Liability: Final Report* (Washington, DC: 1978), I-21–24. This federal study concluded many rate increases were a product of panic pricing by individual employees at underwriters.

increased 195 percent from 1974 to 1976, remained stable from 1976 to 1983, then increased 105 percent from 1983 to 1988, and receded by 27 percent between 1988 and 1990. The GAO concluded that one of the chief factors in the rate changes was “the frequency of claim losses reported by ISO’s insurers.”¹⁴ Thus, the claims experiences *and* fears or expectations of future claims/losses were important in the rate changes for individual insurers, especially regarding the over two-thirds of rates set by individual employees at underwriters in the 1970s.

State Legislative Efforts

While the insurance industry unsuccessfully attempted to reduce premiums, so too did a very few state legislatures. One reform approach, taken by the legislatures of Colorado and Tennessee, was to create incentives for the creation of “captive” insurance companies within their jurisdictions. For a manufacturer, a captive insurance company is a subsidiary of a manufacturing company created solely to provide a form of self-insurance for the manufacturer. However, manufacturers in Colorado and Tennessee rarely established such captive insurance subsidiaries because of the states’ regulatory requirements, such as high capitalization requirements for the captive insurer, state approval of rates, the requirement of domicile within the state, and—most importantly from a federalism and interstate commerce perspective—the captive insurance subsidiaries “would still be subject to the regulatory barriers imposed by other states for risks situate[d] in those states.”¹⁵ As Colorado’s Insurance Commissioner testified before Congress, the captive insurance subsidiaries were “under more restrictive supervision and controls than [regular, non-captive] insurance companies.”¹⁶ Many in Congress saw the state-regulated programs for captive insurers as inevitably self-defeating. The captive insurer programs might have provided the incentive for insurance companies to compete for manufacturers’ business and thereby reduced their product liability rates. Yet, even without onerous regulatory hurdles the greatest barriers to such state-sponsored programs were the federal nature of the Union and the national nature of the American economy. Just as regular insurance companies found themselves dealing with the varying tort systems in different states in which they underwrote manufacturers, so too would the manufacturers and their captive subsidiaries have to comply with the regulatory requirements of each state in which the manufacturer and its captive subsidiary conducted business. The self-insurance model

¹⁴ U.S. GAO, “Product Liability: Insurance Rate Levels and Claim Payments During the 1970s and 1980s,” GAO/HRD-91-108 (Washington, DC: Sept. 1991), 2–3.

¹⁵ H. Rept. 96-791, 10–11. “Capitalization” in this context refers to the need for companies to have cash available to meet immediate expenditure needs.

¹⁶ Testimony of J. Richard Barnes, Commissioner of Insurance, State of Colorado, before the Subcommittee on Consumer Protection and Finance, Nov. 15, 1979, quoted in H. Rept. 96-791, 11.

remained a viable possibility but only if it were made attractive to manufacturers by reducing the costs of nationalizing the programs. The proposal begged for a nationwide approach under the rubric of interstate commerce, which was the basis for the first federal law enacted to address the product liability insurance issue.¹⁷

The Push for Federal Legislation

In 1978 the Carter administration's Department of Commerce argued in favor of "short-term" federal legislative measures. The administration argued for the Internal Revenue Code to be amended to allow for businesses to use pre-tax income for self-insurance. The administration rejected the idea of a taxpayer-funded insurance or reinsurance program because it feared such programs would result in "camouflaging rather than resolving the product liability problem."¹⁸ However, in regard to "long term" measures, the administration supported a national model tort law that would eliminate the "hodge-podge" of state tort laws. The administration argued that "commercial necessity requires uniformity" of tort law.¹⁹ The interstate nature of the commercial and consumer goods economy, the "geographical dispersion" of products manufacturers, appeared to be the chief factor in convincing many congressmembers that "federal action must be taken" regarding products liability insurance reform.²⁰ This was commensurate with the Carter administration's desire to ensure a federal role in accident compensation. For example, the administration also supported a federal no-fault automobile accident compensation bill, which would have eliminated fault (or negligence) as the basis for determining whether a person injured in an auto accident would be compensated.²¹

By 1979, the Department of Commerce published its model product liability law, which was intended for submission to the states for adoption in the hopes that no federal law would be necessary. As of 1981, 22 states had enacted some version of product liability legislation "with no two laws being the same." No state had enacted the model act in full.²² Some manufacturers complained that the model act was

¹⁷ Another possibility for lowering premiums was the use of reciprocal insurance exchanges, or "reciprocals." Such entities are unincorporated and function similarly to a partnership for liability purposes, except that each "member's" liability is individual rather than joint with other members. Members could be both individual persons and other business entities. However, like the captive insurance programs, the reciprocals would encounter the same problems of varied state capitalization requirements and compliance with different states' insurance regulations and licensing requirements. H. Rept. 96-791, 11.

¹⁸ U.S. Dept. of Commerce, "Options Paper on Product Liability and Accident Compensation Issues," *Federal Register*, Vol. 43, No. 67, Thurs., April 6, 1978, 14622-23.

¹⁹ *Ibid.*, 14624.

²⁰ H. Rept. 96-791, 11.

²¹ U.S. Dept. of Commerce, "Options Paper on Product Liability and Accident Compensation Issues," 14626.

²² Letter of Malcolm Baldrige, Sec. of Commerce, to Rep. James J. Florio, June 12, 1981, as quoted in H. Rept. 97-190, 23.

“heavily weighted in favor of retailers at the expense of manufacturers.”²³ Thus, the model law approach was failing to achieve a national market under a system that respected federalism. This failure served as proof in the arguments of tort reform advocates of the need for federal intervention.

In 1980 the 96th Congress debated the Product Liability Risk Retention Act of 1981. This bill would not become law, but the reasons for its failure are instructive in why a successor bill did become law. The aim of the 1980 bill was to attack one narrow element of the product liability issue: the cost of insurance. The bill allowed manufacturers to pool their money into “risk retention groups” for the purpose of self-insuring against products liability claims, and the bill allowed businesses to form “purchasing groups” that permitted collective purchasing in order to reduce insurance premiums.²⁴ A “risk retention group” would be an aggregation of manufacturers that would pool their funds for the purpose of providing insurance to themselves to pay for product liability defense counsel, other lawsuit expenses, and payment of claims. The bill provided for the federal preemption of state insurance laws that otherwise would have hindered or prohibited the formation of private purchasing groups across state lines. Supporters hoped such groups would provide an incentive for private insurance companies to offer affordable insurance to manufacturers. The bill did not affect the states’ substantive tort law or attempt to alter any state rules of court or evidence regarding torts and products liability lawsuits. In other words, this bill

²³ Statement of Jack Elam, General Counsel of Cone Mills Corporation of Greensboro, North Carolina. Statement to the North Carolina Senate Committee on Manufacturing, Labor, and Commerce, and the North Carolina House Judiciary II Committee on Senate Bill 189 – Products Liability and House Bill 235 – Products Liability. Minutes of these committees, Feb. 28, 1979, 2 [Kenneth Kyre, Jr., *Legislative History of the Products Liability Act and the Products Liability Statute of Repose: Senate Bill 189, N.C. Gen. Stat. Chapter 99B and § 1-50(a)(6) (And the History of Senate Bill 746, House Bill 235, and House Bill 993)*, 1 vol. (various foliations): ill.; 30 cm. (August 2007), 167]. Invaluable research assistance regarding this act was provided by the work of Kenneth Kyre, Jr., an attorney in private practice in North Carolina, who compiled and photocopied many original public legislative documents regarding the legislative history of the Product Liability Act in its various incarnations and amendments. Mr. Kyre’s legislative history is not an interpretive or analytical work, and apparently none of the text is his own, with the exception of a chronologically organized table of contents. Rather, it is a compilation and organization of photocopies of original public documents. All interpretations regarding these materials are my own. His compilation is available at the North Carolina Legislative Library in Raleigh, North Carolina, and is entitled *Legislative History of the Products Liability Act and the Products Liability Statute of Repose: Senate Bill 189, N.C. Gen. Stat. Chapter 99B and § 1-50(a)(6) (And the History of Senate Bill 746, House Bill 235, and House Bill 993)*, 1 vol. (various foliations): ill.; 30 cm., by Kenneth Kyre, Jr., of Pinto Coates Kyre & Brown, PLLC of Greensboro, N.C. (August 2007). Hereinafter cited as “Kyre.”

²⁴ Product Liability Risk Retention Act of 1981, 15 U.S.C. §§ 3901–3903 (PL 97-45, September 25, 1981, 95 Stat 949).

was not proposing the federalization of tort law; rather it was only a federal attempt to reduce premiums for products liability insurance.

Nevertheless, the bill contained several provisions that would become problematic for its passage—a new federal agency within the Department of Commerce²⁵—and it would have allowed recovery not only for property damages but also for emotional harm without physical consequences.²⁶ The 1980 bill was initially drafted by the Department of Commerce, was favorably reported out of its House committee, and overwhelmingly passed the House during the presidential election year, in March 1980, with the support of the Carter administration.²⁷ The bill was seen by some Democratic officials as a “move toward deregulation” that was “in sync with the mood of the times and the mood of this Congress.”²⁸ Yet, the Carter administration had a record of ambivalence regarding deregulation. Although the administration had endorsed deregulation in some areas, such as in the airline industry,²⁹ it had fought to maintain government control in areas such as prices for natural gas.³⁰ A report of the House Committee on Interstate and Foreign Commerce in February 1980 contended that the bill would “address one of the principle [*sic*] causes of the product liability problem; [*sic*] questionable insurer ratemaking and reserving practices.” Sponsors hoped that insurance companies would have to compete for manufacturers’ business by setting rates according to the actual claims histories of manufacturers.³¹

²⁵ Congressional Record – Senate, Remarks of Sen. Cannon, Vol. 127, Pt. 15, 97th Cong., 1st sess., Sept. 11, 1981, 20358.

²⁶ H. Rept. 96-791, 16. The expansive definition of “product liability” in the 1979 amendments to the Internal Revenue Code (26 U.S.C.A., § 172(i)(2)(A)), which included damages for emotional harm and loss of use of property demonstrate the uncertainty of future extensions by state courts of the kinds of damages recoverable in product liability cases under the strict liability theory. H. Rept. 96-791, 16.

²⁷ House Reports, 96th Cong., 2nd sess., Vol. 2, Misc. Reports, Report No. 96-791 of the Committee on Interstate and Foreign Commerce (1980) (hereinafter H. Rept. 96-791), 1; Congressional Record – House, Remarks of Rep. L. Richardson Preyer (D-NC), Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 10, 1980, 5060.

²⁸ Congressional Record – House, Remarks of Rep. James H. Scheuer (D/Lib.-NY), Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 10, 1980, 5060.

²⁹ Paul Stephen Dempsey, “Turbulence in the ‘Open Skies’: The Deregulation of International Air Transport,” 12 *Transportation Law Journal* 305, 325–30 (1982).

³⁰ Richard L. Lyons, “House Votes Down Gas Deregulation; Victory for Carter,” *Washington Post*, First sect., A1 (Aug. 4, 1977). President Carter was inconsistent in his stance on deregulation of natural gas; he initially supported deregulation, then switched to supporting price controls, then reverted to supporting gradual deregulation. Richard L. Lyons, “President Takes Yet Another Turn in His View of Gas Deregulation,” *Washington Post*, First sect., A4 (Mar. 10, 1978).

³¹ H. Rept. 96-791, 9–10.

Critics of the bill in the House made several objections. First, they argued the bill was an unwarranted intrusion into a matter theretofore the province of the states. This was an objection based upon federalist principles. Critics were certainly correct that insurance regulation had been a matter for the states. However, in 1944 the U.S. Supreme Court held that insurance regulation was a matter of interstate commerce and could be regulated by the federal government.³² Second, the critics argued that the federal government was simply “too large” and that this bill was yet another enlargement of government. Third, critics thought the federal law would duplicate programs at the state level, such as Colorado and Tennessee’s “risk financing options” laws. Finally, the critics argued the “Commerce Department’s lack of expertise in insurance” was cause for concern that insolvency, fraud, and mismanagement of the proposed risk retention groups would likely result.³³ This argument could have worked against the critics, since the Commerce Department would simply have reason to hire insurance industry experts to staff the administrative functions.

The Senate Committee on Commerce, Science, and Transportation reported favorably on the 1980 bill, notwithstanding that it was eventually defeated in the full Senate. By the time the Senate committee considered the bill, senators expressly conceded “the product liability [insurance] market has stabilized and that [insurance] availability is no longer a problem.”³⁴ By 1980, the net annual increases in liability insurance premiums were no longer considered as “outrageous” as in the 1975–77 period.³⁵ Nevertheless, since manufacturers “continue[d] to believe” that insurance costs were too high, the committee recommended passage of the bill. The committee members blamed the state courts for creating an uncertainty of risk for underwriters at commercial insurance carriers.³⁶ It was hoped that the risk retention groups would increase competition amongst insurance carriers seeking the business of manufacturers. Additionally, the Senate version of the 1980 bill contained one major change: a refusal to create “any new Federal

³² *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944). In 1945, the McCarran-Ferguson Act (15 U.S.C.A. § 1011 et seq.) was enacted. It provided that the states could regulate insurance. However, the law did not prevent future federal regulation of insurance.

³³ Dissenting Views of Representatives James M. Collins (R-TX), Carlos John Morehead (R-CA), and William E. Dannemeyer (R-CA), H. Rept. 96-791, 46–49.

³⁴ Senate Reports, 96th Cong., 2nd sess., Vol. 12, Miscellaneous Reports, Report No. 96-984 from the Committee on Commerce, Science, and Transportation (1980) (hereinafter S. Rept. 96-984), 1–2. The same admission was made in the same committee’s report in 1981 in support of the successful bill, S.1096, Product Liability Risk Retention Act of 1981. S. Rept. 97-172, 2.

³⁵ Congressional Record – House, Remarks of Doug Bereuter (R-NE), Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 10, 1980, 5065.

³⁶ S. Rept. 96-984, 1–2.

bureaucracy.” The Senate sponsors saw the problem as the difficulty of forming captive insurance companies that could work across state lines, not the inability to charter and regulate such captive companies in the first place. Thus, no federal oversight agency was needed.³⁷

In order to understand the ultimate failure of the 1980 bill, we must understand the anti-regulatory context of the late 1970s and early 1980s. Congressmen who opposed the 1980 Risk Retention bill’s proposed regulatory agency often referred to the “spirit of deregulation” that existed throughout the federal government in 1980. The 1970s began with an intense pro-regulatory disposition of many on the American political left, who saw corporations as threatening consumers and the federal government as the solution. Consumer advocates contended “big business must be controlled; the consumer must be protected.”³⁸ The 1970s saw the sharpest increase in the creation of the regulatory state in American history, including consumer protection entities, such as the federal Consumer Products Safety Commission in 1972.³⁹

However, there were critics of the regulatory state in the 1970s and 1980s. Throughout the period there was a steady flow of books that questioned the efficacy of the regulatory state, with titles such as *The Bewildered Society* (1972), *The End of Liberalism* (1969, 1978), and *Instead of Regulation* (1982). The chief criticisms of regulation were: (1) the quelling of price competition in regulated industries; (2) the inability of potential “new competitors to enter the marketplace”⁴⁰; (3) the inclination of many government regulatory agencies to become advocates for the interests they were charged with regulating⁴¹; and (4) the increased costs that regulatory compliance and the lack of competitors produced for manufacturers and, ultimately, consumers.⁴² Also, the federal courts weighed in on issues of agency governance. For example, the courts required agencies to be consistent in the reasons given for particular policies and retain such consistency over time, and required agency rulemaking processes to be more inclusive of the views of citizens.⁴³ The courts’

³⁷ S. Rept. 96-984, 3.

³⁸ George Charles Roche, III, *The Bewildered Society* (New Rochelle, NY: Arlington House, 1972), 255.

³⁹ See Douglas Caddy, *Legislative Trends in Insurance Regulation* (College Station: Texas A&M Univ. Press, 1986), 6.

⁴⁰ Roche, *The Bewildered Society*; Caddy, *Legislative Trends in Insurance Regulation*, 5.

⁴¹ Robert W. Poole, Jr., ed., *Instead of Regulation: Alternatives to Federal Regulatory Agencies* (Lexington, MA: Lexington Books, 1982), vii, 201.

⁴² Caddy, *Legislative Trends in Insurance Regulation*, 6.

⁴³ James Willard Hurst, “The Functions of Courts in the United States, 1950–1980,” 15 *Law & Society Review*. No. 3–4 (1980–81), 468.

disposition of favoring citizen interests in the 1970s in opposition to some aspects of federal agencies' procedures shows how much the federal government relied upon regulatory agencies as implementing entities of government policies and how skeptical even the courts were of the regulatory state's democratic functions.

It is important to note that the initial push to federalize tort law was made by capital goods manufacturers, which were mostly small corporations across America.⁴⁴ These small firms were the main complainants regarding the emergent products liability system, and the proposals eventually made in the early 1980s undoubtedly were crafted with this particular constituency in mind. Thus, the unwillingness to burden manufacturers with a new regulatory agency was no doubt the product of multiple factors: the increasingly popular perception of a failed regulatory state and the pluralistic power of manufacturers.⁴⁵

Federalism Concerns

In addition to the question of the imposition of new regulatory burdens on the private sector, the issue of federalism was prominent in the House debate on this bill. One aspect of federalism is the ability of states to act without federal burdens. Not only do states desire sovereignty in substantive lawmaking, but they also strive to remain free of federal control and burdens. James Collins (R-TX) argued against the 1980 bill, which included the federal administrative provisions, predicting that federal funds would eventually be exhausted and need to be increased. He predicted that the risk retention groups would lack the ability to cover what Collins thought would be excessively high jury verdicts. Thereafter, the federal government would feel compelled to guarantee the risk retention groups. He likened the case to the Employee Retirement Income Security Act of 1974 (ERISA) and the pension obligations of Chrysler Motor Corporation from 1979.⁴⁶ However, Representative Thomas Luken (D-OH) argued that the insurance reforms and federal oversight were avoiding the problem of federal interference with state laws on tort reform *per se*. Ostensibly, Luken was concerned with interfering with the traditional state functions of legislating in the area of tort law. He wanted to limit federal intervention to the area of insurance law. It seems that most House members agreed with Matthew Rinaldo (R-NJ), who noted the bill's requirement that insurers fund

⁴⁴ Ian J. Drake, "The First Attempt at Federalizing Tort Law and Why It Failed," 15.

⁴⁵ In this sense, "pluralism" means the lobbying groups and their members who lobbied Congress and state legislatures to protect manufacturing interests. This could include such groups as the National Association of Manufacturers.

⁴⁶ Congressional Record – House, Remarks of Rep. James Collins, Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 10, 1980, 5061–62.

the measure through user fees, thereby obviating the need for federal tax funds to be used.⁴⁷ However, the eventual failure to enact the 1980 bill was the product of multiple factors, including: resistance to user fees, the ability and expectation that the secretary of commerce would periodically audit the risk retention groups (and the groups would be responsible for paying for such audits), the fact the groups would be subject to antitrust laws and pay state premium taxes, and the Commerce Department's regulation of the way claims were settled under the program.⁴⁸ These were seen as nettlesome federal controls, which impinged upon states' sovereignty regarding insurance regulation.

Supporters of the bill argued that federalist-oriented objections had been outweighed by "the immediate need for such legislation capable of crossing State boundaries to protect business and consumer alike." Thomas J. Corcoran (R-IL) claimed he had been "[l]ong a proponent of States rights," but the extent of the threat posed by products liability insurance rates to "business and consumer alike" overcame his concerns about federalism and state sovereignty.⁴⁹ Doug Bereuter (R-NE) argued that the bill was not contrary to federalism because the bill's exemptions from state insurance laws were "narrowly drawn . . . in order to protect State regulatory authority while allowing the implementation [of] a Federal solution to this essentially multi-State insurance problem."⁵⁰ That is, the proposed federal changes to insurance law were warranted by the national, interstate nature of the problem of liability premium increases.

Although it may seem like Representative Bereuter was trying to reconcile his desire for legislation with his federalist convictions, his argument harkens back to the traditional arguments for federal action: an interstate problem requires national legislative solutions, but state prerogatives can be respected and perhaps accommodated. Again, however, the risk retention groups were seen as "short-term relief [for] the business community." The bill contained a conditional four-year sunset provision.⁵¹

⁴⁷ Congressional Record – House, Remarks of Matthew Rinaldo, Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 10, 1980, 5066.

⁴⁸ H. Rept. 96-791, 12, 15, and 26. The Congressional Budget Office estimated that the fees would offset the initial net costs. Letter of James Blum, CBO, Feb. 29, 1980, cited in H. Rept. 96-791, 36.

⁴⁹ Congressional Record – House, Remarks of Thomas J. Corcoran, Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 10, 1980, 5064.

⁵⁰ Congressional Record – House, Remarks of Doug Bereuter (R-NE), Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 10, 1980, 5065.

⁵¹ Product Liability Risk Retention Act of 1980, § 304(b). This sunset provision would only go into effect if, four years after the implementation of the law, "there exist[ed] no approved risk retention group." Congressional Record – House; text of bill, 5071. Such group would have been approved by the Commerce Department.



Representative Thomas Luken (D-OH) was concerned with how any federalization of tort law would intrude upon traditional state functions. He sought to limit any federal legislation to affecting only state insurance law.

Other, unspecified long-term measures were needed to address the “underlying causes of the product liability insurance problem.”⁵² Nevertheless, there were those who thought the 1980 bill did not go far enough. Thomas Luken (D-OH) claimed that “only a comprehensive tort reform bill” would “eliminate the unnecessary and expensive” product liability lawsuits that he identified as the chief cause of high insurance rates.⁵³

Notwithstanding the federalism concerns of some in the House, the 1980 bill overwhelmingly passed the House by a vote of 332–17.⁵⁴ However, in the Senate the bill languished after being referred to committee.⁵⁵ The main reasons for the failure of the 1980 bill in the Senate were the opposition of the insurance industry, including the larger of the industry’s trade associations—the American Insurance Association, the Alliance of American Insurers, and the National Association of Independent Insurers—and the absence of broad-based public support for the legislation. The insurance groups opposed the bill because they feared the law would give the new risk retention groups a “competitive advantage” over existing onshore insurers.⁵⁶ The lack of broad public support for a federal takeover of the tort insurance industry or the

⁵² Congressional Record – House, Remarks of Doug Bereuter (R-NE), Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 10, 1980, 5066.

⁵³ Congressional Record – House, Remarks of Thomas Luken (D-OH), Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 10, 1980, 5067.

⁵⁴ Roll call vote No. 127, H.R. 6152 (1980), titled The Product Liability Risk Retention Act of 1980. Congressional Record – House, Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 10, 1980, 5068–5072. The House Committee on Rules, “by a nonrecord vote,” reported the resolution favorably, but without commentary in the House Report. House Reports, 96th Cong., 2nd sess., Vol. 2 Misc. Reports, Report No. 96-797, by Rep. Anthony C. Beilenson (D-CA) from the House Committee on Rules.

⁵⁵ After passing the House, H.R. 6152 was reported to the Senate Committee on Science, Commerce and Transportation (S. Rept. 96-984), which later reported it to the Senate on Sept. 23, 1980. This was the last action taken on the bill in the Senate.

⁵⁶ Larry Kramer, “Administration to Support Bill to Allow Product Liability Pool; Administration Backs Interstate Liability Pool,” *Washington Post*, Aug. 17, 1979, Business and Finance section, F1.

Representative Thomas J. Corcoran (R-IL) initially resisted a federal takeover of state insurance law, but changed his mind due to increased insurance rates from product liability lawsuits.

creation of a new federal bureaucracy also made it easier for the Senate to maintain the status quo.

The First Federal Tort Reform Law

The failure of the Congress to pass the 1980 bill was followed in 1981 with the reintroduction and revision of the Product Liability Risk Retention Act of 1981, which was eventually enacted into law. In the House, the original sponsor was James Florio,



then a Democratic congressman from the First District of New Jersey.⁵⁷ The Senate version was originally co-sponsored by Senators Robert W. Kasten, Jr. (R-WI), and Bob Packwood (R-OR).⁵⁸ The bill had been recommended by the Department of Commerce under the Carter administration, and was now supported by the Department under new Reagan administration appointees.⁵⁹ The House and Senate passed it on voice votes in September 1981.⁶⁰

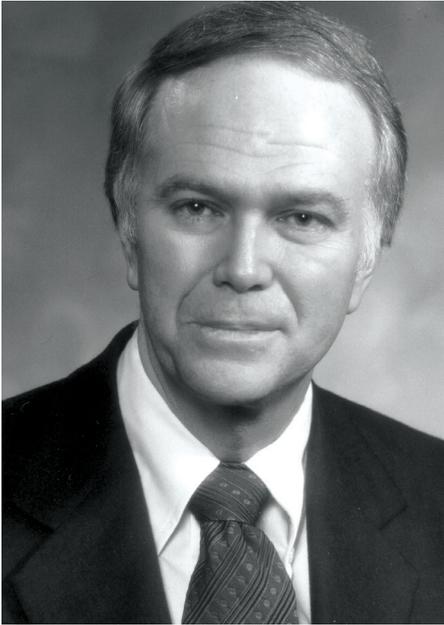
The Risk Retention Act of 1981 was enacted because of its acceptable changes from the failed bill of 1980. The 1981 bill provided for *only* insurance purchasing reform, and the new Reagan administration supported it, at least in part, because it did not have a “federal regulatory role.” Unlike its predecessors, the new bill did not create

⁵⁷ Congressional Record – House, Vol. 127, Pt. 3, 97th Cong., 1st sess., Feb. 25, 1981, 3085, regarding H.R. 2120. From the Committee on Energy and Commerce. Other co-sponsors were Norman Lent (R-NY), Marc Marks (R-PA), Thomas Luken (D-OH), and Joel Pritchard (R-WA). Congressional Record – House, Vol. 127, Pt. 12, 97th Cong., 1st sess., July 16, 1981, 16087. The original Senate bill was S.1096, but the Senate passed the House’s companion measure, H. Res. 2120, in lieu of the Senate bill by a voice vote on Sept. 11, 1981. The Senate bill was introduced by Sen. Robert W. Kasten, Jr., and had 16 co-sponsors.

⁵⁸ Congressional Record – Senate, Remarks of Sen. Kasten, Vol. 127, Pt. 15, 97th Cong., 1st sess., Sept. 11, 1981, 20357. Senator Howard Cannon (D-NV) had sponsored a similar version, S. 69.

⁵⁹ Department of Commerce, Office of the Secretary, “Options Paper on Product Liability and Accident Compensation Issues,” 43 Fed. Reg. 14612, 14625 (April 6, 1978).

⁶⁰ Congressional Record – Senate, Vol. 127, Pt. 15, 97th Cong., 1st sess., Sept. 11, 1981, 20358-59. It became Public Law 97-45, 95 Stat. 949 on Sept. 25, 1981.



Senator Bob Packwood (R-OR) was one of the original co-sponsors of the Product Liability Risk Retention Act of 1981.

any new federal administrative agency or require the expenditure of federal funds. Manufacturers, distributors, and retailers were to be allowed to form self-insurance cooperatives (“risk retention groups”) and purchase insurance on a group basis. It was thought that the chief beneficiaries of the new bill would be manufacturers who were caught in the purported “crisis” of “unaffordable or unavailable” product liability insurance. It was hoped the risk pools (or cooperatives) would allow for lower premiums, which

would reflect the degree of actual risk and would not be impacted by the “present inflationary trends” of the early 1980s. The program was modeled on similar state-level programs for professional malpractice insurance for doctors and lawyers.⁶¹ The new bill would allow for insurance companies that issued product liability coverage chartered in any state to conduct business in any other state, thereby avoiding state laws on capitalization and state chartering restrictions.⁶²

The debates over the Risk Retention Act suggested that the protection of the consumer did not necessarily entail an active regulatory state. It was the widespread perception of a failed regulatory state of the late 1970s that allowed for consideration of an alternative initial approach by the federal government to constituent complaints about high product liability insurance prices. The Risk Retention Act would not have a new federal oversight function; rather, it would simply seek to eliminate existing state barriers to interstate self-funded insurance groups. Importantly, the 1981 bill did not require any federal expenditure or private participant fees, since there was no federal oversight or administrative

⁶¹ Congressional Record – House, Remarks of Rep. Florio, Vol. 127, Pt. 13, 97th Cong., 1st sess., July 28, 1981, 17707-08. Rep. Florio specifically mentioned manufacturers of gym and medical equipment.

⁶² Congressional Record – Senate, Text of Act, § 2(a)(4); remarks of Sen. Kasten, Vol. 127, Pt. 15, 97th Cong., 1st sess., 20356–57. Groups formed in Bermuda and the Cayman Islands also qualified as long as they were chartered in those jurisdictions before 1985. Text of Act, §2(a)(4)(C).

role.⁶³ However, the Securities and Exchange Commission did retain jurisdiction to enforce antifraud statutes.⁶⁴ This form of intervention was more in line with federalism than the comprehensive reforms proposed a few years earlier and even the 1980 version of the Risk Retention Act. Rather than a federalization of state law or an expansion of the federal government through creation of a new bureaucratic entity, the act simply reduced, or eliminated, state barriers to a matter of interstate commercial activity. It was relatively easy for the Reagan administration to support this federalization of torts measure because the bill did not effect an expansion of the federal governmental bureaucracy. At the same time, it sought to create incentives for private insurance carriers to reduce premiums through competition for the new risk retentions groups' business.

The Preservation of Pluralism and Federalism

The 1981 bill was the product of political pluralism, that is, political compromise between different interests and the open competition between different organized interests for government power and public policy to reward and protect their commercial or social goals: the “business and insurance groups have resolved almost all of the remaining differences between them.”⁶⁵ The supporters were diverse: manufacturer associations, including the National Association of Manufacturers, the National Association of Wholesaler-Distributors, and the National Machine Tool Builders Association; insurance associations, including the American Insurance Association; and trial lawyers and consumer protection groups.⁶⁶ The House Subcommittee on Commerce, Transportation, and Tourism held hearings wherein over 30 interest groups testified regarding the risk retention groups bill.⁶⁷ Although the federal law would preempt state laws regarding the “formation and regulation” of risk retention groups and product liability insurance, the states were not prohibited from regulating the licensing, chartering, capital requirements of risk retention groups formed under the law, or requiring actuarial opinions regarding the adequacy of compliance with state regulations. Also, the states could tax premiums and enact other taxes usually levied on insurance companies in the states.⁶⁸ In short,

⁶³ Congressional Record – Senate, Remarks of Sen. Kasten, Vol. 127, Pt. 15, 97th Cong., 1st sess., Sept. 11, 1981, 20357.

⁶⁴ Product Liability Risk Retention Act of 1981, §5(a)(1) & (2) (reproduced in H. Rept. 97-190), 4; S. Rept. 97-172, 6.

⁶⁵ Congressional Record – House, Remarks of Rep. Lent, Vol. 127, Pt. 13, 97th Cong., 1st sess., July 28, 1981, 17708.

⁶⁶ Congressional Record – Senate, Remarks of Sen. Nunn, Vol. 127, Pt. 15, 97th Cong., 1st sess., Sept. 11, 1981, 20358.

⁶⁷ H. Rept. 97-190, 7–8.

⁶⁸ Product Liability Risk Retention Act of 1981, §3(a)(1)(A)-(F), as reproduced in H. Rept. 97-190, 2–3.

the states retained a great deal of regulatory and taxing authority under the law. The committee simply stated its “hopes that States will exercise regulatory restraint and not impose unnecessary regulatory burdens.”⁶⁹ This state regulatory authority was important in obtaining the support of the insurance industry because it allowed states to regulate the new groups just like insurance companies, which would reduce some of the new entrants’ competitive potential.

Nevertheless, there were vocal critics of the 1981 law: state insurance officials. For example, Albert B. Lewis, New York’s superintendent of insurance, claimed the act was “destructive” to the “insurance consumer and the United States insurance industry” because the act lacked specific requirements as to initial capital investments and reserves for the risk retention groups.⁷⁰ However, the congressional committee reports expressed the intention that the states that licensed or chartered the groups retain the authority to require sufficient capital and reserves.⁷¹

The legislation was more than the product of an alleged consensus of private interests. Legislators claimed the bill provided a “marketplace solution to the product liability problem at no cost to the Federal Treasury” and continued to preserve and protect injured consumers’ legal claims.⁷² Supporters hoped that the risk groups would encourage competition among private insurers to calculate premiums based upon “actual risks and loss experience rather than anticipated losses.”⁷³ Additionally, the Department of Commerce provided its endorsement of the bill, claiming businesses would obtain “industrywide protection,” which would allow for greater productivity and innovation.⁷⁴

⁶⁹ H. Rept. 97-190, 13.

⁷⁰ “A Federal Law That Puts Product Liability Insurance at Risk,” Letter of Albert B. Lewis to the Editor, Oct. 15, 1981, *New York Times*, Oct. 26, 1981, Sect. A, 22, col. 4.

⁷¹ Product Liability Risk Retention Act of 1981, §3(a)(1)(A)-(F), as reproduced in H. Rept. 97-190, 2-3; see also “A Safeguard in a Law on Liability Insurance,” Letter from Erich Parker, Director of Public Information, American Academy of Actuaries, to the Editor, Nov. 3, 1981, *New York Times*, Nov. 17, 1981, Sect. A, 30, col. 4. This letter was in response to Albert Lewis’s letter referenced *infra*.

⁷² Congressional Record – House, Remarks of Rep. Lent, Vol. 127, Pt. 13, 97th Cong., 1st sess., July 28, 1981, 17708. The “marketplace solution” phrase was a favorite of supporters. Rep. James Collins (R-TX) used the same phrase in his statement of support at the time of the publication of the House Committee on Energy and Commerce’s report. “Additional Views of Honorable James M. Collins,” H. Rept. 97-190, 28. Also, Senators Barry Goldwater (R-AZ), Howell Helfin (D-AL), and James Exon (D-NE) used the same phrase in their joint statement of support for the 1981 bill. S. Rept. 97-172, 20.

⁷³ Congressional Record – House, Remarks of Rep. Ed Markey (D-MA), Vol. 127, Pt. 13, 97th Cong., 1st sess., July 28, 1981, 17709-10.

⁷⁴ Letter of Malcolm Baldrige, Sec. of Commerce, July 24, 1981, in Congressional Record – House, Vol. 127, Pt. 13, 97th Cong., 1st sess., 17708.

Unresolved Problems

As several congressmen noted, the new law only dealt with one aspect—the availability of insurance—of what was understood as a multifaceted problem. The Commerce Department’s Interagency Task Force on Product Liability identified two other culprits: the “uncertainties” in litigation caused by different states’ laws and manufacturers’ production of “unsafe” (or defective) products.⁷⁵ Presuming the competition amongst insurers envisioned by the law’s drafters actually occurred and resulted in lowered premiums, the law did not modify any state torts laws, create federal tort law standards, or provide any incentives or mandates for “safer” products from manufacturers. Not all of those who voted for the final bill thought it went far enough. For example, Representative James M. Collins (R-TX) argued that Congress needed to enact a national statute of limitations for product liability claims, restrict liability for manufacturers whose products were subsequently modified, and enact limits on the compensatory awards allowed in courts.⁷⁶ Collins had voted against the prior 1980 bill in the House.⁷⁷ The reference to a statute of limitations was pertinent to any good, but was especially a concern of capital goods manufacturers. These were the makers of large, heavy, complex—and, if used improperly, dangerous—machines. These were the manufacturers who sought a limit upon the number of years that could pass before a claim for an injury from a defect could be filed. Additionally, Senator Robert Kasten of Wisconsin contended that this bill was only “the first step” in national product liability reform efforts.⁷⁸ Senator Sam Nunn (D-GA) said the bill kept “in step with the times” by being a “deregulatory solution.”⁷⁹ Thus, for the proponents of federal intervention in the tort law “problem,” the Product Liability Risk Retention Act of 1981 was only an initial step. From the vantage point of 1981, federalization of tort law would have to happen, if at all, in a piecemeal fashion.

⁷⁵ Congressional Record – House, Remarks of Charles Grassley (R-IA), Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 10, 1980, 5067.

⁷⁶ Congressional Record – House, Remarks of Rep. Collins, Vol. 127, Pt. 13, 97th Cong., 1st sess., July 28, 1981, 17709. The earlier 1980 bill, which contained similar group insurance purchasing and risk retention group provisions passed the House but not the Senate and was thought by co-sponsor Rep. Anthony Beilenson (D-CA) to be only an attempt to solve one part – the insurance part – of the product liability problem. Remarks of Rep. Beilenson, Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 6, 1980, 4985.

⁷⁷ Congressional Record – House, Remarks of Rep. Collins and record of roll call vote, Vol. 126, Pt. 4, 96th Cong., 2nd sess., Mar. 10, 1980, 5061–62, 5071.

⁷⁸ Congressional Record – Senate, Remarks of Sen. Kasten, Vol. 127, Pt. 15, 97th Cong., 1st sess., Sept. 11, 1981, 20357.

⁷⁹ Congressional Record – Senate, Remarks of Sen. Nunn, Vol. 127, Pt. 15, 97th Cong., 1st sess., Sept. 11, 1981, 20357.



Senator Robert W. Kasten, Jr. (R-WI), was one of the original co-sponsors of the Product Liability Risk Retention Act of 1981.

The enactment of the Risk Retention Act of 1981 was chiefly the result of the pluralism of the post–New Deal state: the interests of manufacturers—and to judge from the comments of several congressmen, small-scale manufacturers—were ostensibly protected by the risk retention groups allowed under the 1981 law. Therefore, notwithstanding the

apparently emergent ethos of “deregulation” that was supported by conservatives, Republicans, the new Reagan administration, and even many moderate and moderate-to-liberal critics of the national regulatory state of the late 1970s, the 1981 law should not be viewed as a “conservative” or “deregulatory” approach to the products liability issue. Rather it was the product of a longer, pluralistic process of the post–New Deal state, wherein interest groups openly organized and sought to influence public policy with Congress and the president. The 1981 act was an attempt to overcome the pluralistic dilemma presented by the existence of strict products liability and workers’ compensation systems at the state level. At the state level, there were interests that sought to keep a strong workers’ compensation system and tort law within the purview of the state governments. On the other hand, at the federal level there were other interests that sought to federalize tort law or at least insurance law, in an effort to have uniform, national standards for tort law. Congress had sidestepped (or postponed, as many tort reform proponents saw it) the federalization of tort law. Would the changes made to states’ insurance laws be sufficient to reduce the problems posed by products liability claims and lawsuits? Would those who were threatened with such claims and suits (manufacturers and insurers alike) be satisfied—even if insurance was made more “affordable”—with the refusal of the federal government to step into the states’ shoes and alter tort law to provide greater protection to these would-be defendants? The answer was clearly “no.”

Measuring Legislative Results

But what of the answer to the former question? Did the Product Liability Risk Retention Act of 1981 result in lowered premiums for products liability coverage? In short, did

the law work as Congress had hoped? The answer is: in the short term, possibly; in the long term, no. The Reagan administration's secretary of commerce, Malcolm Baldrige, argued that the Risk Retention Act and the presumed resultant competition among insurers would alleviate the upward price pressures for businesses.⁸⁰ In the early 1980s interest rates came down, and during the period of 1984–86, as feared, premiums went up again. The risk-pooling abilities made possible under the act did not seem to produce substantial premium reductions. Some scholars have concluded that the rise in premiums in the mid-1980s was not due to an increase in injuries but rather to an expansion of strict liability to which manufacturers were subjected by decisions of state courts, and the unpredictability of future claims costs such liability presented during the 1970s and 1980s, which reduced the availability of insurance coverage.⁸¹

The Insurance Services Organization noted that its advisory rates for product liability coverage “increased by about 195 percent from 1974 through 1976.” Between 1976 and 1983, the rates were “relatively stable.” At the time, it was thought that rates had stabilized because of “competition in the insurance industry resulting from a four-year-old rate war and the infusion of new insurers into the market.”⁸² Some of those new insurers would have been the risk retention groups allowed under the act. Some manufacturers testified before Congress in 1982 that the Risk Retention Act had resolved the ratemaking problem.⁸³ But at that point, it was far too early to tell. However, the ISO reported that from 1983 through 1988 the rates “increased by about 105 percent.”⁸⁴ The rates would again level off and eventually drop, but there was never convincing evidence that this was due to the Risk Retention Act.

⁸⁰ Letter of Malcolm Baldrige, Sec. of Commerce, to Rep. James J. Florio, June 12, 1981, as reproduced in H. Rept. 97-190, 24.

⁸¹ George L. Priest, “Understanding the Liability Crisis,” *Proceedings of the Academy of Political Science*, Vol. 37, No. 1, New Directions in Liability Law (1988), 203; George L. Priest, “The Current Insurance Crisis and Modern Tort Law,” *Yale Law Journal*, Vol. 96, No. 7 (June, 1987), 1521–90; Scott E. Harrington, “Tort Liability, Insurance Rates, and the Insurance Cycle,” *Brookings-Wharton Papers on Financial Services* 2004 (2004), 97, 126; Michael J. Trebilcock, “The Social Insurance-Deterrence Dilemma of Modern Tort Law,” *San Diego Law Review*, Vol. 24, No. 4 (July–Aug., 1987), 929–1002.

⁸² Terry Morehead Dworkin, “Federal Reform of Product Liability Law,” *Tulane Law Review*, Vol. 57, No. 3 (Feb., 1983), 602, 607, 619 fn. 106 (citing *Wall Street Journal*, Aug. 5, 1982, at 19, col. 3).

⁸³ Statement of Victor E. Schwartz, Counsel, Product Liability Alliance in Product Liability Reform: Hearings on S. 2631 Before the Senate Subcommittee for Consumers, Senate Committee on Science, Commerce, and Transportation, Serial No. 97-109, 97th Cong., 2nd sess. (Mar. 9, 1982), 9.

⁸⁴ U.S. General Accounting Office, Human Resources Division. Report to the Honorable Frank Horton, House of Representatives. “Product Liability: Insurance Rate Levels and Claim Payments During the 1970s and 1980s,” (Sept., 1991) (hereinafter GAO Rept., Sept. 1991), 2.

It appears that the Risk Retention Act failed to reduce or even maintain the plateau in rates through the 1980s. The cause of these rate fluctuations appears to have been multifaceted: price competition among insurers, increases in insurers' investment returns due to interest rate fluctuations, and predicted increases in future claims due to product liability lawsuits.⁸⁵ Federal product liability suits "increased sixfold from 1975 through 1989."⁸⁶ The ISO contended that the "changes in the frequency and average cost of claims reported by its participating insurers" were probably the chief reasons for the fluctuation in rates. Since ISO advisory rates lag behind and are made in response to their member-insurers' experiences, the "sharp increases . . . may have resulted from earlier increases in the frequency and cost of claims reported by ISO's insurers."⁸⁷ The early 1980s turned out to be a period of high price competition among insurers. This was enabled by the falling interest rates, which stimulated rivalry within the insurance industry. However, rates increased again in 1985–86, which was considered a second period of "crisis" in the industry.⁸⁸

Conclusion

The Risk Retention Act of 1981 remains in effect as of this writing.⁸⁹ It was a limited federal intervention in state regulation of the insurance industry that attempted to resolve the insurance rate increases without a federal takeover of state tort law. This act was a bipartisan law and was really the last of its kind in the federal tort reform efforts. Although the remaining tort reform battles of the 1980s and later are beyond the scope of this article, it is important to note a partisan political division that developed after the 1981 Risk Retention Act. Republicans would sponsor most bills in support of a federal role in state tort law. This too was a manifestation of pluralism. Business interests that sought greater protection through federal intervention generally supported Republicans, who were acting contrary to their party's increasingly conservative, or somewhat libertarian, stance against the expansion of federal responsibilities. Alternately, consumer protection

⁸⁵ Joseph A. Page and Marcy M. Stephens, *The Product Liability Insurance Crisis: Causes, Nostrums and Cures*, 13 *Cap. U. L. Rev.* 387 (1983–1984); *Capital University Law Review* 387 (1984), 397–98; William G. Rood, "Products Liability in the Small Capital Goods Manufacturing Firm: Problems, Proposals and Pitfalls," 23 *California Western Law Review* 304 (1987), 327.

⁸⁶ W. Kip Viscusi, *Reforming Products Liability* (Cambridge, MA.: Harvard University Press, 1991), 6. The data cited by Viscusi was only based upon federal lawsuits. Yet, most tort suits are filed in the state courts. Unfortunately, it is impossible to know how many product liability suits are filed in the states because many states do not keep tallies of types of claims/suits filed.

⁸⁷ GAO Rept., Sept. 1991, 3.

⁸⁸ W. Kip Viscusi and Michael J. Moore, "An Industrial Profile of the Links between Product Liability and Innovation," in Peter W. Huber and Robert E. Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (Washington, DC: The Brookings Institute, 1991), 85.

⁸⁹ 15 U.S.C. §§ 3901 *et seq.* (last amended in 1986).

groups and plaintiffs' trial attorneys, who sought protection in legislative control of tort law, generally supported Democrats. Although some Democrats were less enamored of the federal regulatory state in the early 1980s, most Democrats were supportive of the expansion of federal responsibilities. Thus, interests that sought actions contrary to both political parties' philosophical dispositions regarding federal responsibilities and the parties were both attempting to satisfy these constituencies.

The late 1970s and early 1980s were a period during which "tort reform" became a national issue and manufacturers sought to use federal power to protect their interests. Legislative proponents claimed federal intervention would produce lower premiums and result in lower prices for consumer goods. The Risk Retention Act of 1981 sought a truly federalist resolution: a measure limited to matters truly of an interstate commercial character that did not impinge upon the state workers' compensation or tort systems. Although the Risk Retention Act failed to achieve its goals, the law was the product of a pluralist democratic state. That is, the law was the result of the open competition and compromise among organized interests for government power to be used to benefit them. Also, the act reflected the federalist and limited government concerns of conservatives and moderates by not expanding federal responsibilities but only reducing state-based obstructions to interstate commercial activity. That is, this federal intrusion into state sovereignty was arguably just the kind of intrusion envisioned by the creators of the federalist system: using the Commerce Clause for solving an interstate commercial problem extending to the entire United States.⁹⁰

Picture credits: 1981 act, Pub. Law 97-45; Representatives Luken, Corcoran, Collection of the U.S. House of Representatives; Senators Packwood, Kasten, U.S. Senate Historical Office.

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⁹⁰ "[A] wilderness of different state tort standards impedes interstate commerce by requiring either a whole variety of a single product or a uniform standard set by the strictest state. Congress can use its power under the Commerce Clause to address this situation." Robert H. Bork and Daniel E. Troy, "Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce," *Harvard Journal of Law & Public Policy*, Vol. 25, No. 3 (Summer, 2002), 849, 887.