

# Safety Belt Use: Some Products Liability Considerations

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## ABSTRACT

Uncertainties in the American law of products liability are discussed with particular focus upon claims related to safety restraint systems. Anecdotal and published case reports are presented illustrating the variety of allegations which could be made in such cases as well as tactical defense considerations relevant to manufacturers. Substantial litigation exposure makes it desirable for manufacturers to be cognizant of products liability risks and to consult with their counsel notwithstanding a strong commitment to making safe products.

## A CLIMATE OF UNCERTAINTY?

THE WORDS "PRODUCTS LIABILITY" JUSTIFIABLY AROUSE CONCERN in persons, firms and entities associated with the design, manufacture, assembly and marketing of products. Proliferation of products litigation in the United States over the past fifteen years has created enormous problems with important societal implications. This is an era in which proof of liability has been facilitated by major shifts in substantive and procedural rules and litigation practices. The evolutionary pattern has been to make recovery by an injured product user far easier to

achieve. The problem of increasing numbers of claims has been aggravated by the soaring costs of litigation, settlements and verdicts. Additionally, juries have demonstrated an increased willingness to award substantial punitive damages. With individual verdicts and settlements in the multi-million dollar range becoming more common events, it takes little imagination to ponder the ramifications for manufacturers and sellers of mass-produced products. As never before, long-standing designs and whole product lines may be damned by the decision of six, eight or twelve jurors in a given trial. Often, such fateful determinations are made by persons having little or no engineering background or expertise based upon legal instructions employing vague and amorphous concepts of "defectiveness."

Malaise associated with the current products liability system stems, in part, from increased uncertainty about the standards of performance which the law requires in order to avoid liability. The question, "how much safety is enough?" is relatively open-ended and current litigation practices allow second-guessing of product designs by hindsight years after such decisions have been made. Indeed, standards based upon "reasonableness" and good manufacturing conduct may no longer obviate liability because the doctrine of so-called "strict tort liability" has dominated the scene

and furthered the drift towards open-ended liability. One popular version of "strict liability," for example, would hold a manufacturer liable when the product is in a "defective" condition which is "unreasonably dangerous" to the user despite the fact that the "seller has exercised all possible care in the preparation and sale of his product."<sup>(1)</sup>\* This legal standard directs the jury towards a result-oriented inquiry - how well did the product perform in this accident? - rather than towards the reasonableness of the manufacturer's conduct. As some courts and scholars have said, the focus of "strict liability" is shifted to the product and away from the conduct of the maker. Can a manufacturer be held liable despite exercising perfectly reasonable and proper care? Doctrinally, the answer is "yes," if the product is found "defective." The vague test of "defectiveness" (which eludes uniform application by the courts), applied in the context of a hindsight-based litigation process, is understandably frustrating to automotive engineers and designers. They need to know in advance of production what features to build into their automobiles. Since cars cannot be redesigned from accident to accident, it would be comforting to know beforehand precisely what the law requires in order to avoid liability. Unfortunately, we have not yet reached this comfortable stage. We are in an era of flux. There are considerable judicial tensions and legal stresses and strains in this complex area and there are as yet no hard and fast answers.

In a crashworthiness case not too long ago, a federal appellate court affirmed a multimillion dollar judgment against an automobile manufacturer but eloquently expressed "uneasiness" about the "troubling public policy dilemma" presented by such litigation:

"[I]ndividual juries in the various states are permitted,

in effect, to establish national automobile safety standards. The result of such an arrangement, predictably, is not only incoherence in the safety requirements set by disparate juries, but also the possibility that a standard established by a jury in a particular case will conflict with other policies regarding the economics of the automobile industry as well as energy conservation programs."<sup>(2)</sup>

Elaborating upon the problem of jury-formulated standards, the court stated:

[W]hile the jury found [the manufacturer] liable for not producing a rigid enough vehicular frame, a factfinder in another case might well hold the manufacturer liable for producing a frame that is too rigid. Yet, as pointed out at trial, in certain types of accidents - head-on collisions - it is desirable to have a car designed to collapse upon impact because the deformation would absorb much of the shock of the collision, and divert the force of deceleration away from the vehicle's passengers. In effect, this permits individual juries applying varying laws in different jurisdictions to set nationwide automobile safety standards and to impose on automobile manufacturers conflicting requirements. It would be difficult for members of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other jury decides is a defective design. Under these circumstances, the law imposes on the industry the responsibility of insuring vast numbers of persons involved in automobile accidents."<sup>(3)</sup>

\*Numbers in parentheses designate references at end of paper.

The court decried the present system of regulation "by ad hoc adjudications" but stopped short of judicially resolving this "important conflict that implicates broad national concerns." Instead, the court noted that these concerns are more appropriate for correction by Congress.

To be sure, the legal situation is not so bleak that cases cannot be won by manufacturers. Indeed, many cases are successfully defended. There are also signs here and there that some courts and legislatures are recognizing that the pendulum may well have swung too far in favor of liability and too far away from "reasonable conduct." However, products liability still remains an unpredictable area of law fraught with uncertainties. Manufacturers and their engineers need to be duly cognizant of this litigation maelstrom. They need to go about their safety work prudently and responsibly but with a vigilant eye on potential products liability consequences.(4)

#### PRODUCTS LIABILITY FOR SAFETY RESTRAINTS?

Seat belts or safety restraint systems are "products." Liability consequences affecting the design, manufacture, assembly and marketing of these items cannot be divorced from the products liability picture at large. Thus, if products liability risks are generally expanding one may assume that the risk potential for safety restraint litigation will do likewise. If the general costs of litigation, verdicts and settlements in products cases spirals upwards, there is adequate reason to assume that the potential costs associated with safety belt claims will reflect that trend as well. Although safety restraints are already subject to rigid quality control, multiple testing practices and regulatory standards, they are nevertheless products with performance limitations and design compromises. Therefore, they are

not immune from products liability attacks. Indeed, several subtle factors may be noted in this connection. First, automobile and component manufacturers are prime candidates to be sued since they are perceived as "target" or "deep pocket" defendants capable of paying large settlements or judgments. They are also highly vulnerable to substantial punitive damage awards. Second, automobile accidents produce numerous deaths and disabling injuries on a continual basis thereby furnishing a large pool of high-exposure claimants. Third, traditional automobile liability insurance coverage is often insufficient to compensate for the serious or catastrophic injuries sustained in a given accident. This makes it very attractive for claimants' lawyers to sue automobile manufacturers as additional defendants whenever accident injuries are severe. Fourth, as indicated above, legal developments in the products area have made the prospects of eventual recovery against the manufacturer much more favorable and, therefore, more attractive to pursue. Developments like strict tort liability, crashworthiness liability, comparative fault, joint and several liability and punitive damages, to name but a few, encourage the filing of products liability lawsuits. Fifth, the automobile industry is highly regulated by a safety agency continually monitoring for compliance with standards and safety-related defects. Thus, publicity and documentation about accident performance, injuries, test data and vehicle shortcomings is readily available to the knowledgeable claimant's attorney.

For automobile seat belt manufacturers and suppliers the foregoing factors may be affected by additional forces. Seat belt restraints are commonly viewed and rightfully perceived as safety devices. Their intended purpose is to mitigate or prevent injury or death when accidents occur. Thus,

the consumer expectation level in terms of safety performance is very high. When such safety expectations are disappointed or frustrated by a broken restraint or by the occurrence of severe injury notwithstanding use of the safety device, a potentially attractive basis for suit may be presented. The jury is told, in effect, that this safety device simply did not do its job of protecting the occupant. A further consideration is the statistical evidence that most people do not utilize available safety belts. This may be one reason why seat belt litigation is not more abundant. After all, a person who does not use a functioning seat belt can hardly claim that it performed defectively. However, since future efforts are geared towards increased use of restraint systems, it may be expected that the number of claims involving such devices will rise as restraint use markedly increases. This may be offset by a decrease in claims attributable to the reduction in deaths and injuries expected from increased belt use. The point is that products liability is a growing problem for automobile manufacturers generally and this trend is likely to be reflected in the safety restraint area as well.

#### SAFETY RESTRAINT LITIGATION - ANECDOTAL DATA AND VARIETY OF CLAIMS

BELT RELEASE - Although precise data on claims is unavailable, anecdotal information appears to reflect a growing body of sophisticated products liability litigation concerning the performance of safety restraints. For example, a Michigan jury is reported by a litigation journal to have returned a verdict of 1.5 million dollars on December 2, 1983 against a domestic manufacturer for injuries sustained in an accident in which a 1975 automobile went off the road and overturned. The driver was ejected and suffered brain stem injuries. Reportedly,

the plaintiff claimed a manufacturing defect in the driver's seat belt buckle, which allegedly had been reversed at the factory so that the latching button faced inward, thereby permitting an "inertial opening" or release of the restraint during the accident. The defense reportedly claimed that the belt was not being worn or that the buckle had been tampered with after leaving the factory. Since the driver was found contributorily at fault, the award was reduced to \$750,000 but interest and costs will bring the amount over one million dollars.(5)

The question of inadvertent or inertial release of buckle opening mechanisms is problematical. One feature that makes some belt restraints more desirable and acceptable to consumers is the ease and comfort of simple closure and opening. It is also a safety feature to have a simple, accessible and effective belt opening device in order to facilitate prompt and safe extrication of an injured occupant. Speed and simplicity would certainly be desirable if the vehicle, for example, caught fire. Indeed, claimants might allege a defect if seat belts did not release readily. Thus, for example, in a famous case adopting crashworthiness liability the Washington Supreme Court allowed suit upon allegations that a death was caused because the belt buckle did not release after the seat moved forward, thereby perpetuating abdominal pressure.(6) On the other hand, the very feature that caters to these functional and safety needs of easy opening may also contribute to the possibility of "release." A textbook written for lawyers counseled in a 1975 update on seat belt accidents that the then "new" types of "quick release" buckles may "under certain conditions pop open." The reference work illustrated the spring loaded release mechanism and suggested that opening might occur "if the belt is worn loosely and the vehicle in which the wearer is

riding undergoes very rapid deceleration, as in a sudden stop or a collision. It might also occur when the belt is worn snugly and the vehicle experiences more than one impact as in a multiple collision accident." The text goes on to describe the mechanics of the release action stating that, "it takes a blow of only moderate force to make this kind of belt fly open."(7)

If a belt buckle releases inadvertently or because of contact during an accident, is it "defective?" The law simply does not provide a definitive answer to the engineer. Because of the legal climate and operative factors influencing the legal system, there certainly may be products liability implications. The litigation problem may even be exacerbated as a practical matter because the occupant who actually does not wear his belt in the first place may claim that a release occurred. The evidence for both possibilities may very well be the same: no belt webbing stretch; no abdominal belt-wearing contusions; and a very severe injury which would have been mitigated or prevented had a restraint been worn or held. The factual dilemma could boil down to a so-called "swearing contest" at trial with jury doubts possibly resolved in favor of the sympathetic claimant and against the "deep pocket" manufacturer. Judging the credibility of witnesses in such contests is said to be a classic task of the jury. When quality control issues are raised (such as the buckle allegedly installed on its reverse side), questions of "credibility" may also be presented. Thus, a claimant might testify that neither he nor anyone else tampered with the belt buckle since its purchase at retail. This testimony suggests an inference that the buckle reversal originated at the plant or with the seller. The manufacturer, on the other hand, may present evidence of quality control practices which make it impossible for a reversed buckle to have left

the factory. A factual dispute is thereby created which the courts tend to leave to the jury for resolution. Attacks upon quality control practices or assertions of manufacturing flaws are particularly challenging because the manufacturer's own specifications announce the standard of care alleged to have been breached. Moreover, if doctrinal "strict" tort liability prevails, the fact that the manufacturer's quality control practices were excellent by industry norms is not a defense. Since "strict" liability focuses the inquiry upon the condition of the product - and not the conduct of the manufacturer, if the jury finds a "defect," the excellence of the defendant's quality control efforts is theoretically put aside. The jury then moves to consider whether the "defect" sufficiently "caused" the injury.

INJURY DESPITE RESTRAINT - Another litigation journal report describes a California seat belt claim against a Swedish car manufacturer which was settled in mid-1983 on a confidential basis reportedly in the area of \$650,000 to \$850,000. The plaintiff claimed that her 1976 car's safety belt was eight inches too long so that, despite being belted, she was thrown into the dashboard at the glove compartment. She remained in a coma for one month and suffered brain injuries requiring her to relearn speech, walking and other functions. The claimant's lawyer was reported to have relied upon NHTSA Car Crash Assessment barrier tests. These were conducted at 35 mph upon a similar vehicle and registered an HIC reading of 1889 for the passenger dummy.(8) This illustrative experience raises questions of importance to manufacturers. Many other vehicles have also been tested under the same NHTSA program in which HIC readings of belted dummies also exceeded 1000. Are such vehicles "defective?" Are the belt systems "deficient" in affording protection even though they exceed Federal

Motor Vehicle Safety Standard (FMVSS) performance requirements in tests at 30 mph? Products liability law, unfortunately, does not provide a definitive answer. Depending on the facts, the issue could boil down to a "battle of experts" in given cases to be decided by lay juries on an ad hoc basis. The anecdotal report, if true, does however indicate one of the operative forces described earlier as encouraging lawsuits: the existence of considerable test or performance data available to the public which is perceived, construed or interpreted by the plaintiff's lawyer as fortifying his claim. The sensitive manufacturer and its counsel will, therefore, wish to keep abreast of public information about its product which may be used in litigation.

PASSIVE RESTRAINT CASE - Anecdotal information also indicates that not all seat belt claims result in awards to plaintiffs. Some are vigorously and successfully defended. Despite the trial successes, it is important to note that the claims are being filed and litigated at substantial expense and with potentially high exposure. Thus, a litigation journal reports about a Tampa, Florida trial in January 1983 in which a six-member federal court jury denied recovery to a claimant alleging a defect in his 1979 car's passive restraint. The front passenger was a young boy who wore an over-the-shoulder belt attached to the door at his side. The vehicle was struck on the driver's side by a pick-up truck. The boy, who did not wear the available lap belt, sustained a brain stem injury and partial paralysis. The theory of plaintiff's experts was that the brain stem was injured when the shoulder belt bore against the boy's neck and jaw during the collision. The experts contended that the car's design encouraged use of the shoulder belt without the lap belt because the car could not be driven with an unlatched

shoulder belt but could be operated without fastening the lap belt. It was alleged that use of the shoulder strap without the lap belt is particularly dangerous for children or short people. This condition, they claimed, also required explicit warnings which were absent. A metallurgist further contended that opening of the passenger door affected the integrity of the safety belt system. Defense experts reportedly opined that the injury was sustained by lateral motion of the boy's head after impact and not via pressure from the shoulder strap. The trial lasted three weeks with testimony by several experts on both sides.(9) On the surface, the favorable result for the defense in this case seems justified to the authors regardless of the factual merits. The claimant was provided with the very feature his experts alleged would have made a difference but a choice was made not to use it. To fault the manufacturer for plaintiff's elected nonuse seems like an overreaching argument. Nevertheless, the trial does demonstrate the imagination often reflected in modern products litigation as well as the ability to present supportive expert testimony. Although the manufacturer defended successfully, the claimant did get to a jury and, given other circumstances or a different jury, might possibly have prevailed. Such are the vagaries of products liability. The case also demonstrates that passive restraints, whose increased use is avidly encouraged, may become the subject of future litigation despite the current positive view that they are a kind of "savior" device.

BELT ADEQUACY FOR EXTREME SIZES - Some safety belt cases reported anecdotally sound like they should not have been filed. The fact that they get to a jury at all may raise some questions about the permissiveness of the litigation system. Such appears to be the case of a California jury

trial in March of 1983 which resulted in a defense verdict. The claimant's 1977 car struck a brick wall. She sustained fractured ribs and femur and also underwent a splenectomy and total hip replacement. The claimant was not wearing her seat belt at the time. She alleged she could not do so because the belt would not fit around her 50-inch girth. Plaintiff was five feet tall and weighed 210 pounds. At trial, the defense reportedly presented an actress who was also five feet tall but weighed 220 pounds with a 53-inch girth. The jury was shown that the belt in question wrapped around the actress and could be buckled. The manufacturer thereby demonstrated that the belt was long enough to accommodate a person of the claimant's dimensions and complied with FMVSS specifications. This case sounds "tailor-made" for the defense, does it not? Why was this claim permitted to go to the jury? Perhaps simply because a clear factual dispute was presented by both sides - a traditional situation in which the court allows the jury to act as the fact finder. In further defense of the legal system, however, it should be noted that other crashworthiness allegations were also made in the case, i.e., that the steering wheel and dashboard failed to absorb enough of the impact thereby enhancing her injuries. Thus, it seems likely that such issues would have had to be submitted to the jury as well.(10) This brings up an interesting point manufacturers' personnel must keep in mind. Products claims often join together multiple theories of liability and combine several allegations of misconduct in one case. The defendant may have to fight several different allegations impugning the designs of more than one component. Seat belt claims readily lend themselves to this tactic, as will be seen from the discussion on some published cases.

AIRCRAFT RESTRAINTS - We have been discussing automotive safety belt systems but it should be

recognized that products liability easily focuses upon other kinds of restraint systems as well. For example, a growing body of claims centers around the performance of seat belts in aircraft accidents. A trial lawyers' journal recently reported the filing of a lawsuit in Maine against a seat belt manufacturer for severe injuries sustained in a plane crash. The plaintiff alleged that his seat belt detached from its floor anchorage. The seat belt maker sought to dismiss the case for lack of jurisdiction but the court held that the case would have to be defended in Maine.(11) Similarly, in a published case eventually appealed to the Supreme Court of Oregon, a small aircraft crashed. The plaintiffs alleged that defects not only caused the accident in the first place but that crashworthiness defects also enhanced the injuries. Among the crashworthiness deficiencies, the claimants criticized the absence of shoulder harnesses and the unsafe seat belt brackets and attachments. At the trial, an expert testified about the importance of shoulder harnesses as part of an adequate restraint system and showed two motion pictures. One was a 1954 National Advisory Committee for Aeronautics documentary depicting crash tests of light aircraft occupied by dummies. A second film had been produced in 1967 by the Federal Aviation Administration and was entitled, "Restraints for Survival." The sound film was very graphic and emotional in its appeal for increased use of upper torso belts. The Oregon court deemed the film too prejudicial because of its "frank appeal to the emotions of its audience."(12)

It should be noted that, notwithstanding this decision, the admissibility of test films, photographs or other demonstrative materials is often held to be within the discretion of the trial court. Under this discretionary power, a great many sympathetic exhibits are permitted at trial such as injury photographs,

so-called "day-in-the-life-of-the plaintiff" films, and crash tests. In collision cases, photographs of severely damaged vehicles and various stages of the plaintiff's injuries are routinely introduced into evidence. The point is that modern products litigation is not simply a verbal joust or a "war of words" but also involves pictorial and filmed demonstrations possessing considerable psychological impact. This factor is also related to the problems posed by the manufacturer's own test records, correspondence and data. American law permits pretrial "discovery" of documents which would ordinarily be considered confidential. Indeed, sometimes this may include materials properly classified as "trade secrets." Copies may be furnished to the claimant's attorney. These are reviewed by his experts and, if helpful, are often used at trial. These materials might be misinterpreted or select portions taken out of context. The dilemma for the manufacturer, of course, is that internal records are not usually written with the view that they will one day be read to the jury at a products liability trial. Hence, they may contain words or phrases or information which, when viewed out of context, can be misinterpreted with disastrous consequences. Because demonstrative materials often make a profound impression upon jurors, select documents or photographs from the manufacturer's files might be blown up to giant size in order to emphasize an adverse point. Thus, when a challenge is made against the crash safety of an automobile or its restraint system, for example, the defense may be faced with rebutting substantial and creative exhibits introduced by the claimant sometimes even from the manufacturer's own files. The psychological and subjective impact upon the jury of a pictorial image should never be underestimated regardless of the objective strength of the defense case.

INFANT CAR SEATS - Similarly, a potentially fertile area for litigation consequences is that of infant restraints or baby "car seats." This subject is now of renewed interest because states are increasingly mandating that such infant restraints must be used by children of specified age. How well these devices perform in crashes may, therefore, become a vital litigation issue. In one published decision, details are given of an Ohio trial in which a 14 month infant was thrown forcefully into the dashboard when the infant seat's strap broke in an accident. The trial court had excluded the testimony of plaintiff's biomechanical expert on the ground that his expertise on baby seat designs had not been established and, further, that he was relying upon literature not properly shown to be a reliable basis for his expert opinion. Without such testimony, the judge dismissed the claim. On appeal, the ruling was reversed and a new trial was ordered. The appellate court applied a liberal test of what constitutes "expertise" and held that the expert was qualified enough to render an opinion before the jury. The test utilized was whether his opinion "will likely assist the trier of fact in arriving at the truth." The court also said that the expert could rely upon technical literature even though it was merely "hearsay" as to him.(13) This case amply illustrates that modern products liability will tolerate a "battle of experts" even though expertise is demonstrably "thin." The issue of the expert's depth of knowledge and credibility is commonly held to be one for the jury. Additionally, such experts may rely upon literature in the field even though they had nothing to do with preparing the data, findings or conclusions which they employ to fortify their expertise. Because of the wealth of technical literature on the subject of crashworthiness, artful experts can be selective about using what is favorable to



them. The defense must then point out the countervailing literature if such a tactic is desirable. The point is that the "expertise" controversy will often be submitted to the jury. Obviously, this permissive approach regarding expert testimony makes it easier for a claimant to find and present a favorable expert. This factor also operates to encourage litigation.

OTHER RESTRAINTS - Litigation about restraints can also involve trucks or recreational vehicles with sleeping compartments. In one such case, which the manufacturer successfully defended in Illinois, the claimant was injured in a single vehicle accident when he was ejected from the sleeping compartment of his truck into the seat area and then partially out a window. The bunk restraint consisted of two vertical straps placed about 36 inches apart at the front of the sleeping compartment which were permanently attached to the floor and roof of the cab of the truck. The jury heard expert testimony about possible alternative types of restraints including mesh designs. The latter, however, would have required a redesign of the roof structure and could have proved unnecessarily confining in other accidents where speedy escape was essential. On appeal, a major issue was whether the exclusion from evidence of the manufacturer's own subsequent change in bunk restraint design in later truck models was proper. In this case a majority of the appellate court held that exclusion of the evidence was appropriate.<sup>(14)</sup> However, exclusion of such evidence does not always occur. In some jurisdictions the manufacturer's own subsequent improvements are allowed to be hurled against him as evidence of the "defectiveness" of his prior design. While jurors can readily understand that product improvements generally occur all the time, the telling blow such evidence strikes in a sympathetic products trial is that the

plaintiff's experts will often tout the improvement as one that would have made a difference in preventing the very catastrophe that occurred. Thus, the manufacturer's own design changes can help prove the plaintiff's case. If the fact of improved design is also accompanied by a manufacturer's internal documents indicating that the purpose for the change was to improve "safety" or eliminate "dangers," the claimant's case is invariably strengthened. The manufacturer then has to explain the reasons for the improvement while at the same time maintaining that the prior model was not deficient. Alternatively, he might have to urge that the improvement would have made little or no difference.

As may be seen from the foregoing survey, products litigation involves a variety of safety restraints other than those found in automobiles. For the purposes of this paper, however, the authors have primarily concentrated upon automobile restraint cases in order to point out pertinent products liability considerations. We now turn to discuss illustrative cases reflected in published court decisions.

#### SEAT BELT LITIGATION - SOME PUBLISHED CASES

Many judicial decisions are published in law reports while many others are "unreported." The published cases often describe the factual controversy in some detail, the legal issues presented and the court's rulings on those questions. Unlike mere anecdotal reports, published decisions are frequently cited by lawyers and judges as legal precedents. These so-called "reported" cases also reflect a growing body of litigation involving the performance of restraint systems. Unfortunately, the definitive and predictable answers on products liability issues which the engineer would undoubtedly welcome are not stated

with precision. This is to be expected since, as we indicated above, American products law is in a state of flux. In discussing a few illustrative cases, we will identify major categories of reported claims as well as some pertinent considerations in this area.

**FAILURE TO SUPPLY BELTS OR WARN ABOUT NONUSE** - To begin with, courts appear to have been less sympathetic toward claimants who go out and have accidents in vehicles without restraints and thereafter complain in court that the absent restraints should have been provided. When claimants label the vehicle "defective" because it lacked what was perfectly obvious to them, defendants should often prevail. In one such case against a German manufacturer the jury returned a defense verdict, which was affirmed on appeal, when it was claimed that a van was defective because it had no shoulder restraints as standard equipment. As the trial court there said, "that fact was both obvious to the naked eye of anyone who even made a cursory inspection of the vehicle, and was specifically referred to in the owner's manual." (15) In Ohio, a court held that the manufacturer of a public transit bus had no duty to supply seat belts for passengers. (16) Some claimants have also unsuccessfully argued that warnings should issue about the dangers associated with a lack of seat belts (17) or about the dangers of nonuse even when belts are provided. (18) In an Oklahoma Supreme Court decision a wrongful death claim was dismissed against an automobile dealer who sold a used Porsche with a disconnected seat belt warning buzzer. The court held that the absence of the buzzer did not violate any existing regulations and did not render either the seat belt or the automobile "unreasonably dangerous." The danger was an obvious one which required no warnings. (19)

The obviousness of the danger in these cases and the public's

common knowledge about seat belts helps to weaken these kinds of claims. In general, a plaintiff's products liability case is considered much stronger when he can allege a "trap" for the unwary or a so-called "latent condition" which made him an unsuspecting victim of a lurking danger. Plaintiff's lawyers often like to describe the hidden defects involved in their cases as "time bombs" waiting "to explode." Obviously, the "lack of seat belt" claims do not fall into this category and are simply not as compelling. Still, one cannot guarantee that the courts will always dismiss such claims as a matter of law and some may well have to be tried before a jury. Given the increased prevalence of new cars equipped with restraints at most seating positions, such claims would seem, as a practical matter, to concern older cars, aircraft or farm and construction vehicles. We should expect such claims to wane over the years. However, with some flexibility and daring these older claims may yet have their modern-day analogies. For example, what about a claimant who says his car should have been equipped with passive restraints or airbags? Or the claimant who attacks the absence of shoulder restraints in the rear? (20) There may be a good basis for arguing that such claims should also be dismissed but it is not clear that all courts would do so.

**FMVSS-RELATED CASES** - Active and passive safety in automobiles is a subject of extensive federal regulation. Automobile restraint systems must comply with applicable FMVSS. Sometimes, however, litigants and the courts struggle with both the meaning and the extent of influence such performance requirements should have in the context of products liability. Where the lawsuit's allegations merely amount to a generalized claim that safety restraints should prevent all injuries and the manufacturer has complied with the FMVSS' statutory

requirements, the courts and juries will not be overly sympathetic. Safety belts quite simply do not immunize against all injuries. This is particularly true when the plaintiff does not use the product correctly. The decision in Hurt v. General Motors Corp. (21) is illustrative. The plaintiff, a passenger riding in the front of a sedan, was wearing her seatbelt but not her shoulder harness. The car in which she was traveling was struck from the left by another vehicle, and as a result of the collision, the plaintiff's body "submerged" underneath the seatbelt. Subsequently, her physicians discovered a ruptured colon requiring surgery. Suing for her ruptured colon and related damages, the plaintiff proffered federal safety standards which required a seatbelt to provide "pelvic restraint." The standards mandated the manufacturer to set seatbelts at an angle within an allowable range of 20° to 75°. Although the subject seatbelt's angle had been 45°, the plaintiff claimed that her pelvis had not been "restrained" in the accident. The experts agreed that the plaintiff had "submerged," but disagreed as to the desirable seatbelt angle. To prevent submarining upon a frontal impact, one expert opined, the angle should be 90°. This proposal, however, would mean that a vehicle so equipped could not be sold because it would violate federal standards. Another of the plaintiff's experts testified that the angle should have been closer to the maximum, thereby providing "more" pelvic support. The appellate court correctly discerned that the expert testimony amounted to nothing more than an opinion "that in this particular accident . . . the seat belt did not prevent complete pelvic movement in a front end collision." Since the federal standard had been satisfied, the court concluded that the plaintiff was not entitled to recover. Moreover, the court emphasized:  
"The standards do not require

a guarantee that the pelvis, which is restrained by the seat belt, will not move at all upon impact. That the 45° seat belt did not prevent the injury in this case is not sufficient to establish a jury issue that the product was defective. The seat belt did not fail. [Plaintiff] testified that after impact she remained tightly restrained, although her body had shifted its position."

The evidence simply did not indicate the existence of a "defect." Although a different seatbelt angle might have prevented the plaintiff's particular injury in this accident, the seatbelt could not be characterized as "defective in the general context of motor vehicle accidents."

ROLE OF TRIAL ADVOCACY -  
Better trial tactics by claimants and somewhat different circumstances, however, could create rough sledding for the manufacturer. Consider the two Wyoming death cases tried in a federal court in which the plaintiffs won verdicts totalling some \$650,000. A 1970 car in which two lap-belted females were riding as rear seat passengers collided head-on with another vehicle at a closing speed of 75-80 mph. The women died and plaintiffs sued on behalf of their estates. The overall theory was that the belted rear seat occupants received insufficient protection. This theory was comprised of several alleged elements: the rear seats were improperly designed in relation to the backs of the front seats; the backs of the front seats were not cushioned in anticipation of a belted but jackknifing passenger striking her head on the hard surface; and the rear seat belts were not properly designed to prevent jackknifing forward. As to the latter element, plaintiffs contended that rear shoulder belts would have prevented the deaths. Plaintiffs also attacked the angle by which the rear lap belts held the women. Both decedents had

suffered extensive abdominal seat belt injuries and spinal fractures as well as other injuries. This allowed plaintiffs to argue that the horizontal plane of the hip belts was too great. The hips would have been better restrained and held down had the vertical plane been increased. In short, they contended that the improper angle caused the belts to be worn too high. Defense experts argued that the belt angle was proper and that the severity of the injuries was attributable to the high speed. There was considerable controversy at trial over the proper way to measure the 45° angle called for by the FMVSS. Plaintiffs alleged that the standard had been violated. Plaintiffs' experts said the angle should be measured from the anchorage; the defense said it should be measured from the line of the belt coming from the seat back and cushion. To support its position, the manufacturer sought to introduce into evidence a 1972 revision of the standard calling for an angle between 20° and 75° but this evidence was excluded. Plaintiffs also showed the manufacturer's crash tests. The jury verdicts were upheld on appeal.(22) Coincidentally, one of the front seat passengers, also lap-belted but not wearing an available shoulder harness, sued separately. He similarly alleged defects in the restraint system. In his case, however, a jury award of \$800,000 was reversed on appeal and a new trial was ordered.(23)

Why was the Hurt case so compelling for the defense and the Wyoming litigation so successful for the plaintiffs? Both involved lap-belted occupants, abdominal injuries and controversy over the seat belt angle. Yet the appellate courts viewed them with different attitudes. This question is extremely difficult to answer. On the jury level, if one studies the decisions closely one can discern a hard-boiled, sophisticated, tactically stronger attack by the Wyoming claimants. The claims lodged against the restraints were

artfully made and involved interplay with alleged shortcomings in other components. The Wyoming injuries were also more severe, in fact, ultimate. The essential argument was that these people should have survived. In the Hurt case the impact speed, extent of injury and sympathetic circumstances were not as compelling. In addition, although each case involved the impact of government regulations, the respective plaintiffs were not in the same tactical position on the issue. In Hurt, the plaintiff's experts tried to go outside the mainstream of the FMVSS requirement. Indeed, one of them advocated a design which, if adopted, would have violated the standard. The defendant, therefore, easily demonstrated compliance with the FMVSS and was in a good position to "defend" the government's requirement. In the Wyoming cases, however, the plaintiffs' experts used the FMVSS requirement to advance their own claim. They charged the manufacturer with violating the standard; they interpreted the standard to require angle measurements in a certain manner; they strategically connected the intent of the FMVSS to the dominant theory of their case; and, finally, they fought successfully to keep out the defendant's clarifying evidence based upon a later version of the standard. After all is said and analyzed, however, the plain fact is that innumerable variables can govern trial results. Change but a few of these variables and wholly different results might well be possible. This factor heightens the unpredictability of modern products litigation.

COMPLIANCE WITH FMVSS AS DEFENSE? - Manufacturers who rely upon their compliance with FMVSS as an absolute defense to products liability claims will be disappointed. Although some writers have argued that there should be much more deference to government and industry standards and that such regulations should

not be easily discounted by plaintiffs' experts at trial,(24) the courts generally hold that compliance with standards is not a total defense. The product's compliance is often viewed as some evidence of reasonable care or "nondefectiveness" but this does not immunize the defendant against liability. Indeed, some claimants have argued that such evidence is prejudicial in a strict liability case because a product can be "defective" even if it complies with standards.

A good illustration of the courts' attitude on this issue, in the context of a safety restraint case, is found in an Illinois Supreme Court decision announced in December 1982. Two females were rear seat passengers with seat belts fastened when their vehicle collided with another car. Each sustained serious abdominal injuries. One died and the other was hospitalized for many weeks. The plaintiffs' experts alleged that the rear seat had shifted sideways allowing the anchoring wire to disengage. This permitted the rear seat to then move forward. The passengers, in turn, dropped downward so that the seat belts impacted them in the soft abdominal area rather than in the bony hip area. The experts described this "submarining" mechanism. In response, defense experts contended that some of the injuries resulted from hyperflexion over the seatbelt because the occupant was not wearing her belt properly. They contested the theory of forward movement of the seat and its influence on the belt performance. They also demonstrated the manufacturer's compliance with the FMVSS on seat strength. The jury returned a verdict for the defendant manufacturer. On appeal, plaintiffs argued that the evidence regarding compliance with standards was highly prejudicial and distortive. They contended that it should not have been permitted because juries tend to overemphasize such evidence and that, in some cases, minimal or

antiquated standards may confuse the jury as to the available state of technology. The Illinois Supreme Court rejected these arguments. The evidence was relevant and admissible though compliance was not a total defense. Prejudice, if any, could be controlled by the court's instructions to the jury. The dynamics of the adversary process would tend to diminish the alleged problem of minimal or antiquated standards because plaintiffs' experts will be free to dispute the importance of the evidence on safety standards. Since the case involved a classic "battle among experts" and sufficient evidence existed to sustain the defense verdict, judgment was affirmed. Three of the appellate judges, however, dissented urging that compliance with standards was irrelevant in a strict products liability case.(25) The tension reflected in these opposing views is also found in case law around the country so that some uncertainty on the issue may exist.

BROKEN BELTS - The reported decisions involve a substantial number of cases in which the seat belt is found torn or cut at the scene. The claim is then made that faulty materials, lack of strength, influencing "pinch points," sharp edges, bad design or other factors caused the belt to weaken or fail to do its job. Proper analysis of these cases almost always involves a focus upon the particular facts. Was the subject belt original equipment? Where exactly did the belt break? Did the occupant sustain abdominal bruises indicating belt function? How is the accident to be reconstructed? What were the movements of the occupant? If ejected, did the injury occur inside or outside the vehicle? What operative mechanism caused webbing failure? What does microscopic analysis of the fibers show? Can the belt be lined up with sharp or cutting edges? Had the belt been misused prior to the accident? These and a host of other relevant questions become

manifest in studying a given case. An exhaustive factual analysis of the many cases in this category is beyond the space limitations of this paper. However, several broken belt cases do illustrate the nature of the claims. In a Wisconsin case, a car went off the road at 90 mph and rolled over. The decedent's seat belt was partially severed prior to the accident. According to the plaintiff's experts the pre-existing cuts were close to the seat where they would not be seen or felt by the user. A key question for the jury was whether this condition originated at the factory. The jury found the manufacturer 35 percent responsible for the death.(26)

#### PINCHING OR SEVERING OF BELTS

- In an Illinois case, a paralyzed plaintiff who had been ejected sued the car maker alleging that the seat belt broke when the driver's seat slid toward the driver's door during the accident causing the belt to be pinched between the side-bar hockey stick on the left of the driver's seat and a screwhead on the inboard side of the metal strip mud sill which ran along the bottom of the door opening. The defense theory was that the paralytic injury was caused while the belt was actually securing the plaintiff but that the webbing broke at a later point in time. A defense verdict was reversed by the appellate court because defense tests showing the implausibility of plaintiff's "pinch" theory should have been produced to the plaintiff in advance of trial. Accordingly, a new trial was required.(27) It will be seen in some of these cases that the manufacturer partially defends by showing that the belt actually did function as a restraint. The broken strap is then explained as merely a condition of the belt after the critical forces were encountered. Sometimes this entails showing the jury time sequences during an accident. In a South Dakota death claim a station wagon left the

highway and rolled into a ditch. The driver's belt was found buckled but broken. Plaintiff's expert opined that the belt severed under less than expectable forces because the boot and belt had been weakened by rubbing on the seat frame. The defense expert contended that the belt had been cut by the metal capsule binding together the wires of the seat and that this capsule had been moved from the original manufacturer-installed location. The defense also tried to reconstruct the length of the decedent's seat belt as it was adjusted at the time of accident to show that the user had not adjusted the belt properly. A verdict for the plaintiff was upheld.(28) In a California suit, a 1967 Datsun rolled over and struck a mud embankment. The belt ruptured. Plaintiff's experts theorized that the belt webbing was severed by the upper edge of a metal L-shaped bracket located on the outer side of the front bucket seats. The defense disputed this theory based upon a microscopic analysis of the ruptured belt fibers. The physical damage to the steering wheel and dash indicated extreme forward flexion of the torso and, at same time, restraint of the lower body. This allowed the conclusion that the plaintiff sustained his severe injuries before the belt gave way. A jury verdict for the manufacturer was affirmed on appeal with the court commenting that plaintiff, for legal reasons, had failed to sufficiently prove that the belt rupture actually enhanced his injuries.(29)

#### EXPECTED SPECIAL USES -

Sometimes the rupture of a restraint belt must be viewed against the specialized nature of the vehicle involved and the forces foreseeably expected because of the particular uses encountered. In a federal Pennsylvania lawsuit, for example, the driver of a sprint race car died when his car flipped during a collision. His widow sued the manufacturer and retailer of a Y-type shoulder harness she claimed had disintegrated. Plaintiff's

experts testified that the stitching pattern of the subject harness was grossly inferior to the stitching found on other shoulder harnesses made for such uses. The expert had conducted laboratory tests on belts containing the inferior stitching in which failure occurred at 1,000 pounds. Other stitching patterns resisted failure up to 4,000 pounds. There was also testimony that sprint car races often involved cars that flipped and that drivers always walked away from such flips unharmed. The appellate court was particularly impressed that the harness was actually intended to restrain the occupant in a sport in which aerial flips were expected occurrences. Therefore, a directed verdict in favor of the manufacturer was reversed and a new trial was ordered.(30)

ANCHORAGE YIELDING - Sometimes the allegations of failure focus upon the belt anchorage or attachment mechanism rather than the belt strap or webbing. In a Michigan case, for example, the plaintiff's car rolled off the road. The belted passenger suffered only minor injuries. The belted driver, however, claimed major injuries due to defective installation of the bolt which fastens the seat belt to the floor in the back seat area. Because of erroneous evidentiary rulings by the trial judge, the appellate court reversed a defense verdict and ordered a new trial.(31) In an Illinois case a truck driver successfully sued for aggravation of his injuries when the seat belt hook mechanism detached from the eyebolt connected to the frame of the truck. The \$75,000 verdict was affirmed on appeal.(32) One point to be learned from the profusion of broken belt cases is that a perceived "failure" of the restraint mechanism coupled with occurrence of a severe injury are ingredients which may well lead to a lawsuit. The notion that something must have gone wrong with the restraint becomes appealing on the surface. The litigants and

their experts then will need to examine all the factual circumstances in order to fortify their respective positions.

PUNITIVE DAMAGES POTENTIAL - Because the law of products liability applies to restraint systems, the potential for punitive damages exposure must be noted. Punitive damages, if allowed, are awarded to "punish" the wrongdoer who has acted maliciously, wantonly or outrageously and to "deter" him and others from similar conduct in the future. In recent years juries have increasingly awarded punitive damages in products liability cases upon findings that the manufacturer's conduct was wanton, wilful, reckless, outrageous or reflective of a reckless indifference to the rights of others.(33) When awarded, such damages are in addition to the "compensatory" damages sought in every injury case. Depending upon the depth of "outrage" and the wealth of the defendant, such awards may be huge. In some jurisdictions, because of public policy considerations, such damages may not even be covered by insurance. For many good reasons these exposures are undesirable and should be avoided. Could restraint litigation possibly result in adverse punitive damage awards? The general answer is "yes," although a number of practical factors might possibly play a role in keeping down the incidence of such awards. First, safety restraint performance is subject to substantial government standards. While compliance does not completely eliminate exposure, it functionally goes a long way towards assuring a performance level that is not "outrageous" or "reckless." Second, safety restraints tend to be products subjected to considerable quality control and test procedures. Thus, the integrity of such products is probably excellent as a matter of course. Third, since usage rates have been relatively low, the incidence of restraint litigation has not been overwhelming. Fourth,

improvements in restraint technology have probably improved field performance. Still other factors may also contribute to the relative rarity of punitive damage awards in safety restraint litigation thus far. Nevertheless, this area remains a considerable source of liability exposure for reasons described earlier.

One published decision dealing with safety belts does illustrate the potential risks involved. In this Florida case the allegations did not focus upon seat belts exclusively but as a part of the plaintiff's attack on lack of crashworthiness. The plaintiff was a driver of a small 1971 subcompact automobile traveling at 30 mph which collided with a standard size vehicle more than twice its weight. The smaller car's left "A pillar" deformed rearward more than ten inches, the driver's seat detached and the driver moved forward and to the left. Although his lap and shoulder harness were fastened, the driver's head struck the deformed "A pillar" resulting in massive and permanent brain damage. The plaintiff's legs were jammed against the front of the passenger compartment resulting in compound fractures. The manufacturer's own 30 mph barrier tests showed belted dummies striking the vehicle interior and in a car-to-car crash test with a heavier vehicle, the dummy's head struck the "A pillar." Plaintiff also introduced evidence that an employee of the defendant had recommended enlarging the vehicle to improve safety. Experts testified at trial that a number of measures would have improved the collision safety including a variety of structural changes. The experts also suggested redesign of the shoulder belt to reduce "submarining" and making the seat belts from a fabric with less elasticity. The "battle of experts" resulted in the jury's compensatory awards of some \$825,000 and punitive damages in the sum of \$5,000,000. Following trial, the federal judge set aside the punitive award because the

vehicle had complied with the FMVSS thereby negating any conclusion that the manufacturer had acted wantonly or recklessly. On plaintiff's appeal the appellate court reversed and held that the award of punitive damages should be reinstated. As to the issue that punitive damages were precluded by the restraint system's compliance with the FMVSS, the appellate court stated that such compliance did not govern the allegations dealing with strength of the "A pillar" or overall crashworthiness. Furthermore, the court said that compliance with belt stretch regulations "would be meaningless in terms of safety if the car was designed to place the driver's head so close to the front of the passenger compartment that it would be vulnerable in a crash." Accordingly, the jury had sufficient evidence upon which to find the requisite degree of "recklessness."<sup>(34)</sup> To the authors herein, this decision is troubling for policy reasons described earlier in this paper dealing with the inadvisability of letting juries set design standards for the industry on an ad hoc basis.<sup>(35)</sup> Regardless of the merits of such policy disputes, it is evident that courts are willing to allow this process to continue. This case result confirms the potential for high verdict exposures in the crashworthiness area.

This paper has identified a variety of products liability considerations which may impact the field of safety restraint devices. The key step to avoiding liability, of course, is to make safe products and to market them with appropriate communications encouraging safe use. However, the dynamics of the litigation system are such that the potential for lawsuits and liability are present despite a manufacturer's unwavering commitment to safety. That products should not contain unreasonably dangerous defects everyone can agree upon. The questions what is "safe" and what is "defective," however, may be a source of



considerable disagreement. This potential friction is often reflected in products liability litigation. The legal system has facilitated trial of such controversies. Therefore, notwithstanding excellent safety efforts, manufacturers need to be aware of liability risks and consult freely with their counsel so that adverse litigation results may be minimized.

#### REFERENCES

- (1) Restatement (Second) of Torts §402A(2) (a).
- (2) Dawson v. Chrysler Corp., 630 F.2d 950, 962 (3d Cir. 1980).
- (3) *Id.* at 962.
- (4) Sensitivity to the influence of products liability may require some familiarity with basic legal doctrines. A number of legal theories may be said to fit within the framework of so-called "products liability." They represent evolutionary development of American law and, in some respects, overlap. These doctrines constitute an available and potent legal arsenal for the claimant who has been injured in connection with the use of a product. Some theories are conduct-oriented; some focus upon communications made or omitted to purchasers or the public; some are said to be forms of "strict" liability. For a simplified survey of the popular products liability theories, see Hoenig, *The Influence of Advertising in Products Liability Litigation*, 5 J. of Products Liability 321-327 (1982).
- (5) Automotive Litigation Reporter, pp. 3,465-3,466 (Dec. 15, 1983).
- (6) Baumgardner v. American Motors Corp., 522 p.2d 829 (Wash. 1974).
- (7) 16 American Jurisprudence, Proof of Facts, Seat Belt Accidents, pp. 89-91 (1975-1976 Supplement).
- (8) Automotive Litigation Reporter, pp. 2,784-2,785 (July 7, 1983).
- (9) Automotive Litigation Reporter, pp. 2,082-2,085 (Feb. 3, 1983).
- (10) Automotive Litigation Reporter, pp. 2435-2436 (April 21, 1983).
- (11) Wass v. American Safety Equipment Corp. (U.S.D.C. Maine, Sept. 30, 1983), reported in 26 ATLA Rep. 420 (Nov. 1983).
- (12) Wilson v. Piper Aircraft Corp., 577 P.2d 1322 (Ore. 1978).
- (13) Mannino v. International Mfg. Co., 650 F.2d 846 (6th Cir. 1981).
- (14) Oberst v. International Harvester Co., 640 F.2d 863 7th Cir. (1980).
- (15) Day v. Volkswagenwerk Aktiengesellschaft, 451 F.Supp. 4 (E.D. Pa. 1977), *aff'd*, 578 F.2d 1373 (3d Cir. 1978).
- (16) Gleich v. General Motors Corp., 277 N.E. 2d 566 (Ohio Ct. App. 1971).
- (17) Day v. Volkswagenwerk Aktiengesellschaft, *supra* n.15.
- (18) See Marshall v. Ford Motor Co., 446 F.2d 712, 715 (10th Cir. 1971) (no duty to warn rear occupants to use their belts; the function of seat belts "is a matter of common knowledge").

- (19) *Berry v. Eckhardt Porsche Audi, Inc.*, 578 P.2d 1195 (Okla. 1978).
- (20) Such an allegation was advanced in *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978).
- (21) 553 F.2d 1181 (8th Cir. 1977).
- (22) *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978).
- (23) *Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980).
- (24) See Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 Colum. L. Rev. 1531 (1973); Hoenig, *Resolution of "Crashworthiness" Design Claims*, 55 St. John's L. Rev. 633, 682-84 (1981); Hoenig, *Compliance With Government Standards*, N.Y.L.J. Nov. 30, 1977, p.1; O'Donnell, *Design Litigation and the State of the Art: Terminology, Practice and Reform*, 11 Akron L. Rev. 627 (1978); Raleigh, *The "State of the Art" in Product Liability: A New Look at an Old "Defense,"* 4 Ohio N.U.L. Rev. 249 (1977); von Huelsen, *Design Liability and State of the Art: The United States and Europe at a Crossroads*, 55 St. John's L. Rev. 450 (1981).
- (25) *Moehle v. Chrysler Motors Corp.*, 443 N.E. 2d 575 (Ill. Sup. Ct. 1982).
- (26) *Austin v. Ford Motor Co.*, 273 N.W. 2d 233 (Wis. 1979).
- (27) *Carlson v. General Motors Corp.*, 289 N.E. 2d 439 (Ill. App. 1972).
- (28) *Engberg v. Ford Motor Co.*, 205 N.W. 2d 104 (S.D. 1973).
- (29) *Endicott v. Nissan Motor Corp.*, 141 Cal. Rptr. 95 (Cal. App. 1977). For a discussion of the legal requirement to prove that a crashworthiness defect caused "enhanced" injuries, see Hoenig, *Resolution of "Crashworthiness" Design Claims*, 55 St. John's L. Rev. 633, 692-706 (1981).
- (30) *Barris v. Bob's Drag Chutes & Safety Equipment, Inc.*, 685 F.2d 94 (3d Cir. 1982).
- (31) *Steinberg v. Ford Motor Co.*, 250 N.W. 2d 115 (Mich. App. 1977).
- (32) *Stahl v. Ford Motor Co.*, 381 N.E. 2d 1211 (Ill. App. 1978).
- (33) For a recent case reviewing punitive damage precedents in the products liability area, see *Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828 (3d Cir. 1983).
- (34) *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981).
- (35) See text accompanying notes 1-3, *supra*.