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WORKPLACE GOODS JOB GROWTH AND COMPETITIVENESS ACT OF 2005

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

H.R. 3509

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WORKPLACE GOODS JOB GROWTH AND COMPETITIVENESS ACT OF 2005

TUESDAY, MARCH 14, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1:05 p.m., in Room 2141, Rayburn House Office Building, the Honorable Chris Cannon (Chairman of the Subcommittee) presiding.

Mr. CANNON. I'd like to call to order this hearing of the Commercial and Administrative Law Subcommittee.

And we'll be considering H.R. 3509, the "Workplace Goods Job Growth and Competitiveness Act of 2005." This legislation, introduced by Representative Chabot, would establish a nationwide, 12-year statute of repose for durable goods in the workplace. This bill seeks to address a fundamental problem for American manufacturers, the long tail of liability that extends for creating long-lasting quality goods.

Through ingenuity of design and quality of craftsmanship, American manufacturers produce a range of workplace goods, whose useful life exceeds 12 years. Many of these goods have been in service for decades. In one case, a machine that stamped a part for the first Smith Corona typewriter—before my time, by the way—was used to create a piece of the Apollo rocket over a 100 years later. This longevity comes at a cost—a significant cost. These goods expose their manufacturers to suits for products that left their control decades before, even when subsequent owners have significantly modified the machine.

However, these suits beg the question: if the design, manufacture, and warnings on a product were good enough to keep it running for 10, 20, or 30 years, how are they suddenly deficient when an accident occurs in the 40th year?

As previous hearings before the Judiciary Committee and this Subcommittee have shown, the price of such litigation is staggering.

A Tillinghast survey that came out yesterday showed that tort costs in the United States reached $260 billion in 2004. That amount equals 2.2 percent of the United States gross domestic product. The utility of such litigation is often questionable. Defendant companies, faced with possible runaway jury verdicts, will often settle otherwise meritless claims. And, as one of our witnesses will testify to today, nearly half of the machine tool indus-

try's litigation costs go to defense lawyers. The claimants themselves see less than 30 percent of the monies paid out by manufacturers and that amount is reduced by a third or more for their attorneys' fees.

The only clear winners in this cycle of litigation are, of course, the lawyers, many of which are very good people, I might say as an aside.

H.R. 3509 addresses this problem by creating a nationwide statute of repose for durable goods used in the workplace. Black's Law Dictionary defines a statute of repose as a statute barring any suit that is brought after a specified time since the defendant acted; in this case, 12 years after the product was delivered to its first purchaser, even if this period ends before the plaintiff has suffered a resulting injury. This differs from a statute of limitations, which is a statute establishing a time limit for suing in a civil case based on the date when the claim accrued.

Their purpose, however, is very similar: to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost; memories are faded; and witnesses have disappeared.

H.R. 3509 is narrowly tailored to address this problem of prolonged liability. The statute of repose contained in the bill only applies to durable goods used in manufacturing as opposed to consumer goods.

Further, the statute of repose does not apply to personal injury or wrongful death actions unless the injured person is covered by worker's compensation.

Therefore, every person would be compensated for his or her injuries.

H.R. 3509 also contains exceptions relating to toxic or environmental harms. The provisions of this bill are very similar to statutes of repose that have been enacted in approximately a dozen States. H.R. 3509 is very similar to a bill that passed the House of Representative in the 106th Congress as well as the statute of repose that Congress enacted in the General Aviation Revitalization Act of 1994. That act has been widely credited with saving the small aircraft manufacturing industry in this country.

I'd like to thank Congressman Chabot for introducing this legislation, and I look forward to hearing from all of our witnesses today.

And with that, Mr. Watt, would you like to make an opening statement?

Mr. WATT. Thank you, Mr. Chairman. I'll be——

Mr. CANNON. The gentleman is recognized for 5 minutes.

Mr. WATT. I'll be brief. I doubt I'll take 5 minutes. What I really should do is just record this statement, because I've given it so many times. It just seems like every time I turn around, we're addressing this whole issue of tort reform in one way or another. And we're addressing it at the Federal level. And it just seems to me to be the most arrogant pursuit we could possibly be engaged in at the Federal level, especially given the fact that many of my colleagues who are pushing this agenda came into Congress with the avowed purpose of returning power to the States and expressing

grave concerns about the detriment that we are doing to States' rights.

Well, tort law throughout our history has been a primary area in which the States have been paramount. And I just don't understand how we can reconcile this assault on States' rights.

So this is not about substance for me. Actually, I'm told that North Carolina has one of the more restrictive statues of repose—6 years. Mr. Coble is over there. He's my expert on these things, so he'll correct me if I'm wrong, and this statute would have a longer statute of repose if we federalized it than the North Carolina statute, so this can't be about the substance of what we're doing. It's about who has the prerogative to make that decision.

And I hate to be always the chairman of the States' rights caucus in this Judiciary Committee. I'm just—I didn't come here expecting to have to do that.

And so it's disappointing to me that we keep going down this road over and over and over again, especially when the—I'm not on the side of this that I was expecting to be on when I came to Congress. I thought the Republicans were going to fight this States' rights prerogative issue for me. I'm just not getting any help from you all anymore.

So I'm disappointed. I'm here, but not to argue about the substance, but to argue about whether the Federal Government has the prerogative to impose itself on States over and over and over again in every area of our life without justification in my opinion.

With that—I took less than 5 minutes. I took less than 4 minutes.

Mr. CANNON. Yes.

Mr. WATT. So happy to yield back.

Mr. CANNON. I'm impressed and I'm wiling to be the co-chair of the States' rights caucus with the gentleman if he would like to create that.

Mr. WATT. It's created, Mr. Chairman. I just can't get any Members on your side to join me because you all keep wandering off the reservation to support legislation of this sort, which is inconsistent, in my opinion, with the whole concept of States' rights.

Mr. CANNON. Without entering into a debate, this Committee is the Committee that exists to oversee the commercial processes throughout the United States and to not let State law interfere with the commerce of the country. And so while I'm a States' rights advocate who was thrust into the middle of these kinds of discussions and frankly have done a great deal of it this year, probably more than we've done in the history of Congress to date. That is last year we did—we passed actually—had signed into law four tort reform actions which are bills, of which I'm properly proud.

Would the gentleman from North Carolina like to make an opening statement?

Mr. COBLE. Well, I won't make a full opening statement, Mr. Chairman.

Mr. CANNON. The gentleman is recognized for 5 minutes.

Mr. COBLE. I want to thank my States' rights colleague from North Carolina for elevating me to the high status of expert. Mel, I thank you for you that.

I think Mr. Watt is embellishing my prowess. I'm not an expert by any means. But I do think Mr. Watt is correct. And I think our statute is 6 years in North Carolina.

This is an issue, folks, that many of my constituents and perhaps, Chris, you and Mel may have had the same response. I just indicate that this is an issue that needs attention and resolving. That's why we're here today. And hopefully, you four outstanding panelists can shed light upon that.

I thank you, Mr. Chairman.

Mr. CANNON. The gentleman yields back.

Mr. COBLE. You got it.

Mr. CANNON. We're going to have to take a look at this statute and make sure that it doesn't pre-empt the more restrictive North Carolina statute if that is the case, which I think we can probably do.

Mr. WATT. I'm sure you can.

Mr. CANNON. And all other States that are more restrictive. And without objection, all Members will have 5 legislative days to submit additional material for the hearing record.

I would now like to introduce our witnesses for today's hearing. Our first witness is—oh, pardon me. Would the gentleman from Massachusetts like to make an opening statement?

Mr. WATT. The co-chair of the States' rights caucus I'm sure would like to——

Mr. CANNON. We're going to have four co-chairs. This has to be bipartisan.

Mr. DELAHUNT. I move to strike the last word, and I will not use all the 5 minutes, and I just associate myself. I was listening to the remarks of the chairman of the States' rights caucus, Congressman Watt, and I really do have to—I feel compelled—I felt compelled to come down to the hearing, so I can hear what I've heard before again and just say that you know there's a—it is amazing, it really truly is, that those that preach the loudest about devolution, States' rights, really have turned their back on States' rights.

So I'm here to support the States and my chair, Congressman Watt.

I would hope that the panelists could direct—or include in their remarks if they simply could point to the need and some of the data that exists and I guess I'd have a question, why 12 years as opposed to 18, and I'd also like to welcome an old and dear friend of mine to the panel. That's Jim Mack. I'm sure he disagrees with me on just about everything, but he's still my pal. And with that, I yield back.

Mr. CANNON. The gentleman yields back.

I'm just hoping that if we get this caucus organized, that maybe some of the people on this side the dais will get some contributions from the trial lawyers and that may—who knows? It might affect the judgment between the groups, although we may still on this side want to do tort reform.

Our first witness is Ms. Elizabeth Sitterly, Legal Counsel to Giddings and Lewis, a manufacturer of machine tools located in Fond du Lac, Wisconsin. Giddings and Lewis is a division of the Cincinnati Machine Company. Ms. Sitterly received her Bachelor of Arts from Northwestern University and her Juris Doctor from Chi-

cago Kent College of Law. In her capacity as Legal Counsel to Giddings and Lewis, Ms. Sitterly is responsible for overseeing the product liability suits brought against her company.

Our second witness is Mr. Kevin P. McMahon, Partner at Nelson Mullins Riley and Scarborough. He is testifying on behalf of the National Association of Manufacturers, where he served as the Chairman of the Legal Issues Policy Task Force. Mr. McMahon received his Bachelor of Arts degree from the University of California at Santa Barbara, and his law degree from the University of South Carolina School of Law.

In addition to his involvement with NAM, that is, the National Association of Manufacturers, he is the Immediate Past President and Chairman of the American Tort Reform Association. I think those are the guys on our side of the aisle.

Our third witness is Professor Andrew Popper, Professor of Law at American University's Washington College of Law. Professor Popper received his bachelor's at Baldwin Wallace College. He attended DePaul University's School of Law for his Juris Doctor and subsequently earned his L.L.M. from George Washington University National Law Center. Professor Popper teaches a number of courses at American University, including Torts.

Our fourth witness—our fourth and final witness is Mr. James H. Mack, the Vice President of Tax and Economic Policy at AMT, the Association for Manufacturing Technology, where he has worked since 1975. Mr. Mack graduated from the University of Wisconsin at La Crosse, where he earned a Bachelor of Science, as well as from the University of Wisconsin School of Law. He's been active in promoting a national statute of repose for a very long time, and, in fact, testified before the House Committee on the Judiciary on this very issue in the 106th Congress.

Again, I welcome all of our witnesses, and I look forward to hearing your testimony.

Before you get started, let me just draw your attention. The light panel before you—there's one on either side. That starts out green. After 4 minutes, it turns yellow, and then it turns red. And that suggests it's time to wrap up. We're actually interested in what you have to say, and if you go a little longer, that's fine. If not, if it goes too long, I'll tap the gavel and remind you.

Now, it's the practice of this Committee to swear in all witnesses appearing before it, so if you would please stand and raise your right hand.

[Witnesses sworn.]

Mr. CANNON. The record should reflect that the witnesses all said yes, and you may be seated. We'll now proceed with our first witness, Ms. Sitterly.

TESTIMONY OF ELIZABETH SITTERLY, ESQ., LEGAL COUNSEL, GIDDINGS & LEWIS, LLC, CINCINNATI MACHINE, FOND DU LAC, WISCONSIN

Ms. SITTERLY. My name is Elizabeth Sitterly. I'm Legal Counsel for Giddings & Lewis, a division of Cincinnati Machine.

I've been an attorney for—okay. I'm sorry. I've been an attorney for over 20 years, of which 19 have been dedicated in some form

to the defense of product liability actions; most recently for the last 9 years with Giddings & Lewis, located in Fond du Lac, Wisconsin.

Being part of the machine tool industry has been an extraordinary learning experience. I've learned what an integral part these companies and the machines these companies produce play in our society.

The companies that I represent have been around for a long time—G&L since 1852 and Cincinnati Machines since 1884.

Robust is the word commonly used to describe the machines these companies make. They are the Cadillacs of their kind, and, therefore, last for a very long time.

Anyone familiar with this industry will tell you that it's cyclical, and the cycle has been down for the last few years. To use my company as an example, in the last 5 years we have not turned a profit. This lack of profitability, in part, was caused by the exorbitant costs of litigating product liability actions across the country.

These companies are in danger. Litigation costs are strangling companies like mine. We're spending money not on improving productivity and safety, but on defending claims

I was asked here today to share with you the experiences of the product liability history of two venerable machine tool companies.

If you would walk into my office today, you would find that, of the 11 open product liability cases, eight of them involve claims on products that were manufactured at least 12 years prior to the claimant's injury. The claims involve products that were manufactured between 1941 and 1982. In the last 2 years, I have resolved three cases. All three involve machines manufactured 12 years before the date of the plaintiff's injury. We've paid $740,000 in defense costs and have paid $1.4 million in settlement costs. The largest settlement in that time period was on a claim involving a machine manufactured in 1966. This case is a good example of why we need legislation such as H.R. 3509. An experienced machine operator sustained a near amputation of his non-dominant hand. Though the machine that the plaintiff was injured on was manufactured in 1966, its design was born in the 1930's. There were 9,000 of these machine sold, and this was the first claim of injury we've ever received. The plaintiff was injured performing an operation in a way that was specifically prohibited in our operator's manual. He was trying to save time by doing it his way.

You're probably thinking this a great case for the defense, but given the disfiguring nature of the injury and the difficulty in finding expert testimony on a product of that vintage, giving it to a jury was too great a risk. The matter was settled in an amount over $700,000, but not before $410,000 was spent on preparing the defense.

In 9 years, I have taken only one case to trial. It was a case that I believed could not be lost and involved a machine that was built in 1982. It was so substantially modified from the time it was shipped, that I thought no jury in the world could find against us. Furthermore, the operator was trained incorrectly and insufficiently and took a chance on "beating the machine," and he lost. But I was wrong to the tune of $533,000. But that wasn't before we paid $409,000 to defend the claim. The plaintiff was dis-

appointed in the verdict as well. His demand was in excess of $2 million, which wouldn't be unusual in a case of this nature.

Honestly, when a plaintiff is injured on a machine that's over a decade old, I'm hard pressed to take that case to trial because of the difficulty in preparing that defense.

When machines are that old, none of the engineers involved in the product design are still with the company. More often than not, they're deceased. So the company has nobody left to defend the design or the pains taken by them to make that product safe, as that was defined at the time of manufacture.

It is also an almost insurmountable task to get a jury to stay focused on standards that were in effect at the time the machine was designed. The impact on the bottom line of the Cincinnati Machine group of companies is staggering. Companies like ours can't be looking over our shoulders in fear of what liability lurks in the past, dedicating our scant resources to create reserves for liabilities that never die.

We need to set our sites on the future, dedicating those resources to R&D, to create safer, more productive machines. The beauty of this bill is that it does not overreach in my mind. It seeks to set a reasonable statute of repose in those cases where the party sustained a workplace injury and was compensated. This is a good piece of legislation. It supports companies that make America more productive and competitive. We respectfully urge its adoption. Thank you.

[The prepared statement of Ms. Sitterly follows:]

PREPARED STATEMENT OF ELIZABETH SITTERLY

I. INTRODUCTION

My name is Elizabeth Sitterly, Legal Counsel for G&L, a division of Cincinnati Machine. I have been an attorney for over 20 years of which 19 have been dedicated, in some form, to the defense of product liability actions—most recently, for the last nine years, with G&L.

Being part of the machine tool industry has been an extraordinary learning experience. I have learned what an integral part these companies and the machines these companies produce play in our society. I have also learned the historically important roles these companies have played, not the least of which has been to help aid in the defense of this country. The companies that I represent have been around for a long time—G&L since 1852 and Cincinnati Machine since 1884. "Robust" is the word commonly used to describe the machines these companies make. They are the "Cadillac's" of their kind and, therefore, last for a very long time.

Anyone familiar with this industry will tell you that it is cyclical, and the cycle has been down for the last few years. It is returning to an upward climb slowly. But to use my company as an example, in the last five years we have not turned a profit. But for the generosity of a benevolent corporate parent, G&L would have closed its doors and with that lost its history and all its contributions. This lack of profit in large part was caused by the exorbitant costs of litigating product liability actions across the country.

These companies are in danger. Litigation costs are strangling companies like mine. We are spending money not on improving productivity and/or safety, but on defending claims involving machines sometimes older than the people on this panel. This problem also interferes with our ability to compete with our overseas competitors who, unlike us, have no product liability laws to fear.

I was asked here today to share with you the experiences of the product liability history of two venerable machine tool companies.

II. THE COMPANIES' PRODUCT LIABILITY HISTORY 2002–2005

If you would walk into my office today, you would find that, of the 11 open product liability cases, eight of them involve claims on products that were manufactured

over 12 years prior to the claimant's injury. The claims involve products that were manufactured between 1941 and 1982. All three of our recently resolved cases involve products older than 12 years (1991—$225,000 settlement, $112,000 expenses; 1966—$700,000 settlement, $410,000 in expenses; 1942—$90,000 in settlement, $151,000 in expenses). From 2003 to 2005, we have spent over $740,000 in defense costs. We have paid $1.4M in settlements (out of that amount less than half was paid with insurance dollars). Therefore, in two years we have paid almost $1.3M on product liability litigation.

The largest settlement in that time period was on a claim involving a machine manufactured in 1966. This case is a good example of why we need legislation such as H.R. 3509. An experienced machine operator sustained a near amputation of his non-dominant hand. He sustained this injury as he was trying to change an arbor on a horizontal milling machine that was manufactured in 1966. These milling machines were designed in the mid-1930s. The model that this gentleman was operating was only slightly changed from the original design. Approximately, 9,000 of these machines were sold. The Company stopped producing machines altogether in 1994.

The plaintiff was injured performing an operation in a way that was specifically prohibited in the operator's manual. His employer and fellow employees advocated the method he used at the time of the injury to save time. The plaintiff's attorney proffered arguments regarding standards, guarding and the like that were state of the art at the time of trial rather than at the time the machine was manufactured. One of the many frustrating aspects of this case was that, despite the large number of these machines in the field and the amount of time that they have been operated, the Company never had a claim on this type of mill.

You are probably thinking this is a great case for the defense. But given the horrendous disfiguring nature of the injury, taking the risk of what a jury might do with this was too great. The matter was settled for an amount over $700,000 but not before $410,000 was spent on preparing the defense. The company had a $500,000 Self Insured Retention (SIR).

We also settled a case on a mill shipped in 1942. Here we settled for $90,000 and spent $151,000 in defense costs.

In nine years, I have taken only one case to trial. It was a case that I believed could not be lost and involved a machine manufactured in 1982. It was so substantially modified from the time it was shipped, that I thought no jury in the world could find against us. Furthermore, the operator was trained incorrectly and insufficiently and took a chance on "beating the machine" and lost. I was wrong to the tune of $533,000. The plaintiff felt it was a loss, as his demand was well over $2M. We paid $409,000 to defend this matter.

Honestly, given the nature of injuries sustained on machine tools, I am hard pressed to take a case to trial. When machines are over 12 years old, none of the engineers involved in the product design are still with the company. More often than not, they are deceased. So the Company has no one left to defend the design or the pains taken by them to make the product "safe" as was defined at the time of manufacture. It is also an almost insurmountable task to get a jury to stay focused on standards that were in effect at the time the machine was designed. That is assuming there were standards that controlled design at the time the machine was manufactured. All of these factors make it difficult to take a case to trial, ESPECIALLY on an old product.

III. THE NEED FOR H.R. 3509

The impact on the bottom line of the Cincinnati Machine group of companies is staggering. It is not only in the dollars paid out, but also the increase in insurance premiums due to settlements or verdicts, the damage to reputation in publicized outcomes, and the increased litigation when "word gets out" that companies such as ours are paying out for injuries on machines that were manufactured several decades ago.

The dollars that have been paid out on the examples that I shared with you today could be put to much better use on things such as research and development. Developing newer, safer, more productive machines adds to the well being not only of our group of companies but to the economy as a whole.

This bill does not over-reach, it sets a reasonable statute of repose in those cases where the claimant sustained a workplace injury and is eligible for workers' compensation. No injured worker would go uncompensated under H.R. 3509.

This is a good piece of legislation. It is sorely needed by companies that make America more productive and competitive. We respectfully urge its adoption.

Thank you for your attention.

Mr. CANNON. Right on time. Thank you. Mr. McMahon.

TESTIMONY OF KEVIN McMAHON, PARTNER, NELSON MULLINS RILEY & SCARBORUGH, LLP, WASHINGTON, D.C., ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. MCMAHON. Mr. Chairman, Members of the Subcommittee, my name is Kevin McMahon, and I'm a Partner in the law firm of Nelson Mullins Riley & Scarborough.

Today, I'm appearing on behalf of the National Association of Manufacturers. Along with several other clients, our firm represents Owens Illinois in litigation matters.

Owens Illinois is an active member of the NAM. Additionally, I'm the Immediate Past Chairman of the American Tort Reform Association and currently serve on its Board of Directors and Executive Committee.

I've been involved in efforts to enact common sense legal reforms at the State and Federal level for several years.

The NAM supports enactment of H.R. 3509, the "Workplace Goods Job Growth and Competitiveness Act of 2005," as introduced.

H.R. 3509 would establish a national statute of repose of 12 years, a time beyond which a manufacturer would no longer be expected to be responsible for claims attributable to workplace durable goods. The NAM, with membership of manufacturers that extends well beyond durable goods, however, would prefer to see a final bill that would extend the coverage and reduce the number of years before the bill's protections apply.

With that said, however, the NAM wants to see H.R. 3509 become law and will work with the sponsors and supporters to ensure that any potential changes to the bill do not diminish support for it.

In past Congresses, statute of repose legislation has enjoyed strong bipartisan support in the House. In fact, H.R. 3509 is based on a compromise negotiated with the Clinton White House during consideration of the Comprehensive Product Liability Reform Measure.

The experience of the General Aviation Revitalization Act, or GARA, which established an 18-year statute of repose for makers of light, privately owned aircraft, demonstrates that a Federal statute of repose can be successful. GARA, which was passed during a Democratically controlled Congress and signed by President Clinton in 1993, is credited with reviving an industry that was once thought to be dead, and in the process created thousands of jobs.

Perhaps more importantly, contrary to what plaintiff attorneys and some consumer groups predicted, the skies are as safe, if not safer, than they were prior to the enactment of GARA.

Our country has a long history of encouraging the development and production of useful goods for the benefit of our society and the world, and that system is undermined by excessive liability exposure.

The policy of the United States should be to recognize that as products age, the responsibility for their integrity and operability shifts after a reasonable period to those who exercise control over

them. Like manufacturers, owners and employees have an equal responsibility to ensure that products and tools they use are safe and effective for the job.

The statute of repose also recognizes that many owners take the liberty of modifying their equipment. These alterations may even go against express warnings issued by the manufacturer. The longer a good has been separated from its manufacturer, the more likely this is to occur.

Another difficulty with the passage of time is ironically the progress of technology and the state-of-the-art innovations. Defendants will themselves unfairly have to explain why they did not think of an innovation that came 20 or 30 years after the time the good was produced.

Unlike Hollywood, manufacturers cannot go back to the future to add innovation to products 60, 70, or 80 years old.

For example, Harris Corporation, a manufacturer of printing equipment has been sued on equipment manufacture in 1922 after decades of multiple modifications and alterations, which were out of their control. How can this be equitable or just?

Some States have recognized this inequity in the legal system and have enacted their own statutes of repose. In States that have a fixed statute, the number of years usually begins at the time of initial purchase. Some of these States limit the application to workplace goods, but most apply to all goods.

Most States with a statute of repose have a shorter time period than H.R. 3509. North Carolina, for example, has a 6-year statute of repose that applies to all goods.

It's very important to highlight that under the current language, someone who is injured on the job would be covered by worker's compensation; and, therefore, would not be left without a remedy. If there is no worker's compensation coverage, then a statute of repose does not apply and claimants can file a lawsuit.

Additionally, a statute of repose will simply help level the playing field with some of our cheap international competitors—Japan and the European Union. Both Japan and the EU have 10-year statutes of repose that cover all goods.

As it is, U.S. legal costs are twice as high as a percentage of GDP as our international competitors. According to the Tillinghast study cited in yesterday's Wall Street Journal, in 2004, total tort costs were $260 billion and nearly $900 for every person in the country.

It's projected that the cost will rise to nearly $315 billion by 2007. Enactment of 3509 would begin to reduce the substantial tort tax, which is a drag on innovation and job creation.

I'll sum up. Even though 11 States have a fixed statute of repose applicable to goods, their effect is limited by the fact that 70 percent of domestic products travel in interstate commerce; thus, only 30 percent of goods are manufactured and sold in one State. That is why, like the GARA bill, Congress should enact a Federal statute of repose Moreover, Federal law establishing a statute of repose for 10 years or less that covers all goods would be the best and preferred solution to truly help the United States overcome its comparative disadvantage in terms of legal costs.

If sponsors and other supporters concluded after consulting with their colleagues that this is not politically feasible at this time, the

NAM would encourage passage of H.R. 3509 as a meaningful step toward helping our domestic manufacturers better compete with our international competitors.

On behalf of the National Association of Manufacturers, I thank you for the opportunity to appear before you today, and I would be happy to take any questions that Members of the Subcommittee may have. Thank you.

[The prepared statement of Mr. McMahon follows:]

PREPARED STATEMENT OF KEVIN MCMAHON

Mr. Chairman, members of the subcommittee, my name is Kevin McMahon. I am a partner in the law firm of Nelson Mullins Riley & Scarborough. Today, I am appearing on behalf of the National Association of Manufacturers (NAM). Along with several other clients, our firm represents Owens Illinois in litigation matters. Owens Illinois is an active member of the NAM. Additionally, I am the immediate past chairman of the American Tort Reform Association, and currently serve on their Board of Directors and Executive Committee. I have been involved in efforts to enact common sense legal reforms at the state and federal level for several years.

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

The NAM supports enactment of H.R. 3509, the Workplace Goods Job Growth and Competitiveness Act of 2005, as introduced. It would establish a national statute of repose—a time beyond which a manufacturer should no longer reasonably be expected to be held liable for a product—of 12 years for workplace, durable capital goods. The NAM, however, would prefer to see a final bill that would extend the coverage, reduce the number of years before the bill's protections apply and allow states greater flexibility. With that said, the NAM most wants to see H.R. 3509 become law and will work with the sponsors and other supporters to ensure that changes made to the bill do not diminish the support for it.

In past Congresses, statute of repose legislation has enjoyed strong, bipartisan support in the House. In fact, H.R. 3509 is based on a compromise negotiated with the Clinton White House during the consideration of a comprehensive product liability reform measure. Unfortunately, despite strong and bipartisan votes in the House, the proposal was not taken up by the full Senate except as part of the broader comprehensive bill.

The experience of the General Aviation Revitalization Act (GARA) of 1993, which established an 18-year statute of repose for makers of light, privately owned aircraft, demonstrates that a federal statute of repose can be successful. GARA, which was passed during a Democratic-controlled Congress and signed by President Clinton, is credited with reviving an industry that was once thought to be dead, and in the process creating thousands of jobs. Perhaps more importantly, contrary to what opponents of GARA predicted, the skies are as safe if not safer than they were prior to the enactment of GARA.

It is a sad commentary on today's U.S. legal system that a statute of repose even needs to be contemplated. Unfortunately, however, the plaintiff's bar has brought lawsuits against products that are decades (if not more than a century) old and, even more unfortunately, both the federal and state judiciaries have allowed these lawsuits to go forward.

Nothing lasts forever. Every perfectly designed and manufactured product will eventually fail. Yet the law imposes a duty on those who make things to do so responsibly, so as not to unreasonably put at risk those who use them. Our country has a long history of encouraging the development and production of useful goods for the benefit of our society and the world, and that system is undermined by excessive liability exposure. The policy of the United States should be to recognize that, as products age, the responsibility for their integrity and operability shifts to those who exercise control over them. It is unfair and unreasonable to hold a manufacturer liable for long-term, ordinary wear and tear, for natural degradation of materials, or the effects of the environment or other outside forces. Like manufacturers, users have an equal responsibility to ensure that the products and tools they use are safe and effective for the job.

It is true that in the vast majority of cases involving older products that the manufacturer/defendant almost always wins. Juries tend to understand that owners

need to take responsibility for upkeep and routine maintenance. Thus, plaintiff's counsel will usually offer to settle the case for less than the value of defending the litigation, in full knowledge that the defendant's insurer will insist on a settlement. While the plaintiff may be somewhat better off, a hefty portion of his or her award will be needed to cover legal fees and expenses.

A statute of repose also recognizes that many owners take the liberty of modifying their purchases. These alterations may even go against express warnings issued by the manufacturer. The longer that a good has been separated from its manufacturer, the more likely this is to occur.

Another difficulty with the passage of time is, ironically, the progress of technology and other state-of-the-art innovations. Defendants will find themselves unfairly having to explain why they did not think of an innovation that came 20 or 30 years after the time that the good was produced even though the product in question was revolutionary in its safety features at the time of manufacture.

Harris Corporation, for example, has resolved printing industry equipment cases during this millennium involving equipment manufactured as early as 1922 and throughout each decade thereafter through the '70s. Many of those cases involve issues related to industry standards that are decades old and disputes over the affect of multiple modifications and retro-fitting. Harris Corporation eventually sold its printing industry equipment assets in the early '80s.

Another important consideration regarding the length of time following an initial acquisition is the ability of the manufacturer to notify purchasers about the need to replace a certain part, or to not use the product in a certain manner. Even if the producer has information about the customer, such as a purchase order, mail-in warranty card, or credit data, the notice will be sent to the initial acquirer only. If the product has been sold, bartered or given away, there is little that the manufacturer can do to ensure that the notice gets to the current owner.

Some states have recognized this breakdown in the legal system and have begun to enact their own statutes of repose. Specifically, twelve states have a "fixed" statute of repose of a set number of years, while seven additional states have a "soft" statute of repose that relies on terms and concepts such as "useful life" that are open to litigation. Seven state supreme courts have found statutes of repose to violate the state's Constitution and 26 states do not have a statute of repose.

In the states that have a fixed statute, the number of years usually begins at the time of the initial purchase, except for Vermont. (That state has a special statute of repose of 20 years that applies specifically to latent exposure to noxious medical agents.) Some of these states limit the application to workplace goods, but most apply to all goods. With the exception of Texas and Iowa—each of which has a fixed, 15-year statute of repose—the other states with a fixed statute of repose all have a shorter time period than does H.R. 3509. North Carolina, for example, has a six year statute of repose that applies to all goods.

The NAM appreciates that the number of years in the proposed legislation has been lowered from 18 years in the past to the current 12. Eighteen was initially chosen because of the precedent found in GARA. Since H.R. 3509 creates a uniform period of time, the NAM hopes that an even lower number of years reflecting the consensus of the states that have fixed statutes of repose (such as 10 or less?) could be feasible for continued strong and bipartisan House support. Another consideration would be to allow states that have chosen to enact shorter statutes of repose to keep the length of time of their choosing as long as they do not exceed the federal standard.

In addition, since most states with a statute of repose allow for the coverage of all goods, the NAM would hope that the sponsors and other supporters could consider extending the coverage. Under the current language, of course, someone who is injured on the job would be covered by worker's compensation and therefore would not be left without any reparation. On the other hand, the basic principle underpinning the need for a statute of repose remains the same: purchasers need to take responsibility for upkeep and maintenance of their products. Even the highest quality products wear down over time.

Consider as a hypothetical, for example, the case of a couple with young children who buy a metal swing set. As the children grow up, the swing set is used less and less, but remains standing in the yard. The once-young children grow up, get married and have children of their own. On a visit to grandma and grandpa's, one of the grandchildren is allowed to play in the backyard. He begins to swing as strong as he can. The old and, by now, rusted, swing set is not able to handle the stress and collapses onto the grandchild. The family sues the swing-set manufacturer and the jury awards millions of dollars in punitive damages, even though the swing set had long outlived its useful life and was allowed to rust.

In this example, should the swing-set manufacturer even have to face the prospect of losing a jury award and, in the case of a small manufacturer, possibly the entire business?

A statute of repose of 10 or fewer years applicable to all goods will simply level the playing field with some of our chief international competitors, Japan and the European Union (EU). Both Japan and the EU have 10-year statutes of repose that cover all goods. Moreover, many foreign firms have entered the U.S. market only relatively recently, thereby putting established domestically based companies at a competitive disadvantage because of the higher legal costs they face connected with defending lawsuits against older products. By the same token, well-established, long-standing American companies are put at a competitive disadvantage with respect to new domestic competitors that do not face the same long tail of exposure from products sold years ago. This puts added financial pressure on companies with substantial legacy costs to cut back or eliminate wage, health care and retirement benefits, at a time when those crucial elements of our standard of living are already at great risk.

As it is, U.S. legal costs are twice as high as a percentage of GDP as our international competitors. According to Tillinghast-TowersPerrin, in 2004 total tort costs were $246 billion, or nearly $3,400 for every family of four. Enactment of H.R. 3509 would begin to whittle down this "tort tax" and, if the political will is there to improve its provisions, its contribution to reducing the tort tax will become even greater.

Even though 11 states have a fixed statute of repose applicable to goods, their effect is limited by the fact that 70 percent of domestic products travel in interstate commerce. Thus, only 30 percent of goods are manufactured and sold in one state. If a manufacturer were based in North Carolina, for example, but 12 years later its merchandise ended up in the possession of an owner in New Jersey (which does not have a statute of repose) who did not perform the proper care, the 6-year North Carolina statute of repose would not apply. Conversely, if the manufacturer were based in New Jersey and the good ended up in North Carolina, the chances are that the lawsuit would be filed in New Jersey.

Thus, a federal law establishing a statute of repose of 10 years or less and that covers all goods would be the best and preferred solution to truly help the United States overcome its comparative disadvantage in terms of legal costs. If the sponsors and other supporters concluded after consulting with their colleagues that this is not politically feasible at this time, however, the NAM would encourage passage of H.R. 3509 as introduced in order to at least begin to help domestic industry better compete with our international competitors.

On behalf of the National Association of Manufacturers, I thank you for the opportunity to appear before you today. I would be happy to take any questions that the members of the subcommittee may have. Thank you.

Mr. CANNON. Thank you, Mr. McMahon. Professor Popper, you're recognized for 5 minutes.

TESTIMONY OF ANDREW POPPER, PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

Mr. POPPER. Good afternoon. Thank you. Two quick Supreme Court cases before I get to my testimony. One *Silkwood v. Kerr-McGee*, which held that tort law is inherently State law; and two, *CFTC v. Schor*. In *CFTC v. Schor*, the Supreme Court said, dealing with federalism, that there are often blendings in functions between houses of Congress or between the Executive and the Judicial, and the same is true with federalism and State rights. But the Court says in Schor that when there is a phalanx of activity that's in the wrong place, action has to happen. And that is exactly the case with tort reform.

So in response to the comments earlier, I certainly align myself with the positions that were made before. This is a serious federalism problem.

Let me get to my statement. Think about tort reform for a moment. This has never been a fair fight. Think about the alignment of forces. On one side, you have the entire GNP. All of American

industry, all of American retailing and health care and pharmaceuticals and the insurance companies. And for that matter, you have the press, who would very much like to never have to pay punitive damages when they defame into oblivion some private citizen. That's on one side of the aisle.

On the other side, you have underfunded consumer groups who are often fragmented. You have a few victims' rights groups who have been somehow mocked as shameless seekers of underserved damage awards.

And then you have trial lawyers, the people who protect you when you're injured, the people who brought you the consumer's rights movement, who have been horribly defamed and vilified over the last few years. This is not a fair fight.

And when it comes to this specific piece of legislation, this is a seemingly simple bill. It is unclear, however, whether it could apply to regulatory actions. It is unclear whether it affects recall litigation. It's unclear about dealing with knowing concealment of defects. And, by the way, since you raised GARA, now GARA is 18 years, and it has an exception for fraudulent concealment. This bill does not. This bill is unclear on vested claims. This bill is even unclear on how it's supposed to achieve its stated objective of competitiveness.

Those technical shortcomings in the bill, however, pale in comparison to what's substantively wrong with this legislation. This bill undermines incentives for better design. It undermines incentives for innovation. It displaces manufacturers from the cycle of liability, when they are the ones who are in the best position to cover the claims from the products they sold, from which they profited, and in the better position to improve the long-term integrity of those products themselves.

It undermines the whole theory of risk distribution, which I thought was the predicate for tort reform in the first place. It denies innocent injured persons of their right to redress of wrongs in court, raising questions of fairness and due process and access to the courts. It abolishes lawful claims of consumers.

It seemingly exposes employers to greater liability rather than sharing that liability with manufacturers, and, by and large, statistically it deals with a tort reform fantasy: that we have a large amount of claims involving older products where there has not been a showing of a breach of a duty of care.

This bill punishes workers, not for filing at the wrong time or bringing a frivolous claim. This bill punishes workers for being hurt at the wrong time. It cuts away at incentives to keep long-term records. It cuts away at the incentives to do longitudinal studies. It cuts away at recordkeeping obligations that manufacturers have now.

It undermines transparency in the production community, because, gee, why should you talk about the deficits you know about in your product if liability is cut off after 10 years.

It creates a *de jure* interference with private contract, creating an incentive in the long run for courts to muddle the common law meaning of due care.

It creates no incentive to recall products. It creates tension in labor management relationships, because it's going to take out of

the cycle the true source of liability if there is genuinely a defective piece of machinery.

In fact, there's not one line in this bill that helps consumers. There's nothing to facilitate claims. There's nothing to improve product quality. There's nothing to lessen the costs that workers are going to sustain.

The fact of the matter is that the only thing this bill does is legally and forever remove fault from at-fault manufacturers.

This is tort reform, as I have come to know it: a series of bills that have but one meaning—reducing accountability and giving consumers absolutely nothing in exchange. It's not that it's incomprehensible. In fact, it's perfectly understandable. Who wouldn't want to be excused of responsibility after they engaged in misconduct?

But the fact that it's understandable doesn't mean that it's right or proper or fair or just, particularly to an injured worker. It is none of these things, and I urge the Committee to reject the legislation. Thank you.

[The prepared statement of Mr. Popper follows:]

PREPARED STATEMENT OF ANDREW F. POPPER

My name is Andrew Popper.[1] I appreciate the opportunity to testify on H.R. 3509, a modest side-show in the broader tort reform war.

1. A SHORT PERSPECTIVE ON TORT REFORM

Tort reform has always been an unfair fight. Think about the alignment of forces. On the side of those seeking to limit liability is the entire GNP. All of U.S. manufacturing, all of retailing, the health care industry, the pharmaceuticals, the insurance companies, and even much of the press who have abandoned consumers on this issue, with the hope of never having to pay punitive damages when they defame into reputational oblivion a private citizen.

On the other side, opposing these limits on accountability, are the defenders of the tort system—underfunded and often fragmented consumer groups, a few victims rights groups, some of whom have been mocked as shameless seekers of undeserved damage awards and, of course, trial lawyers. Trial lawyers—the architects of the consumer rights movement, the advocates for you and me when we are injured, the lawyers who represent the consumer perspective—have been horribly vilified by a decades long comprehensive campaign to undermine their credibility.

This is hardly a fair fight.

And then there is the term "tort reform." Laws that provide no protection for consumers, no incentive for greater safety, and limit the rights of those who lack power are hardly the stuff of reform.[2]

And the data—or lack thereof—regarding the current civil justice system. From the CRS report forward, no credible juried study documents a crisis in the tort or insurance system[3] that could conceivably justify legislation that limits arbitrarily consumer rights, as does H.R. 3509.

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[1] Biography at conclusion of testimony. (It is not the policy of the Committee on the Judiciary to print witness biographies.)

[2] Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed,* 10 Fordham J. Corp. & Fin. L. 55, 75 (2004). "Very cleverly, they have used the term 'tort reform' to refer to their efforts to make it harder for tort plaintiffs to win cases and, when they do win, to receive awards that fully compensate them for their injuries and adequately punish defendants for egregious acts." Richard S. Miller, *Tort Law And Power: A Policy-Oriented Analysis,* 28 Suffolk U. L. Rev. 1069, n.61 (1994). "[T]he proponents of 'tort reform' have succeeded in grossly misleading the public and its decisionmakers about the nature and dimensions of the problems produced by tort law. . . ." Andrew F. Popper, *A One-Term Tort Reform Tale: Victimizing the Vulnerable,* 35 Harv. J. on Legis. 123, 127 (1998).

[3] Michael L. Rustad, *Access To Justice: Can Business Co-Exist with the Civil Justice System? The Closing of Punitive Damages' Iron Cage,* 38 Loy. L.A. L. Rev. 1297, 1417 n.354 (2005). "Despite the controversy over punitive damages, the empirical reality is that there is no nationwide crisis requiring radical judicial tort reform." *Tort Questions,* 16 Risk & Insurance 9, Vol. 16 (Au-

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2. THE BILL

H. R. 3509, a seemingly simple bill imposing a 12-year statute of repose on civil actions involving durable goods, is flawed at a technical level.

It is unclear whether it applies to regulatory post-repose actions initiated by state or federal consumer protection agencies.[4]

It is unclear whether it affects recall litigation in the post-repose period.

It is unclear about what happens in the presence of knowing concealment of design or structural deficits.[5]

It is unclear what happens to vested claims—that is, injuries that have already occurred (for which a claim has not been filed) prior to the 12-year bar.

And it is unclear in text and import as to how it would meet its stated goals of increasing competitiveness or reducing insurance.

3. THE BILL DOES NOT ADVANCE THE INTERESTS OF CONSUMERS

The technical shortcomings of the bill, however, pale in comparison to the harm this bill will cause consumers.

The bill undermines incentives for better design, for innovation, in products designed for long term use.[6]

The bill displaces manufacturers from the liability cycle when they are in the best position (a) to cover claims made from products they sold[7]—and from which they profited—and (b) to improve the long term integrity of the products they will sell in the future.[8]

The bill undermines the distribution of risk that underlies much of the liability theory that has been argued by those seeking tort reform.[9]

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gust 1, 2005). "The debate over the tort litigation crisis is driven by hyperbole, faulty evidence and 'secret' data, according to *The Frivolous Case for Tort Law Change,* a recent study by the Economic Policy Institute. The authors, economist Lawrence Chimerine and attorney Ross Eisenbrey, found no evidence to link the tort litigation crisis with economic difficulty. Nor did they uncover any evidence to connect benefits to proposed tort system reforms."

[4] Jennifer R. Sentivan, *The Statute of Repose Precludes Community Affairs Department From Filing Enforcement Action,* 12 New Jersey Lawyer 17 (May 5, 2003).

[5] For a "fraudulent concealment" exception, see General Aviation Revitalization Act of 1994, Pub. L. No. 103–298, 108 Stat. 1552, Section 2(b)(1), 49 U.S.C. 49101 *et. seq.*

[6] "[T]he basic, if not singular, function of tort law is to create incentives for reducing tortious risks. Optimally, tort achieves this goal by threatening potential injurers with liability for all losses their tortious conduct may cause, compelling them to internalize the costs of tortious harm before they take risky action. . . ." [footnotes omitted]. David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't,* 37 Harv. J. on Legis. 393, 404 (2000). "One manner in which tort liability may affect well-being is through the incentives it creates for potential injurers to take care or otherwise to adjust their behavior to reduce harm and thereby decrease their chances of having to pay damages. . . ." Louis Kaplow and Steven Shavell, *Fairness Versus Welfare,* 114 Harv. L. Rev. 961, 1039 (2001).

[7] Manufacturers of products used the workplace have a duty to warn of defects discovered after a product has been sold. *Liriano v. Hobart,* 170 F.3d 264 (2d Cir. 1999). Quite obviously, they have a duty to exercise due care in the design of such products, based on their foreseeable use. With durable goods, the notion that those duties would be extinguished arbitrarily after 12 years seems irrational, particularly if the goods are marketed to an employer on the basis of their ability to function effectively over longer periods of time.

[8] Despite significant regulatory efforts [*e.g.,* 29 U.S.C. 654 (2000), that requires every employer "(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. . . ."], the American workplace is not as safe as it should be. Every year, more than 6,000 workers die of workplace injuries. Tens of thousands are injured. "Many worker deaths are the types of deaths that would make headline news if the perpetrator was an ordinary citizen. For example, some workers have been decapitated on assembly lines, ground up in a cheese grinder, buried alive in corn, or seared to a furnace room floor." [footnotes omitted]. Elizabeth A. Lambrecht Karels, *Current Public Law and Policy Issues: Make Employers Accountable for Workplace Safety! How the Dirty Little Secret of Workers' Compensation Puts Employees at Risk and Why Criminal Prosecution and Civil Action Will Save Lives and Money,* " 26 Hamline J. Pub. L. & Pol'y 111, 129, 143 (2004). Passing a law that eliminates responsibility for those who design and sell workplace equipment only exacerbates this situation.

[9] Jan Allan Baughman, Comment, 25 Cap. U. L. Rev. 671, 703 (1996). "Statutes of repose are reform measures that provide unnecessary, inappropriate protection to manufacturers and insurers at the expense of injured consumers. Important policies such as safety promotion and risk-spreading are compromised. Injured plaintiffs are denied redress for manufacturers' wrongs, regardless of a product's defectiveness, notwithstanding a claim's legitimacy. Instead, an arbitrary time period determines a manufacturer's liability."

The bill denies innocent injured persons their right to redress of wrongs in a court of law[10] raising questions of basic due process, equal protection, and access to courts.

The bill abolishes lawful claims of consumers before a consumer could know of the risks they face.[11]

The bill seemingly exposes employers to greater liability rather than sharing that liability with manufacturers of defective workplace equipment.[12]

The bill addresses a tort reform fantasy—litigation regarding older durable goods—when in the grand scheme of things there is not much evidence of litigation regarding long term goods.[13]

The bill ignores the reality of variation in the anticipated life of durable goods—the fact is, there are products designed, and priced, for very long term use.[14]

The bill punishes consumers and workers, not for filing at the wrong time or bringing claims with questionable merit, but rather for being injured by a defective product at the wrong moment in time.[15]

The bill cuts away at incentives to undertake long-term longitudinal studies of risk or engage in long-term product monitoring and record-keeping.[16]

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[10] States have long recognized that for certain activities and products, statutes that restrict litigants' rights based on artificial time frames can be greatly unfair. For example, in *Terry v. N.M. State Highway Comm'n,* 98 N.M. 119, 120–23, 645 P.2d 1375, 1376–79 (1982), the court held that a 10-year statute of limitations was unfair as applied to architects, contractors, and engineers because their work was designed to be used and relied upon well beyond that time frame. The same can be said about durable goods. They are supposed to last far beyond the 12-year limit H.R. 3509 suggests—presumably, that is why they are referred to as durable. A number of states faced constitutional challenges to such statutes, often finding the statutes denied rights protected under a state constitution, *e.g., Jackson v. Mannesman Demag Corp.,* 435 So. 2d 725 (Ala. 1983); *Turner Constr. Co. v. Scales,* 752 P.2d 467 (Alaska 1988); *Hazine v. Montgomery Elevator Co.,* 861 P.2d 625 (Ariz. 1993); *Austin v. Litvak,* 682 P.2d 41 (Colo. 1984); *McCollum v. Sisters of Charity of Nazareth Health Corp.,* 799 S.W.2d 15 (Ky. 1990); *Dickie v. Farmers Union Oil Co.,* 611 N.W.2d 168 (N.D. 2000); *Hanson v. Williams County,* 389 N.W.2d 319 (N.D. 1986); *State* ex rel. *Ohio Acad. of Trial Lawyers v. Sheward,* 715 N.E.2d 1062 (Ohio 1999); *Lyons v. Lederle Labs.,* 440 N.W.2d 769 (S.D. 1989); *Daugaard v. Baltic Co-op Bldg. Supply Ass'n,* 349 N.W.2d 419 (S.D. 1984), *abrogated by Cleveland v. BDL Enters., Inc.,* 663 N.W.2d 212, 224 (S.D. 2003); *Nelson v. Krusen,* 678 S.W.2d 918 (Tex. 1984); *Sax v. Votteler,* 648 S.W.2d 661 (Tex. 1983); DeYoung v. Providence Med. Ctr., 960 P.2d 919 (Wash. 1998); *Kohnke v. St. Paul Fire & Marine Ins. Co.,* 410 N.W.2d 585 (Wis. Ct. App. 1987), *review granted* 416 N.W.2d 296 (Wis. 1987), *aff'd and remanded,* 424 N.W.2d 191 (Wis. 1988).

[11] Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules,* 54 La. L. Rev. 907, 916 (1994). "Agitation for 'tort reform' has produced a motley array of laws lobbied by powerful and well organized special interest groups. The manner in which these enactments curtail the rights of tort victims differs from one state to the next. Among them are arbitrary caps on damages, stunted limitation periods, 'statutes of repose' that bar actions before they arise, as well as provisions abolishing the collateral source rule or joint and several liability, to name just a few. . . ." (footnotes omitted).

[12] If a worker's recourse is limited to workers' compensation, after 12 years innocent workers suffering severe injury from workplace accidents caused by defective machinery will have no ability to collect for the broad ranges of compensable losses not covered by workers compensation. "Often, workers' compensation benefits paid to injured workers are lower than the actual damages they have incurred." S. Elizabeth Wilborn Malloy, *The Interaction of the ADA, the FMLA, and Workers' Compensation: Why Can't We Be Friends?* 41 Brandeis L. J. 821, 849 (2003) [footnotes omitted].

[13] Robert Van Kirk, Note, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort,* 1989 Duke L.J. 1689, 1712–3 (1989). "Some studies indicate that as many as ninety-seven percent of all product related injuries occur within the first six years following manufacture. Although proponents may use this figure to suggest that relatively few plaintiffs will be affected adversely by a typical ten-year statute of repose, the figure also suggests that many of the arguments in favor of statutes of repose may be overstated. If only three percent of all claims are eliminated by a six-year repose period, then the efficacy of such statutes undoubtedly is called into question. . . . [T]he insurance industry has failed to demonstrate that suits against older products actually are responsible for a proportionately larger share of damage awards. . . ."

[14] "Another drawback of a statutorily defined time limit is that statutes of repose simply lack the flexibility to deal effectively with products of varying anticipated lives. . . ." Van Kirk, *id.* at 1714.

[15] In *DeLuna v. Burciaga,* 2005 WL 1862395 (1st Dist., Aug. 5), the court held that "[a] statute of repose gives effect to a policy different than that advanced by a period of limitations; it is intended to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiff's lack of knowledge of her cause of action." Reported in GARMISA, *'Test Case' that Failed Results in Legal Malpractice Claim,* Chicago Daily Law Bulletin, Sept. 8, 2005, p. 1.

[16] The problems of document retention and record keeping are troubling. Efficiency pressures and litigation anxiety have led businesses to purge office environments of all documents argu-

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The bill creates a de jure interference with private contracts, limiting a sellers claim of "useful life" and the *common law* obligations that would otherwise flow therefrom.[17]

The bill undermines transparency, creating an incentive for a manufacturer to be circumspect about data they may have on long term use of their goods.[18]

The bill creates no incentive to recall products[19] found to be dangerous after extended use.[20]

The bill creates tension in terms of labor/management relations since workers and employers would be denied access to the "true source" of fault in a factory accident caused by defects in the equipment or machinery used.[21]

The bill affects disproportionately low to moderate income workers who are more likely to work in traditional blue collar employment environments where exposure to equipment—as defined in the bill[22]—is common.[23]

People injured by products used properly should have no less right to compensation if they are injured in the 11th or 13th year of a product's useful life.

There is not one line in this bill that actually helps consumers; nothing to facilitate claims, nothing to improve product quality, nothing to lessen worker costs for injuries.[24]

And what arguments support the bill? H.R. 3509 relieves "at fault" manufacturers of their responsibility.

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ably not required to be maintained. Such purges have led to obstruction of justice charges when investigations of misconduct are thwarted by overly aggressive document retention policies. Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes,* 8 Fordham J. Corp. & Fin. L. 721 (2003). It is quite easy to imagine a 12-year "total shred" policy for equipment manufacturers if H.R. 3509 becomes law—and equally easy to see how that policy would destroy the ability of injured workers to develop proper product function/product failure histories.

[17] "At purchase, the expectations of both parties will embody a generalized conception about the length of time the product will render service. Intertwined with these expectations is an implicit understanding that if the product contains a defect and is therefore unreasonably dangerous, then the purchaser will be able to seek redress from the manufacturer. Manufacturers cannot justifiably express surprise or claim unfairness when injured parties ultimately bring suit. Presumably, a manufacturer of industrial machinery understands that her product is designed to last for at least a decade and perhaps much longer. She must realize at the point of sale, therefore, that suits may be brought against her at any time in the course of that product's life." Van Kirk, *supra,* note 13, pp. 1714–15.

[18] It is already difficult to compel disclosure of material facts outside of a clear duty to do so. Even in cases of arguable fraudulent concealment of facts, courts have been cautious in finding a duty to disclose information in the absence of a clear statutory or common law duty to do so. *Moses.com Securities, Inc. v. Comprehensive Software Systems, Inc.,* 406 F.3d 1052, 1064–1065 (8th Cir. 2005). If H.R. 3509 passes, it will greatly limit the ability of an injured worker to get data from a manufacturer in the post repose period.

[19] Jeffrey A. Lamken, Note, *Efficient Accident Prevention as a Continuing Obligation: The Duty to Recall Defective Products,* 42 Stan. L. Rev. 103, 127 (1989). "Concern over potential liability provides efficient incentives to recall a defective product. . . ."

[20] Cutting off liability, arbitrarily, may undermine the incentives for better products and services. See Gary T. Schwartz, *Mixed Theories of Tort Law Affirming Both Deterrence and Corrective Justice,* 75 Tex. L. Rev. 1801 (1997).

[21] Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?* 34 Wake Forest L. Rev. 1083, 1136 n.285 (1999) ("Workplace injuries involving defective products are liability concerns for the product manufacturers as well as the employers."), citing Thomas A. Eaton, *Revisiting the Intersection of Workers' Compensation and Product Liability: An Assessment of a Proposed Federal Solution to an Old Problem,* 64 Tenn. L. Rev. 881, 886 (1997). The workers compensation funds are simply not sufficient to cover broad losses from devastating injuries. See Malloy, *supra,* note 12.

[22] Suffice it to say that the incidents of equipment related injuries in agriculture and industry are frightening. "While there are various reasons why farm injuries occur, many of the most severe incidents are directly related to the use of farm equipment. Agricultural machinery is becoming more complex and more powerful as new technologies develop, creating an intense need for implements to be as safe as possible." [footnotes omitted]. Nathaniel R. Boulton, Note, *The Farmer's Retort to Tort Reform: Why Legislation to Limit or Eliminate Punitive Damages Hurts the Agricultural Sector,* 9 Drake J. Agric. L. 415, 427 (2004).

[23] E.g. factory machinery (presses, mixers, joining apparatus, molding machines, fork lifts, packing machines, steam or hydraulic lifts, high power pumps), farm equipment, including balers and tractors, and many types of construction tools from compressor to drills, are all made to last longer than 12 years.

[24] Legislation of this type leads inevitably to the conclusion that our political system has made its choice: as between at-risk workers and large corporations, the corporations are the favored interest. "[T]he environment created by the current executive administration is to give lip service to the American worker while giving a wink and a nudge to big business. . . ." Lambrecht, *supra,* note 8, p. 136.

4. CONCLUSION

This is tort reform as I have come to understand it—a series of bills that have but one meaning: reducing accountability and giving consumers and workers nothing in exchange. It is not that it is incomprehensible. In fact, the reasoning is all too understandable. Who would not like to be excused of responsibility after they engaged in misconduct? The fact that the reasoning underlying this bill is understandable, however, does not mean that it is right, proper, just and fair. It is none of those things. I urge the committee to reject H.R. 3509. Thank you.

Mr. CANNON. You may not have noticed, but you ended exactly as the red light came on. This is a remarkable panel. Thank you. Mr. Mack, you're recognized for 5 minutes

TESTIMONY OF JAMES H. MACK, ESQ., VICE PRESIDENT, GOVERNMENT RELATIONS, THE ASSOCIATION FOR MANUFACTURING TECHNOLOGY, McLEAN, VA

Mr. MACK. Thank you, Mr. Chairman. This is not the first time that AMT has appeared before this Committee in support of product liability reform. Over the years, we've testified before this and other Congressional Committees in support of numerous product liability bills.

Because these bills were broader in scope than H.R. 3509, some of their provisions drew controversy that could not be overcome during their consideration by the Senate and or the White House.

H.R. 3509 is different. It deals only with the issue of over-age workplace products. It does not contain controversial provisions on other product liability issues that have held up passage in past years

Under this proposal, no injured worker would go uncompensated. H.R. 3509 would only deal with claims involving injuries allegedly caused by workplace durable goods for which the plaintiff has received or is eligible to receive worker's compensation.

For those specific kinds of cases, it would create a uniform national statute of repose, preempting any State statutes of repose that apply to these claims. Otherwise, State law would continue to apply. Thus, State statutes of repose that may cover consumer goods and other non-durable goods would not be affected.

Why make a special rule for machine tools and other manufacturing equipment?

Well, let me try to deal with that. Everything in this hearing room, except for the people, was either made by a machine tool or made by a machine that was made by a machine tool. A strong machine tool industry is vital to America's military and economic security. Our industry is very cyclical. Price pressures are very strong. Profitability is very low, even in good years. Domestic consumption of machine tools is 14 percent higher today than it was a year ago, but domestic production is only up 7 percent. Imports now represent 65 percent of domestic consumption.

AMT estimates that the average age of machine tools installed in American factories has climbed from 10 years, the last time we testified in 1999, to 13 years in 2004. When a factory decides to invest in new capital equipment, the old machinery is usually not thrown in the trash heap. Instead, companies who lack the resources for new machines purchase these over-age machines, often altering them to fit their needs.

This process is repeated, as newer machines are required and older ones are resold. Safety features built into the original equipment have sometimes been negligently or intentionally disabled by employers or workers in an effort to increase production or to avoid the nuisance of dealing with guards or lockout mechanisms and other safety features.

The result of all these factors is a big overhang of overage machine tools in the U.S. market, which are the subject of four-fifths of our industry's lawsuits.

Under product liability law today in many States potential liability for my industry's products is endless, literally forever. Many of these machines built before Ronald Reagan became President, before the creation of OSHA, before Neil Armstrong walked on the Moon, before the Beatles came to America, and yes, even before I was born 70 years ago are still in use today.

The survey data contained in my written testimony documents that such litigation is a drain on financial resources not only from adverse settlements or verdicts, but from the cost of successful defense.

Most cases involving overage machine tools never go to trial, and if they do, a jury almost always finds for the defendant. If a machine has functioned properly for 12 years, it's highly unlikely that it was improperly designed.

However, even when these lawsuits are won, the litigation nevertheless results in unnecessarily high legal and transaction costs. The claimant's pleadings must be answered. Depositions taken. Design experts consulted. Historical records, if any, unearthed and evaluated. And the result is a substantial expenditure of funds, additional litigation in our courts, and the diversion of resources that could be invested in greater competitiveness.

Our most recent financial performance report shows that the median expenditure by our members for product liability costs was 0.6 percent of sales, about half of this for insurance premiums; the other half on settlement awards and out-of-pocket costs.

This 0.6 percent may not sound like much until you learn that in 2004, median after-tax profits for companies in our industry was only 1.9 percent of sales.

Mr. Chairman, H.R. 3509 is a narrow bill that addresses the problem of overage workplace equipment in the U.S. market for manufacturers of that equipment. It's the end result of years of negotiations with the Congress. It provides for two-way preemption. It's limited to workplace products. It assures no claimant would go uncompensated, and it contains a toxic harm exclusion, including but not limited to exposures to asbestos.

It's essentially the same bill this Committee approved 5 years ago. And it—and the bill that the House passed.

It will improve the competitiveness of U.S. workplace equipment manufacturers and at the same time it assures no injured worker would go uncompensated. It's good legislation, and we respectfully urge its adoption. Thank you, Mr. Chairman.

[The prepared statement of Mr. Mack follows:]

PREPARED STATEMENT OF JAMES H. MACK

I. INTRODUCTION

My name is James H. Mack, Vice President of Tax and Economic Policy at AMT—The Association For Manufacturing Technology—a trade association whose membership represents over 350 manufacturing technology providers located throughout the United States, almost the entire universe of machine tool builders who operate here. Most of them would be classified as small businesses, with only about a half dozen having more than 500 employees. About 40 percent of our industry's output is exported.

Pursuant to House Rule XI, clause 2(g)(4), I am obliged to report to you that AMT received $225,100 from the Commerce Department's Market Co-operator Development Program for a technical center in China. One hundred sixty-five thousand three hundred dollars was disbursed in 2005. The $59,800 balance will be disbursed by the end of this month.

According to the U.S. Census of Manufacturers, 78 percent of the companies in our industry have less than 50 employees. They build and provide to a wide range of industries the tools of manufacturing technology including cutting, grinding, forming and assembly machines, as well as inspection and measuring machines, and automated manufacturing systems.

Everything in this hearing room, except for the people, was either made by a machine tool or made by a machine made by a machine tool. Several years ago, the Reagan and first Bush Administrations, responding to strong encouragement of over 250 Members of Congress provided temporary import relief for our industry, based on the threat posed to our national security from Asian machine tool imports. They did so because of their recognition that a strong machine tool industry is vital to America's military and economic security.

Our industry is very cyclical. Price pressures are very strong, and profitability is relatively low—even in good years. Domestic consumption of machine tools is 14 percent higher than a year ago, but domestic production is only up seven percent. Imports represent 65 percent of domestic consumption.

AMT estimates that the average age of machine tools has climbed from 10 years in 1998 to nearly 13 years in 2004. When a factory decides to invest in new capital equipment, the old machinery is usually not thrown in the trash heap. Instead, companies, who lack the resources for new machines, purchase these over-age machines, often altering them to fit their needs. This process is repeated, as newer machines are acquired and older ones resold. The result of all of these factors is a big overhang of over-age machine tools in the U.S. market. This exposes the manufacturers of the old equipment to costly litigation.

II. THE NEED FOR A FEDERAL STATUTE-OF-REPOSE FOR WORKPLACE DURABLE GOODS

Unlike a statute of limitations, a statute-of-repose measures the time limitation from the date of the initial sale of the capital equipment. Statutes of limitations, by contrast, typically impose a time limit measured from the time of the injury or the discovery of its cause.

Under product liability law today, in many states, potential liability for my industry's products is endless—literally "forever." Many of these machines—built before Ronald Reagan became President, before the creation of OSHA, before Neil Armstrong walked on the moon, before the Beatles came to America, and yes, even before I was born seventy years ago—are still in use today.

Although these machines were built decades ago to safety standards of their day and although they are likely to have passed through several owners—each of whom are likely to have made their own modifications to accommodate their needs—they are still the subject of four-fifths of our industry's lawsuits. Safety features built into the original equipment have sometimes been negligently or intentionally disabled by employers or workers in an effort to increase productions or avoid the "nuisance" of dealing with guards, lock-out mechanisms, and other safety features. But proving such circumstances is extremely difficult. This litigation imposes liability in situations where our members have not exercised control over the product for such a long period that it is unfair to hold them accountable for the products performance.

Such litigation is also disproportionately expensive and socially unproductive. It is a drain on financial resources, not only from the adverse verdicts, but from the costs of successful defense. Most cases involving overage machines never go to trial, and if they do, a jury almost always finds for the defendant. If a machine has functioned properly for 12 years, it is highly unlikely that the machine was improperly designed.

However, even when these lawsuits are "won," the litigation nevertheless results in unnecessarily high legal and transaction costs. No matter how frivolous the actual facts, the claimant's pleadings must be answered, depositions taken, design experts consulted, and historical records, if any, unearthed and evaluated. The result is a substantial expenditure of funds, additional litigation in our courts, and the diversion of resources that could be invested in greater competitiveness. Insurers know this and factor it into insurance premiums.

This also results in legal extortion, in which baseless suits are filed by entrepreneurial lawyers, who know that many companies and/or their insurers will pay an out-of-court settlement rather than accept the risk and high cost of defense. When a case does go to trial and the jury finds for the claimant, the judgment can force a company to close its doors. The $7.5 million verdict in 1996 involving a machine built in 1948 against Mattison Technologies, a 100-year-old Rockford, Illinois machine tool builder, led to the company's bankruptcy.

In contrast, the incursion by foreign machine tool builders into the U.S. market is fairly recent (within the past 25 years). Therefore, foreign machine tool builders do not bear the significant long-tail exposure of U.S. builders. American companies that have been in business for many years must factor into their prices the risk of litigation involving thousands of overage machines. Our Japanese and European competitors don't have those risks and those costs. Their liability exposure is relatively small (both Europe and Japan have 10-year statutes-of-repose, if they are sued in their home markets). Enactment of a statute-of-repose for workplace durable goods would therefore level the playing field for U.S. manufacturers and achieve the uniformity and certainty necessary to produce the state-of-the-art products for which we are noted.

III. H.R. 3509

I appreciate the opportunity to testify in support of "The Workplace Goods Job Growth and Competitiveness Act of 2005" (H.R. 3509). This is not the first time AMT has appeared before this Committee in support of product liability reform. Over the years, we have testified before this and other Congressional committees in support of numerous product liability bills. Because those bills were broader in scope than H.R. 3509, some of their provisions drew controversy that could not be overcome during their consideration by the Senate and/or the White House.

H.R. 3509 is different. H.R. 3509 deals only with the issue of overage workplace products. It does not contain controversial provisions on other product liability issues that have held up passage in past years. Under this proposal, no injured worker would go uncompensated. H.R. 3509 would only deal with claims involving injuries allegedly caused by

workplace durable goods for which the plaintiff has received or is eligible to receive worker compensation. For that specific category of cases, the provision would create a uniform, national statute-of-repose, preempting any state statutes-of-repose that apply to those claims. Otherwise, state law would continue to apply. Thus, state statutes-of-repose that may cover consumer goods and other non-durable goods would not be affected.

Some earlier product liability bills had "one-way preemption," which would create a federal statue-of-repose in those states with no statutes-of-repose while preserving shorter state repose periods. Unlike those provisions, H.R. 3509 has "two-way preemption," which will actually extend the repose period for capital goods to 12 years in nine of the 11 states that have enacted time limits; but our members are willing to accept that extension in order to achieve the certainty a national period of repose would provide.

An additional eight states have enacted statutes-of-repose based on the "useful safe life" of the product. This approach has proven to be ineffective; because the "useful safe life" of each product must be litigated in every case, and substantial transaction costs must still be incurred.

IV. AMT'S 31ST ANNUAL PRODUCT LIABLITY SURVEY

Preliminary results of AMT's 31st Annual Product Liability Survey indicate that our members and/or their insurers could reduce their product liability costs by 62 percent, through adoption of a federal product liability statute-of-repose.

Twenty-five percent of the respondents reported claims in 2005. Virtually all of the claims were brought in state courts.

None of the closed claims reported from 2005 reached trial. Fifty percent were settled for an average of $146,100 and the remaining 50 percent were dropped without awards being paid. In addition, companies experiencing litigation had an average of three claims pending at year's end.

Whether cases are won, lost, or settled—defense costs for our members are substantial. The 1992 Insurance Services Office (ISO) closed claims study shows that for every $10 paid out to claimants by insurance companies for product liability, another $7 is paid for lawyers and other defense costs. *These transaction costs will be reduced substantially, if Congress enacts H.R. 3509.*

Based upon these survey results, every 100 claims filed against machine tool builders "cost" $10.4 million—including $5.1 million in defense costs and $2.3 million in subrogation paid to employers and/or their workers' compensation carriers, regardless of employer fault or the lack thereof. In other words, the current system provides $3.0 million to claimants (less whatever they pay out in contingency fees, which average 33 percent) and $7.4 million in transaction costs.

If a 12-year statute-of-repose were to be enacted, the "cost" of the same 100 claims filed against machine tool builders would be $4.0 million—a savings of $6.4 million or 62 percent. Eighty-four percent of our members' closed and pending claims

(and the substantial transaction costs associated with them) would have been eliminated by a 12-year statute-of-repose.

IV. CONCLUSION

Mr. Chairman, H.R. 3509 is a narrow bill that addresses the problem of overage workplace equipment in the U.S. market for manufacturers of that equipment. It does not affect claims involving other products. It establishes no precedent on whether states should enact statutes-of-repose governing other products nor on the appropriate scope or length of these statutes.

H.R. 3509 is the end result of years of negotiations within the Congress. It provides for two-way preemption; it is limited to workplace products; it assures no plaintiff would go uncompensated; and it contains a toxic harm exclusion, including, but not limited to, exposures to asbestos.

H.R. 3509 is essentially the same bill approved by the Judiciary Committee in 1999 and passed by the House in 2000. If this bill is broadened in an attempt to help manufacturers of non-workplace durable goods, or to provide one-way preemption; no company will ultimately be better off because the bill will not become the law of the land. The concerns of other manufacturers can be addressed in other legislation now or in the future.

By enacting H.R. 3509, as it is written, you would be declaring that endless litigation involving overage workplace equipment in the U.S. marketplace is a serious problem facing American producers who are, after all, the foundation of our industrial economy; and that the interstate commerce clause impels a federal solution. It is a problem not faced by our Asian and European competitors in their own markets nor, because of the longtail of exposure, in ours. The current system has cost jobs, money, and time. The principal beneficiaries have been lawyers on both sides of the counsel table. Advances in high-tech products are slowed as a result. Resources that could have gone toward the development of new technology and higher productivity for America have been expended on wasteful transaction costs with a relatively small percentage of total litigation dollars going to injured workers.

Enactment of H.R. 3509 will improve the competitiveness of U.S. workplace equipment manufacturers by driving down their litigation costs and cutting down on meritless lawsuits. At the same time, it ensures that no injured worker would go uncompensated. Passage of similar legislation relating to private aircraft has revitalized the domestic aircraft industry.

This is good legislation, and we respectfully urge its adoption.

Thank you for your attention. I would be pleased to respond to your questions.

Mr. CANNON. Thank you, Mr. Mack. The Chair would now recognize Mr. Watt for 5 minutes for questioning.

Mr. WATT. Thank you, Mr. Chairman, and I appreciate your allowing me to go first. And I apologize to the witnesses because I need to leave to make something that's over at 2 p.m., and I'm trying to get there just for a few minutes.

I guess I'm tempted to pick up on the personal responsibility tack that Professor Popper picked up on, since that was the other mantra that a number of my colleagues came into Congress on—personal responsibility. I'm not sure exactly how I think this bill supports that or the proposition of States' rights, but I'm not going there. He covered that.

I'm tempted to pick up on the 7,000 plus machines that were sold by Ms. Sitterly's employer with only one lawsuit. But I don't think I'll go either, because that's really not substantively what I'm concerned about.

What I am concerned about is Mr. McMahon's comment. Not concerned, I just want to get more clarity because I'm not sure under the standard that you have put forward here, whether there would be any State tort law anymore. This notion that any time you have some movement in interstate commerce, that gives you the basis for Federal preemption, just talk to me a little bit about what your theory is on what the standard for States should be in this area and then maybe I can get a better idea of what you think the standard ought to be.

Mr. MCMAHON. Right. Well, Congressman Watt, as you know, the Constitution gives Congress the power to legislate in matters of interstate commerce, so the issue is what particular scenarios arise where it becomes compelling for Federal preemption. With regard to the particular issue we have before us and workplace durable goods, as I indicated in my testimony, 70 percent of the products that are manufactured in one particular State will be sold and resold and sold and resold over period of time and moved in many different States.

And, therefore——

Mr. WATT. But this bill applies to 100 percent. It doesn't apply to 70 percent. Even if you accept that proposition, then what about the machine that was sold 15, 18, 20 years ago. It sat in the same State. You're saying that because that machine moved in interstate to get to that location, all of a sudden the Federal Government has some preemptive right to tell what the statute of limitations ought to be?

Mr. MCMAHON. Well, again, I think it's a balancing of equities and an issue of fundamental fairness. I think you have to be cognizant of the fact that because so much machinery moves State to State that in order to have a situation where you don't have a patchwork quilt, if you will, of differing State laws that apply and that manufacturers would have to then prescribe to all of these varying standards. There are many inequities there. It's inefficient. It's not cost effective.

Mr. WATT. Is it constitutional? Yeah. That's a good point.

Mr. MCMAHON. I—yeah. Okay.

Mr. WATT. But, you know, I'm just——

Mr. MCMAHON. I understand.

Mr. WATT [continuing]. You know I'm trying to get some understanding of under your theory whether there would be any State tort law. Well, let me postulate this case. This is the one I always enjoy talking to my colleagues about. You got a doctor who's operating on a patient inside North Carolina, a patient certainly not straddling the State line. Maybe the doctor is using a piece of operating equipment that was bought in another State. That's enough to get you interstate preemption, Federal preemption or you're saying—where's the line here. I'm just trying to figure out what is the——

Mr. MCMAHON. Right. Well, first of all——

Mr. WATT. What is the logical line that we are going to draw here between what the Federal Government's right is and what the States have to do.

Mr. MCMAHON. Right. Well, first of all that good would have to be 12 years earlier.

Mr. WATT. No. I'm not talking about under that. I'm talking about. That was my shot at others' tort reform that they already did, which I couldn't for the life of me understand why medical negligence is a matter of Federal law as opposed to State law. Nobody operates or sees a patient across State lines. Now, maybe once and a while, I do live on the South Carolina line, and I concede that some of my constituents may go to South Carolina and get inferior medical care. Or some of their constituents might come to North Carolina and get superior medical care, whichever way you want to look at it. I hope nobody from South Carolina is watching this. I get a lot of nasty phone calls.

But I just—I mean I don't even—I don't understand what the standard would be here that would give the Federal Government the right to just—I mean and it's not substantive. I mean North Carolina has got a shorter statute of repose, but it seems to me that North Carolina ought to have that right to decide what the—whether it's going to have a statute of repose and what the statute should be. What is the justification for even from a business standpoint taking the North Carolina 6-year statute of repose and making it a 12-year statute of repose?

Mr. MACK. Congressman, could I perhaps help——

Mr. WATT. Yes, sir.

Mr. MACK [continuing]. And——

Mr. WATT. Help me please.

Mr. MACK [continuing]. Help add to the confusion here. The—I can't address anything other than product liability cases here. That's what the subject of this hearing is about. And if you're asking what is the justification for a Federal preemptive statute addressing product liability cases, let me try to give you one.

The insurance industry rates its product liability claims on a national basis, with good reason. North Carolina has a very short statute of repose for capital goods or for all products. One of our members in North Carolina or perhaps a woodworking machinery company in North Carolina pays the same insurance rates as a company in New Jersey. Why?

Mr. WATT. I appreciate it, Mr. Mack. I hear what you're saying, but now you're telling me that——

Mr. WATT. Without objection, the gentleman is recognized for an additional minute.

Mr. WATT [continuing]. Just because the insurance industry rates on some national basis that that's some basis constitutionally for doing something.

Mr. MACK. Well——

Mr. WATT. I just don't accept that. Nor do I accept the fact that just because a machine moved in interstate commerce 15 years ago, that somehow the Federal Government has the right to tell that State what their statute of repose ought to be. That is—that is a radical departure from where the law has been in this country, and

my—based on everything I know—you know, I just don't understand how we get there from here.

Mr. MACK. Sure. The courts I think have, as I understand it, have interpreted the 14th amendment to give Congress the right to enact legislation that affects interstate commerce. Then really it seems to me the question that you're asking is should it do so. What justification is there to follow this constitutional prerogative that Congress has and hopefully in our written testimony and what we will say through the afternoon's hearing that we will provide some justification for doing that would satisfy your concerns, Congressman.

Mr. WATT. I obviously am not picking on anybody. I'm just trying to get a standard here.

Mr. MACK. No, I know.

Mr. WATT. I appreciate it. I yield back, Mr. Chairman. And I appreciate you for allowing me.

Mr. CANNON. The gentleman's time has expired. Once again, I just might note that I've invited the new—the Chairman of the Proposed Democratic States' Rights Caucus to take up as his first issue the elimination of the Department of Education. I will see if that—if we can gain some bipartisan support on that.

Thank you. Mr. Chabot, would you like to make an opening statement?

Mr. CHABOT. Yes.

Mr. CANNON. Without objection.

Mr. CHABOT. Mr. Chairman, I ask unanimous consent to make a statement, and I'll keep it much shorter than the 5 minutes.

But I'd thought as the principal sponsor of this legislation, I wanted to take just a couple of minutes why I think we do need this important liability reform.

American manufacturers of durable goods are frequent targets of litigation over products that are decades old and have met all safety standards when that particular product was put onto the market. The endless tale of liability puts U.S. manufacturers at a disadvantage with their foreign counterparts. Most often, when these suits are brought to trial, defendant companies win, as has been mentioned. However, because it costs so much to litigate these claims, companies must often settle within their insurance limits and these manufacturers are then forced to incorporate the risk of litigation in the form of higher prices, which then ends up on the backs of the consumers.

This bill will help save millions of dollars that would have otherwise been spent on these types of frivolous lawsuits, resources that could be used to compete in the global marketplace and create jobs back home; therefore, it would be a much better use of these dollars.

I also wanted to highlight the three core aspects of the bill. Number one, H.R. 3509 imposes a nationwide statute of repose. This national standard will provide needed stability in the marketplace. And secondly, because the bill would only apply to plaintiffs who are eligible to receive worker's compensation, no one would go uncompensated, as has also been mentioned.

Twelve years is an adequate amount of time to test a product's viability without needlessly barring victims from the courthouse.

Since the 106th Congress, I've worked to pass a national statute of repose for durable goods in the workplace. In fact, in the 106th Congress, the legislation passed the House and then passed both bodies of Congress in product liability reform legislation that was then unfortunately vetoed—unfortunately, in my view, by President Clinton.

Since that time, I've continued to work with national groups like the National Association of Manufacturers and small groups located in my district in Cincinnati, Ohio, who continue to pay settlements in frivolous cases, because it will cost more to defend the case than to settle.

Jobs in the district that I represent, for example, are continually threatened by frivolous suits and, in fact, back in 2001, a local company, Madison Grinder, was forced to close its doors after a products liability suit.

Just the machine tool industry alone employs over 1,500 workers in the Cincinnati area. I might note, however, that it wasn't too long ago when that 1,500 jobs was 7,000 jobs in the Cincinnati area. It was always one of the premier areas for the machine tool industry.

After the passage of several tort reform measures this year, I'm pleased to see that we're once again highlighting the runaway litigation costs that businesses in our country face at the expense of the average consumer.

And I want to thank you, Chairman Cannon, for holding this hearing, and we appreciate the testimony of the witnesses thus far. I think whichever side they're on, I think it's really been excellent. And I yield back my time.

Mr. CANNON. I thank the gentleman. Thank you for introducing this legislation. We very much appreciate it. And without objection, all Members will have 5 days—5 legislative days to submit opening statements or additional materials for the hearing record. Hearing no objections, so ordered.

At this point, we're a little bit out of order, because Mr. Watt needed to leave. So if it's okay, Mr. Delahunt, we'll call on Mr. Coble. Is that? Thanks. Mr. Coble—the gentleman is recognized for 5 minutes

Mr. COBLE. Thank you, Mr. Chairman. Bill, are you on a short leash? Do you need to go earlier?

Mr. DELAHUNT. No. I'm fine.

Mr. COBLE. Okay. Mr. Chairman, thank you for holding this hearing. Thank you all for being with us.

Mr. Mack, what impact would the 12-year statute of repose have upon a worker's ability to receive worker's comp and would employers still be held liable for injuries that occur on the job?

Mr. MACK. Well, under the provision of 3509, the only time it comes into play is when the claimant is eligible for worker's compensation, so we say unequivocally that no injured worker would go uncompensated.

Mr. COBLE. So no negative impact?

Mr. MACK. It would not in any way affect the claimant's right to get worker's compensation or ability to get worker's compensation, and only those persons who are injured in the workplace and are eligible for worker's comp would this bill be—go into effect.

Mr. COBLE. All right. Now, you mentioned durable goods, Mr. Mack. Comment a little bit more in detail, if you will. What goods are intended to be included in the bill's definition and what goods are not intended to be included?

Mr. MACK. Well, I think basically it is intended to cover equipment like the stuff our folks make, which I indicated, makes other things.

It might be construction equipment—equipment that is used in the workplace to either produce a product or to work on a project that—and I think under the definition of the bill is intended to have a life of at least 3 years; is subject to depreciation under the Internal Revenue Code; is used in the trade or business for the production of income. It's intended to cover workplace products that are used in the workplace that cause traumatic injury. The last time we had this hearing, 5 or 6 years ago, there was a long discussion about toxic harms and how do you define toxic harms and the Committee, in its wisdom, provided a definition in the markup for toxic harm——

Mr. COBLE. I know, and my time is about to run out, Mr. Mack.

Mr. MACK. But it specifically said asbestos isn't covered.

Mr. COBLE. Mr. McMahon, talk to me about two-way preemption versus one-way preemption.

Mr. MCMAHON. Sure. I mean two-way preemption means that the statute of repose will be extended in States that currently have a fixed-time statute, like North Carolina has 6 years, that would now be extended to 12 years under that bill.

One-way preemption creates Federal statute of repose in States with no current statute of repose and preserves the shorter statute of repose, so in North Carolina, it would be 6 years.

So many claim that that is unfair or has been claimed as unfair and so, therefore, under this bill, there is two-way preemption, not one.

Mr. COBLE. And North Carolina would then be under the 12 year?

Mr. MCMAHON. Correct.

Mr. COBLE. Okay. Mr. Chairman, in closing—I'm about out of time here—this matter is clearly subject to interpretation, some good, some bad. But I've heard horror stories. Ms. Sitterly, you mentioned some that simply demand our imagination in resolving it. You want to give one more before the red light turns on? Before the red light illuminates in my eye and the Chairman hammers me down?

Mr. CANNON. If you could turn the mike on, please?

Ms. SITTERLY. I just recently settled a case on an mill that was shipped in 1942, and we spent $151,000 in defense costs and then settled it for $90,000. And I mean 1942. So I think that's reason right there.

Mr. COBLE. Well, what caused the injury?

Ms. SITTERLY. A lot of comparative negligence honestly on the operator. He stuck his hand in the mill. So the employer trained him poorly, provided him with gloves, when the operator manual clearly stated no gloves are to be used.

Mr. COBLE. And the defendant was the original manufacturer I take it in that case?

Ms. SITTERLY. It was. Yes.

Mr. COBLE. I see the red light, Mr. Chairman. Thank you, sir.

Mr. CANNON. The gentleman yields back. Mr. Delahunt.

Mr. DELAHUNT. Yes. Thank you.

Mr. CANNON. The gentleman is recognized for 5 minutes

Mr. DELAHUNT. Yeah. I thank the Chair.

Counsel Sitterly, have you testified before the Wisconsin State Legislature?

Ms. SITTERLY. I have not.

Mr. DELAHUNT. You haven't? Has there been a proposal made before the Wisconsin State Legislature that would embrace basically the legislation that's before us now?

Ms. SITTERLY. I'm afraid I don't know the answer to that.

Mr. DELAHUNT. You don't? Do you know if anybody has gone to the Wisconsin State Legislature or the Administration in Wisconsin and put forth legislation or a proposal that would deal with I guess the word is horror stories or frivolous lawsuits?

Ms. SITTERLY. I'm afraid I don't know. I think they should, though, if they haven't.

Mr. DELAHUNT. Well, that's my point. I mean I think they should, too. If all these horror stories—and I'll accept your version, okay and your conclusions—it's inarguendo, as we say.

I mean I sit here and I wonder, you know, I think the key question was asked by Mr. Watt. You know, where is the line and when is the Commerce Clause implicated? Maybe—I just jotted some notes down. It's to ensure stability in the marketplace. Maybe that's it. But, you know, this Constitution gets to be a pesky thing sometimes when it doesn't work to your particular advantage.

You know that's the problem with constitutions. You know they can cause you aggravation and cause you to go out and spend some money. But, you know, we heard—we hear the term frivolous lawsuits thrown around. You know, I'm sure some lawsuits are frivolous except can you—somebody give me a definition that we could implicate into legislation.

I mean we're a democracy that prides ourselves in giving access to the courts. And you know the Federal justice system simply can't accommodate. But when I reflect and think of the arguments that my friends and colleagues make who support this legislation, I just—you know why not just file a bill and abolish, you know, the—you know, State judicial systems. Now, let's get a new amendment and update it. Maybe things have changed because of the changes in the marketplace. Professor?

Mr. POPPER. Well, that's a terrible idea. Thank you. Just to comment on these horror story questions. I mean the real horror story is the fact that there's 6,000 workers who die in the workplace every year. There are tens of thousands of people who are horribly injured. I made reference to it in my testimony at Footnote 8.

Now, you want horror stories. There are horror stories of a person ground up in a cheese grinder, buried alive in corn, or seared to a furnace from the floor. The workplace is not a safe place. We do our best. But when you try and think about legislation that's balancing out profitability on one hand and excess profitability in many cases, against basic safety from those who are least able to protect themselves, I think the balance has to tilt the other way.

I mean in—and on this federalism question, gee, you know the Constitution isn't all that clear on a lot of areas, but one thing it is clear on and that is it was written to limit the power of the Federal Government, not to expand it.

Mr. DELAHUNT. Well, I—if I may, Professor, you know, as I'm reading this bill for the first time, and I—as I read it, I think there's some equal protection issues that are implicated here as well in terms of how we treat different victims.

You know and two-way preemption, I don't think that really solves the constitutional issue, Mr. McMahon, and I'll pronounce your name properly.

Mr. MCMAHON. One Irish to another.

Mr. DELAHUNT. These non-Irish, they just don't know how to do it. I mean I can't believe what I've been hearing.

Mr. MCMAHON. We're close to St. Patrick's Day.

Mr. DELAHUNT. You know that's right.

But I mean we've heard these arguments, you know, before, and, you know, Ms. Sitterly, I mean, you have had 7,000 cases and only one went to trial? Did I catch that right?

Ms. SITTERLY. Nine thousand machines. Yes. Yeah.

Mr. DELAHUNT. Okay. And only one went to trial. You know my position is if—I think that the insurance carriers don't—I think they take an easy approach, okay. And I don't think they go to trial often enough. And when I hear arguments such as, you know, oh, these are complicated cases. Well, I don't think that most jurors are dumb. I really don't. And, you know, there's that instinctual, common sense that you know that people have, especially when it's done in a collective way.

I really do believe in the justice system, you know——

Mr. CANNON. Without objection, the gentleman's time will be extended by 1 minute.

Mr. DELAHUNT. Thank you, Mr. Chairman. And I'll—I'll try not to just ramble on.

But, you know, you got to tell these insurance companies, if you're a company, hey, defend these things. If there are frivolous lawsuits out there, go to trial. Go to trial and establish the fact that, you know, that that's unacceptable and is creating costs. I haven't seen any of the data, but, you know, the whole profitability that Jim Mack brings up about .06 percent and 1.9 percent. I dare say an analysis is that if this is a piece of our non-competitiveness, it's such—it's almost infinitesimal, and that there are, you know, other factors that are going into the equation that are hurting us competitively. I mean I can think of you know those jobs going overseas and labor costs and a whole variety of other things. But you know those who might have a particular agenda when they come to tort reform try to make it sound as, you know, these are runaway costs for all these frivolous lawsuits and yet whenever I ask for any data, I don't get any. I just get free-for-all. With that, I'll yield back.

Mr. CANNON. Thank you. Very close to that additional minute. We appreciate that.

Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman.

Mr. CANNON. The gentleman is recognized for 5 minutes.

Mr. CHABOT. Thank you. Before, I answer—ask questions, I would just comment that the gentleman from Massachusetts I mean I would stipulate that most juries aren't dumb and I, however, think that many of the cases don't make it to trial. They get settled. It's causing insurance rates to go up. It's making U.S. companies less competitive. That's one of the reasons that we have lost an awful lot of jobs in this country.

And perhaps—I'll open this up to any of the panelists—my understanding is the statutes of repose in some of the other countries—Japan, Korea, and others and relative to lawsuits—does put us at a tremendous disadvantage, and if one of the members would like to discuss that, either Mr. Mack or Mr. McMahon.

Mr. MACK. Sure. The—yeah—both the EU and Japan have 10-year statutes of repose that apply across the board to all products, including those that cause toxic harms. I mean it—and I'm not advocating that. But the point is that our principal competitors are basically insulated from lawsuits in their home market and in each other's markets by these statutes of repose, and, therefore, don't have in their home markets or each other's markets long tails of liability.

Mr. CHABOT. Okay.

Mr. MACK. Now, in the United States, a Japanese company or a European company is subject to the U.S. laws whatever they are. But in our market, our home market, our members are subject to this long tail of liability and the incursion of foreign imports to the degree they are now is relatively recent.

So a Japanese company or a European company or a Korean company, because it doesn't have this long tail of liability, when it goes to insure the products that it does sell in the United States, the costs are infinitely lower, and their overall liability costs are infinitely lower than a company that has been around for a long time in the United States and has produced jobs in the Cincinnati area for a gazillion years.

Mr. CHABOT. Thank you. Mr. McMahon, I don't know if you—if that was sufficient. It probably was. Let me get at a different question, and you've already answered this to some degree, but could you once again very briefly explain why the statute of repose should be a Federal issue, and why we're moving forward that way; why you think this is an appropriate route for the Congress to go?

Mr. MCMAHON. Sure. I'd be glad to, Congressman.

As you know, Congress has the authority to act here under article I, section VIII. The Constitution gives Congress the power to legislate matters of interstate commerce. As was raised in my testimony, at at least 70 percent we know of manufactured workplace durable goods are moving in interstate commerce. So even if you had a perfect set of State laws that protected manufacturers and frankly balanced the rights of manufacturers with plaintiffs, because that product is moving across, especially a product, say, 30 years old that has been owned and resold and sold and resold and moved in and out of different States and all around that you don't have the ability to apply any one State's particular law. Essentially, you can allow plaintiff's attorneys to forum shop and because it has been so many places and pick a jurisdiction in which they want to file a claim, the manufacturers have no certainty; they

have no predictability because they don't know which particular laws they're going to be held accountable to.

Mr. CHABOT. And just to be clear, if a State, say, North Carolina has a 6-year statute of repose, it goes up to 12?

Mr. MCMAHON. Correct.

Mr. CHABOT. If the State had 15, it comes down to 12?

Mr. MCMAHON. Correct. That's two-way preemption.

Mr. CHABOT. Right. And if a State has nothing, it's 12.

Mr. MCMAHON. Twelve.

Mr. CHABOT. So 12 is going to be the statute of limitations nationwide?

Mr. MCMAHON. Correct.

Mr. CHABOT. Ms. Sitterly, let me conclude with you if I can real quickly.

You mentioned in your testimony that you're hesitant to bring cases to trial. Could you expand on that and the factors that companies like yours must consider when evaluating a case, even if it is frivolous.

Ms. SITTERLY. Well, first, when you're dealing with——

Mr. CHABOT. I think the mike's not on there, too.

Ms. SITTERLY. I think it is. There.

Mr. CHABOT. Okay.

Mr. SHAYS. The first thing is on a machine that's been manufactured a decade or more ago, you have to retrieve the old records and that implies that you can find the records, and then you need to find an engineer, an expert, who is familiar with the standards as they existed at the time. And then you have to be able to have a jury focus on those standards and not just go to the standards of today.

And also the fact that the transaction costs of defending a case—depositions and outside experts and the cost that the company bears on the witnesses that are in-house, for example, the engineers. I mean instead of doing their jobs, they're out preparing for depositions and the like. And also in machine tool industries are usually graphic, and you have great sympathy on the part of the plaintiff as well.

So those are some of the factors that we look at when we decide whether or not we're going to take a case to trial or settle it.

Mr. CHABOT. Thank you. Thank you, Mr. Chairman.

Mr. CANNON. The gentleman yields back. Thank you. And again, thank you, Mr. Chabot, for introducing this legislation, which I think is great. And I'll talk about that. In fact, I'm going to get on the soap box in a minute like many other people have, but I have a couple of questions. First, Mr. McMahon, previous versions of this bill as well as the General Aviation Revitalization Act have contained an 18-year statute of repose. Why is the 12-year statute of repose better?

Mr. MCMAHON. Mr. Chairman, that is a good question. You know, why 12 years?

I think the key notion is a reasonable time period. As you stated, GARA is 18 years. Nine of eleven States with statutes of repose have—are shorter than 12 years. Japan and EU have 10 years. But they apply to all consumer goods. I know many members of the NAM would support moving to that level, 10 years. The original or

one of the original provisions related to the statute of repose was in the Contract with America. That was 10 years. Twelve years seems to be a more modest number than past efforts at Federal legislation. It's also the mean, between 6 and 18.

Mr. CANNON. Thank you. In addition to the 11 or so States that currently have a fixed statute or term statute of repose, an additional half dozen States, including my home State of Utah have enacted a statute of repose that was ultimately held unconstitutional under that State's constitution for violating a right to trial or open courts provision.

First, is there any reason why a statute of repose would be unconstitutional under the United States Constitution? And second, why should Congress pass a law that effectively forces those States to adopt a statute of repose when it would not be constitutional for their State legislature to do so?

Is there any difference than the situation that occurred when Congress passed the General Aviation Revitalization Act? Mr. McMahon?

Mr. MCMAHON. I think GARA sets the precedent. I think it explains the rationale. You know ultimately, this is a policy decision. You want to balance the equities and adopt reasonable limits on long tail liability. Again, products moving in interstate commerce, this is a particular area similar to GARA where there is an availability to do it, and I believe a desire to do it, a justification I should say for it.

Mr. CANNON. Thank you, Mr. Mack, do you have any comment on that constitutionality question?

Mr. MACK. Well, you're correct that some States have provisions in their State constitutions dealing with open courts and access to courts and the like, which provisions do not appear in the United States Constitution and, therefore, do not—would not bar a Federal statute of repose. I would argue that the legislature in those States, having seen the need to pass a statute of repose. One could argue that the people of those States, represented by their legislatures and governors do—would like to see some restraint on lawsuits involving overage products.

The trend line, by the way, in States that have adopted fix-termed statutes of repose has been to both in Texas, in Connecticut, in Colorado, which I think are the most recent to restrict the application to workplace injuries, perhaps for the reason that this legislation does we should be able to argue that no injured person, no injured worker under these—under this bill would go uncompensated.

Mr. CANNON. Thank you. You know, I was struck, Mr. Popper, by your comment that the real tragedy is the—first of all that the workplace is not a safe place, and that the real tragedy is 6,000 deaths and you described a couple of ways people have died recently in some graphic detail, and that is a matter of concern. I personally have worked in that very unsafe workplace—in a coal mine and also in a steel mill, and one of the things that really strikes me, from my own personal experience, and having watched the development of society over the last few years is that there has been a dramatic reduction in the number of people that are dying in the workplace.

And you talked earlier about the likely effect that this bill would have on innovation and on design, and suggested that that would be negative.

My own experience is that the global workplace has changed. The paradigm has changed, and the companies that are going to continue to compete have to be focused on design. They have to be focused on innovation, but they have to also be able to have an endpoint to the liability that their prior products have caused.

Now, on the other hand, the reason injuries have declined and deaths have declined is in large part because there's a partnering between people that buy equipment and people that design and sell equipment. And so people that have equipment or resell equipment or move equipment and buy equipment from people who've bought it before and they haven't used, there's a huge incentive on the part of those people to be safe.

There are also incentives to make money and then to cut corners and sometimes you get employees who cut corners and unfortunately you let—there are employers who let employees do that. I will never forget the yelling at I got when I didn't card out an electronic circuit that I was involved in helping—or working in the context of, because that was a company that was deeply concerned about safety. Not all companies are.

But the key here-and the reason I think this legislation so important—is that to the degree that you have—you bid up the number of jobs, in other words, as you remove these obstacles to new jobs, and the economy has more jobs, then part of the compensation package becomes a safer work environment and people move away from the kind of world view that allows people to do dangerous things, and they move more toward the harsher and safer world. It would be harsher in the sense that you correct people that do unsafe things.

And over time, as we do that, we then refocus on innovation and improved design and the effect of that is not just that American workers, of whom 6,000 died last year, not only are those American workers going to be safer, but around the whole world workers are going to be safer.

So if we're really concerned about workers—in the first place, how on earth do you compensate 6,000 deaths? That's a very difficult problem.

On the other hand, how do you avoid the deaths, and it seems to me that at some point you have to be looking at how we create a world that in which the incentives align to create a safer workplace. And it seems to me that this bill does that, because it creates a virtuous cycle between the machine manufacturer and his future business and the machine operator company and his future business.

Did you want to comment on that, Mr. Popper?

Mr. POPPER. Of course. Thank you. I guess we're going to have to agree to disagree. Let's make the positive assumption. Let's make the optimistic assumption that you're right; that the workplace safety records have improved. And I think there's a lot of data to that effect.

Mr. CANNON. That's not an assumption. I mean there's massive data to that over the last—if you take last 20 years, I mean the

trend line is massive. Now, if it—whether it will continue or not that's a different question. I agree. And we may——

Mr. POPPER. Right.

Mr. CANNON [continuing]. May not be so optimistic about that, but there are lots of reasons to believe that we would.

Mr. POPPER. Even if—making that assumption, why in the world would you want to pull out of the marketplace a primary incentive to make the workplace safer? You maintain liability standards with the manufacturers, if that's had a positive effect, then great.

This piece of legislation pulls out the rug from under the workers, because right now——

Mr. CANNON. Can we interact on this just a little bit, because——

Mr. POPPER. Surely.

Mr. CANNON [continuing]. It seems to me that what this legislation does is it says to the employer I'm the guy who's going to be stuck, because the manufacturer is going to get off the hook. And so the guy who's in charge of safety now has a much higher reason to not be the deep pocket in the lawsuit. Is there not some of that?

Mr. POPPER. I don't really think that's the dynamic that will occur, because the employer is going to have its liability limited by worker's compensation. They're not going to be liable in major product liability cases. They're not going to be liable when there are foreseeable losses. They're not going to be liable when the manufacturer is sitting on a longitudinal study about downstream risk. They're not going to be liable for any of that. They're going to be only liable to the extent that there's worker's comp, which, as you know, is an exclusive remedy and bars the kind of civil litigation that you're describing.

Mr. CANNON. Unless there is negligence or gross negligence depending upon the State standard on the part of the employer and allowing a machine that's been modified to the point that it's dangerous probably constitutes that kind of negligence in many cases. I mean you got lots of standards in different States.

Mr. POPPER. Right. And the fact of the matter is I'd be curious in seeing any case law which suggests that where there is significant product modification, a manufacturer of a product, who produced the product as originally constructed in good order and followed regular due care regimes was, in fact, liable. As you know, if there is significant modification of a product, the manufacturer doesn't bear the same——

Mr. CANNON. But we're not talking about the manufacturer. We're talking about the company that buys the machine and operates it.

Mr. POPPER. Precisely. Precisely.

Mr. CANNON. That company, but I think what we've had testimony of is that juries do strange things here, and my personal experience in this regard is fairly significant and juries, in fact, do—they want to take care of the individual who has the problem. If you happen to get in front of one, there's probably going to be conversation one way or another.

So it isn't a question here of the larger societal question. Moving away from the—what you're just describing is not liability on the part of the manufacturer of the equipment and toward responsi-

bility on the guy who really can actually control the safety of the workplace environment, which the employer who bought the equipment.

Mr. POPPER. Right. And in the event that you have that scenario and the employer bears liability—that's what I was testifying about before—that creates a tension that's really I don't think particularly healthy, and I do think the manufacturer ought to stay in there. And if it is a product that has a useful life that goes well beyond this 12-year period, it's inconceivable to me that you would eliminate that regime of responsibility. Who benefits in this? Certainly not the worker. Certainly not the employer. The only one who benefits in this is the manufacturer, who's going to shore up profitability and to me it's like the constitutionality question, frankly.

You know I gave you a whole series of cases that question the constitutionality of statutes of repose, but it's a policy question. This is a policy question as well. And it seems to me that if the policy that you're really concerned about is vitality of the American marketplace, then you want to optimize the incentives on the producers of durable goods to be responsible for those goods, particularly when they malfunction. And this legislation frankly is inexcusable in that it would allow for a manufacturer who's fraudulently concealed a deficit in the machine to be immunized after 12 years. You don't even do that with GARA.

Mr. CANNON. Well, but I think the point is that within the 12 years that defect that may you've suggested be concealed is probably going to become apparent or if it's not concealed, then there's just a better design possibly out there in the mind of God and somehow we infer some part of that better design.

It seems to me the failure of your logic is that somehow we're going to stop the innovation or stop the promulgation of those kinds of designs that make it more safe. And it seems to me that the logic on the other side of this equation, which is employer wanting safe employees, bidding up the cost of is employment by increasing the safety for his employees, wanting better equipment, having the ultimate liability if he messes with the equipment and leaving the equipment manufacturer out of the cycle, that seems to me to be a virtuous cycle that increases the rate at which we're progressing toward fewer deaths and fewer injuries in the workplace. And that's why I think this is really actually a very good piece of legislation.

I want to thank the panel for having been here today. We appreciate your comments, your input. It's been very valuable. Do you have more questions?

With that, we stand adjourned. Thank you.

[Whereupon, at 2:38 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

STATEMENT OF MARK J. NUZZACO, GOVERNMENT AFFAIRS DIRECTOR, NPES, THE ASSOCIATION FOR SUPPLIERS OF PRINTING AND CONVERTING TECHNOLOGIES ON H.R. 3509

Statement by

Mark J. Nuzzaco
Government Affairs Director

NPES The Association for Suppliers of Printing, Publishing and Converting Technologies

ON H.R. 3509

Workplace Goods Job Growth and Competitiveness Act of 2005

For the Record of the Hearing of
Commercial and Administrative Law Subcommittee
Committee on the Judiciary
United States House of Representatives

March 14, 2006

Submitted March 29, 2006

NPES is a U.S. trade association whose member companies are engaged in the manufacture and distribution of machinery, software and supplies used in all phases of the printing, publishing and converting industries.

The Association for Suppliers of
Printing, Publishing and Converting Technologies

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Summary of Statement

On H.R. 3509

Workplace Goods Job Growth and Competitiveness Act of 2005

I. NPES and the Graphic Communications Industry

II. Public Policy Basis for Statutes of Repose

III. The Concepts Embodied in H.R. 3509 are the Product of Decades of Refining Analysis and Debate within Congress and Between Congress and the Executive Branch

IV. There is a Compelling Case for Federal Legislation in the Area of Liability for Injuries Related to Durable Goods in the Workplace

V. H.R. 3509 Mitigates the Problematic Interface of Workers' Compensation Statutes and Product Liability Tort Law

VI. H. R. 3509 Would Leave No Injured Worker without a Remedy

VII. Durable Goods Manufactures will have Strong Legal and Economic Incentives to Produce Safe Products Under H. R. 3509's Statute of Repose

VIII. H. R. 3509 is Good Public Policy and should be Law

I. NPES and the Graphic Communications Industry

NPES The Association for Suppliers of Printing, Publishing and Converting Technologies is a U.S. trade association whose over 400 member companies are engaged in the manufacture and importing for sale or distribution of machinery, equipment, systems, software and supplies used for design, assembly, production and distribution of information by companies in the graphic creation, design, prepress, package printing/converting, finishing and publishing industries.

NPES member companies provide the technological foundation for one of the largest industries in the United States – graphic communications. Four hundred NPES members provide the essential equipment and supplies for an industry that includes more than 65,000 firms, employs more than 1.5 million people. Over the years, the Graphic Communications industry has ranked in the top 10 manufacturing employers in the United States

In response to unfair and burdensome liability claims for product related injuries, twelve states have statutes of repose for products; seven other states have statutes that refer to a presumption and/or concepts like "useful safe life" that require litigation (Exhibit A).

A statute of repose is a statute that specifies that upon the expiration of a designated or ascertainable time period measured from a fixed point such as the date of manufacture, sale, or delivery of a product, an injured party can no longer bring a product liability suit. Some of the public policy reasons supporting statutes of repose include: 1) that a product's safe use for a substantial period of time is an indication that the product was not defective at the time of manufacture, sale, or delivery, 2) that there is a greater chance that external causes beyond the manufacturer's control, such as misuse or alteration, contributed to injuries occurring many years after the initial purchase, 3) that the passing of time increases the manufacturer's and/or seller's difficulty in constructing a valid defense because much of the evidence as to defect,

damages , defenses, and the like may be lost, destroyed or otherwise beyond reconstruction, and 4) that a jury may inappropriately apply a more modern standard reflecting technological developments when assessing liability (See 30 A.L.R. 5th 1). NPES concurs that these grounds are valid reasons to uphold a statue of repose.

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III. The Concepts Embodied in H.R. 3509 are the Product of Decades of Refining Analysis and Debate within Congress and Between Congress and the Executive Branch

NPES commends the leadership of Congressman Steve Chabot (R-OH-1) and his cosponsors Congressmen Henry Hyde (R-IL-6) and Howard Coble (R-NC-6) for introducing H. R. 3509, the *Workplace Goods Job Growth and Competitiveness Act of 2005*. H. R. 3509 would provide a national statute of repose for workplace durable goods used in a trade or business, which would bar liability claims for death or personal injury from being filed against the manufacturer or seller of a workplace durable good more than twelve years after it was delivered to its first purchaser or lessee. Application of the bar on claims would be limited to workers who have received or are eligible to receive workers' compensation, and whose injury does not involve a toxic harm.

The concepts embodied in this legislation are not new. Indeed, provisions similar to those of H.R. 3509 have been found in numerous omnibus product liability proposals dating back to the mid-1980s. The fact that these bills did not become law was largely due to other more contentious elements in those bills, not the statute of repose provisions. But for disagreements over those other elements, a statute of repose for workplace durable goods might well be law today.

Congressman Chabot's current legislation, H.R. 3509, is similar to that which he introduced in the 106th and 107th congresses. Unlike earlier omnibus bills, it focuses on the single-issue of manufacturer and seller liability for injuries that occur on overage durable goods in the workplace, where workers' compensation is available. The provisions of H.R. 3509 are the product of extensive bipartisan negotiations among members of congress, and between congress and the executive branch over the past two decades. With this long history in mind, it is now time for congress to enact H.R. 3509 – which is a narrowly targeted, carefully balanced, and well crafted response to a

particularly serious continuing burden shouldered by domestic manufacturers of workplace durable goods. Enactment of this legislation would not be unprecedented. Quite the contrary, it would be very similar to the *General Aviation Revitalization Act of 1994*. That legislation was designed to meet a very specific need of a threatened general aviation industry twelve years ago; H.R. 3509 is no less needed by an increasingly threatened domestic workplace durable goods industry today.

IV. There is a Compelling Case for Federal Legislation in the Area of Liability for Injuries Related to Durable Goods in the Workplace

The United States Constitution gives the U.S. Congress power to legislate over matters of interstate commerce. Congress' authority under the Commerce Clause of the Constitution is invoked in this instance because manufacturers of capital goods sell their products nationwide. Moreover, once these products are introduced into the stream of commerce they can be, and often are, resold in other states, leaving the original manufacturer exposed to a patchwork of liability laws. Claimants in a suit can, and often do, take advantage of this patchwork by forum shopping for jurisdictions with the most favorable law, thus making it difficult, if not impossible for individual states to effectively regulate their own marketplaces, and dispelling the possibility of nationwide uniformity of treatment. Therefore, a federal statute of repose for workplace durable goods is needed in order to standardize this patchwork and create a stable business environment where the treatment of plaintiffs and defendants in overage product cases is the same in California as it is in Maine. As noted above, there is recent precedent supporting the use of this power in matters of product liability. Specifically, Congress has enacted the *General Aviation Revitalization Act of 1994*, which includes an 18-year statute of repose, and the 1998 Biomaterials Access Assurance Act.[1]

[1] Public Laws 103-298 and 105-230 respectively.

While some state supreme courts have held their state's statute of repose invalid under the terms of their state's constitutional provision of "access to courts", the U.S. Constitution has no such provision that would bar a federal statute of repose. Nor would a federal statute of repose violate due process or equal protection rights under the U.S. Constitution if it is rationally related to a legitimate governmental purpose, which we would argue H.R. 3509 is, as explained below.

V. H.R. 3509 Mitigates the Problematic Interface of Workers' Compensation Statutes and Product Liability Tort Law

There is a problem with the current interface of workers' compensation statutes and product liability tort law in the workplace. More specifically, there is clearly something wrong with a system that looks to a limited number of relatively small manufacturers of durable goods to underwrite liability costs for thousands of industrial workplaces, where there is the potential for job-related injuries occurring on industrial machinery. This is an especially inequitable situation in light of experience that shows that the vast majority of injuries suffered on overage workplace durable goods are not the result of product defects, but more typically are due to other factors beyond the control of product manufacturers or suppliers. These other factors often include unsafe acts and/or conditions over which manufacturers almost never have any control. Moreover, they usually have little or no knowledge of these circumstances until a product liability claim is filed against them. Indeed, many times the manufacturer does not even know where the product is years after its original sale and subsequent re-sale. The case of *King v. Brandtjen & Kluge* (Exhibit B) is a good example of a typical case involving an over-aged workplace durable good: in this instance a printing press.

VI. H. R. 3509 Would Leave No Injured Worker without a Remedy

It cannot be emphasized too strongly that no injured worker would be left without a remedy if H.R. 3509 were to become the law throughout the United States. This is because the statute of repose in H. R. 3509 would apply only to claims for injuries occurring on durable goods where the claimant either has or is eligible to receive workers' compensation payments. Opponents of H.R. 3509 erroneously argue that the bill would return the state of the law back to the 19th Century, by shifting the financial burden of industrial injuries from business to workers. This is simply not the case.

H.R. 3509 will put into place a national statute of repose targeted at a narrow but important range of workplace injury cases. It will not repeal workers' compensation laws across the country. What it will do is greatly reduce the amount of disproportionately expensive and socially unproductive litigation, with little actual reduction in extra benefits to injured workers. It is good public policy based on common sense, and an understanding of the circumstances and nature of accidents involving overage equipment in the industrial workplace.

Apparently, opponents remain dissatisfied with the rationale for H.R. 3509's targeted statute of repose, criticizing workers' compensation payments as inadequate to make injured workers whole. Regardless of the validity or invalidity of this assessment of workers' compensation payments, it seems irrelevant to our support for H.R. 3509. The trade-off of potentially greater judgments or settlements in tort cases, in exchange for certain compensation for workplace injuries is at the heart of the workers' compensation compact between employers and their employees. Regrettably, manufacturers/suppliers of workplace durable goods are not parties to this compact, but have been added to the compensation equation by expansive judicial theories of liability. Whatever the alleged need for this expansion, it has been done at the expense of adding a potentially ruinous

and not-bargained-for burden on industrial machinery manufacturers, in many cases years after their products were initially sold into the stream of commerce.

Opponents of H.R. 3509 have also leveled the charge that the bill would unfairly single out workers and take away rights. They make this assertion by postulating the situation where both a worker and a bystander are injured by the same overage product in the workplace. They correctly judge that under H.R. 3509's statute of repose the injured bystander could sue the product manufacturer, and the management of the workplace we might add although opponents overlook this point, whereas the worker could not, having to settle for a workers' compensation payment. Are the potential awards to these plaintiffs possibly different? Perhaps they are. Is that possible difference unfair or unjust? We think not.

To change the situation a little, even under current law without a statute of repose, in the case of non-product-related injuries suffered by workers and bystanders in the same workplace remedies could be different. Whereas a bystander could possibly receive a settlement or judgment in a tort case, a worker is again "left with only" a workers' compensation award. Again, there is a difference in outcome, but we do not think it unjustified. Rather than pointing out the legal infirmity of H.R. 3509's statute of repose, these examples serve to once again underscore the basic mutually agreed upon trade-off at the heart of the workers' compensation compact. Employers and their workers are parties to that compact: bystanders and manufacturers are not. This is the reason for the bargained-for difference in outcomes in the various situations, not the inequity of the statute of repose.

Finally, opponents have criticized earlier bills similar to H.R. 3509 in the case of two workers injured by the same product, one before and one after the tolling of the

statute of repose, for unfairly shifting the risk of defective products to workers. But what is fair about a system that saddles manufacturers with potentially endless liability in the name of rectifying alleged inadequacies in the workers' compensation bargain between employers and employees? What about non-product-related workplace injuries? Are they inadequately compensated for by workers compensation as well? If so, what do H.R. 3509's critics suggest in those cases? We are tempted to refer to the old adage that two wrongs don't make a right. Shoring up the alleged weakness in the workers' compensation system by saddling manufacturers/suppliers of workplace durable goods with unfair and not-bargained-for liability is inherently inequitable and ultimately counterproductive to our economy.

VII. Durable Goods Manufactures will have Strong Legal and Economic Incentives to Produce Safe Products Under H. R. 3509's Statute of Repose

Opponents of H.R. 3509 also argue that "by shifting the cost of injury to workers and employers, this bill removes the legal and financial incentive that the manufacturers of durable workplace machinery currently have to ensure that their products remain safe throughout their useful lives." We find this to be a preposterous assertion that overlooks the fact that even under H.R. 3509's statute of repose, manufactures will continue to be fully subject to a finding of liability for injuries incurred on their products for the first twelve years of use in the workplace.

Far from "forcing the workers' compensation system to subsidize the costs that should be charged to the manufacturers of older defective equipment," H.R. 3509 would continue to keep manufacturers in the compensation equation for the first twelve years of their products' useful life. In many cases this will be well beyond a product's economic life, meaning that it will be technologically obsolete well before the expiration of the repose period. Moreover, a common practice is for the original purchaser to resell the

used equipment, without the knowledge of the manufacturer, before the statute of repose is tolled. Therefore, durable good manufacturers will continue to have the same incentives they have under current law to design, build and market safe equipment, knowing that they could be found liable for product defects for twelve years after selling their product into the stream of commerce.

With this potential for liability in mind, what logic would persuade a manufacturer to gamble its company's reputation and financial solvency by not producing a safe product in the first place, with the hope of escaping liability in year thirteen of its product's useful life? And even if a product was found to be "defective" in year thirteen, experience shows that liability should not be measured against the technological advances of the intervening thirteen years if a product was state-of-the-art when first put into commerce.

VIII. H. R. 3509 is Good Public Policy and should be Law

H.R. 3509 is a narrow bill that is the result of years of negotiation and compromise. It attempts to accomplish a targeted and important purpose. It would not unduly infringe upon states' rights, as Congress has full power and authority to regulate interstate commerce. Neither would it violate due process or equal protection principles, because it is reasonably related to a legitimate governmental purpose. And, it would not leave injured workers without financial remedy, because workers' compensation would always be available to injured workers. It would, however, prevent frivolous lawsuits that injure the competitiveness of American manufacturers of workplace durable goods.

H.R. 3509 represents the limit of what can be enacted into law at this time. It would be the next incremental step in addressing areas of inequity and inefficiency in the

current law. For this reason we urge you to act now and make it law in the 109th Congress.

NPES thanks the Committee for its interest in this important subject, and we stand ready to respond to inquiries and/or provide additional information.

# # #

EXHIBIT A

STATE STATUTES OF REPOSE FOR PRODUCTS
June 2005

Compiled by NPES The Association for Suppliers of Printing, Publishing and Converting Technologies

Definitions:
[1]**Fixed Term** – refers to a products statute of repose of a specified duration.
[2] **Soft Statute** – refers to a presumption and/or concepts like "Useful safe life" that require litigation
[3]**Unconst**. – indicates that a state has had a products statute or repose held unconstitutional by the state's highest court
[4]**No Statute** – state has no products statute of repose
*Illinois – has a fixed statute of repose; it also had a more defendant-friendly statute held unconstitutional
+Florida - repealed its twelve-year statute of repose in 1986.
L- statute of repose limited to latent exposure to noxious medical agents
M – statute of repose limited to manufacturing equipmen: or workplace accidents

Fixed Term[1]

1. Colorado 7[M]
2. Connecticut 10[M]
3. Georgia 10
4. Illinois 10/12
5. Indiana 10
6. Iowa 15
7. Nebraska 10
8. North Carolina 6
9. Oregon 8
10. Tennessee 10
11. Texas 15[M]
12. Vermont 20[L]

Soft Statute[2]

1. Idaho
2. Arkansas
3. Kansas
4. Kentucky
5. Michigan
6. Minnesota
7. Washington

Unconst.[3]

1. Arizona
2. Illinois *
3. New Hampshire
4. North Dakota
5. Ohio
6. Rhode Island
7. Utah

No Statute[4]

1. Alabama
2. Alaska
3. California
4. Delaware
5. District of Columbia
6. Florida+
7. Hawaii
8. Louisiana
9. Maine
10. Maryland
11. Massachu-setts
12. Mississippi
13. Missouri
14. Montana
15. Nevada
16. New Jersey
17. New Mexico
18. New York
19. Oklahoma
20. Pennsyl-vania
21. South Carolina
22. South Dakota
23. Virginia
24. West Virginia
25. Wisconsin
26. Wyoming

EXHIBIT B

King v. Brandtjen & Kluge

Brandtjen & Kluge, Inc. has been manufacturing graphic arts equipment in the United States since 1919. Its current president is Hank Brandtjen, the fourth generation to manage the company. The total annual premium for the company's product liability insurance coverage is $92,164.00 for an annual aggregate limit of $3,000,000. In addition, Brandtjen & Kluge has a Self-Insured Retention (per claim) of $100,000.

In 1994, Kluge was sued by Colleen King, an employee of the Aakron Rule Company, for an injury she received while hand feeding a Kluge press. The press was manufactured and shipped by Kluge in 1950 to Dieville, Inc. in Seneca Falls, New York. In subsequent years a wood products company obtained this press. Aakron Rule then bought out this company and the Kluge press was moved to Akron, New York.

Over the years, Kluge lost touch of who owned the press. The press was being serviced but at deposition Kluge was unable to ascertain the identity of the service company. In 1979, Kluge made the decision to not sell parts to pre-1960 presses. Others have since capitalized on this business. At the time of the accident, the press had been greatly modified. The entire automatic feeder had been removed, parts from a competitive machine had been remanufactured and installed, the automatic throw-off impression mechanism had been modified to be hand operated and the gripper system had been removed to allow hand feeding. In addition, the press was being hand fed stock beyond the original size limitations.

King claimed she was reaching into the press without stopping it to retrieve a pile of printed stock she had knocked over into the press. She severely injured her left hand and has limited use of it as a result. The press was being operated with knowledge of the owner in violation of New York State law and federal OSHA regulations. King had also been warned of the dangers.

In 1986, Kluge sent certified letters to all known press owners warning that older model presses did not meet current safety standards and that a press should never be hand-fed. Additional letters were sent in 1988 to every customer the company had corresponded with since 1960. In 1988, Kluge also placed ads in the major trade magazines conveying similar warnings. Kluge continued to mail letters to press owners as it became aware of them. In 2002, Kluge continues to mail letters to all known used equipment dealers and repair people. Regrettably, and notwithstanding Kluge's best efforts, none of the above mentioned mailings reached the plaintiff's employer, Aakron Rule, because Kluge was unaware of the location of the re-sold press involved in the injury.

Kluge eroded the $100,000 SIR in defending this case. In addition, it logged 350 hours of time to support its legal representation. The final settlement was for $1,000,000: $650,000 to Kluge and the balance to Aakron Rule.

There has not been an injury on a press built since 1986, the year Kluge guarded the presses to meet the then new safety standards. In addition, the company has not had an injury on a press made post 1960 that has been retrofitted with guards. Kluge has won all cases brought to trial. This case was settled by the insurance company before trial.

This year the cost of insurance is such that Brandtjen & Kluge is being forced to drop its product liability coverage. A suit will mean the end of a company that has been in business for over 83 years.