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SYMPOSIUM: ASBESTOS LITIGATION

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CONGRESS SHOULD ACT TO RESOLVE THE NATIONAL ASBESTOS CRISIS: THE BASIS IN LAW AND PUBLIC POLICY FOR MEANINGFUL PROGRESS

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State courts have traditionally been the primary source of American tort law. Unlike commercial law, securities law, tax, criminal law, and other legal fields that are statutory or regulatory in nature, tort law has mostly evolved through the state courts by the "common law" process.[1] Nevertheless, judicial lawmaking is confined to individual disputes concerning discrete issues and parties.[2] The

1. *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS 1 (10th ed. 2000).

2. *See* Berger v. Sup. Ct. of Ohio, 598 F. Supp. 69, 76 (S.D. Ohio 1984), *aff'd*,

information that judges receive in the course of litigation is from two advocates who present information in the best interests of their particular client. This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the United States Constitution to give the judiciary jurisdiction to decide "cases and controversies."[3] This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to broad scale information, and judicial changes in tort law apply retroactively rather than prospectively.

In contrast to judicial lawmaking, Congress can gather information from a variety of sources, which is why the responsibility for formulating public policy issues has traditionally and properly been vested in the legislative branch. Through the hearing process, Congress has access to a wealth of information, including the ability to receive testimony from persons and groups representing a multiplicity of perspectives. This process allows Congress to engage in broad policy deliberations and to carefully formulate public policy. This is important in the context of liability law, because the impacts may extend nationwide and go far beyond the litigants in a particular case. Furthermore, legislative enactments give the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly.

Federal civil justice reform thus invariably requires a balancing of two sometimes competing interrests—basic principles of federalism and respect for states' rights versus the need for predictable, national rules that promote interstate commerce. The fact that tort law traditionally has been the province of the states does not mean that it should be off-limits to any reform at the federal level. Federal legislation can provide an effective means of addressing liability problems that are rooted in interstate commerce and are national in scope. Indeed, there have been many situations—as this article will demonstrate—where federal legislation has been enacted to address national liability problems.

When is federal tort or civil justice reform legislation appropriate? First, we believe that there must be a serious problem that requires the attention of national policymakers. Second, we believe that federal legislation should be narrowly tailored to limit its intrusion upon matters that otherwise would be subject to state

861 F.2d 719 (6th Cir. 1988) (explaining that "[a] judge acts on individual cases, not broad programs.").

3. U.S. CONST. art. III, § 2, cl. 1.

authority. Third, the federal solution must be superior to other efforts to solve the problem. Fourth, the federal solution should be in the public interest, and not simply reflect a "bailout" for an alleged wrongdoer. The article provides examples where these criteria have been met and federal legislation has been successful. Finally, the article will show how the criteria support federal action to address the current "asbestos-litigation crisis."[4]

I. EXAMPLES OF SUCCESSFUL FEDERAL ACTION

Congress has utilized its power under the Commerce Clause to enact laws preempting state tort law for almost a century.[5] These laws, discussed below, chronicle Congress's active, longstanding participation in setting tort liability rules to address specific, national liability problems.

A. Early Federal Laws Addressing Liability Law

1. The Limitation of Vessel Owner's Liability Act

The Limitation of Vessel Owner's Liability Act ("LVLA")[6] was one of the first major federal tort policy statutes. Congress enacted the LVLA in 1851 to promote commercial shipping by limiting the liability of ship owners for loss or damage to cargo. The Act exempted ship owners from liability for any loss or damage to goods on board ship resulting from fire, unless the fire was caused by the design or neglect of a ship owner. In addition, the LVLA provided ship owners with limited liability for any loss or destruction of goods on board ship. The United States Supreme Court upheld the constitutionality of the LVLA in *Providence & New York Steamship Co. v. Hill Manufacturing Co.*[7]

4. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997).

5. *See* Victor E. Schwartz, Mark A. Behrens, & Leavy Mathews III, *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEGIS. 269, 274 (1999). Maritime law is generally beyond the scope of this article, but that is another field in which Congress has been active in setting tort policy rules. *See generally* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY Ch. VI (2d ed. 1975) (discussing how the Supreme Court rewrote laws which affected how harbor and crew members recovered for injuries).

6. 46 U.S.C. app. §§ 181–196 (2000).

7. 109 U.S. 578, 590–94 (1883).

2. *Federal Employers' Liability Act*

Early in the last century, Congress enacted the Federal Employers' Liability Act of 1908 ("FELA"),[8] a federal statute that established rules governing personal injury and wrongful death actions brought by railroad workers and their families against railroads engaged in interstate commerce. FELA is a "tort substitute" for workers' compensation in the railroad field. FELA, among other things: (1) abolished the fellow-servant rule, a common law rule which shielded employers from liability where one employee negligently caused harm to a another; (2) abrogated the contributory negligence defense and replaced it with a pure comparative fault rule where the employer's violation of a safety statute contributed to the employee's injury; (3) abrogated the assumption of risk defense where the employer's violation of a safety statute contributed to the employee's injury; (4) voided any contract or device that would enable any common carrier to exempt itself from liability under the Act; and (5) established a two-year statute of limitations for actions governed by the Act. Federal and state courts were given concurrent jurisdiction to decide FELA cases.[9] The FELA statute was upheld by the United States Supreme Court in *Mondou v. New York, New Haven & Hartford Railroad Co.* (commonly known as the "*Second Employers' Liability Cases*").[10]

3. *The Longshoremen's and Harbor Workers' Compensation Act*

In 1927, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"),[11] a FELA-like statute that provides fixed awards to employees or their dependents in cases of employment-related injuries or deaths occurring upon the navigable waters of the United States.[12] Congress enacted the LHWCA to "provide injured employees with more immediate and less expensive relief than that available in a common law tort action,"[13] and to provide employers with liability that was "limited and

8. 45 U.S.C. §§ 51–69 (2000). A 1906 version of FELA was declared unconstitutional in *The Employers' Liability Cases*, 207 U.S. 463, 499 (1908).

9. The Jones Act, a FELA-like statute that permits seamen injured "in the course of his employment" to "maintain an action for damages at law," 46 U.S.C. § 688 (2000), also has been interpreted to provide federal and state courts with concurrent jurisdiction. *See* Engel v. Davenport, 271 U.S. 33, 37 (1926).

10. 223 U.S. 1, 53 (1912).

11. 33 U.S.C. §§ 901–950 (2000).

12. *See* Kane v. United States, 43 F.3d 1446, 1449 (Fed. Cir. 1994).

13. Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046, 1051 (5th Cir. 1983).

determinative."[14] The LHWCA was upheld by the United States Supreme Court in *Crowell v. Benson.*[15]

4. The Federal Drivers Act

The Federal Drivers Act ("Drivers Act")[16] was enacted in 1961 to relieve government drivers from the burden of personal liability for claims arising from vehicular accidents occurring during their course of employment. Unlike many employers, the United States neither maintained liability insurance to protect its employees nor assisted them in paying for their own insurance against on-the-job accidents. "[M]oved by the fact that automobile accident insurance placed such a heavy financial burden on government drivers that it was adversely affecting morale and making it difficult for the government to attract competent drivers into its employ,"[17] Congress decided to immunize individual federal drivers from tort liability arising out of accidents caused by their negligence. In lieu thereof, the Drivers Act limited persons injured by federal drivers to statutory remedies against the United States.[18] The Drivers Act has been declared constitutional.[19]

5. Black Lung Benefits Act of 1972

In 1972, Congress amended Title IV of the Federal Coal Mine Health and Safety Act of 1969 to add the Black Lung Benefits Act.[20] The Black Lung benefits provisions established a compensation scheme for coal miners allegedly suffering from "black lung disease" (pneumoconiosis) and the survivors of miners who died from or were "totally disabled" by the disease. Under the Black Lung program, a claimant seeking benefits files a claim with the District Director of the Department of Labor's Office of Workers' Compensation Benefits. The District Director investigates the claim and determines whether the claimant is eligible for benefits. If the claimant is so eligible, and

14. Smither & Co., Inc. v. Coles, 242 F.2d 220, 222 (D.C. Cir. 1957) (citing Bradford Elec. Co. v. Clapper, 286 U.S. 145, 159 (1932)).

15. 285 U.S. 22, 65 (1932).

16. 28 U.S.C. § 2679(b)–(e) (2000).

17. Carr v. United States, 422 F.2d 1007, 1012 (4th Cir. 1970).

18. *See* 28 U.S.C. § 2679(b), (d).

19. *See* Thomason v. Sanchez, 539 F.2d 955, 958 (3d Cir. 1976); *Carr*, 422 F.2d at 1010–11; Nistendirk v. McGee, 225 F. Supp. 881, 882 (W.D. Mo. 1963).

20. *See* Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665, 667 & n.4 (1989) (discussing the Black Lung Benefits Act as "the only single industry, single disease compensation law ever attempted" at the time of its passage).

no employer can be held responsible for the claimant's illness, the claimant is paid from a Black Lung Disability Trust Fund, derived from an excise tax paid by coal mine operators based on the tonnage and price of coal sold. The scheme was upheld by the United States Supreme Court in *Usery v. Turner Elkhorn Mining Co.*[21]

6. *The Price-Anderson Act*

The Price-Anderson Act,[22] as amended in 1975, limited the aggregate liability for a single "nuclear incident" to $560 million to be paid from contributions from nuclear power plant operators, private insurance, and the Federal Government.[23] In addition, the amended Act required operators to waive certain legal defenses in the event of a substantial nuclear incident.[24] The Act was critical to the development of the "private nuclear power industry" in the United States.[25] Congress appreciated that, even though the risk of a major nuclear accident was extremely remote, the "potential liability dwarfed the ability of the industry and private insurance companies to absorb the risk."[26] Without reasonable and defined limits on liability, there would probably be no nuclear power industry in the United States.[27] The Act was declared constitutional by the United States Supreme Court in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*[28]

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21. 428 U.S. 1, 14 (1976).

22. 42 U.S.C. § 2210 (2000).

23. *See* 42 U.S.C. § 2210(a)–(g); *see also* 42 U.S.C. § 2214(q) (2000) (defining a "nuclear incident" as "any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material . . . .").

24. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 65 n.5 (1978) ("The defenses of negligence, contributory negligence, charitable or governmental immunity and assumption of the risk are all waived in the event of an extraordinary nuclear occurrence . . . .").

25. *Id.* at 64.

26. *Id.*

27. The 1988 Amendments to the Price-Anderson Act created a federal cause of action for nuclear accident claims and provided that public liability actions filed in state courts were retroactively subject to removal. 42 U.S.C. §§ 2014(w), 2210(n)(2). Several courts have held that retroactive application of the 1988 Price-Anderson Act Amendments did not violate due process. *See In re* TMI, 89 F.3d 1106, 1113 (3d Cir. 1996); *In re* TMI Litig. Cases Consol. II, 940 F.2d 832, 861 (3d Cir. 1991); O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1102 (7th Cir. 1994).

28. 438 U.S. 59, 84 (1978).

7. *Swine Flu Act*

The National Swine Flu Immunization Program of 1976 ("Swine Flu Act")[29] was enacted to deal with the collapse of the commercial liability insurance market for vaccine manufacturers and distributors following judicial decisions holding polio vaccine manufacturers strictly liable for vaccine-related injuries.[30] In addition, Congress was concerned about the devastating economic impact that would occur due to lost wages if the population were not inoculated before the start of the flu season.[31] Modeled after the Drivers Act, the Swine Flu Act barred common law tort actions against swine flu vaccine manufacturers and providers and created a Federal Tort Claims Act remedy against the United States as the exclusive means of recovery for swine flu-related injuries.[32] Courts have upheld the Swine Flu Act.[33]

8. *Atomic Weapons Testing Liability Act*

In 1985, Congress passed the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act (known as the "Atomic Weapons Testing Liability Act") to address liability issues affecting the testing of nuclear weapons critical for the security of the United States.[34] The Act created a cause of action against the United States for radiation injuries arising from federal atomic weapons testing programs, retroactively abolished private tort actions against government contractors for such injuries, and made the Federal Tort Claims Act the sole remedy for those injuries.[35] The Act has passed constitutional muster.[36]

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29. 42 U.S.C. § 247b(j)–(l) (1976) (repealed 1978); *see* Weldon v. United States, 70 F.3d 1, 1 n.1 (2d Cir. 1995).

30. *See* Davis v. Wyeth Labs., Inc., 399 F.2d 121, 130 (9th Cir. 1968); Reyes v. Wyeth Labs., Inc., 498 F.2d 1264, 1295 (5th Cir. 1974).

31. Sparks v. Wyeth Labs., Inc., 431 F. Supp. 411, 415 (W.D. Okla. 1977).

32. 42 U.S.C. § 247b(k).

33. *See* DiPappa v. United States, 687 F.2d 14, 19 (3d Cir. 1982); Ducharme v. Merrill-Nat'l Labs., 574 F.2d 1307, 1311 (5th Cir. 1978); Jones v. Wyeth Labs., Inc., 457 F. Supp. 35, 38 (W.D. Ark. 1978), *aff'd*, 583 F.2d 1070 (8th Cir. 1978); *Sparks*, 431 F. Supp. at 418; Wolfe v. Merrill Nat'l Labs., Inc., 433 F. Supp. 231, 238 (M.D. Tenn. 1977).

34. 42 U.S.C. § 2212 (1988) (repealed 1990).

35. *See id.*; Hammond v. United States, 786 F.2d 8, 9 (1st Cir. 1986).

36. *In re* Consol. United States Atmospheric Testing Litig., 820 F.2d 982, 990–92 (9th Cir. 1987); *Hammond*, 786 F.2d at 13–16.

9. National Childhood Vaccine Injury Act of 1986

One year later, Congress enacted the National Childhood Vaccine Injury Act of 1986[37] to address manufacturers' liability concerns relating to the distribution of vaccines and to minimize the public health dangers posed by low vaccine supplies.[38] The Act created a no-fault compensation program for childhood vaccine-injury victims to be funded by an excise tax on each dose of vaccine. As a predicate to receiving compensation under the Act, injured persons were required to file a petition in the United States Court of Federal Claims demonstrating, among other things, that he or she "incurred unreimbursable expenses . . . in an amount greater than $1,000."[39] The law was upheld in *Black v. Secretary of Health and Human Services.*[40]

10. Federal Employees Liability Reform and Tort Compensation Act

The Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act") amended the Federal Tort Claims Act to provide for the substitution of the United States as a defendant in any action where one of its employees is sued for damages as a result of an alleged common law tort committed by the employee within the scope of his or her employment.[41] Congress enacted the Westfall Act to respond to the United States Supreme Court's decision in *Westfall v. Erwin,*[42] which limited a federal official's absolute immunity from tort claims to situations where the official's actions were "within the outer perimeter of an official's duties and . . . discretionary in nature."[43] Congress saw the *Westfall* decision as an erosion of the common law tort immunity formerly available to federal employees. The Westfall Act has been declared constitutional.[44]

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37. 42 U.S.C. §§ 300aa-1 to 300aa-34 (2000).

38. Victor E. Schwartz & Liberty Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future*, 48 OHIO ST. L.J. 387, 394 (1987).

39. 42 U.S.C. § 300aa-11(c)(1)(D)(i) (amended 1998).

40. 93 F.3d 781, 787 (Fed. Cir. 1996).

41. 28 U.S.C. § 2679(d)(3) (2000).

42. 484 U.S. 292 (1988).

43. *Id.* at 300.

44. *See* Salmon v. Schwarz, 948 F.2d 1131, 1142 (10th Cir. 1991); Sowell v. Am. Cyanamid Co., 888 F.2d 802, 805 (11th Cir. 1989); Connell v. United States, 737 F. Supp. 61, 64 (S.D. Iowa 1990).

B. Recent Laws Setting National Tort Policy Rules

More recently, Congress has shown an even greater willingness to tackle national liability issues through federal legislation. Below we discuss some of the more significant major congressional enactments in this area and summarize others.

1. The General Aviation Revitalization Act of 1994

The General Aviation Revitalization Act of 1994 ("GARA")[45] created an eighteen-year statute of repose for manufacturers of general aviation aircraft (i.e., aircraft with less than twenty seats that are not involved in scheduled passenger-carrying operations) and their component parts suppliers.[46] GARA addressed a serious decline in the manufacture and sale of general aviation aircraft.[47] This industry's decline had been caused, in part, by an extraordinary increase in the cost of liability insurance.[48] Liability costs for the industry increased from $24 million in 1978 to more than $200 million per year in the years preceding GARA's enactment despite the fact that the industry's safety record was improving.[49] The heart of the problem was that manufacturers were being sued for tragic incidents involving planes that were decades old.

It was clear that federal action was necessary for a number of reasons. First, many pilots were unable to purchase new planes due to the cost of "long-tail" liability being factored into the cost of general aviation aircraft. Pilots wanted to be able to buy newer planes rather than be forced to fly older, more affordable aircraft. Second, federal action was needed to restore and create jobs. Between 1978 and 1994 when GARA was passed, general aviation manufacturers lost 20,000

45. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101).

46. *Id.* at §§ 2(c)–(d), 3(3), 108 Stat. 1553. GARA did not provide a new basis for federal court jurisdiction. Cases that would have been decided by a state court before GARA's August 1994 effective date remain in state court today, subject to the federal limit on tort liability. GARA also does not preempt state statutes of repose that may be more restrictive to claimants than GARA's 18-year limit. *See generally* Victor E. Schwartz & Leah Lorber, *The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry*, 67 J. AIR L. & COM. 1269 (2002) (discussing the background and constitutionality of GARA) [hereinafter Schwartz & Lorber]; David Moffitt, Note, *The Implications of Tort Reform For General Aviation: The General Aviation Revitalization Act of 1994*, 1 SYRACUSE J. LEGIS. & POL'Y 215 (1995) (discussing background and effects of GARA).

47. H.R. REP. NO. 103-525, pt. 1, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638, 1639.

48. *Id.*

49. *Id.*

jobs and another 80,000 jobs in related fields were lost.[50] Safety innovation in the industry was stifled. Finally, the federal government, through the Federal Aviation Administration, had already established extensive rules regulating the aviation industry. Liability was one of the only areas of aviation that had not been addressed by the Federal Government.[51]

The Association of Trial Lawyers of America ("ATLA") and Ralph Nader vigorously opposed GARA.[52] They argued that the threat of litigation encouraged safety and that planes would be less safe if Congress limited the liability of aircraft manufacturers and their parts suppliers.[53] GARA was enacted over their objections.

Enough time has passed to conclude that GARA has been a success and that its goals could not have been accomplished by state action alone. A March 1997 hearing by the Consumer Affairs Subcommittee of the Senate Commerce Committee explored GARA's effects.[54] John Moore, Senior Vice President of Human Resources for Cessna Aircraft Company, testified that Cessna withdrew from the single engine aircraft market in 1986.[55] As a result of GARA, Cessna is back in the single engine aircraft business.[56] At the time of the Subcommittee's hearing, Cessna's small aircraft division had over 650 employees and had plans to double employment.[57] Paul Newman, Chief Financial Officer of the New Piper Aircraft Corporation, testified that GARA permitted New Piper to emerge from a Chapter 11 bankruptcy that had idled 1,000 workers.[58] John Yodice, General Counsel of the Aircraft Owners and Pilots Association ("AOPA"), testified that his members supported GARA, even though it limited their rights to sue.[59] AOPA members realized that they were paying an extraordinary amount for new aircraft due to manufacturers' "long tail" liability exposure for very old planes—aircraft that had flown safely for more than two decades.

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50. *Id.*
51. *See* H.R. REP. NO. 103-525, pt. 2, at 6 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638, 1647.
52. *See* Patrick J. Shea, Note, *Solving America's General Aviation Crisis: The Advantages of Federal Preemption Over Tort Reform,* 80 CORNELL L. REV. 747, 781–83 (1995).
53. *Id.* at 782.
54. *See* S. REP. NO. 105-32, at 41–42 (1997).
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

John Peterson of the Montgomery County Action Council of Coffeyville, Kansas—the home of Cessna's new small aircraft plant—testified that, prior to 1995, Montgomery County ranked ninety-eighth out of 105 Kansas counties in economic indicators.[60] The county's population was dropping, employment was on the decline, per capita income was down, and property values were depressed.[61] After GARA, new housing starts were up 260 percent, the value of new homes doubled, retail sales were up five percent, per capita income nearly doubled, and nearly 500 people per year were moving into the county.[62]

Moreover, contrary to ATLA's prediction, safety records have improved since GARA's enactment, both in terms of numbers of accidents and accidents per flight hours.[63] Over 25,000 new jobs have been created as a result of the law.[64] GARA has been declared constitutional.[65]

2. *The Biomaterials Access Assurance Act of 1998*

The Biomaterials Access Assurance Act of 1998[66] ("Biomaterials Act") was enacted in response to a liability crisis that threatened the availability of implantable medical devices such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints.[67] Suppliers of the raw materials and component parts used to make such devices had stopped supplying their products to medical device manufacturers because they were finding that the cost of responding to litigation far exceeded potential sales revenues—even though courts were not finding the suppliers liable for alleged defects in the finished devices.[68] As the House of Representatives Commerce Committee found, "[e]ven though in almost every case the biomaterials suppliers have been ultimately able to establish their lack of culpability, the legal fees and employee resources involved in obtaining a judgment or dismissal

60. *Id.* at 42.
61. *Id.*
62. *See id.*
63. *See* Schwartz & Lorber, *supra* note 46, at 1283–84.
64. *See id.* at 1282.
65. *See id.* at 1326–40 (discussing cases upholding GARA under various constitutional challenges).
66. Pub. L. No. 105-230, 112 Stat. 1519 (1998).
67. *See* H.R. REP. NO. 105-549, pt. 2, at 9 (1998).
68. *See id.*; *see also* Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support Its Enactment Now*, 64 TENN. L. REV. 595, 623 (1997).

usually outweigh any profits to be gained."[69] The Biomaterials Act allows suppliers of the raw materials and component parts used to make implantable medical devices to obtain dismissal, without extensive discovery or other legal costs, in certain tort suits in which plaintiffs allege harm from a finished medical implant.

In the case of the Biomaterials Act, the problem facing the biomaterials industry and consumers was clear, as was the need for congressional legislation. The shortage of raw materials threatened to lead to shortages of lifesaving and life-enhancing medical devices. For example, a 1997 study by Aronoff Associates revealed that at least seventy-five percent of the suppliers of biomaterials used to make medical implants had banned sales to U.S. implant manufacturers.[70] Congress also heard from consumers like nine-year old Tara Ranson of Phoenix, Arizona.[71] Tara had a shunt (a small plastic tube) implanted in her head to relieve a severe condition called hydrocephalus—sometimes called "water on the brain."[72] Without the Biomaterials Act, Tara may not have had access to this lifesaving device.[73] Phyllis Greenberger, Executive Director for the Society for the Advancement of Women's Health Research, told Congress that passage of the legislation was especially important to women "because they live longer than men, and as a result, suffer more from chronic disease, increasing their chances of needing a medical device, such as hip or joint replacements."[74]

The biomaterials supply crisis constituted an adverse issue inextricably linked with interstate commerce. Tort reform at the state level was unlikely to solve the problem because biomaterials suppliers were subject to litigation in any state.[75] As was true in the case of GARA, ATLA, Ralph Nader's Public Citizen, and other consumer groups fervently opposed the Act.[76]

3. *The Paul D. Coverdell Teacher Protection Act of 2001*

In the year 2000, not many people realized how severely teachers

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69. H.R. REP. NO. 105-549, pt. 2, at 11.
70. *See* S. REP. NO. 105-32, at 58 (1997).
71. *See id.* at 58–59.
72. *Id.* at 59.
73. *See id.*
74. *Id.*
75. *See* H.R. REP. NO. 105-549, pt. 2, at 11 (1998).
76. *See* Deirdre Shesgreen & Sam Loewenberg, *Can Tree-Cutters Be Tree-Huggers?*, LEGAL TIMES, Aug. 3, 1998, at 4 (discussing Public Citizen's opposition to the Biomaterials Access Assurance Act).

and principals of elementary and high schools had been adversely affected by the liability system. Nevertheless, a survey conducted by the American Tort Reform Association ("ATRA") indicated that elementary and high school principals were spending a substantial amount of time away from school responding to junk lawsuits.[77] The lawsuits were undermining their efforts to improve the education of their students. ATRA's survey also showed that principals and teachers were hamstrung in exercising reasonable discipline in the classroom because of excessive litigation. The survey found that twenty percent of principals who responded reported spending from five to ten hours per week in meetings and documenting events to avoid litigation.[78] Six percent of respondents spent ten to twenty hours per week on those tasks.[79] Fifty-seven percent of respondents reported that lawsuits affected school-related programs for students or teachers.[80]

ATRA's survey demonstrated that excessive litigation against educators was a costly, nationwide problem. Federal dollars targeted toward education were being diverted to deal with tort lawsuits. It was in the interests of the public to allow principals and teachers to focus on running their schools, educating their students, and to act to assure that reasonable discipline would not lead to frivolous litigation. It was clear to Congress that excessive litigation involving our nation's teachers was a real problem and needed federal action.

The Paul D. Coverdell Teacher Protection Act of 2001 (named after the late Democratic Senator from Georgia who had introduced the Act in a prior Congress) was included in the "No Child Left Behind" education bill signed by President George W. Bush on January 8, 2002.[81] The Teacher Protection Act amendment to the broader education reform bill had passed the House of Representatives by a wide margin and received ninety-eight votes in the Senate. The Act states that if teachers and principals follow school rules they will not be subject to liability.[82] It also states that tough standards should be applied before punitive damages are allowed, and that teachers and principals should be liable only for their "fair share"

77. *See* Press Release, Am. Tort Reform Ass'n, School Principal Survey Reveals Fear of Liability Limits Educational Opportunities for America's Children (Sept. 1, 1999), *available at* http://www.atra.org.

78. *Id.*

79. *Id.*

80. *Id.*

81. Pub. L. No. 107-110, § 2361, 115 Stat. 1425, 1667.

82. *Id.* § 2366, 115 Stat. at 1668–69.

of fault for a harm and not for injuries caused by others.[83]

4. Laws Relating to the Events of September 11th and Future Acts of Terrorism

a. The Airline Transportation Safety and System Stabilization Act of 2001

Shortly after the terrorist attacks on America on September 11, 2001, Congress enacted the Airline Transportation Safety and System Stabilization Act of 2001[84] to establish an administrative fund to provide a quick, no-fault recovery to persons injured or killed in the attacks.[85] The Act also provided airline carriers whose planes were involved in the attacks with civil liability protections from September 11th terrorism-related lawsuits. These protections included:

(1) Limiting the liability for all claims arising from the September 11th attacks to the limits of the carriers' liability insurance coverage;
(2) Creating an exclusive federal cause of action for damages arising out of the September 11th-related hijackings and air crashes, based on the substantive law of the state where the crashes occurred; and
(3) Vesting exclusive jurisdiction for all September 11th terrorism-related claims in the United States District Court for the Southern District of New York.[86]

b. The Aviation and Transportation Security Act of 2001

Next, Congress passed the Aviation and Transportation Security Act of 2001[87] to limit the liability of other potential parties to September 11th terrorism-related lawsuits, including aircraft manufacturers, airport sponsors, persons with a property interest in the World Trade Center, and the City of New York. These liability protections are not available to any person who was a knowing participant in any conspiracy to hijack an aircraft or commit a terrorist act.

83. *Id.* § 2366(c), 115 Stat. at 1669–70.
84. Pub. L. No. 107-42, 115 Stat. 230 (codified at 49 U.S.C. 40101).
85. *Id.* § 403, 115 Stat. at 237.
86. *Id.* § 408, 115 Stat. at 240–41.
87. Pub. L. No. 107-71, 115 Stat. 597.

c. The Homeland Security Act of 2002

The Homeland Security Act of 2002[88] extended to air security companies the same civil liability protections from terrorism-related lawsuits that were extended to the airline industry and others in the Air Transportation Safety and System Stabilization Act and the Aviation Transportation and Security Act. The Homeland Security Act also provided manufacturers, distributors, and other suppliers of certain anti-terrorism products with civil liability protections, including exclusive federal jurisdiction over personal injury and property damage claims against product sellers arising out of an act of terrorism, limits on liability and punitive damages, "fair share" apportionment of non-economic damages, and a rebuttable presumption that the government contractor defense applies to any claims against a covered defendant.[89] The liability provisions apply whether a public or private entity purchased the products.

There are a number of preliminary requirements that must be met before these liability protections are available. The Secretary of the Department of Homeland Security must certify products as "qualified anti-terrorism technologies" before a product supplier is eligible for the civil liability protections.[90] The product suppliers also must maintain a certain amount of insurance.[91] Moreover, the products must have been used against an act of terrorism, and the act of terrorism must have been designated as such by the Secretary.[92] The bill would not limit the liability of people who knowingly help terrorists or conspire to commit acts of terrorism.[93]

d. Terrorism Risk Insurance Act of 2002

To stabilize insurance markets after the September 11th events, Congress required insurance companies to make available coverage for insured losses in all property and casualty programs, despite any pre-existing exclusion for claims arising out of an act of terrorism, and to offer insurance for insured losses that are similar to coverage applicable to losses from other events.[94] In turn, Congress provided that the Federal Government would, in effect, act as an excess insurer

88. Pub. L. No. 107-296, § 1, 116 Stat. 2135.
89. *Id.* §§ 862–63, 1201–02, 1204, 116 Stat. at 2238–40, 2286–87.
90. *Id.* § 863(d)(2), 116 Stat. at 2240.
91. *Id.* § 864(a), 116 Stat. at 2241.
92. *Id.* §§ 864(c), 865(2), 116 Stat. at 2241–42.
93. *Id.* § 863(e), 116 Stat. at 2240.
94. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 101, 116 Stat. 2322, 2323.