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The Product Liability Mess: How Business Can Be Rescued from the Politics of State Courts

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THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS. By *Richard Neely.* New York: The Free Press. 1988. Pp. ix, 181. $24.95.

Judge Richard Neely's[1] latest book provides a political blueprint for overhauling current product liability law. Like Neely's earlier works, this book is not directed at the legal community;[2] rather, the author intends that the work furnish the business community with a new strategy to bring about product liability law reform. The substance of Neely's proposed reform is unoriginal: he suggests adopting a national law of product liability.[3] It is his proposed means of implementing the change that is unique.

The author identifies a structural deficiency in the current product liability system as the primary justification for reform.[4] Because of the

1. Other books by Judge Richard Neely include THE DIVORCE DECISION (1984), HOW COURTS GOVERN AMERICA (1981), WHY COURTS DON'T WORK (1983), and JUDICIAL JEOPARDY (1986). Judge Richard Neely was elected to the West Virginia Supreme Court of Appeals in 1972 at the age of 31. He served as Chief Justice in 1980 and 1985. Between graduation from Yale Law School and his election to the West Virginia Supreme Court, Judge Neely served in the Army as an artillery captain, practiced law as a solo practitioner, and, in 1970, served one term in the West Virginia Legislature. Judge Neely is also a professor of economics at the University of Charleston.

2. Nor does Neely claim the book is a work of legal scholarship; indeed, he begins the book with the statement that "Larry Tribe and Richard Epstein, two leading constitutional theorists, can't write this book. . . . [T]oo much brilliance, and too nice a regard for the intricacies of legal theories, can affect a person's appreciation of how to deliver a bold blow to the political jugular." P. 1. Epstein has commented on the area, however, in discussing the likelihood of the Supreme Court limiting the area of punitive damages. He thinks it unlikely that the Court will become involved: " 'To get involved is like hugging a tar baby . . . . Conservative justices will be reluctant to use constitutional law to intervene in an historically states' rights area, and liberals will be wary of interfering with justice.' " Olson, *Punitive Damages: How Much Is Too Much?,* BUS. WK., Mar. 27, 1989, at 54, 56 (quoting Epstein). The Supreme Court's recent refusal to apply the excessive fines clause of the eighth amendment to reduce an award of punitive damages supports Epstein's position. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2914 (1989).

3. Many of the advantages of a federal system of product liability have been noted in earlier works. *See, e.g.,* Reed & Watkins, *Product Liability Tort Reform: The Case for Federal Action,* 63 NEB. L. REV. 389 (1984). Neely's proposed reform is comparatively mild; he does not join the group of reformers advocating wholesale replacement of current tort law. *See, e.g.,* Sugarman, *Doing Away with Tort Law,* 73 CALIF. L. REV. 555 (1985) (advocating replacement of current tort law with a compensation system). Instead, Neely praises liability law for making "the United States the safest country in the world." P. 9. Later in the book, he again voices support for the general concept of product liability law, stating that "[p]rotection from accidents for individuals, wealth redistribution to random victims, and product safety are desirable social goals." P. 118.

4. P. 57. Neely does cite several other, less important factors that have increased the hazard to business from product liability claims. These include the increased capacity of the courts, and the proliferation of lawyers — in particular, the increase in the number of "dumb lawyers." Pp. 21-23. The latter factor is important to the product liability issue because a "bunch of dumb lawyers are more likely to be ambulance chasers than they are to crowd the more intellectually demanding fields of taxation, administrative law, or corporate takeovers." P. 23. Neely's argument that more "dumb lawyers" are entering the field appears to be based on incorrect or out-

inherently parochial nature of state courts, exacerbated by the fact that many state judges are elected, Neely contends that state courts are locked into a "competitive race to the bottom."[5] Neely defines this "race" with a simple example. Allowing a paraplegic to collect a few hundred thousand dollars from the Michelin Tire Company, following a single-car crash of unexplained cause, permits Judge Neely a sound night of sleep. Michelin will likely survive, and if it doesn't, only the French will care. More important, Judge Neely's disabled constituent will have sufficient money to live out her life — and she, her family, and her friends will vote for Neely in future elections (pp. 1-4). In more general terms, Neely perceives state court judges as more than happy to redistribute out-of-state wealth to in-state constituents.[6] And given a product liability system with standards "as fluid as Lake Michigan" (p. 20), courts have little trouble formulating decisions to further this objective.

Neely's solution to this problem is neither surprising nor original. The author advocates replacing the current system of product liability law — in reality fifty-three separate systems of law — with a uniform, national common law of product liability. Federal courts would be given supervisory authority over the law, with state courts continuing to administer the law. Under such a system, federal courts, with their inherent national perspective, would be impervious to the pressures that lead to the "competitive race to the bottom." Not only are federal courts national in scope, but federal judges are lifetime appointees, unlike the majority of state court judges. The idea of a national common law of product liability has been advocated by others,[7] and it has

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dated information. According to Neely, fewer brilliant people are applying to law school, which suggests that the schools are accepting lower caliber applicants. Just the contrary appears to be true: according to a recent report from the Law School Admission Services, the number of applications to accredited law schools is continuing a "record-breaking" string of increases that began three or four years ago. The number of applications has increased 44.6% since 1986. *The More the Merrier,* STUDENT LAW., Feb. 1990, at 5-6. The increased applications, unaccompanied by an increase in law school populations, would ordinarily portend increased competitiveness and selectivity in law school admissions. Neely fails to articulate why he feels the calibre of law students in general is declining, other than to relate the difficulties faced by his local law school in attracting qualified applicants. P. 23.

5. Recognition of this perceived bias is well-established:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen or between citizens of different states.

Bank of the United States v. Deveaux, 9 (5 Cranch) U.S. 61, 87 (1809).

6. Neely, in his typically blunt style, later sets forth an even more aggressive agenda, stating that "[t]he best I can do, and I do it all the time, is make sure that my own state's residents get more money out of Michigan than Michigan residents get out of us." Pp. 71-72.

7. *See, e.g.,* Reed & Watkins, *supra* note 3. The tie between future U.S. competitiveness and lack of uniformity in product liability law was cited by Rep. Thomas Luken of Ohio in introducing recent legislation aimed at creating a national law of product liability. Gastel, *Product Liability Tort Reform,* INS. INFO. INST. (May 1990).

been the subject of several unsuccessful bills in Congress.[8]

Neely diverges from the mainstream, however, in rejecting Congress as the appropriate forum in which to bring about this reform.[9] In a chapter entitled "Kiss Congress Goodbye" (pp. 80-105), he explains why Congress is unable to act in this area. The structure of Congress itself, according to Neely, favors the status quo by erecting numerous barriers to the passage of any legislation.[10] Rather than throw up his hands in despair, though, Neely advocates bypassing Congress, with the federal judiciary acting unilaterally to create a national product liability law.

This strategy for bringing about change is Neely's most controversial suggestion. The legality of such a solution is doubtful. Neely himself seems to concede this point when he states that "I make no claim to having reconciled state sovereignty with a national law [of product liability]" (p. 107). Nevertheless, he cites *New York Times Co. v. Sullivan*[11] for the proposition that the Supreme Court has the power to rewrite state law when policy considerations mandate it (pp. 103-05). Yet, unlike libel law, product liability law does not implicate the first amendment or other overriding constitutional concerns.[12]

Neely replies to this objection with an analysis of federalism, dividing the doctrine into three distinct schools of thought: historical federalism, result-oriented federalism,[13] and practical federalism (p. 118). The first two conceptions of federalism, Neely admits, do not support

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8. *See, e.g.*, S. 666, 100th Cong., 1st Sess. (1987); S. REP. No. 422, 99th Cong., 2d Sess. (1986); S. REP. No. 476, 98th Cong., 2d Sess. (1984); S. REP. No. 670, 97th Cong., 2d Sess. (1982).

9. Later in the book, Neely also rejects any reform based on a coordinated effort by the states. P. 159 (discussing the failure of the Uniform Contribution Among Tortfeasors Act).

10. Support for this contention may be found in the public choice literature. *See, e.g.*, W. ESKRIDGE & P. FRICKEY, LEGISLATION 368-77 (1988) (cyclical majorities, the gatekeeping power of committees, and strategic voting all work to obstruct implementing the will of the majority). Neely also identifies other impediments to legislative action, including the technical nature of the subject matter and the lobbying power of the American Trial Lawyers' Association. Pp. 80-81.

11. 376 U.S. 254 (1964).

12. Two recent Supreme Court decisions emphasize this point. In Florida Star v. B.J.F., 109 S. Ct. 2603 (1989), the Court set aside an award of damages against a newspaper, even though the paper had published a rape victim's name in violation of a state statute. 109 S. Ct. at 2613. In upholding the right of the paper to publish such information, the Court found the first amendment concern overriding. Decided the same term, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989), reaches a different result. Lacking the first amendment concern present in *Florida Star*, the Court refused to set aside or reduce a jury's determination of punitive damages in a private dispute. 109 S. Ct. at 2914.

13. Neely's historical federalism is based on traditional ideas of federalism, whereby the federal government is a government of delegated powers. The doctrine is derived from the intent of the framers, who did not set out to create a strong, centralized government. P. 108. Result-oriented federalism, on the other hand, is more fluid. Neely defines it as a convenient doctrine invoked by those opposing particular federal legislation. Under this concept of federalism, for example, those opposed to racial integration may raise federalism arguments if they believe more favorable treatment is available from the states. P. 111.

a court-enacted national common law of product liability. Yet practical federalism, which Neely defines as a doctrine chiefly directed at fostering competition among state governments (p. 112), lends support to Neely's proposal. In particular, one goal of practical federalism is preventing extortion of concessions by distributional coalitions (pp. 113-14). And Neely's plan, with product liability law administered at a national level, furthers this objective by reducing the externalities resulting from the competitive race to the bottom.[14]

Neely, again acknowledging the weakness of his position, retreats in the final chapter of the book, suggesting that Congress enact an empowering statute (pp. 169-71). Similar to the Sherman Act, the statute would be worded in general terms, granting the federal judiciary the right to fashion a national common law of product liability. Neely's concession to constitutional concerns is, however, short-lived. At the end of the proposal he states that although such a bill would be marginally easier to pass than a more detailed statute, it still is unlikely to pass, and thus the solution ultimately must come from the federal judiciary (p. 173).

On a more general level, Neely's argument that a problem of sufficient magnitude exists to justify his reform is not wholly persuasive. The author begins with the presumption that a product liability crisis is inevitable, but fails to provide much evidence to support this proposition (p. 3). His argument appears to be based on his own proclivity for redistributing wealth to in-state plaintiffs,[15] generalized to encompass a significant number of state appellate judges (p. 4). Taken together with the data "all around us" that product liability law is a hazard to the economy (p. 3), this desire to redistribute wealth seems sufficient to convince Neely that a crisis is at hand.[16] Yet there is much evidence that contradicts such a conclusion.

Much of the analysis of the increase in product liability claims has

14. Earlier in the book, Neely acknowledges that federal courts may exhibit some bias as well. For example, federal judges are typically local appointees and thus may feel some sense of obligation, or perhaps kinship, to in-state litigants. Yet he argues that this bias is diluted at the appellate level. P. 40.

15. It is not entirely clear to what degree these factors play a role in Neely's decision making. A recent "clarification" in the *ABA Journal* suggests that Judge Neely may only be mimicking what he perceives to be an unspoken rationale other judges use. The *Journal* had quoted a passage from *The Product Liability Mess* in which Neely explained how redistributing out-of-state wealth to in-state plaintiffs helps Neely's chances for reelection. The following month the *Journal* made it clear that the quote did not reflect Neely's personal views. *Quotes,* A.B.A. J., Jan. 1989, at 32.

16. One observer has noted that "the claim that the rise in liability insurance rates can be adequately explained by higher tort awards appears to be based largely on anecdotes and conjecture." Rabin, *Some Reflections on the Process of Tort Reform,* 25 SAN DIEGO L. REV. 13, 29 (1988). Thus, Neely appears to have joined a crowd by presuming, without a solid basis, that liability law had precipitated a crisis.

focused on cases brought in federal court.[17] But a mere two percent of the cases filed in the United States are filed in federal court, and an increase in activity in federal courts does not necessarily imply that a similar increase in state courts has occurred.[18] Admittedly, at first glance the data on federal filings is alarming. From 1974 to 1985, product liability claims in federal courts increased 758%.[19] Removing asbestos claims from the total, however, leads to a much different result; over one quarter of all product liability claims during this period were asbestos claims.[20] By 1986, asbestos claims accounted for 43% of federal product liability claims. And, from 1985 to 1987 nonasbestos product liability claims in federal courts decreased 27%.[21] Neely himself supports litigants' pursuit of asbestos claims (p. 2). Finally, even if one still considers the data on federal claims alarming, evidence suggests that state courts have not suffered similar increases in claims. Tort claims as a whole in state courts increased nine percent from 1978 to 1984; over the same period the population increased eight percent.[22]

At this point, one cannot help but question the value of the book: little evidence supports the notion that there is a product liability crisis, and even if a crisis is at hand, Neely's proposal for reform appears

17. Comment, *Rumors of Crises: Considering the Insurance Crisis and Tort Reform in an Information Vacuum,* 37 EMORY L.J. 401, 415 (1988).

18. *Id.* at 415-16 (1988). Yet many are willing to make this leap of faith. For example, a recent government report states that "[t]he growth in the number of [federal] product liability suits has been astounding. . . . There is no reason to believe that the state courts have not witnessed a similar dramatic increase in the number of product liability claims." REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 45 (Feb. 1986). Empirical evidence suggests otherwise: as a whole, federal court litigation has been increasing at a pace about four times that of state courts. J. GUINTHER, THE JURY IN AMERICA 164 (1988).

19. Galanter, *The Day After the Litigation Explosion,* 46 MD. L. REV. 3, 24 (1986). All other tort claims increased a relatively small 24% over the same period. *Id.*

20. Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days,* 1988 Wis. L. Rev. 921, 939 (citing U.S. GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: EXTENT OF "LITIGATION EXPLOSION" IN FEDERAL COURTS QUESTIONED 22 (1988)).

21. Galanter, *supra* note 20, at 940, 941 n.77.

22. Galanter, *supra* note 19, at 7. Unfortunately, the data available on state court claims does not separate product liability claims from all other tort claims. Nevertheless, the numbers suggest something other than a litigation crisis. Left unanswered, however, is the question of where the common perception of a product liability crisis originated. One possible explanation is the insurance industry itself. In 1986, the Insurance Information Institute spent $6.5 million dollars to promote the idea that a crisis was at hand. *The Manufactured Crisis,* 51 CONSUMER REP. 544, 545 (1986). And there is some speculation that some insurers even canceled policies on noneconomic grounds to strengthen the perception of a crisis. Abramowitz, *W. Va. Sues 5 Big Medical Insurers,* Wash. Post, Apr. 15, 1986, at D4, col. 1. Economic self-interest appears to have been the industry's primary motivation. Comment, *supra* note 17, at 408. The industry may profit from a public perception of crisis. For instance, following a Delaware Supreme Court decision that appeared to enlarge potential director and officer liability, insurance companies that underwrote such coverage were able to raise premiums far in excess of their increased exposure. Put another way, these firms earned abnormally high returns as a result of a perception of crisis. Bradley & Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance,* 75 IOWA L. REV. 1, 55-56 (1989).

constitutionally infirm. Nevertheless, two aspects of *The Product Liability Mess* make the book worthwhile.[23]

The author's strategy for change reveals useful insights into the judicial process. Part of Neely's strategy includes lobbying the judiciary. In Neely's view, judges are merely politicians and although the method of explaining proposals to the judiciary is different, bringing about change is nonetheless a lobbying exercise (pp. 149-50). According to the author, the "major difference between courts and other political institutions . . . is that it is not usually smart to try to bribe appointed judges" (p. 14). Neely's lobbying plan includes what he terms a "propaganda function," designed to inform the judiciary of the need for a national common law of product liability. Magazine articles, op-ed pieces, and *The Product Liability Mess* are all examples of this type of lobbying.[24]

The idea that the judiciary can and should be lobbied by business is sure to provoke discussion.[25] Neely bemoans the inability of the judiciary to gather information — so-called "legislative facts" — so necessary to making intelligent decisions (pp. 139-41). In so doing, Neely reveals the importance of information about the world to his job as a decision maker; concomitantly, he reveals the frustration of the judiciary with its inability to gather such information.

Moreover, Neely's candor throughout the book allows the reader an inside look at a modern legal realist at work. Neely provides the reader with an understanding of what is important to at least one sitting state appellate judge in making decisions. Neely's work is unique if only for the fact that it comes from one who actively practices legal realism rather than from the "pointy-headed elite."[26] Certainly, Neely overstates his position at times for effect,[27] but nevertheless the reader

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23. The following discussion is subject to one caveat: readers familiar with Neely's recent work *Judicial Jeopardy* will find that *The Product Liability Mess* offers little new material.

24. The second prong of Neely's plan involves publication of academic articles in prominent law journals. Supporting this prong of the battle plan, Neely discusses a case he decided by adopting in its entirety a scheme described in a law review article. Actual implementation must then come about by bringing numerous test cases to court. P. 146.

25. Justice William Brennan, for one, questions the value of trying to influence the outcome of a case through nonjudicial means. In discussing the recent demonstrations on the Courthouse steps, Justice Brennan commented: " 'It's such a sad waste of time. Those demonstrations don't affect a single vote.' " Rosellini, *The Most Powerful Liberal in America,* U.S. NEWS & WORLD REP., Jan. 8, 1990, at 27, 28.

26. Judge Neely uses this term to describe academic commentators, who, the author contends, propose solutions that are often worse than the problem. P. 4.

27. Neely seems to enjoy making bold statements: "One jerk-water Texas state trial court (with the obscene concurrence of a Texas court of appeals) has managed to screw up something bigger than many nation-states . . . ." P. 37 (discussing the *Penzoil v. Texaco* litigation). Later he discusses business lawyers who later become judges, commenting that even when business lawyers become judges they "often devote the rest of their lives to doing penance for having been business whores when they were young." P. 59. Neely is also not afraid to contradict himself; this last quote conflicts with an earlier statement, in which Neely asserts that once conservative or liberal judges are appointed, they "seldom change their spots." P. 26.

is left with the sense that Neely provides an accurate picture of how he goes about his job.[28]

The *Product Liability Mess* has one other redeeming aspect: despite its substantive flaws, the book is a pleasure to read. The work is direct, confrontational at times,[29] and almost devoid of footnotes. In one of the author's earlier books he states that he "would prefer to be read rather than admired."[30] Neely's latest work appears destined to realize that objective.

— *Matthew Harris*

28. Other appellate judges have also provided valuable insights into the judicial process. *See, e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); J. FRANK, COURTS ON TRIAL (1949); R. POSNER, FEDERAL COURTS (1985).

29. Perhaps Neely is continuing a family tradition in this aspect. Although he provides no details, he does note early in the book that his own grandfather (it is not clear if this is the same grandfather who was a U.S. Senator) was expelled from the West Virginia University College of Law for whistling "Dixie" on campus. P. 31. One might imagine Grandfather Neely's rendition of "Dixie" was furnished for more than mere musical entertainment.

30. R. NEELY, HOW COURTS GOVERN AMERICA xii (1981).