

**Testimony of Andrew F. Popper
Professor of Law
American University, Washington College of Law**

**Before the Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
United States House of Representatives
109th Congress, First Session**

March 14, 2006

**Hearings on H.R. 3509, The "Workplace Goods Job Growth and Competitiveness
Act of 2005"**

**Professor Andrew F. Popper
American University
Washington College of Law
4801 Massachusetts Ave., N.W.
Washington, D.C. 20016
202.274.4233
apopper@wcl.american.edu**

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

¹Biography at conclusion of testimony.

²Susan 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 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 system³ that could conceivably justify legislation that limits arbitrarily consumer rights, as does H.R. 3509.

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 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: Victimized 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 (August 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.*

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 sold⁷—and from which they profited—and (b) to improve the long term integrity of the products they will sell in the future.⁸

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).

⁷Manufacturers 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*:

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

The bill denies innocent injured persons their right to redress of wrongs in a court of law¹⁰ 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

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.

⁹Jan 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."

¹⁰States 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).

¹¹Friedrich 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

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

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,

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

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 products¹⁹ found to be dangerous after extended use.²⁰

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 arguably 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

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 bill²²—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

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.

of their responsibility.

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.

Andrew F. Popper is a professor at American University, Washington College of Law in Washington, D.C. where he teaches torts, administrative law, government litigation (a seminar), and advanced administrative law. He is the director of the law school's integrated curriculum project. In 1996, he was honored nationally as the recipient of the American Bar Association Robert B. McKay Award for Excellence in Tort Law. In 1999 and 2004, he received university-wide awards for outstanding contributions to the academic program at the university. He has served as chair of the Ad Law Section of the FBA and Vice Chair of the ABA Committee on Government Relations, Section on Legal Education and Admission to the Bar. He serves as a site visitor for the ABA and AALS and has participated in the accreditation review of eight other law schools. He is the author of more than 100 published articles, papers, and public documents. His manuscript, "Rediscovering Lone Pine," won the 2005 Maryland Writers Association award for mainstream fiction. He has testified before various Congressional committees and authored several amicus curiae briefs before the United States Supreme Court. Prior to his career in legal education, he was a lawyer with the Office of the General Counsel at the AEC and thereafter the NRC, and was involved with enforcement of federal antitrust law in the nuclear power field.