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EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

March 3, 1982

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Department of Commerce
 Department of Defense
 Department of Labor
 Department of Justice
 Environmental Protection Agency
 Department of Health and Human Services
 Department of Transportation
 Department of Agriculture
 Department of Housing and Urban Development
 Department of the Treasury
 Council of Economic Advisors
 Small Business Administration
 Federal Trade Commission

SUBJECT: Senate Commerce Committee Staff Draft bill/Product Liability Act (Plus sectional analysis)

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than COB Thursday, April 1, 1982

Questions should be referred to William A. Maxwell (395-3890), the legislative analyst in this office.

Robert E. Carlstrom for
 Assistant Director for
 Legislative Reference

Enclosures

cc: Jeff Hill John Dyer Mike McConnel
 Beth Pinkston Pat Szervo Dale Collins (UPO)
 Frank Seidl Mike Horowitz Penny Eastman (WH)
 ✓ Bob Carleson (OPD/Rm 208)

[STAFF WORKING DRAFT NO. 2]

MARCH 1, 1982

97TH CONGRESS
2D SESSION

S.

To regulate interstate commerce by providing for a uniform product liability law,
and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH , 1982

Mr. introduced the following bill; which was read twice and referred to the
Committee on

A BILL

To regulate interstate commerce by providing for a uniform
product liability law, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SHORT TITLE

4 SECTION 1. This Act may be cited as the "Product Lia-
5 bility Act".

6 DEFINITIONS

7 SEC. 2. As used in this Act—

1 (1) "claimant" means any person who brings a
2 product liability action, and if such an action is brought
3 through or on behalf of an estate, the term includes the
4 claimant's decedent, or if such an action is brought
5 through or on behalf of a minor, the term includes the
6 claimant's parent or guardian;

7 (2) "clear and convincing evidence" is that meas-
8 ure or degree of proof that will produce in the mind of
9 the trier of fact a firm belief or conviction as to the
10 allegations sought to be established; the level of proof
11 required to satisfy this standard is more than that re-
12 quired under preponderance of the evidence, but less
13 than that required for proof beyond a reasonable doubt;

14 (3) "commerce" means trade, traffic, commerce,
15 or transportation (A) between a place in a State and
16 any place outside of that State; or (B) which affects
17 trade, commerce, or transportation described in clause
18 (A);

19 (4) "express warranty" means any material state-
20 ment, affirmation of fact, promise, or description relat-
21 ing to a product, including any sample or model of a
22 product;

23 (5) "harm" means (A) physical damage to proper-
24 ty other than the product itself; (B) personal physical
25 injury, illness, or death of the claimant; or (C) mental

1 anguish or emotional harm manifested by a substantial
2 objective symptom, and caused by such a personal
3 physical injury, illness or death; "harm" does not in-
4 clude commercial loss;

5 (6) "manufacturer" means (A) any person who is
6 engaged in a business to produce, make, or construct
7 any product (or component part of a product), and a
8 product seller, distributor, or retailer of products may
9 be a manufacturer with respect to a given product to
10 the extent that such a product seller, distributor, or re-
11 tailer produces, makes, or constructs the product before
12 its sale; or (B) any product seller not described in
13 clause (A) which holds itself out as a manufacturer to
14 the user of the product, unless at the time the claimant
15 brings a product liability action, the product seller
16 identifies the person who actually manufactured the
17 product;

18 (7) "person" means any individual, corporation,
19 company, association, firm, partnership, society, joint
20 stock company, or any other entity (including any gov-
21 ernmental entity);

22 (8) "practical technological feasibility" means the
23 technical and scientific knowledge relating to the safety
24 of a product which is available, adequately demonstrat-

1 ed and economically feasible for use by a product seller
2 at the time of manufacture of a product;

3 (9) "preponderance of the evidence" is that meas-
4 ure or degree of proof which, by the weight, credit,
5 and value of the aggregate evidence on either side, es-
6 tablishes that it is more probable than not that a fact
7 occurred or did not occur;

8 (10) "product" means any object or substance
9 which is capable of delivery either as an assembled
10 whole or as a component part and is produced for in-
11 troduction into trade or commerce; "product" does not
12 include human tissue or organs;

13 (11) "product seller" means—

14 (A) a manufacturer; or

15 (B) a person who, in the course of a business
16 conducted for that purpose, sells, distributes,
17 leases, installs, prepares, packages, labels, mar-
18 kets, repairs, maintains, or otherwise is involved
19 in placing a product in the stream of commerce;
20 but does not include—

21 (i) a seller of real property;

22 (ii) a provider of professional services in any
23 case in which the sale or use of a product is inci-
24 dental to the transaction and the essence of the

1 transaction is the furnishing of judgment, skill, or
2 services; or

3 (iii) any person who—

4 (I) acts in only a financial capacity with
5 respect to the sale of a product; and

6 (II) leases a product under a lease ar-
7 rangement in which the selection, possession,
8 maintenance, and operation of the product
9 are controlled by a person other than the
10 lessor;

11 (12) “product user” means any person, including
12 the claimant’s employer, who owns, operates, or has
13 control of a product;

14 (13) “reasonably anticipated conduct” means the
15 conduct which would be expected of a reasonably pru-
16 dent person who is likely to use the product in the
17 same or similar circumstances; and

18 (14) “State” means any State of the United
19 States, the District of Columbia, the Commonwealth of
20 Puerto Rico, the Virgin Islands, Guam, American
21 Samoa, the Northern Mariana Islands, the Trust Terri-
22 tory of the Pacific Islands, and any other territory or
23 possession of the United States.

1 RESPONSIBILITY OF MANUFACTURERS

2 SEC. 4. (a)(1) In any product liability action, a manufac-
3 turer is liable to a claimant if—

4 (A) the claimant establishes by a preponderance of
5 the evidence that—

6 (i) the product was unreasonably unsafe in
7 construction, as provided in subsection (b);

8 (ii) the product was unreasonably unsafe in
9 design, as provided in subsection (c);

10 (iii) the product was unreasonably unsafe be-
11 cause the manufacturer failed to provide adequate
12 warnings or instructions about a danger connected
13 with the product or about the proper use of the
14 product, as provided in subsection (d); or

15 (iv) the product was unreasonably unsafe be-
16 cause the product did not conform to an express
17 warranty made by the manufacturer with respect
18 to the product, as provided in subsection (e); and

19 (B) the claimant establishes by a preponderance of
20 the evidence that the product unit which allegedly
21 caused the harm complained of was manufactured by
22 the defendant and that the unreasonably unsafe aspect
23 of the product was the proximate cause of the harm
24 complained of by the claimant. ✓

1 (2) The claimant must introduce sufficient evidence to
2 allow a reasonable person, by a preponderance of the evi-
3 dence, to make the determinations specified in paragraph (1).
4 Expert opinion is not considered sufficient evidence under
5 this paragraph unless it is supported or corroborated by sub-
6 stantial objective evidence.

7 (3) A claimant may not establish any fact necessary to
8 make the determinations described in paragraph (1) by show-
9 ing that the identical issue of fact was determined adversely
10 to the manufacturer in another action against another claim-
11 ant, unless both actions were based on harm caused by a
12 single event in which two or more persons were harmed.

✓ no collateral
estoppel

13 (b) A product is considered unreasonably unsafe in con-
14 struction if, when the product left the control of the manufac-
15 turer, the product deviated in a material way—

16 (1) from the design specifications or performance
17 standards of the manufacturer; or

18 (2) from otherwise identical units of the same
19 product line.

20 (c)(1) A product is considered unreasonably unsafe in
21 design if, at the time of the manufacture of the product, a
22 reasonably prudent manufacturer in the same or similar cir-
23 cumstances would not have used the design that the manu-
24 facturer used. No manufacturer is liable under this subsection
25 unless—

1 (A) the manufacturer knew or, based on substan-
2 tial support in the scientific, technical, or medical com-
3 munity for the existence of the danger which caused
4 the claimant's harm, should have known about the
5 danger which allegedly caused the claimant's harm;
6 and

7 (B) a means to eliminate the danger that caused
8 the harm was practically and technologically feasible.

9 (2) A manufacturer is not liable under this subsection for
10 harm caused by—

11 (A) an unavoidably dangerous aspect of a product.
12 As used in this subparagraph, an "unavoidably danger-
13 ous aspect" means that aspect of a product which
14 could not, in light of substantial scientific and technical
15 knowledge at the time of manufacture, have been
16 eliminated without seriously impairing the effectiveness
17 with which the product performs its intended function
18 or the desirability, economic and otherwise, of the
19 product to the person who uses or consumes it; or

20 (B) an unsafe aspect of a product which a reason-
21 ably prudent product user would have recognized as
22 obvious or as an aspect generally characteristic of the
23 product, or which was a matter of common knowledge
24 to persons in the same or similar circumstances as the
25 claimant.

1 (3) If an alternative design is offered as evidence that a
2 product was unreasonably unsafe in design, no manufacturer
3 is liable under this subsection unless the claimant establishes
4 that, at the time of the manufacture of the product—

5 (A) the manufacturer knew or, based on substan-
6 tial support in the scientific, technical, or medical com-
7 munity for the existence of the alternative design,
8 should have known about the alternative design; and

9 (B) the alternative design would have—

10 (i) utilized only science and technology for
11 which there was substantial scientific, technical,
12 or medical support;

13 (ii) provided better safety with regard to the
14 particular hazard which caused the claimant's
15 harm and equivalent or better overall safety than
16 the chosen design. The overall safety of the alter-
17 native design is equivalent to or better than the
18 chosen design if the hazards it eliminates are
19 greater than any new hazards it creates for any
20 persons and for any uses; and

21 (iii) been desirable, functionally, economical-
22 ly, and otherwise, to the person who uses or con-
23 sumes it.

24 (d)(1) A product may be considered unreasonably unsafe
25 because of the failure of the manufacturer to provide warn-

1 ings or instructions about a danger connected with the prod-
2 uct or about the proper use of the product if—

3 (A) necessary warnings or instructions were not
4 provided, under paragraph (2); or

5 (B) postmanufacture warnings or instructions were
6 not provided, under paragraph (3).

7 (2) A manufacturer is liable for failure to provide neces-
8 sary warnings or instructions if the claimant establishes by a
9 preponderance of the evidence that at the time the product
10 was sold—

11 (A) the manufacturer knew or, based on substan-
12 tial support in the scientific, technical, or medical com-
13 munity for the existence of the danger which caused
14 the claimant's harm, should have known about the
15 danger which allegedly caused the claimant's harm;

16 (B) the manufacturer failed to provide the warn-
17 ings or instructions that a reasonably prudent manufac-
18 turer in the same or similar circumstances would have
19 provided with respect to the danger which caused the
20 harm alleged by the claimant, given the likelihood that
21 the product would cause harm of the type alleged by
22 the claimant and given the seriousness of that harm;

23 (C) the manufacturer failed to provide such warn-
24 ings or instructions to the claimant or to another
25 person in accordance with paragraph (4)(A); and

1 (D) warnings or instructions, if provided, would
2 have led a reasonably prudent product user either to
3 decline to use the product or to use it in a manner so
4 as to avoid harm of the type alleged by the claimant.

5 (3)(A) A manufacturer is liable for failure to provide
6 postmanufacture warnings or instructions if the claimant es-
7 tablishes by a preponderance of the evidence that—

8 (i) after the product was manufactured, the manu-
9 facturer knew or, based on substantial support in the
10 scientific, technical, or medical community for the ex-
11 istence of the danger which caused the claimant's
12 harm, should have known about the danger which al-
13 legedly caused the claimant's harm; and

14 (ii) postmanufacture warnings or instructions
15 would have been provided by a reasonably prudent
16 manufacturer in the same or similar circumstances,
17 given the likelihood that the product would cause harm
18 of the type alleged by the claimant and given the seri-
19 ousness of that harm.

20 (B) A manufacturer is not liable under this paragraph if
21 it made reasonable efforts to provide postmanufacture warn-
22 ings or instructions to a product user or to another person, in
23 accordance with paragraph (4)(A).

1 (4)(A) A manufacturer is not liable under this subsection
2 for failure to provide adequate warnings or instructions to the
3 claimant if those warnings or instructions were provided to—

4 (i) a person, including an employer, who could
5 reasonably have been expected to assure that action
6 would be taken to avoid the harm or that the risk of
7 harm would be explained to the actual product user;

8 (ii) the using or supervising expert, where the
9 product involved is one which may be legally used only
10 by or under the supervision of a class of experts. For
11 purposes of this clause, warnings or instructions are
12 considered provided to the using or supervising expert
13 where the manufacturer employed means reasonably
14 calculated to make them available to the expert, and
15 this does not require actual, personal notice to the
16 expert; and

17 (iii) the manufacturer's immediate buyer, where
18 the product was sold as a component or material to be
19 incorporated into another product and the claimant was
20 exposed to the component or material after it was in-
21 corporated or converted into another product.

22 (B) A manufacturer is not liable under this subsection
23 for failure to warn about—

24 (i) dangers that are obvious. As used in this
25 clause, "dangers that are obvious" are those of which

1 a reasonably prudent product user or a person identi-
2 fied in subparagraph (A), if applicable, would have
3 been aware without a warning or instruction and dan-
4 gers which were a matter of common knowledge to
5 persons in the same or similar position as the claimant;

6 (ii) the consequences of product misuse or use
7 contrary to warnings or instructions available to the
8 user or to a person identified in subparagraph (A), if
9 applicable; or

10 (iii) alterations or modifications of the product
11 which do not constitute reasonably anticipated conduct
12 on the part of the product user.

13 (e)(1) A product may be considered to be unreasonably
14 unsafe because it did not conform to an express warranty if—

15 (A) the manufacturer made an express warranty
16 about a material fact concerning the safety of the prod-
17 uct;

18 (B) this express warranty proved to be untrue;
19 and

20 (C) the claimant's reasonable reliance on that
21 untrue warranty caused the harm.

22 (2) As used in this subsection, "material fact" means
23 any specific characteristic or quality of the product, but does
24 not include a general opinion about, or general praise of, the
25 product or its quality.

1 (3) A product seller may be subject to liability under this
2 subsection although it did not engage in negligent or fraudu-
3 lent conduct in making the express warranty.

4 RESPONSIBILITY OF OTHER PRODUCT SELLERS

5 SEC. 5. (a)(1)(A) In any product liability action, a prod-
6 uct seller other than a manufacturer is liable to a claimant,
7 if—

8 (i) the claimant establishes by a preponderance of
9 the evidence that the product unit which allegedly
10 caused the harm complained of was sold by the defend-
11 ant and was the proximate cause of the harm com-
12 plained of by the claimant; and

13 (ii) the claimant establishes by a preponderance of
14 the evidence that the product seller failed to exercise
15 reasonable care with respect to the product.

16 (B) In any product liability action, a product seller other
17 than a manufacturer is liable to a claimant if—

18 (i) the product seller made an express warranty,
19 independent of any express warranty made by a manu-
20 facturer as to the same product, about a material fact
21 concerning the safety of the product;

22 (ii) this express warranty proved to be untrue; and

23 (iii) the claimant's reasonable reliance on that
24 untrue warranty caused the harm.

1 (2)(A) The claimant must introduce sufficient evidence
2 to allow a reasonable person, by a preponderance of the evi-
3 dence, to make the determinations specified in paragraph (1).
4 Expert opinion is not considered sufficient evidence under
5 this paragraph unless it is supported or corroborated by sub-
6 stantial objective evidence.

7 (B) A claimant may not prove any fact necessary to
8 make the determinations described in paragraph (1) by show-
9 ing that the identical issue of fact was determined adversely
10 to the product seller in another action against another claim-
11 ant, unless both actions were based on harm caused by a
12 single incident in which two or more persons were harmed.

13 (3)(A) In determining whether a product seller is subject
14 to liability under this subsection, the trier of fact may con-
15 sider the effect of the conduct of the seller with respect to the
16 construction, inspection, or condition of the product, and any
17 failure of the seller to transmit adequate warnings or instruc-
18 tions about the dangers and proper use of the product.

19 (B) A product seller is under no obligation to open a
20 prepackaged product to inspect it, and is not liable under this
21 section for failure to open such a product.

22 (b) A product seller other than a manufacturer is liable
23 for harm to the claimant caused by a product in the same
24 manner as the manufacturer of the product if—

1 (1) the manufacturer is not subject to service of
2 process under the laws of the State in which the action
3 is brought; or

4 (2) the court determines that the claimant would
5 be unable to enforce a judgment against the manufac-
6 turer.

7 RELEVANCE OF GOVERNMENT STANDARDS OR
8 SPECIFICATIONS

9 SEC. 6. (a)(1)(A) If there was a Federal Government
10 standard pertaining directly to that aspect of a product which
11 caused claimant's harm, and that aspect of the product was
12 in compliance with the standard at the time of its manufac-
13 ture, the product shall not be considered to be unreasonably
14 unsafe in design, unless the claimant proves by clear and
15 convincing evidence that the product was unreasonably
16 unsafe in design, as provided in section 4(c), and that a safer
17 design not only was available and within practical technologi-
18 cal feasibility but would also have complied with all manda-
19 tory Federal, State, and local government standards.

20 (B) If there was a Federal Government standard per-
21 taining directly to that aspect of a product which caused the
22 claimant's harm, and that aspect of the product was not in
23 compliance with the standard at the time of its manufacture,
24 the product shall be considered to be unreasonably unsafe in
25 design unless the product seller proves by clear and convinc-

1 ing evidence that the failure of the seller to comply with
2 those standards was a reasonably prudent course of conduct
3 under the circumstances.

4 (2)(A) If the warnings and instructions relating to that
5 aspect of a product which caused the harm of the claimant
6 were in compliance with all applicable Federal Government
7 standards pertaining to the product existing at the time of
8 manufacture, the product shall not be considered to be unrea-
9 sonably unsafe because of the failure of the product seller to
10 provide adequate warnings and instructions unless the claim-
11 ant establishes by clear and convincing evidence that the
12 product was unreasonably unsafe because of the failure of a
13 product seller to provide adequate warnings or to satisfy a
14 post-manufacture duty to warn, as provided in sections 4(d)
15 or 5, except that a product accompanied by warnings or
16 instructions which comply with Federal legislation prescrib-
17 ing specific warning or instruction language or symbols shall
18 not be considered unreasonably unsafe because of a failure of
19 the product seller to provide other warnings or instructions
20 with regard to that aspect of the product warnings or instruc-
21 tions to which the legislation relates.

22 (B) If warnings or instructions relating to that aspect of
23 the product which caused the claimant's harm were not pro-
24 vided in compliance with an applicable Federal Government
25 standard pertaining to the product existing at the time of

1 manufacture, the product is unreasonably unsafe because of
2 the failure of the product seller to provide adequate warnings
3 and instructions unless the product seller proves by clear and
4 convincing evidence that the failure of the seller to comply
5 with such standard was a reasonably prudent course of con-
6 duct under the circumstances.

7 (b)(1) If a product sold to the Federal Government is
8 manufactured according to Federal Government contract
9 specifications and if the aspect of the product which caused
10 the claimant's harm was in compliance with such specifica-
11 tions, the product is not unreasonably unsafe in construction
12 and design.

13 (2) If a product sold to the Federal Government is man-
14 ufactured according to Federal Government contract specifi-
15 cations and if warnings and instructions provided by the
16 product seller relating to that aspect of the product which
17 caused the claimant's harm were in compliance with such
18 specifications, the product is not unreasonably unsafe because
19 of the failure of the product seller to provide adequate warn-
20 ings and instructions, unless the product seller failed to
21 satisfy a postmanufacturing duty to warn.

22 (3) For purposes of this subsection, a product shall not
23 be considered to have been manufactured according to Fed-
24 eral Government contract specifications if a product identical
25 to the product in all significant respects was commercially

1 available from the product seller prior to the date of the
2 product's first sale to the Federal Government.

3 (c) Nothing in this section shall be construed to preclude
4 a court from applying the provisions of this section to State
5 or local safety regulations.

6 COMPARATIVE RESPONSIBILITY

7 SEC. 7. (a) Comparative responsibility of the claimant
8 shall not bar recovery in a product liability action, but shall
9 reduce any damages awarded to the claimant in an amount
10 proportionate to the responsibility of the claimant. Except as
11 set forth in subsection (b)(2), for purposes of this section,
12 "comparative responsibility" means, with respect to a claim-
13 ant, conduct of the claimant involving negligence, contribu-
14 tory negligence or assumption of risk.

15 (b)(1) In any product liability action involving a claim of
16 comparative responsibility, the court, unless otherwise agreed
17 by all parties, shall instruct the jury to answer special inter-
18 rogatories (or, if there is no jury, the court shall make find-
19 ings) indicating the amount of damages each claimant would
20 be entitled to recover if comparative responsibility were dis-
21 regarded and the percentage of total responsibility for the
22 claimant's harm to be allocated to each claimant, to each
23 defendant, to any third-party defendant, and to any other
24 person, including an employer or coemployee. For purposes

1 of this paragraph, the court may determine that two or more
2 persons are to be treated as a single party.

3 (2) In the case of responsibility of the employer of the
4 claimant or any coemployee of the claimant for the claimant's
5 harm, damages shall be reduced (A) by the amount deter-
6 mined under section 9(a), if that section is applicable; or (B)
7 by the percentage of responsibility apportioned to the em-
8 ployer or coemployee, whichever is greater.

9 (c) The court shall determine the award of damages to
10 each claimant in accordance with the findings made under
11 subsection (b), and shall enter judgment against each party
12 determined to be liable in proportion to the degree of respon-
13 sibility.

14 (d) If a claimant has not been able to collect on a judg-
15 ment in a product liability action, and if the claimant makes a
16 motion within 1 year after the judgment is entered, the court
17 shall determine whether any part of the obligation of a joint
18 tortfeasor who is a party to the action is not collectable from
19 such a person. Any amount of obligation which the court
20 determines is uncollectable from that tortfeasor shall be real-
21 located to the other tortfeasors who are parties to the action
22 and to the claimant according to the respective percentages
23 of their responsibility, as determined under subsection (b).

MISUSE OR ALTERATION

1
2 SEC. 8. (a)(1) If a product seller proves by a preponder-
3 ance of the evidence that misuse of a product by any person
4 other than the product seller has caused the claimant's harm,
5 the claimant's damages shall be reduced or apportioned to
6 the extent that the misuse was a cause of the harm. If misuse
7 by the employer of the claimant or by any coemployee of the
8 claimant was a cause of the harm, damages shall be reduced
9 by (A) the amount determined under section 9(a), if that sec-
10 tion is applicable; or (B) the percentage of responsibility ap-
11 portioned to the employer or coemployee, whichever is great-
12 er. Under this subsection, the trier of fact may determine that
13 the harm caused by the product occurred solely because of
14 misuse of the product.

15 (2) For purposes of this Act, misuse shall be considered
16 to occur when a product is used for a purpose or in a manner
17 which is not consistent with the common or reasonable prac-
18 tice of users of the product.

19 (b)(1) If a product seller proves by a preponderance of
20 the evidence that an alteration or modification of the product
21 has caused the claimant's harm, the damages of the claimant
22 shall be reduced or apportioned to the extent that the alter-
23 ation or modification was a cause of the harm. If alteration or
24 modification by the employer of the claimant or by any coem-
25 ployee of the claimant was a cause of the harm, damages

1 shall be reduced by (A) the amount determined under section
2 9(a), if that section is applicable; or (B) the percentage of
3 responsibility apportioned to the employer or coemployee,
4 whichever is greater. Under this subsection, the trier of fact
5 may determine that the harm arose solely because of the
6 product alteration or modification. Reduction or apportion-
7 ment under this subsection shall not be made if—

8 (A) the alteration or modification was in accord-
9 ance with instructions or specifications of the product
10 seller;

11 (B) the alteration or modification was made with
12 the express consent of the product seller; or

13 (C) the alteration or modification was reasonably
14 anticipated conduct, and the product seller failed to
15 provide adequate warnings or instructions with respect
16 to that alteration or modification.

17 (2) For purposes of this Act, alteration or modification
18 shall be considered to occur—

19 (A) when a person other than the product seller
20 changes the design, construction, or formula of the
21 product, or changes or removes warnings, instructions,
22 or safety devices that accompanied or were displayed
23 on the product; or

1 (B) when a product user fails to observe the rou-
2 tine care and maintenance required for a product and
3 that failure was the cause of the claimant's harm.

4 (3) Ordinary wear and tear of a product shall not be
5 considered to be alteration or modification of a product under
6 this subsection.

7 EFFECT OF WORKER COMPENSATION BENEFITS

8 SEC. 9. (a) In any product liability action in which dam-
9 ages are sought for harm for which the person injured is enti-
10 tled to compensation under any State or Federal worker
11 compensation law, the damages shall be reduced by the sum
12 of (1) the amount paid as worker compensation benefits for
13 that harm; and (2) the present value of all worker compensa-
14 tion benefits to which the employee is or would be entitled for
15 the harm. If a person eligible to file a claim for worker com-
16 pensation benefits has not filed such a claim, the trier of fact
17 shall determine at the time of trial the amount of worker
18 compensation benefits to which the claimant would be enti-
19 tled in the future or the amount to which the claimant would
20 be entitled if the claimant had filed a worker compensation
21 claim.

22 (b) Unless the product seller has expressly agreed to
23 indemnify or hold an employer harmless for harm to an em-
24 ployee caused by a product—

1 tion 4(d), may be brought for harm caused by such a product
2 more than 25 years from the date of delivery of the product
3 to its first purchaser or lessee who was not engaged in the
4 business of selling or leasing the product or using the product
5 as a component in the manufacture of another product.

6 (2) As used in this subsection, "capital good" means a
7 product eligible for depreciation under the Internal Revenue
8 Code of 1954, as amended, and used in trade or business or
9 held for the production of income.

10 (b) Subsection (a) is not applicable if—

11 (1) the harm of the claimant was caused by the
12 cumulative effect of prolonged exposure to a defective
13 product; or

14 (2) the harm, caused within the period referred to
15 in subsection (a), did not manifest itself until after the
16 expiration of that period.

17 (c) Nothing contained in subsection (a) shall affect the
18 right of any person who is subject to liability for harm under
19 this Act to seek and obtain contribution or indemnity from
20 any other person who is responsible for that harm.

21 (d) No claim under this Act may be brought more than 2
22 years from the time the claimant discovered, or in the exer-
23 cise of due diligence should have discovered, the harm.

PUNITIVE DAMAGES

1
2 SEC. 11. (a)(1) Punitive damages may be awarded to
3 any claimant who establishes by clear and convincing evi-
4 dence that the harm suffered was the result of the reckless
5 disregard of the product seller for the safety of product users,
6 consumers, or persons who might be harmed by the product.
7 Punitive damages may not be awarded in the absence of a
8 compensatory award.

9 (2) As used in this subsection, "reckless disregard"
10 means outrageous conduct manifesting a conscious, flagrant
11 indifference to the safety of those persons who might be
12 harmed by a product and constituting an extreme departure
13 from accepted practice. A choice among alternative product
14 designs, when made in the ordinary course of business,
15 whether negligent or not, does not by itself constitute "reck-
16 less disregard".

17 (b) The trier of fact, in determining under subsection (a)
18 whether punitive damages should be awarded, may
19 consider—

20 (1) the product seller's awareness of the likelihood
21 that serious harm would arise from the sale or manu-
22 facture of a product;

23 (2) the conduct of the product seller upon discov-
24 ery that the product caused harm or was related to
25 harm caused to users or others, including whether

1 upon confirmation of the problem the product seller
2 took appropriate steps to reduce the risk of harm;

3 (3) the duration of the conduct and any conceal-
4 ment of it by the product seller; and

5 (4) whether the harm suffered by the claimant
6 was partly the result of the claimant's own negligent
7 conduct.

8 (c) If the trier of fact determines under subsection (a)
9 that punitive damages should be awarded to a claimant, the
10 court shall determine the amount of those damages. In
11 making that determination, the court may consider—

12 (1) all relevant evidence relating to the factors set
13 forth in subsection (b);

14 (2) the profitability of the conduct to the product
15 seller; and

16 (3) the total effect of other punishment imposed
17 upon the product seller as a result of the misconduct,
18 including punitive damage awards to persons similarly
19 situated to the claimant and the severity of other pen-
20 alties to which the product seller has been or may be
21 subjected.

22 (d) Notwithstanding the provisions of section 12, a prod-
23 uct seller may introduce relevant evidence of post-manufac-
24 turing improvements in defense of punitive damages.

1 SUBSEQUENT REMEDIAL MEASURES

2 SEC. 12. (a) Evidence of measures taken after an event,
3 which if taken previously would have made the event less
4 likely to occur, is not admissible to prove liability under this
5 Act in connection with the event.

6 (b) This section does not require the exclusion of evi-
7 dence of subsequent measures if offered to impeach testimony
8 proving—

- 9 (1) ownership or control of a product; or
10 (2) feasibility of precautionary measures.

11 SEPARABILITY CLAUSE

12 SEC. 13. If any provision of this Act or the application
13 of it to any person or circumstance is held invalid, the re-
14 mainder of this Act and the application of the provision to
15 any other person or circumstance shall not be affected by that
16 invalidation.

17 EFFECTIVE DATE

18 SEC. 14. This Act shall be effective 60 days after the
19 date of its enactment, and shall apply to all product liability
20 actions commenced on or after that date, including any action
21 in which the harm or the conduct which caused the harm
22 occurred before the effective date.

○

SECTION-BY-SECTION SUMMARY

PRODUCT LIABILITY ACT OF 1982

Staff Working Draft No. 2

March 1, 1982

Section 1. -- Title

This section of the draft provides that the legislation may be cited as the Product Liability Act.

Section 2. -- Definitions

Several terms used in the legislation are defined in this section. Most importantly, (1) a "manufacturer" includes not only a person engaged in a business to produce, make, or construct a product, but also a product seller which either holds itself out as a manufacturer or acts as a manufacturer with respect to a given product; (2) a "product seller" is a manufacturer or any person selling, leasing, installing or packaging a product or otherwise placing it in commerce, but this term excludes sellers of real property, professionals, and certain financial entities; and (3) "reasonably anticipated conduct" is conduct expected of a reasonably prudent person.

Section 3. -- Preemption of Other Laws

This section defines "product liability action" governed by this Act as any civil action brought against a manufacturer or product seller for harm caused by a product, without regard to state law theories of strict liability in tort, negligence, breach of warranty, failure to warn or instruct, or misrepresentation, which previously governed such an action. State law is superceded to the extent the Act addresses the issue. Civil actions for harm to a product itself or for commercial loss are not product liability actions. Purely economic harms have traditionally been a matter of commercial law, not tort law. The Act does not expand the jurisdiction of the Federal courts.

Section 4. -- Responsibility of Manufacturers

This section provides that in any product liability action, a manufacturer is liable if the claimant establishes by a preponderance of the evidence that the product is unreasonably unsafe in construction, in design, because of a failure to provide adequate warnings or instructions, or because the product did not conform to an express warranty.

A product may be unsafe in construction if it deviated from the manufacturer's design or performance specification or from otherwise identical units of the same product line. A manufacturer is, then, strictly liable for mismanufactured products if the deviation in the product caused the claimant's harm.

A product may be unreasonably unsafe in design if a reasonably prudent manufacturer would not have used the design. A claimant must show that the manufacturer knew or should have known about the danger which caused the claimant's harm and that there was a means to eliminate that danger. Where an alternative design is offered as part of the claimant's case, it must be one about which the manufacturer knew or should have known and one which used technology for which there was substantial support in the scientific, technical or medical community. Manufacturers are not liable for unavoidably dangerous aspects of a product or for unsafe aspects which a reasonably prudent person would recognize as obvious or generally characteristic of the product. For example, the risks of rabies vaccine injections are unavoidable because they cannot be eliminated without impairing the vaccine's benefits. Similarly, hazards of hang gliders are obvious or generally-recognized by reasonable people.

A product may be unreasonably unsafe because of a failure to provide adequate warnings or instructions if (1) the manufacturer knew, or should have known of the existence of the danger which caused the claimant's harm, (2) a reasonably prudent manufacturer would have provided the warnings or instructions which the claimant alleges would have been adequate, (3) the manufacturer did not provide such warnings or instructions, and (4) the warnings or instructions would have prevented harm to a reasonably prudent product user. In addition, the manufacturer may be responsible for failure to warn if, after the product was made, the manufacturer discovered or should have discovered the danger which caused the claimant's harm and failed to provide post-manufacture warnings to the claimant as a reasonably prudent manufacturer would have done.

Warnings or instructions must be given to a product user unless they were provided to certain classes of persons who could be expected to pass the warning on to the users. A manufacturer is not liable for failure to warn about obvious dangers, consequences of misuse, alteration or modification.

A manufacturer is strictly liable for breach of express product warranties where the claimant reasonably relied on the warranty and the breach thereof caused the claimant's harm.

Section 5. -- Responsibility of Other Product Sellers

This section provides that a product seller other than a manufacturer is liable if, by a preponderance of the evidence, the seller's own lack of reasonable care in handling the product or the seller's own breach of an express product warranty was the proximate cause of claimant's harm. Thus, the seller is responsible only for his own fault. Where, however, the manufacturer is not subject to service of process or is determined to be judgment-proof, the seller may be responsible for harms attributable to the manufacturer. This section will reduce litigation costs by taking the seller out of suits in which he is not responsible. At the same time, it permits recovery by the claimant if the responsible manufacturer cannot be served.

Section 6. -- Relevance of Government Standards or Specifications

Under this section, compliance with a federal government standard relating to product design or warnings or instructions raises a presumption that the compliant aspect of the product is not unreasonably unsafe, the presumption can be overcome by clear and convincing evidence that the product was unreasonably unsafe. Conversely, non-compliance raises a presumption that the product is unsafe, which the seller may overcome with clear and convincing evidence. Compliance with federal government contract specifications is conclusive proof that the product was not unreasonably unsafe.

Section 7. -- Comparative Responsibility

Under this section, the comparative responsibility of third parties and of the claimant (due to contributory negligence or assumption of risk) does not bar recovery, but reduces compensatory damages awarded to the claimant by an amount proportionate to the claimant's responsibility. This comports with the purpose of the Act which is to place incentives for risk prevention on those best able to implement that goal.

Section 8. -- Misuse or Alteration

Under this section, if a product seller establishes by a preponderance of the evidence that a misuse or alteration of a product caused the claimant's harm, damages shall be reduced or apportioned to the extent that the misuse or alteration was a cause of the harm. A product alteration will not lead to a reduction in damages if it was in accordance with seller instructions; if it was performed with the seller's consent; or if it was reasonably anticipated and the seller failed to provide a warning against that alteration. This section ensures that responsibility for harm is not placed on those who did not cause the harm. In doing so, it places incentives for risk prevention on those best able to do so.

Section 9. -- Effect of Worker Compensation Benefits

Under this section, damages shall be reduced by the amount paid to the claimant under any state or Federal worker compensation law and the present value of any such benefits to which the claimant will be entitled in the future. Unless the product seller has expressly agreed to indemnify an employer, the employer would have no right of subrogation, contribution, indemnity or lien against the seller, and the worker compensation insurance carrier of the employer shall have no right of subrogation against the product seller. This provision will substantially reduce transaction costs without reducing the amount the injured claimant receives.

Section 10. -- Time Limitation on Liability

If a product is a capital good, no claim alleging unsafe design or failure to warn in a product liability action may be brought for harm caused by the product more than 25 years after delivery to the first buyer or lessee not engaged in the business of selling and leasing the product or using the product as a component in the manufacture of another product. Capital good is defined as a product used in trade or business or held for the production of income.

This limitation on liability is not applicable if (1) the claimant's harm was caused by the cumulative effect of prolonged exposure to the product; or (2) the harm did not manifest itself until after the time limitation. Thus, claims for certain harms, such as harms from drugs, which do not manifest themselves until many years after product use, would not be barred by this section.

No claim may be brought more than 2 years from the time the claimant discovered or should have discovered the harm.

Section 11. -- Punitive Damages

Punitive damages may be awarded to any claimant who receives compensatory damages and who establishes by clear and convincing evidence that the harm suffered was the result of the reckless disregard of the product seller for the safety of product users.

Reckless disregard means outrageous conduct manifesting a conscious, flagrant, indifference to the safety of persons who might be harmed by a product and constituting an extreme departure from accepted practice.

Following a determination by the trier of fact that punitive damages should be awarded, the judge would determine the amount of damages. This provision ensures that potential abuses which may occur in multiple product liability exposure are avoided.

Section 12. -- Subsequent Remedial Measures

Evidence of corrective measures taken by a product seller after a harm has occurred would not be admissible in court to prove liability. This preserves the incentive for product sellers to improve their products.

Section 13. -- Separability Clause

A determination that a provision of the Act is invalid or that the application of it to any person or circumstance is invalid will not affect the remainder of the Act.

Section 14. -- Effective Date

This Act will apply to all actions commenced on or after the effective date, including any action in which harm or the conduct which caused the harm occurred before the effective date.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

March 4, 1982

LEGISLATIVE REFERRAL MEMORANDUM

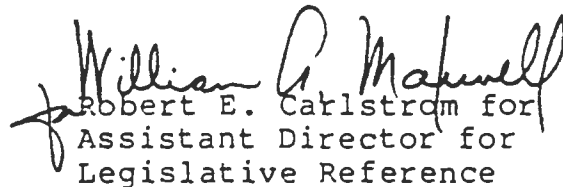
TO: Legislative Liaison Officer
Department of Defense
Department of Labor
Department of Justice
Environmental Protection Agency
Department of Health and Human Services
Department of Transportation
Department of Agriculture
Department of Housing and Urban Development
Department of the Treasury
Council of Economic Advisors
Small Business Administration
Federal Trade Commission

SUBJECT: Commerce proposed testimony for March 12, 1982
on concept of a Product Liability Law

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than COB Tuesday, March 9, 1982. ORAL COMMENTS ACCEPTABLE.

Questions should be referred to William A. Maxwell (395-3890), the legislative analyst in this office.


Robert E. Carlstrom for
Assistant Director for
Legislative Reference

Enclosures

cc: Jeff Hill	John Dyer	Mike McConnel
Beth Pinkston	Pat Szervo	Dale Collins (VPO)
Frank Seidl	Mike Horowitz	Penny Eastman (WH)
Bob Carleson (Rm 208)		

3/2/82

DRAFT .

STATEMENT OF MALCOLM BALDRIGE

SECRETARY OF COMMERCE

BEFORE THE

COMMITTEE ON CONSUMER

UNITED STATES SENATE

MARCH 12, 1982

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I AM PLEASED TO HAVE THE OPPORTUNITY TO PARTICIPATE IN THESE HEARINGS. IN CONSIDERING THE NEED FOR TORT REFORM IN THE PRODUCT LIABILITY AREA, THE COMMITTEE IS UNDERTAKING AN INQUIRY THAT IS BOTH APPROPRIATE AND TIMELY. ALTHOUGH THE SIZE AND EXACT NATURE OF THE PRODUCT LIABILITY PROBLEM AND ITS PROPER SOLUTION ARE, OF COURSE, THE SUBJECT OF THESE

HEARINGS, IT IS THE VIEW OF THE ADMINISTRATION THAT PRODUCT LIABILITY LAW IS AN AREA IN WHICH WE OUGHT TO BE LOOKING FOR IMPROVEMENT.

I KNOW THAT OTHER WITNESSES WILL BE ADDRESSING THE TYPES OF PROBLEMS THEY ARE ENCOUNTERING. I WOULD LIKE TO SUMMARIZE FOR THE COMMITTEE THE EFFORTS THE DEPARTMENT HAS BEEN MAKING IN THIS AREA.

THE DEPARTMENT OF COMMERCE HAS DEVOTED CONSIDERABLE TIME AND EFFORT TO STUDYING PRODUCT LIABILITY LAW AND ITS OPERATION THROUGHOUT THE FIFTY STATES.

IN 1976, PRESIDENT FORD ASKED THE DEPARTMENT TO CHAIR AN INTERAGENCY TASK FORCE WHOSE MISSION WAS TO REVIEW WIDESPREAD COMPLAINTS WITHIN THE BUSINESS COMMUNITY CONCERNING RAPIDLY

RISING COSTS OF SECURING INSURANCE. THE TASK FORCE COMPLETED ITS WORK IN NOVEMBER, 1977, AND PUBLISHED A SEVEN-VOLUME REPORT CONTAINING ITS FINDINGS. A SUMMARY OF THESE FINDINGS MAY BE OF INTEREST TO THE COMMITTEE. THEY INCLUDE THE FOLLOWING:

- ° PRODUCT LIABILITY PREMIUMS HAD INCREASED SUBSTANTIALLY FOR MANUFACTURERS OF INDUSTRIAL EQUIPMENT, INDUSTRIAL CHEMICALS AND HEAVY CASTINGS; AS WELL AS PHARMACEUTICALS, MEDICAL DEVICES AND OTHER HIGH-RISK CONSUMER PRODUCTS. THIS WAS TRUE EVEN FOR SOME INDIVIDUAL COMPANIES WHICH HAD EXPERIENCED NO PRODUCT LIABILITY CLAIMS.

- ° THE IMPACT OF PREMIUM INCREASES HAD BEEN GREATER FOR SMALL BUSINESSES THAN FOR LARGE BUSINESSES.

° INCREASING PREMIUMS HAD CAUSED SOME SMALLER FIRMS
TO DISCONINUE CERTAIN PRODUCT LINES, AND OTHERS TO
FOREGO DEVELOPMENT OF NEW PRODUCTS.

THE TASK FORCE IDENTIFIED TWO PRINCIPAL CAUSES FOR THE
INCIDENCE OF RISING INSURANCE PREMIUMS. THESE WERE: (1)
OVERLY SUBJECTIVE RATEMAKING PRACTICES WITHIN THE INSURANCE
INDUSTRY, AND (2) UNCERTAINTIES IN THE TORT LITIGATION SYSTEM
BROUGHT ABOUT IN PART BY A LACK OF UNIFORMITY AMONG THE
STATES AS TO THE LEGAL STANDARD FOR PRODUCT LIABILITY WHICH
WOULD BE APPLIED.

SIGNIFICANT PROGRESS HAS BEEN MADE IN DEALING WITH THE
PROBLEM OF SUBJECTIVE RATEMAKING PRACTICES. FOLLOWING
PUBLICATION OF THE TASK FORCE'S REPORT, THE DEPARTMENT, AGAIN
AT THE REQUEST OF ^{CARTER} THE ADMINISTRATION, CONDUCTED AN EXHAUSTIVE

STUDY OF INSURANCE RATEMAKING PRACTICES NATIONWIDE. THE
CONCLUSION OF THIS STUDY WAS THAT LIMITED FEDERAL
INTERVENTION IN THE TRADITIONALLY STATE-REGULATED INSURANCE
MARKET MIGHT BE APPROPRIATE TO INSURE OBJECTIVITY IN
RATEMAKING PRACTICES WITHOUT ESTABLISHMENT OF ANY NEW FEDERAL
BUREAUCRACY OR REGULATIONS.

THE DEPARTMENT HAS BEEN ACTIVE IN THE FOUR-YEAR EFFORT TO
ENACT LEGISLATION WHICH WOULD PROVIDE ADDITIONAL INCENTIVES
TOWARD OBJECTIVE, COMPETITIVE RATEMAKING PRACTICES. THE RISK
RETENTION ACT OF 1981 WILL, WE ARE CONFIDENT, BE EFFECTIVE IN
SOLVING A MAJOR PROBLEM IN SECURING ADEQUATE AND AFFORDABLE
INSURANCE.

IN THE SAME VEIN, WE SUPPORTED LEGISLATION, SINCE ENACTED,
AMENDING THE INTERNAL REVENUE CODE TO ENLARGE THE CARRYBACK

PERIOD FOR NET OPERATING LOSSES RESULTING FROM PRODUCT LIABILITY CLAIMS FROM THREE TO TEN YEARS.

AS TO THE LACK OF UNIFORMITY AMONG STATE TORT LAWS, A SUCCESSFUL SOLUTION HAS SO FAR ELUDED US.

ONE OUTGROWTH OF THE DEPARTMENT TASK FORCE'S WORK WAS THE RECOMMENDATION THAT THE DEPARTMENT PREPARE A UNIFORM PRODUCT LIABILITY LAW. THIS RECOMMENDATION HAD THE OVERWHELMING SUPPORT OF THOSE WHO COMMENTED ON THE PROPOSAL.

WE SPENT THREE YEARS WORKING ON THIS PROJECT. THE DEPARTMENT'S "DRAFT UNIFORM PRODUCT LIABILITY LAW" WAS PUBLISHED FOR COMMENT IN JANUARY, 1979. COMMENTS RECEIVED FROM THE PUBLIC ON THIS EFFORT RAN TO 1500 PAGES FROM 240 GROUPS OR INDIVIDUALS. IN ADDITION TO SOLICITING COMMENTS,

THE DEPARTMENT CONDUCTED FOUR MAJOR CONSUMER CONFERENCES ON THE DRAFT LEGISLATION, AND OF COURSE MET WITH ALL INTERESTED INDUSTRY GROUPS.

WE BELIEVE THE FINAL UNIFORM ACT, PUBLISHED IN NOVEMBER, 1979, REPRESENTS THE MOST INTENSIVE EFFORT YET UNDERTAKEN TO ACHIEVE A BROADBASED CONSENSUS ON WHAT PRODUCT LIABILITY LEGISLATION SHOULD LOOK LIKE.

THE CARTER ADMINISTRATION ULTIMATELY CHOSE TO OFFER THE UNIFORM ACT AS A MODEL FOR STATE ACTION. THE REASONS ADVANCED FOR THIS DECISION WERE THAT, PRIOR TO FEDERAL ACTION, THE STATES SHOULD BE GIVEN THE OPPORTUNITY TO CONSIDER MODEL LEGISLATION; AND THAT THE FEDERAL GOVERNMENT SHOULD ADDRESS THE ISSUE OF INSURANCE RATES FIRST. THESE CONDITIONS HAVE NOW BEEN MET. THE RISK RETENTION ACT HAS, AS

I INDICATED, BEEN ENACTED INTO LAW; AND THE STATES HAVE IN MANY CASES ENACTED THEIR OWN PRODUCTS LIABILITY LEGISLATION.

THE RESULTS, HOWEVER, HAVE BEEN DISCOURAGING.

SINCE PUBLICATION OF THE UNIFORM ACT, THE PROBLEM IT WAS DESIGNED TO SOLVE -- DISPARITIES AMONG STATE TORT LAWS -- HAS WORSENERED. ALTHOUGH THE UNIFORM ACT HAS WON ENDORSEMENT FROM MANY BUSINESS GROUPS, INSURERS AND STATE LEGISLATORS, IT HAS BEEN PARTIALLY ADOPTED IN ONLY FOUR STATES (CONNECTICUT, WASHINGTON, IDAHO AND KANSAS; NO STATE HAS ADOPTED IT TOTALLY. TWENTY-FOUR OTHER STATES HAVE ADOPTED SOME FORM OF PRODUCT LIABILITY LEGISLATION, GENERALLY ADDRESSING ONLY A FEW ISSUES. THESE STATUTES ARE NOT UNIFORM FROM STATE TO STATE, AND THEREFORE DO NOT EASE THE UNCERTAINTY AMONG PRODUCT SELLERS, INSURERS AND CONSUMERS.

MR. CHAIRMAN, DURING MY CONFIRMATION HEARINGS, I INDICATED THAT, IN MY VIEW, IT WOULD BE WORTHWHILE AT SOME POINT TO LOOK INTO LEGISLATION TREATING THE "TORT" PORTION OF THE OVER-ALL PRODUCT LIABILITY PROBLEM. I NOTED THAT, IN MY VIEW, THE PROBLEM HAS HAD A DAMPENING EFFECT ON THE DEVELOPMENT OF NEW PRODUCTS, AND ON PRODUCTIVITY GENERALLY.

THIS VIEW IS NOW THAT OF THE ADMINISTRATION AS WELL.

I RECOGNIZE THAT THERE ARE MANY UNRESOLVED ISSUES SURROUNDING THE CONCEPT OF FEDERAL PRODUCT LIABILITY LEGISLATION.

HOWEVER, THE INABILITY OF THE STATES TO ENACT UNIFORM LAWS GOVERNING PRODUCT LIABILITY SUGGESTS THAT SUCH LEGISLATION SHOULD BE CONSIDERED BY THE CONGRESS. I LOOK FORWARD TO CONTINUING TO WORK WITH YOU AND THIS COMMITTEE AS YOU

CONSIDER SPECIFIC LEGISLATIVE RESPONSES TO A SIGNIFICANT
PROBLEM.

THANK YOU, MR. CHAIRMAN.

(END OF PREPARED STATEMENT)