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

Mike -
I would have sent this to you earlier, but I'd no idea you were interested in it.
7 Feb 82

MEMORANDUM FOR:
Chris DeMuth
Jim Tozzi
Mike Horowitz
Mike McConnel
Penny Eastman (WH)
Dale Collins (VPO)
Jeff Hill
Beth Pinkston
Frank Seidl
Bob Carleson (OPD)
Mike Uhlmann (OPD)
John Dyer
Pat Szervo
Tom Morgan
Al Parkman (CEA)

FROM: Bill Maxwell

- Attached as a revised copy of Commerce's proposed testimony for Friday, March 12, 1982 on concept of Federal Product Liability Law.

- Please phone (x3890) your comments to me by 10:00A.M. Wednesday, March 10, 1982 so that I can clear the testimony by noon that day.

-This third draft is the result of discussions between Commerce (Steve Halloway and Art Watson) and ExOP staff (Dale Collins, Mike McConnell, and Jeff Hill). NOTE the two alternative endings. Your preference should be indicated (or a compromise drafted).

3/9/82

DRAFT #3

STATEMENT OF MALCOLM BALDRIGE

SECRETARY OF COMMERCE

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

SUBCOMMITTEE ON CONSUMER

UNITED STATES SENATE

MARCH 12, 1982

Mr. Chairman and Members of the Comittee:

I am pleased to have the opportunity to participate in these hearings. In considering the need for Federal action in the product liability area, the committee is undertaking an inquiry that is both appropriate and timely. 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 which warrants a national forum for discussion.

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 overall product liability problem. I noted that some aspects of current law in

the area of product liability have had a dampening effect on the development of new products, and on productivity generally.

Mr. Chairman, I recognize that any consideration by this committee of product liability must address the tensions that lie between the traditional State-by-State approach to product liability law, and the modern economic reality of nationwide markets, as well as those between the evolutionary nature of the common law and the increased certainty offered by legislation. What we are saying today is that uncertainties in the product liability tort system have created serious problems in interstate commerce that call for a solution that would define consumers' rights and product sellers' obligations in a fair, equitable, and uniform manner.

This Administration is committed to the concept of Federalism. We feel that in order to be successful, any legislation must be consistent with that concept.

I am not today endorsing any piece of Federal legislation that would flow from this or any other committee. We seek a balanced and effective approach.

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 an extensive final 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 discontinue certain product lines, and others to forego development of new products.

Among the principal causes identified by the Task Force of the incidence of rising insurance premiums 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 conducted an exhaustive study of insurance ratemaking practices nationwide. The conclusion of this study was that limited Federal intervention in the traditionallly 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.

Reduction in the uncertainties of the tort litigation system has been more difficult to accomplish.

One outgrowth of the Department Task Force's work was the recommendation that the Department prepare a uniform product liability law. After three years, during which the Department received extensive comments and conducted four major consumer conferences, the Uniform Act was published as a model for State action.

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. Thirty-one other States have adopted some form of product liability legislation, but this legislation has varied widely from State to State. Indeed, since publication of the Uniform Act, disparities among State tort laws have increased rather than decreased.

This has not eased the uncertainty among product sellers, insurers, and consumers. For example, some States say you should warn about obvious defects, other States do not. Most States exclude evidence of improvements in product safety in order to encourage safety innovation, but two States now admit such evidence. Such uncertainty results in legal costs which exceed the amount consumers obtain in judgments. Insurance data show that for every 66 cents a plaintiff receives in judgments, 77

cents is spent for lawyers. Through increased uniformity, these costs can be reduced, to the direct benefit of the consuming public.

The State legislatures are not to be blamed for failing to address the product liability problem. It is very difficult for States, either through case law or statute, to resolve the product liability problem. Even if an individual State develops a fair, comprehensive approach to the liability issues, the fact remains that products manufactured in that State are sold, used, and insured on a nationwide basis. Each State's law affects every other State, and each State's citizens are affected by the laws of other States. No State has the practical ability to ensure that its manufacturers will receive fair and consistent treatment in the relevant market.

(This ending is preferred by ExOP staff).

I am not today endorsing any particular legislative approach being considered by this or any other Committee. There is a range of approaches that can be considered:

-- A uniform Federal law preempting all State laws;

-- A Federal law recognizing the binding nature of the law of the State of manufacture, within appropriate limits;

-- Continuing reliance on the State-by-State consideration of a model bill; and

-- Any other that may be proposed as this issue is considered.

I recognize that there are many unresolved issues surrounding the concept of Federal product legislation. However, the unwillingness 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.

(Commerce would substitute this ending).

Mr. Chairman, I recognize that there are many unresolved issues surrounding the need for Federal action in the product liability area. There are a number of possible solutions to this problem, not all of which require Federal legislation. I urge the Committee to consider them all. However, the inability of the States to enact uniform laws governing product liability suggests that such legislation should be considered by the Congress. The Department looks forward to working with the Comittee in this effort.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

March 10, 1982

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Federal Product Liability Legislation

Secretary Baldridge is due to testify on Friday, March 12, before Senate Commerce on whether and to what extent the federal government should enact legislation dealing with product liability.

There is a fairly strong bias within the Commerce Department in favor of a statute mandating federal preemption; in this, the Department reflects strong industry sentiment to the same effect. Senator Kasten is perhaps the most outspoken exponent of this view on the Hill. He has circulated a draft bill to establish federal preemption but has not yet introduced it.

After lengthy negotiating sessions on March 9, the draft Commerce Department testimony was rewritten to remove what had been a general endorsement of the necessity for federal preemption. There is a fairly unanimous opinion within EOP that the testimony should draw up short of endorsing a particular legislative approach and explicitly acknowledge the legitimacy of the countervailing values of federalism. In short, our recommendation is that the Secretary acknowledge the existence of the problem and the willingness of the Administration to work with Congress to solve it, but that he not embrace any one option to the exclusion of others. We will get a final reaction from Commerce today (Wednesday), and I will report in more detail tomorrow.

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PLEASE REFER TO
OUR FILE NO.

STATEMENT OF: George W. Keeley
Halfpenny, Hahn & Roche

BEFORE: Consumer Subcommittee

Committee on Commerce,
Science and Transportation

United States Senate

ON: Federal Uniform Product
Liability Legislation

DATE: March 12, 1982

My name is George W. Keeley. I am a member of the law firm Halfpenny, Hahn & Roche and legal counsel to the National Association of Wholesaler-Distributors (NAW).

NAW has acquired some rather extensive experience with the product liability problem and state legislative efforts to address this problem. Beginning in 1976, I have participated in the formation by NAW of wholesaler-distributor product liability state task forces in 33 states. Each task force was comprised of wholesaler-distributors in the state of all types of products and their purpose was to advocate corrective product liability legislation at the state level. I was involved directly with the efforts of the Illinois Task Force in successfully supporting legislation in Illinois which placed a statute of repose on strict tort liability cases, and which eliminated the application of the strict tort liability theory to wholesaler-distributors and other non-manufacturers in most cases.

Over the years these task forces, in cooperation with other organizations, have obtained reform legislation of varying degree in some 28 states. This six year exercise has made many badly needed improvements in the law, but it must be recognized as a piece-meal approach of open-ended duration. Each state which has acted has addressed some problem areas, but not all which need attention. Moreover, even within a given area, the statutes passed are not uniform which precludes any consistent interpretation among the states. Even if ultimately achieved in all the states, it will nevertheless leave the Nation with 50 different approaches to product liability law.

It has become apparent that uniformity, certainty and fairness in the product liability laws is not going to occur without nationwide application of Federal product liability legislation.

I do appreciate the Subcommittee's invitation to participate in these hearings and discuss the need for federal action to address adequately the product liability problem.

The Subcommittee and its chairman are to be complimented on their hard work in preparing Staff Working Drafts Nos. 1 and 2 to delineate the rules of product responsibility in a fair, reasonable and impartial manner - - with a recognition of the principle that such responsibility should be based upon fault. The Drafts are a balanced solution, taking into account the public comments of many diverse interests. Further, these Drafts trace their conceptual origin to the Model Uniform Product Liability Act which was the work product of the Commerce Department, following its own exhaustive study of this problem. In the written remarks I will comment on the three questions posed in Chairman Kasten's letter of invitation dated March 3, 1982.

1. THERE IS A NEED FOR LEGISLATION TO CORRECT THE PRODUCT LIABILITY PROBLEM

A recent report by the House of Representatives, No. 95-977 */, concluded after extensive public hearings that there is a product liability problem in this Nation, and the problem is particularly

*/ Subcommittee on Capital Investment and Business Opportunities, House Committee on Small Business, Product Liability Insurance, H.R. Rep. No. 95-977, 95th Cong., 2nd Sess. (1978) (hereafter the "House Subcommittee Report").

severe for small business. The U.S. Department of Commerce found that the development of product liability law on a case-by-case basis in the state courts has left the law lacking in uniformity and stability, to the detriment of product sellers, insurers and users alike.

Legislative action is required to restore uniformity. To accomplish this the Commerce Department's Task Force on Product Liability and Accident Compensation developed a model uniform product liability law for use by the states. The final version of the model uniform law was published in the Federal Register, 44 FR 62714, October 31, 1979, and had the benefit of public scrutiny and comment from 240 organizations and individuals, including product manufacturers, product sellers, insurer groups and consumers. In fact a special effort was made by the Task Force to attract comments from product users and consumers through cooperation with the Office of the Special Assistant to the President for Consumer Affairs.

Today's lack of uniformity and certainty in the law can be traced to a rapid revolution in product liability law. Traditionally American tort law has imposed liability only on those parties at fault who are responsible for damage caused to a person not a fault. Now, however, the doctrine of "strict liability" created by the state courts has swept this notion aside. Instead liability is assessed against products sellers- - including wholesaler-distributors and other non-manufacturers - - even though they have exercised all possible care in the preparation and sale of the product.

The result has been devastating. The strict liability concept has produced a product liability system which is badly out of balance and utterly lacking in equity and common sense. It no longer fairly decides claims based on responsibility. Rather it has become a compensation mechanism to pay damages whenever someone is injured. Unfortunately, the uncertainty created by this change in the law has produced a virtual lottery for businesses which sell products and must insure against these risks, and for the injured parties involved.

We agree with the Commerce Department and the House Subcommittee Report - - there is a product liability problem which can only be remedied by a legislative approach.

2. THERE IS A COMPELLING NEED FOR UNIFORMITY THROUGH A FEDERAL PRODUCT LIABILITY LAW.

Product liability rules have evolved primarily from state court decisions. As a result, the rules governing a seller's product responsibility are anything but uniform. Even for a particular state, there is no assurance to a seller that the rules will not change suddenly as subsequent court decisions revise the fluid concepts of the common law.

The system we now have is fraught with uncertainty. For example, consider the uncertainty which a wholesaler-distributor faces when confronted with an allegation that he sold a defective product which caused injury to a claimant:

1. Under California law a claimant need not prove the product is unreasonably dangerous but in other states this must be established.

2. In most states the wholesaler-distributor is subject to strict tort liability even though he merely sold the product and did not participate in its design or manufacturer. In other states, the wholesaler-distributor is not strictly liable (e.g. Arizona, Arkansas, Georgia, Colorado, South Dakota, Nebraska, Kentucky) while in others strict liability has limited application to non-manufacturers (e.g., Idaho, Illinois, Kansas, Minnesota, North Carolina, Tennessee, Washington).

3. In a few states, the claim may be barred by a statute or repose if the product has been in use for ten years or more, while in other states there is no such limitation period based on the product's age.

4. In thirty-seven states the wholesaler-distributor may encounter the comparative responsibility doctrine (eleven states follow a "pure" form while the remaining twenty-six follow a "modified" form), where the other states have not adopted the comparative responsibility concept.

5. The defenses of product misuse or alteration where such misuse or alteration caused the injury complained of have either been restricted or eliminated where the conduct can be characterized as "forseeable."

This is simply a partial list of the diverse and conflicting patchwork of product liability rules as a result of the state-by-state approach. However, this is merely the beginning of the wholesaler-distributor's dilemma.

Product Liability Burdens
Interstate Commerce

Depending on the commodity line involved, a wholesaler-distributor may sell products to customers in several states or

to customers in all fifty states and foreign countries as well. In many cases the customer resells the product for use in other states and some products are "mobile" and may be used in any number of states. Other products are component parts to other products and are incorporated and shipped all over the country.

It can readily be seen that the typical wholesaler-distributor is not able to predict exactly in what state the products he sells will eventually be put to use. This makes it virtually impossible to determine which set of state product liability laws the product may eventually be judged against, adding to the uncertainty in the state-by-state approach.

The decidedly interstate nature of the product liability problem is nowhere more apparent when one considers the modern "choice of laws" rule and the opportunity it creates for a party to "forum shop." Consider this example: a product made in California; sold to a Wisconsin wholesaler-distributor; sold to an Illinois retailer; sold to an Illinois resident who is injured by the product while in Michigan.

Traditionally a court would generally apply the substantive law of the state where the injury occurred, no matter where the suit was brought. In our example, Michigan law would apply.

Today the modern "significant contacts" test rejects this predictability, and instead applies the law of the state having a "significant relationship with the occurrence and the parties." Using this approach in our example, it is possible that the law of California, or Wisconsin, or Illinois, or Michigan could apply. This latitude to argue results in forum shopping to seek

the most favorable set of state laws and adds to transaction costs and burden on the litigation system. A Federal law will provide uniformity and would eliminate this burden and give certainty as to the rules which will decide any product liability claim.

Uniformity in Product Liability Law Possible Only With Congressional Action

The issue in our view is not whether product liability laws should be reformed, but whether it is preferable to accomplish same at the State or Federal level. We recognize that tort law is an area historically reserved to the states and are sensitive to the fact that a compelling case needs to be made if Federal pre-emption is to be warranted. We believe that such a case exists.

A state-by-state approach to product responsibility has placed an unnecessary burden on interstate commerce. Attempts to remedy the dilemma through legislative action to reform the various state laws on product liability has fallen short of solving the problem - - such laws where they have been enacted have not been uniform. This uncertainty persists even though twenty-eight states have passed product liability legislation in an attempt to alleviate the problem.

Given the interstate scope of product liability, the broad variations in state law, and the tremendous uncertainty as to which law will be applied in a particular case, it is not surprising that product liability risk evaluation by insurance underwriters is difficult. After all, product liability insurance rates are set on a countrywide basis.

NAW fully supports the conclusion in the House Subcommittee Report that the seriously needed uniformity and stability in product liability law can only occur as a result of Federal legislation. Experience indicates to us that simultaneous adoption of any uniform state product liability law by the state legislatures, or any interstate compact, is an extremely remote possibility.

3. ESSENTIAL PROVISION FOR FEDERAL PRODUCT LIABILITY LEGISLATION.

Section A which follows discusses the need for a separate standard of responsibility for non-manufacturers -- including wholesaler-distributors -- which is based on a duty to exercise reasonable care with respect to the product. The need for and desirability of such a distinction is receiving broad acceptance today by the U.S. Department of Commerce, state legislatures, manufacturer groups, and insurer groups. This is a long-overdue return to the negligence standard for wholesaler-distributors who do not create (and should not be responsible for) defects in a product, but merely act as a conduit in distributing a product.

A non-manufacturers provision is the cornerstone of product liability reform legislation for wholesaler-distributors. No other provision, or provisions, will better address the product liability problems facing our industry.

Section B discusses the other provisions which merit inclusion in Federal legislation and are needed to restore stability and fairness to the law of product liability.

A. Product Responsibility Of Non-Manufacturers

Section 5 of the Staff Working Draft Nos. 1 and 2 does contain the single most important provision with respect to product liability law as applied to wholesaler-distributors -- a section setting forth the responsibilities of product sellers other than manufacturers. Clearly, a distinction must be made in the standards of responsibility imposed on manufacturers of products, and the standards for wholesaler-distributors and other non-manufacturers who neither design nor construct the product.

For the reasons set forth below, a Federal product liability law must contain a seller's provisions i.e., rules which define a non-manufacturer's product liability in terms of fault, and not strict liability. To not include a seller's provision would be to ignore the principal cause of the product liability problem now facing the nation's wholesaler-distributors.

Under present law, a non-negligent wholesaler, distributor or retailer can be made a defendant in a product liability lawsuit merely because he is a legal seller of the product, and even though he passes a product on to the user in its original manufactured condition. This involvement in litigation is inequitable and unwarranted; it is the result of the indiscriminate application of the doctrine of strict liability in tort to all product sellers. It has the result of exposing non-manufacturing sellers to substantial transaction costs of defense and resultant higher insurance premiums despite the low frequency of judgments against them.

Thus, current product liability law impacts disporportionately on wholesaler-distributors. Consider these cases:

* An Illinois court ruled a wholesaler-distributor of a hammer strictly liable for an injury caused by the hammer despite the fact that the product passed unopened through the warehouse. (Illinois law: Dunham v. Vaughn & Bushnell Mfg. Co., 247 N.E. 2d 401 (Ill. Sup. Ct.)

* A wholesaler-distributor of a dynamite fuse was held strictly liable for multiple injuries at a dam site, even though the wholesaler-distributor never had possession of the fuse, having passed on the customer's order to the manufacturer who shipped directly to the customer. (California law: Canifax v. Hercules Powder Co., 237 Cal. App. 2nd 44 (Cal. App. Ct.))

* A wholesaler of a casket was held strictly liable to a pallbearer who sustained injuries due to a defective handle. (D.C. law: Cottom v. McGuire Funeral Service, Inc., CCH ¶6320).

* A wholesaler-distributor of a sump pump was found liable for the death of a man who was electrocuted in a neighbor's water-filled basement while attempting to repair the pump. (Missouri law: Keener v. Dayton Electric Mfg. Co., 445 S.W. 2d 362 (Mo. Sup. Ct.))

The unique position of the wholesaler-distributor must be recognized to reduce the unnecessary, non-meritorious and costly involvement of wholesaler-distributors in product liability suits and claims. A full discussion on specific problems of wholesaler-distributors under the present state law approach is contained in the Appendix to this statement.

A non-manufacturer is an extraneous party in a strict liability case. The wholesaler-distributor and other non-manufacturers are often entitled to indemnity from the manufacturer of the defective product for losses incurred, thus shifting the responsibility for the product where it belongs. (E.G., Liberty Mutual Insurance Co. v. Williams Machine & Tool Co., 62 Ill. 2d. 77).

This "shifting" process, however, generates substantial litigation costs. Once made a defendant, the wholesaler-distributor becomes involved in two lawsuits at his own expense: one to defend against plaintiff's claim which involves his supplier's product; the other to prosecute a third-party action against the manufacturer to obtain indemnity. The litigation is further compounded if others in the chain of distribution are named defendants.

Unnecessary Transaction Costs Can Be Reduced

The substantial costs of defense and insurance premiums create special problems for wholesaler-distributors. The Department of Commerce has noted in publishing the Uniform Product Liability Act that wholesalers, distributors and retailers are "frequently brought into a product liability suit." As a consequence, Commerce reports:

> "In light of ISO data showing that for every dollar of claims paid, at least 35 cents in spent in defense costs, [Citation] the net result is that wholesalers, retailers, and distributors are subject to substantial product liability costs in terms of both premiums and defense costs. These costs are added to the price of products and waste legal resources." (Emphasis added) (44 FR 62726, October 31, 1979)

Staff Draft section 5 would eliminate the need for this wasteful shifting process by limiting strict liability in tort to the person ultimately responsible for the defective product. The provision would help halt complex and wasteful multiple-defendant litigation which generates litigation costs for all defendants in the suit (costs ultimately borne by the public) with no corresponding benefit.

In effect, the present law gives the claimant a strong financial incentive to name as parties to a product liability action as many members of the distributive chain as possible. The wholesaler-distributor's insurance carrier often finds it is more economical to enter into a settlement with the claimant rather than incur the inevitable costs of defense. The seller's provision eliminates this unwarranted incentive for "shot-gunning" of defendants in product liability suits.

We support Section 5 of the Staff Draft which establishes a duty limitation on product sellers who are not manufacturers. It is a fair and reasonable measure which has the broad-based support of the Commerce Department's UPLA and has been adopted in various forms by 14 state legislatures so far.

The duty is a return to the negligence concept, requiring the exercise of reasonable care in the preparation and sale of a product. If the duty is breached, liability will result. But sellers are not unfairly burdened with strict liability for the product's design, or construction, or warnings and instructions--factors over which the wholesaler-distributor has no control.

B. Other Important Provisions For Federal Legislation

Other areas of the product liability law are important to restore greater balance to the system. Each area is now addressed in the Staff Drafts and we urge that they be retained as part of any Federal legislative action. Several of the provisions are discussed below in brief.

1. Time Limitation on Liability

Since the typical statute of limitation for personal injury begins to run from the date of the injury, the potential product liability exposure of a seller of durable goods is practically infinite. A statute of repose sets forth a definite period of time after which product liability terminates. A repose period is necessary to eliminate the uncertainty of a potentially - infinite tail of exposure for sellers of durable products.

It is important to assure fairness to all in the chain of distribution that this repose period have the same starting and ending time for all parties, thus precluding arbitrary, discriminatory and inequitable imposition of liability which could occur where multiple repose period would have starting and ending times.

2. Responsibility of Manufacturers

The product responsibility of manufacturers should be well defined and limited using a standard of reasonableness. While a manufacturing defect might continue to be judged in terms of strict liability, other areas (design, instructions, warnings, warranty) should be dealt with on a fault basis. Under the fault standard there would be no design liability unless it was proved that there was a safer alternative design which was feasible and available to the manufacturer at the time the product in question was manufactured.

3. Responsibility of Product Users and Others

Consistent with the concept of fault, product users must bear responsibility for their conduct when using a product.

Product sellers should have an affirmative defense against a claim for damage caused by: use of a product with knowledge of a defect; use of a product contrary to instructions or warnings; and use of a product for a purpose other than the use for which it was designed, manufactured, recommended or warranted. Damages should not be recoverable if a party is principally at fault in causing his own injury, but on the other hand a slight degree of fault on the claimant's part should not necessarily bar some proportionate recovery.

4. Misuse and Alteration

If product misuse or an unauthorized product alteration occurs after sale, and such conduct causes (partially or totally) an injury, the product seller should not have to answer in damages for the harm so caused. This defense should not be compromised by the notion of forseeability which has today virtually eliminated any responsibility for a product misuse or alteration.

CONCLUSION

In sum, the burden on interstate commerce makes federal product liability legislation action both preferable and necessary in our considered opinion. We would urge this Subcommittee to act to report Federal product liability reform legislation. Thank you again for the opportunity to appear before you today.

APPENDIX

IMPACT OF PRODUCT LIABILITY LAW ON WHOLESALER-DISTRIBUTORS

The wholesaler-distributor's present product liability dilemma was accurately predicted thirteen years ago by a far-sighted jurist who noted in dissent:

> "Pragmatically, it will be the wholesaler and retailer who will feel the bite of the new doctrine (of strict liability in tort). As to the non-negligent distributor, wholesaler and retailer, the new doctrine is heavy-handed to the point of injustice. *** The new philosophy of liability without fault will mean the difference between survival and extinction to many a small businessman." *

This prediction, unfortunately, has come true today. for wholesaler-distributors, equity requires that the law be changed. Necessity requires that Federal legislation be enacted to provide uniformity and certainty to the patchwork set of state laws under which we now labor.

Doctrine of Strict Liability in Tort

Product liability is a branch of the tort law. It may be broadly defined as the legal responsibility of a manufacturer or seller of a product to compensate a user who has been harmed by a defective condition in the product. The doctrine of strict liability in tort is one of three legal theories which a claimant may use in asserting a product liability claim. The strict liability theory is in its infancy stage when compared to the other two traditional theories of negligence and express or implied warranty.

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* Bailey v. Montgomery Ward & Company, 431 P. 2d. 108, 117-118 (Ariz. App. Ct. 1967) (Dissenting Opinion)

Strict liability is liability without fault. It is imposed on the manufacturer and all sellers of a product which is deemed defective and unreasonably dangerous to the user, where the defect is the proximate cause of injury. Strict liability arises even in cases where the seller has exercised all possible care in the preparation and sale of the product:

The doctrine of strict liability was judicially-created in the California case of Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57 (Cal. Sup. Ct. 1963). Subsequently the doctrine was codified in Section 402A of the Restatement (Second) of Torts published in 1965. Today, the courts - - not legislatures - - have adopted strict liability or its equivalent as the law in 47 states. *

Wholesaler-Distributors Are
Strict Liability Defendants

As a direct consequence of this new legal theory, non-negligent wholesaler-distributors are now routinely made parties to product liability claims and suits. Section 402A states that all sellers are strictly liable, and "seller" includes a wholesaler-distributor. ** The court cases are in agreement.

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* CCH, Products Liability Report, Paragraph 4016 (1979). All states except North Carolina, Virginia and Wyoming have adopted the Section 402A rule of strict liability in tort or a variation of this rule.

** Comment (f) to Section 402A states: "The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefor applies to any manufacturer of such a product to any wholesale or retail dealer or distributor ... The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business." (Emphasis added)

For example, in Dunham v. Vaughn & Bushnell Mfg. Co., 247 N.E. 2d. 401 (Ill. Sup. Ct. 1969), the court held a wholesaler-distributor strictly liable for a defective hammer which passed through his warehouse unopened, in its original package.

In fact, the doctrine of strict liability has even been applied to wholesaler-distributors who sold a product, but never had physical possession of the merchandise which was directly shipped from the manufacturer to the customer. This was the result in Little v. Maxam, Inc., 310 F. Supp. 875 (N.D. Ill.) where a distributor had a machine shipped directly to his customer and took no part in its design, construction or installation. In a California case, Canifax v. Hercules Powder Co., 237 Cal. App. 2d. 44, (Cal. App. Ct. 1965), the court held a wholesaler-distributor of a dynamite fuse strictly liable even though the wholesaler-distributor never had possession of the fuse, having passed on the customer's order to the manufacturer who shipped directly to the customer. These are but a few examples of the reported product liability cases which involve wholesaler-distributors.

Application of Strict Liability To Wholesaler-Distributors Must Be Eliminated

The sweeping application of strict liability to all members of the distributive chain is harsh for several reasons. First, the wholesaler-distributor did not create the defective condition in the product; and the condition of the product - - not the conduct of the parties - - is the very basis for strict tort

liability. Second, the wholesaler-distributor is ill-equipped to defend a product which he neither designed nor manufactured. Finally, the wholesaler-distributor must incur substantial and unwarranted defense costs; these expenditures are unnecessary, and simply fuel increasing litigation costs in product liability cases which eventually the public must bear.

Legislation is required to eliminate this inequity and limit the application of strict tort liability to the person who designs and manufacturers the product and creates the defect in the product. It is these parties who create the risk and are ultimately responsible for the condition of the product. Such legislation would not in any way affect or reduce a wholesaler-distributor's responsibility for negligent conduct, for we believe liability should attach to the person truly at fault.

U.S. Commerce Department
Endorses Product Liability Relief
For Wholesaler-Distributors

In July, 1978, the Department of Commerce was directed to develop a model uniform product liability law for use by the states to relieve the present uncertainty in product liability law. This uncertainty was identified by the Federal Interagency Task Force on Product Liability as a major case of the product liability problem. After extensive study and comment by a wide-range of product manufacturers and sellers, consumers, insurer groups and associations, the Department published its Uniform Product Liability Act ("UPLA"). *

* 44 FR 62714, October 31, 1979.

UPLA Section 105, entitled "Basic Standards of Responsibility for Product Sellers Other Than Manufacturers," addresses the problem of excessive product liability costs for wholesaler-distributors and other non-manufacturers. Section 105, often referred to as the "Seller's Provision," would basically eliminate strict liability in tort for non-manufacturers in the vast majority of cases. However, Section 105 would hold these sellers responsible for harm to a claimant which was proximately caused by a seller's failure to use reasonable care. Essentially this represents a return to a negligence standard of conduct for wholesaler-distributors and other non-manufacturers.

In recommending this change in the law, Commerce noted that the Seller's Provision would "not compromise incentives for loss prevention" and "it also leaves the claimant with a viable defendant whenever a defective product has caused harm." (44 FR 62726)

On the positive side, however, Commerce stated the change should reduce the substantial product liability defense costs and insurance premium expense now overloading wholesaler-distributors. The costs are "excessive," according to the report, wastes legal resources, and must be added to the price of the product.

Fourteen States Have Enacted A "Seller's Provision Into Law

To date, fourteen states have followed the Commerce Department's recommendation that non-manufacturers generally not be subject to strict liability. The laws in each state * do vary

in language, but as to concept there is general agreement - - a wholesaler-distributor or other non-manufacturer should not be held responsible for a defect in a product designed and made by someone else.

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* The states are: Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Kansas, Kentucky, Minnesota, Nebraska, North Carolina, South Dakota, Tennessee and Washington.

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

STATEMENT OF

David P. Sloane, Director-Congressional Relations,
National Association of Wholesaler-Distributors
and
Peter W. Voss, Jr., President
Voss Equipment, Inc.
Harvey, Illinois

BEFORE THE

Subcommittee on the Consumer

Committee on Commerce, Science & Transportation

United States Senate

ON

Product Liability Uncertainties
In
Wholesale Distribution:

A Uniform Federal Law Is Needed
March 12, 1982

1725 K Street, N.W. • Washington, D.C. 20006 • 202/872-0885

SUMMARY

On behalf of the National Association of Wholesaler-Distributors' 121 member national associations and their aggregate 45,000 member companies, we strongly support passage of a uniform federal product liability law.

Passage of the Risk Retention Act (PL 97-45) in 1981 resolved the insurance components of the product liability problem. Congress must now address the more difficult underlying problem of uncertainties in the tort litigation system.

The development and evolution of strict liability in tort has imposed serious burdens on wholesaler-distributors who, by virtue of their position in the marketing chain, are not able to control product manufacture or product use.

Therefore, the application of strict liability is causing them to pay for the negligent actions of others at a substantial cost to the industry and to product users. While ultimately being relieved from products litigation in most cases, wholesaler-distributors, nonetheless, incur substantial legal and insurance costs. These needless transaction costs must be eliminated through the enactment of a balanced, uniform federal law.

NAW is seriously concerned about the trend away from fault in the tort litigation system. Rather than fairly determining the relative fault of parties in product injury cases, the system today has become a method for compensating such injuries.

Equity must be reestablished through the passage of a preemptive federal uniform product liability statute.

FULL STATEMENT OF
DAVID P. SLOANE
DIRECTOR-CONGRESSIONAL RELATIONS
NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

Mr. Chairman, Members of the Subcommittee. My name is David P. Sloane and I am Director-Congressional Relations for the National Association of Wholesaler-Distributors (NAW).

Accompanying me this morning is Mr. Peter W. Voss, Jr., President of Voss Equipment, Inc., Harvey, Illinois. He is a member of the Material Handling Equipment Distributors Association, an affiliate association of NAW. Voss Equipment is a small material handling equipment distribution firm which sells and leases fork lift trucks and other material handling equipment to industry.

Mr. Voss is well qualified to present the wholesale distribution industry's views with regard to the tort litigation system and the need for federal legislation.

The case he will discuss this morning clearly illustrates the inequities of strict liability for non-manufacturing product sellers. As an activist during the Illinois state product liability reform campaign, he can also offer valuable insights on the limitations of the state-by-state approach.

Congress has made important progress in resolving the product liability problem. Passage of the NAW-supported Risk Retention

Act (PL 97-45) in 1981 provided an innovative and useful solution to the insurance component of the problem. Chairman Kasten, your championship of this statute is deeply appreciated by the wholesale distribution industry and countless others in the product seller community. As a follow up, I am happy to report to you that NAW is rapidly moving ahead with plans to establish the first risk retention group for utilization by our industry.

The next and most critical phase of reform will be to resolve uncertainties in the tort litigation system through enactment of a uniform federal law. The development of Staff Working Drafts 1 and 2 shows important progress in that regard already. We urge you to proceed with that critical process and look forward to working with you on this in the months ahead.

About NAW and the Wholesale Distribution Industry

The National Association of Wholesaler-Distributors is a federation of 121 national wholesaler-distributor trade associations (see attached list) which have a collective membership of approximately 45,000 firms nationwide, with 150,000 places of business.

The members of our affiliate associations are responsible for over 60 percent of the $1.2 trillion of merchandise which flowed through wholesale distribution channels in 1981.

The industry employs approximately 3 million of the 5.4 million Americans working in wholesale trade in stable, high-paying year-round employment.

Merchant wholesaler-distributors perform an essential economic function. They make goods and commodities of every description available at the place and time of need. Wholesaler-distributors purchase goods from producers, inventory these goods, break bulk, sell, deliver and extend credit to retailers and industrial, commercial, institutional, governmental and contractor business users.

Wholesaler-distributors are essential to the efficient satisfaction of consumer and business needs. Further, by the market coverage which they offer smaller suppliers and the support which they provide to their customers, wholesaler-distributors preserve and enhance competition, the critical safeguard of our economic system. According to an NAW survey, the typical wholesaler-distributor established market connections between 133 manufacturers and 533 business customers. Many of these manufacturers are themselves small businessmen who must rely on wholesaler-distributors to establish, maintain and nurture markets for their products. The majority of customers are small businessmen, also, who look to the merchant wholesaler-distributor to provide merchandise availability, credit and other critical services.

Wholesale Distribution Industry Involvement In Product Liability

NAW members wholesale and distribute every conceivable type of consumer and industrial product, from sporting goods to heavy machine tools.

The doctrine of strict liability, through the evolution of case law over the past two decades, has eroded many of the traditional concepts of equity in tort law. This evolutionary process is transforming the tort litigation system into a compensation mechanism and away from its traditional function of determining and allocating fault. The increasing involvement of wholesaler-distributors in product liability actions resulting from factors beyond their control illustrates the trend away from fault.

In response to the inequity of strict liability, NAW launched a massive grassroots-oriented state product liability campaign beginning in 1977. Wholesaler-distributor product liability task forces were formed in 33 states to petition legislatures to enact tort legislation. Our efforts, in combination with those of manufacturers, resulted in passage of 28 state statutes, 14 of which contain provisions limiting the liability of non-manufacturing product sellers to their own negligence, of critical importance to our industry.

As a result of those initiatives, however, we are now firmly convinced that state reforms will not produce the uniformity needed to restore certainty and predictability to the conduct of interstate commerce. Preemptive federal legislation, establishing clear and uniform standards, is the only way to accomplish this objective.

FULL STATEMENT OF
PETER W. VOSS, JR., PRESIDENT
VOSS EQUIPMENT, INC.
HARVEY, ILLINOIS

My name is Peter W. Voss, Jr. I am President of Voss Equipment, Inc. of Harvey, Illinois -- a suburb of Chicago. My father started this business in 1940, and we have been supplying material handling equipment to business and industry in the Greater Chicago area since then. We are a small business, employing approximately 56 people, with gross annual sales of $8.8 million.

I sincerely appreciate the opportunity to appear before this Subcommittee as it looks into the need for resolving the growing product liability tort litigation problem.

While I know that this Subcommittee and its Chairman have been commended for their leadership in enacting the Risk Retention Act (PL 97-45), I, nonetheless, want to offer my own personal thanks for making this concept a reality. With this statute now on the books, the insurance element of the product liability problem has been resolved through a creative and effective marketplace solution.

I can tell you in no uncertain terms that I am glad Congress has finally begun to examine the tort litigation issue. As a veteran

of the Illinois' product liability reform campaign, I don't believe the state-by-state approach will produce the necessary results: uniformity, predictability and stabililty. The states will not enact the same or similar laws (this is already proving correct); product sellers will not obtain the predictability they need to sell their products with knowledge of their full responsibilities; and the law will continue to expand and change, constantly redefining the limits of liability for wholesaler-distributors and others. Only a uniform federal law can address the unique interstate nature of this problem.

I don't mind telling this Subcommittee I am scared. The specter of a devastating product liability case haunts my business on an almost daily basis. A pending case involving a fellow Pennsylvania material handling equipment distributor is a prime example. The distributor never had possession of the forklift, nor control over its use. Yet an $18.8 million judgment was just rendered against him and the manufacturer. While the case is now on appeal, if the decision holds, it will more than likely wipe that company out.

This is not an isolated example of the inequities of the product liability system for wholesaler-distributors. These very real problems exist in a number of the commodity lines, ranging from industrial distribution to pharmaceutical wholesaling. While I am here today to talk about my own product liability problems, my statement reflects the serious concerns of thousands of other

wholesaler-distributors throughout the country. For our industry, given the current state of the law, product liability means lack of control over circumstances which give rise to liability, lack of uniformity and lack of equity and common sense.

I am particularly heartened by the recent work of this Subcommittee in developing Staff Working Drafts No. 1 and No. 2. As I understand it, these proposals contain many, if not most, of the basic components needed to address the tort litigation problem in a comprehensive and fair manner. The primary thrust of these legislative proposals is to clarify the law and place it on a fault basis. Nowhere is the burdensome inequity of strict liability more apparent than when applied to wholesaler-distributors.

Let me share with this Subcommittee the details of a product liability case that involved my company. I think by way of example, I can illustrate why present law is so unfair to wholesaler-distributors and why passage of a uniform federal law is so necessary. Fortunately, this has been the only major product liability case involving a piece of Voss equipment thus far. However, given the lottery-like nature of the present system, it may well happen again . . . and I will have absolutely no control over its occurrence.

In this case, my company leased a used gas-operated fork lift truck to a steel company. The truck had been used by other companies prior to this on a leased basis. However, we carefully serviced it -- as we do all such vehicles -- before delivery. No modifications of any kind were made to the truck.

In this particular company, the truck was being used to transport heavy steel door frames from one part of the facility to another. As it happened, a man who had been with the company for several years was just transferred to this assignment to avoid layoff as a result of company cutbacks.

He received no formal training in the operation of the equipment and later admitted he had not been instructed on proper loading and unloading procedures. A co-worker who had been assigned to work with him for a short time told him the truck functioned much like an automobile and would take some getting used to.

After this admittedly insufficient learning period, the employee was left to his own devices to begin his new loading and unloading job. On the morning of his first day of independently operating the truck, not more than one hour after he set to work, the accident occurred. He had improperly stacked a load of heavy steel door frames in the upright position on the truck. When the operator went to remove one door, the other twelve on the truck tipped over and fell on him. He sustained relatively serious injuries as a result.

Voss Equipment was not even informed of the accident until the following summer, some six months later, when we received notice that a product liability action had been filed. The employee was suing my company, as well as the lift truck manufacturer, for damages of $775,000 for his injuries. Before I had become familiar with the details of the case, the manufacturer had already settled out of court.

Since I had product liability coverage, my insurance company handled the entire case for me. Upon reviewing the circumstances, they settled out of court for $165,000. They knew the dangers of risking a jury trial given the trend in strict liability judgments against wholesaler-distributors.

My product liability premiums rose significantly as a result of the accident for which I had no fault. However, I don't hold the insurer to blame. Under that circumstance, I would have made the same decision to settle out of court.

I place the blame for my situation on the legal system. The development and evolution of strict liability imposes an impossible burden on non-manufacturing product sellers. It assumes that we can control the actions of product users to ensure safe and proper use of our products. This is not possible. We do not make the trucks we sell and lease; we cannot drive them for our customers; and we cannot keep a constant watch over their use. A fork lift truck is big, heavy and potentially

dangerous if it is used improperly. There is no way this equipment can be made otherwise and still perform the tasks industry demands of it.

This type of case sums up much of the wholesaler-distributor's product liability problem. He's paying for the negligent actions of others, whether it be the occasional defective product passing through his warehouse in its original packaging, or the negligent use or misuse of one of his products in the home or in the workplace. Either way, he is being assessed under strict liability for events over which he has no control. When I explain this to others not in this business, they are dumbfounded. How can you be held liable for developments you cannot control? It defies logic and basic fairness. Furthermore, while ultimately being relieved from product litigation in most cases, wholesaler-distributors, nonetheless, incur substantial legal and insurance costs. These needless transaction costs are generally passed along to product users and benefit no one -- except the lawyers.

It was clear to us that employer/employee negligence caused this needless and unfortunate accident. The injured employee scarcely received any training on the use and operation of the lift truck. It was obvious from the accident and later observations that the employer had condoned or encouraged an unsafe loading and transporting procedure which involved stacking the doors in an upright position on the truck and securing them to the truck's

mast with rope. This is an unsafe method of stacking; the doors should have been laid across the fork lift flat, one on top of the other. This system was probably developed as a step saver to accommodate their shipping or storage operations.

Furthermore, in a deposition, the co-worker that had provided scant instruction on operating the lift truck to the injured employee said that he had repeatedly informed his supervisors that this particular truck had developed a problem; the forks tended to settle and sink under a heavy load. It was only several days after the injury had occurred that Voss Equipment was called in to examine the truck. Bear in mind, we had not been told about the accident. In testing the truck to see if fork settling was a problem, my serviceman found that this was not the case. He did, however, note on his service report that the truck showed signs of being overloaded.

The injured worker admitted under oath that he had never been told anything about the load capacity of the truck. The co-worker also admitted that his division never held any safety meetings until after the injury had occurred.

Yet, these facts made little difference in my case. Under strict liability, I was liable regardless of fault simply because I had leased the piece of equipment. The legal odds were weighted so heavily against me that a trial was not worth the risk, even though I was completely innocent of the harms caused.

It seems to me, as well as to thousands of other wholesaler-distributors, that this doctrine is grossly inequitable. In my case and in countless others like it, employers and employees should have borne the costs of their own negligent actions. Under the present scheme of strict liability, however, the responsibility for negligent injury-causing actions is shifted away from those who can best control product use to those who can least control it, wholesaler-distributors.

Fourteen states have now recognized the inequity of strict liability for non-manufacturing sellers and the logic of limiting the seller's liability to negligent conduct, demonstrating the need for a federal solution to the problem. This concept is fortunately included in Staff Draft 1 and 2. If the seller's negligent handling of a product causes an injury, then he is liable. This is undoubtedly the most critical product liability issue for wholesaler-distributors and other non-manufacturing product sellers.

Let me conclude my testimony by saying that if my negligent handling of a product causes an injury, I am prepared to assume responsibility for those actions. That is why I have product liability insurance. But to hold me strictly liable for the negligent injury-causing actions of others is simply not fair. I cannot afford that, and my insurer cannot adequately insure that kind of liability.

I am not a deep pocket, nor are other wholesaler-distributors. We are small businessmen and women. My company operates on a very limited profit margin of one to two percent of sales.

A uniform federal law for product liability is desperately needed to restore common sense and equity to the tort litigation system and to resolve the uncertainties in interstate commerce that have developed. Products that I have distributed are by now almost certainly in a number of states. Companies are relocating or selling off equipment all the time. Where will my next product liability case occur? Will I be willing to gamble on principle and take it into the courts, or will my insurance system again be called upon to pay for the costs of someone else's negligence?

I believe the product liability system in this country is unworkable. If steps are not taken to straighten it out, companies like mine that provide important services and jobs could be destroyed by one major case.

Mr. Chairman, I commend you for holding these critical hearings and urge you to move ahead with all due speed in the consideration and enactment of a uniform federal product liability law.

Thank you.

National Wholesaler-Distributor Organizations Affiliated with the National Association of Wholesaler-Distributors

Air-conditioning & Refrigeration Wholesalers
American Dental Trade Association
American Jewelry Distributors Association
American Machine Tool Distributors' Association
American Supply Association
American Surgical Trade Association
American Traffic Services Association
American Veterinary Distributors Association
Appliance Parts Distributors Association, Inc.
Associated Equipment Distributors
Association of Footwear Distributors
Association of Steel Distributors
Automotive Service Industry Association
Aviation Distributors & Manufacturers Association

Bearing Specialists Association
Beauty & Barber Supply Institute, Inc.
Bicycle Wholesale Distributors Association, Inc.
Biscuit & Cracker Distributors Association

Ceramic Tile Distributors Association
Ceramics Distributors of America
Coated Abrasives Fabricators Association
Cooperative Food Distributors of America
Copper & Brass Servicenter Association
Council for Periodical Distributors Association
Council of Wholesale-Distributors
American Institute of Kitchen Dealers

Distributors Council, Inc.
Door & Hardware Institute
Drug Wholesalers Association

Electrical-Electronics Materials Distributors Assn.
Explosive Distributors Association, Inc.

Farm Equipment Wholesalers Association
Flat Glass Marketing Association
Fluid Power Distributors Association, Inc.
Food Industries Suppliers Association
Foodservice Equipment Distributors Association

General Merchandise Distributors Council

Hobby Industry Association of America

Independent Medical Distributors Association
The Irrigation Association
Institutional & Service Textile Distributors
Association, Inc.
International Ceramic Association

Machinery Dealers National Association
Mass Merchandising Distributors Association
Material Handling Equipment Distribution Association
Monument Builders of North America-Wholesale Div.
Motorcycle Industry Council
Music Distributors Association

National-American Wholesale Grocers' Association
National Appliance Parts Suppliers Association
National Association of Aluminum Distributors
National Association of Chemical Distributors
National Association of Container Distributors
National Association of Decorative Fabric Distributors
National Association of Electrical Distributors
National Association of Fire Equipment Distributors
National Association of Floor Covering Distributors
National Association of Manufacturing Opticians
National Association of Marine Services, Inc.
National Association of Meat Purveyors
National Association of Plastics Distributors
National Association of Recording Merchandisers, Inc.
National Association of Service Merchandising
National Association of Sporting Goods Wholesalers
National Association of Textile & Apparel Distributors
National Association of Tobacco Distributors
National Association of Writing Instrument Distributors
National Beer Wholesalers Association
National Building Material Distributors Association
National Business Forms Association
National Candy Wholesalers Association
National Commercial Refrigeration Sales Association
National Electronic Distributors Association
National Fastener Distributors Association
National Food Distributors Association
National Frozen Food Association
National Independent Bank Equipment Suppliers Assn.
National Industrial Belting Association
National Industrial Glove Distributors Association
National Lawn & Garden Distributors Association
National Locksmiths' Suppliers Association
National Marine Distributors Association

National Paint Distributors, Inc.
National Paper Trade Association, Inc.
National Plastercraft Association
National Sash & Door Jobbers Association
National School Supply & Equipment Association
National Solid Wastes Management Association
National & Southern Industrial Distributors Associations
National Spa and Pool Institute
National Truck Equipment Association
National Welding Supply Association
National Wheel & Rim Association
National Wholesale Druggists' Association
National Wholesale Furniture Association
National Wholesale Hardware Association
Northamerican Heating & Airconditioning Wholesalers
North American Wholesale Lumber Association, Inc.

Optical Laboratories Association
Outdoor Power Equipment Distributors Association

Pet Industry Distributors Association
Petroleum Equipment Institute
Power Transmission Distributors Association, Inc.

Safety Equipment Distributors Association, Inc.
Scaffold Industry Association
Shoe Service Institute of America
Specialty Tools & Fasteners Distributors Association
Spring Service Association
Steel Service Center Institute

Textile Care Allied Trades Association
Toy Wholesalers' Association of America

United Pesticide Formulators & Distributors Association

Wallcovering Distributors Association
Warehouse Distributors Association for
Leisure & Mobile Products
Watch Materials & Jewelry Distributors Association
Water and Sewer Distributors Association
Wholesale Florists & Florist Suppliers of America
Wholesale Stationers' Association, Inc.
Wine & Spirits Wholesalers of America, Inc.
Wood Heating Alliance
Woodworking Machinery Distributors Association

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO Mike Uhlmann

See me

Take necessary action	☐
Approval or signature	☐
Comment	☐
Prepare reply	☐
Discuss with me	☐
For your information	☐
See remarks below	☐

FROM Jeff Hill JH DATE 3/15

REMARKS

See attached clipping from the Saturday Washington Post discussing product liability legislation.

Apparently, Commerce is planning to resolve this issue within four weeks.

OMB FORM 4
REV AUG 70

Liability Standards Split Administration

By Caroline E. Mayer
Washington Post Staff Writer

The Reagan administration is sharply split over whether it should endorse legislation that would set federal uniform standards for product liability suits, thereby preempting long-held state rights.

The conflict was revealed yesterday when Commerce Secretary Malcolm Baldrige testified before the Senate consumer subcommittee on the need for such legislation. A former chief executive who frequently has stated his support for a federal product liability law, Baldrige had been expected to endorse strongly the current subcommittee effort to write legislation.

However, on last-minute orders from the White House, Baldrige was forced to rewrite his testimony and refrain from any specific endorsement. Instead, Baldrige pointed out that any effort to enact federal standards must consider the states' long-held rights to set the rules for when consumers could sue for damages for injuries incurred from the use of a product.

Given the administration's commitment to federalism, Baldrige noted that, except for "pressing national needs," the states should be "free to adopt their own standards, enforced by state officials in state courts."

Administration and industry sources say White House officials directed Baldrige to change his testimony on Thursday, just one day before he was scheduled to appear. Sources also say the orders came after White House counsellor Edwin Meese expressed concern that Baldrige's testimony was counter to the Reagan administration's federalism program.

Sources say that Meese was alerted to the potential conflict by aides from the White House during the routine Office of Management and Budget review of testimony by administration officials before it is presented in Congress.

Baldrige declined to comment on the change in his testimony when questioned about it after the hearing.

Nonetheless, Baldrige and his aides made it clear that the White House orders did not represent the administration's final say on the controversial product-liability issue, and he and his aides are confident they can win administration support for legislation.

In fact, Baldrige noted, he intends to have the Cabinet Council on Commerce and Trade—of which he is chairman—reconsider the administration's position within the next four weeks. At one point, the administration apparently had considered sending the issue to the Cabinet Council on Legal Affairs—a move that many predicted would have generated vigorous opposition to the legislation, given the legal profession's strong feelings against federal product liability standards.

INSIDE BUSINESS