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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

4/21/82

Mike Uhlmann

Recently, I met with the Executive Committee of the Product Liability Alliance. The attached document, in part, reflects their reactions to the points we discussed.

Jim Tozzi

→ Bill Barr

THE PRODUCT LIABILITY ALLIANCE
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MEMORANDUM

April 15, 1982

TO: Members of the Working Group of the Cabinet Council on Commerce and Trade

FROM: The Product Liability Alliance

RE: The Case for Federal Product Liability Legislation

Gentlemen:

The Product Liability Alliance (TPLA) is an organization of more than 150 businesses and trade associations whose membership is a cross-section of those subject to product liability claims. It includes small, medium-size and large businesses; manufacturers, wholesalersand retailers; and insurers and insurance brokers.

TPLA was formed to support the enactment of a balanced and effective Federal product liability statute. TPLA is not a policy making entity; it takes no position on particular provisions of pending proposals. Rather, it serves as a forum for communication among groups with widely divergent views on product liability, a catalyst for consensus.

TPLA members believe that the rules governing the obligations of product sellers and the rights of product users should be codified in a statute; that such a statute will be effective only if it is enacted at the Federal level; and that such a statute should be balanced -- fair to those who make and sell products as well as to those who use them.

The businesses belonging to TPLA are firm believers in President Reagan's economic recovery program, and strong supporters of his efforts to delegate to the States and the private sector regulatory and other functions that do not require Federal involvement. At the same time, they recognize that some problems cannot be dealt with by the States. Product liability law is such a problem.

Products made in one State may be distributed in several others, sold in still more, and used in all. The rules governing the manufacturer's liability for harm caused by his products are established primarily on a case-by-case basis not merely in his home State courts but by courts in every other American jurisdiction. These rules vary widely from State to State, and are becoming progressively less predictable and increasingly unfair.

Individual States have attempted to deal with this problem by codifying their product liability rules. Some 28 States now have product liability statutes, but all of them are different. Worse, some of them have impaired in-State consumer rights while doing nothing to make a manufacturer's out-of-State liabilities less uncertain. Ironically, these good-faith efforts by the States to cope with the interstate product liability problem have, if anything, compounded it.

The interstate movement of products requires product liability insurers to make rates on a nationwide basis, whereas rates for all other lines of insurance are made on a State-by-State basis. Individual State aberrations from the majority rule on a given issue thus have repercussions for premium payers in all other States, since it cannot be predicted when these "highest common denominator" rules may come into play for a given manufacturer's products.

The inability of the States to deal effectively with the interstate nature of products liability suggests the appropriateness of limited Federal intervention in the process of balancing product sellers' and product users' rights and duties.

TPLA believes that the Federal role in product liability should be limited to the determination of the policy governing the obligations of businesses whose products move in interstate commerce, since the States cannot, by their own actions, achieve the uniformity essential to a stable and predictable product liability law. TPLA also believes that the mainspring of Federal policy should be fairness to both product sellers and product users.

At the same time, TPLA believes that the States will be able and should be permitted to implement Federal product liability policy through their court systems. A Federal product liability statute, applied in individual State court actions, would add no costs to State judicial systems. Moreover, since uniform rules would tend to discourage the "forum shopping" now prevalent in product liability cases, Federal court caseloads in actions based on diversity jurisdiction should decline.

TPLA believes that the Working Group will find the case for a fair Federal product liability law persuasive, and suggests that the Group's recommendations to the Cabinet Council focus first upon the need for such a law. The development of the statutory details will be an evolutionary process, and we believe that it would be premature for the Working Group to base its overall policy judgment on specific provisions of legislative proposals subject to change.

It has been suggested that Administration policy toward product liability legislation should be developed in the analytical framework commonly applied to proposed Federal programs or economic regulations. Some have argued that because a Federal product liability law would to some extent "regulate" State courts, any such proposal should therefore be evaluated in terms of relative economic costs and benefits.

While a Federal product liability law would certainly limit the range of State court discretion on broad legal questions, it would in no way impinge upon the current method State courts use to determine liability in individual product injury cases. Indeed, it would make that task easier. Thus, to characterize a Federal product liability law as a "regulatory" statute misconstrues its purpose, which is to fairly balance the interests of plaintiffs and defendants in product liability law.

Similarly, while a Federal product liability law would certainly affect the costs associated with product liability, it does not, as a proposed Federal program or economic regulation would, involve an expenditure of tax dollars against which its benefits can be weighed. Indeed, while some of the economic benefits of a Federal product liability statute could be quantified (e.g., reduction in transaction costs resulting from the elimination of subrogation and contribution actions in workplace product liability cases), others cannot be (e.g., economic implications of a fault standard in product design defect and duty to warn cases). Moreover, how can an economic value be assigned to the concept of fairness?

To apply cost-benefit analysis to what amounts to a codification of the law in the majority of States assumes that there are tangible costs against which the largely intangible benefits of such a codification can be balanced. We can see no such costs.

The difficulties of trying to weigh a Federal product liability law in the traditional cost versus benefit scale are best illustrated by the fact that most of the pending legislative proposals preserve traditional causes of action in product injury cases. For example, all pending proposals preserve claims alleging strict liability in tort for product manufacturing defects. Thus, there is no way of estimating whether there will be more or fewer such claims.

Similarly, it would be impossible to calculate the value of legal man-hours saved by a Federal law's elimination of the current need to brief every legal issue over and over again in every action in every State court.

It has also been suggested that the recent stability of product liability insurance rates is barometric evidence that there is no product liability problem. This is emphatically not the case. Product liability is a "long-tail" line of insurance in which the majority of claims arising during the policy period are settled years later. Thus, the impact of the near tripling in the number of product liability claims filed in Federal District Courts alone during 1975 (2,886) and 1981 (9,071) will not begin to be felt until sometime after those cases go to verdict or are settled in the years to come. Moreover, most major product manufacturers substantially or entirely self-insure their product liability, so that insurance data does not fully represent the frequency or severity of product liability losses. An enclosed TPLA "Background Paper on Product Liability Insurance" addresses these and other points in detail.

The adversary system of justice is enormously expensive, and will remain so with or without a Federal product liability law. A Federal product liability statute would preserve -- indeed it would strengthen -- the fault basis for assignment of liability in product injury cases, and therefore does not have as its sole purpose a reduction in the transaction costs of the tort system. Thus, to analyze a concept whose thrust is equitable in economic terms is a disservice both to the concept and to cost-benefit analysis.

We are enclosing several TPLA documents which you may find useful in your analysis of the product liability issue:

(1) "The Product Liability Problem" -- This is a two-page summary of the case for Federal product liability legislation.

(2) "Elements of a Fair Federal Product Liability Statute" -- This document outlines the key issues TPLA recommends be dealt with in Federal product liability legislation.

(3) "Background Paper on Product Liability Insurance" -- This paper relates the history of Federal examination of the role of insurance rate making practices in the product liability problem and describes the Congressional resolution of the insurance issue (the Product Liability Risk Retention Act).

(4) "Summary of Public Comment" -- This compendium of all public comment on the Senate Consumer Subcommittee's Staff Draft No. 1 of the Product Liability Act, prepared by TPLA Counsel Victor E. Schwartz, is a useful guide to the perspectives the entire spectrum of affected interests have on product liability.

(5) "Compendium of Comments" -- This document synthesizes the views of TPLA members on the first Staff Working Draft, and is a useful illustration of the consensus approach the TPLA has taken toward the substance of Federal product liability legislation.

We think these documents make a strong case for the need for a Federal product liability statute that fairly balances product seller and product user interests. They show that while there may be divergence as to precisely what such a statute should contain, there is little doubt as to its necessity. The last two in particular show how quickly a consensus can be developed on details among those with a common goal.

With the first meeting of the Working Group scheduled for Monday, April 19, we wanted to get this preliminary material in your hands as quickly as possible. While we will be following up with you individually in more detail next week, please feel free to call upon any of the TPLA member organization representatives listed below if we can be of assistance to you prior to your April 19 session.

Les Cheek	Crum & Forster Insurance Companies	296-5850
Bob Fields	FMC Corporation	293-7900
Jim Mack	National Machine Tool Builders Assn.	893-2900
Victor Schwartz	Crowell & Moring	452-5873
Dirk Van Dongen	National Association of Wholesaler-Distributors	872-0885

STATEMENT BY
JAMES H. MACK
PUBLIC AFFAIRS DIRECTOR
NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION
BEFORE THE
SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE
OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES
APRIL 23, 1980

I. INTRODUCTION

My name is James H. Mack. I am Public Affairs Director of the National Machine Tool Builders' Association (NMTBA), a national trade association representing over 370 American machine tool manufacturing companies, which account for approximately 90% of United States machine tool production.

Although the total machine tool industry employs approximately 110,000 people with a combined annual output of around $3.9 billion, most NMTBA member companies are small businesses with payrolls of 250 or fewer employees.

While relatively small by some corporate standards, American machine tool builders comprise a very basic segment of the U. S. industrial capacity, with a tremendous impact on America. It is the industry that builds the machines that are the foundation of America's industrial strength.

We welcome this opportunity to once again address this Subcommittee on the extremely important issue of products liability. As you may recall, last year in testimony before this Subcommittee Mr. L. C. Lackey, Vice President of Finance of the Wysong and Miles Company, an NMTBA member company, and I described to you in broad brush the historical background and development of products liability tort law.[1/] At that time particular emphasis was given to the law's unique evolution in the industrial workplace setting. Also documented, with shocking statistics, was the U. S. machine tool industry's distressing situation relative to the availability and affordability of products liability insurance coverage for its members.

The multifaceted nature of this problem has also been documented by the Commerce Department, in its exhaustive two-year study of the products liability "mess," which found that the problem is caused both by uncertainties in the litigation system and by insurance ratemaking difficulties.

With regard to this latter aspect of the problem, we note that the results of our 1980 Products Liability Survey reveal that some changes have occurred in the products liability insurance market since we last testified before this Subcommittee. Seemingly, there has been improvement in some areas, such as slight reductions in average products liability premiums.

1/Statement by L. C. Lackey, Vice President of Finance, Wysong & Miles Company, Before the Subcommittee on Consumer Protection and Finance, Committee on Interstate and Foreign Commerce, U. S. House of Representatives, June 26, 1979.

However, simultaneously there also appears to have been deterioration in other indicators, such as significant increases in the number of companies with deductibles and the size of those deductibles.

Our 1980 statistics show that a little over half of our members still either have no primary coverage or have substantial deductibles under their 1980 policies. Thus, insurance company assertions that the crisis is easing seem unsubstantiated by the facts. The average NMTBA member is paying $111,700 this year for primary products liability coverage. This figure represents some easing from 1979's average of $143,900. However, in 1976 the average products liability premium was only $71,000 which still seems large when compared to 1970's average of $10,000.

Interestingly, 41% of our members reported that they were able to negotiate a reduction from initial quotations, once they had the opportunity to review their own claims experience (or lack thereof) with insurance underwriters.

One out of eight members reported no products liability coverage. This is better than last year's 20%. However, another 5% believe either that their policies will be cancelled or that their premiums will be increased substantially within the next year. Moreover, of those members with products liability insurance, 8% seriously doubt the financial stability of their insurance carrier.

Some of our members have only nominal products liability insurance. The combination of their annual premiums and deductibles nearly equals (and in some cases surpasses) the ceiling of their primary coverage. These companies have purchased this paper insurance to satisfy customers' sales requirements or to qualify for umbrella coverage, which protects the insured from catastrophic claims which threaten their assets. And even at these staggering prices, still an appalling 23% of machine tool builders with annual sales in excess of $2.5 million are unable to secure umbrella coverage.

Thirty-nine percent (39%) of our members reported average deductibles or self-retentions, of $94,300 compared to $80,500 last year and $27,000 in 1975. This is up from 30% last year.

In light of such serious difficulties faced by members of our industry, we commend the legislative insight and initiative of this Subcommittee for the instrumental role you played in the sponsorship and ultimate passage by the House of Representatives of H.R. 6152, the "Product Liability Risk Retention Act of 1980." We congratulate you for crafting a measure which specifically addresses the products liability insurance availability/affordability problem, and offers capital goods manufacturers relief from panic pricing and other inequitable insurance rating practices.

As you know, legislation almost identical to H.R. 6152 (S. 1789) is currently pending before the Senate Commerce Committee. We hope that the magnitude (332-17) of the House's approval of its

Risk Retention Bill, and the broad philosophical spectrum of support such an overwhelming vote reflects will encourage the Senate to expeditiously enact such an equitable market solution to the problem of affordable products liability coverage.

Indeed, risk retention groups will provide many of our members with an affordable alternative to what is now excessively priced, if not nonexistent products liability coverage from regular commercial insurers. For many such companies, particularly smaller businesses, meeting this immediate and pressing need is critical in the determination of whether they will continue to be profitable enterprises, or will be faced with the possibility of bankruptcy as the result of potential excessive products liability judgments for which they are uninsured.

II. NECESSITY FOR LEGISLATIVE MODIFICATION TO UNDERLYING PRODUCTS LIABILITY TORT LAW

Unquestionably, the risk retention approach is a vital response to the products liability insurance affordability/ availability problem. However, we must point out that this is only a partial, albeit very important, solution to the overall products liability crisis. In that regard, we now turn our attention to what we consider to be an equally significant, if not more fundamental cause of the products liability problem now facing American manufacturers. Specifically, we refer to the underlying tort law in the area of products liability.

Although our industry is presently defending a plethora of lawsuits, its courtroom record is quite impressive. In fact, of 1,217 closed claims reported in 1976, 1978, 1979 and 1980 surveys, only 14% actually reached trial. Of these, our members won 70%.

In other words, only 4% of the total number of products liability claims against our members have resulted in judgments substantially in excess of the plaintiff's workers' compensation lien -- an accumulated average courtroom loss of $164,000. Forty-nine percent (49%) are settled for an average of $25,800 and the remaining 39% are dropped without awards being paid.

It is the quantity of products liability suits, not the quality of our products, which have persuaded many products liability insurers either to abandon the field or to charge high premiums unrelated to the insured's claims experience. Defense costs equaling 35¢ for every dollar paid out rather than actual judgments are spooking products liability carriers. The average amount expended on each of these 1,217 claims (including defense costs) was $25,900.

In addition, the "trendline" in design defect and "failure to warn" cases is in the direction of imposing liability on product sellers <u>without</u> a demonstration of fault. This is also expected to increase insurance costs in the absence of remedial legislation.

In view of these statistics and "trendlines," we are indeed very gratified to note the introduction of two very significant bills which deal with the underlying tort law of products liability: H.R. 7000, the "Uniform Product Liability Act," cosponsored by Congressmen Preyer and Broyhill; and H.R. 5626, the "National Product Liability Act," introduced by Congressman Sensenbrenner for himself and Congressmen Broyhill, Roth, Sawyer, Corcoran, Stockman, Luken and Ireland.

Each of these bills, to one degree or another, attempts to arrest the more significant aberrational developments in the case law of products liability in some jurisdictions, and to correct some unfair aspects of the law in most jurisdictions. Although we may disagree with some of the particular details of these two bills, we commend their sponsors for their willingness to try and find equitable and, might we emphasize, politically viable answers to a perplexing set of problems.

We also believe that it is important to point out that just as risk retention and tort law modifications separately are important specific remedies to two component causes of the overall problem, the interrelationship of these two responses is also a critical factor in the ultimate integrated solution to the products liability crisis. Just as the many facets of the problem are interwoven, so too must be any solution which hopes to be effective. Therefore, there is certainly much to be said for the proposition that a statute which arrests development of compensation-system-oriented

trends in products liability tort litigation law; "smoothes out" (i.e., overturns) exotic state court decisions in some so-called "leading jurisdictions," which have given rise to those trends; and which corrects some of the more egregiously unfair aspects of the current state of the law as it is interpreted in most jurisdictions will do much to provide a climate in which our members can protect themselves with affordable products liability insurance. The Risk Retention Act will assure that these changes in tort law will be reflected in lower products liability premiums for product sellers.

III. OPTIMAL CONTOURS OF UNIFORM PRODUCTS LIABILITY LAW LEGISLATION

Before commenting specifically on the various provisions of H.R. 7000 and H.R. 5626, we would first like to briefly outline what we consider to be the optimal contours of uniform products liability legislation. In arriving at this position we should emphasize that we have taken into account both what we believe to be politically feasible as well as substantively necessary at this point in time.

Obviously, any proposal would have to be drafted in a fashion which would balance the various competing interests in a manner which would be politically palatable to Congress or state legislatures which necessarily represent many diverse interests.

As we have stated before this Subcommittee in the past, a products liability statute drafted in a corporate boardroom would stand little chance of passage, even though it might receive unanimous and unqualified support from much of the business community. By the same token, a proposed statute drafted in the boardroom of the American Trial Lawyers' Association or the Consumer Federation of America would very likely meet strong resistance and, even if it were passed, would do little to rectify the insurance affordability problem faced by NMTBA members -- and might well exacerbate it.

From a purely theoretical standpoint, it might be attractive to craft tort law modifications that would deal with procedural as well as the substantive legal issues in a products liability case. However, political considerations as well as already firmly established legal doctrines mitigate against the imposition of additional, or the modification of existing state procedural rules of law. Moreover, limiting modifications to only those areas of substantive tort law appears to be an appropriate approach, particularly if federal preemptive legislation, which we favor, is to be the route to be taken. Therefore, we believe that H.R. 7000 and H.R. 5626 have appropriately and prudently limited their scope to areas of substantive products liability tort law modifications.

Finally, having stated our preference for a products liability act that would address the whole spectrum of substantive legal issues involved in products liability tort law, but

would leave to the states issues of purely procedural law, we would now like to briefly enumerate what we consider to be the minimum requirements of any federal products liability statute which presumes to solve the products liability "mess."

These minimum elements, not necessarily in order of priority are (1) the ending of subrogation; (2) limits on liability for overage products; (3) limits on liability imposed on the basis of 20-20 hindsight; (4) a defense based on modification or misuse of a product; and (5) the grounding of design defect and "failure to warn" cases in a fault system.

Although we would prefer, and would encourage this Subcommittee to consider a broad approach to products liability legislation, we, nevertheless, believe that an act which incorporates provisions which address at least the above listed five issues, would be a major step in the right direction. Such a law would make it much more feasible for products liability insurers to accurately determine products liability underwriting risks. This in turn would allow insurers to bring their products liability insurance premiums into closer harmony with the actual claims experience of their insureds.

Needless to say, the net result of this whole process would be relief from the severe products liability crisis now faced by members of our industry and other capital goods manufacturers.

IV. COMMENTS ON VARIOUS PROVISIONS OF H.R. 7000 AND H.R. 5626

We commend the legislative initiative of the sponsors of H.R. 7000 and H.R. 5626 for their interest in seeking to modify the current lottery-like nature of products liability tort law in the United States, which encourages people to litigate even when they have no concept of (1) the slim chances of their winning; (2) the fact that today's products liability tort system benefits primarily the plaintiff's bar and the insurance industry (through enforcement of subrogation liens); and (3) the fact that defense costs attributable to oftentimes meritless cases may cause a third-party defendant to lose his products liability insurance or abandon a product line.

The following comments are directed toward what we believe to be particularly important conceptual areas of products liability law, which are addressed in either or both H.R. 7000 and H.R. 5626.

Subrogation

A critical element in the conceptual framework of products liability is that of subrogation. We commend H.R. 7000 for dealing with this difficult concept. Conversely, we believe that the absence of a similar provision in H.R. 5626 constitutes a major weakness in that bill, and therefore may be an area the authors and proponents of that bill may want to reconsider.

Section thirteen of H.R. 7000 provides that neither the employer nor his workers' compensation carrier shall have a right of subrogation against the product seller. And, a judgment rendered against a product seller will be reduced by the amount paid as workers' compensation benefits for the same injury, plus the present value of all future workers' compensation benefits payable under the workers' compensation statute.

However, the act would still preserve the employer's workers' compensation shield and would not permit a product seller to bring a contribution claim against him.

Although we strongly support most of the concepts embodied in this section, we, nevertheless, do have some reservations about the barring of a product seller's right to bring a contribution claim against an employer.

We realize that the social policy originally adopted with the advent of state workers' compensation systems, that is, the replacement of the costly, time consuming, and uncertain tort litigation process with an efficient administrative system that assures the injured worker of adequate compensation for losses he may have suffered in the course and scope of his employment, is still very valid. In this regard, we appreciate the appeal of arguments favoring the full retention of an employer's workers' compensation shield.

However, what this original policy fails to fully take into account is the increasing products liability burden placed upon industrial equipment manufacturers, which is the

direct result of the combination of expanding theories of tort liability and the maintenance of employers' workers' compensation tort liability shields.

In light of these developments, we would therefore urge the adoption of the comparative fault concepts contained in section eleven of H.R. 7000 (again H.R. 5626 contains no comparable provision), including the section's imputation of employer fault to the employee in the computation of damages. If, however, the Subcommittee should decide not to include a comparative fault section in its bill, we would recommend that consideration be given to allowing for at least a limited right of contribution against the employer by the product manufacturer.

In any case, we consider that inclusion of section thirteen of H.R. 7000 in your final draft to be an essential element of any equitable products liability act. We believe that such an approach would substantially reduce current litigation costs without diminishing an employee's right to recover in a products liability claim. And, we understand that the insurance industry has indicated that inclusion of section thirteen would result in significant premium reductions for sellers of workplace products.

<u>Limitations on Actions</u>

One of the major contributing factors in the products liability "mess" from our industry's perspective is the fact that machine tools enjoy such longevity of use in the industrial workplace. Because of this, it is not uncommon for a manufacturer

to be sued for an accident which occurred today on a machine produced over one-half century ago, and which the machine tool builder does not even know is still in existence.

To continue to hold manufacturers liable for accidents that occur on any machine they have ever produced, regardless of its age, or more importantly, regardless of the state-of-the-art at the time the machine was built, seems inequitable.

On the other hand, we appreciate that it would also be less than fair to grant compensation to one injured workman, but deny it to another, simply because of the date of manufacture on their respective machines. Therefore, some equitable balancing mechanism is needed.

Both H.R. 7000 and H.R. 5626 address this problem, but in somewhat differing fashion.

Section four of H.R. 5626 cuts off a seller's liability, in the absence of an express warranty, ten years after the first sale, lease, or delivery of possession of the product alleged to have harmed the plaintiff. In addition, the action must be brought within the period of the statute of limitations. However, the bill grants an additional ten year statute of repose in the event of product changes. Such actions can be brought against persons who alter, modify or change a product within ten years following the change. Similarly, actions based on duties which arise by operation of contract or a state-mandated product recall, can be brought against the party owing a duty within ten years from the date such duty arises.

In contrast to this relatively rigid approach, section ten of H.R. 7000 provides that product sellers are not subject to liability for harms that arise after the product's "useful safe life" has expired. According to the bill, "useful safe life" begins at the time of delivery to a purchaser who is not engaged in the business of selling such products and extends through the time in which the product would "normally be likely to perform or be stored in a safe manner."

In claims that involve harms caused more than ten years after the time of delivery to a purchaser who was not engaged in the business of selling such products, a presumption would arise that a product has been used beyond its useful safe life. The presumption could be rebutted by clear and convincing evidence. However, the presumption would not apply if: (1) the product seller expressly warrants that its product can be used for a longer period; (2) the product seller intentionally misrepresents or conceals information about a product; (3) the harm was caused by prolonged exposure to a defective product; or (4) the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until ten years after the time of delivery, or if the harm caused within the ten-year period did not manifest itself until after that time.

Finally, the statute of limitations under the Act is two years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause.

H.R. 5626 would clearly be preferable from the point of view of providing products manufacturers as much certainty as possible about the extent of their potential products liability. However, we recognize the inequitable results which could occur and to which opponents of products liability tort legislation are certain to point. As a matter of fact, statutes of repose adopted by many state legislatures (at least the major ones) have been so compromised and watered down as to render them of questionable practical effect. And in some cases such statutes have been found to be unconstitutional nullifications of plaintiffs' right to sue based upon certain states' constitutional provisions.

As we have already said, products liability tort law modifications must be drafted somewhere between the corporate boardroom and the union hall. We believe that section ten of H.R. 7000 is closer to this mid-point, than other possible compromises (particularly those adopted in major state legislatures), and we are prepared to accept and support it, if an absolute ten year statute of repose is not politically feasible.

Design Defects

Both H.R. 7000 and H.R. 5626 are to be commended for their grounding of liability in design defect cases in a fault standard, rather than that of strict liability as has been the case in some of the more exotic court decisions.

These two sections are really the hearts of their respective bills. Their approach would codify the current state of the law in most jurisdictions and would arrest the trendline of cases moving away from the traditional tort notion of liability based on fault and toward the imposition of absolute liability on product manufacturers. Both of these functions are absolutely essential if we are to keep from moving to strictly a compensation system, in which case we would need to set up an entirely new system of distributing such compensation.

Section five of H.R. 7000 adopts a fault standard with respect to products that are allegedly defective in design. The bill states that a product is unreasonably unsafe if the claimant proves that at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms and the seriousness of those harms outweighed both the manufacturer's burden of producing a product with an alternative design that would have prevented those harms, and the diverse effect of that alternative design on the usefulness of the product.

In making this determination, the statute directs a court to consider: (1) any warnings or instructions provided with the product; (2) the technological and practical feasibility of a product designed so as to have prevented the harm, yet substantially serve the expected needs of likely product users; (3) the effect of any proposed alternative design on the usefulness of the product; (4) the comparative costs of the product as designed and with an alternative design; (5) the new or

additional harms that might have resulted if the product were alternatively designed; and (6) evidence of custom in the industry at the time of manufacture, or compliance with a non-governmental safety standard existing at such time.

Using a similar approach, section five of H.R. 5626 holds manufacturers liable if the plaintiff proves by a preponderance of the evidence, in addition to other requirements of State or Federal law, that the formula or design was the immediate cause of injury, and that an alternative formula or design was available at the time of manufacture and would have avoided or reduced the plaintiff's injury or damage.

According to the bill, an alternative formula or design: (1) must provide overall safety as good or better than the overall safety of the original product; (2) provide better safety as to the particular injury causing hazard; (3) either have been in substantial use by manufacturers of similar products and available for adoption <u>or</u> have been known or should have been known to exist by the manufacturer and was available for adoption; (4) could have been adopted without causing increased costs, or costs that were significantly outweighed by added safety benefits; and (5) met any minimum Federal standards applicable to the product at the time of manufacture.

The Subcommittee should give consideration to expanding the "alternative design" portion of H.R. 7000 to include the alternative design contents contained in H.R. 5626.

Finally, H.R. 5626 provides specific guidance for triers of fact to determine the outcome of actions for injuries which could have been avoided or reduced by the use of safety equipment.

The bill sets up a defense if the defendant proves by a preponderance of evidence that: (1) the product was suited to more than one use; (2) the attachment of an additional safety device would have been inappropriate or incompatible with a function or manner of use of the product; (3) the additional safety device was known or should have been known to be available for purchase or use; (4) the injured person did not purchase or use such device; and (5) the use of such additional device would have avoided or reduced the injury or harm.

Arguably, the concepts found in this language are also contained within H.R. 7000's second criteria for determining if a defendant's product is unreasonably unsafe. However, we believe that stating them in the more explicit terms of H.R. 5626 is preferable and should be given strong consideration by this Subcommittee.

Duty to Warn

Both H.R. 7000 and H.R. 5626 utilize the fault standard employed in design defect cases in "failure to warn" cases as well. We strongly support this approach. Again, the use of a fault standard in "duty to warn" cases is a further affirmation that we are working within the confines of a liability, not a compensation system.

H.R. 5626 states that in a products liability action for failure to provide adequate specifications, instructions, or warnings, the plaintiff must prove by a preponderance of the evidence, in addition to other requirements of State or Federal

law, that: (1) the product was the immediate physical and producing cause of the injury or damage; (2) if adequate specifications, instructions, or warnings had been provided, the user of the product (or any other person shown to have been in a position to respond to such information) would have altered his conduct so as to avoid or reduce the injury or harm; (3) the product with accompanying specifications, instructions, or warnings failed to provide persons of ordinary skill and judgment who might have been expected to use the product with reasonable notice of its properties and ordinary uses or its maintenance, or reasonable notice of identifiable hazards associated with its properties, use or maintenance, for other than ordinary purposes or maintenance if such would not have been clear to persons of ordinary skill and judgment in the exercise of due care for the safety of reasonably expected users.

However, the bill elaborates further by providing that defendants are not liable for failure to warn of an unidentified hazard at the time of manufacture, unless the plaintiff proves by a preponderance of the evidence that, after the hazard became known, the defendant failed to make reasonable efforts to provide adequate warnings where failure to do so constituted a breach of a legal duty of care. A first class mailing of warnings, instructions or specifications to the last known user of the product shall create a rebuttable presumption that reasonable efforts to provide adequate warnings were made.

In its treatment of this problem, H.R. 7000 states the <u>claimant must prove that at the time of manufacture</u>, the likelihood that the product would cause the claimant's harm or

similar harms and the seriousness of those harms rendered the manufacturer's instructions or warnings inadequate, and that the manufacturer should have provided the instructions or warnings that the claimant alleges would have been adequate.

In making this determination, the trier of fact is directed to consider: (1) the extent to which the manufacturer should have been aware, at the time of manufacture, of any damages or potential harm associated with the product; (2) the manufacturer's ability to anticipate the likely product user's awareness of the danger or potential harm; (3) the technological and practical feasibility of providing adequate warnings; (4) the clarity and conspicuousness of the warnings or instructions provided; (5) the adequacy of the warnings or instructions provided; and (6) evidence of industry custom or compliance with a nongovernmental safety standard applicable to the hazard.

Either of these sections would be acceptable in that they both require a claimant to show fault on the part of the manufacturer and clearly delineate what a trier of fact is to take into consideration in determining if the manufacturer has met his duty to warn.

Additionally however, H.R. 7000 includes a very important provision absent from H.R. 5626. H.R. 7000 requires a claimant to prove that the warnings he alleges would have been adequate would have been effective because either a reasonably, prudent user would have declined to use the product or used it in such a manner as to have avoided the harm.

Our members report to us that normally triers of fact are required to choose between the adequacy of the warning actually provided by the defendant and some nebulous, "perfect" -- albeit unspecified -- warning, which would have allegedly "guaranteed" against an accident. Therefore, it seems quite reasonable that the claimant bear the affirmative duty of producing for the trier of fact a warning which he believes would have been more effective than the one used by the manufacturer. The sponsors of H.R. 7000 are to be commended for this innovation.

Finally, H.R. 7000 contains a very significant provision which bars manufacturer liability on the basis of failure to warn or instruct if the dangers causing the injury were open and obvious. The trend in some jurisdictions to require warnings against "open and obvious" dangers is most disturbing, because it tends to weaken the effectiveness of <u>all</u> warnings.

We strongly support these two additional and important concepts of H.R. 7000. We feel that their inclusion clearly makes H.R. 7000's duty to warn provision superior to that of H.R. 5626.

<u>Product Misuse and/or Alteration</u>

We applaud both H.R. 7000 and H.R. 5626 for again grounding liability in fault in both the cases of product misuse and product alteration.

The basic distinction between the two bills is that H.R. 5626 makes both misuse and alteration (as defined in the bill) complete defenses, whereas H.R. 7000 adopts a comparative fault approach which reduces a claimant's damages to the extent that the misuse or alteration was the cause of the harm.

Notably, H.R. 7000 specifically treats failure to maintain as a form of misuse. We strongly agree with this approach and would urge that it be employed in either a comparative fault or complete defense treatment of misuse or alteration.

However, we believe it is vitally important to also specifically treat an employer's failure to train a workman as a form of misuse. Data which we submitted to the Subcommittee last year indicates that approximately 65% of products liability injuries which occur on machine tools are the result of a lack of adequate training of the injury victim. Furthermore, the statistics also show that over one-half of all workplace accidents occur during a worker's first six months on the job. Similar to the concept of failure to maintain, we believe and would urge that failure to train be included in any treatment of misuse.

As we stated before, the fundamental difference between H.R. 7000 and H.R. 5626 is that of comparative fault versus a complete defense to liability.

We prefer the comparative fault approach, because it involves the employer (who is the party most often at fault for

the workplace injury) in the fault assessment equation. However, we do recognize that it may be difficult to impose a comparative fault scheme on states which currently do not utilize such a concept in their law. Therefore, we would suggest that if the comparative fault approach is foreclosed for such reasons, very strong consideration should be given to the possibility of allowing some form of action for contribution by sellers against employers for a limited amount over and above the employers' workers' compensation liability. Such contribution should at least be made available in the event of particularly egregious acts of commission or omission by employers, who, for whatever reason, fail to maintain safe workplaces for their employees.

Failure to Discover Defective Condition and Use of a Product with a Known Defect

While H.R. 5626 does not specifically address these two issues, H.R. 7000 deals with them both. Again the approach is that of a comparative fault system, with the claimant's damages being reduced (1) to the extent that his injury was the result of a defective condition that would have been apparent without inspection, or (2) to the extent that he acted unreasonably in the face of a known defect.

Although, as we have repeatedly stated, we view comparative fault as a useful conceptual approach to products liability law, in the above two circumstances we find it hard to imagine situations in which the results of weighing the

claimant's fault against the measure of his damages would not always in effect result in a complete defense for the manufacturer against the injured's claim.

This being the case, we would suggest that a slight departure from a pure comparative fault system be made in this area by providing that the above two situations be made complete defenses to a products liability claim.

Limits on Liability Imposed on the Basis of 20-20 Hindsight

We commend H.R. 7000 for addressing an issue which we have identified as one which must receive consideration in an effective products liability bill. Specifically we refer to section 7(b), which states that if a product seller proves that it was not within practical technological feasibility for him to make the product safer with respect to design and warnings or instructions at the time of manufacture so as to have prevented claimant's harm, he will, in general, not be liable for defect in design or failure to warn or instruct.

Moreover, we fully agree with H.R. 7000's definition of "practical technological feasibility" as "the technical, mechanical, and scientific knowledge relating to product safety that was reasonably feasible for use (in light of economic practicality) by the product seller at the time of manufacture."

Finally, we also agree that exceptions to this rule are justified if a product seller acted unreasonably in selling the product at all; violated an express warranty; or failed to meet a post-manufacture duty to warn about the product.

A closer question arises, however, when a product has complied with a government standard or a government requisition specification.

H.R. 7000 provides that if the injury-causing aspect of a product was in compliance with a legislative enactment or administrative regulation relating to design or performance, it shall not be deemed defective unless the claimant proves that a reasonably prudent product seller would and could have taken additional precautions. And, conversely, if the injury-causing aspect of the product was not in compliance with such a standard, the product shall be deemed defective unless the product seller proves that its failure to comply was a reasonably prudent course of conduct under the circumstances.

In contrast, section five of H.R. 5626 sets up compliance with a mandatory federal standard or regulation as a complete defense to a products liability action.

We view the approach of H.R. 7000 on this issue as more sensitive to our underlying philosophical belief in allowing and indeed encouraging manufacturers to find new and innovative ways of solving technical problems, rather than hamstringing them with design restrictive criteria, from which they dare not deviate lest they lose their complete defense in a products liability case.

Furthermore, we seriously doubt that the tact taken by H.R. 5626 on this issue would significantly reduce litigation.

We do, however, believe that compliance with mandatory government contract specifications should be a complete defense. We understand that legislation permitting actions by injured claimants against the government is pending in the House Judiciary Committee. This is proper, because, the government -- and not the product seller -- is, in fact, the designer of the product.

Other Provisions of H.R. 7000

Finally, we note H.R. 7000's inclusion of provisions, (which are absent from H.R. 5626) dealing with post manufacture changes, punitive damages and the unavoidably dangerous aspects of products. Without going into a great deal of detail at this time, we briefly note that we agree with the treatment these issues receive in H.R. 7000, and would urge their inclusion in a final draft of a comprehensive products liability bill.

V. THE PRODUCTS LIABILITY CRISIS REQUIRES THE STATUTORY EMBODIMENT OF CERTAIN ELEMENTS OF TORT LAW

Some opponents of H.R. 7000, H.R. 5626, and similar legislation argue that the common law development of products liability tort law should not be interrupted by the enactment of a statute. Our response to this criticism is that we fully appreciate that what any statute does is to "take a picture" of a particular area of the law as it exists at the moment, and freeze frame that picture. Additionally, some statutes airbrush in changes in the picture's negative.

We believe that with regard to products liability, at a minimum the picture has to be taken now, so that the exotic applications of the doctrine of strict liability to design defect and "failure to warn" cases will be arrested. This is vital if we are to continue to have a growing and productive manufacturing industry in the United States.

We have also identified some areas of products liability tort law in which we believe some selective airbrushing must take place if equity and balance are to be maintained, particularly for manufacturers of workplace products.

VI. THE INTERSTATE NATURE OF THE PRODUCTS LIABILITY CRISIS MANDATES A FEDERAL SOLUTION TO THE PROBLEM

Having stated what we believe to be essential elements in any well balanced and effective products liability legislation, we now address the issue of the proper forum in which to enact such a law.

It is suggested by some that due to the traditional common law development of products liability jurisprudence, any modifications in tort law, such as those proposed in H.R. 7000 and H.R. 5626, should be made on a state-by-state basis, in a manner similar to the adoption of the Uniform Commercial Code (UCC).

Certainly we recognize that there are benefits to be derived from such a procedure. Presumably, it would allow for tailor-made approaches to unique problems and concerns of individual states. Furthermore, it would foster a degree of variation between the several states' treatment of problems

common to all. The results of such differing solutions to common difficulties could then at a later date be analyzed and compared, with the advantages and disadvantages of the various approaches more clearly identified for all to evaluate.

However, having stated the merits of a state-by-state approach to the law of products liability, we, nevertheless, believe that a federal approach to tort law modification is required for two very significant reasons which greatly outweigh the above stated advantages.

First, analytically the geographical distribution and interstate flow of products are distinguishing features of the products liability problem. Unlike the intrastate complexion of medical malpractice for instance, where it is typically true that the state of the practitioner's place of business or residence, the state of the injury, and the state of the injury victims residence are all the same, products liability is much more complex. For example, products injury victims may be scattered across fifty jurisdictions, while the insured manufacturer may have facilities in only one state, his product being carried across the country by numerous distributors and middlemen. Therefore, we firmly believe that the potential nationwide impact of products liability strongly argues for a federal remedy to the problem.

Second, on a very pragmatic level, we greatly fear that the philosophical and theoretical satisfaction to be derived from adoption of a model tort law on a state-by-state basis would very

likely come at the financial hardship of many of our members and other product sellers. These manufacturers will continue to have to pay exorbitant products liability insurance premiums, or in some of the most extreme cases may actually be bankrupted by astronomical products liability judgments for which they were unable to obtain insurance coverage, while they wait for their individual state legislatures to get around to enacting "uniform" tort law modifications.

Moreover, even if it were possible for products manufacturers to endure such a protracted and torturous process of state-by-state enactment of products liability tort law modifications, we wonder what the final results of such a process would be. Since critics of a federal preemptive like to point to the state-by-state adoptence of the UCC as a more satisfactory method of achieving jurisprudential uniformity, perhaps it behooves us to take a closer look at exactly what the results of that exercise have been.

Today the UCC (1962 Official Text) with variations, is law in all states but Louisiana and is also law in the District of Columbia and the Virgin Islands.

Unquestionably, the UCC originally conceived in 1940 by Mr. William A. Schnader, President of the National Conference of Commissioners on Uniform State Laws, stands as a monument to the tireless efforts of many leading legal scholars in their attempt to bring uniformity to important areas of the commercial law. However, it is a monument not without its flaws.

The National Conference of Commissioners was the originating sponsor of the Code. However, this was not the first venture of the conference into the field of commercial law reform. The conference had earlier sponsored a number of "uniform acts" in fields of commercial law ranging from sales to negotiable instruments. However, by the late 1930's it became apparent that the acts had become outdated as a result of the emergence of new patterns of commercial activity. Moreover, by that time it was clear that one of the major objectives of the "uniform acts" had not been achieved. That is, the uniformity which had been sought had been thwarted by the fact that not all states enacted the acts. And in those states that had incorporated the uniform acts into their law, state courts rendered countless nonuniform "judicial amendments." Against this background the UCC was developed.

Although eventually almost every state adopted the UCC, in contrast to the relative lack of support for the earlier acts, it was far from being an overnight process. In 1953, Pennsylvania became the first state to enact the model business code. A full decade later only slightly over half of the states had followed suit by adopting some form of the UCC. And, New York, a major commercial center, had been one of the last of these states to accept the uniform law. Finally, by 1968, a full fifteen years after the process had begun, the UCC was in effect in every state but Louisiana, as well as the District of Columbia and the Virgin Islands.

So, the UCC had succeeded in a vital area where its predecessor "uniform acts" had failed, that is, being adopted in nearly every jurisdiction in the union. However, surely this protracted process was not without its inconvenience to the flow of commerce. And we are certain that the luxury of such a state-by-state process, lasting for over a decade and a half, is certainly one that is quite literally unaffordable for many of our members today.

Furthermore, the Uniform Commercial Code was not literally uniform in all of the various states. By 1967, the various jurisdictions enacting the code had made approximately 775 separate amendments to it. Moreover, some of the states that most liberally rewrote or deleted sections of the UCC were the very states that conducted a large share of the business to which the code's concepts were applicable. For example, New York amended article five in a manner that renders it inapplicable to many letter of credit transactions, even though New York does more letter of credit business than any other state. California was also a principal offender against the UCC's goal of uniformity.

Although the substantive areas of law differ, we wonder if similar problems would not occur were the modifications suggested in H.R. 7000 and/or H.R. 5626 to be offered as model laws to be enacted when and if the individual states chose to do so. Certainly, the currently existing disparity in products liability jurisprudence strongly suggests that there would be key states that would differ in their enthusiasm for certain of the modifications embodied in H.R. 7000 and/or H.R. 5626.

Another problem which is beginning to arise with the UCC, and which would also undoubtedly occur with a state-by-state approach to products liability tort law modification as well, is that of varying judicial interpretation.

It is of course not unusual for laws, which necessarily must, to one degree or another, contain "open-ended" phraseology, to receive somewhat varied judicial interpretation. That different courts will give such phrases different meanings should surprise no one. Moreover, after any uniform law has been on the books for a while, disparate judicial interpretations and constructions will inevitably become a source of nonuniformity.

However, it may be possible to reduce the extent of this type of "judicial legislation" to a great degree by providing the model act with a uniform or unitary legislative history. Federal enactment of the provisions in H.R. 7000 and/or H.R. 5626, in light of all of their legislative history would provide such a common background to which courts could look in the future when faced with the need to render an interpretation of the statutory language. However, adoption on a piecemeal state-by-state basis would not.

Even more distressing, as in the case of the UCC, many states may not even hold hearings or publish reports, and therefore will fail to provide interpreting courts with any legislative guidance at all. Faced with such a situation, courts will inevitably fall back upon their particular state's common law tort jurisprudence, as a source of guidance.

With this "judicial legislation, occurring in numerous jurisdictions across the country, it may not be long before the uniformity which we have so arduously worked to achieve will be lost, and we will find ourselves in no better circumstances than the present situation.

Finally, there is a fundamental qualitative difference between what the UCC was designed to accomplish and what are the primary objectives of a uniform products liability act, which allows the UCC to function in spite of the attenuating pressures of nonuniformity, but which would completely thwart the objectives of uniformity in products liability law. That basic distinction is simply but significantly the fundamental legal dichotomy between contract and tort.

The UCC is designed to operate in the area of commercial transactions where the involved parties exist in arms length business relationships, into which each party has entered with conscious intent, albeit without a perfect foreknowledge of their outcome. By contrast, a uniform products liability act would necessarily have a function in the area of tort law, which has as its objective the compensation of parties for damages which are obviously not planned, and are very often quite unpredictable.

This basic dichotomy between consciously planned contractual relationships on the one hand, and involuntary and unpredictable tortious interactions on the o her, is made more evident by the fact that the UCC itself contains a conflict of laws section (§1-105) which permits the contracting parties

in most cases to select beforehand which forum's law will govern their agreement. By contrast there is certainly no way for products liability defendants to predetermine which state tort law will apply since there is no way of predicting in which jurisdiction a tortious injury may occur. Indeed, in most cases there does not even exist a legal relationship between the plaintiff and the defendant prior to the time of the purportedly tortious injury.

Therefore, because of the potential for products liability suits to unpredictably arise in numerous and diverse jurisdictions, it is vital that the pressures of nonuniformity be kept to a minimum in the enactment of products liability legislation. Indeed, in the case of capital goods used in the industrial workplace, nonuniformity in only a relatively few states may be extremely detrimental to the ultimate goal if those states happen to be highly industrialized and are the situs of the bulk of industrial workplace accidents.

Finally, uniformity in products liability tort law, and hence greater predictability of the outcome of such litigation, is of vital importance not only to plaintiffs and defendants in such cases, but also to insurance companies who base their premiums for underwriting products liability insurance coverage on the statistical probabilities of such claims experience.

As we stated earlier, we are very gratified that the House of Representatives has adopted the Risk Retention Act. However, for that act to be most effective as a competitive market force in reducing products liability insurance premiums, it must be accompanied by the kind of uniform tort law modifications embodied in H.R. 7000 and H.R. 5626, which will allow commercial insurers to bring their premiums into closer harmony with actual claims experience, by allaying their fears of potentially enormous products liability judgments waiting to befall one of their insureds.

VII. CONCLUSION

In conclusion, let us reiterate and reemphasize the reality of the products liability crisis faced by American manufacturers today. Although our 1980 products liability survey results reveal that some changes have occurred in the products liability insurance market over the past year, the net sum of those changes leaves most members of our industry in no better position than before, and some in an even worse situation.

For this reason, we commend the sponsors of H.R. 7000 and H.R. 5626 for their recognition of the need to address certain inequities in the underlying tort law of products liability. Although in some cases we have expressed a preference for the provisions of one bill over those of the other, we think that both bills contain significant and helpful modifications which should be taken into account in the final drafting of a products liability law.

Finally, for reasons already enumerated, we believe the products liability crisis to be a national problem which merits a national solution. Therefore, we urge this Subcommittee to given both judicious and expedicious consideration to the various products liability modifications currently pending before it. The swift enactment of equitable and well balanced products liability tort law modifications, in conjunction with the already passed Risk Retention Act, will, we believe, to a great degree, restore a measure of predictability to products liability jurisprudence, which should in turn result in a more rational and competitive products liability insurance market. But most importantly, the entire country as well as the individual consumer will benefit from a more innovative and productive manufacturing sector of the national economy.

Thank you for the opportunity to testify before this Subcommittee today. We would be pleased to respond to any questions you may have at this time.

THE PRODUCT LIABILITY ALLIANCE
1725 K Street, N.W Suite 710
Washington, D.C. 20006
(202) 872-0885

File
Prod Liab

MEMBERSHIP

A C & S Inc

A H Robins

A L C O A

A S A R C O Inc

Aetna Life & Casualty

Alexander & Alexander

Alliance of American Insurers

Alliance of Metal Working Industries

American Business Conference

American Hardware Manufacturers Association

American Hoechst Corporation

American Insurance Association

American International Group

American Machine Tool Distributors Association

American Mining Congress

American Petroleum Institute

American Supply Association

American Surgical Trade Association

American Textile Machinery Association

American Traffic Services Association

April 26, 1982

Asbestos Compensation Coalition

Associated Equipment Distributors

Association of General Merchandise Chains

Atlantic Richfield

Automotive Service Industry Association

Bendix Corporation

Black & Decker Company

Business Roundtable

Carrier Corporation

Chainsaw Manufacturers Association

Chamber of Commerce of the United States

Chemical Manufacturers Association

Construction Industry Manufacturers Association

Colt Industries Inc

Commercial Union Insurance Co

Crum & Forster Insurance Companies

Eaton Corp

E I Dupont de Nemours Company

Electronic Industries Association

Eli Lilly Corporation

Emerson Electric

F M C Corporation

Farm & Industrial Equipment Institute

Fike Metal

Firestone Tire & Rubber Co

Ford Motor Company

Foundry Equipment Manufacturers Association

General Electric

General Motors Corporation

Geosource

Goodyear

Gould Pumps, Inc.

Grumman Allied Industries

Gulf & Western Industries Inc.

Harris Corporation

Hartford Insurance Group

Health Industry Manufacturers Association

Household International

I C I Americas Inc

Independent Insurance Agents of America

Insurance Co of North America

International Association of Amusement Parks & Attractions

International Harvester Co

International Snowmobile Industry Association

I T T Corporation

Johnson & Johnson

Kemper Group

Litton Industries

Man-Made Fiber Producers Association

Manufacturers Association of Jamestown Area

Manufacturing Agents National Association

Material Handling Institute

Merck & Co Inc

Mobil Oil Corporation

April 26, 1982

Monsanto Co

Motor Vehicle Manufacturers Association

Motorcycle Industry Council

National Association of Casualty & Surety Agents

National Association of Chain Manufacturers

National Association of Furniture Manufacturers

National Association of Independent Insurers

National Association of Insurance Brokers

National Association of Manufacturers

National Association of Margarine Manufacturers

National Association of Wholesaler-Distributors

National Electrical Manufacturers Association

National Federation of Independent Business

National Fertilizer Solutions Association

National Insulation Contractors Association

National Legal Center for Public Interest

National Machine Tool Builders Association

National Marine Manufacturers Association

National Retail Merchants Association

National Solid Wastes Management Association

National Spa & Pool Institute

National Sporting Goods Association

National Tool Die & Precision Association

National Truck Equipment Association

National Wholesale Druggists' Association

Neece Cator & Associates

P P G Industries

April 26, 1982

Pharmaceutical Manufacturers Association

Philip Morris

Proprietary Association

Pulp & Paper Machinery Manufacturers

Reinsurance Association of America

Risk & Insurance Management Society Inc

Rohm & Haas

Rubber Manufacturing Association

Special Committee for Workplace Product Liability Reform

Scientific Apparatus Makers Association

Sears Roebuck & Co.

Sheet Metal & Air Conditioning Contractors National Association

Small Business Legislative Council

Society of the Plastics Industry

Sporting Goods Manufacturers Association

Squibb Corporation

Sun Company

Textron

3M Company

Toyota Motor Sales USA Inc

Truck Trailer Mfg Assn

U B A Inc

Union Camp Corp

Union Carbide

United States Steel Corp

Venners & Company

Woodworking Machinery Manufacturers of America

April 26, 1982

THE WHITE HOUSE
WASHINGTON

Tomorrow's
meeting at
3pm

THE WHITE HOUSE

WASHINGTON

May 4, 1982

MEMORANDUM FOR WAYNE H. VALIS

FROM: JUDY HARRIS Judy

SUBJECT: Meeting with Mike Ullman and Wendell Gunn
Wednesday, May 5 -- 3:00 p.m.

For your information, the following will be meeting with Wendell Gunn and Mike Ullman on Product Liability tomorrow:

Marty Connor — Washington Corporate Counsel
General Electric Company
777 14th Street, N. W./Suite 1100
Washington, D. C. 20005

Les Cheek — Vice President, Federal Affairs
Crum and Forster Insurance Company
1120 Connecticut Avenue/Suite 1142
Washington, D. C. 20036

Robert Fields — Director of Regional Affairs
FMC Corporation/Suite 500
1627 K Street, N. W.
Washington, D. C. 20006

Andy Paul — Director of Government Relations
Gulf and Western
600 New Hampshire Avenue, N. W.
Washington, D. C. 20037

Victor Swartz — Partner,
Crowell and Moring
1100 Connecticut Avenue, N. W./12th Floor
Washington, D. C. 20036

Dirk Van Dongen — President
National Association of Wholesaler-Distributors
1725 K Street, N. W./Suite 710
Washington, D. C. 20006

I have informed Mr. Ullman's and Mr. Gunn's offices; clearances will be handled by Mr. Ullman's office (Room 228), where the meeting will be held. All parties have been advised, and Mr. Van Dongen is arranging for the above people to be here on time.

cc: Wendell Gunn
Mike Ullman

DOCUMENT NO. 071758PD

OFFICE OF POLICY DEVELOPMENT STAFFING MEMORANDUM

DATE: 4/23/82 ACTION/CONCURRENCE/COMMENT DUE BY: 4/30/82

SUBJECT: Meeting with Product Liability Coalition

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	SMITH	☐	☐
PORTER	☐	☐	UHLMANN	☐	☐
BANDOW	☐	☐	ADMINISTRATION	☐	☐
BAUER	☐	☐	DRUG POLICY		
BOGGS	☐	☐	TURNER	☐	☐
BRADLEY	☐	☐	D. LEONARD	☐	☐
CARLESON	☐	☐	OFFICE OF POLICY INFORMATION		
FAIRBANKS	☐	☐	GRAY	☐	☐
FRANKUM	☐	☐	HOPKINS	☐	☐
HEMEL	☐	☐	OTHER		
KASS	☐	☐	✓ Wayne Valis	☒	☐
B. LEONARD	☐	☐	______	☐	☐
MALOLEY	☐	☐	______	☐	☐

REMARKS:

Go ahead. Me and Wendell Gunn or Bill Barr/Mike Uhlmann.

EDWIN L. HARPER
ASSISTANT TO THE PRESIDENT
FOR POLICY DEVELOPMENT

THE WHITE HOUSE

WASHINGTON

OFFICE OF
POLICY DEVELOPMENT

1982 APR 22 P 4: 33

April 20, 1982

MEMORANDUM FOR ED HARPER

FROM: WAYNE VALIS Wayne

SUBJECT: Meeting with Product Liability Coalition

As you know, about 150 trade associations and companies have formed the Product Liability Coalition. Recently, they have requested that I arrange a meeting between now and the end of April with you or members of the Administration Product Liability Group.

Please advise me on this at your earliest convenience. As you know, this is one of the most important business issues, and I hope we can arrange a presentation by the coalition.

Thanks much. I appreciate it. WV

No — Stop —

Me + Wendell G.
or Bill Bovv / Mike U.

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

...the national voice of wholesale distribution

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

April 16, 1982

TO: Trade Association Liaison Council

FROM: Dirk Van Dongen

SUBJ: Product Liability Reform

During our meeting yesterday, several of you expressed an interest in the outcome of the Administration's current deliberation of the position it will take on Federal product liability reform.

For your reference and use, I'm enclosing a list of the Cabinet Council working group on this issue and a background memorandum supporting a uniform Federal solution to this problem which has been submitted to the working group by The Product Liability Alliance.

TPLA is an ad hoc group formed to advance the prospects of Federal product liability reform legislation.

As discussed at our meeting, the working group is scheduled to make its recommendations to the Cabinet Council by May 7. So, if this issue affects your members, we encourage you to immediately initiate contacts with members of the working group, and senior White House staff, as well, expressing your support for the establishment of uniform Federal standards to resolve what is a clear interstate commerce problem.

Should you be interested in learning more about TPLA and its activities, please call me, or David Sloane, our Director - Congressional Relations, at the above number.

THE PRODUCT LIABILITY ALLIANCE

1725 K Street, N.W Suite 710
Washington, D.C. 20006
(202) 872-0885

MEMORANDUM

April 15, 1982

TO: Members of the Working Group of the Cabinet Council on Commerce and Trade

FROM: The Product Liability Alliance

RE: The Case for Federal Product Liability Legislation

Gentlemen:

The Product Liability Alliance (TPLA) is an organization of more than 150 businesses and trade associations whose membership is a cross-section of those subject to product liability claims. It includes small, medium-size and large businesses; manufacturers, wholesalersand retailers; and insurers and insurance brokers.

TPLA was formed to support the enactment of a balanced and effective Federal product liability statute. TPLA is not a policy making entity; it takes no position on particular provisions of pending proposals. Rather, it serves as a forum for communication among groups with widely divergent views on product liability, a catalyst for consensus.

TPLA members believe that the rules governing the obligations of product sellers and the rights of product users should be codified in a statute; that such a statute will be effective only if it is enacted at the Federal level; and that such a statute should be balanced -- fair to those who make and sell products as well as to those who use them.

The businesses belonging to TPLA are firm believers in President Reagan's economic recovery program, and strong supporters of his efforts to delegate to the States and the private sector regulatory and other functions that do not require Federal involvement. At the same time, they recognize that some problems cannot be dealt with by the States. Product liability law is such a problem.

Products made in one State may be distributed in several others, sold in still more, and used in all. The rules governing the manufacturer's liability for harm caused by his products are established primarily on a case-by-case basis not merely in his home State courts but by courts in every other American jurisdiction. These rules vary widely from State to State, and are becoming progressively less predictable and incr asingly unfair.

Individual States have attempted to deal with this problem by codifying their product liability rules. Some 28 States now have product liability statutes, but all of them are different. Worse, some of them have impaired in-State consumer rights while doing nothing to make a manufacturer's out-of-State liabilities less uncertain. Ironically, these good-faith efforts by the States to cope with the interstate product liability problem have, if anything, compounded it.

The interstate movement of products requires product liability insurers to make rates on a nationwide basis, whereas rates for all other lines of insurance are made on a State-by-State basis. Individual State aberrations from the majority rule on a given issue thus have repercussions for premium payers in all other States, since it cannot be predicted when these "highest common denominator" rules may come into play for a given manufacturer's products.

The inability of the States to deal <u>effectively</u> with the interstate nature of products liability suggests the appropriateness of limited Federal intervention in the process of balancing product sellers' and product users' rights and duties.

TPLA believes that the Federal role in product liability should be limited to the determination of the <u>policy</u> governing the obligations of businesses whose products move in interstate commerce, since the States cannot, by their own actions, achieve the uniformity essential to a stable and predictable product liability law. TPLA also believes that the mainspring of Federal policy should be <u>fairness</u> to both product sellers and product users.

At the same time, TPLA believes that the States will be able and should be permitted to <u>implement</u> Federal product liability policy through their court systems. A Federal product liability statute, applied in individual State court actions, would add no costs to State judicial systems. Moreover, since uniform rules would tend to discourage the "forum shopping" now prevalent in product liability cases, Federal court caseloads in actions based on diversity jurisdiction should decline.

TPLA believes that the Working Group will find the case for a fair Federal product liability law persuasive, and suggests that the Group's recommendations to the Cabinet Council focus first upon the <u>need</u> for such a law. The development of the statutory details will be an evolutionary process, and we believe that it would be premature for the Working Group to base its overall policy judgment on specific provisions of legislative proposals subject to change.

It has been suggested that Administration policy toward product liability legislation should be developed in the analytical framework commonly applied to proposed Federal programs or economic regulations. Some have argued that because a Federal product liability law would to some extent "regulate" State courts, any such proposal should therefore be evaluated in terms of relative economic costs and benefits.

While a Federal product liability law would certainly limit range of State court discretion on broad legal questions, it .ld in no way impinge upon the current method State courts use determine liability in individual product injury cases. Indeed, : would make that task easier. Thus, to characterize a Federal roduct liability law as a "regulatory" statute misconstrues its purpose, which is to fairly balance the interests of plaintiffs and defendants in product liability law.

Similarly, while a Federal product liability law would certainly affect the costs associated with product liability, it does not, as a proposed Federal program or economic regulation would, involve an expenditure of tax dollars against which its benefits can be weighed. Indeed, while some of the economic benefits of a Federal product liability statute could be quantified (e.g., reduction in transaction costs resulting from the elimination of subrogation and contribution actions in workplace product liability cases), others cannot be (e.g., economic implications of a fault standard in product design defect and duty to warn cases). Moreover, how can an economic value be assigned to the concept of fairness?

To apply cost-benefit analysis to what amounts to a codification of the law in the majority of States assumes that there are tangible costs against which the largely intangible benefits of such a codification can be balanced. We can see no such costs.

The difficulties of trying to weigh a Federal product liability law in the traditional cost versus benefit scale are best illustrated by the fact that most of the pending legislative proposals preserve traditional causes of action in product injury cases. For example, all pending proposals preserve claims alleging strict liability in tort for product manufacturing defects. Thus, there is no way of estimating whether there will be more or fewer such claims.

Similarly, it would be impossible to calculate the value of legal man-hours saved by a Federal law's elimination of the current need to brief every legal issue over and over again in every action in every State court.

It has also been suggested that the recent stability of product liability insurance rates is barometric evidence that there is no product liability problem. This is emphatically not the case. Product liability is a "long-tail" line of insurance in which the majority of claims arising during the policy period are settled years later. Thus, the impact of the near tripling in the number of product liability claims filed in Federal District Courts alone during 1975 (2,886) and 1981 (9,071) will not begin to be felt until sometime after those cases go to verdict or are settled in the years to come. Moreover, most major product manufacturers substantially or entirely self-insure their product liability, so that insurance data does not fully represent the frequency or severity of product liability losses. An enclosed TPLA "Background Paper on Product Liability Insurance" addresses these and other points in detail.

The adversary system of justice is enormously expensive, and will remain so with or without a Federal product liability law. A Federal product liability statute would preserve -- indeed it would strengthen -- the fault basis for assignment of liability in product injury cases, and therefore does not have as its sole purpose a redu in the transaction costs of the tort system. Thus, to analyze a concept whose thrust is equitable in economic terms is a disservice both to the concept and to cost-benefit analysis.

We are enclosing several TPLA documents which you may find useful in your analysis of the product liability issue:

(1) "The Product Liability Problem" -- This is a two-page summary of the case for Federal product liability legislation.

(2) "Elements of a Fair Federal Product Liability Statute" -- This document outlines the key issues TPLA recommends be dealt with in Federal product liability legislation.

(3) "Background Paper on Product Liability Insurance" -- This paper relates the history of Federal examination of the role of insurance rate making practices in the product liability problem and describes the Congressional resolution of the insurance issue (the Product Liability Risk Retention Act).

(4) "Summary of Public Comment" -- This compendium of all public comment on the Senate Consumer Subcommittee's Staff Draft No. 1 of the Product Liability Act, prepared by TPLA Counsel Victor E. Schwartz, is a useful guide to the perspectives the entire spectrum of affected interests have on product liability.

(5) "Compendium of Comments" -- This document synthesizes the views of TPLA members on the first Staff Working Draft, and is a useful illustration of the consensus approach the TPLA has taken toward the substance of Federal product liability legislation.

We think these documents make a strong case for the need for a Federal product liability statute that fairly balances product seller and product user interests. They show that while there may be divergence as to precisely what such a statute should contain, there is little doubt as to its necessity. The last two in particular show how quickly a consensus can be developed on details among those with a common goal.

With the first meeting of the Working Group scheduled for Monday, April 19, we wanted to get this preliminary material in your hands as quickly as possible. While we will be following up with you individually in more detail next week, please feel free to call upon any of the TPLA member organization representatives listed below if we can be of assistance to you prior to your April 19 session.

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Bob Fields	FMC Corporation	293-7900
Jim Mack	National Machine Tool Builders Assn.	893-2900
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National Machine Tool Builders Association

National Product Liability Council

Southern Furniture Manufacturers Association

Special Committee for Workplace Product Liability Reform

Sporting Goods Manufacturers Association

Textron, Inc.

U. S. Chamber of Commerce

3M Company