EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL OF ECONOMIC ADVISERS

Date: 5/5

To: Bill Beach

From: Alex Parker

FYI

UNITED STATES GOVERNMENT

memorandum

DATE: April 16, 1982

REPLY TO ATTN OF: Allen Parkman

SUBJECT: Product Liability

TO: Bill Niskanen

The CCCT has designated a working group to identify and analyze the economic and intergovernmental policy arguments for and against a new Federal statute on product liability that would preempt jurisdiction of the states in this area.

In this memo I would like to present the economically desirable standards for product liability under different circumstances, discuss areas in which recent developments in state law have deviated from the desirable rules, and then look to see if the most concrete Federal alternative (the Kasten draft bill) would remedy the deficiencies in the state laws.

Efficient Tort Law

The actions of injurers and victims can result in accidents. When the social costs of accidents are minimize by both parties equating the reduction in expected damages of an accident to the marginal costs of the last unit of care at a positive level of care, then the economically efficient standard should be negligence with a defense of contributory negligence. If the marginal cost of care is less than the expected harm, then the injurer is negligent. Meanwhile, if the marginal cost of care by the victim is also less than the expected harm, then the victim is held to be contributory negligent. Therefore, to avoid liability the injurer has incentives to be efficient and to collect the victim has an incentive to be efficient.

However, the administration of this system is not costless. There are costs involved in determining if the parties were negligent and also the costs of processing and collecting the claim. Therefore, in cases where the victim cannot take any evasive action (i.e., the optimal level of case is zero) a case for strict liability has developed on efficiency grounds. Strict liability reduces the incentives for victims to take evasive action and, therefore, strict liability would not be attractive where negligence is appropriate. However, strict liability is less costly to establish than negligence, so where no defense of contributory

negligence would be appropriate (there is nothing the victim could do to avoid the harm), strict liability is referable to negligence. Strict liability should not alter the allocative decision of the injurer from the situation that would have existed under negligence.

A secondary question is whether the injurer or the victim under strict liability would be the lower cost source of insurance. That issue is avoided here by assuming that the injurer is the lower cost source of insurance.

Let me apply this system to product liability. If defective tires throw off pieces of tread or develop bumps before they explode, then a negligence standard with a defense of contributory negligence would appear to be appropriate. On the other hand, if the first evidence to the victim of a defective tire is when it explodes, then strict liability might be preferable.

Defects in the Present State Product Liability Law

Although the framework discussed above was the one that was in place approximately 25 years ago, Richard Posner argues that in at least five areas current state law is in serious conflict with the dictates of economic efficiency. These areas are:

1) The law disregards consumer choice by refusing to recognize compliance with the industry standard of care as a defense in design defect cases. Because of low transaction costs, the industry standard represents the socially efficient tradeoff between price and safety and, therefore, it cannot be negligent.

2) Contemporary products liability law often fails to recognize a defense of unsafe use by the consumer. Therefore, potential victims do not have the proper incentives to avoid accidents.

3) Liability is often imposed in products cases where the product is defective by current safety standards but not by the standards recognized when the product was made. Economic incentives are based on ex ante alternatives rather than ex post results. Liability ex post would give incentives for less durable products, etc.

4) Punitive damages are often imposed in product cases. In economic analysis intentional misconduct is

reserved for cases where there is a tremendous disparity between the costs and benefits of avoiding injury, which is seldom the case in products cases.

5) Even clear and conspicuous disclaimers of product liability usually are not enforced by the court. This is in violation of the principles of the Coase Theorem with low transaction costs.

Statutory Improvement over the Common Law

Because of the five defects listed above there may be the need for state or federal statutory law to create a more efficient product liability law. The primary reason given for why the states have not enacted statutes to resolve these defects is that state legislatures are biased toward in-state plaintiffs and against out-of-state defendants. Since most of these defects are favorable toward plaintiffs, the biased legislatures have little incentive to correct the defects. That may be true, but I am not convinced. An alternative argument may be that the common law is evolving, and no author can come up with a statute that people accept as an improvement over the common law even with all its defects.

We have an example of a statutory alternative, and the working group should be concerned about its ability to correct the five defects mentioned above. Attached to this memo are copies of the Section-by-Section Summary of the "Product Liability Act of 1981" as well as the draft itself. It is subject to change, but I would not think by very much.

Turning to the defects presented above:

1) Industry standards: While government standards create a presumption of reasonableness (Section 6), design defects are held to a negligence standard based on information available at the time of manufacture (Section 4). The industry standard is not mentioned as evidence of reasonableness. Therefore, the Kasten bill would not appear to resolve this defect.

2) Unsafe use: Misuse or alteration are the basis for comparative negligence and a resulting reduction in the damages (Section 8). Therefore, the bill would reduce the defect, although comparative negligence is a more costly system to administer than contributory negligence.

3) Time of standard: The Kasten bill establishes reasonableness for design as being the time of the manufacture of the product (Section 4). This would be an improvement.

4) Punitive damages: They can be imposed for harm suffered as the result of reckless disregard by the seller (Section 11). The court, rather than the jury, will determine the amount of the damages. One of the factors that the court may consider is the financial condition of the seller, which seems to be inappropriate. This would not appear to be a major improvement.

5) Warnings: A product is unreasonably unsafe if the warnings are inadequate (Section 4), but by analogue the warning is reasonable if adequate and, therefore, this problem is addressed.

Summary: As far as its ability to correct for the defects in state common law identified by Posner, the Kasten Bill would have a mixed effect.

Potential Defects in the Kasten Bill

Any analysis of the Kasten Bill must proceed with caution because this is only a draft and for those not thoroughly familiar with the topic the flaws may be too subtle to identify. However, some of my concerns are:

1) Preemption (Section 3): This is a fundamental question. Why have states not enacted product liability statutes? Is their inaction based on bias or an inability to write an acceptable statute? There is very little evidence presented by proponents of the Kasten Bill on these issues. I would be concerned about the final bill that would result from the political process, since the manufacturers are so much more concentrated than the consumers. Also, any bill would be difficult to amend if it resulted at some point in the future in undesirable results.

2) Design is held to a negligence standard, while construction is held to strict liability (Section 4). As indicated at the very beginning, the appropriate standard from an economic point of view is based on classes of products rather than the phase of manufacture. Therefore, the design/manufacturing distinction would appear to be potentially inefficient.

3) Federal, state, and local standards create a presumption of reasonableness (Section 6). Since these standards are more politically than economically driven, I would be suspicious of their ability to create efficient results. Clearly they would reduce information costs in litigation, but that reduction may be overwhelmed by manufacturers producing unsafe products that meet standards, but result in an inefficient level of accidents due to a lack of information in the product markets.

4) Section 7 establishes comparative responsibility as determining the recovery of the plaintiff. Under existing law, contributory negligence is a potential defense to negligence, while it is not a defense in strict liability cases. Comparative negligence is a more costly system than no defense or contributory negligence to administer, so it may be less efficient.

5) In Section 9, damages are reduced by the amount of any worker compensation benefits. The idea behind negligence is to create incentives for reasonable behavior. The potential damages from unreasonable behavior are the incentive for reasonable behavior. This section says that damages will be less for manufacturers who produce unreasonably unsafe products for workers covered by workers compensation. The producer should have an incentive to not produce unreasonably unsafe products, no matter who uses them. This section creates very undesirable incentives, and is blatantly pro-manufacturer.

6) Section 10 sets time limits on liability actions. It is not clear to me that an arbitrary statutory limit of 10 years for a component part is better than the common law period. This is arbitrary. Since it is not based on some logical foundation, it must be subjected to examination as to why these dates are better than the ones determined by the courts. There should be evidence to support these assertions.

7) Section 12 would not permit the introduction into evidence of subsequent remedial measures. This restriction is part of the Federal Rules of Evidence. However, with strict liability cases it has been ignored. Of course, in strict liability cases it is not relevant. In many cases, by introducing remedial measures to prove ownership, for example, plaintiffs have been able to introduce these measures into evidence. It may be difficult to administer.

Conclusion

Product liability law is in a state of flux. However, it is not clear that any statute, at either the state or Federal levels, would be an unambiguous improvement. Because of the rigidity of statutory law, any ambiguity has to come out in favor of the common law.

HUTCH FUQUA SPORTS
HUTCH ATHLETIC GOODS, INC.
1924-1928 West 8th. Street / CINCINNATI, OHIO 45204
TELEX - 810-461-2678 • TELEPHONE — 513-251-4510

May 7, 1982

Dear Mr. Uhlmann:

As President and C.E.O. of an 80 year old sporting goods manufacturing co., Hutch Sporting Goods, Inc., I am sending you a copy of the letter that Howard J. Bruns sent to the President concerning Product Liability.

We at Hutch stand behind this letter 100% as we feel this to be the proper avenue to pursue.

Respectfully,

John S. Anderson

JS/vh

Enclosure

① Bill Barr, FY1

② Response — Dear Mr. A,
Thank you for your note and enclosures on the issue of Product liability. As you are aware, we are now engaged in a close analysis of the problem, and appreciate having the perspective of the sporting goods industry. You may be assured that your views will be given the most serious consideration.
Sincerely

Manufacturers of Superior Athletic Goods

SPORTING GOODS MANUFACTURERS ASSN.

Respond to:

MARIA DENNISON
Washington office:
1730 K Street, NW
Suite 315
Washington, DC 20006
(202) 775-1762

Executive Office
200 Castlewood Drive
North Palm Beach,
Florida 33408
305/842-4100

April 23, 1982

The President
The White House
Washington, D.C. 20510

Dear Mr. President:

The Sporting Goods Manufacturers Association (SGMA), a key Member of The Product Liability Alliance, has learned that the Cabinet Council on Commerce and Trade has two-fold concerns: (1) the effect of federal liability tort reform on 'New Federalism' initiatives, and (2) the opposition of the American Bar Association (ABA) to a federal products liability bill.

The ABA stance is one that is obvious in its self-serving character. It is in lawyers' self-interest to perpetuate a litigious society. And that we are! Contrary to the ABA's recent communications to you, Members of your Administration and the Congress, while some 28 states have enacted remedial product liability legislation, none of them are alike. The Uniform Product Liability Act has only been adopted, in part, in four states. To quote a recent FORBES magazine statement, "While there must be standards of law on product liability, 50 fragmented, separate standards sounds like little more than a full-employment plan for lawyers."

It only stands to reason that the ABA is protecting the interests of 500,000 attornies who have grown wealthy at the expense of consumers. Why at the expense of consumers? Because the cost of litigation and judgements against business become part of the cost of a product. It also costs jobs. How? Product liability costs of this industry is 4.2% of sales; in Japan its .5% (⅛ of 1%), which gives that nation's products a substantial advantage with obvious effects on jobs.

I feel the ABA's position strikes at everything your administration represents. They wish to line their own pockets by waving the populous flag of consumerism. While the public suffers, they receive 56% of the benefits.

Draft product liability proposals offered by Senator Kasten, are not, in any way, in conflict with the 'New Federalism' program. Product Liability draft legislation, upon which we have commented favorably, requires neither the creation of a new Federal Agency nor the expenditure of Federal monies. It adds no basis for bringing actions in the Federal Courts. As 'New Federalism' programs deal with governemnt programs and grants, it is difficult to understand why 'federal tort reform' is conceptually aligned with 'New Federalism' applications, that have no bearing on the intent or implememtation of a federal product liability bill.

(more)

Add One
April 23, 1982

A meaningful, Federal Product Liability Act would go far in reducing the regulatory burden of government by allowing manufacturers to know their responsibilities and obligations, and consumers, their legal rights. Our companies do business throughout the United States, and we are confronted with a number of different laws and different interpretations of laws by the Courts. A Federal, uniform statute would recognize the interstate commerce dimensions of product liability actions.

While we cannot predict the specific impact a federal product liability bill would have on jobs, trade and numbers of cases litigated, we can state emphatically, the economics of this grave situation, as experienced by the small and medium-sized manufacturing operations, that comprise our industry.

The attached backgrounder illustrates the unfair and onerous burden that uncertainty in the law has created for both manufacturers and consumers, alike. We, in the sporting goods community, have stood resolutely behind the programs and policies the Administration has initiated and espoused in our communications with Members of Congress. We urge your appreciation of the despair on the part of (1) the entrepreneurs who are being destroyed by the strict liability theory, while being still expected to provide the assets with which to maintain our society and from which to distribute the wealth; and (2) of those injured people who are victims of a random, dilatory and cumbersome tort system which does nothing to insure that compensation is prompt and adequate.

One hundred and fifty associations and corporations, large and small, comprise The Product Liability Alliance. Among those, many groups, like the SGMA, have always preferred resolution of problems at the state-level. In this instance, we believe the only equitable solution to the products liability crisis can be attained through federal reform.

One of the best ways to reduce the costs of U.S.-made products is to eliminate the unwanted and non-productive fat. Certainly the city of New York learned this lesson the hard way, as did the work force of Detroit. Subsidizing 500,000 U.S. attornies is a luxury this nation and our sports industry can ill-afford. We seek your support.

Respectfully,

Howard J. Bruns
President
Sporting Goods Mfrs. Association

FACT SHEET

THE PRODUCTS LIABILITY CRISIS AND THE SPORTING GOODS INDUSTRY

ANECDOTAL EVIDENCE

CASE 1 . . . In New York, a 16 year old boy was awarded $1 million for sustaining permanent paralysis, while playing baseball. He attempted to score by diving headlong into the catcher. The jury awarded damages on the basis that the coach failed to properly instruct of all possibel injuries in playing the sport. A dissenting judge's opinion is worth noting: "Just how far must a coach go in his instructions? Should he have told the plaintiff not to run into a wall, or not to step into a hole on the playing field? If every negative possibility were to be discussed with the players, they would have to be placed in cotton batting to guard against all remote possibilities of harm."

This case was later reversed, but only after hundreds of thousands of dollars in cost -- none of which was for the benefit of the injured boy. Now what kind of a system is that?

CASE 2 . . . This year, the Seattle School Board was sued by a high school football player, whom a jury awarded $6.3 million because the coach neglected to tell of the risk involved in playing football. A prominent Seattle School Board member has asked for a complete review of the entire school sports program, suggesting the cancelling of all 'high risk' sports, to include football, baseball, wrestling, etc. The District, insured for only $5.5 million, is seriously considering the proposal as a result of the excessive damage award and fear of exposure to future product liability litigation where 'assumption of risk and comparative fault' are not provided for in the present tort system, and an insurance premium crunch. We are already seeing insurance companies necessarily excluding some types of sports from school programs as a result of a system of entitlement.

CASE 3 . . . The sporting goods industry can't be mentioned without a discussion of the $5.3 million judgement awarded against the Riddell football helmet company. This jury verdict was despite the fact it could not be proven that the youth who suffered paralysis during a football game was even wearing a Riddell helmet. As a matter of practice, the injured party would not receive the entire $5.3 million. The attorney, if using the standard contingency fee of one-third, would have received approximately $1,750,000.

How much pain and suffering did the attorney in that case actually have? Is paying an attorney that much money what insurance is suppose to accomplish? Is that what society is trying to do? If the Riddell company, not a large firm, but very well known in the sport of football for providing high quality, dependable products is forced out of business, while other manufacturers discontinue making helmets, to whom are the football players going to turn for protective equipment? Inferior equipment is a distinct possibility.

Following the $5.3 million suit, three new suits against the manufacturers were filed in the six months following. One of which totaled $15 million. All of this the result of a legal system gone amuck, penalizing the convenient instead of the guilty. One large lawsuit against small business could wipe them out. No insurance -- No business.

CASE 4 . . . A lawsuit for $2,545,000 was filed against Nissen Corporation over an accident involving a mini-trampoline and spotting belt. After spending more than 3 months preparing the case, and many thousands of dollars expended, Nissen was informed that the equipment in question had actually been manufactured by another company.

When some 1 million high school football players and 42,000 college football players suddenly find the sport which they have worked so hard to become proficient at has been cancelled at their respective schools, and when 6 million skiers find that $2-3 of their lift ticket is for product liability insurance, or when 31 million baseball and softball players have to pay substantially more for their balls and bats for no other reason than product liability, or when 40 million campers discover that two suppliers of equipment no longer exist for really no good reason -- the same can be said for 43 million hunters and 23 million bicyclists-- then and only then, will the consumer begin to translate the small and medium-sized businessman's problem into their own personal areas of concern and awareness.

Who are the villains here? The system takes the blame. The ultimate solution must treat the injured fairly and equally; the guilty firmly, but equitably; and, the innocent...well...just leave them alone. The present tort system, encompasaing the doctrines of entitlement and strict liability, has created a crisis where the risk of doing business precludes being in business, at a time when factories and products have never been safer according to government and private reports.

FACT SHEET

THE PRODUCTS LIABILITY CRISIS AND THE SPORTING GOODS INDUSTRY

ECONOMIC EVIDENCE:

A. Profile: Sporting Goods Industry

COMPOSITION: Small/medium sized sporting goods equipment, camping, athletic clothing and athletic footwear manufacturers.

Along with our affiliate organizations, we have 3,200 members; plus, an organized constituency dependent on our members products of 70,000 coaches, 40,000 phys ed teachers, 20 million children in youth sports programs, and 56 million students in school phys ed programs.

SIZE: $16 billion.

PROFITABILITY: 1.4 percent of sales, as compared to a national average of 4.8 percent for manufacturers.

NO. OF CONSUMERS: The Universe.

TRADE IMPACT: Industry estimates are 4.2 percent of sales, as compared to ½ of 1 percent for foreign competitors.

CONSUMER IMPACT: Under the present system, product diversity and product availability is lessened. Camping, gymnastics, skiing, wrestling, and football industry segments are not able to justify, in some instances, continued investment in development when not sure of being in business the next year, or that improvements will not be used against the industry in court.

B. Profile: Football Helmet Manufacturers

VIABILITY: Overall profits from the entire football helmet/facemask industry are estimated to be no more than $1 million on gross sales of $25-35 million. Insurance premium costs of this industry due to excessive products liability litigation is 3 to 4 times more than profits.

PRODUCT PRICE: Minimum of 10% of wholesale price of a football helmet represents product liability costs.

JOBS: Of 13 football helmet manufacturers in 1975, only 6 are still in business.

LITIGATION: Over the last 13 months, damages of $26 million have been awarded. On an average, 4 cases are settled out-of-court, for every one litigated because of costs. For every $.66 an injured claimant receives, $.77 is spent in legal costs. Presently, 50-60 cases are pending involving incidents with products 10-15 years ago.

SCHOOL SPORTS: School districts are increasingly being exposed to products liability actions. We have already seen the elimination of trampolines in school gymnastic programs-- a market of 'high risk' sports, like football, may suffer the same consequences. It is football gate receipts that support 80% of interscholastic athletic budgets.

THE WHITE HOUSE

WASHINGTON

May 14, 1982

Dear Mr. Anderson:

Thank you for your note and enclosures on the issue of product liability. As you are aware, we are now engaged in a close analysis of the problem, and appreciate having the perspective of the sporting goods industry. You may be assured that your views will be given the most serious consideration.

Sincerely,

Michael M. Uhlmann

Michael M. Uhlmann
Special Assistant to
the President

Mr. John S. Anderson
President
Hutch Athletic Goods, Inc.
1924-1928 West 8th Street
Cincinnati, Ohio 45204

— Barr

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

May 10, 1982

MEMORANDUM

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

FROM: The Product Liability Alliance

RE: Membership of the Product Liability Alliance

Gentlemen:

Enclosed is a copy of the current list of members of The Product Liability Alliance (TPLA). More than 180 businesses and trade associations, representing the entire spectrum of businesses subject to the product liability problem, now support TPLA's efforts to enact a balanced and effective Federal product liability law.

The TPLA membership includes many business organizations that have strongly and consistently supported the Administration's economic recovery program, and which keenly appreciate the Administration's sensitivity to the business community's problems.

It may be of interest to the Working Group to know that the only groups opposed to the concept of a fair, effective and workable Federal product liability law are the Association of Trial Lawyers of America (plaintiffs' lawyers), the Defense Research Institute (defense attorneys), the American Bar Association (currently reviewing its position), and Ralph Nader's Public Citizen.

TPLA seeks the enactment of a fair set of Federal rules governing the rights of users and the obligations of sellers of products in interstate commerce. Such legislation would involve no Federal dollars, no Federal bureaucracy, and no Federal regulations.

Enclosure

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

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
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

April 26, 1982

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

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

BUSINESS INSURANCE, MAY 10, 1982

→ Barr file products liability

Uniform product liability law needed, British insurer says

By JAMES C. LAWSON

PHILADELPHIA—U.S. product liability insurance rates will go through the roof unless federal legislators establish a strong, legal foundation to anchor them, a British insurance company official says.

"Product liability rates (in the United States) are about 20 times what they are in Europe," Thomas W. Marriott, legislation manager of the Norwich Union Insurance Group of Norwich, England, told delegates to the World Insurance Congress. "And rates vary between seven and 40 times what they are in Britain."

Mr. Marriott spoke at a session on "Competitive Advantage—Disparate Responsibilities for Product Safety."

U.S. product liability rates are higher than in other nations, Mr. Marriott said, partly because insurers set rates on a national basis, instead of varying rates by state according to each state's tort law.

The highest product liability judgment ever awarded in England, Mr. Marriott said, was 375,000 pounds (approximately $660,000), far less than some judgments in the United States.

Mr. Marriott also attributed high U.S. product liability rates to:

- Higher jury awards that in turn are due to economic inflation.
- "Social inflation" that has prompted the public to be more litigation-minded.
- Lawyers who encourage more suits and charge high contingency fees.

"A huge amount of money has been made by lawyers," said Mr. Marriott. "The cost of litigation is enormous because of lawyers' contingency fees."

The inclusion of medical fees in the awards also attributes to high rates, Mr. Marriott added.

"There's a great deal of pressure to pick up medical fees," explained Mr. Marriott. "You don't have that pressure in Britain because hospital costs are picked up by the Social Security system. In the case of an accident, medical fees are taken care of."

Several bills that propose a nationwide product liability standard that would supersede state tort laws have been drafted and await legislative action. The measures would for the most part beef up manufacturers' defenses and, thus, help keep product liability insurance rates down.

Draft legislation sponsored by Sen. Robert W. Kasten, R-Wis., would bar product liability suits involving major capital goods 25 years after the product was delivered. It also would make the plaintiff identify the manufacturer, would exempt wholesalers from many product liability suits, would reduce awards by the extent a plaintiff was negligent and would make manufacturers responsible only for the "useful safe life" of a product.

Another bill, H.R. 5261, sponsored by Rep. John J. LaFalce, D-N.Y., establishes a statute of limitations for suits, puts the burden of proof on the plaintiff and provides that damages be diminished when workers compensation benefits have been paid.

A third bill, H.R. 5214, sponsored by Rep. Norman Shumway, R-Calif., would bar most product liability suits from being filed 10 years after the product is first sold, but would extend that time limit to 15 years in cases where injury is sustained by prolonged exposure to a product. It would also limit the amount of punitive damages a plaintiff could collect to twice the amount of actual damages, not exceeding $1 million.

Meanwhile, the lack of a uniform product liability law in the United States also makes it more difficult for foreign manufacturers to make products that meet all U.S. products standards, Mr. Marriott said.

A product that meets the differing requirements of the states will often be too highly priced to sell in other countries, he explained.

A product that may be adequate for a Third World market may not be considered adequate in the United States or in a European country, he said. For example, a contraceptive manufacturer might find Third World consumers more interested in obtaining a low-cost product at a level of safety lower than what is necessary in industrialized countries. ■

Leslie Cheek
Vice President — Federal Affairs

Crum & Forster Insurance Companies

1120 Connecticut Avenue, N.W.
Suite 1142
Washington, D.C. 20036
(202) 296-5850

file products liability

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 17, 1982

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Product Liability and Federal Preemption

This memorandum provides: (1) an overview of the problems faced by industry; (2) a discussion of possible Federal responses, with emphasis on the preemptive statute favored by industry; and (3) an analysis of the "principles of Federalism" which should guide this Administration in addressing the products liability issue.

I. PROBLEMS FACED BY INDUSTRY

A. Diverse and hostile State laws have emerged.

Historically, State laws have governed the liability of manufacturers for injuries caused by their products.

Since 1960, State product liability laws have become unstable in two respects:

- Judicial activism within the States has resulted in departure from common law principles and the judicial-creation of extreme pro-plaintiff rules which substantially increase industry's exposure. (Many States have, by judicial fiat, done away with "fault", radically expanded "strict liability", and eliminated defenses traditionally available to sellers and manufacturers.)

- Sharp divergencies among the States have emerged as judges, severed from the anchor of common law, have embarked on a course of ad hoc judicial rule-making. (There is now wide variation among the States on such matters as duty of care, available defenses, and evidentiary and procedural rules.)

Over the past four years, there has been a countervailing trend as State legislatures have moved to remedy this imbalance. About 30 States have enacted product liability statutes; but,

these laws, no two of which are alike, provide only limited relief. The statutes focus on specific problems (e.g., statutes of repose) rather than comprehensively addressing the nature of a manufacturer's duty and the elements of a product liability claim.

B. Industry has been injured in three ways.

Sellers cannot predict where their products will end up and, hence, what legal standards will be applied in product liability suits. Manufacturers must assume, no matter where they are located, that they will be governed by the laws of the State with the most extreme pro-plaintiff rules.

This has injured manufacturers and distributors in essentially three ways:

1. Increased Insurance Costs: Insurance companies must build a high contingency factor into their rates to take into account the experience in those States with the strictest laws.

2. Disincentives Toward Product Innovation and Development: Some States have rules which penalize innovation and design changes. Because manufacturers cannot predict the standards by which new products will be judged, they are wary of innovation.

3. Increased Litigation Costs: Legal costs associated with determining 'what law applies', forum-shopping, and rebriefing of issues, appreciably increase the cost of product liability litigation.

These costs are passed on to consumers, either in the form of higher prices or obsolete products.

In short, a single State with extreme pro-plaintiff rules can inflict the costs of these rules on manufacturers and consumers located in the other 49 States.

C. The Costs of Diversity: Contract vs. Tort

The costs of non-uniform product liability laws are probably greater than the costs of non-uniform contract laws:

- The costs of adhering to 50 different sets of contract law have been mitigated by: (1) adoption of U.C.C.; (2) general State adherence to common law principles; (3) ability of parties to choose applicable law and modify rights by

contract terms; and (4) clear-cut choice-of-law rules.

- The costs of adhering to 50 different sets of product liability law have been exacerbated by: (1) judicial innovation away from common law principles; (2) limitations on ability to modify rights by contract; (3) development of State "long-arm statutes" which assert jurisdiction on out-of-state parties; (4) the move away from clear-cut choice-of-law rules in tort cases; and (5) increasing litigiousness of society.

II. POSSIBLE FEDERAL RESPONSES

A. Previous Federal Involvement

Responding to industry complaints, President Ford established a Federal Interagency Task Force in 1976 with the Commerce Department as its lead agency. The Task Force concluded that product liability insurance rates had increased dramatically due to (1) overly subjective ratemaking by major carriers, and (2) imbalances in product liability law among the States.

To deal with ratemaking, President Reagan approved the Product Liability Risk Retention Act of 1981 (P.L. 97-45, Sept. 25, 1981) which ensures objective underwriting by permitting manufacturers to form risk retention groups and insure themselves.

To address imbalances in State law, the Commerce Department published in 1979 the Uniform Product Liability Act. This model law for adoption by the States would, if fully adopted, establish uniform statutory standards of conduct (as well as certain procedural and evidentiary rules) nationwide.

B. Current Options

The Administration has essentially four options:

1. Do Nothing: Tort law has always been a matter for the States. The inconveniences that result from 50 different sets of rules arise in numerous other contexts and are part of the price we pay for our "Federal System". The Federal government should do nothing unless industry shows that: (1) the costs are exceptional; (2) the product liability problem is unique; and (3) a federal approach would be "better".

2. Encourage the Uniform Code Approach: Tort law should be handled in the same way the States have

handled sales and contract law under the U.C.C. In the past three years, UPLA has been adopted by four States. The going is slow, but State action is better than Federal intervention. The Federal government could help spur on the process.

3. Develop a Creative "Federalist" Approach: The Administration may be able to develop an approach which provides predictability but uses the diversity of the States as a means of stimulating a market mechanism, rather than attempting to stifle all non-uniformity. (E.g., a Federal statute which would require that the law of the place of manufacture governs product liability claims. This would foster competition among States to attract industry and would bring the market to bear, as consumers sought products from States that had come closest to the optimal mix of safety and price. Critics will say that some States may adopt lax standards and inflict unsafe products on the rest of the country. But this is far from clear.)

4. Adopt a Preemptive Federal Statute: Enact a single Federal product liability law that would supercede all such State laws. Federal jurisdiction would not be expanded. This would provide (1) uniformity and, hence, predictability; (2) a means for "rolling back" some extreme pro-plaintiff rules; and (3) a rigid system that will check judicial activism.

C. The Approach Favored by Industry -- Preemption

Industry feels that progress on UPLA has been too slow. It wants the Administration to endorse "the concept" of a preemptive Federal statute.

There are two principal groups pushing for a Federal statute:

- The Product Liability Alliance (TPLA) with over 180 trade association and corporate members representing manufacturers, retailers, insurers, small businesses, etc. A "moderate" group that endorses a "fair and balanced approach" between consumer and industry interests.

- Coalition for a Uniform Product Liability Law (CUPLL), a smaller group composed of large manufacturers and generally perceived as more "hard line" in pursuing distinctly pro-industry legislation.

The main opposition to a preemptive Federal statute comes from some lawyers' and consumers' groups:

- o ABA initially opposed Federal legislation, but two sections are reconsidering this position.

- o The National Trial Lawyers Association is opposed, as is the defense bar.

- o Nader's Public Citizens' group and other "consumer" organizations are actively resisting Federal legislation.

- o Other consumer groups say they will support a Federal statute if it is "balanced".

The picture in Congress is as follows:

Senate: Senator Kasten (R-WI), chairman of the Consumer Subcommittee of the Senate Commerce Committee, has drafted a comprehensive Federal product liability statute, and plans to introduce it at the end of this week. Drafts have been widely circulated. TPLA supports it. Consumer groups view it as tilting too much toward industry. (A synopsis of the Kasten Bill is attached.)

House: Rep. Shumway (R-CA) has introduced a bill, supported by CUPLL, that tilts decisively in favor of industry. Rep. Waxman (D-CA), chairman of the Health & Environment Subcommittee of the Energy & Commerce Committee, has drafted a bill which has not yet circulated. It is expected to be more "middle-of-the-road" than Shumway's, though it will be slanted toward "consumer" interests.

The arguments "for" and "against" a preemptive Federal statute are as follows:

Pro	Con
1. Uniformity will result in predictability.	1. Premise that Federal law will bring uniformity and stability is erroneous: -- 50 state judiciaries will interpret statute differently; -- states will adopt different rules to "fill the gaps"; -- statute will encourage judicial activism by wiping the slate clean of prior precedents; -- the statutory standards
2. Predictability will: -- stabilize insurance rates; -- encourage research, innovation in product manufacture; -- expedite reparations process and reduce legal costs for all parties.	
3. Provides a way to roll-back extreme pro-plaintiff	

rules.

4. Puts a statutory check on future judicial activism.

are inherently malleable (e.g., "reasonableness").

2. A single law is risky:
   -- political process at national level may result in bad law;
   -- a single prestigious court could sour the law by anti-industry constructions;
   -- even if law is stable, this would prevent positive evolution.

3. Would set a bad precedent for "Federalizing" other areas of law traditionally left to the States. (Product liability problem is indistinguishable from problems in other areas of the law.)

III. GUIDING PRINCIPLES

This Administration should be guided by the following general principles in considering a possible Federal response to the product liability problem.

A. Free market action is preferable to government regulation.

Theoretically, selection of optimal product liability rules could be left to the market: Binding product liability laws would be repealed. The respective rights, duties and liabilities of consumer and manufacturer would be defined in individual sales contracts. Manufacturers could offer their products with a range of "insurance" options. Prices would vary according to the extent of "insurance" offered. Through the purchases, consumers would be permitted to choose their preferred option, and, in this way, select the optimal product liability rule. For a variety of reasons, the pure market approach is not a feasible means of setting product liability rules. Some government regulation is required.

B. Local regulation is preferable to State regulation; State regulation is preferable to Federal regulation.

The reason is competition. If local regulation is inefficient, people can easily escape. If there is a Federal monopoly on regulation, the cost of escape may be prohibitively high. Thus, the lower the level at which regulation is imposed, the more of a competitive check on oppressive regulations is

imposed by the ability of people to vote against it with their feet. Regulation at the lowest feasible level is thus preferable to Federal regulation because:

- o The movement of people and capital operates as a market-like mechanism to induce governments to improve their regulations.

- o Consumer welfare is enhanced because people are able to exercise a degree of choice about desirable regulatory regimes.

- o The larger number of "laboratories" produces more experience and information on better regulatory solutions.

The presumption in favor of local or state regulation is strongest where the burdens of the regulation are confined to the locality or state. Deference to the State political process is most appropriate where those directly affected by the regulation were represented in that process.

C. The presumption in favor of State over Federal regulation is less where State regulation imposes excessive burdens on persons outside the State.

The lower the level of regulation, the greater the danger that the regulatory authority will impose costs on people to whom it is not answerable politically. Thus, while the competitive check is stronger at lower levels, the political check may be weaker.

If the costs of each State's regulation are spread throughout the nation, the advantage of diversity (i.e. the competitive check) is lost. Diversity is good where it serves as a basis for choice. When the burdens of each State's regulations are inflicted throughout the nation, people cannot "choose" to avoid them. There is no escape; they must live with whatever rules the legal system deals out in a particular case. Diversity thus results in capriciousness rather than competition.

D. Even where State regulation inflicts external burdens, it is preferable to federal regulation unless (1) the external burdens are clearly excessive in relation to the putative benefits, and (2) the burdens of Federal regulation will be demonstrably lower.

Federalism has its price. It has always been recognized that the Federal system gives rise to inconveniences and inefficiencies.

However, the disadvantages of a single Federal law are clear.

It eliminates the check of a market mechanism on government regulation. There is no reason to suppose that a "better" products liability law can be created by a rational policital decision at the national level, without any market mechanism.

E. If Federal intervention is essential, an approach that preserves diversity and competition should be adopted over one which creates a preemptive uniform rule.

The disadvantages of a single Federal law are clear: (1) uniformity; (2) ridigity; and (3) arbitrariness. These sacrifices may not be necessary to obtain predictability.

It may be possible to develop an approach that achieves predictability but, at the same time, preserves diversity and competition. One possible approach is a Federal choice of law statute.

IV. RECOMMENDATION

It is too early to embrace the concept of Federal preemption in the products liability area.

Before we go down that road, we must make sure that:

(1) the costs of the present system are excessive;

(2) the Uniform Code approach is impractical;

(3) short of preemption, there is no Federal measure that will establish predictability while preserving diversity and competition; and

(4) the costs of a single Federal statute would be lower than present costs.

cc: Roger Porter
Wendell Gunn

SYNOPSIS OF "KASTEN BILL"

Sec. 3 -- Preemption:

Preempts state laws. Would not expand Federal jurisdiction.

Sec. 4 -- Manufacturers' Duties:

Preserves "strict liability" in cases involving negligent manufacture and express warranty.

Adopts traditional "negligence" standard in cases involving negligent design and failure-to-warn. Would "roll back" attempts by a minority of courts to extend "strict liability" to such cases.

Sec. 5 -- Non-Manufacturing Sellers' Duties:

Provides that non-manufacturing seller can only be held liable if he does something negligent. (Strict liability in express warranty cases.) Arrests efforts by a minority of courts to extend "strict liability" to non-manufacturing sellers.

Sec. 6 -- Government Standards:

Creates presumption that, if a manufacturer complies with Federal design or warning standards, the design or warning is not unreasonably unsafe.

Creates reverse presumption: the design or warning is presumed unsafe if manufacturer has failed to comply with Federal standards.

Both presumptions can be rebutted by clear and convincing evidence.

Sec. 7 -- Comparative Negligence:

Adopts "pure" comparative negligence standard. A plaintiff's recovery is reduced in direct proportion to the extent his own negligence had contributed to his injury.

Sec. 8 -- Plaintiff Misuse or Alteration:

Permits seller to raise plaintiffs' misuse or alteration of the product as a defense.

Sec. 9 -- Worker Compensation:

Reduces damages by the amount paid to claimant under worker compensation laws.

Sec. 10 -- Time Limit:

Provides that no claim alleging unsafe design or failure-to-warn may be brought for harm caused by a "capital good" more than 25 years after delivery.

Sec. 11 -- Punitive Damages:

Limits punitive damages to cases where there is clear and convincing evidence that the harm resulted from the reckless disregard of the product seller. Punitive damages can only be awarded by the judge.

Sec. 12 -- Subsequent Remedial Measures:

Provides that evidence of corrective measures taken by a product seller after the harm has occurred cannot be used as evidence against the seller to show unsafety of the original product.

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

file product liability Bill FYI

May 21, 1982

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

FROM: The Product Liability Alliance

RE: American Bar Association Journal Article on Product Liability

Gentlemen:

We commend to your attention the enclosed article, "Product Liability: A Continuing Process of Change," from the May edition of the American Bar Association Journal. After a careful analysis of the trend in recent decisions, the author, a former Chairman of the Board of Reichhold Chemicals, Inc., concludes that "it is timely for Congress to move forward with a national product liability law."

The author points out that both consumers and businesses will benefit from national product liability legislation. He analyzes the consumer interest as follows:

> ...To persons injured by products, national legislation can bring important help. Claimants will benefit because some states have not adopted any form of strict liability, eliminated privity, or taken many other steps sure to be considered in national legislation. The public will benefit from a clear statement by Congress that the principles of modern product liability are not a temporary phenomenon resulting from sympathetic attitudes of some courts but a reallocation of responsibilities in recognition of realities of modern manufacture, distribution, and use of products. The public will also benefit from a clear definition of manufacturer duties in meaningful and realistically achievable terms.

As for product manufacturers and their insurers, Mr. Shea points out that "(t)hey will benefit from clearer uniform standards that require consideration of practical technical feasibility at the time of manufacture, provide clear guidelines on warning methods, and recognize legitimate and necessary relationships between cost, feasibility, useful life, alteration, and foreseeability of use and misuse."

Enclosure
cc: Messrs. Edwin Meese, III
James A. Baker, III
Edwin L. Harper
Wayne Valis
Malcolm Baldridge

Product Liability: A Continuing Process of Change

Changing liability theories have produced a situation that cannot be measured by product manufacturers, sellers, and insurers.

By Edward E. Shea

THE LAST two decades have seen major changes in the law relating to product liability—the development of strict liability; long-arm jurisdiction; elimination or limitation of privity in most states; expansion of pretrial discovery; extension of design and warning duties to include foreseeable misuse; and interpretation of statutes of limitations to run from injury or from discoverability of injury or its cause rather than the time of sale of the product.

Recent court decisions adopting new theories of industry liability and expanding insurance coverage for latent injuries and diseases are making still more fundamental changes. The result is billions of dollars of potential liability exposure without clear answers where the liability may fall or what should be done to minimize the risk. As a result, there is growing interest in federal legislation to clarify the rights of claimants injured by products and the duties of product manufacturers and their insurers. This article discusses the court decisions and recent and pending legislation and gives reasons why adoption of national uniform product liability legislation is timely.

A traditional requisite for proof of product liability based on negligence, breach of warranty, or strict liability is sufficient evidence to identify the manufacturer or seller of the product. In recent years, however, the courts have been presented with a major volume of cases involving latent diseases or injuries. Best known are the cases seeking to recover for asbestosis, mesothelioma, and bronchogenic carcinoma alleged to have resulted from exposure to asbestos and the cases seeking to recover for cancer suffered by daughters alleged to have resulted from their mothers' use of diethylstilbestrol during pregnancy. Under recent interpretations of statutes of limitations, these claims are not necessarily barred because the products were sold many years ago. Plaintiffs' counsel, however, found they were faced with a further barrier—the major difficulty or impossibility of proving the identity of the manufacturers and sellers of the asbestos and DES used.

To overcome this barrier, plaintiffs' counsel sought relief from the burden of manufacturer identification and sought to impose joint liability on manufacturers of asbestos and DES as industries. Two theories were argued initially: concerted action liability and alternate liability. Precedent for concerted action liability was found in *Hall* v. *E.I. du Pont de Nemours & Company*, 345 F.Supp. 353 (E.D. N.Y. 1972), in which the court ruled that manufacturers of products alleged to be essentially identical (blasting caps) could be held jointly liable for injuries if they engaged in concerted action by conspiracy or agreement to control the risks of the product, for example, through membership in an industry association. Alternate liability was argued on precedent found in *Summers* v. *Tice*, 199 P. 2d 1 (Calif. 1948), in which the court ruled that two hunters who fired guns simultaneously could be held jointly liable for injury, although the plaintiff could not identify which hunter fired the shot causing injury.

An article, "DES and a Proposed Theory of Enterprise Liability," published in 46 *Fordham Law Review* 963 (1978), has been cited frequently in subsequent court decisions. The article pointed out that concerted action liability, as outlined in *Hall*, might not apply to a product manufactured by a large

number of widespread manufacturers, only some of whom were named as defendants, and might require proof of a conspiracy, agreement, or understanding beyond mere parallel practices. The article noted that the events in Summers occurred simultaneously at one location and both hunters potentially responsible were defendants. The article proposed adoption in the pending DES cases of a hybrid theory called "enterprise liability." Under this proposal the burden of manufacturer identification would be shifted to manufacturers named as defendants on proof of several elements, the most important being proof that a generically similar defective product was manufactured by all the defendants, the joined defendants accounted for a high percentage of the defective products on the market at the time of the plaintiff's injury, and there existed an insufficient industry-wide standard of safety as to manufacture of the product.

The courts so far have been cautious about adopting industry liability and none has embraced "enterprise liability" as proposed in the law review article. In *Lyons v. Premo Pharmaceuticals Labs, Inc.*, 406 A. 2d 185 (1979), a New Jersey intermediate appellate court ruled that theories of industry liability do not apply when the manufacturer can be identified. In *Abel v. Eli Lilly & Company*, 289 N.W. 2d 20 (1979), a Michigan intermediate appellate court rejected enterprise liability. In a two-to-one decision, however, it found precedent in Michigan law to relieve the plaintiffs of the burden of manufacturer identification and allow them to proceed on theories of concert of action liability and alternate liability. In *Davis v. Yearwood*, 612 S.W. 2d 917 (1980), the Tennessee Court of Appeals refused to adopt theories of industry liability in a lawsuit against 102 defendants, including 59 manufacturers, resulting from a fire in a jail that began in a padded cell alleged to have contained a variety of materials including nylon, latex, polyvinyl chloride, and flexible polyurethane foam. Some lower courts have rejected all theories of industry liability in DES cases, and some have stated that adoption of enterprise liability would be proper only by a state supreme court or legislature.

In 1980 the Supreme Court of California announced a new theory of several industry liability. This theory was adopted in *Sindell v. Abbott Laboratories*, 607 P. 2d 924, in a DES case after finding lengthy allegations of parallel manufacturer activities insufficient to support concerted action liability, finding joint alternate liability unjustified because only five of 200 manufacturers were before the court, and rejecting enterprise liability because of the widespread decentralized nature of the industry and the fact that many standards followed in the industry are imposed by government regulation. The court formulated a new theory under which the action could proceed provided that manufacturers having a "substantial percentage" of the market are named as defendants with several liability allocated among them based on their market shares. This theory is now being called "market share liability," and it was followed in 1981 by a New Jersey court in *Ferrigno v. Eli Lilly & Company*, 420 A. 2d 1305.

New theories abound in product liability

The Appellate Division, First Department, New York in *Bichler v. Eli Lilly & Company*, 436 N.Y.S. 2d 625 (1981), upheld jury instructions that concerted action liability could be imposed on a DES manufacturer without proof of an actual conspiracy if the jury found either conscious parallelism or independent actions substantially aiding or encouraging failure to test the product. If upheld, this decision would considerably expand joint industry liability. A federal district court in Massachusetts, however, granted partial summary judgment in favor of manufacturers of DES after careful analysis showed that the evidence failed to demonstrate any actual agreement amounting to concert of action, aiding or abetting, or joint venture. *Payton v. Abbott Laboratories*, 512 F.Supp. 1031, (1981). As in *Sindell*, the court specifically rejected efforts to establish concerted action on the basis of alleged conscious parallelism.

Plaintiffs' counsel have moved quickly to employ the new theories of industry liability, and the result has been shock waves as manufacturers find themselves being named in large defendant groups alleged to be "industries."

The courts that adopted industry liability sought to remove a barrier to trial on the merits based on the allegations in the asbestos and DES cases. As a precedent, however, industry liability raises serious difficulties. Among the problems are definition of industries and identification of their members; determination of the essential identity of products sold for different markets and uses or containing multiple components and raw materials; determination of market shares or other means of allocating liability; unavailability of defense evidence on the merits in older cases; and potential adverse effects on the activities of industry associations in developing product standards and test methods and acting as clearinghouses for product safety data.

In addition, there is a problem of duplication of defense cost in cases defended by multiple manufacturers. Each manufacturer retains its own counsel and wishes to defend its own product. Sharing of defense work and cost is possible within limits, but that co-operation tends to reinforce plaintiffs' theory that the defendants compose an industry group. If defendants responsible for vital portions of the investigation and defense should settle, the loss of continuity to other defendants can be a severe blow. Thus, there is considerable pressure on manufacturers to make cost-of-defense settlements regardless of the merits to avoid years of effort and expense.

Product liability insurance is part of the coverage commonly provided in comprehensive general liability policies insuring against liability for bodily injury and property damage. The coverage is accomplished by "products hazard" and "completed operations" provisions.

A general liability policy obligates the insurer with respect to bodily injury or property damage caused by an "occurrence" during the policy period, which is ordinarily one year. Limits of liability are stated per occurrence and in the aggregate. For example, a policy may limit liability of the insurer to $500,000 for each occurrence and $1,000,000 for all occurrences within the policy period, less a deductible amount of $100,000 per occurrence. A fairly typical policy defines an "occurrence" as an accident, including continuous or repeated exposure to conditions, that results in bodily injury or property damage neither expected nor intended from the standpoint of the insured during the policy period. Some manufacturers carry "excess" policies with "drop down" provisions in the event that liability exceeds the limits of the primary policy, but many do not.

Most product accidents (such as vehicle collisions or pressure vessel ex-

plosions) occur suddenly. The event alleged as the basis of the manufacturer's liability is clearly an "occurrence" under the policy for the year in which the accident happens. Thus, the coverage of that policy, including limitations and deductibles, applies.

Although the product is alleged to have been defective since manufacture, it has been accepted that an "occurrence" does not happen until the defect results in bodily injury or property damage — perhaps a number of years later. This method of coverage has important practical consequences. When it issues or renews a policy for a particular year, an insurer assumes the risk of sudden occurrences involving products sold in prior years when the manufacturer may have been self-insured or covered by another insurer.

Insurers found product liability coverage increasingly difficult to underwrite as the courts expanded product liability. A "crisis" developed in the middle 1970s. Premiums increased sharply and coverage was restricted or denied entirely to some manufacturers. This led the Department of Commerce to sponsor a study and propose legislation, to which I refer later.

As the 1970s progressed, the difficulties of product liability coverage again were magnified as litigation to recover for nonsudden injuries began to grow. Lawsuits were commenced against manufacturers of pharmaceuticals, chemicals, construction materials, and other products alleging that the products caused disease or injury either gradually over a period of years or caused harm that remained apparently dormant for years and then manifested itself as disease or injury. These cases claimed liability that far exceeded the customary limits afforded for "occurrences" within the annual policy coverage, including "excess" coverage, maintained even by major manufacturers. Because of the nature of the harm claimed, it was not clear when an "occurrence" had taken place.

Faced with enormous potential liability, manufacturers contended that coverage should be provided under policies issued in prior years. Insurers asserted claims against earlier insurers and against manufacturers with respect to earlier periods of self-insurance seeking to shift to them at least a proportionate share of liability for latent diseases and injuries. Two principal theories have been argued: "manifestation" and "exposure."

The manifestation theory was adopted by the Supreme Court, New York County, in *American Motorists Insurance Company* v. *E.R. Squibb & Sons, Inc.*, 406 N.Y.S. 2d 658 (1978), and the insurer whose policies were in effect during the years when injuries from diethylstilbestrol manifested themselves was held liable. The exposure theory was adopted by a federal district court in Michigan in *Insurance Company of North America* v. *Forty-Eight Insulations, Inc.*, 451 F.Supp. 1230 (1980). The decision was affirmed on appeal, and the Supreme Court denied certiorari. The result was that insurers providing coverage during the years of worker exposure to asbestos insulation sold by the defendant manufacturers were held obligated for a proportionate share of the liability to claimants suffering from asbestosis, although the harm did not manifest itself until many years later. The exposure rule also was later applied by the court to claims resulting from mesothelioma and bronchogenic carcinoma.

What theory governs the asbestos cases?

In subsequent decisions the exposure theory was adopted by the Fifth Circuit in *Porter* v. *American Optical Corporation*, 641 F. 2d 1128 (1981), and by the U.S. District Court in the District of Columbia in *Keene Corporation* v. *Insurance Company of North America*, 513 F.Supp. 47 (1981). At that point, a potential trend seemed possible toward the exposure theory, which, the courts observed, tends to allocate liability widely among insurers and reduces the difficulty experienced by manufacturers, distributors, and retailers of asbestos and other products in obtaining current coverage.

Recent decisions, however, have not followed the potential trend and have opened possible new directions. In *Eagle-Picher Industries* v. *Liberty Mutual Insurance Company*, 523 F. Supp. 110 (D. Mass. 1981), the court adopted a manifestation theory. Placing emphasis on analysis of the policy language, Judge Rya Zobel held that injury occurs when exposure produces clinically evident diseases that can be diagnosed. On appeal of the district court's decision in *Keene Corporation*, the Court of Appeals for the District of Columbia Circuit held that insurers who had policies outstanding during periods of inhalation exposure, exposure in residence, and manifestation must each provide full coverage to the insured manufacturer (667 F. 2d 1034 (1981)). With one dissent, the court also held that the coverage must be provided by the insurers without proration for periods when the manufacturer was uninsured. The court stated that liability among the insurers should be allocated according to the "other insurance" provisions of their policies, which contain formulas for contribution by equal shares and by limits.

The only consistency now found in the courts' decisions is a tendency to decide in favor of theories that provide the greatest insurance coverage on the facts of the case before them. (*Keene* and *American Motorists* involved the relatively unusual situation in which the manifestation theory provided greater coverage than the exposure theory.) Resolution may have to await review by the Supreme Court, but its decision on March 8, 1982, to decline to review the *Keene* case may mean a lengthy wait.

Faced with growing exposure to liability and expense during the product liability crisis, manufacturers and insurers have sought legislative relief.

State legislatures have adopted a variety of reform laws. The most common restriction has been a statute of limitations requiring that any product liability action be commenced within a relatively short period (two to six years) after a product defect is discovered or became discoverable, but in no event later than a somewhat longer period (ten to 12 years) after the product was first delivered to its initial purchaser. Other common provisions clarify the availability of defenses based on (1) the state of the art at the time the product was made, (2) modification of the product subsequent to sale, and (3) use of a product beyond its reasonable anticipated life.

The Department of Commerce sponsored an interagency task force on product liability that included representatives of several government agencies supplemented by an advisory committee of representatives of industry, labor, law firms, insurers, and consumer organizations. The task force published its final report in 1977, and the department published a draft model code for adoption by state legislatures. After public comments, the Model Uniform Product Liability Act was published by the department in 44 *Federal Register* 62714 (1979), together with an analysis of its provisions. A statute con-

taining many provisions of the M.U.P.L.A. has been adopted in Connecticut. Other states have adopted some of its provisions.

On March 1, 1982, the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation published for comments a second staff draft of a bill entitled the Product Liability Act of 1982. Highlights of that proposed act are:

- Section 3 provides that any claim brought against a manufacturer or other product seller for harm caused by a product is a "product liability action" governed by the act regardless of liability theory, but does not include any action for harm to the product itself or commercial loss.
- The proposed act would supersede other state, but not federal, law regarding matters covered by it, but it permits reference to other sources of law whenever the act does not deal with a subject area. Jurisdiction of federal and state courts remains unchanged
- Under Section 4(a) a manufacturer is liable if the claimant establishes by a preponderance of the evidence that the product was unreasonably unsafe (1) in construction, (2) in design, (3) because the manufacturer failed to provide adequate warnings or instructions, or (4) because the product did not conform to an express warranty made by the manufacturer with respect to the product. The claimant also must establish by a preponderance of the evidence that the product was manufactured by the defendant and that the unreasonably unsafe aspect of the product was the proximate cause of the harm complained of by the claimant. This provision would eliminate industry liability, joint or several.
- Sections 4(b), (c), (d), and (e) provide criteria for determining whether a product is unreasonably unsafe. Of special interest, Section 4(c)(3) permits consideration of an alternate design offered as evidence that a product was unreasonably unsafe in design. The claimant must establish, however, that (1) the manufacturer knew or should have known about the alternate design and (2) the alternative design would have (a) utilized only science and technology for which there was substantial scientific, technical, or medical support; (b) provided better safety with regard to the hazard which caused claimant's harm and equivalent or better over-all safety than the chosen design; and (c) been desirable functionally, economically, and otherwise to the person who uses it.
- Under Section 4(d) a manufacturer must provide adequate warnings or instructions at the time of manufacture and also has postmanufacture obligations to provide warnings. The manufacturer is not liable, however, for failure to warn or instruct unless the claimant establishes that the manufacturer knew or should have known about the danger which caused the claimant's harm, and a manufacturer is not liable for failure to warn about dangers that are obvious, product misuse or use contrary to warnings or instructions, or alterations or modifications of the product that do not constitute reasonably anticipated conduct on the part of the product user. A manufacturer must provide warnings or instructions to the product user, but several exceptions are permitted to provide warnings or instructions to third parties, including employers, experts, and buyers of components or materials incorporated or converted into other products.

Congress should enact a national product liability law

- Subsequent sections provide for liability of sellers other than manufacturers (including failure to transmit adequate warnings); presumptions relating to compliance or noncompliance with government standards; comparative negligence or assumption of risk determined by special interrogatories; misuse, alteration, or modification of a product; reduction of damages by the amount of workmen's compensation benefits and elimination of related subrogation, contribution, indemnity and lien rights; limitations of claims; punitive damages; denial of admissibility in evidence of subsequent remedial measures taken by manufacturers; and a prospective effective date applicable to actions filed after its date.
- Of special interest, the period of limitation of actions for products that are depreciable capital goods is 25 years from the date of first delivery, but the limitation does not apply if the claimant's harm was caused by prolonged exposure or, if caused within the 25-year period, did not manifest itself until after expiration of that period. In addition, no claim may be brought more than two years after the claimant discovered or should have discovered the harm.

The Senate subcommittee is holding hearings on the draft legislation and reportedly plans further action in 1982. If the act is adopted, its application will apply to the extent of the power of Congress to regulate commerce under the Constitution. While the commerce power has been construed broadly by the courts, there will inevitably be some cases in which arguments can be made that pre-emption by the act does not apply and prior state law should govern.

There is now serious interest in Congress in national product liability legislation. To persons injured by products, national legislation can bring important help. Claimants will benefit because some states have not adopted any form of strict liability, eliminated privity, or taken many other steps sure to be considered in national legislation. The public will benefit from a clear statement by Congress that the principles of modern product liability are not a temporary phenomenon resulting from sympathetic attitudes of some courts but a reallocation of responsibilities in recognition of realities of modern manufacture, distribution, and use of products. The public also will benefit from a clear definition of manufacturer duties in meaningful and realistically achievable terms.

Threatened by the continuing product liability crisis and change that cannot be measured by underwriters, manufacturers and insurers also will support federal legislation. They will benefit from clearer uniform standards that require consideration of practical technical feasibility at the time of manufacture, provide clear guidelines on warning methods, and recognize legitimate and necessary relationships between cost, feasibility, useful life, alteration, and foreseeability of use and misuse.

The draft Product Liability Act of 1982 will need revision to reflect valid viewpoints from many interested groups, but it is timely for Congress to move forward with a national product liability law. *Journal*

(Edward E. Shea handled product liability matters for more than ten years as vice president and general counsel for Reichhold Chemicals, Inc., where he also served as chairman of the board until late 1981. He is now counsel to Wendels, Marx, Davies and Ives in New York City and is also a consultant and lecturer for industry associations and an adjunct professor at the Graduate School of Business of Pace University.)