THE WHITE HOUSE

WASHINGTON

May 12, 1982

Dear Nancy:

How can I refuse to support a program which, you claim, finds origins in my dissenting opinions while a member of the California Supreme Court? Certainly, I believed in my stated policy judgments on products liability issues while a member of the California Court, and I do now. Your analyses of my dissenting opinions are very accurate, and your presentation of the need for the proposed federal products liability legislation is very persuasive.

I would support such proposed legislation in principle and would be inclined to urge others to do so if the Cabinet Council on Commerce and Trade seeks an administrative decision.

My best regards.

Sincerely,

Bill

William P. Clark

Ms. Nancy Clark Reynolds
Vice President, National Affairs
The Bendix Corporation
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MEMORANDUM

TO: James A. Baker, III, Chief of Staff
and Assistant to the President

FROM: Nancy Clark Reynolds

DATE: May 24, 1982

RE: Product Liability Briefing

Introduction

On Thursday, May 27, you will be meeting with the leadership group of a broad based business coalition called The Product Liability Alliance. The Product Liability Alliance consists of over 200 trade associations and businesses representing small, medium, and large business, wholesaler-distributors, retailers, and product manufacturers. It also represents over 95% of the insurance industry that writes product liability insurance, as well as all major trade associations representing both insurance brokers and agents. The Product Liability Alliance was formed for the purpose of enacting uniform Federal product liability law in the United States.

The individuals at the meeting will include: Victor Schwartz, who is counsel to the Alliance and formerly served under the Ford Administration as Chairman of the Federal Interagency Task Force on Product Liability. Schwartz is the co-author of the most widely used torts case book in the United States, and currently is a partner at the law firm of Crowell & Moring; Leslie Cheek, who is a Senior Vice President of the Crum & Forster Insurance Company and has had extensive experience in the insurance industry; Jim Mack, who heads Government Relations for the National Machine Tool Builders Association and has tracked the product liability issue for over six years (Mack handles Congressional Liaison for the Alliance); Hall Northcott, who represents the 3-M Corporation which has been a long-term and consistent supporter of Republican causes; and Mr. Dirk Van Dongen, who is President of the National Association of Wholesaler Distributors, which is a conglomerate umbrella association of 120 wholesaler-distributor trade associations. NAW-D also represents over 46,000 individual wholesalers. They have been consistent supporters of Administration policies on many difficult issues.

History and Background

The Federal Government involvement in product liability began, ironically enough, with a memorandum dated April 26, 1976 from L. William Seidman to you when you served as Undersecretary of Commerce (copy attached). The memorandum called for the establishment of an Interagency Task Force to examine why insurance rates in the area of product liability had undergone sudden major increases. The study lasted 18 months and was continued under the Carter Administration. The Final Report of the Task Force focused on two principal causes of the problem. First, there was concern that insurance rates were set on an overly subjective basis. Ultimately, this part of the problem was resolved with the passage of the Risk Retention Act under this Administration (P.L. 97-45). The Risk Retention Act facilitates the ability of businesses to form self-insurance cooperatives and helps assure that product liability rates and premiums are set on a competitive basis. The business community now believes that the problems relating to insurance ratemaking are over.

The second cause of the problem was the growing uncertainty in the tort system. The Task Force found fundamental inconsistencies and imbalances in product liability tort law rules. To address this part of the problem, the Carter Administration authorized the drafting of a uniform product liability act that would serve as a model for the states. The final version of that model act was published in October of 1979.

At the time there was a hope that the states might act uniformly in this area, but they have not. Over 30 states have passed product liability bills, but none are the same. Also, the bills that have been enacted have generally not included the basics of product liability law, i.e., when is a manufacturer responsible for a design defect. As a practical matter, state laws have served only to reduce consumer rights without providing <u>any</u> benefit to product sellers. Meanwhile, new and totally unprecedented cases have arisen and are continuing to arise. The law is in a state of chaos.

The Current Situation

The principal beneficiaries of the chaos are both plaintiff and defense attorneys. Currently, attorneys are garnering $7.00 for every $6.00 plaintiffs receive in product liability judgments.

There are also economic pressures within the system to constantly expand liability. Most extreme cases have come from California, but judges in other states feel pressure to follow California rules because citizens in their states are, in effect, paying for the increased liability created in California. The trend of the law is toward absolute liability. Many members of the business community believe that, unless some stabilization and balance are placed in the tort system, it will break down and we will have to turn to complicated, bureaucratic compensation systems. Their proposed solution is a balanced and effective Federal product liability law.

The product liability problem affects foreign commerce. American manufacturers who sell abroad must factor in a product liability cost that is higher than those companies who sell some products in the United States but have their major exports in other countries of the world. The problem also affects the development of new products because rules in a few states permit the introduction of new product safety improvements against product sellers with respect to old products they already have on the market. Again, there is no way to precisely quantify the economic costs involved in these areas, but it is clear that they exist.

Current Political Action

The House and Senate

Members of The Product Liability Alliance have found two very different champions for their cause. In the Senate, Robert Kasten, a conservative Republican from Wisconsin, has since April 1981, been working to develop a fair and balanced product liability proposal. He has put forth two staff drafts, received over 2,000 pages of public comment and has held hearings on the subject. In the House, the key person has been Congressman Henry Waxman, a liberal Democrat from California. Waxman has not introduced a bill, but has indicated that he will go along with about 80% of what is in the Kasten draft. Waxman strongly believes that a uniform federal solution is necessary to resolve the problem. At present Waxman and Kasten are trying to move closer together to agree on a joint proposal.

The Administration's Position

When Senator Kasten held hearings on March 9 and 12 of this year, it was anticipated that Secretary of Commerce Baldrige would support the general concept of a federal product liability tort law. However, when his testimony was reviewed by the White House, it caught some people by surprise and they put a hold on the issue. Baldrige was asked to describe the problem but to make no commitment on the issue of federalism. The issue was then turned over to the Cabinet Council on Commerce and Trade.

The business community has met with numerous members of the Cabinet Council on Commerce and Trade and some of their subordinates. Unfortunately, business community members have received many conflicting signals. They have been asked for detailed data that are virtually impossible to produce. Some Administration officials have looked at the project as a "regulatory one" when, in fact, it is not. The principal proposals in this area would create no new bureaucracy or involve any federal expenditures. Incentives for loss prevention on the party that could best accomplish that goal (an aim of the Kasten draft), might lessen the need for additional federal regulation.

The cost savings involved would be principally in the area of legal, business operations, and insurance costs. While general statements can be made showing why these costs will be reduced, no exact projects can be made. In that regard, all that the business community seeks is a statement from the Administration that it endorses a "fair and effective" proposal. This would leave the Administration and the business community itself the right to support or oppose specific proposals as they come to fruition. The business community's fundamental position is that this is a matter of interstate commerce and not antithetical to new federalism. They have made a very strong case that the state-by-state approach to the issue simply has not worked.

Finally, the business community notes that the principal opposition to what they are seeking is coming from Ralph Nader's Public Citizens' Group (other consumer groups appear willing to work with the business community to develop a balanced bill), the American Trial Lawyers Association (the plaintiffs' bar) the Defense Research Institute (the defense bar) and the American Bar Association.[1/] As the Alliance has pointed out, the lawyers benefit the most from the current system, and their opposition suggests that substantial non-production costs would be reduced under uniform product liability law.

NCR/rs
Attachment

1/ It should be noted that two sections of the American Bar Association are now reconsidering the ABA's position.

THE WHITE HOUSE

WASHINGTON

April 23, 1976

MEMORANDUM FOR JAMES A. BAKER III

FROM: L. WILLIAM SEIDMAN LWS

SUBJECT: Product Liability Insurance

I appreciate your providing me with the packet of materials as requested concerning the program to address the problem of product liability. I have four suggestions:

1. We are aware of numerous requests for copies of the staff study on "Product Liability Insurance: Assessment of Related Problems and Issues" prepared by the Department of Commerce in response to a request from the Economic Policy Board Executive Committee. Our past practice has been not to release any documents containing recommendations or alternatives for consideration by the Economic Policy Board or the President. I am anxious to maintain this precedent and at the same time be responsive to legitimate requests for the information and data collected. Accordingly, I am hereby authorizing you to release those portions of the study which are purely informational in nature and which do not contain recommendations or alternatives for consideration by the Economic Policy Board.

2. The tendency in government to create interagency mechanisms to address particular issues has in the past often led to a plethora of entities with no overall direction or reporting mechanism to the President. The Economic Policy Board was created in September 1974 in part to replace a host of interagency cabinet level committees that were then dealing with economic policy matters. Since it is impractical for the EPB Executive Committee to itself undertake specialized studies, we have adopted the practice of establishing task forces and subcommittees, generally at the Under or Assistant Secretary level, to address particular problems and report to the EPB Executive Committee and ultimately to the President. Product liability is clearly an issue which requires an interagency effort and the EPB Executive Committee has approved the establishment of a task force. I suggest that the task force

Seidman memo goes in early Correspondence file

be chaired by the Department of Commerce and consist of representatives, at the Assistant Secretary level or higher, from the Departments of Commerce, Justice, Health, Education and Welfare, Housing and Urban Development, Labor, Transportation, Treasury, the Council of Economic Advisers, the Office of Management and Budget, the Assistant to the President for Economic Affairs, the Small Business Administration, and the Consumer Product Safety Commission. Since you have been intimately involved in the effort thus far, I recommend that you chair the task force and that the task force report periodically to the EPB Executive Committee.

3. I agree that it would be useful for the task force to have an advisory committee on product liability to draw upon the expertise of individuals in the private sector.

4. I am somewhat concerned about the projected time schedule for the task force effort. We now have approximately 8 months until late December when the preparations for the 1977 State of the Union message should be receiving final consideration. I prefer a time schedule for the task force geared to providing recommendations that might be included in the 1977 State of the Union address.

I would be pleased to discuss these suggestions with you at your convenience.

J. R.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 27, 1982

MEMORANDUM FOR: JAMES BAKER III

FROM: WENDELL W. GUNN

SUBJECT: Briefing Points on Product Liability

It is my understanding that you will be meeting with representatives of the Product Liability Alliance, including a Mr. Victor Schwartz. Attached are briefing points prepared by Sherman Unger, General Counsel of the Department of Commerce. Included therein is an allusion to the business community's dissatisfaction with the Administration's lukewarm support, particularly OMB and the White House, who, they say, do not understand the issue. In fact, the real source of their dissatisfaction is that the Administration did not immediately salute and move into action.

Your guests have already met with a number of Administration and White House officials, apparently in search of a sympathic ear. They have been told by several such officials, including OPD, that consideration of a major step like federal pre-emption requires that the problems be well defined and well documented. We have asked for quantitative information regarding the prospective impact on insurance, litigation expense, etc., to be used as the basis for cost/benefit analysis. Not only have they not supplied such information, but they seem to resent our asking for it.

This matter will probably come before the Cabinet Council on Commerce and Trade within the next 30 days. Meanwhile, if you need more details please call.

cc: Ed Harper

BRIEFING POINTS ON PRODUCT LIABILITY

James A. Baker, III

PURPOSE OF YOUR MEETING

- The Business Community is seeking Administration support for Federal legislation to resolve problems being encountered in the law of product liability. They believe that the case has been made for a Federal solution after six years of deliberations in Congress as well as within the Executive Branch. (See Tab C, Chronology of Federal Involvement in Product Liability.)

- The Business Community is dismayed that the Administration has so far declined to support the concept of Federal product liability legislation. They were surprised that, in his testimony before the Senate Consumer Subcommittee on March 12, 1982, Secretary Baldrige -- who supports the need for a Federal approach -- offered only luke-warm support. They perceive that the problem lies with White house and OMB staff who do not fully understand the issue and who are concerned - unjustifiedly - that product liability legislation would be inconsistent with Administration concepts of New Federalism.

- Representatives of the Business Community have been meeting with OMB, CEA and White House policy staff in order to turn the Administration around on the product liability issue.

PRINCIPAL ISSUES TO BE DISCUSSED

The two specific concerns you will be asked to address are:

- Whether Federal Product Liability legislation is necessary to reduce the insurance, manufacturing and legal costs currently experienced by the business community.

- Whether Federal Product Liability legislation establishing uniform Federal standards is consistent with new Federalism and can be supported by the Administration.

STATUS OF ADMINISTRATION POSITION
ON PRODUCT LIABILITY

- The Product Liability issue is currently before the Cabinet Council on Commerce and Trade. The Cabinet Council first considered the issue on April 7, 1982. At that time, a Working Group was formed and directed to "identify and analyze the economic and intergovernmental policy arguments for and against a new federal statute on product liability." The Working Group is considering the following issues:
  - Whether Federal Product Liability legislation is necessary to reduce the insurance, manufacturing and legal costs currently experienced by the business community.
  - Whether Federal Product Liability legislation establishing uniform Federal standards is consistent with new Federalism and can be supported by the Administration.
- The Working Group held its first meeting on April 19, 1982, and anticipates presenting its recommendations to the Cabinet Council in mid-July.

BACKGROUND OF THE ISSUE

- During the 1960's, state courts began to develop new and divergent theories on which to base the liability of product manufacturers, moving away from theories based on negligence and developed theories intended to permit "compensation" to the consumer when injuries occurred.
- As product liability law began to become inconsistent from state to state, manufacturers began to find that the cost of obtaining adequate liability insurance was markedly rising. This resulted from the fact that unlike automobile, medical or worker compensation lines, product liability insurance is rated nationally, because most products are marketed nationwide. Insurance companies were therefore setting rates based upon increased exposure in a few states.
- In response to this problem, President Ford established a Federal interagency task force in 1976 and appointed the Department of Commerce as its lead agency. You were

instrumental in setting up this Task Force. See Tab D. The Task Force conducted a major survey of the product liability situation generally. It found that both liability of manufacturers and product liability insurance rates had increased dramatically. Among the principal causes identified by the task force for these increases were (1) overly subjective rate-making practices by major insurance carriers, and (2) uncertainties and imbalances in product liability law among the states.

° In response to the problem of overly subjective ratemaking practices, President Reagan approved the Product Liability Risk Retention Act of 1981 (Public Law 97-45, September 25, 1981). The Risk Retention Act ensures objective underwriting by permitting manufacturers to form risk retention groups and insure themselves. The Act provides for a limited preemption of inconsistent state laws in order to achieve this purpose.

The second outgrowth of the findings of the Task Force was the publication, by the Department of Commerce in 1979, of the Uniform Product Liability Act, a model law for adoption by the states which, if fully adopted, would have established nationwide uniform standards.

° The approach represented by the Uniform Product Liability Act has been unsuccessful. Only four states have adopted portions of the uniform law; twenty-seven other states have adopted various other statutes, none of which is alike. The result has been increased uncertainty among product sellers, insurers, and consumers. For this reason, all sectors of the business community are urging adoption of Federal uniform product liability standards.

° Congressional interest in product liability legislation has been growing in recent years. In the 97th Congress, Senator Kasten, Chairman of the Senate Consumer Subcommittee, developed a draft bill, and after extensive public comment, has come forth with a second draft. The Consumer Subcommittee held two days of hearings in March on the need for product liability legislation.

° In the House of Representatives, Congressmen Shumway and LaFalce have each introduced legislation, and it is anticipated that Congressman Waxman will do so in the near future.

BUSINESS WEEK: May 31, 1982

LAW

A liability patchwork Congress may replace

Congress is moving to preempt the patchwork of state product liability laws that has prompted a growing number of costly suits against manufacturers and suppliers. Three years ago the Commerce Dept. drafted a model statute that it hoped the states would adopt. But business failed to lobby for the model law, and no states have enacted it. Now business is pushing Congress to act.

An alliance between Senator Robert W. Kasten Jr. (R-Wis.) and Representative Henry A. Waxman (D-Calif.), both chairmen of subcommittees that originate liability legislation, makes enactment of the law, only recently dismissed as farfetched, a real possibility. "If these guys can agree on a bill with business' backing, you'll get a law," predicts Victor E. Schwartz, former chairman of a task force that developed the uniform product liability act for Commerce.

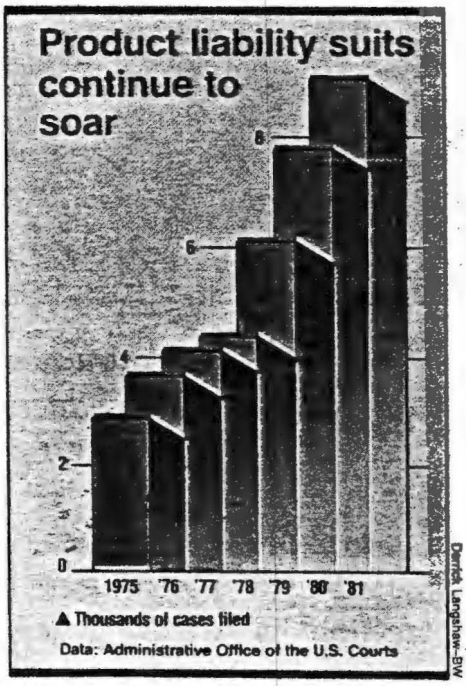
Business, once wary of a federal solution, now solidly supports it. Companies hope a uniform statute will cut back the steadily rising number of suits in federal courts (chart) and an even larger number in state courts, which do not keep comparable statistics. As proof of the consensus for change, Schwartz points to a lobbying group, the Product Liability Alliance, recently formed to back federalization. Among its 180 members are some of the largest U. S. companies and trade associations.

Finding fault. Rather than expand federal court jurisdiction, the law would merely establish rules for state courts to follow. It would also create federal standards stating who is responsible, and under what circumstances, when a worker or consumer is injured by a product. Kasten is worried that product liability law is being transformed into a system that pays injured persons regardless of fault.

The two legislators are still far apart on some issues that go to the heart of cutting down on lawsuits. For example, Kasten would impose a 25-year "statute of repose" for capital goods, which means that legal action could not be brought for injuries caused by older machines. Waxman opposes any statute of repose.

States' rights. A more fundamental disagreement—lessening chances of any legislation this year—is whether a manufacturer must be individually identified in a suit. Waxman agrees with a 1980 California Supreme Court decision giving plaintiffs the right to sue all manufacturers of the same product according to their market share. The decision came in a case in which a woman was unable to name the company that sold her mother diethylstilbestrol (DES)—a drug that the woman alleged had later caused her to develop vaginal cancer. On May 11, the New York Court of Appeals handed down a similar ruling in another DES case. Under Kasten's bill, the plaintiffs would not have been able to collect.

The position of the Reagan Administration, which remains split over legislation that would preempt states' rights, is not known. But some lawyers and consumer groups strongly object. Richard



F. Gerry, president of the Association of Trial Lawyers of America, says that shifting "the burden of injuries from the manufacturers or distributors of defective products to the victims of those defects must outrage the conscience of all right-thinking persons." A lawyer for Ralph Nader's Congress Watch called the Kasten bill "an industry wish list," vowing his organization will "fight it to the death." ■

THE PRODUCT LIABILITY ALLIANCE
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THE PRODUCT LIABILITY PROBLEM

Because the rules determining the liability of product sellers for product-related injuries have been developed almost exclusively by judges on a case by case basis, they vary from state to state, sometimes resulting in direct conflict. Because they are judicially created, these rules may change as the judicial temperament of a court changes. The result is a crazy quilt of law which is constantly changing and which is totally unpredictable by consumers, product sellers, and insurers. Macroeconomic policy affecting consumer rights, manufacturer responsibilities, and technological development, has in effect, been made by judges on an ad hoc basis.

In an effort to remedy this imbalance, 31 state legislatures, including such major manufacturing states as Illinois and Michigan, have passed some limited form of product liability statute. Individually, most of these statutes provide only defenses of some type, and do not outline the basic elements of product liability claims; nor do they define standards for manufacturer responsibility. Most importantly, no two state statutes are exactly alike.

The wide variation among state product liability laws threatens insurers' efforts to accurately predict the potential liability of the manufacturers they insure and limits the ability of manufacturers to make informed decisions regarding the design of products for nationwide distribution and sale. Some state courts have expanded the strict liability concept (liability without fault) to include product design cases. Manufacturers have little incentive to improve the design or safety of their products where their actions may be judged without regard to whether they were at fault. Consumers ultimately pay the costs of this uncertainty in higher product prices.

Product liability has emerged as a costly impediment to interstate commerce. Uncertainties and imbalance in the product liability tort litigation system will continue in the absence of a uniform statute enacted at the federal level. Product liability is a national problem requiring a national solution.

THE BENEFITS OF FEDERAL UNIFORMITY

There is a growing consensus that balanced federal product liability legislation is needed to bring uniformity and certainty to the law and to stabilize what has become a serious burden on interstate commerce.

Congressional initiatives in the 96th Congress resulted in extensive public hearings and the introduction of various product liability bills in the House. Interest in the product liability problem has continued in the 97th Congress. The Senate Commerce Consumer Subcommittee recently held hearings on product liability reform. The Committee staff, under the direction of Consumer Subcommittee Chairman Senator Robert Kasten, prepared a draft bill last October establishing uniform rules of liability. Extensive public comment on the draft bill led to a revised version, released in early March. The revised Senate staff draft made several changes suggested by consumers.

Product liability tort law has been studied extensively by the government, by the business community and by consumer groups. The 97th Congress now confronts a timely opportunity to take action beneficial to consumers and product sellers alike:

* Federal product liability legislation will allow consumers to know their legal rights and product sellers to know their obligations. A uniform law will allow consumers and product sellers, both dependent on lawyers in the current litigation system, to more accurately assess in advance the consequences of their actions and the reasonableness of the fees they are charged by lawyers.

* Uniform product liability provisions, under which manufacturers would be liable when they are at fault, will encourage the design, manufacture and distribution of safe products. A strict or absolute liability system, prevelant in some states, does not properly allocate responsibility nor provide incentives for accident prevention where they will do the most good.

* A portion of the very high transaction costs currently associated with product liability actions is inevitably shouldered by the consuming public in the form of higher product prices. Today, seven dollars is spent for lawyers for every six dollars paid to claimants. Stability in product liability tort law, brought about by a federal fault-based standard, will reduce the excessive costs inherent in the current legal environment.

* Today's chaotic and unpredictable product liability litigation system primarily benefits plaintiff's and defendants' lawyers. It is not surprising, therefore, that the organized bar opposes federal product liability tort law modifications, which would result in a reduction of transaction costs.

CONCLUSION

Three Administrations have recognized the existence of a product liability problem. An Interagency Task Force on Product Liability, created in 1976, identified insurance ratemaking difficulties and uncertainty and imbalance in the tort litigation system as the primary contributors to the product liability mess. With regard to the former aspect of the problem, last year's passage of the Risk Retention Act will help assure that product liability insurance rates will remain competitive. But, because product liability is not solely an insurance problem, the Risk Retention Act provides a key first step towards solving the overall product liability crisis.

A federal product liability tort statute drafted with precision and care will go far toward improving the present climate of almost total uncertainty caused by the application of nonuniform standards in the various states. Although complete certainty cannot be legislated, the most effective step toward certainty should be taken. The swift enactment of an equitable and balanced federal product liability tort law will benefit the entire country, including the individual consumer, through a more innovative and productive national economy.

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ELEMENTS OF A FAIR FEDERAL PRODUCT LIABILITY STATUTE

Fairness and balance between the interest of product sellers and product users should be the guiding principle in any Federal product liability statute. Over the past few years, this essential balance has been lost in a maze of conflicting state court decisions and a hodgepodge of varying state statutes.

The uncertainty and unpredictability of the state-by-state approach to product liability law are a costly burden on interstate commerce and a major factor in the volatility of product liability insurance rates.

A uniform set of rules is essential and can be achieved only through enactment of a Federal statute. Such a statute ought to codify the law as it is practiced in the majority of jurisdictions and correct the inequities in the current system.

A balanced approach to the product liability problem, one that takes into account what is politically feasible as well as substantively necessary, ought to address at least the following issues:

(1) The Federal law ought to provide for an appropriate allocation of fault in design and failure to warn cases. The tort system was created to fairly allocate liability on the basis of fault. But in some jurisdictions, it has recently evolved into a compensation-oriented system which has eliminated fault as a consideration. In these jurisdictions, all that is required to establish liability is to prove a causal relationship between a product and an injury, regardless of the conduct of the parties involved. This imbalance must be corrected so that design and failure to warn cases are governed by a fault-based standard.

(2) It ought to reflect the fact that manufacturing defects and express warranty cases are governed in most, if not all, states by a strict liability standard. This is as it should be, and the Federal product liability statute should codify strict liability in manufacturing defect and express warranty cases.

(3) It ought to require a plaintiff to prove that the defendant actually manufactured or designed the product in question. A defendant should be held liable only for his own conduct, not that of unknown others.

(4) It ought to hold product sellers to a standard of conduct consistent with practical technological feasibility at the time of manufacture. The tendency of some courts to impose 20-20 hindsight based on new technological developments should be eliminated.

(5) It ought to eliminate subrogation of workers' compensation claims and automatically reduce a plainiff's award in workplace cases by the

amount of compensation. This would significantly reduce transaction costs in cases arising out of workplace incidents.

(6) The law ought to provide for a system of comparative fault in the workplace and in other product liability litigation and require courts to consider misuse or modification of a product in assessing the manufacturers' liability and/or damages.

(7) It ought to deal in a balanced way with over-age products, providing some form of repose for products that are over-age and providing that the technological feasibility of product design safety at the time the product was manufactured be the standard against which liability and fault are measured.

(8) It ought to foreclose -- as most states now do -- the introduction of evidence of post-manufacture design changes for purposes of proving that the design of the product was defective in the first place. The barring of such evidence is a time-honored tradition in tort law, which has long held that such evidence is irrelevant. Permitting its introduction would impede the development of safer products.

(9) It ought to require distributors and other non-manufacturing sellers to exercise reasonable care in their handling of products, but should not make them routinely liable for defects that an ordinarily prudent product seller would not discover.

(10) It ought to give extra weight to manufacturers' compliance with Government safety standards in product liability actions. Just as failure of a manufacturer to comply with such standards may be used to prove his negligence, so his compliance with them should mitigate his liability.

(11) It ought to separate the imposition of punitive damages from the principal claim for compensation. Evaluation of conduct meriting punitive action should be based on flagrant indifference to product safety and extreme departure from accepted practice. In addition, it should set appropriate limits on the amount of punitive damages in single or multiple actions.

(12) It ought to provide that proof of or acceptance of liability in one product liability action does not permit a judicial assessment of liability in future unrelated actions involving other claims. The use of the doctrine of collateral estoppel is unfair to defendants facing multiple claims.

A Federal product liability bill requires neither the creation of a new Federal agency nor the expenditure of Federal monies. It adds no new basis for bringing actions in the Federal courts. Limited Federal action along these lines will address the most serious aspects of the product liability problem and will benefit both business and consumers.

WASHINGTON POST - MARCH 13, 1982

Liability Standards Split Administration

By Caroline E. Mayer
Washington Post Staff Writer

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

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

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

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

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

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

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

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

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

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Federal Standards, Please

THE ADMINISTRATION, enamored with its recently articulated concept of New Federalism, is sitting on the fence when it comes to work currently in progress to produce an eminently sensible reform bill establishing a federal legal standard for product liability.

It should stop listening to the siren song of its ideologues and the trial lawyers, who falsely masquerade as supporters of consumer groups, and pay more attention to the Republican Party's traditional constituents, the business community.

Manufacturers, whose products are in many cases produced as well as distributed interstate, urgently want the kind of reform being proposed by Rep. Henry Waxman, a liberal Democrat from California, and Sen. Robert Kasten, a conservative Republican from Wisconsin.

The two legislators are proposing, for the first time, a federal standard to decide who is responsible and under what circumstances when consumers and workers are injured by the products they use and very possibly abuse.

Action on the state level has led to sharply differing rules on fundamental issues of product liability law, ranging from the most liberal, in states like California, to such southern states as Alabama.

A historic case in point was the decision in California to allow daughters who contracted cancer because their mothers took the drug DES while pregnant to sue the companies producing the drug even if they cannot prove which company's product was used by the mother. The ramifications of such a decision, which makes manufacturers liable according to their market share, have yet to be fully felt. But this is not the issue that most worries the legislators.

They are more concerned that research and development in new processes and innovation in new products is being inhibited under present conditions. Companies, feeling vulnerable and uncertain of their liability, simply are not prepared to take a chance on improving their products if they are to be sued for not having thought of those improvements for use in their products earlier.

(OVER)

BUSINESS WEEK: May 31, 1982

LAW

A liability patchwork Congress may replace

Congress is moving to preempt the patchwork of state product liability laws that has prompted a growing number of costly suits against manufacturers and suppliers. Three years ago the Commerce Dept. drafted a model statute that it hoped the states would adopt. But business failed to lobby for the model law, and no states have enacted it. Now business is pushing Congress to act.

An alliance between Senator Robert W. Kasten Jr. (R-Wis.) and Representative Henry A. Waxman (D-Calif.), both chairmen of subcommittees that originate liability legislation, makes enactment of the law, only recently dismissed as farfetched, a real possibility. "If these guys can agree on a bill with business' backing, you'll get a law," predicts Victor E. Schwartz, former chairman of a task force that developed the uniform product liability act for Commerce.

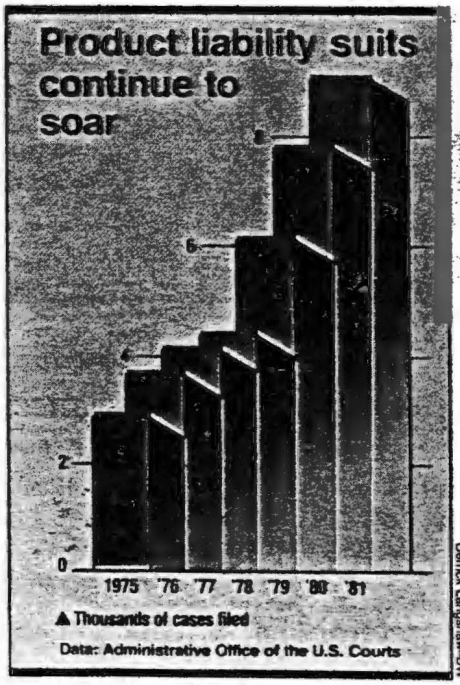
Business, once wary of a federal solution, now solidly supports it. Companies hope a uniform statute will cut back the steadily rising number of suits in federal courts (chart) and an even larger number in state courts, which do not keep comparable statistics. As proof of the consensus for change, Schwartz points to a lobbying group, the Product Liability Alliance, recently formed to back federalization. Among its 180 members are some of the largest U. S. companies and trade associations.

Finding fault. Rather than expand federal court jurisdiction, the law would merely establish rules for state courts to follow. It would also create federal standards stating who is responsible, and under what circumstances, when a worker or consumer is injured by a product. Kasten is worried that product liability law is being transformed into a system that pays injured persons regardless of fault.

The two legislators are still far apart on some issues that go to the heart of cutting down on lawsuits. For example, Kasten would impose a 25-year "statute of repose" for capital goods, which means that legal action could not be brought for injuries caused by older machines. Waxman opposes any statute of repose.

States' rights. A more fundamental disagreement—lessening chances of any legislation this year—is whether a manufacturer must be individually identified in a suit. Waxman agrees with a 1980 California Supreme Court decision giving plaintiffs the right to sue all manufacturers of the same product according to their market share. The decision came in a case in which a woman was unable to name the company that sold her mother diethylstilbestrol (DES)—a drug that the woman alleged had later caused her to develop vaginal cancer. On May 11, the New York Court of Appeals handed down a similar ruling in another DES case. Under Kasten's bill, the plaintiffs would not have been able to collect.

The position of the Reagan Administration, which remains split over legislation that would preempt states' rights, is not known. But some lawyers and consumer groups strongly object. Richard F. Gerry, president of the Association of Trial Lawyers of America, says that shifting "the burden of injuries from the manufacturers or distributors of defective products to the victims of those defects must outrage the conscience of all right-thinking persons." A lawyer for Ralph Nader's Congress Watch called the Kasten bill "an industry wish list," vowing his organization will "fight it to the death." ■



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Federal Standards, Please

THE ADMINISTRATION, enamored with its recently articulated concept of New Federalism, is sitting on the fence when it comes to work currently in progress to produce an eminently sensible reform bill establishing a federal legal standard for product liability.

It should stop listening to the siren song of its ideologues and the trial lawyers, who falsely masquerade as supporters of consumer groups, and pay more attention to the Republican Party's traditional constituents, the business community.

Manufacturers, whose products are in many cases produced as well as distributed interstate, urgently want the kind of reform being proposed by Rep. Henry Waxman, a liberal Democrat from California, and Sen. Robert Kasten, a conservative Republican from Wisconsin.

The two legislators are proposing, for the first time, a federal standard to decide who is responsible and under what circumstances when consumers and workers are injured by the products they use and very possibly abuse.

Action on the state level has led to sharply differing rules on fundamental issues of product liability law, ranging from the most liberal, in states like California, to such southern states as Alabama.

A historic case in point was the decision in California to allow daughters who contracted cancer because their mothers took the drug DES while pregnant to sue the companies producing the drug even if they cannot prove which company's product was used by the mother. The ramifications of such a decision, which makes manufacturers liable according to their market share, have yet to be fully felt. But this is not the issue that most worries the legislators.

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(OVER)

Uniform federal standards would bring predictability and stability to the product liability process and help stabilize product liability insurance rates. Consumers would know their rights and manufacturers and distributors would know the rules, says Victor E. Schwartz, former chairman of the Federal Interagency Task Force on Product Liability. This will encourage research and innovation in manufacturing, expedite the reparations process and reduce legal costs.

It would also draw some of the fire of European Community negotiators, who contend that varying product liability laws in the United States are a particularly difficult non-tariff barrier for their exporters to overcome.

European companies, not to mention Japanese ones, are severely inhibited from test marketing their products in the United States, the way things stand today. But there is, it is only fair to point out, no uniformity when it comes to liability rules in various European countries.

The counter-argument for reform of liability insurance practices, as presented in the May issue of the American Bar Association's quarterly news magazine, The Brief, is a largely legalistic one.

Professor James D. Ghiardi of Marquette University Law School contends that federal pre-emption of state laws would prompt a nationwide constitutional challenge in the courts. Another difficulty arises, he points out, if state courts have jurisdiction over federal law, a problem that would not be resolved until the Supreme Court considered each and every provision.

He contends that federal legislation is unwarranted and unwise and would create an absolute legal morass for American business and consumers. This is why the American Bar Association's Tort and Insurance Practice Section division opposes and has testified against such changes.

REP. WAXMAN AND SEN. KASTEN have a number of issues to sort out between themselves before they can come up with a joint reform bill that could stand a good chance of passage. They must decide, for example, how many years back to set the limit on liability for capital equipment.

The senator would like to open up the DES case again, which Rep. Waxman believes to be tempting fate as far as new legislation is concerned.

Both legislators favor letting distributors of products off the hook unless the manufacturer cannot be reached, as in the case of an overseas manufacturer exporting to the U.S. market.

Whatever the reservations the legal community might have — and nobody can doubt that they have an ax to grind — the Congress should be commended for tackling the issue and we can only hope that they are successful. There is little doubt that the issue is one that should be handled on a federal level.

THE PRODUCT LIABILITY ALLIANCE

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Sidewinders = "no comment"