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Friction Materials
Standards Institute
Attn: E. W. Drislane
East 210 Route 4
Paramus, NJ 07652

May 4, 1982

Dear Mr. Drislane:

I have reviewed the contribution request from "The Product Liability Alliance" and have the following comment.

The "alliance" is made up of some 29 companies and trade associations, many of which are larger and in better financial position than the F.M.S.I. While the request for contribution is small, I'd suggest that in the current economic shape, the F.M.S.I. hold back on a contribution at this time.

Sincerely,

J. W. Armstrong
Corporate Director
Safety & Protection Services

JWA/gvp

FMSI 07034

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FRICTION MATERIALS STANDARDS INSTITUTE, INC., EAST 210 ROUTE 4, PARAMUS, NJ 07652

April 30, 1982

To: Health and Environmental Affairs Committee

Subject: Memorandum from the Product Liability Alliance asking support for Uniform Product Liability Law

At the Committee Meeting on April 28, 1982, I adivsed that the Institute had received a memorandum from an association advocating support of a Federal Uniform Product Liability Law. I did not have the papers at the Meeting. As a result, I was asked to distribute the papers received to the Committee for comment.

Enclosed is a copy of the memorandum from The Product Liability Alliance asking for our support. The first question is whether the Institute should make a contribution of $100 to this association. I advised that there is precedence if this is considered a worthy association--we contribute to the Automotive Information Council on an annual basis. At the Committee Meeting it was decided that I would circulate this to the Committee Members and then would make a decision based on these comments after review by Mr. Armstrong, Chairman of the Committee, and our Legal Counsel.

If you wish to comment, please have them here by May 10.

E. W. Drislane
Executive Director

EWD/e

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THE PRODUCT LIABILITY ALLIANCE

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

April 5, 1982

MEMORANDUM

To: Trade Association Executives

From: David P. Sloane, Director-Congressional Relations
National Association of Wholesaler-Distributors

Subject: Federal Product Liability Reform

This month's successful Senate Consumer Subcommittee hearings highlighted the growing consensus in favor of Federal product liability legislation.

Critical to enactment of such legislation is cooperation and coordination among its proponents.

The Product Liability Alliance has been formed to achieve this goal. Already, over 150 major trade associations and companies have joined the Alliance, and a Steering Committee (see attached) has been at work for four months.

TPLA is an ad hoc organization. It advocates no policy positions on the content of specific bills. Instead, it supports, generally, the advancement of balanced and effective product liability legislation.

We invite you to join in this critical effort.

No financial commitment is required. But we would appreciate a $100 contribution to cover TPLA printing and postage costs. The National Association of Wholesaler-Distributors is serving as Executive Secretariat of The Product Liability Alliance. Make your check payable to NAW Product Liability Fund (TPLA Account).

Please indicate your interest by completing the attached form.

Give me a call (202/872-0885) if you have any questions.

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Also enclosed for your review is a copy of the testimony given by noted tort law authority Victor Schwartz on behalf of TPLA at the Senate hearings, and a press release associated with same.

To: The Product Liability Alliance
1725 K Street, N.W.
Washington, D.C. 20006

/___/ YES ... we wish to participate in The Product Liability Alliance. Please add us to your mailing list, and keep us posted on your efforts.

-PLEASE PRINT-

NAME_____

ASSOCIATION_____

ADDRESS_____

CITY_____STATE_____ZIP_____

TELEPHONE_____(____)_____

/___/ YES ... we are enclosing $100 to help fund TPLA's printing and postage costs. Make your checks payable to NAW Product Liability Fund (TPLA Account).

PLEASE IDENTIFY YOUR WASHINGTON REPRESENTATIVE, IF YOU WISH HIM OR HER TO RECEIVE OUR MAILINGS ALSO:

NAME_____

ASSOCIATION_____

ADDRESS_____

CITY_____STATE_____ZIP_____

TELEPHONE____(____)_____

FMSI 07037

THE PRODUCT LIABILITY ALLIANCE

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

STEERING COMMITTEE ORGANIZATIONS

Alliance of American Insurers

American Business Conference

American Insurance Association

American Mining Congress

American Petroleum Institute

Associated Equipment Distributors

Business Roundtable

Colt Industries, Inc.

Crowell & Moring

Crum & Forster Insurance Companies

E I Dupont De Nemours Company

FMC Corporation

General Electric

Gulf & Western Industries, Inc.

Halfpenny, Hahn & Roche

Hartford Insurance Group

Insurance Company of North America

Motor Vehicle Manufacturers Association

National Association of Furniture Manufacturers

National Association of Manufacturers

National Association of Wholesaler-Distributors

National Machine Tool Builders Association

National Product Liability Council

Southern Furniture Manufacturers Association

Special Committee for Workplace Product Liability Reform

Sporting Goods Manufacturers Association

Textron, Inc.

U. S. Chamber of Commerce

3M Company

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

PRESS RELEASE

FOR IMMEDIATE RELEASE

CONTACT: DAVID SLOANE

THE PRODUCT LIABILITY ALLIANCE URGES ENACTMENT OF FEDERAL PRODUCT LIABILITY LAW

TPLA's Victor Schwartz: Varying State Statutes Are Impeding Interstate Commerce

Washington, D.C. (March 9, 1982) . . . Asserting that "product liability law has spawned decisions that are simply unfair to all parties", a representative of The Product Liability Alliance (TPLA) today urged a Senate Subcommittee to approve legislation which would standardize product liability tort law at the federal level.

According to Dr. Victor Schwartz, representing TPLA, "Today no one can accurately predict what product liability law will be in the future. Federal legislation . . . setting forth uniform nationwide rules of liability would bring greater predictability and stability to the litigation process and to product liability insurance rates." Dr. Schwartz's comments came during testimony before the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation.

The Product Liability Alliance, a newly-formed group of more than 150 businesses and trade associations, is a cross-section of the entire product liability process. TPLA includes

(over)

small, medium and large businesses; manufacturers, wholesaler-distributors and retailers; insurers and insurance brokers. All members of TPLA support enactment of balanced and effective federal product liability law.

Victor Schwartz, TPLA representative at the Senate hearing, is a partner in the Washington, D. C. law firm of Crowell and Moring. In addition, he is the former Chairman of the Federal Interagency Task Force on Product Liability and co-author of one of the most widely-used torts casebooks in the United States.

Product liability law is the set of rules governing a product seller's responsibility for harms caused by his products. These rules are established almost exclusively by judges in state courts in cases arising after an accident has occurred. As a result, these rules not only vary widely from state to state, but also are usually applied retroactively, making law even in a single state, unpredictable.

"CRAZY QUILT DESIGN"

Thus, according to Schwartz, a single federal product liability law will better serve all parties involved than does the current "crazy quilt" design of varying state laws.

A uniform product liability law "will enable manufacturers, retailers and wholesaler-distributors to understand what their obligations are in the design, manufacture and sale of products. It will bring increased accuracy to the setting of insurance rates. And it will allow consumers to know what their rights are", stated Schwartz.

In his testimony, Schwartz cited two examples of what he termed "unfair" state product liability court decisions:

- In a recent Maryland case, a manufacturer of a commercial laundry dryer which had worked well for 18 years was found liable for a substantial amount of damages when someone attempted to dry a huge hot air balloon in the machine. The dryer simply was not made for that purpose, and disintegrated, injuring the plaintiff.
- A car manufacturer was held liable for harm that was caused when a tire came apart on a vehicle being driven at more than 100 miles per hour.

PRODUCTS SOLD NATIONWIDE

The TPLA representative stressed that the states should not be blamed for failing to address the product liability problem effectively. Because of the interstate nature of product manufacturing and distribution, it is almost impossible for states, either through case law or statute, to address the product liability problem in a meaningful way. Even if an individual state develops a comprehensive approach to liability issues, the fact remains that products manufactured within that state are sold and used on a nationwide basis. This fact is reflected in the way product liability insurance rates differ from medical malpractice, auto and almost all other liability insurance rates which are set on a state-by-state basis.

Stated Schwartz: "Because some products are mobile and can give rise to liability in the state of manufacture, the state of sale, or the state of use, product liability rates must be set on a countrywide basis."

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Schwartz concluded his testimony by alluding to two legislative initiatives advanced by the Senate Subcommittee - - "Staff Working Drafts 1 and 2" - - which would establish a federal product liability tort reform law. "In light of the fact that federal action is necessary", he states, "the approach of the Staff Draft represents a limited form of federal action; nevertheless, it can be effective. The draft does not require the expenditure of federal funds. The Staff Draft sets forth standards of liability which will be implemented by state courts. It would put to rest the jumble of product liability law that now impedes interstate commerce.

"Product liability tort law is intended to focus responsibility on the party or parties who, if they had acted reasonably, could have done something to prevent a harm."

* * * *

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

TESTIMONY
OF
VICTOR E. SCHWARTZ
ON BEHALF OF THE PRODUCT
LIABILITY ALLIANCE
BEFORE
THE CONSUMER SUBCOMMITTEE
OF
THE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE

MARCH 9, 1982

Mr. Chairman and members of the Subcommittee: Thank you for your very kind invitation to discuss the product liability problem, and whether federal action in the area of tort law is necessary to resolve that problem.

I am here today on behalf of The Product Liability Alliance, a newly-formed group of more than 150 business and trade associations that is a cross-section of the entire product liability process. It includes small, medium and large businesses; manufacturers, wholesalers-distributors, and retailers; insurers and insurance brokers. All members of the Product Liability Alliance support the enactment of balanced and effective federal product liability law.

I have observed the product liability problem from many viewpoints -- as a law professor in the field of torts, as a government official when I chaired the Interagency Task Force on Product Liability, and as a practicing lawyer. It is a problem whose history dates back to the early 1960's, but which became serious in

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1975 and will be much more serious in the future unless federal action is taken now.

Let me share with you, briefly, some background facts about the product liability problem.

Product liability law, simply put, is the set of rules governing a product seller's responsibility for harms caused by his products. These rules are established almost exclusively by judges in state courts in cases arising after an accident has occurred. As a result, these rules not only vary widely from state to state, but also are usually applied retroactively, making law even in a single state unpredictable.

The slow evolution of tort law in the United States accelerated dramatically in the 1965-1975 decade, spawning new and diverse theories of liability. In 1975-1977, insurance rates rose for many businesses, especially smaller ones. The Interagency Task Force found an average increase of over 300% in the diverse product areas it studied.

The Task Force conducted an intensive 18-month study of the problem and found three causes that could be addressed by federal legislation.

One cause of the problem was overly subjective insurance ratemaking practices. Insurers simply did not have enough data to set rates accurately. Sometimes rates were too high, sometimes too low. To address this problem, the Department of Commerce

developed the Risk Retention Act which, after refinements and improvements by this Committee, became law last year. By providing product sellers with competitive alternatives to commercial insurance, it put to rest, now and for the future, the insurance ratemaking aspects of the product liability problem. If product liability insurance rates, which have stabilized over the past three years, ever again become in any way unfair or unreasonable, product sellers will have convenient self-insurance and group insurance alternatives.

The other principal causes of the product liability problem identified by the Task Force were unsafe manufacturing practices and uncertainties in the tort system. To address these, the Task Force developed in 1979 the Uniform Product Liability Act (UPLA), which was to serve as a model for the states to use in codifying the obligations of product sellers and the rights of persons injured by defective products. Unfortunately, this approach simply has not worked. While some states have adopted portions of UPLA, the legislative picture at the state level is, if anything, more confusing now than before UPLA. Indeed, it is a crazy quilt of conflicting laws. Let me mention just a few examples.

First, with respect to incentives for safer manufacturing practices, states differ as to whether a product seller's efforts to improve his product and make it safer after an accident can be used against him in product liability cases. Forty-eight states believe that the law should encourage product safety and prohibit

the use of such evidence. However, two major states, New York and California, admit the evidence. As a result, product sellers, whose products may cause injury in any state of the Union, including New York and California, may hesitate to develop new safety devices on their products. Indeed, fear that evidence of such innovation could be used to prove liability for products made many years before the improvements were even conceived of operates to retard product improvement.

Second, the overwhelming majority of states follow traditional tort law and require that the plaintiff show who made the product that injured him. But at least one state, California, has ruled that a seller may be liable for products made by someone else. An insurance entity, whether it is a self-insurance vehicle or a commercial insurer, must now try to estimate the potential risks not only of its own insureds but of unknown others.

Third, product liability law has spawned decisions that are simply unfair to all parties. In a recent Maryland case, for example, a manufacturer of a commercial laundry dryer, which had worked well for 18 years, was found liable for a substantial amount of damages when someone attempted to dry a huge hot air balloon in the machine.[1/] The dryer simply was not made for that purpose and it disintegrated, injuring plaintiff. In another

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1/ American Laundry Machinery Industries v. Horan, 45 Md. App. 97, 412 A.2d 407 (1980).

case, a car manufacturer was held liable for harm that was caused when a tire came apart on a vehicle being driven at more than 100 miles per hour.[2/]

Finally, the law has become so complex that it is a trap for the unwary, and plaintiffs with legitimate claims may go uncompensated.

The Case for a Uniform Product Liability Law. A fair and effective stabilization of product liability law is in the interest of all groups concerned about this problem. It will enable manufacturers, retailers, wholesalers and distributors to understand what their obligations are in the design, manufacture and sale of products. It will bring increased accuracy to the setting of insurance rates. And, it will allow consumers to know what their rights are.

Today, even the greatest experts cannot predict what product liability law will be in the future. The result is that injured consumers who want to know their rights are totally dependent on lawyers. Consumers are entitled to have at least a basic idea of what their rights are. Such knowledge will, among other things, enable them to assess the reasonableness of charges for legal services they receive in product liability actions. Consumers have also been affected in this crisis atmosphere by some state stat-

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2/ Le Bouef v. Goodyear Tire & Rubber Co., 623 F.2d 985 (5th Cir. 1980).

utes. As will be indicated later, these statutes often have little effect on the product liability problem. Finally, a uniform law will reduce the enormous transaction costs of the product liability system, costs which are usually passed on to the consumers in the form of higher prices for products.

The Case for Federal Action. In 1979, Office of Management and Budget officials decided UPLA was more appropriate for adoption by the states than for enactment by Congress. Their reasons were threefold. First, tort law has traditionally been left to the states. Second, it was thought that states should be given the opportunity to adopt uniform product liability laws on their own. Finally, it was thought that the issue of insurance ratemaking should be addressed first.

The underlying bases for these assumptions are no longer valid. First, the insurance ratemaking aspect of the problem has been addressed through the enactment of the Risk Retention Act, so that any savings or stabilization wrought by the enactment of uniform tort law will be passed on by insurers or self-insurers to persons who buy products. Second, the states have not acted uniformly in the enactment of product liability law. Thirty-one states have passed some form of product liability statute, and none is the same. Practically none of these are comprehensive laws, and only touch a few product liability issues.

The states should not be blamed for failing to address the product liability problem effectively. Because of the interstate

nature of product manufacturing and distribution, it is almost impossible for states, either through case law or statute, to address the product liability problem in a meaningful way. Even if an individual state develops a comprehensive approach to liability issues, such as is reflected in Staff Draft No. 1 and No. 2, the fact remains that products manufactured in that state are sold and used on a nationwide basis. This fact is reflected in the way product liabiilty insurance rates differ from medical malpractice, auto, and almost all other liability insurance rates which are set on a state by state basis. Because some products are mobile and can give rise to liability in the state of manufacture, the state of sale, or the state of use, product liability rates must be set on a countrywide basis.

Governor John Carlin of Kansas made this very point in vetoing a product liability law in his state. He said, "Current economic data indicate that approximately 90% of the products manufactured in Kansas are purchased out-of-state, and a similar percentage of goods used by Kansans are manufactured in other areas. Consequently, unless a law is passed on the federal level, or Kansas law corresponds to legislation in other states, only a small number of Kansas businesses could benefit."3/

While the actual percentage of goods sold out-of-state might vary a bit, the same general statement would be true in respect to each of the states.

3/ Veto message by Governor Carlin, April 24, 1980.

Thus, the only reason left to bypass federal action is tradition. But that tradition has now become a major impediment to both interstate and foreign commerce, and old customs must bend to the facts of a modern society.

Federal legislation preempting state law and setting forth uniform, nationwide rules of liability would bring greater predictability and stability to the litigation process and to product liability insurance rates. It would reduce the horrendous litigation costs that we have today. Insurance data show that for every 66 cents a consumer receives in judgments, 77 cents is spent for lawyers.

Those opposed to federal action have argued first that no such action is necessary, on the theory that the problem is not the fluctuating legal rules applied in the courts, but overly subjective insurance ratemaking practices and faulty manufacturing practices. But, this Committee has already addressed the problem of insurance ratemaking practices, and the insurance industry's business customers agree that the insurance problem is over and done with. Moreover, the Staff has produced a draft law which squarely addresses manufacturing practices by imposing liability upon a manufacturer who has been at fault in making an unsafe product.

Second, it is argued that a federal law would not produce certainty or stability in the system because courts and juries in

the various states would still be called upon to resolve important questions and, depending how they are resolved, determine the outcome of individual cases. Although the state courts and juries would be required under a federal law to apply a uniform standard of liability, they may come to different conclusions after applying that standard. This is true of any statute. For example, the Federal Rules of Evidence enacted by Congress in 1975 have been subject to a great deal of judicial interpretation. However, no one could honestly desire to revive the old system of inconsistent and unpredictable common law evidence rules in the Federal Courts. A uniform standard drafted with the precision and care evident in Staff Draft No. 2, will go far toward improving the present climate of almost total uncertainty caused by the application of retroactive, non-uniform rules in the various states. It is absurd to suggest that because complete certainty cannot be legislated, the most effective step toward that certainty should not be taken.

Third, it is argued that federal legislation in the area of product liability tort law will not mesh with other areas of tort law at the state level. Again, careful drafting can avoid this problem. Both Staff Draft No. 1 and Staff Draft No. 2 focus exclusively on product liability actions. They do not reach into other areas of law. There are no arbitration procedures or new procedural devices that are not part of traditional state law.

Fourth, it is argued that federal legislation will have a bias that may be pro-consumer or pro-product seller. In that connection, the very open process which is being used by this Subcommittee is the best way to achieve legislation that is balanced and fair. The Staff Draft has built upon the work of the past and set in motion a totally democratic means of developing legislation. There is proof of this in the Staff's consideration of both consumer and product seller comments in the evolution from Staff Draft No. 1 to Staff Draft No. 2. These hearings, of course, will provide further guidance.

Fifth, it is argued that somehow product liability legislation will open the door for federal legislation in other areas of tort law. But the "camel's nose" argument is simply fallacious in this case. There is no federal interest in entering into ordinary tort cases such as slip and fall or medical malpractice, which are merely of local concern.

Finally, if there is a need to observe "tradition," there is ample precedent for federal action where national, uniform standards have been necessary to promote or facilitate interstate commerce. I would be pleased to supply the Committee with background material on this subject.

In light of the fact that federal action is necessary, the approach of the Staff Draft represents a limited form of federal action; nevertheless, it can be effective. The draft does not require

the expenditure of federal funds. The Staff Draft sets forth standards of liability which will be implemented by state courts. It would put to rest the jumble of product liability law that now impedes interstate commerce.

While different constituent groups will speak to the detailed content of the draft, I would observe that it recognizes a fundamental principle about product liability law. Product liability tort law should not be a compensation system. If it were, a product seller would always be liable for harms caused by his product; that is the system that is used in workers' compensation. Product liability tort law is intended to focus responsibility on the party or parties who, if they had acted reasonably, could have done something to prevent a harm.

Staff Draft No. 2 is generally in accord with this principle and with the guidelines set forth by the Federal Interagency Task Force on Product Liability.

In summary, the business community seeks a balanced law at the federal level, one that will improve the current liability climate and put to rest a problem that is a virulent impediment to interstate commerce.

Thank you.