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M E M O R A N D U M

TO: Product Approval Task Group

FROM: Suzanne H. Schmith
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SUBJECT: Liability of Product Evaluation Entities

DATE: August 2, 1999

The purpose of this memorandum is to explain the liability of approved product evaluation entities in the state product evaluation and approval process, as requested by members of the Task Group. This memo describes the liability in the most general terms only for the information of all group members. As with all product liability cases, liability is a fact-specific determination and varies with the facts of each individual case. Evaluation entities should consult with their own legal counsel for advice in any particular case.

Generally, liability may be imposed on one who certifies the quality or performance of a product to a purchaser who relies on such certification of quality and is injured by a defect in the product. *63 Am. Jur. 2d Products Liability s. 96 (1996)*. The certifier is generally not liable for breach of warranty, nor is strict liability imposed. However, one who independently tests or certifies a product is held to a duty of care in issuing its certification or seal so that the public may rely upon it and not be unreasonably exposed to harm. *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680 (1969). Therefore, an evaluation entity may be liable under the theory of negligence. The Restatement of Torts provides that one who negligently gives false information to another is subject to liability for physical harm caused by action taken by another in reasonable reliance upon that information, where such harm results (a) to the other, or (b) to a third person who may foreseeably be put in peril by the action. Such negligence may consist of failure to exercise reasonable care in (a)

ascertaining the accuracy of the information, or (b) in the manner in which it is communicated. *Id.* Generally speaking, to sustain a cause of action for negligence, the plaintiff must prove (1) there was a duty of care owed to the defendant, (2) that duty was breached, (3) the breach was the proximate cause of the injury or other damages to the defendant. In alleging negligence against an independent evaluation entity, the plaintiff must have suffered physical injury in order for liability to attach.