

**NLWJC - Kagan**

**Counsel - Box 020- Folder 001**

**Civil Tort Reform [2]**

# Withdrawal/Redaction Sheet

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. agenda	Phone No. (Partial) (1 page)	nd	P6/b(6)
001b. schedule	Phone No. (Partial) (1 page)	05/31/1995	P6/b(6)

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**COLLECTION:**

Clinton Presidential Records  
 Counsel's Office  
 Elena Kagan  
 OA/Box Number: 8286

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**FOLDER TITLE:**

Civil Tort Reform [2]

2009-1006-F

kc142

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### RESTRICTION CODES

**Presidential Records Act - [44 U.S.C. 2204(a)]**

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

**Freedom of Information Act - [5 U.S.C. 552(b)]**

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March 21, 1995

**MEMORANDUM TO PETER YU**

**CC: JUDGE MIKVA, BRUCE LINDSEY, DOUG LETTER**

**FROM: JEFF CONNAUGHTON**

**SUBJECT: Comments on Proposed DOJ Agenda**

**(1) NO DEMONSTRATED NEED FOR FEDERAL PREEMPTION**

The proposal plainly contradicts the view expressed in the Reno/Mikva letter that proponents of federal preemption "bear a heavy burden of persuasion." The DOJ proposal starts by acknowledging that the proponents of reform have not adequately demonstrated the need for national tort reform: "The Working Group did not believe that the proponents of the Rockefeller Bill had met their burden of demonstrating the need for comprehensive Federal legislation that would override critical features of the product liability laws of the states." The same obviously will be said of the DOJ proposal: that DOJ has not adequately demonstrated the need for it.

As I understand it from our subsequent conversations with Justice Department representatives, DOJ now intends to argue that the following rationales support federal preemption of state products liability law: (a) products move in interstate commerce, and (b) the fear of excessive punitive damage awards has stymied product innovation in certain industries.

**The Interstate Commerce Rationale:** The fact that products move across state lines establishes that Congress has the constitutional authority to enact products liability legislation under the Commerce Clause. But this minimal test of congressional authority to act certainly does not equate to the Reno/Mikva "heavy burden" standard. If so, why did the Reno/Mikva letter suggest that certain provisions might meet its burden while others the letter discussed had not -- when all concern interstate commerce?

**The Impact-on-Product-Innovation Rationale:** The Justice Department's proposal cites no empirical evidence supporting its claim that the fear of excessive punitive damage awards has thwarted product innovation. Proponents of reform have offered only anecdotal evidence -- some of which, if anything, has demonstrated the value of the tort system in deterring the production of unsafe products -- supplemented by subjective answers to survey questionnaires by business executives. What is DOJ's response to the evidence that suggests that punitive damages have been awarded only rarely in products cases and that the number -- but not the amount -- of such awards has decreased in recent years? In short, what evidence justifies the DOJ's dramatic change of heart both from its own conclusions about the lack of persuasive empirical evidence justifying national tort reform and from the tenor and substance of the Reno/Mikva letter?

**(2) NO RATIONALE FOR LIMITED, BUT NOT EXTENSIVE, PREEMPTION**

If the DOJ supports limited, but not extensive, federal preemption, it should explain why. Otherwise, its support for limited reforms arguably implies the need or justification for the further federalization of state products law; moreover, DOJ has not adequately countered the rationales behind enacting a federal bill that would apply to all civil cases.

The answer cannot be, "only products move in interstate commerce, thus federal preemption should be limited to products cases." That argument justifies the complete federalization of products liability law -- why should we stop with DOJ's ideas? Moreover, the interstate commerce argument could be applied to other types of civil cases. Finally, if DOJ relies on such slim reeds, why shouldn't others concoct correspondingly slim rationales to justify nationalizing the law in other areas of traditional state authority?

**(3) NO PREEMPTION THAT HELPS PLAINTIFFS**

The DOJ proposal would preempt state law only when the federal provision would help defendants, but not when it would help plaintiffs. That is patently one-sided and unfair.

3/21/95

TO: Peter Yu

FROM: Linda Lance, Office of the Vice President ✓

RE: Comments on Justice Department Proposed Product Liability Reform Agenda

As requested, I have reviewed the DOJ's proposal on product liability reform and have the following comments.

As a preliminary matter, any work to federalize current law must keep in mind at all times that this is an unprecedented alteration of long-established and carefully crafted common law and state statutes. While I understand that the Administration can only improve the legislation under consideration if it is engaged in the debate, no change in this area should be undertaken lightly or without some empirical evidence that there is a real problem that the change will address.

As DOJ states, their working group "did not believe that the proponents of the Rockefeller Bill had met their burden of demonstrating the need for comprehensive Federal legislation that would override critical features of the product liability laws of the states." DOJ also correctly notes that "provisions of the Rockefeller Bill would interact poorly with existing state product liability regimes. . . . it would have merely replaced one patchwork national system of product liability law with another."

However, without citing any additional empirical evidence of the need for change or any means of avoiding the resultant patchwork of laws, they recommend changes not only in punitive damages (where DOJ apparently believes the best case can be made for the necessity of reform), but in a number of other areas, including a limited regulatory defense. I am unaware of any objective basis on which to distinguish the need for some reforms over others, and am concerned about the lack of a coherent theme uniting the DOJ recommendations or an ability to articulate why reforms in this area and not others are acceptable and warranted. Limitation of acceptable reforms to those in the area of punitive damages would ameliorate this concern.

In any event, should the Administration publicly embrace the view that evidence exists for particular changes (particularly those outside the punitive damages area), it would create a dangerous precedent that would make it difficult to draw the line between acceptable and unacceptable reforms. Thus, I would urge that the negotiations be undertaken in the spirit of an attempt to work with Mr. Rockefeller to improve his bill, and not based on any concession, public or otherwise, that the evidence demonstrates that changes to the current system are required.

In addition, if negotiations are to be useful in either avoiding legislation or ensuring the enactment of legislation that the President can sign, they must recognize that any Senate bill is likely to be altered in conference with the draconian House bill already enacted. It must be made clear to Senator Rockefeller that the Administration will not accept further erosions of the negotiated position.

With respect to the specific DOJ proposals, I have the following concerns:

1. Elimination of jury trial on the amount of punitive damages -- any recommendation to avoid the jury system is significant both substantively and politically, and should not be undertaken lightly. DOJ offers this, with other reforms, as a means of avoiding more draconian caps on punitive damages as now proposed by Rockefeller. However, DOJ also notes that this change was opposed by the ABA Working Group on Civil Justice, but supported by the Quayle Council on Competitiveness; and that "a close question exists" as to whether such practice would be unconstitutional (the only U.S. Court of Appeals to rule on the issue, the Fourth Circuit, has held it to be unconstitutional). At a minimum, such a change should not be offered up in the first instance, but only if it is really necessary to avoid caps on damages. In the past, caps on damages have been very contentious in the Senate and other punitive damages compromises could well be enough standing alone to avoid enactment of caps.

2. Clear and convincing standard for punitives -- While this recommendation may well be a way of forestalling caps, it should be noted that it will revise current law in the vast majority of states. According to DOJ only about 14 states currently require this standard, while the others permit punitives based on the lesser standard of preponderance of the evidence. This is a dramatic example of one-way preemption in favor of business and an overruling of current state law.

3. Limited regulatory defense -- this provision was recommended in response to last Congress' Rockefeller bill, which contained an extreme regulatory defense. Since Senator Rockefeller has dropped that provision in his current bill (the provision was widely viewed as contributing to his inability to invoke cloture in the last Congress), I recommend that we similarly delete this provision from the DOJ proposal. DOJ recognizes that any such defense is problematic, and we should certainly not unilaterally offer to revive the issue in this Congress.

4. Promote balance in the legislation -- As with the securities proposals, it is widely recognized that the Rockefeller bill is one-way preemption, changing only those state laws that burden business without addressing any concerns of consumers. Aside from the substantive problems with such an approach, and the lack of resultant uniformity, this does not square with the Administration's efforts to assist the middle class. To address this problem, when the Administration accepts provisions of the Rockefeller bill, we could insist on the addition of provisions that also protect consumers and bring balance to the bill. Two such provisions, both of which have considerable merit, are:

(1) a ban on secrecy agreements in settlements, to permit information on defective products to be disseminated before additional injuries occur; and

(2) insurance data collection, to allow the federal government to monitor the insurance industry's response to any legislation enacted. It is unclear the extent to which the insurance industry's pricing practices contribute unreasonably to the cost of product liability to business. Currently the FTC is explicitly barred from even gathering data on the insurance industry. Thus, there will be no way to monitor the effect of any tort reform on costs to the insurance industry or its customers, both businesses and

consumers. Senator Rockefeller proposed such an amendment in earlier Congresses, although he has more recently expressed concern that its addition would result in the insurance industry killing a product liability bill, and it is clear that such an amendment would be aggressively opposed by the insurers.



EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL OF ECONOMIC ADVISERS  
WASHINGTON, D.C. 20500

March 21, 1995

SENIOR ECONOMIST

MEMORANDUM FOR PETER YU

FROM: JONATHAN BAKER *JB*  
SUBJECT: Comments on DOJ Product Liability Reform Proposals

1. The tone of the document may not be consistent with the White House approach. It appears tilted toward constructive engagement, without enough emphasis on drawing distinctions with the Contract proposals. This could be fixed by adding an initial section that presents an overview of the problem and criticizes the Republicans' proposed solutions (especially the problems with capping punitive damages and adopting the English rule for fee shifting).
2. Although the proposals repeatedly mention the importance of deterrence as one goal of a private damages system, the document could do more to take on the Republican proposals that would effectively eliminate punitive damages (e.g. the exclusion of pain and suffering from the base that is multiplied, capping punitive damages). Without the threat of punitive damages, we may well see a flood of faulty products--only two small regulators (the Consumer Product Safety Commission (for consumer products) and the FDA (for medical devices)) and the limited incentive to avoid harming brand reputation would remain as bulwarks deterring this end.
3. The proposal for allocating a portion of punitive damage awards to someone other than the plaintiff is particularly interesting because it preserves deterrence and a private attorney general incentive (albeit possibly lessening the latter), while removing some of the perceived unfairness of unpredictable compensation awards. I am skeptical, however, of doing anything with the portion of the award not received by the plaintiff other than depositing it in the General Fund; there is too much danger of encouraging rent-seeking in the designation of a deserving cause.
4. The issues raised by product liability reform proposals are economic as well as legal. Although the Antitrust Division's economists appear not to have participated in the DOJ working group, I would encourage the Justice Department to invite them to work with the DOJ working group in revising this document and drafting any testimony.

cc: Joe Stiglitz

Post-It™ brand fax transmittal memo 7671 # of pages > 1

To <i>Peter Yu</i>	From <i>Jon Baker</i>
Co. <i>NEC</i>	Co. <i>CEA</i>
Dept.	Phone # <i>395-5614</i>
Fax # <i>456-2223</i>	Fax #

June 7, 1995

**MEMORANDUM TO BRUCE LINDSEY**

**FROM**               **JEFF CONNAUGHTON**

**SUBJECT**            **The White House Conference on Small Business**

I have attached materials that were mailed to participants in the upcoming White House Conference on Small Business (Patton Boggs faxed it to me and did not know its origin). Some of it, as one would expect, deals with tort reform.

According to Ellen Seidman, the conference seems not to be oriented toward small *hi-tech* business. I wonder if these types of businesses worry more about punitive damages reform than about safe harbors.

We have heard nothing from the conference organizers about conference seminars/discussions on tort reform -- nor have we had conversations with them about whether a presidential statement on securities reform would interest this particular audience.

Do you know who is coordinating this? Do you want to call that person and ask these questions? Thanks.

cc:    Abner Mikva  
       Doug Letter

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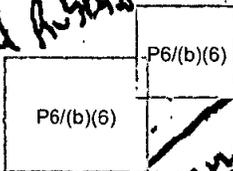
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[001a]



**National Conference Recommendation Agenda II  
Recommendations 294-428**

The National Conference Recommendation Agenda (NCRA) is the official record of recommendations forwarded to the National Conference. As this is the official record, the NCRA numbers are permanent and will not change during the National Conference.

The NCRA is divided into two sections. Section I, called *NCRA I*, comprises recommendations voted out of the six regional meetings held in April and May 1995. (Due to consolidation of identical recommendations, the total number of recommendations in *NCRA I* has decreased from 300 to 293.)

Section II, called *NCRA II*, comprises additional recommendations forwarded by the state delegations by May 26, 1995. These recommendations are listed beginning with #294.

In both *NCRA I* and *NCRA II*, recommendations are grouped with like recommendations within the 11 issue categories. If a recommendation cannot be grouped with another recommendation, the recommendation appears in the "Ungrouped" category within the issue area.

Appendices currently under development include an index and a list showing recommendations forwarded by each delegation. For *NCRA I* recommendations, the index references the Regional Recommendation Agenda (RRA) number, the state sponsor and cosponsors, and the number of votes the recommendation received. For *NCRA II* recommendations, only a notation of the sponsoring delegation is included in the index.

The index also notes similar recommendations listed in other issue areas (e.g., home office deduction recommendations, which were forwarded in both the Community Development and Taxation issue areas, have "pointer" notations referencing like recommendations in the other issue category).

Appendices will be included in the National Conference Delegate Notebook. Due to production deadline, there are no subtopic headings within issue categories in the *NCRA I* (secs. 1-293). Subtopic headings are included in the enclosed *NCRA II*. Included in the National Conference Notebook will be both the *NCRA I* and *II*, both with subtopic headings.

## Regulation and Paperwork

### Tort Reform/Product Liability

364. Congress shall enact legislation requiring that in all cases where a plaintiff loses and where the judge determines the case was meritless or frivolous, the full costs of the court and reasonable costs of the defense shall be paid by the plaintiff.
365. America's Civil Justice System is in need of total overhaul. Congress should enact legislation which reforms the American Civil Justice System. Lawsuits and huge awards for damages are destroying many small businesses. Small businesses often close shop or file bankruptcy once legal action is filed against them because they cannot afford expensive legal counsel or an extended trial. Changes to the legal system must be reformed to include all of the following:
- a) Limit punitive damages
  - b) Establish proportionate liability
  - c) Discourage wasteful litigation (Adopt the "English Rule")
  - d) Limit product liability lawsuits incentives
  - e) Reform the judicial systems and or courts
  - f) Require mediation/arbitration prior to litigation.
366. Congress should enact legislation requiring that in all cases where a plaintiff loses and where the judge determines the case was meritless or frivolous, the full costs of the court and the costs of the defense shall be paid by the plaintiff.

### User-Friendly Government

367. Congress should make OSHA, EPA, FDA, etc. more employer friendly by changing the structural bias and changing laws so that:
- a) Fines may be assessed only for intentional and willful negligence or non-compliance.
  - b) A grace period for cited infraction to come into compliance before imposition of fines.
  - c) No fines for paperwork related infractions, except where intentional and willful for the purpose of concealment of known non-conformance.
  - d) No monies through the assessment of fines may be used directly or indirectly to fund the inspection branch of any agency.
  - e) The Inspection, Adjudication and Assessment branches of any agency shall be separate.
  - f) The liability between employer and employee(s) shall be proportionate to their relative culpability.
  - g) Independent arbitration is required, and Appellate review of assessments are allowed.
368. The decisions of regulatory agencies are often arbitrary and heavy-handed. Appealing decisions within the agency is usually not afforded adequate due process and judicial proceedings are costly and time consuming. Congress should establish an independent dispute resolution commission or appeals board to which any federal regulatory agency rule, regulation, citation or fine could be

June 1, 1995

TO: Delegates to the  
White House Conference on Small Business

FROM: John Paul Galles, President,  
National Small Business United

Camille Haney, Delegate and Chair,  
NSBU White House Conference Committee

RE: Welcome to Washington!



1155 15TH STREET, N.W.  
SUITE 710  
WASHINGTON, D.C. 20005  
202-393-8830  
FAX: 202-372-8343

Congratulations again on your selection as a delegate to the 1995 White House Conference on Small Business.

Your free, four-month membership in National Small Business United (NSBU) -- the nation's oldest small-business organization, representing over 65,000 small-business leaders from throughout the country -- is an expression of our respect for you as a mover and shaker in the fastest-growing segment of the world's economy.

Now, we look forward to welcoming you to Washington and getting to know you during the many networking opportunities scheduled during the week of the Conference, including:

- NSBU Exhibit (#E-14) will be open daily in the Small Business Showcase for informal discussions about membership, public policy issues, and conference recommendation implementation strategies. NSBU is a national leader in advocating small business issues such as product liability reform -- see the enclosed update.
- Reception: 6:00 p.m. to 8:00 p.m., Sunday, June 11th -- Ballroom, Sheraton Hotel (with NFIB, NASE, NAWBO, and U.S. Chamber of Commerce).
- Briefing Session: 8:00 p.m., Sunday, June 11th -- Virginia Suite, Sheraton Hotel (with NFIB, NASE, NAWBO, and U.S. Chamber of Commerce).
- Reception: 6:30 p.m., Monday, June 12th at the Hilton -- stay tuned for more details.
- NSBU Mentor: If you are a first-time delegate and would like to team up with a seasoned small business advocate during the conference and beyond, we'll put you in touch with a like-minded NSBU member-mentor. We view ourselves as the real movers and shakers in the small business community, and think you will agree!

Please call NSBU's Member Benefits Hotline -- 1-800-345-NSBU (6728) for more information. Or just stop in at one of the events noted above and introduce yourself. We're looking forward to meeting you.

Received Time

Jun. 6. 2:31PM

Print Time

Jun. 6. 2:35PM



## Small Business Update on...

# Product Liability Reform

After 15 years of debate, good product liability reform legislation has passed the Senate and the House of Representatives. The tireless efforts of small businesses from throughout the nation contributed significantly to this historic action. The support of people like you and your colleagues who realize the crippling cost of the current system to American small businesses and consumers has brought us to the threshold of victory. Your continued efforts will be needed as we move toward the finish line.

While the media has focused on differences in the Senate- and House-passed versions of the product liability bills, there are many similarities. Also, both bills include provisions long advocated by the small business community. For example, the bills:

- Establish limitations on punitive damages awards;
- Abolish joint liability with respect to non-economic damages, such as pain and suffering;
- Hold product sellers and suppliers responsible only for their own negligence and not that of a manufacturer;
- Provide a complete defense if a claimant was under the influence of drugs or alcohol and that was the cause of the harm;
- Provide for a reduction of a claimant's award to the extent that the harm resulted from product misuse or alteration; and
- Limit litigation involving over-age products.

Differences in the two bills must be resolved in a conference committee. Both chambers then will have to vote again on the legislation. If it passes, the bill will be sent to the President for signature.

For your information, when President Clinton was vice chairman of the National Governors Association (NGA), the NGA adopted a resolution urging Congress to adopt a product liability bill. And recently, the media reported that the President "expressed a willingness to sign a 'moderate' legal-reform bill."

So you can see, we are well on our way to getting a reform bill this year, but we cannot rest until President Clinton signs a bill into law. Your continued efforts to support passage of a rational, effective product liability law this year are urgently needed.

(Continued on back)



### What you can do...

Specifically, please write to your Senators and Representatives, today, to let them know that:

- Proponents of product liability reform have been working on this issue for 15 years and the Senate and House votes in support of reform were historic.
- The product-related provisions of the House- and Senate-passed bills are similar in many ways, and they are both good bills.
- A conference committee should be convened without delay to resolve differences in the bills passed by the two chambers so a good product liability law can be enacted this year.
- President Clinton said he would support a moderate legal reform bill. Please urge him to a bill into law.

We look forward to continuing to work with you as we move forward on the road to victory!

### For additional information...

Contact: **Todd McCracken**  
Director of Government Affairs  
National Small Business United  
1155 15th Street, N.W., Suite 710  
Washington, DC 20005

Phone (202) 293-8530  
Fax (202) 872-8543

June 1, 1995

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[0016]

P6(b)(6)

**DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT**  
*(Program and times are subject to change)*

**1995 WHITE HOUSE CONFERENCE ON SMALL BUSINESS  
NATIONAL CONFERENCE SCHEDULE**  
*(as of May 21 @ 12:23 pm)*

**Saturday, June 10th**

noon-9:00 pm Registration - Washington Hilton & Sheraton Washington

**Sunday, June 11th**

noon-9:00 pm Registration - Washington Hilton & Sheraton Washington  
6:00 pm-8:00 pm Opening Reception

**Monday, June 12th**

6:00 am-7:00 pm Registration/Information Desk Open - Washington Hilton  
7:00 am-8:00 am Delegation Caucus Sessions  
8:00 am Ballroom doors open (Security Clearance begins)  
8:45 am-10:45 am Opening Breakfast Session/President William J. Clinton and  
Vice President Alben Giro, Jr.  
11:00 am-1:00 pm Issue Sessions  
1:15 pm-3:00 pm Luncheon Program/Senator Christopher S. "Kit" Bond (R-MO),  
Senator Dale Bumpers (D-AR), Representative Jan Meyers (R-KS),  
and Representative John J. LaFalco (D-NY)  
3:15 pm-3:45 pm Delegation Caucus Sessions  
4:00 pm-6:00 pm Issue Sessions  
Evening Exhibit Hall Tour - Open to the Public/Private-Sponsored Reception/  
Delegation Caucus Sessions

**Tuesday, June 13th**

6:00 am-6:00 pm Registration/Information Desk Open - Washington Hilton  
7:00 am-8:30 am Breakfast Session/Secretary of Commerce Ronald H. Brown  
8:45 am-11:15 am Issue Sessions  
11:30 am-12:15 pm Delegation Caucus Sessions  
12:30 pm-2:00 pm Luncheon Program/Secretary of the Treasury Robert E. Rubin  
2:15 pm-3:00 pm Delegation Caucus Sessions  
3:15 pm-6:45 pm Issue Sessions  
Evening Exhibit Hall Tour - Open to the Public/Private-Sponsored Reception/  
Delegation Caucus Sessions

(over)

**DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT**  
*(Program and times are subject to change)*

**1995 WHITE HOUSE CONFERENCE ON SMALL BUSINESS  
 NATIONAL CONFERENCE SCHEDULE**  
*(as of May 31 @ 12:23 pm)*

**Wednesday, June 14th**

6:00 am-6:00 pm	Registration/Information Desk Open - Washington Hilton
7:00 am-8:30 am	Breakfast Session/SEC Chairman Arthur Levitt
9:00 am-10:00 am	Agency Roundtable Session/EPA Administrator Carol Browner, SBA Administrator Philip Lader, IRS Commissioner Margaret M. Richardson, OSHA Administrator Joseph A. Dear and Comptroller of the Currency Eugene A. Ludwig
10:15 am-noon	Agency Dialogues
noon-2:00pm	Delegation Caucus Sessions
2:00 pm-6:00 pm	Voting: Final Recommendations/Findings
7:30 pm-10:00 pm	Closing Dinner/Vice President Albert Gore, Jr. & Hill Leadership
10:00 pm-midnight	Dancing/Family & Friends invited to join 1995 White House Conference on Small Business Adjourns

★ ★ ★ ★ ★ ★ ★

**Thursday, June 15th**

8:00 am-noon	Small Business Administration's Office of Advocacy Breakfast Discussion on Implementation of the Final Report/Current and Former Chief Counsels for Advocacy Jere Glover, Milt Stewart, and Frank Swain
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***Unless otherwise noted, all WHCSB events are open to registrants only.***

THE WHITE HOUSE  
WASHINGTON

**DRAFT**

December 22, 1994

MEMORANDUM FOR THE CHIEF OF STAFF

THROUGH: ABNER MIKVA  
FROM: JOEL KLEIN, BRUCE LINDSEY, & PETER YU  
SUBJECT: LEGAL REFORM ISSUES: PRELIMINARY RECOMMENDATIONS

Legal reform issues pose a political conundrum for the Administration. On the one hand, the President and the Vice President have publicly criticized certain legal reforms, most notably in the area of product liability (see Attachment), and several traditional constituencies are strongly opposed to the current reform proposals. At the same time, the new Congress appears likely to pass a legal-reform bill--a bill that could have broad public support. This memorandum offers background and outlines a range of actions the Administration could take in this area.

Background. The category of "legal reforms" includes three distinct but related issue areas:

- civil justice reforms (such as changes in attorneys' fees and rules of evidence);
- product liability reforms (such as changes in the law of damages and statutes of repose);  
and
- securities litigation reforms (such as limits on stockholder class-action suits).

Proponents of reform voice similar arguments in all three areas, claiming that the current system is unfair, encourages wasteful litigation, stifles innovation, and undermines US competitiveness. Opponents of reform characterize the proposals as result-oriented provisions that serve only to shield defendants from liability and to federalize an area traditionally controlled by state law.

Although the legal-reform debate has raged for at least a decade, the empirical evidence is far from definitive. While each side is able to marshal data that appear to support its claims, independent studies (such as those by Rand and GAO) have reached mixed conclusions. These studies suggest that in the 1980s litigation increased significantly (largely due to asbestos-related claims), but also that the filings in more recent years evidence no clear trends. With regard to product liability cases, the studies also fail to support charges that, at the median, damage awards (compensatory or punitive) have been dramatically increasing.

*Legislative Activity and Context.* Last session, after lengthy negotiations that significantly altered (in a pro-consumer direction) the initial bill, Congress established an 18-year statute of repose for product liability claims concerning general aviation aircraft. In addition, Congress considered:

- S. 687, sponsored by Sen. Rockefeller, which would establish uniform federal standards in several areas of product liability law; a cloture vote on the bill failed by 3 votes.
- several health care bills that would reform malpractice and medical products liability laws, limiting contingency fees and noneconomic damages.
- legislation designed to reduce class-action lawsuits in securities litigation by establishing a fee-shifting rule and eliminating joint-and-several liability.

Chairman Brooks' ability to delay product liability legislation in the House led proponents to concentrate on the Senate. In 1992 and 1994, Sen. Rockefeller introduced a compromise bill that did not limit either punitive damages or attorneys' fees, two of the most controversial elements of previous proposals. Then-Sen. Gore voted against the bill in committee in 1992 and in had opposed earlier versions of the bill on the Senate floor.

The "Common Sense Legal Reform Act," which the Republicans plan to introduce next session, goes further than most of these bills. More precisely, it provides for:

- civil justice reforms for federal courts:
  - a "loser pays" or "English rule" attorney-fee regime for diversity actions brought in federal court; and
  - amendments to the rules of evidence regarding expert scientific testimony.
- product liability reforms that govern both federal and state court claims:
  - a uniform limit on the liability of product retailers;
  - a uniform "clear-and-convincing" evidentiary standard for punitive damages;
  - a cap on punitive-damages awards; and
  - a bar on joint-and-several liability for noneconomic damages.
- securities litigation reforms:
  - an English rule for all securities-fraud claims;
  - a strict scienter requirement that effectively eliminates joint-and-several liability; and
  - an "actual reliance" requirement that severely increases a plaintiff's burden of proof.

The legislative politics surrounding legal reform is in a state of flux. In general, legal reform has not been a partisan issue, although the Contract may change that dynamic (at least in the House). Given current information, the most likely scenario is that reforms in the three

areas--civil justice, product liability, and securities--will proceed on separate tracks, and that the latter two may move fairly quickly. It also appears that the House will move more quickly than the Senate.

Many observers believe that the Rockefeller bill could easily pass the reconstituted House, and could receive more than 65 votes in the Senate. Accordingly, proponents of reform are weighing plans to press for more radical reform. If they do, moderate Democrats and Republicans who voted for earlier versions of Rockefeller's bill will be in a critical position.

*Brief Analysis.* The Justice Department is undertaking a comprehensive analysis of the Contract. In general, it is worth noting that the Contract provisions tend to address the problems of the legal system faced by business interests, and to leave unaddressed problems with access to justice faced by citizen, consumer, and labor interests. With regard to the specific issue areas, we offer the following observations.

- *Civil Justice Reforms*--Adoption of the English Rule, even if limited to federal diversity jurisdiction, would fundamentally alter the American legal system. It is far from clear that such a reform is justified and how such a change would affect state court filings. Reform of evidentiary rules by statute is also a dangerous business: it may be best to leave such changes to the authority and accumulated experience of the courts.
- *Product Liability Reforms*--The threshold question here concerns federalism: the Contract bill would preempt state standards in several areas. While it certainly is the case that the vast majority of commerce is interstate (or international), it is not clear that the federal interest in uniformity is sufficient to trump the interests of the States in an area that is traditionally the province of state courts and legislatures. (Indeed, in the 1980s, 48 States enacted various versions of "tort reform.")

Assuming one were to support *some* federal standards, a few are particularly problematic. Limitations on retailers' liability and a clear-and-convincing standard for punitive damages, for example, are less problematic than a cap on punitives or the elimination of joint-and-several liability for noneconomic damages. The latter two would create troubling inequities and arguably represent a far greater intrusion into state sovereignty than the former two.

- *Securities Litigation Reforms*--The federalism issue is not present here, as this is an area long governed by federal law. The data--which are more complete than those regarding product liability--suggest that the number of suits (both absolutely and as a percentage of IPOs) is not increasing, although the dollar amount of the awards is increasing. Unlike in the product liability area, the plaintiffs' bar has its own legislative agenda, which includes overruling the Supreme Court's recent *Central Bank* ruling (in order to create a statutory cause of action for aiding and abetting a 10b(5) violation) and extending the statute of limitations for 10b(5) actions. Some reform in this area may be appropriate,

although far-reaching changes (such as adoption of the English Rule or an actual reliance requirement) would be very problematic.

*Options.* As of this writing, it seems likely that Congress will disaggregate the Contract bill and set aside its most severe provisions. It also seems fairly likely that Congress will pass a product liability reform bill and a securities litigation reform bill, with support from the business community and increasing expectations of a Presidential veto among consumer groups and the plaintiffs' bar.

Both as a policy matter and a political matter, it would be unsound for the Administration to embrace the Contract bill. In general, one can distinguish among four plausible options.

- *Option 1: Oppose any significant legal reforms.* This would be viewed positively by traditional constituencies: consumer, labor, and seniors groups, as well as the trial lawyers. However, it could be viewed more broadly as "politics as usual," given the widespread anti-lawyer animus in the general public. If a veto threat were not credible, the Administration could be marginalized in the legislative process.
- *Option 2: Wait and see.* This posture would be difficult to maintain, and could also leave the Administration in a highly unfavorable position: facing a bad bill and the narrow options of a controversial veto or a severely criticized signing.
- *Option 3: Articulate clear policy principles, challenge the Contract bill, and engage the debate.* A third option would be to address directly legal reform issues. To do so, the President could articulate policy principles that would frame his position. Under an overall theme of "making the legal system work better for the middle class," the President could identify changes that he believes are essential to meaningful reform, such as:
  - a bar on secret settlements in federal product cases that implicate public health;
  - alternative dispute resolution (ADR) mechanisms that work;
  - insurance reporting requirements; and
  - changes to reduce the "race to the courthouse" in securities litigation.

Moreover, the President could identify reforms that he believes are *not* tolerable, such as:

- broad application of the English rule in federal courts;
- restrictions on compensatory damages;
- favorable treatment for business (as opposed to consumer) litigation; and
- changes that would eviscerate private enforcement of the securities laws.

Such a statement could help frame the debate and might encourage proponents of the Contract bill to consider an approach that served consumer as well as business interests.

- *Option 4: Emphasize the federalism dimensions of this issue.* This option would involve either (i) developing and supporting reforms limited to the *federal* courts or (ii) calling for elimination of federal diversity jurisdiction and deferring to States on legal reforms. Either approach would emphasize the States' role in this area and expose the Republicans' inconsistent positions on States' rights.

Recommendations. At this point, we believe that Option 3 makes the most sense. Toward that end, we propose the following next steps.

- With the assistance of Legislative Affairs, Counsel's office and the NEC would begin discussions with consumer groups, ATLA, Sen. Rockefeller's staff, and others to explore the possibility of revising Sen. Rockefeller's bill to address more completely consumer concerns (e.g., by addressing secrecy in settlements and enhancing ADR).
- A working group would evaluate the various legal reform proposals and their interaction with other Administration initiatives (such as health care reform and reauthorization of environmental statutes). By mid-January, the group will draft, for your--and ultimately, the President's--consideration, an Administration statement of principles for sound legal reform. At that time, the President would be able to decide which sorts of reforms, if any, he wishes to support and which he wishes to oppose. If approved, these principles would facilitate and inform ongoing discussions with the parties.

\_\_\_\_ Agree; proceed with preliminary conversations and draft statement of principles.

\_\_\_\_ Disagree.

\_\_\_\_ Let's discuss.

MAYER, BROWN & PLATT

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MARK H. GITENSTEIN  
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December 20, 1994

Mr. Bruce Reed  
Deputy Assistant to the President  
for Domestic Policy  
The White House  
Washington, D.C. 20500

Dear Bruce:

Attached are talking points regarding securities litigation reform highlighting key points that should be raised in discussions about the Contract With America. In addition to these brief points, I have also attached a "whitepaper" containing a more in-depth analysis of the issues. Finally, for your information, I have attached a letter that Senators Dodd and Mikulski wrote to the New York Times in response to a recent article about securities litigation reform.

Please call if you or your colleagues have questions that are not addressed in these materials or if you would like additional information. My office has an extensive collection of research on securities law and policy.

Let me know if I can help on crime, welfare or any of the other issues we care about.

Best wishes for the holidays.

Sincerely,



Mark H. Gitenstein

Attachments

cc: Ellen Seidman

*Peter, Joel -*

*See sep point 8. We may not agree, but it's clear what the accountants are most concerned about is NOT our facts support for them but rather that we'd side with the +100 lawyers.*

## Securities Litigation Reform

1. Securities litigation reform is an effort to rationalize a litigation system that has gotten out of control. The current system has developed haphazardly through forty years of court decisions with little intervention by policymakers. The result is a system that rewards lawyers who can quickly bring -- and settle -- many lawsuits, punishes emerging high-growth companies, and yet yields only minimal recoveries for defrauded investors.

2. Securities litigation reform did not originate with the Contract With America, and is not a Republican issue. Bipartisan reform legislation was introduced in the 103rd Congress by Senators Chris Dodd and Pete Domenici, and by Representative Billy Tauzin. Senators Mikulski, Conrad, Moseley-Braun, Murray and Pell were among the Senate cosponsors. Forty-nine Democratic cosponsors in the House are returning to the Congress.

3. There is wide-spread consensus for reform.

- Senator Chris Dodd said that "[t]he investing public deserves a system of private remedies which offers better protection to investors rather than promoting a wasteful and ineffective litigation sub-culture."

- Senator Barbara Mikulski: "I am absolutely opposed to this race to the courthouse mentality that ends up in needless [securities fraud] lawsuits... [I]f we spend our time, our money and our energy on these frivolous and nasty and malicious lawsuits, we cannot spend our time, energy, creative and executive ability in creating jobs for this country and an export market to be able to duke it out in the new global economy."

- Simon M. Lorne, General Counsel of the Securities and Exchange Commission, stated that "[a] couple of years ago there was a debate about whether there was a problem. That debate has largely gone away. The debate now is, how do we solve the problem?"

4. The high-tech industry strongly supports reform legislation because the industry is often the target of meritless securities fraud litigation. Such lawsuits in this high-growth sector of the economy hurt American competitiveness and inhibit job creation.

- A letter signed by 219 California high-tech firms to Senator Feinstein urging her support for the Dodd/Domenici bill noted that 19 of the 30 largest companies in Silicon Valley have been victims of securities suits since 1988.

- Scott McNealy, Chairman, President and CEO of Sun Microsystems recently said that "[t]here is grim irony in the

fact that participation in our economy's growth sectors, especially biotech, computers and telecommunications, carries with it an inordinate risk of shareholder strike suits arising from the rapid technological change and unpredictability inherent in those sectors."

- States with concentrated high-tech companies, such as California, Washington and Massachusetts, are particularly affected by such meritless suits.

5. Pension funds support reform.

- Managers of 10 large pension funds, including the Texas Teachers Retirement System, the Oregon Public Employees' Retirement System, and the New York City Pension Funds, wrote that "the current system is not protecting investors and needs reform. Under the current system, defrauded investors are receiving too little compensation, while plaintiffs' lawyers take the lion's share of any settlement."

- Maryellen Andersen, Investor and Corporate Relations Director of the Connecticut Retirement & Trust Funds, testified that "we are the ones who are hurt if the system doesn't work right or efficiently, and we are the ones who stand to benefit most if it does...[T]here is reason to believe that system isn't yet working right."

6. Ironically, the current securities fraud litigation system actually inhibits voluntary disclosures that benefit investors.

- An unpublished study of the corporate disclosure process conducted by professors at Harvard Business School found that fear of meritless lawsuits was the number one obstacle to enhanced voluntary disclosure by corporate managers.

- A survey by Venture One of 212 entrepreneurial companies found that 71% were reluctant to discuss company performance with analysts or otherwise to disclose information for fear that an unjustified lawsuit would result. Only 17% of the companies responding to the survey had been defendants in shareholder lawsuits.

- An American Stock Exchange survey found that 75% of corporate CEOs limit the information disclosed to investors out of fear that greater disclosure would lead to a lawsuit.

7. While the events in Orange County, California have confused the debate about securities litigation reform, they do not directly implicate the Dodd/Domenici bill.

- The Dodd/Domenici bill is not retroactive so it would have no impact on Orange County investors.

- The Dodd/Domenici bill preserves investors' right to sue under SEC Rule 10b-5 if the defendant had actual knowledge of the fraud or was reckless in making a misrepresentation or omission.

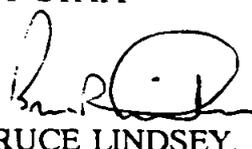
- The Dodd/Domenici bill retains joint and several liability for defendants who knowingly engage in fraud. In cases currently brought in Orange County, which claim knowing misrepresentation and fraud, all investors could recover 100% of their damages from any one of the defendants.

8. The Administration should let this issue develop in the Congress before taking a public position. A bipartisan bill is likely to emerge that would screen out meritless claims but retain an effective private right of action.

THE WHITE HOUSE  
WASHINGTON

January 4, 1995

MEMORANDUM FOR THE CHIEF OF STAFF

THROUGH: ABNER MIKVA   
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SUBJECT: LEGAL REFORM ISSUES: PRELIMINARY RECOMMENDATIONS

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Background. The "legal reforms" currently being discussed include three related issue areas:

- civil justice reforms (such as changes in attorneys' fees and rules of evidence);
- product liability reforms (such as changes in the law of damages); and
- securities litigation reforms (such as limits on stockholder class-action suits).

Proponents of reform voice similar arguments in all three areas, claiming that the current system is unfair, encourages wasteful litigation, stifles innovation, and undermines US competitiveness. Opponents of reform characterize the proposals as unnecessary provisions that serve only to shield defendants from liability and to federalize an area traditionally controlled by state law.

The empirical evidence regarding the need for reform is far from definitive. While each side is able to marshal data that appear to support its claims, independent studies have reached mixed conclusions. These studies suggest that in the 1980s litigation increased significantly (largely due to asbestos-related claims), but also that the filings in more recent years evidence no clear trends. With regard to product liability cases, the studies also fail to support charges that, at the median, damage awards (compensatory or punitive) have been dramatically increasing. In response, proponent of reform emphasize that the mere threat of suit and large awards has a deleterious impact on business.

Legislative Activity and Context. The legal-reform debate has raged for at least a decade. Last session, after lengthy negotiations that significantly altered (in a pro-consumer direction) the

initial bill, Congress established an 18-year statute of repose for product liability claims concerning general aviation aircraft. In addition, Congress considered several bills, including S. 687, sponsored by Sen. Rockefeller, which would have established uniform federal standards in several areas of product liability law. A cloture vote on S. 687 failed by 3 votes. In 1992, then-Senator Gore publicly opposed bills similar to S. 687.

The "Common Sense Legal Reform Act," which the Republicans plan to introduce next session, goes further than did S. 687. The more controversial provisions of the bill include:

- civil justice reforms for federal courts:
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  - amendments to the rules of evidence regarding expert scientific testimony.
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- securities litigation reforms:
  - an English rule for all securities-fraud claims;
  - a scienter requirement that effectively eliminates joint-and-several liability; and
  - an "actual reliance" requirement that greatly increases a plaintiff's burden of proof.

The legislative politics surrounding legal reform is in a state of flux. In general, legal reform has not been a partisan issue, although the Contract may change that dynamic. Given current information, the most likely scenario is that reforms in the three areas--civil justice, product liability, and securities--will proceed on separate tracks, and that the latter two may move fairly quickly. It also appears that the House will move more quickly than the Senate. Many observers believe that the Rockefeller bill could easily pass the reconstituted House, and could receive more than 65 votes in the Senate. Accordingly, proponents of reform are weighing plans to press for more radical reform. If they do, moderate Democrats and Republicans who voted for earlier versions of Rockefeller's bill will be in a critical position.

*Brief Analysis.* The Justice Department is undertaking a comprehensive analysis of the Contract bill. In general, those provisions tend to address the problems faced by business interests, and to leave unaddressed access to justice by citizen, consumer, and labor interests. With regard to the specific issue areas, we offer the following observations.

- *Civil Justice Reforms*--Adoption of the English Rule, even if limited to federal diversity jurisdiction, would fundamentally alter the American legal system. It is far from clear that such a reform is justified and how such a change would affect state court filings.

- *Product Liability Reforms*--The threshold question here concerns federalism: the Contract bill would preempt state standards in several areas. While it certainly is the case that the vast majority of commerce is interstate (or international), it is not clear that the federal interest in uniformity is sufficient to trump the interests of the States in an area that is traditionally the province of state courts and legislatures. Indeed, in the 1980s, 48 States enacted various versions of "tort reform." Assuming one were to support *some* federal standards, a few are particularly problematic. Limitations on retailers' liability and a clear-and-convincing standard for punitive damages, for example, are less problematic than a cap on punitives or the elimination of joint-and-several liability.
- *Securities Litigation Reforms*--The data--which are more complete than those regarding product liability--suggest that the number of suits is not increasing, although the dollar amount of the awards is increasing. Unlike in the product liability area, the plaintiffs' bar has its own legislative agenda, which includes extending the statute of limitations for 10b(5) actions. Some reform in this area may be appropriate, although far-reaching changes (such as adoption of the English Rule) would be very problematic.

*Options.* Both as a policy matter and a political matter, it would be unsound for the Administration to embrace the Contract bill. In general, there are four plausible options.

- *Option 1: Oppose any significant legal reforms.* This would be viewed positively by traditional constituencies: consumer, labor, and seniors groups, as well as the trial lawyers. However, it could be viewed more broadly as "politics as usual," given the widespread anti-lawyer animus in the general public. Moreover, other constituencies, such as the high-technology sector, which favor securities-law reform would be disappointed. If a veto threat were not credible, the Administration could be marginalized in the legislative process.
- *Option 2: Wait and see.* This posture would be difficult to maintain, and could also leave the Administration in a highly unfavorable position: facing a bad bill and the narrow options of a controversial veto or a severely criticized signing.
- *Option 3: Articulate clear policy principles, challenge the Contract bill, and engage the debate.* Under this option, the President could articulate policy principles to clearly establish his position. Under an overall theme of "making the legal system work better for the middle class," the President could identify changes that he believes are essential to meaningful reform, such as:
  - a bar on secret settlements in federal product cases that implicate public health;
  - alternative dispute resolution (ADR) mechanisms that work;
  - a requirement that insurance companies report litigation and premium data; and
  - changes to reduce the "race to the courthouse" in securities litigation.Moreover, the President could identify reforms that he believes are *not* tolerable, such as:
  - broad application of the English rule in federal courts;

- restrictions on compensatory damages;
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Such a statement could help frame the debate and might encourage proponents of the Contract bill to consider an approach that served consumer as well as business interests.

- *Option 4: Emphasize the federalism dimensions of this issue.* This option would involve either (i) developing and supporting reforms limited to the *federal* courts or (ii) calling for elimination of federal diversity jurisdiction and deferring to States on legal reforms. Either approach would emphasize the States' role in this area and expose the Republicans' inconsistent positions on States' rights.

Recommendations. At this point, we believe that Option 3 makes the most sense. Toward that end, we propose the following next steps.

- With the assistance of Legislative Affairs, Counsel's office and the NEC would begin discussions with consumer groups, ATLA, Sen. Rockefeller's staff, and others to explore the possibility of revising Sen. Rockefeller's bill to address more completely consumer concerns (e.g., by addressing secrecy in settlements and enhancing ADR).
- A working group consisting of the various White House offices and DOJ would evaluate the various legal reform proposals and their interaction with other Administration initiatives (such as health care reform and reauthorization of environmental statutes). By late January, the group will draft, for your--and ultimately, the President's--consideration, an Administration statement of principles for sound legal reform. At that time, the President would be able to decide which sorts of reforms, if any, he wishes to support and which he wishes to oppose. If approved, these principles would facilitate and inform ongoing discussions with the parties.

---

Decision.

\_\_\_ Agree: proceed with preliminary conversations and draft statement of principles.

\_\_\_ Let's discuss.

## PRODUCTS LIABILITY AND CIVIL JUSTICE REFORM

### President Clinton: Press Accounts and Past Statements

- \* WJC: "The proposals advanced by George Bush and Dan Quayle [presumably including S.640, the Rockefeller bill] are dramatically tilted toward big polluters, manufacturers and insurance companies, and against consumers and victims." *The Candidates on Legal Issues*, ABA J., Oct. 1992, at 57.
- \* WJC: "Bush and Quayle want to cap the ability of juries to award victims punitive damages, even when that is the only way to bring a powerful offender to justice, or to keep a dangerous product off the market." *Id.*
- \* WJC: "[Bush and Quayle] want to make victims pay the legal fees of big manufacturers, if, for some reason, they sue and lose. It is nothing more than trickle-down justice." *Id.*
- \* WJC: "As a general matter, I believe that legal reform should be enacted in the laboratories of the states, rather than at the federal level." *Id.*
- \* WJC: "In my view, the best reforms are those that make it less likely for people to go to court. We should encourage greater use of alternative dispute resolution to give consumers redress without having to litigate, such as mediation, mini-trials, and the multi-door courthouse. We should also encourage the use of special masters to help sort through complex cases. And we should restrict the use of secrecy agreements, which too frequently force litigants to refight the same battles, over and over, while endangering public health." *Id.*
- \* WJC: "But I will oppose any proposals that pretend to 'reform' lawsuits while actually encouraging dangerous products or marketplace fraud." *Id.*
- \* Stephanopoulos: "Bush and Quayle want to slam the door in the face of the one million women who have been put at risk by silicone breast implants, the hundred of thousands of workers who suffered from asbestos exposure, and the victims of dangerous products such as the Dalkon Shield" -- in an Aug. 27 campaign statement. *Is Bush Hurting Cause He Champions?* LEGAL TIMES, Aug. 31, 1992, at 1.

- \* "[A letter by David Williams, president of the Arkansas Trial Lawyer Association, to Arkansas lawyers] recounts two instances in which the Arkansas trial lawyers successfully lobbied Clinton. When Clinton proposed tort reforms, he wrote, 'we immediately got on the horn to the governor about this and the tort reform part of the legislative package was pulled.' Another time, Clinton vetoed a 'good samaritan' bill that would have given doctors providing free care for the poor immunity from liability suits.' . . . Betsey Wright, a Clinton campaign aide, said the governor did take both actions, but offered explanations why. The good samaritan bill was vetoed because Clinton feared it would create a dual health care system, with the poor having no recourse against malpractice, she said. The tort reforms were dropped after efforts to achieve a compromise between the trial lawyers and insurance companies failed, according to Wright." Multiple press accounts, Aug. 27, 1992.

But See . . .

- \* "Bill Clinton serve[d] on a National Governor's Association subcommittee that issued a statement in support of a uniform [product liability] code." *Bush More Progressive on Legal Reform*, DALLAS MORNING NEWS, Oct. 31, 1992, at 30A.
- \* WJC: "[W]e didn't want the whole health care plan to come a cropper on a debate over tort reform. We thought there had to be some. We knew that the states were taking up this issue to some extent, but we thought we ought to do something nationally, even though tort law historically has been completely within the purview of state government, not the national government. So we agreed that there ought to be a limitation on lawyer fees, contingency fees." *Teleconference with the California Medical Association*, 30 WEEKLY COMP. PRES. DOC. 611.

#### Vice President Gore

- \* Voted against S.640, the Rockefeller Bill, in the Commerce Committee in 1992.
- \* Coauthored Minority Views in the Commerce Committee report on product liability legislation in 1990.
- \* Widely quoted in press as having deemed the Rockefeller bill "anti-consumer."

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January 4, 1995

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  - a scienter requirement that effectively eliminates joint-and-several liability; and
  - an "actual reliance" requirement that greatly increases a plaintiff's burden of proof.

The legislative politics surrounding legal reform is in a state of flux. In general, legal reform has not been a partisan issue, although the Contract may change that dynamic. Given current information, the most likely scenario is that reforms in the three areas--civil justice, product liability, and securities--will proceed on separate tracks, and that the latter two may move fairly quickly. It also appears that the House will move more quickly than the Senate. Many observers believe that the Rockefeller bill could easily pass the reconstituted House, and could receive more than 65 votes in the Senate. Accordingly, proponents of reform are weighing plans to press for more radical reform. If they do, moderate Democrats and Republicans who voted for earlier versions of Rockefeller's bill will be in a critical position.

*Brief Analysis.* The Justice Department is undertaking a comprehensive analysis of the Contract bill. In general, those provisions tend to address the problems faced by business interests, and to leave unaddressed access to justice by citizen, consumer, and labor interests. With regard to the specific issue areas, we offer the following observations.

- *Civil Justice Reforms*--Adoption of the English Rule, even if limited to federal diversity jurisdiction, would fundamentally alter the American legal system. It is far from clear that such a reform is justified and how such a change would affect state court filings.

- *Product Liability Reforms*--The threshold question here concerns federalism: the Contract bill would preempt state standards in several areas. While it certainly is the case that the vast majority of commerce is interstate (or international), it is not clear that the federal interest in uniformity is sufficient to trump the interests of the States in an area that is traditionally the province of state courts and legislatures. Indeed, in the 1980s, 48 States enacted various versions of "tort reform." Assuming one were to support *some* federal standards, a few are particularly problematic. Limitations on retailers' liability and a clear-and-convincing standard for punitive damages, for example, are less problematic than a cap on punitives or the elimination of joint-and-several liability.
- *Securities Litigation Reforms*--The data--which are more complete than those regarding product liability--suggest that the number of suits is not increasing, although the dollar amount of the awards is increasing. Unlike in the product liability area, the plaintiffs' bar has its own legislative agenda, which includes extending the statute of limitations for 10b(5) actions. Some reform in this area may be appropriate, although far-reaching changes (such as adoption of the English Rule) would be very problematic.

*Options.* Both as a policy matter and a political matter, it would be unsound for the Administration to embrace the Contract bill. In general, there are four plausible options.

- *Option 1: Oppose any significant legal reforms.* This would be viewed positively by traditional constituencies: consumer, labor, and seniors groups, as well as the trial lawyers. However, it could be viewed more broadly as "politics as usual," given the widespread anti-lawyer animus in the general public. Moreover, other constituencies, such as the high-technology sector, which favor securities-law reform would be disappointed. If a veto threat were not credible, the Administration could be marginalized in the legislative process.
- *Option 2: Wait and see.* This posture would be difficult to maintain, and could also leave the Administration in a highly unfavorable position: facing a bad bill and the narrow options of a controversial veto or a severely criticized signing.
- *Option 3: Articulate clear policy principles, challenge the Contract bill, and engage the debate.* Under this option, the President could articulate policy principles to clearly establish his position. Under an overall theme of "making the legal system work better for the middle class," the President could identify changes that he believes are essential to meaningful reform, such as:
  - a bar on secret settlements in federal product cases that implicate public health;
  - alternative dispute resolution (ADR) mechanisms that work;
  - a requirement that insurance companies report litigation and premium data; and
  - changes to reduce the "race to the courthouse" in securities litigation.Moreover, the President could identify reforms that he believes are *not* tolerable, such as:
  - broad application of the English rule in federal courts;

- restrictions on compensatory damages;
- favorable treatment for business (as opposed to consumer) litigation; and
- changes that would eviscerate private enforcement of the securities laws.

Such a statement could help frame the debate and might encourage proponents of the Contract bill to consider an approach that served consumer as well as business interests.

- *Option 4: Emphasize the federalism dimensions of this issue.* This option would involve either (i) developing and supporting reforms limited to the *federal* courts or (ii) calling for elimination of federal diversity jurisdiction and deferring to States on legal reforms. Either approach would emphasize the States' role in this area and expose the Republicans' inconsistent positions on States' rights.

Recommendations. At this point, we believe that Option 3 makes the most sense. Toward that end, we propose the following next steps.

- With the assistance of Legislative Affairs, Counsel's office and the NEC would begin discussions with consumer groups, ATLA, Sen. Rockefeller's staff, and others to explore the possibility of revising Sen. Rockefeller's bill to address more completely consumer concerns (e.g., by addressing secrecy in settlements and enhancing ADR).
- A working group consisting of the various White House offices and DOJ would evaluate the various legal reform proposals and their interaction with other Administration initiatives (such as health care reform and reauthorization of environmental statutes). By late January, the group will draft, for your--and ultimately, the President's--consideration, an Administration statement of principles for sound legal reform. At that time, the President would be able to decide which sorts of reforms, if any, he wishes to support and which he wishes to oppose. If approved, these principles would facilitate and inform ongoing discussions with the parties.

Decision.

\_\_\_\_ Agree: proceed with preliminary conversations and draft statement of principles.

\_\_\_\_ Let's discuss.

THE WHITE HOUSE  
WASHINGTON

January 17, 1995

**MEMORANDUM FOR LEGAL REFORM WORKING GROUP**

**FROM:**

**JOEL KLEIN** 

**SUBJECT:**

Options Memorandum

I have asked Peter Yu and Jeff Connaughton to prepare an options memorandum for the President based on the memos that have been circulated. You previously received a copy of Peter's draft statement of principles. You might also benefit from Jeff's thinking on this subject, which is attached. We will circulate a draft of the options memorandum later this week.

THE WHITE HOUSE  
WASHINGTON

January 17, 1995

MEMORANDUM FOR LEGAL REFORM WORKING GROUP

FROM: JEFF CONNAUGHTON

SUBJECT: Confronting Political Choices

1. *The Republicans have defined legal reform as anti-lawyer, pro-competitiveness, and pro-innovation.*

The business community has capitalized on the public's animosity toward lawyers to develop political momentum behind reform proposals that would shield defendants from liability. Putting aside the usual Republican devotion to federalism principles, proponents have focused on Washington-led reforms to nationalize the fight against trial lawyers and to trump the results of similar reform battles in the fifty state capitals.

Last year's Senate vote count (cloture failed by two votes), the changes in Congress after the election, and legal reform's inclusion in the Contract with America all strongly indicate that a products liability and a securities litigation reform bill will pass the Congress this year. Because reform efforts have a long history (at least in the products liability area), the general outlines of the bills likely to pass are discernible at this stage. It's fair to say that, unless the President strongly opposes the Contract's approach to legal reform during the coming months, the bills he should expect to reach his desk will be pro-defendant and designed to restrict plaintiffs' rights.

2. *Peter Yu has drafted a statement of principles which raises federalism concerns and supports balanced reform.*

Peter's statement: (1) proposes reforms of the federal rules and procedures to curb frivolous suits and to promote alternative dispute resolution and expedited settlement (not currently before Congress), (2) supports preemptive federal standards for punitive damages (an element of Contract legislation), and (3) opposes the English Rule, the evisceration of private securities suits, caps on punitive damages, and discriminatory treatment of noneconomic damages (other elements of Contract legislation).

By design, Peter's statement indicates the President would support reasonable and "balanced" reform: the statement proposes provisions consumers like and opposes others too harmful of plaintiffs' interests; it acknowledges problems with frivolous suits and punitive damage awards; yet, Peter attempts to preserve the President's flexibility to either sign or veto the legislation Congress ultimately passes.

3. *Failure to confront the difficult political choices presented by legal reform only delays the political pain and squanders the opportunity to control the political debate.*

Before reaching consensus on a statement of principles, I believe we should decide upon a political strategy responsive to the considerable momentum behind Republican-led reforms. As long as legal reform remains driven by peoples' animosity toward lawyers, the President cannot win. If he signs legislation, consumer groups will accuse him of selling out to the business community. If he vetoes it, the Republicans and business community will say he has been captured by the trial lawyers. A statement of principles (even one as thoughtful and balanced as Peter's) without a stronger political strategy will have little impact on the national debate or the legislative process.

*How does the President ultimately benefit, then, if we issue a statement of position some may initially perceive as reasonable and balanced? Unless we reframe the debate and create a winning scenario for the President, some version of the Republican-backed bills will pass the Congress, and we will not have prepared an effective rationale for the President's ultimate action (whether he signs or vetoes the bills).*

4. *The White House should reframe Republican legal reform as favoring corporate defendants over consumers and small investors.*

Aggressively opposing the Contract's legal reforms creates a winning scenario that fits the President's "Middle Class" strategy. Poll figures indicate that although a majority of Americans support legal reform, the level of support makes it the weakest element of the Contract. By opposing the Contract-generated bills, the President can stand with small investors, consumers, and victims of corporate negligence (the vaunted "middle class") against insurance companies, large corporations, and accounting firms. If the President intends to pick fights on principle, he should rally to this one: The Contract's proposed legal reforms target relief to corporate defendants, not to the middle class. People may dislike lawyers, but they will resent to a greater degree legislation they believe will unfairly favor corporate defendants.

The Justice Department, the Securities and Exchange Commission, and the Rand Corporation's Institute for Civil Justice each have concluded the empirical data do not support proponents' claims of a litigation "explosion." The legal system does cost too much and take too long. But solutions that simply truncate plaintiffs' rights in meritorious suits do not address systemic problems: frivolous suits, excessive use of discovery as a strategic tool or tactic, motions practice that causes delay, the need for alternative dispute resolution methods and equitable settlement-inducement mechanisms, the need for active judicial case management, and access to justice for the middle class (which has been virtually priced out of our legal system, but for contingency fee arrangements in big-dollar cases).

Accordingly, I propose the attached version of a statement of principles (or perhaps it could serve as the political addendum to Peter's more scholarly rendition). Its purpose would be to defeat the bills before Congress or to develop a convincing veto rationale (should the President need it) based on principles the President comfortably can defend. At the same time, it proposes reforms consistent with those principles. I propose we use this statement of principles to develop an effective and sustained communications strategy that vigorously opposes the Contract's approach to legal reform.

5. *A Statement of Principles based on federalism concerns and the need for balanced reform would be insufficient to affect compromise.*

Even if we hope to support a compromise, a statement based on federalism concerns (except for preemptive federal standards for punitive damages) and the need for balanced reform, probably would not accomplish one. In the products liability area, the opposing sides have been engaged in mortal combat for a decade over an approach consumers deem fundamentally unsound. Fattened by the current political mood, the PLCC expects the President would dare not veto a bill that passes both houses of Congress. The PLCC is devising their recommended changes to last year's bill on the basis of Senate vote counts, not White House input.

As drafted, Peter's statement reflects a modulated pro-consumer position. By opposing some of the key components of legislation expected to pass, it would raise expectations of a veto among hopeful consumer groups and trial lawyers. The flexibility it seeks to preserve for the President is illusory: the draft statement alone would not change the current political dynamic (driven by attitudes about lawyers). We must reframe the bills as inimical to the interests of the middle class before a veto would be politically defensible and the threat of a veto effective.

*In short, the WH cannot be an agent for compromise unless we employ effective and sustained political rhetoric against the substance of the Contract/PLCC approach and in favor of alternatives.*

\* \* \* \*

In closing, I believe reform proponents' tactics require that we enter this debate on a political plane that speaks to a presidential election audience. The country's dislike of lawyers and litigiousness calls for a proactive and coherent explanation of the President's views on legal reform.

**A DRAFT PROPOSAL**  
**STATEMENT OF PRINCIPLES**

- \* **The Contract with America's Common Sense Legal Reforms target relief to corporate defendants, not to the middle class.**

*How would the middle class benefit from:*

- Making a losing plaintiff pay General Motors' legal fees?
- Capping the award of punitive damages against corporations that knowingly fail to correct design flaws leading to consumer death or injury?
- Enacting rules that discriminate against victims suffering loss of reproductive ability and other noneconomic damages?

- \* **The Contract with America's Common Sense Legal Reforms would shield fraudulent market manipulators like Charles Keating and Ivan Boesky from suits by small investors.**

*How would the middle class benefit from:*

- Preventing certain types of securities fraud suits unless the plaintiff holds a minimum \$10,000 investment in one stock?
- Making losing plaintiffs pay defendants' attorney fees, effectively ending class-action lawsuits by small investors?
- Forcing investors to prove that a defendant had actual knowledge of a fraud as opposed to proving the defendant acted with reckless disregard for the truth -- thus licensing reckless behavior by officers, directors, brokers and other fiduciaries?

- \* **The Administration supports legal reforms that reduce costs and delays in the federal civil justice system for plaintiffs and defendants.**

*The middle class would benefit from:*

- Limits on the fees attorneys can charge plaintiffs when suits settle early in the litigation process.
- Alternatives to trial such as court-annexed arbitration and mediation which allow the middle class to seek resolution of disputes at lower cost.
- Procedural reforms that encourage defendants to make reasonable settlement offers in meritorious cases and plaintiffs to accept them.

## DRAFT PROPOSAL

- Enhanced judicial case management techniques to reduce costs and delay.
- Discovery and motions practice reforms that prevent defense lawyers from causing undue delay and plaintiffs' lawyers from conducting unwarranted fishing expeditions.
- A legal presumption against secrecy provisions that prevent the release of information relevant to public health or safety (and cause subsequent plaintiffs to rediscover the identical information, at the price of considerable expense and delay).

*Business defendants would benefit from reforms directed at frivolous suits, not meritorious ones:*

- Mandated sanctions for frivolous filings.
- Higher pleading standards on product liability actions.
- Changes to the way class actions are brought, pleaded, and managed in order to reduce the "race to the courthouse" by plaintiffs' lawyers who, intent on controlling the lawsuit and reaping large fees, have no inkling of the suit's merits.

- \* **The Contract with America's Common Sense Legal Reforms would preempt state laws in a one-sided fashion: only where helpful to defendants, but not to consumers.**

*How would the middle class benefit from:*

- A preemptive federal law more restrictive of plaintiffs' rights than current law in many states?
- A preemptive federal law that caps punitive damages available under the laws of many states, without granting consumers uniform rights in all states?
- A preemptive federal law that disrupts state law balances of consumer and business interests developed by state legislatures and state judges?
- A federal products liability statute that Washington lobbyists in future years would attempt to amend with additional provisions favoring corporate defendants?

## **DRAFT PROPOSAL**

- \* **The Contract with America's Common Sense Legal Reforms Expose Republican Hypocrisy About Federalism and Free-Market Approaches.**
  - When the direction of most governmental reforms emphasizes the role of the states and moves away from Washington control, why should the federal government regulate product liability suits brought under state law?
  - Litigation reflects a free-market approach to enforcing public safety and health concerns; why don't the Contract reforms respect the individual's freedom to sue if her legal rights have been violated?
  
- \* **The Model of Consensus Legal Reform Should be the Civil Justice Reform Act of 1990.**
  - The CJRA focuses on systemic reform to reduce litigation costs and delay in the federal civil justice system.
  - A broad coalition of Democrats and Republicans developed the CJRA and corporations and consumers, defense and plaintiffs' attorneys supported its enactment.
  - The CJRA mandated the courts to study the effectiveness of designated procedural reforms in ten pilot districts, so Congress could enact empirically verified, uniform solutions.
  - The Administration supports building on the CJRA by implementing reforms in the areas of judicial case management, discovery, and enhanced use of alternative dispute resolution on the basis of the pilot programs Congress and the federal courts established in the CJRA.

call Bryson  
call Edley

DRAFT--NOT FOR DISTRIBUTION--CLOSE-HOLD

The American civil justice system is one of this nation's greatest inventions, and one of its most valuable assets. Much of the genius of this system lies in its federal structure: civil justice is one area in which States truly have served as "laboratories of democracy"--over the last fifteen years virtually every State has significantly reformed its legal system. Despite this basic soundness, our legal system remains in need of reform. Business groups and others are concerned about frivolous lawsuits and unpredictable liabilities and their effects on innovation and competitiveness; consumer groups and others are concerned about meaningful and prompt access to justice and the impact of the legal system on public health and safety.

The Administration believes that reform of the civil justice system is desirable, but emphasizes that significant changes to that system must be preceded by, and based upon, careful and thoughtful analysis. Caution is in order in part because the empirical evidence regarding the need for reform is far from definitive. Moreover, constructive reform of the civil justice system must respect both the balance between federal and state authority and the States' traditional role in developing the substantive law governing tort and contract actions.

This document outlines the principles that inform the Administration's position on legal reform issues.

- More than anything, a legal-reform measure must be balanced. It must improve the civil justice system--not as a process that serves one class of parties or another, but as a system that serves all parties: potential plaintiffs, potential defendants, and the public interest. The Administration would oppose any legal-reform measure that was not balanced in this way.
- As a first priority, legal reform efforts should focus on the reform of federal rules and procedures: whenever possible the federal government should lead by example, not by mandate--this is as true in legal reform as in welfare reform and regulatory reform. In particular, the following areas provide opportunities to improve the functioning of federal courts:

- Reduce frivolous litigation: The problem of meritless litigation and "nuisance suits" could be addressed by mandating sanctions for such filings (i.e., strengthening FRCP 11) and by imposing higher pleading standards on product liability actions (extending FRCP 9). The Administration supports these and similar revisions to the federal Rules. Such targeted reforms would be more effective at eliminating frivolous litigation than a blanket "English rule" (requiring the losing party to pay costs and attorneys fees of the prevailing party) for federal courts sitting in diversity, which is likely to prejudice legitimate claims and disadvantage legitimate claimants.

might be more balanced but not more effective

most litigation is business v. business

what about an EAJA type standard? -1-

emphasize Rule 11 goes both ways - isn't Rule 11 the key?

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- Improve the efficiency of the legal system: Long delays in a legal system disserve all interests, denying relief to legitimate plaintiffs and repose to responsible defendants. The Administration supports a broad expansion of alternatives to litigation, while preserving a plaintiff's constitutional right to a jury trial. Legal reform legislation should include meaningful incentives to use alternative dispute resolution (ADR) systems such as court-annexed arbitration. For example, a party (or in the case of a plaintiff, her counsel) who declines to participate in ADR and who ultimately fails in her claim could be required to bear some portion of the prevailing party's costs and attorney's fees (up to a specified limit).

means only the rich get juries?

Another example of a measure that would increase early settlements and reduce litigation and transaction costs in product liability cases is a limited fee-shifting provision for parties who declined an early offer of settlement (deemed reasonable by a judicial officer) and who obtained a significantly smaller judgment after trial. The Administration supports such targeted reforms in product liability cases brought in federal court.

why?

- Protect the public interest in the approval of settlements and orders: In approving settlements and protective orders, a federal court must balance the interests of the parties and the public interest. In light of the significant public interest in preserving health and safety, the Administration supports a legal presumption against secrecy provisions that would prevent the release of information relevant to public health or safety.

is this counter-productive long run?

- In the Civil Justice Reform Act of 1990, Congress initiated an unprecedented and comprehensive attempt to reduce litigation costs and delays in the federal courts. The preliminary results of that effort indicate that alternative dispute resolution has been underutilized, and that discovery reform can lead to significant reductions in costs and delay. The Administration supports building on the CJRA and implementing reforms in the areas of judicial case management, discovery, and enhanced use of alternative dispute resolution on the basis of the pilot programs Congress and the courts established in the CJRA.

- In addition, in areas of established federal authority, further substantive and procedural changes may improve the functioning of the legal system. For example, with regard to litigation brought under federal securities law, changes in the way that class actions are brought, pleaded, and managed as well as extensions of the statutes of limitation, would reduce the wasteful "race to the courthouse" and the risk of meritless claims that has emerged in recent years.
- However, the Administration would oppose legal reforms that would effectively end private enforcement by middle-class owners of corporate securities. The Securities and

why would this last piece do this?

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Exchange Commission has long relied on such private suits to supplement public enforcement efforts against securities fraud.

- Legal reforms that preempt state laws and supplant traditional state authority should be undertaken only if justified by sound analysis and a strong federal interest. While Congress certainly has the authority to preempt state law, history teaches that such usurpation of state authority ought be exercised with significant caution. In particular:

- While each State has reconciled the various goals of the tort system differently, many States have emphasized compensation--"making the innocent victim whole"--as a central objective of their systems. To limit the recovery of compensatory damages--whether directly or through differential treatment of noneconomic damages or through changes in joint-and-several liability rules--is to trump the decisions of the courts and legislatures of these States. The Administration opposes preemptive legislation to limit the recovery of compensatory damages.
- With regard to limits on punitive damages, the Administration's position is similar. All parties agree that, in certain rare circumstances, punitive damages are appropriate to deter or punish extraordinarily irresponsible behavior. There is not, however, any *a priori* basis for fixing a ceiling on the award of punitive damages, measured either by a dollar amount or as a multiple of compensatory damages; instead punitive damages are and should be imposed based on the facts and circumstances of the particular claim: one claim may warrant \$100 in punitive damages, another \$1 million. Moreover, every State that permits punitive damages also provides a mechanism for remittitur or appeal to correct errant jury awards. Accordingly, the Administration believes that preemptive legislation to place a cap on punitive damages collectible under state law is unsound.
- At the same time, there may be justification for federal guidance establishing when punitive damages are appropriate. Particularly in an era in which the vast majority of commerce is interstate or international, the federal government has an interest in providing businesses with predictability--that is, in ensuring that firms that meet specified standards of behavior can be assured protection from punitive damages. Thus the Administration would not oppose preemptive federal standards for punitive damages, such as standards drawn from a Restatement, that provide a fair and predictable guidance without immunizing extraordinarily irresponsible behavior that warrants punishment. Similarly, the Administration would not oppose a preemptive evidentiary standard (such as "clear and convincing evidence") for punitive damages claims. Again, in both of these areas, preemptive standards would provide potential defendants with some certainty without

why? Is  
Have  
sufficient  
impact on  
interstate  
commerce?

Focus that  
the reforms  
generally hurt  
consumers?

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imposing insurmountable hurdles for legitimate plaintiffs in extraordinary circumstances.

As a matter of fairness, the Administration would not oppose a symmetrical effort to provide potential *plaintiffs* with predictability. Thus, in jurisdictions that currently do not provide punitive damages, a preemptive provision would serve to establish a claim for such damages. This would ensure that plaintiffs in different jurisdictions face similar standards in claiming punitive damages.

- Finally, in order to assess the effectiveness of any reforms and inform subsequent reform efforts, the Administration supports studies of (i) the effect of state and federal civil justice reforms on claims, judgments, settlements, and liability-insurance premiums; (ii) the effect of shareholder actions on corporate formation, organization, and operation; and (iii) access to justice for claims that are not litigated due to their smaller value.

*Judges + states best to do this - frame this as an over-regulation issue*

*hit tactics of lawyers and things they use to drive up costs of litigation - point as business v. consumer?*



EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL OF ECONOMIC ADVISERS  
WASHINGTON, D.C. 20500

SENIOR ECONOMIST

January 17, 1995

MEMORANDUM FOR JOEL KLEIN  
PETER YU

FROM: JONATHAN B. BAKER *JBB*

SUBJECT: Comments on Proposed Statement of Principles on  
Legal Reform

These comments respond to your request last Friday. Some of my thoughts come after reflection over the weekend, and thus address issues I did not raise at our meeting.

I would revise the draft to frame the discussion in terms of the following principles:

- Legal reform must not give manufacturers incentives to flood the market with unsafe products.
- Legal reform must not deny those with legitimate claims access to the courts.
- Legal reform must reduce the time cases spend in the legal system--and thus reduce costs associated with delay.
- Legal reform must deter genuinely frivolous lawsuits.

These principles are more partisan than those in the draft, and aimed more at the public than policymakers. In the current political environment the Administration's main policy leverage, and main way of clarifying what the President stands for, comes from the veto threat. Principles like the above help maximize these benefits by clarifying both what the President wishes to accomplish and where he draws the line, without committing him to any specific text.

Even on its own terms, as a policy document, the draft could do a better job of recognizing that legal reform proposals are economic policy issues as well as legal policy issues. The draft recognizes the important interests of ensuring the fair resolution of disputes and keeping the transactions costs of

doing so low, but it does not generally recognize that legal rules affect the allocation of goods and services and thus the efficiency of the economic system. For example:

- Draconian limits on punitive damages would prevent the legal system from punish extraordinarily irresponsible behavior (as the draft notes). Of equal importance (and not highlighted in the draft), cutting back on punitive damages would make most manufactured goods less safe. In particular, the Contract With America proposal that effectively ends punitive damages in products liability cases (by raising the evidentiary standard and capping awards) would dramatically reduce the incentive of most manufacturers to invest in product safety by scrutinizing product designs and responding to consumer complaints. The result: products will cause more injury than before, not out of increased manufacturer malice but as a result of changing economic incentives.

The danger that legal reform will undermine product safety is especially great if the Contract's takings proposals are also enacted, as they will discourage Federal regulators from picking up the slack by forbidding the sale of dangerous products. Indeed, the only incentive that would remain to prevent widespread manufacturer indifference to product safety is a firm's incentive to protect the reputation of its brand names. But manufacturers whose products fall close to the line on safety can evade this incentive by avoiding the use of established brand names when marketing such goods. Moreover, to the extent brand names become more important as a guarantor of quality, these legal reforms would likely harm consumers by conferring market power on firms with established brand names: entry will be increasingly difficult into branded product markets as consumers become understandably reluctant to try products of new competitors.

- The problem with the English rule is not just that it is likely to disadvantage legitimate claimants (as the draft notes). The economic literature on the subject suggests that the English rule could also raise aggregate legal expenditures.
- The Rockefeller bill's offer of judgment proposals for product liability litigation raise complex incentive issues that require further study. It will require a great deal of analysis to predict their effect on the amount of judgments, the probability of settlement, the amount of legal fees for cases that go to trial, the number of lawsuits, and the incentives of manufacturers to avoid selling unsafe products if Congress enacts this proposal without the caps that Rockefeller has proposed. (With the caps, the proposal may have little effect.)

3

- A product liability system that applies the substantive legal rules of the states may encourage states to apply too tough products liability standards. Each state can take advantage of an externality: a tougher standard protects its citizens primarily, while the costs of damage awards are borne mainly by out-of-state purchasers of the product. I realize that the policy implication of this point is to favor a national legal standard, which is counter to what politics may demand; still, there is a serious economic efficiency issue here.

The draft could also usefully emphasize that proposed reforms might advance some goals while advancing others. For example, giving more power to the judge relative to the jury could help reduce delay and deter frivolous suits, but it may also undermine the goal of preserving access to the courts unless the reform proposals are targeted narrowly at the delay and frivolous lawsuit problems. (The draft effectively recognizes this point in discussing federal rules reform to reduce frivolous litigation, but could do more to emphasize the principles at stake and the tradeoff among them.) In addition, the draft should point out that the elements of the package of legal reforms can be modified to best serve the mix of policy goals. Thus, while the Contract proposals almost certainly overshoot, by underdetering unsafe products, it is possible (I don't know) that the Rockefeller bill proposals, which also reduce deterrence but in a more measured way, are better than the status quo.

Finally, I have two technical comments on the draft. First, I don't think that private enforcement of securities law is particularly a middle class issue. Second, I don't think we want to argue that limiting the recovery of compensatory damages is to trump the decisions of the courts and legislatures unless we are prepared to seek preemption or repeal of all workers compensation laws.

CC: Joseph E. Stiglitz  
Doug Letter  
Tracey Thornton  
Michael Waldman

Jan. 13, 1995

To: Ab Mikva, Joel Klein, Peter Yu, Jeff Connaughton

From: Doug Letter

At today's meeting regarding litigation reform, Joel indicated that we should try to develop a set of principles regarding civil litigation reform that can be used to guide the Administration's policy in this area. I propose a rather straightforward and simple approach, which is attached.

As you can see, I think this is an effort that the Administration should generally oppose insofar as it proposes federal regulatory legislation. The Administration can safely do so without seeming obstructionist or simply in the pocket of the plaintiffs' bar.

The Administration can make clear that the lawyers on both sides have created a problem, which should be addressed. But, in light of the Administration's regulatory reform thrust, we can quite credibly argue that civil litigation reform is not something to be accomplished by more regulation from Washington D.C. And, the Administration can make clear that many of the current legislative proposals are anti-consumer and against the interests of individuals. Thus, the Administration should be able to oppose this legislative effort without thereby falling into the trap of seeming to buck the trend of reining in lawyers.

In addition, since this is not a new initiative and is one that appears to be moving on a fairly fast legislative track, I think it would make sense to try to determine at this stage if the principles we are trying to develop meet the President's views.

(In line with Ab's instructions the other day, I note that the attached can fit into an "Eisenhower memo," but I have made it more than one page for ease of readability.)

## STATEMENT OF PRINCIPLES REGARDING CIVIL LITIGATION REFORM

1. There is a problem with both federal and state civil legal systems, caused in significant part by lawyers, both plaintiffs' and defendants' counsel: litigation costs too much and the systems are too slow.

2. This problem is not one appropriately addressed by more regulation from the central government in Washington, D.C.; such regulation would mostly benefit lawyers because substantial new court time would be taken up interpreting and applying the additional regulations.

3. The major part of the problem can best be addressed by two groups:

(A) federal and state trial judges, who are usually appointed by the President or a Governor and approved by the legislature, or elected by the people; and

(B) state legislators.

Trial judges supervise the litigation process every day, and they should be encouraged to exercise greater control by penalizing attorneys (and parties when appropriate) for bad arguments or claims, excessive discovery, etc. Judges are in the best position to know in any specific case if the lawyers are abusing the system.

If more general rules are needed for the state court systems, state legislators are the closest to the people, and they can address this as a local problem.

4. Many of the proposals to change the legal system through federal legislation are anti-consumer, and would hurt individuals.

For example, the English Rule would make the loser pay the winner's attorney fees. This discourages somebody who gets hurt by a defective product from suing any large corporation, which will rack up massive legal bills. Unless the injury is extremely serious, an individual will often be reluctant to sue (and even when the injury is serious, there may be great fear because of the possibly high legal fees, coupled with the already high expenses from the injury).

The Contract With America generated bill proposes that stock market investors who have been defrauded cannot bring certain types of suits unless they have a minimum \$10,000 investment in one stock. Few individuals will fall in that category. Thus, this bill truly does favor the wealthy. Further, by proposing to eliminate the "fraud on the market" cause of action, the bill

would do away with one of the major protections for investors who are not professionals.

Caps on punitive damages often may remove the incentive for large corporations to take warranted steps to be sure their products are safe.

These are just some examples; we can draw more from the proposed bills.

5. Some federal legislative reform is needed to rein in abusive lawyers. For instance, we support reasonable procedural amendments to laws allowing securities investors and lawyers to file class actions. And, workable steps can be taken to encourage litigants in federal court cases to accept mediation and/or arbitration to resolve their disputes quickly and inexpensively.

Most other possible reforms are ones that state legislatures and courts should examine because they are in the best position to determine if such efforts make sense in their states.

THE WHITE HOUSE  
WASHINGTON

**DRAFT**

January 24, 1995

MEMORANDUM FOR THE PRESIDENT

FROM: JOEL KLEIN, BRUCE LINDSEY, & PETER YU

SUBJECT: DECISION REQUESTED:  
STATEMENT OF PRINCIPLES ON LEGAL REFORM ISSUES

The Chief of Staff previously approved an effort co-chaired by the Counsel's office and the NEC to develop a strategy addressing legal reform legislation likely to arise in this Congress. This memorandum presents a strategic choice regarding the Administration's position on legal reform issues and offers two draft "statements of principle" for your consideration.

I. BACKGROUND

Both you and the Vice President have been critical, or at least skeptical, of reforms of the legal system through preemptive federal legislation. Attachment A offers selected press accounts of your statements on these issues.

The legal reform legislation included in the Contract with America is, by most accounts, quite extreme; Attachment B outlines the primary provisions of the bill. For several years, Senator Rockefeller has championed a more moderate approach to product liability reform; last session, a cloture vote on the bill failed by only 3 votes. Senator Dodd plans to reintroduce a federal securities litigation bill that is less extreme than the Contract provisions. Most observers believe the House will pass legal-reform legislation relatively quickly (perhaps within the first 100 days) and that the Senate will not move until late spring. The Rockefeller and Dodd bills may emerge as "compromise" approaches that could attract the required 60 votes.

The Chief of Staff charged the interagency group with developing a proactive approach and a "statement of principles" that would serve as an outline of the Administration's position.

II. OPTIONS

In general, there are two primary options for an Administration statement of principles.

- Option 1: Oppose the Contract Bill. One approach would emphasize that the legal system should protect the middle class from injustice and fraud. Republican reforms would limit the liability faced by defendants in products and securities litigation rather than decrease litigation costs and delay for all parties. This option (illustrated by Attachment C) attacks the premises of Republican reforms with the following principles:

# DRAFT

- the Contract approach *limits corporate liability* to the detriment of product safety, full compensation for injured plaintiffs, and private redress against insider trading and securities fraud;
  - the Administration supports legal reforms to decrease frivolous suits and high costs and delay, *without underterring fraud and corporate negligence*; and
  - outcomes that offend common sense in products cases should be dealt with by the States, *not by the federal government*; abuses of securities law call for targeted reforms, *not simply reductions in the liability of potentially fraudulent parties*.
- Option 2: Indicate Your Support for "Balanced" Reform. A second approach (illustrated by Attachment D) would focus less on the Contract bill and offer a more modulated approach. The central elements of that approach are:
    - a legal reform bill must be *balanced* and address the concerns of both businesses and consumers;
    - legal reform is generally a *matter of state law* and thus the Administration supports *reforms in federal courts* to reduce frivolous litigation and accelerate resolution in the federal courts;
    - the Administration supports *pro-consumer provisions* such as limits on secrecy in settlements and strong private enforcement of securities laws; and
    - the Administration *opposes preemptive limits on compensatory and punitive damages*, but does not oppose uniform standards for punitives to enhance predictability for businesses.

### III. ANALYSIS

Though substantively similar (Option 1 incorporates the pro-consumer positions in Option 2), these options reflect two quite different strategies. Option 1 takes advantage of the extreme nature of the Contract bill to attempt to reframe the legal-reform debate in a manner consistent with our middle-class theme. This would send a strong signal to the Congress and strengthen the hand of consumer and attorney interests (it also recognizes that a veto must be politically defensible before the threat of a veto becomes effective). It may, however, trigger negative reactions from the business community, and could, given the strong anti-lawyer animus in the general public, be misinterpreted as "a defense of lawyers." For that reason, it also recommends that you favor some form of contingency fee reform.

Option 2 does not directly address the Contract but rather attempts to acknowledge the concerns of both business and consumer interests. The emphasis on a balanced bill could improve the legislation passed, in part by encouraging business interests to reconsider any overly ambitious reform efforts. Consumer interests may be deeply disappointed by this approach; attorney groups would likely tolerate, but not embrace, it. While intended to be more accommodating, this Option could be viewed by some as tentative and equivocal.

In short, Option 1 conveys a strong middle-class message and lays the groundwork for a veto; Option 2 emphasizes balance and leaves greater room for either signature or veto.

# DRAFT

## IV. RECOMMENDATIONS

Neither option garnered a consensus of the working group. However, all offices continue to agree that prompt action by the Administration (perhaps in the form of statements or testimony by Justice Department officials) is necessary.

## V. DECISION

- Pursue Option 1 statement of principles.
- Pursue Option 2 statement of principles.
- Let's discuss.

President Clinton

- "The proposals advanced by George Bush and Dan Quayle [presumably including S.640, the Rockefeller bill] are dramatically tilted toward big polluters, manufacturers and insurance companies, and against consumers and victims." *The Candidates on Legal Issues*, ABA J., Oct. 1992, at 57.
- "Bush and Quayle want to cap the ability of juries to award victims punitive damages, even when that is the only way to bring a powerful offender to justice, or to keep a dangerous product off the market." *Id.*
- "[Bush and Quayle] want to make victims pay the legal fees of big manufacturers, if, for some reason, they sue and lose. It is nothing more than trickle-down justice." *Id.*
- "As a general matter, I believe that legal reform should be enacted in the laboratories of the states, rather than at the federal level." *Id.*
- "In my view, the best reforms are those that make it less likely for people to go to court. We should encourage greater use of alternative dispute resolution to give consumers redress without having to litigate, such as mediation, mini-trials, and the multi-door courthouse. We should also encourage the use of special masters to help sort through complex cases. And we should restrict the use of secrecy agreements, which too frequently force litigants to re-fight the same battles, over and over, while endangering public health." *Id.*
- "But I will oppose any proposals that pretend to 'reform' lawsuits while actually encouraging dangerous products or marketplace fraud." *Id.*

Vice President Gore

- Voted against S.640, the Rockefeller Bill, in the Commerce Committee in 1992.
- Co-authored Minority Views in the Commerce Committee report on product liability legislation in 1990.
- Widely quoted in press as having deemed the Rockefeller bill "anti-consumer."

## ATTACHMENT B: LEGAL REFORM BILLS

The more controversial provisions of the "Common Sense Legal Reform Act" include:

- Civil justice reforms for federal courts:
  - a "loser pays" or "English rule" attorney-fee regime for diversity actions brought in federal court; and
  - tighter rules regarding expert scientific testimony.
- Product liability reforms that govern both federal and state court claims:
  - limits on the liability of product retailers;
  - uniform "clear-and-convincing" and "actual malice" standard for punitive damages;
  - a cap on punitive-damages awards; and
  - a bar on joint-and-several liability for noneconomic damages.
- Securities litigation reforms:
  - an English rule for all securities-fraud claims;
  - a scienter requirement that effectively eliminates joint-and-several liability; and
  - an "actual reliance" requirement that greatly increases a plaintiff's burden of proof.

The civil justice reform provisions could significantly reduce suits by smaller parties (such as consumers) against larger parties. The product liability provisions preempt an area long the province of state courts and legislatures. The securities litigation provisions would eviscerate private enforcement actions.

The primary features of S. 687, introduced last session by Senator Rockefeller, include:

- establishment of a federal fault standard for punitive damages (including a safe harbor for FDA- and FAA-approved products), but no cap on punitive damages;
- elimination of joint and several liability for noneconomic damages;
- incentives for out-of-court settlements and for the use of alternative dispute resolution;
- uniform statutes of limitation and repose for product liability claims.

Consumer and attorney groups were particularly critical of the distinction between economic and noneconomic damages, limitations on joint and several liability, and the FDA/FAA safe harbor.

The **Dodd bill** on securities-litigation reform includes:

- guardians ad litem and steering committees for class actions;
- a scienter requirement;
- limits on attorneys fees to a "reasonable percentage of the amount recovered";
- restrictions on the use of civil RICO in securities law claims; and
- proportionate liability in federal securities fraud actions.

Consumer and attorney groups were particularly critical of the proportionate liability provisions and the limits on attorneys fees.

ATTACHMENT C  
STATEMENT OF PRINCIPLES (OPTION 1): OPPOSE THE CONTRACT

**The Contract with America limits corporate liability to the detriment of product safety, full compensation for injured plaintiffs, and private redress against insider trading and securities fraud.**

*How would the middle class benefit from:*

- Making a losing plaintiff pay General Motors' legal fees?
  - Capping the award of punitive damages against corporations that knowingly fail to correct design flaws leading to consumer death or injury?
  - Enacting rules that discriminate against victims suffering loss of reproductive ability and other noneconomic damages?
  - Preempting state laws in a one-sided fashion: only where helpful to defendants, but not to consumers.
  - Preventing certain types of securities fraud suits unless the plaintiff holds a minimum \$10,000 investment in one stock?
  - Forcing investors to prove that a defendant had actual knowledge of a fraud--thus licensing reckless behavior by officers, directors, and other fiduciaries?
- The Administration supports legal reforms that reduce costs and delays in the federal civil justice system for plaintiffs and defendants.

*The middle class would benefit from:*

- Limits on the fees attorneys can charge plaintiffs when suits settle early in the litigation process.
- Alternatives to trial such as court-annexed arbitration and mediation which allow the middle class to seek resolution of disputes at lower cost.
- Procedural reforms that encourage defendants to make reasonable settlement offers in meritorious cases and plaintiffs to accept them.
- A legal presumption against secrecy provisions that prevent the release of information relevant to public health or safety.

*Business defendants should benefit from reforms directed at frivolous suits, not meritorious ones.*

**Outcomes in state law cases that offend common sense should be addressed by the states, not by federal regulation.**

**Reforms should respect the freedom of the individual to sue if her legal rights have been violated; litigation reflects a free-market approach to enforcing public safety and health concerns and the viability of the securities markets.**

**Empirical data should support claims made about the effectiveness of controversial reform measures.**

ATTACHMENT D:  
STATEMENT OF PRINCIPLES (OPTION 2): SUPPORT BALANCED REFORM

- More than anything, a legal-reform measure must be balanced. It must improve the civil justice system--not as a process that serves one class of parties or another, but as a system that serves all: potential plaintiffs, potential defendants, and the public interest.
- Whenever possible the federal government should lead by example, not by mandate--this is as true in legal reform as in welfare reform and regulatory reform. Thus, reform efforts should focus on the reform of federal rules and procedures. In particular, reforms should:
  - Reduce frivolous litigation through measures such as mandated sanctions for such frivolous filings and higher pleading standards for product liability claims. Such targeted reforms would be more effective at eliminating frivolous litigation--and more fair--than a blanket "English rule."
  - Improve the efficiency of the legal system through measures such as a broad expansion of alternatives to litigation, and meaningful incentives (such as limited fee-shifting) to use such alternatives and to encourage early settlements.
  - Protect the public interest by establishing a presumption against secret settlement that would prevent the release of information relevant to public safety or health.
- Legal reforms that preempt state laws and supplant traditional state authority should be undertaken only if justified by sound analysis and a strong federal interest. Thus:
  - The Administration opposes preemptive legislation to limit the recovery of compensatory damages as well as limits on punitive damages. With regard to the latter, punitive damages are appropriate to deter or punish extraordinarily irresponsible behavior. In such rare cases, punitive damages are and should be imposed based on the facts and circumstances of the particular claim--not subject to some arbitrary or formulaic amount or cap.
  - At the same time, there may be justification for federal guidance establishing when punitive damages are appropriate, such as a "clear and convincing evidence" requirement. Particularly as the vast majority of commerce is interstate, the federal government has an interest in providing businesses with some predictability.
- With regard to securities litigation, changes in the way that class actions are pleaded and managed as well as extensions of the statutes of limitation would reduce the wasteful "race to the courthouse" and the risk of meritless claims that has emerged in recent years. However, the Administration opposes legal reforms--such as those in the Contract bill--that would effectively end private enforcement of the securities law. The Securities and Exchange Commission has long relied on such private suits to supplement public enforcement efforts against securities fraud.

document name: litiga.ref      Douglas Letter      DRAFT

Jan. 25, 1995

Joel:

Peter Yu and Jeff Connaughton have prepared a draft memo for the President regarding a statement of principles on litigation reform. I think I have no problem with the substance of their draft. My problem is, although I have never worked with this President, I think their draft is too complicated to give to the President, and asks him to get involved in too much detail. My experience in doing memos for principals like Presidents and Attorneys General is that they should be shorter and simpler. I propose the following instead, which I think says much of the same things, but attempts to be simpler. It assumes that there would be a meeting with the President to discuss the points, and, once his general direction is obtained, the matter would be left to the next level down to work out the details. So, I offer this as an alternative. Peter and Jeff have seen a prior version of this draft, which incorporates some suggestions from Jon Baker in CEA.

Doug Letter

Memorandum for the President

From: ? (Klein, Lindsey, Yu, Letter?)

Re: Options Regarding Approaches To The Republican Proposals In The Contract With America For Civil Litigation Change

Part of the Contract With America is a proposal to make substantial changes in the way civil litigation in general is conducted, and more specifically to render private investor securities fraud suits far more difficult to pursue. We believe that, as proposed, these Republican initiatives are largely bad policy that would be detrimental to consumers, and could threaten the attractiveness of United States capital markets. Contrary to the usual Republican concern for federalism, these proposals would also impose more regulation from Washington, D.C. over subjects that are, in the main, more appropriately governed by the states. Although we oppose many of the "reforms" that the Republicans are pushing, there are some warranted reform measures in overall civil litigation and private securities fraud suits.

There is a political risk in opposing this part of the Contract because of the strong anti-lawyer sentiment among the public. Nevertheless, a principled position favoring reasonable reforms but opposing the central parts of the Republican proposal is possible, while avoiding the appearance of being allied with the plaintiffs' bar. The Administration should be able to show that this Republican initiative is anti-consumer as well as pro-big business, and could undermine the attractiveness of United States capital markets.

At this point, the Administration has several options:

(1) Adopt a cautious approach to see how the Republican proposals fare in Congress, assuming that the most likely outcome will be a bill somewhere between the Republican proposal and what we would favor.

(2) Primarily through the Department of Justice, take a more active approach in the legislative process, opposing the most outrageous aspects of the Republican plan.

(3) Take the offensive, through both the White House and the Justice Department, strongly and publicly attacking the more radical aspects of the Republican proposal, while suggesting some reasonable reform measures.

These options are discussed in the attached memorandum. We favor the third option because the changes urged by the Republicans are generally misguided, and our opposition would meld nicely with the Administration's current effort to help the middle class and control over-regulation by the Federal Government.

**THE REPUBLICANS' PROPOSED COMMON SENSE LEGAL REFORM ACT, AND  
POSSIBLE OPTIONS FOR THE ADMINISTRATION REGARDING THAT PROPOSAL**

A. In the Contract With America, the Republicans have included a provision for making changes in civil litigation in general, and specifically reducing the ability of consumers to obtain punitive damages in products liability cases and of private investors to file securities fraud actions. The more radical aspects of the bill include:

- \* civil justice reforms for federal courts:
  - a "loser pays" or "English rule" attorney fee regime for diversity actions brought in federal court; and
  - amendments to the rules of evidence governing expert scientific testimony.
  
- \* product liability reforms governing both federal and state court claims:
  - a uniform limit on the liability of product retailers;
  - a uniform "clear and convincing" evidentiary standard for punitive damages;
  - a cap on punitive damage awards; and
  - a bar against "joint and severable" liability for non-economic damages.
  
- \* securities litigation reforms:
  - an English rule for all private securities fraud claims;
  - a scienter requirement that effectively insulates reckless conduct by corporate officers, and their accountants and lawyers;
  - an "actual reliance" pleading requirement that eliminates the existing "fraud on the market" cause of action, and significantly reduces the class of investors who can file fraud suits;
  - a requirement that only plaintiffs who own \$10,000 in the stock at issue can file certain types of fraud suits.

Put bluntly, we think these "reforms" generally represent very bad policy.

In the products liability area, the proposed limits on punitive damages would significantly hinder the legal system from punishing irresponsible behavior by manufacturers and sellers. By raising the evidentiary standard and capping awards, the Contract With America proposal should greatly reduce the number and amount of punitive damage awards. These changes would likely result in products and practices that are less safe.

In the securities arena, by so drastically limiting private investor suits -- upon which the SEC heavily relies -- the GOP will

reduce substantially the incentive for corporate officers to act responsibly. And they remove the check currently provided by lawyers and accountants who try to keep their clients in line in order to avoid possible liability for reckless conduct that allows securities fraud to occur. In addition, the Republican plan would establish a constitutionally questionable line that allows only large investors to file certain types of fraud suits. These various changes could undermine the currently solid international reputation of our capital markets, which attracts massive foreign investments here.

In addition, the English rule is, we believe, particularly a mistaken approach that will discourage legitimate suits by all but very wealthy litigants.

B. The Republicans have defined legal reform as anti-lawyer, pro-competitiveness, and pro-innovation. They portray the civil legal system as broken, in significant part because of the greed of professional plaintiffs and plaintiffs' lawyers who bring suits for shake-down purposes. They can trot out some spectacular examples of punitive damage awards and "strike suits" that indeed make the system appear flawed.

The securities fraud aspects of the Republican proposal are likely to proceed rapidly in the House, which has already held one hearing on them (although without inviting the SEC). The other parts of the proposal will move on different tracks, although they can also be expected to go quickly in the House.

C. With regard to the overall civil litigation proposed reforms, it is not at all clear that there is much need for change, although civil litigation is generally too costly and slow in both the federal and state courts systems. In the securities area, SEC officials support some reforms, particularly of the procedures governing class actions. (Ironically, two of the major reforms that the SEC has supported would have the opposite effect of the current Republican proposals, reversing Supreme Court case law in order to make private investor fraud suits easier to pursue.)

As with any system of such massive size, there are plainly some reforms of products liability actions and securities fraud cases that are warranted. We see no problem in working with Congress to identify these reasonable reforms, and support them. It would appear to make the most sense to have this effort led by the Department of Justice and the SEC.

At the same time, the Administration must decide how to deal with the more far-reaching aspects of the Republican proposal. Opposing those proposals in a highly visible way through the White House raises a political risk because the Republican effort is supported, and driven by, the pervasive anti-lawyer attitude around the nation. We see three primary options:

1. One option is to keep the Administration largely out of the fray, and see how the legislation develops as the various groups in Congress battle over it and compromise. The SEC will oppose in the normal legislative process the most radical securities law provisions in the Republican plan, and may be able to knock some of them out.

This is a low risk approach in the sense that the Administration cannot be accused of being beholden to the much maligned plaintiffs' bar. However, it basically cedes this entire issue to Congress, leaving the White House with only the final option of either signing or vetoing whatever bill emerges. The likely outcome would be a bill somewhere between the current Republican proposal and what we think constitutes reasonable reform. Assuming that some of the most controversial parts of the Republican initiative are deleted, this will place the White House in a difficult position because it will make it virtually impossible politically to veto a bill that promises to rein in abusive plaintiffs' lawyers.

2. A second option is to have the Administration take a more active role, primarily through the Department of Justice. That agency could attempt to participate actively in the legislative process, trying to eliminate from any bill the especially troubling proposals.

This relatively low-key approach again keeps the Administration out of the limelight on this issue. It also increases the chances that a somewhat palatable bill might emerge. However, the danger is that, without substantial involvement by the Administration, given the momentum, there is a significant possibility that the final legislative product will be something that cannot practically be vetoed, but nevertheless contains objectionable provisions.

3. Both of the above options are essentially passive and low risk. They mean that the Administration will be forgoing the possibility of meaningfully shaping the debate in this area, and making political gains through forcefully opposing the more outrageous Republican proposals. We believe that there is much to be gained instead by involving the Administration in this process at a high level, through both the White House and the Department of Justice; we would hope to expose the anti-consumer, anti-investor, big government attributes of the Republican plan, allowing the Administration to defeat that plan's unreasonable elements, and to get credit for doing so.

We predict that the Administration can reshape the debate by showing that the Republican proposals will tend to harm consumers by restricting their ability to recover punitive damages when they are injured by unsafe products. The expected result of such a change is more unsafe products and practices. In addition, small

investors who are the victims of fraudulent securities measures will suffer. We thus should be able to portray the Republican proposal accurately as favoring corporate defendants over consumers and small investors (or even large investors, such as pension funds). Particularly in the securities fraud area, there are aspects of the Republican plan that allow us to take this approach quite convincingly. We might also be able to demonstrate that the Republican proposals could upset the attractiveness of the nation's capital markets, which are currently successful in drawing overseas capital in part because of the perception that fraud here is kept to a minimum by our legal system.

At the same time, we should be able to expose the strange nature of the Republican proposals that will seize from the states key aspects of regulation of civil litigation. This effort would tie in perfectly with the Administration's current theme of eliminating unwarranted regulation from Washington, D.C. The Administration should be able to make the point that, while some reasonable reforms and preemption might be appropriate, in the main, governance of civil litigation is a function for state legislatures and state courts (as well as federal trial judges).

Thus, we see a good opportunity for the Administration at a high level to take the offensive here against the Republican proposals that favor corporate defendants and rely upon regulation from Washington. If the Administration simultaneously suggests or supports reasonable reforms, we can help avoid the charge of being in the pocket of the plaintiffs' bar. This problem can be further lessened by saying candidly that there are problems with the civil litigation system because it costs too much and is too slow, and that these problems have been caused in some part by lawyers for both sides. However, the principal solution to this problem lies with the state legislatures, and state, local, and federal trial judges.

Our effort might be aided by the atmosphere generated by the current, well-publicized financial trouble in Orange County. We can point out the problems that arise when corporate officers, and their accountants and lawyers, fail to police themselves properly (although that might not have been the actual problem in the Orange County situation). Judge Sporkin's eloquent statement in the Charles Keating case (wondering where the lawyers and accountants were as Keating looted his savings and loan association) should also be helpful. In addition, we have been told that some powerful organizations such as the AARP, the AFL/CIO, and the Teamsters oppose the radical revisions proposed in the securities fraud area. We thus may be able to attract good allies in this fight.

Finally, the benefit of this activist approach is that, if it succeeds, the White House will not face the prospect of confronting a bill that is not so bad that it can be vetoed, but still contains much that we oppose. By trying to shape the debate, we are more

likely to get a bill that makes the kinds of reforms that we think are truly good policy.

\* \* \* \* \*

In sum, while there is some risk with this approach, we recommend that the White House and the Justice Department (possibly in conjunction with the SEC) take on the Republican plan in an activist and firm way, attacking the GOP proposal as being anti-consumer and anti-federalist, and possibly harming the nation's capital markets. At the same time, we can recognize the current problems with the civil legal system, propose reasonable reforms, and recommend that the states address the other existing problems at their own level.

THE WHITE HOUSE  
WASHINGTON

January 26, 1995

MEMORANDUM FOR THE LEGAL REFORM WORKING GROUP

FROM: Joel Klein and Peter Yu   
SUBJECT: Attached Decision Memorandum

Attached please find a draft decision memorandum presenting two alternative "statements of principle" regarding legal reform. We will meet to discuss this on Wednesday, February 1, at 3:00 - 4:30 in Room 476 OEOB.

Please come prepared with your comments *and your office's recommendation*, as we plan to forward this memorandum through the Chief of Staff to the President at the end of next week.

Thank you.

THE WHITE HOUSE  
WASHINGTON

January 26, 1995

**DRAFT**

MEMORANDUM FOR THE PRESIDENT

FROM:

SUBJECT:                   DECISION REQUESTED:  
STATEMENT OF PRINCIPLES ON LEGAL REFORM ISSUES

This memorandum presents a strategic choice regarding the Administration's position on legal reform issues and offers two draft "statements of principle" for your consideration.

I.     BACKGROUND

Both you and the Vice President have been critical, or at least skeptical, of reforms of the legal system through preemptive federal legislation. Attachment A offers selected press accounts of your statements on these issues.

The legal reform legislation included in the Contract with America is, by most accounts, quite extreme; Attachment B outlines the primary provisions of the bill. For several years, Senator Rockefeller has championed a more moderate approach to product liability reform; last session, a cloture vote on the bill failed by only 3 votes. Senator Dodd plans to reintroduce a federal securities litigation bill that is less extreme than the Contract provisions. Most observers believe the House will pass legal-reform legislation relatively quickly (perhaps within the first 100 days) and that the Senate will not move until late spring. The Rockefeller and Dodd bills may emerge as "compromise" approaches that could attract the required 60 votes.

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In general, there are two primary options for an Administration statement of principles.

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  - the Administration *opposes preemptive limits on compensatory and punitive damages*, but does not oppose uniform standards for punitives to enhance predictability for businesses.

### III. ANALYSIS

[the following section may not be included in the final draft memorandum]

Though substantively similar (Option 1 incorporates the pro-consumer positions in Option 2), these options reflect two quite different strategies. Option 1 takes advantage of the extreme nature of the Contract bill to attempt to reframe the legal-reform debate in a manner consistent with our middle-class theme. This would send a strong signal to the Congress and strengthen the hand of consumer and attorney interests (it also recognizes that a veto must be politically defensible before the threat of a veto becomes effective). It may, however, trigger negative reactions from the business community, and could, given the strong anti-lawyer animus in the general public, be misinterpreted as "a defense of lawyers." For that reason, it also recommends that you favor some form of contingency fee reform.

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# DRAFT

In short, Option 1 conveys a strong middle-class message and lays the groundwork for a veto; Option 2 emphasizes balance and leaves greater room for either signature or veto.

## IV. RECOMMENDATIONS

[to be completed]

## V. DECISION

- Pursue Option 1 statement of principles.
- Pursue Option 2 statement of principles.
- Let's discuss.

## ATTACHMENT A: PRESS ACCOUNTS OF PAST STATEMENTS

### President Clinton

- "The proposals advanced by George Bush and Dan Quayle [presumably including S.640, the Rockefeller bill] are dramatically tilted toward big polluters, manufacturers and insurance companies, and against consumers and victims." *The Candidates on Legal Issues*, ABA J., Oct. 1992, at 57.
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The primary features of **S. 687**, introduced last session by Senator Rockefeller, include:

- establishment of a federal fault standard for punitive damages (including a safe harbor for FDA- and FAA-approved products), but no cap on punitive damages;
- elimination of joint and several liability for noneconomic damages;
- incentives for out-of-court settlements and for the use of alternative dispute resolution;
- uniform statutes of limitation and repose for product liability claims.

Consumer and attorney groups were particularly critical of the distinction between economic and noneconomic damages, limitations on joint and several liability, and the FDA/FAA safe harbor.

The **Dodd bill** on securities-litigation reform includes:

- guardians ad litem and steering committees for class actions;
- a scienter requirement;
- limits on attorneys fees to a "reasonable percentage of the amount recovered";
- restrictions on the use of civil RICO in securities law claims; and
- proportionate liability in federal securities fraud actions.

Consumer and attorney groups were particularly critical of the proportionate liability provisions and the limits on attorneys fees.

ATTACHMENT C  
STATEMENT OF PRINCIPLES (OPTION 1): OPPOSE THE CONTRACT

**The Contract with America limits corporate liability to the detriment of product safety, full compensation for injured plaintiffs, and private redress against insider trading and securities fraud.**

*How would the middle class benefit from:*

- Making a losing plaintiff pay General Motors' legal fees?
  - Capping the award of punitive damages against corporations that knowingly fail to correct design flaws leading to consumer death or injury?
  - Enacting rules that discriminate against victims suffering loss of reproductive ability and other noneconomic damages?
  - Preempting state laws in a one-sided fashion: only where helpful to defendants, but not to consumers.
  - Preventing certain types of securities fraud suits unless the plaintiff holds a minimum \$10,000 investment in one stock?
  - Forcing investors to prove that a defendant had actual knowledge of a fraud--thus licensing reckless behavior by officers, directors, and other fiduciaries?
- The Administration supports legal reforms that reduce costs and delays in the federal civil justice system for plaintiffs and defendants.

*The middle class would benefit from:*

- Limits on the fees attorneys can charge plaintiffs when suits settle early in the litigation process.
- Alternatives to trial such as court-annexed arbitration and mediation which allow the middle class to seek resolution of disputes at lower cost.
- Procedural reforms that encourage defendants to make reasonable settlement offers in meritorious cases and plaintiffs to accept them.
- A legal presumption against secrecy provisions that prevent the release of information relevant to public health or safety.

*Why a federal issue?*

*Business defendants should benefit from reforms directed at frivolous suits, not meritorious ones.*

**Outcomes in state law cases that offend common sense should be addressed by the states, not by federal regulation.**

**Reforms should respect the freedom of the individual to sue if her legal rights have been violated; litigation reflects a free-market approach to enforcing public safety and health concerns and the viability of the securities markets.**

**Empirical data should support claims made about the effectiveness of controversial reform measures.**

ATTACHMENT D:

STATEMENT OF PRINCIPLES (OPTION 2): SUPPORT BALANCED REFORM

- More than anything, a legal-reform measure must be balanced. It must improve the civil justice system--not as a process that serves one class of parties or another, but as a system that serves all: potential plaintiffs, potential defendants, and the public interest.
- Whenever possible the federal government should lead by example, not by mandate--this is as true in legal reform as in welfare reform and regulatory reform. Thus, reform efforts should focus on the reform of federal rules and procedures. In particular, reforms should:
  - Reduce frivolous litigation through measures such as mandated sanctions for such frivolous filings and higher pleading standards for product liability claims. Such targeted reforms would be more effective at eliminating frivolous litigation--and more fair--than a blanket "English rule."
  - Improve the efficiency of the legal system through measures such as a broad expansion of alternatives to litigation, and meaningful incentives (such as limited fee-shifting) to use such alternatives and to encourage early settlements.
  - Protect the public interest by establishing a presumption against secret settlement that would prevent the release of information relevant to public safety or health.
- Legal reforms that preempt state laws and supplant traditional state authority should be undertaken only if justified by sound analysis and a strong federal interest. Thus:
  - The Administration opposes preemptive legislation to limit the recovery of compensatory damages as well as limits on punitive damages. With regard to the latter, punitive damages are appropriate to deter or punish extraordinarily irresponsible behavior. In such rare cases, punitive damages are and should be imposed based on the facts and circumstances of the particular claim--not subject to some arbitrary or formulaic amount or cap.
  - At the same time, there may be justification for federal guidance establishing when punitive damages are appropriate, such as a "clear and convincing evidence" requirement. Particularly as the vast majority of commerce is interstate, the federal government has an interest in providing businesses with some predictability.
- With regard to securities litigation, changes in the way that class actions are pleaded and managed as well as extensions of the statutes of limitation would reduce the wasteful "race to the courthouse" and the risk of meritless claims that has emerged in recent years. However, the Administration opposes legal reforms--such as those in the Contract bill--that would effectively end private enforcement of the securities law. The Securities and Exchange Commission has long relied on such private suits to supplement public enforcement efforts against securities fraud.

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*Doug Letter*

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***PROPOSED REFORM AGENDA  
OF THE  
DEPARTMENT OF JUSTICE  
PRODUCT LIABILITY  
WORKING GROUP***

**January 1995**

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**DRAFT**

## INTRODUCTION: A PRODUCT LIABILITY REFORM AGENDA

As has been the case for more than a decade, major products liability legislation was introduced in both the Senate and the House of Representatives last term. The leading bill in the Senate, S. 687, was introduced by Senator Rockefeller (D.- W.Va.), while a largely identical companion bill, H.R. 1910, was introduced in the House by Congressman Rowland (D.- Ga.). Both bills were scaled down versions of prior product liability reform proposals and would have preempted various features of state product liability law. Neither bill was passed.

In August of 1994, the Department's Product Liability Working Group (the Working Group) issued a lengthy report summarizing and analyzing the most important and potentially controversial features of the Rockefeller Bill. The Working Group recommended that the Department oppose passage of the Rockefeller Bill as it was then drafted. The Working Group's overriding concerns were two-fold:

- ***Federalism.*** The Working Group did not believe that the proponents of the Rockefeller Bill had met their burden of demonstrating the need for comprehensive Federal legislation that would override critical features of the product liability laws of the states. Considerable evidence amassed by the Working Group suggested that there never was a widespread product liability "crisis," or at least that any incipient trend towards a crisis has subsided either on its own accord or as the result of state product liability reforms. The Working Group concluded that the available evidence neither made a positive, empirical case for across-the-board national tort reform, nor even began to demonstrate that the problems that exist are of such magnitude as to exceed the remedial abilities of state legislatures.
- ***Interaction with Existing State Law.*** The Working Group was also concerned that the provisions of the Rockefeller Bill would interact poorly with existing state product liability regimes. All fifty states have enacted some type of product liability reform, but those reforms vary considerably. Because the Rockefeller Bill would have preempted some, but not all, of these provisions, it would have merely replaced one patchwork national system of product liability law with another. Moreover, many of the state's product liability schemes were passed as package reforms by legislatures attempting to strike a careful balance among competing concerns by enacting some provisions favoring defendants and others favoring plaintiffs. The Working Group was concerned that by preempting only part of these reform packages, the Bill would have disrupted the balance of these state regimes, most likely skewing them in favor of defendants.

While reserving these generic concerns, the Working Group recommended that the Justice Department consider proposing alternative legislation addressing certain product liability issues.

Building on its August report, the Working Group recently reconvened to develop proposals for a product liability reform agenda. We remain skeptical that comprehensive national product liability legislation is a pressing need, particularly in light of the many liability reforms recently passed by state legislatures. We also believe that drafting Federal legislation that will produce national uniformity and not yield a host of unintended consequences will be, at very least, a Herculean task. Yet, clearly, some limited product liability reforms are warranted and have received wide support from diverse groups. Many of these provisions are procedural reforms designed to work in combination to produce more rational and fair punitive damage awards, thereby obviating the need for an absolute cap or ceiling on punitive damages. Other reform proposals are less compelling, but still preferable to some of the faulty provisions in the Rockefeller Bill and the more Draconian product liability reforms contained in Section 103 of the Republican's "Common Sense Legal Reform Act." The Working Group's proposed agenda for product liability reform incorporates both types of provisions.

Our agenda includes nine items:

- Employ a clear and convincing evidence standard for awarding punitive damages.
- Adopt a Federal standard of punitive liability.
- Allow judges to determine the amount of punitive damages.
- Bifurcate jury trials involving punitive damages.
- Establish a limited retailer defense.
- Establish a limited regulatory defense.
- Establish Federal statutes of limitations and repose.
- Allocate a portion of punitive damage awards in product liability suits to someone other than the plaintiff.
- Pursue mass tort reform.

These items are described in greater detail below. Some of them arise directly from our consideration of the Rockefeller Bill, while others stem from major studies that have been conducted on the tort system by groups such as the American Bar Association, the American Law Institute, and the American College of Trial Lawyers. These proposals are offered as a basis from which to begin a serious dialogue on how the Department and the Administration should approach product liability reform in the next Congress.

## POSSIBLE COMPONENTS OF A LIMITED REFORM AGENDA

### (1) Employ a Clear and Convincing Evidence Standard for Awarding Punitive Damages

Burden of proof standards "direct the attention of the jury to the degree of belief which the proponent of the proposition must produce in their minds before [the proponent] is entitled to a finding favorable to him." J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242, 247 (1944). The Committee Report on the Rockefeller Bill,<sup>1</sup> at 40, indicates that most jurisdictions permit an award of punitive damages based on the preponderance of the evidence. See also Kenneth Redden, *Punitive Damages* § 7.2(A)(3) (1980). There is, however, a trend towards permitting an award of punitive damages only upon evidence meeting the "clear and convincing evidence" standard. A number of states have already adopted the "clear and convincing evidence" standard, either by judicial decision,<sup>2</sup> or by statute.<sup>3</sup> This standard is also employed in the Model Uniform Products Liability Act. Model Uniform Product Liability Act § 120(A), *reprinted in* 44 Fed. Reg. 62,714 (1979). And it has also been endorsed by each of the principal groups to analyze punitive damages since 1979, including the Special Committee on Punitive Damages of the American Bar Association Section of Litigation, the American Bar Association House of Delegates, the American College of Trial Lawyers, and a committee of the American Law Institute.<sup>4</sup>

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<sup>1</sup> The Report of the Senate Committee on Commerce, Science and Transportation, S. Rep. No. 203, 103d Cong., 1st Sess. 25 (1993) [hereinafter "Committee Report"].

<sup>2</sup> See *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437 (1980).

<sup>3</sup> See, e.g., Ala. Code § 6-11-20; Alaska Stat. Ann. § 09.17.020; Ga. Code Ann. § 51-12-5.1(b) (tort actions); Ind. Code Ann. § 34-4-34-2; Kan. Stat. Ann. § 60-3702(b); Ky. Rev. Stat. Ann. § 411.184(f)(2); Minn. Stat. Ann. § 549.20; Mont. Code Ann. § 27-1-221(5); Ohio Rev. Code Ann. § 2307.80; Ore. Rev. Stat. Ann. § 30.925(1); S.D. Codified Laws Ann. § 21-1-4.1; Utah Code Ann. § 78-18-1. See also Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 Iowa L. Rev. 1, 7, n. 24, (1992).

<sup>4</sup> See ABA, *House of Delegates Res. on Report No. 123* at 1 (Feb. 1987) (adopting recommendation of the ABA Report of the Action Commission to Improve the Tort Liability System 18 (Feb. 1987)); American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* 15 (1989); Reporter's Study *Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change* 249 (1991). The Council on Competitiveness under Vice President Quayle also supported this reform. See President's Council on Competitiveness,

In our view, principles of fairness suggest that given the quasi-criminal nature of punitive awards, the burden of proof should be higher than in the normal civil case. The Supreme Court has indicated that "[t]here is much to be said in favor of ... requiring ... a standard of 'clear and convincing evidence,'" specifically noting that the use of this standard would serve two goals:

On a practical level, the clear-and-convincing evidence requirement would constrain the jury's discretion, limiting punitive damages to the more egregious cases. This would also permit closer scrutiny of the evidence by trial judges and reviewing courts. ... On a symbolic level, the higher evidentiary standard would signal to the jury that it should have a high level of confidence in its factual findings before imposing punitive damages.

Pacific Mut. Life Ins. Co. v. Haslip, 111 S.Ct. 1032, 1062 (1991). See also Victor E. Schwartz and Mark A. Behrens, *Punitive Damages Reform -- State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip*, 42 *Am. U. L. Rev.* 1365 (1993). Accordingly, in crafting any Federal product liability legislation, we believe strong consideration should be given to requiring that the "clear and convincing evidence" standard be used in resolving questions concerning the liability for and amount of punitive awards.

## **(2) Adopt a Federal Standard of Punitive Liability**

Section 203(a) of the Rockefeller Bill would have established a Federal standard for the award of punitive damages. This section would have allowed punitive damages to be awarded only if the claimant established that the harm suffered was the result of the manufacturer's or product seller's "conscious, flagrant indifference" to the safety of those who might be harmed by a product. It further would have precluded punitive damages from being awarded in the absence of an award of compensatory damages.

Although virtually all jurisdictions precondition an award of punitive damages upon a showing of conduct that goes beyond ordinary negligence, some permit such an award based upon a showing of reckless indifference to human safety.<sup>5</sup> In those states, a manufacturer or other product seller who deliberately ignores a product's dangers may be liable for punitive damages. By comparison, Section 203(a) would have allowed punitive damages to be awarded only upon a showing of the seller's conscious, flagrant indifference to the safety of

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**Agenda for Civil Justice Reform in America 22 (1991).**

<sup>5</sup> See Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 *Ala. L. Rev.* 61 (1992) (appendix).

those who might be injured by the product, thereby seemingly requiring more than a mere reckless indifference to, or willful ignorance of, the product's dangers. This conclusion is supported by the Committee Report, at page 44, which explains:

[T]o be "conscious" of its flagrant misconduct, a manufacturer or product seller must be aware that its product is legally defective and that its conduct in selling it in such a condition is therefore improper. . . . It is only when a manufacturer consciously leaves in its product a danger that is unreasonable, and sells the product to the public knowing it to be defective, that its conduct can be said to manifest a "conscious, flagrant indifference" to consumer safety.

The Committee Report left open what additional proof would be required to show that indifference was "flagrant" and was also silent as to whether a plaintiff had to prove the requisite state-of-mind directly (*e.g.*, introducing a "smoking gun" memorandum) or could rely on circumstantial evidence.

Both the American Law Institute and the Special Committee on Punitive Damages of the American Bar Association Litigation Section support a minimum standard for punitive awards that requires a conscious act on the part of the tortfeasor.<sup>6</sup> Given the quasi-criminal nature of punitive damages, it seems reasonable that such damages should not be based upon a finding of gross negligence, but should require a showing that the defendant had some knowledge of the risk of harm. Toward this end, we believe a better alternative to Section 203(a) of the Rockefeller Bill would be to delete the word "flagrant" and to allow punitive damages to be imposed where the claimant establishes that his or her injury was the result of the defendant's "conscious indifference" to the safety of those who might be harmed by a product. To avoid ambiguity, such a statute should indicate expressly that a defendant is "consciously indifferent" if it knows of and disregards a substantial risk to health or safety. Either the statute or its legislative history should also make clear that the requisite state-of-mind could be established by circumstantial evidence, including evidence showing that information available to the defendant made the risk obvious.

The second part of Section 203(a) would have conditioned an award of punitive damages on a finding of compensatory damages. Under state law, there is general agreement that an award of compensatory damages should be predicated on the imposition of punitive

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<sup>6</sup> American Bar Association, Section of Litigation, **Report of the Special Committee, Punitive Damages: A Construction Examination** 18 (1986); American College of Trial Lawyers, **Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice** 10 (1989). *See also* Victor E. Schwartz & Mark A. Behrens, *The American Law Institutes' Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damage Reform*, 30 *San Diego L. Rev.* 263 (1993).

damages.<sup>7</sup> However, courts and state legislatures differ on whether a nominal award should suffice,<sup>8</sup> and particularly on whether punitive damages should be recoverable if a contributory negligence statute bars recovery of compensatory damages. Some states hold that actual damages must be recoverable, while others either make their contributory negligence statutes inoperative in this instance or allow punitive damages so long as there is a "compensable injury."<sup>9</sup> We believe that a provision precluding the award of punitive damages in the absence of a compensatory award should be approached cautiously and be designed to accommodate the major differences in state law concerning contributory negligence.<sup>10</sup>

### (3) Allow Judges to Determine the Amount of Punitive Damages

According to a recent American Law Institute Reporter's Study, "[t]wo fundamental questions must be addressed in the design of a punitive damages regime. The first question is under what legal conditions there should be liability for such an award; the second is how to determine the appropriate size of the award." American Law Institute, **Reporter's Study on Enterprise Liability for Personal Injury: Approaches to Legal and Institutional Change** 243 (1991) (hereinafter ALI Study). Most do not question the juries' ability to resolve the first of these fundamental inquiries, *i.e.*, whether particular conduct warrants punitive damage. A jury can scrutinize the evidence and weigh the behavior it establishes to determine whether the conduct was outrageous, or based on the defendant's evil motives or reckless indifference to the rights of others. Juries, however, are arguably less outfitted to

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<sup>7</sup> See, *e.g.*, Bishop v. Firestone Tire & Rubber Co., 814 F.2d 437 (7th Cir. 1987) (Indiana law); Deland v. Old Republic Life Ins. Co., 758 F.2d 1331 (9th Cir. 1985) (Alaska law); Vidrine v. Enger, 752 F.2d 107 (5th Cir. 1984) (Mississippi law).

<sup>8</sup> Compare Kemner v. Monsanto Co., 576 N.E. 2d 1146 (Ill. App. Ct. 1991), *appeal denied*, 584 N.E. 2d 130 (Ill. 1991) (vacating punitive damage award where jury returned a verdict of one dollar in economic damages) with McClure v. Gower, 385 S.E. 2d 271 (Ga. 1989) (punitive damages recoverable where actual damages of \$33 awarded).

<sup>9</sup> Compare Tucker v. Marcus, 142 Wis. 2d 425, 418 N.W. 2d 818 (1988) with Nappe v. Anshelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 55, 477 A. 2d 1224, 1232 (1984). See also Joel H. Spitz, Note, *Punitive Damages -- Recover of Compensatory Damages as a Prerequisite*, 42 Marq. L. Rev. 609 (1989).

<sup>10</sup> It should be noted that there are a limited number of jurisdictions (possibly only Alabama) in which wrongful death damages are exclusively punitive in nature. Any Federal product liability standard would have to be drafted so as to permit the award of punitive damages in such states without the necessity of having an award of compensatory damages. Provisions designed to cure this problem have been included in prior Federal product liability legislation and are part of the Federal Tort Claims Act, *see* 28 U.S.C. § 2674.

resolve questions concerning the size of the award. Nothing in the juror's knowledge of the "common affairs of life" qualifies them to assign a specific dollar value to achieving the twin goals of punishment and deterrence. See Clarence Morris, *Punitive Damages in Tort Cases*, 44 *Harv. L. Rev.* 1173, 1176 (1931). The unfettered discretion given to juries determining the size of an award enhances the possibility that improper factors will creep into the decisionmaking process, such as revenge, prejudice, and bias. See American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* 13-14 (1989). See also ALI Study at 261.

Should there be Federal reform of the law of punitive damages, we recommend that the jury retain the responsibility of determining liability for punitive damages, while the judge be given the responsibility for setting the amount of those damages. Judges are already involved in weighing punitive damage verdicts, both in the remittitur procedure, which allows them to reduce the size of a jury verdict, and in reviewing jury verdicts on appeal. The skills employed in these roles are essentially the same as those employed by judges in imposing fines and sentences on criminal defendants. In the latter role, judges gain experience in weighing conflicting penal purposes and in applying the legal concepts needed to identify behavior that justifies a particular level of punishment.

Based on these considerations, judicial determination of the amount of punitive damages is increasingly being urged by a number of commentators.<sup>11</sup> At least three states have already adopted this practice. See *Conn. Gen. Stat. Ann.* §52-240b; *Kan. Stat. Ann.* §60-3702; *Ohio Rev. Code Ann.* §2315.21(c). See also Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory and Beyond*, 65 *N.Y.U. L. Rev.* 23, 61 n.76 (1990). Congress has required judges to determine the amount of total damages or of punitive

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<sup>11</sup> See, e.g., James G. Ghiardi, *Punitive Damages Awards -- An Expanded Judicial Role*, 72 *Marq. L. Rev.* 33 (1988); Griffin B. Bell & Perry E. Pearce, *Punitive Damages and the Tort System*, 22 *U. Rich. L. Rev.* 1, 17 (1987); James G. Ellis, *Punitive Damages, Due Process, and the Jury*, 40 *Ala. L. Rev.* 1003-07 (1989); Richard Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 *Ky. L. J.* 1, at 124 (1985); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 *Va. L. Rev.* 269, 302 (1983); David Owen, *Punitive Damages in Products Liability Litigation*, 74 *Mich.L. Rev.* 1257, 1320 (1976). But see Note, *Judicial Assessment of Punitive Damages, The Seventh Amendment, and the Politics of Jury Power*, 91 *Colum. L. Rev.* 142, 142n.2 (1991) (opposing judicial determination). In its *Blueprint for Improving the Civil Justice System*, an ABA Working Group recognized the need for "close judicial scrutiny of [punitive] awards," but opposed having judges determine the amount of punitive damages. Report of the ABA Working Group on Civil Justice, *ABA Blueprint for Improving the Civil Justice System* 82 (1992). However, the Council on Competitiveness under Vice President Quayle supported this reform. See President's Council on Competitiveness, *Agenda for Civil Justice Reform in America* 22 (1991).

damages in a number of federal statutory causes of action.<sup>12</sup> These statutes provide precedent for shifting the assessment function to judges in punitive damage cases.

Nonetheless, a close question exists as to whether such a practice would violate the Seventh Amendment. Recently, the Fourth Circuit, sitting en banc, held that the Seventh Amendment's guarantee of a jury trial prohibited judicial assessment of punitive damages. Defender Industries v. Northwestern Mut. Life, 938 F.2d 502 (4th Cir. 1991). The Fourth Circuit heavily relied on Tull v. United States, 481 U.S. 412 (1987). In Tull, the Supreme Court held that the Seventh Amendment does not require a jury to determine the amount of a civil penalty under the Clean Water Act, reasoning that jury need not determine a remedy in a civil trial unless such a determination is "necessary to preserve the 'substance of the common-law right of trial by jury.'" 481 U.S. at 426 (quoting Colgrove v. Battin, 413 U.S. 149, 157 (1973)). The Fourth Circuit concluded that an assessment by a jury of the amount of punitive damages is an inherent and fundamental element of the right to trial by jury and, therefore, under Tull, is protected by the Seventh Amendment. 938 F.2d at 507. In so concluding, however, the Fourth Circuit discounted other language in Tull which states that "[n]othing in the Amendment's language suggests that the right to a jury trial extends to the remedy phrase of a civil trial." Id. at .<sup>13</sup> Moreover, it is questionable whether the Fourth Circuit's analysis would extend to punitive damages awarded under a Federal product liability standard and subject to other Federal procedures and limitations. Such a punitive award would more resemble the civil penalty at issue in Tull and might be sustained against a Seventh Amendment challenge.

#### (4) Bifurcate Jury Trials Involving Punitive Damages

The defendant's wealth is a major factor in determining an appropriate punitive damage award, but is irrelevant in determining compensatory liability or damages. See James Ghiardi and John J. Kircher, Punitive Damages: Law and Practice 5.36 and Table 5-3 (1985 & Supp. 1989). See also Restatement (Second) of Torts § 908(b) ("In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant."). Many are concerned that the introduction of evidence of the defendant's wealth is highly inflammatory and could prejudice the jury in

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<sup>12</sup> See Equal Credit Opportunity Act, § 706, 15 U.S.C. §1691e(b) (1988); Patent Act, July 19, 1952, ch. 950, 35 U.S.C. §284 (1988); Fair Housing Act, Title VIII, §812, Civil Rights Act of 1968, 42 U.S.C. §3612(c) (1988); Petroleum Marketing Practice Act, §105(d)(2), 15 U.S.C. §2805(d)(2) (1988); Fair Credit Reporting Act, §616, 15 U.S.C. §1681n(2) (1988).

<sup>13</sup> See also Thompson v. Kerr-McGee Refining Corp., 660 F.2d 1380, 1386 (10th Cir. 1981) (Petroleum Marketing Practice Act may give issue of punitive damages to the judge); Swofford v. B & W, Inc., 336 F.2d 406, 410, 412-13 (5th Cir. 1964) (judicial determination of "exemplary" damages permitted in Patent Act cases).

determining whether the defendant is liable for compensatory damages. *See American Bar Association, Report of the Action Committee to Improve the Tort Liability System* 17 (1987). Responding to these concerns, at least five states -- Georgia, Missouri, Montana, Nevada and New Jersey -- have adopted a mandatory bifurcation requirement in at least some cases involving punitive damages.<sup>14</sup>

We agree with those who believe that punitive damages should be awarded in a separate proceeding -- that is, to have the jury receive evidence about and render a verdict on the compensatory claim and on the liability of the defendant for punitive damages, then, assuming a positive verdict, to have the jury return and hear evidence and rule on the amount of punitive damages to be awarded. Bifurcation would ensure that the jury does not consider inflammatory evidence relevant only to the question of punitive damages when it resolves issues concerning the defendant's liability for compensatory damages. One commentator has explained that bifurcation --

would enable the court to give the jury more detailed punitive damage instructions and enable the parties to present more evidence relevant only to punitive damage issues, ..., without unduly increasing both the risk of prejudice and the length of every trial in which punitive damages are sought.

Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 *Ala. L. Rev.* 919, 947 (1989). Bifurcation would also enhance judicial efficiency by shortening the overall length of trial if the defendant prevails on liability, any by eliminating any claim by the defendant that evidence concerning his wealth had biased the jury's determination of his liability for compensatory damages. *See Richard A. Seltzer, Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 *Fordham L. Rev.* 37, 90-91 (1983).

A mandatory bifurcation procedure could constitute a unifying structure upon which to graft other reforms, such as use of the "clear and convincing evidence" standard and a the Federal standard for punitive damages.<sup>15</sup> The result of adopting these three reforms, we

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<sup>14</sup> Ga. Code Ann. § 51-12-5.1(d); Mo. Ann. Stat. § 510.263; Mont. Code Ann. § 27-1-221(7)(a); Nev. Rev. Stat. Ann. § 42.005(3); N.J. Stat. Ann. § 2A:58C-5. *See also* Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 *Ala. L. Rev.* 831, 870 n.96 (1989). The Council on Competitiveness under Vice President Quayle supported this reform. *See President's Council on Competitiveness, Agenda for Civil Justice Reform in America* 22 (1991).

<sup>15</sup> The justification for mandatory bifurcation, of course, would be substantially lessened if, as discussed above, the judge, rather than the jury, determined the amount of punitive damages owed by the defendant.

believe, would be to award punitive damages in a more rational and consistent manner, thereby obviating the necessity for more Draconian measures, such as absolute caps on punitive damage awards.

### (5) Establish a Limited Retailer Defense

Absent an applicable statute abrogating common law, the majority of jurisdictions have adopted a comprehensive theory of strict liability in tort, under which the manufacturer, the final seller, and all intermediate sellers are typically held liable for injuries caused by a defective and unreasonably dangerous product, regardless of their lack of personal fault. *See Restatement (Second) of Torts*, § 402A. In addition, the final sellers (and intermediate sellers in those jurisdictions that have abolished the requirement of privity of contract in actions for breach of implied warranty) are generally liable for breach of the implied warranties of merchantability and fitness for a particular purpose under Sections 2-314 and 2-315 of the Uniform Commercial Code. Even in the minority of jurisdictions that have not adopted the theory of strict liability in tort for injuries caused by defective and unreasonably dangerous products, a seller will generally be liable under an implied warranty theory for injuries caused by a defective product, even in the absence of any proof of negligence on the part of the seller.

Underlying this prevailing rule is the notion that holding a product seller liable for harms caused by a product promotes safety and reduces the risk of harm. Many believe that product sellers will seek to avoid liability by pressuring manufacturers to make safe products and that product sellers who profit from the sale of defective products should be liable for the harms those products cause. In addition, because the knowledge and expertise of product sellers generally exceeds that of consumers, it would appear to be reasonable to encourage them to influence manufacturer conduct. This view is reflected in Council Draft No. 1 of the proposed *Restatement (Third) of Torts: Products Liability*, § 101 (September 13, 1993), which would continue to impose liability upon all sellers of defective products, in part on the basis that non-negligent sellers of defective products will typically be able to pass any liability back to the manufacturer through an action for indemnity.

Those states that have enacted legislation limiting the liability of non-manufacturing sellers have done so on the ground that such sellers have no meaningful opportunity to inspect, much less test, the dozens or even thousands of products they receive for resale.<sup>16</sup>

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<sup>16</sup> Statutes designed to protect the non-manufacturing product seller include: Ariz. Rev. Stat. Ann. § 12-684; Ark. Code Ann. § 16-116-107; Colo. Rev. Stat. Ann. § 13-21-402; Del. Code Ann. tit. 18 § 7001; Ga. Code Ann. § 51-1-11.1; Idaho Code § 6-1407; Ill. Stat., ch. 735, para. 5/2-621; Iowa Code Ann. § 613.18; Kan. Stat. Ann. § 60-3306; Ky. Rev. Stat. Ann. § 411.340; Md. Cts. & Jud. Proc. Code Ann. § 5-311; Minn. Stat. § 544.41; Mo. Stat. § 537-762; Neb. Rev. Stat. § 25-21,181; N.C. Gen. Stat. § 99B-2; N.D. Cent. Code §§ 28-01.3-03, *et. seq.*; Ohio Rev. Code Ann. § 2307.78; S.D. Codified Laws Ann.

The approaches of these statutes vary. For example, Arizona does not immunize the seller, but allows the seller to obtain indemnity from the manufacturer for potential damages and attorney's fees and requires the plaintiff to attempt initially to satisfy its judgment from the manufacturer. Ariz. Rev. Stat. Ann. § 12-684. In states such as Maryland, the seller may assert as an affirmative defense that it had no knowledge of, or responsibility for, the defect and that the manufacturer is amenable to suit and solvent. Maryland allows the seller to be brought back into the case if the manufacturer becomes insolvent after the seller is granted summary judgment. Md. Cts. & Jud. Proc. Code Ann. § 5-311. Some jurisdictions, among them Colorado, have given non-manufacturing sellers a limited immunity from actions based upon strict liability in tort, but have not immunized them from actions based upon breach of implied warranties under the Uniform Commercial Code. Colo. Rev. Stat. Ann. § 13-21-402. Still others, like Iowa, have given retailers immunity from actions based upon both strict liability in tort and breach of the implied warranty of merchantability, but have left intact actions for breach of the implied warranty of fitness for a particular purpose. Iowa Code Ann. § 613.18. Finally, some state statutes endeavor to protect retailers from strict product liability through such devices as "closed container" or "no duty to inspect" rules.<sup>17</sup>

Under Section 202(a) of the Rockefeller Bill, a non-manufacturing product seller would have been liable only for harm caused: (i) by its own failure to exercise reasonable care with respect to the product or (ii) by a product that fails to conform to an express warranty made by the product seller. This provision lacked some of the basic safeguards that have been preserved in state laws limiting seller liability. For example, it would have prevented plaintiffs from prevailing in cases where it was clear that a product was defective when it reached the consumer, but where it was unclear whether the defect arose during manufacture, or somewhere later in the distribution chain.<sup>18</sup> Further, the provision would have immunized a non-manufacturing seller from liability even where the seller was aware of a product's dangers, and was aware that the consumer intended to use the product in an unsafe manner, so long as the seller passed along whatever written warnings it received from parties above it in the chain of distribution. Finally, this provision was subject to an unwieldy exception -- Section 202(c) rendered the retailer defense inapplicable if the

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§ 20-9-9; Tenn. Code Ann. § 29-28-106; and Wash. Rev. Code Ann. § 7.72.040.

<sup>17</sup> Under these laws, a retailer of a prepackaged closed container is not held liable if he or she purchased the product from a reputable manufacturer and the imperfections were not readily ascertainable. *See, e.g., Allen v. Delchamps, Inc.*, 624 So. 2d 1065 (Ala. 1993).

<sup>18</sup> Under Section 402A(1)(b) of the Restatement (Second) of Torts and Section 101 of Council Draft No. 1 of the proposed Restatement (Third) of Torts: Products Liability, a manufacturer is liable only where the product reaches the user or consumer "without substantial change in the condition in which it is sold." In these circumstances, Section 202 would have also immunized retailers and others in the distribution chain, thereby leaving no one liable when a defect arose at some undeterminable point during the distribution of a product.

manufacturer was either not subject to service of process or if "the court determines that the claimant would be unable to enforce a judgment against the manufacturer." The provision, however, failed to specify at what point the decision concerning the manufacturer's ability to satisfy a judgment would be made, leaving open the possibility that a plaintiff unable to sue a retailer would eventually be unable to collect from an insolvent manufacturer.

The threat of potentially massive liability for product liability claims, and the litigation costs involved in securing indemnity from product manufacturers, are legitimate concerns for many small retailers which may well be deserving of federal legislation. To avoid the pitfalls highlighted above, however, that legislation must be much more carefully tailored than Section 202 of the Rockefeller Bill and Section 103(b) of the Republican's "Common Sense Legal Reform Act" (which contains a similar provision). Such a provision might establish an affirmative defense for product sellers in those cases in which the seller is not at fault and the manufacturer is known, subject to suit, and able to pay a judgment against it. In this regard, we do not believe that it is unreasonable to require the seller to prove, *inter alia*: (i) that it had no role in the design or manufacture of the product and had no knowledge of the defect that caused the harm; (ii) that it did not alter, mishandle or misassemble the product in such a manner as to cause the harm; and (iii) that it made no express warranties or implied warranties of fitness for a particular purpose and passed along all written warnings and instructions received from the manufacturer and distributors.<sup>19</sup> To encourage plaintiffs to pursue only manufacturers, the statute of limitations and statutes of repose on claims against product seller could be tolled, thereby making it unnecessary for the plaintiff to file suit against the seller unless the manufacturer is unable to satisfy a judgment. A member of the Working Group has developed statutory language that would accomplish these functions.

### **(6) Establish a Limited Regulatory Defense**

The Rockefeller Bill included a provision that would have largely barred punitive damage awards from being entered with respect to pharmaceuticals and aircraft that meet the standards established by governing Federal regulatory agencies. This provision, which was based on several state statutes,<sup>20</sup> would not have provided much relief to the pharmaceutical and aircraft industries because studies suggest that much of their continuing liability exposure

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<sup>19</sup> This proposal is based in significant part upon a Maryland statute. See Md. Cts. & Jud. Proc. Code Ann. §5-311.

<sup>20</sup> See Ariz. Rev. Stat. Ann. § 12-701; N.J. Stat. Ann. § 2A:58C-5; Ohio Rev. Code Ann. § 2307.80(C); Or. Rev. Stat. § 30.927; and Utah Code Ann. § 78-18-2. See also Kan Stat. Ann. § 60-3304 (applying a general regulatory defense).

exists with respect to compensatory, rather than punitive, damages.<sup>21</sup> Indeed, one study has revealed that between 1965 and 1990, there were only 53 punitive damage awards in medical cases.<sup>22</sup> Moreover, with the exception of asbestos cases, the overall frequency of punitive damage awards in product liability cases has been decreasing since the mid-1980's. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 Iowa L. Rev. 1, 39 (1992). See also American Bar Association, Section of Litigation, *Report of the Special Committee, Punitive Damages: A Constructive Examination* (1986).

Some evidence does suggest that the small aircraft and pharmaceutical industries may be withholding products from the market based on liability concerns. See Steven Garber, *Product Liability and the Economics of Pharmaceuticals and Medical Devices* 81 (Rand Institute for Civil Justice 1993); H. Rep. No. 525, 103d Cong., 2d Sess. 2 (1994) (noting "a serious decline in the manufacture and sale of general aviation aircraft by United States companies.") But other possible provisions of a Federal product liability statute -- a heightened burden of proof and a more strict standard of punitive liability -- should largely address these situations. Moreover, assuming these other provisions are enacted, it is questionable whether a manufacturer whose conscious indifference to safety is proven by clear and convincing evidence should, nonetheless, be immune from liability under a separate regulatory defense.

Yet, there is some merit to the notion that when the government has carefully assessed the risk of a product and certified that it meets the safety and efficacy standards established by experts, manufacturers should not be punished by non-expert juries.<sup>23</sup> However, many courts that have addressed the question whether FDA or FAA approval should constitute a defense to punitive damages have viewed those agencies' regulations and procedures as establishing only minimum standards of safety, not equivalent to the higher

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<sup>21</sup> See 138 Cong. Rec. S6652 (daily ed. May 14, 1992) (statement of Sen. Tom Harkin); S. Rep. No. 215, 102d Cong., 2d Sess. at 65 (minority views of Sens. Hollings and Gore (citing studies performed by Professor Michael Rustad of Suffolk University Law School and Professor Thomas Koenig of Northeastern University)).

<sup>22</sup> Michael Rustad, The Roscoe Pound Foundation, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* 8, 23 (1991).

<sup>23</sup> See Paul Dueffert, Note, *The Role of Regulatory Compliance in Tort Actions*, 26 Harv. J. on Legis. 175 (1989); James A. Henderson Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 Colum. L. Rev. 1531, 1555-56 (1973).

standards required by tort law.<sup>24</sup> Those courts have been unwilling to allow sometimes outdated regulations or vague standards of care to supplant state law.<sup>25</sup> Commentators who have studied the proposed regulatory defense also observe that its viability rests on the questionable assumption that the responsible agencies will always be adequately staffed and will be permitted to regulate effectively by the Administration then in office. *See, e.g.,* Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 *Vand. L. Rev.* 1121, 1146-1163 (1988); Teresa Moran Schwartz, *Punitive Damages and Regulated Products*, 42 *Am. U. L. Rev.* 1335 (1993).<sup>26</sup> The widespread injuries that thousands of women suffered as a consequence of using the Dalkon Shield or DES -- both of which received FDA approval during prior Administrations -- suggest the potential danger in assuming that regulatory agencies will always function effectively.

Proponents of a regulatory defense argue that it will encourage companies to provide information to the FAA and the FDA. This rationale might support a limited immunity from punitive damages stemming from design defects because the provision of information by the company assists the regulatory agencies in assessing whether a product is safe. Indeed, a recent study by the Rand Corporation concludes that where the FDA has approved drugs that were eventually determined to be unsafe, the flaw in the approval process related to a company's failure to provide adequate testing information to the FDA. *See* Steven Garber, **Product Liability and the Economics of Pharmaceuticals and Medical Devices** 127-28 (Rand Institute for Civil Justice 1993). But this study does not explain why the immunity afforded by a regulatory defense should also extend to manufacturing defects, faulty advertising campaigns and failures to warn. In these areas, the relevant regulatory agencies either play no supervisory role (*e.g.*, manufacturing defects) or are not plagued by any

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<sup>24</sup> As Judge Abner Mikva has suggested, "federal legislation has traditionally occupied a limited role as the *floor* of safe conduct [not] a *ceiling* on the ability of states to protect their citizens. . . ." *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1543 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) (emphasis added).

<sup>25</sup> *See, e.g.,* *Smith v. Atlantic Richfield Co.*, 814 F.2d 1481, 1487 (10th Cir. 1987); *Elsworth v. Beech Aircraft Corp.*, 195 Cal. Rptr. 227, 230-31, 147 Cal. App. 3d 279 (1983); *Wilson v. Piper Aircraft Comp.*, 282 Or. 61, 577 P. 2d 1322, 1324-26 (1978) (en banc); *Southern Pac. R.R. v. Mitchell*, 80 Ariz. 50, 292 P.2d 827, 832-33 (1956).

<sup>26</sup> These concerns are not theoretical. A recent study of the FDA chaired by former FDA Commissioner, Dr. Charles Edwards, identified the lack of resources as a recurring theme in that agency's history. U.S. Dept. of Health & Human Service, Advisory Committee, *Final Report on the Food and Drug Administration* 39 (1991).

demonstrable lack of information (*e.g.*, warnings).<sup>27</sup> Moreover, the Rockefeller Bill inexplicably would have immunized manufacturers who failed to take corrective action absent governmental directive once serious problems had been discovered with a product.

For these reasons, we oppose a broad regulatory defense. As an alternative, we would recommend a more narrowly-tailored provision, such as one limited to drugs approved on an emergency "fast-track" basis under 21 C.F.R. § 312 or "orphan drugs" designed to treat rare diseases and disorders. An "orphan drug" defense might prove particularly beneficial. As an incentive to invest in drug development, Congress enacted the Orphan Drug Act in 1983, as an amendment to the Federal Drug and Cosmetic Act. Pub. L. No. 970-414, 96 Stat. 2049 (1983) (codified as amended at 21 U.S.C. §§ 360aa-360ee (1988)). Since its implementation, the FDA has granted approximately 500 orphan drug designations and has approved the marketing of approximately 100 of those drugs. *See Fed. Reg.* 23,888 (May 9, 1994). Some Congressional critics, however, believe that the exclusive marketing provisions of the Orphan Drug Act have allowed manufacturers to charge exorbitant prices for drugs such as AZT. *See Orphan Drug Act Amendments Introduced*, 6 No. 5 *J. Proprietary Rts.* 23 (May, 1994). Others are concerned that manufacturers' liability costs threaten to undermine the incentives for orphan drug development and drugs approved on a fast-track basis. *See Susan F. Scharf, Orphan Drugs: The Question of Products Liability*, 10 *Am. J.L. & Med.* 491 (1990).<sup>28</sup> A Federal product liability bill would provide an opportunity to revisit these subjects from a slightly different perspective, perhaps exchanging limitations on punitive damages for legislative reforms leading to lower prices for certain drugs to treat rare or critical diseases.

At very most, a Federal regulatory defense should be limited to design defects, where there is at least some credible evidence that improving the flow of information to the FDA and FAA would indeed produce safer products. Moreover, given the complexity of the FDA and FAA regulatory processes, we strongly believe that any regulatory defense should be developed only after careful consultation with the affected regulatory agencies.

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<sup>27</sup> The Rand Institute report suggests that the biggest problem with respect to warnings is that "companies supply extensive, detailed, and descriptive information to physicians and almost no information to patients." *Id.* at 195. Although this report suggests that a regulatory defense might encourage better warnings, it also recognizes that a major problem with such warnings currently derives from FDA practices. *Id.*

<sup>28</sup> *See also Drug Issues: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 41-42, 51-52 (1987) (testimony of Abbey S. Meyers, Executive Director, National Organization for Rare Disorders) (liability insurance is a "major issue of concern" inhibiting development of orphan drugs).

## (7) Establish Federal Statutes of Limitations and Repose

As illustrated by the Rockefeller Bill, most recent reform bills have included both a statute of limitations and a statute of repose for product liability cases. A statute of limitations generally begins to run upon the accrual of a cause of action. By comparison, a statute of repose, which is usually longer in length, runs from the date of a discrete act on the part of the defendant, usually the manufacture or delivery of the product in question. Statutes of repose thus can have the effect of barring actions even before a potential plaintiff has been injured. See Robert A. Van Kirk, Note, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, 1989 Duke L.J. 1689.

**Statute of Limitations.** Having a national statute of limitations would alleviate the substantial confusion and the lack of uniformity that currently characterizes the application of state statutes of limitations. In product liability actions, several possible statutes of limitations, each with differing limitation periods and triggering events, may apply depending on whether an action is brought in negligence, warranty or strict liability, whether the injury is to person or property, and whether a contract was involved. The impact of these differing statutes is, of course, magnified for corporations whose products flow in interstate commerce. These corporations are amenable to suits by plaintiffs who can effectively choose among several statutes of limitations depending not only upon how they plead their case, but also where they chose to file their lawsuit. See Francis E. McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 *The Forum* 416, 420 (1981).

A Federal product liability statute could replace this patchwork of limitations with a unified national standard, applicable to all types of product liability suits. We believe such a provision would have the salutary effect of providing certainty to manufacturers, sellers and their insurance carriers as to the duration of their liability exposure. While a uniform statute of limitations will eliminate some otherwise viable claims (a grandfathering clause could be included in the statute to minimize any immediate impact in this regard), it makes sense to have modern companies that often function in interstate markets be subject to a single statute of limitations. Indeed, where they have been enacted on the state level, product liability statutes of limitations have reportedly reduced insurance costs and eliminated the gamesmanship of attempting to frame obvious tort claims in contract or to file suit in a state with which the plaintiff has minimal contacts but which has a lengthier statute of limitations.

Section 204(a) of the Rockefeller Bill generally would have required a complaint to be filed within two years of the time the claimant discovered or, in the exercise of reasonable prudence, should have discovered the harm and its cause. Based on our review of state statutes, we believe a provision along these lines, with a two or three year limitations period, would be reasonable. We believe affording a claimant time to discover both the harm itself (important where the harm is latent or only becomes manifest with repeated exposure) and the actual cause of the harm is important to ensure that the claimant has adequate time to commence his or her lawsuit. Such a time period would be more liberal than that afforded

by some states, in which the statute of limitations is triggered by an injury, and not by the claimant's discovery that the injury related to a product defect.

*Statute of Repose.* The most noted justification for a national statute of repose is that it would alleviate insurance problems for certain industries. Responsibility for older products and latent defects exposes certain manufacturers to long periods of potential liability and a large number of potential plaintiffs. By cutting off a defendant's liability after a set period, statutes of repose lead to a more accurate assessment of risks and thereby allow for greater precision in setting insurance rates. Proponents also claim that a statute of repose will eliminate claims for which evidence is difficult to produce and will prevent manufacturers from being held to current design standards for products manufactured long ago.<sup>29</sup> While there are reasonable countervailing arguments to these points,<sup>30</sup> we believe that, on balance, a Federal statute of repose would provide helpful uniformity.

By one commentator's count, twenty-one states have adopted a statute of repose. See Terry M. Dworkin, *Federal Reform of Product Liability Law*, 57 *Tul. L. Rev.* 602, 604 (1983). At least seven other states have adopted so-called "useful life statutes" in which the expiration of a product's useful life (often presumed to be between 10 and 12 years) is either a factor in determining negligence or a complete defense to suit.<sup>31</sup> A Federal statute of repose would harmonize these provisions and, assuming that it is construed to preempt

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<sup>29</sup> These are essentially the same arguments that have been made in favor of Section 110 of the Model Uniform Product Liability Act, which includes a similar provision. See *Uniform Model Product Liability Act* § 110, reprinted in 44 *Fed. Reg.* 62,714, 62,733 (1979). See also Laurie L. Kratky, *Statutes of Repose in Products Liability: Death Before Conception?*, 37 *Sw. L. J.* 665 (1983).

<sup>30</sup> Opponents of this provision counter that plaintiffs also face additional evidentiary problems as time passes and ultimately must carry the burden of proof. Critics also contend that if a defendant's negligence causes damage, the passage of time should be irrelevant. See Josephine H. Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 *Vand. L. Rev.* 627, 633-35 (1985); Patricia J. Maibanek, Note, *The Utah Product Liability Limitation of Action: An Unfair Resolution of Competing Concerns*, 1979 *Utah L. Rev.* 149, 152.

<sup>31</sup> See, e.g., Ark. Code Ann. § 16-116-105(c) (using expiration of product's useful life as a factor in comparative negligence determination); Conn. Gen. Stat. Ann. § 52-577a(c) (providing useful life limitations period for plaintiffs not covered by workers compensation provisions); Minn. Stat. Ann. § 604.03 (expiration of useful life is defense to products liability action). See also Robert A. Van Kirk, Note, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, 1989 *Duke L.J.* 1689, 1691 n.13.

shorter statutes of repose under state law, would actually enhance the ability of many claimants to sue. We support attempting to promote uniformity in this area.<sup>32</sup>

### **(8) Allocate a Portion of Punitive Damage Awards in Product Liability Suits to Someone Other Than the Plaintiff**

Courts and commentators have often characterized punitive damages as providing plaintiffs with a "windfall." *See, e.g., Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 84 (1971) (Marshall, J., dissenting). To be sure, punitive damages are not designed primarily to compensate the plaintiff, but rather to punish a defendant for its egregious conduct against society and to deter others from engaging in similar conduct. Nonetheless, to the extent they reimburse the plaintiff's litigation costs, which compensatory damages do not offset, punitive damages serve to make the plaintiff whole. Moreover, some quantum of punitive damages compensates the plaintiff for acting as a "private attorney general," encouraging the plaintiff to pursue a suit that serves the societal goal of deterrence. In practice, then, the "windfall" portion of a punitive damage award equals only the amount that exceeds the plaintiff's litigation costs and a proper economic incentive for the plaintiff to pursue punitive damages. *See Note, Apportioning a Piece of Punitive Damage Award to the State: Can State Extraction Statutes be Reconciled with Punitive Damage Goals and the Takings Clause?*, 47 U. Miami L. Rev. 437, 444-48 (1992); James D. Ghiardi & John J. Kircher, *Punitive Damages Law and Practice* §21.12 (1989 & Supp. 1993).

This windfall can cause at least two economic distortions. First, it encourages plaintiffs (and their lawyers) to pursue punitive damages in relatively weak cases, inflating litigation expenses for both sides while the plaintiff seeks a lottery-like payoff that can be hundreds of times the actual damages suffered. Further, the windfall portion of punitive damage award can, if it renders the defendant insolvent, can endanger the ability of later claimants to receive compensation for their injuries. *See ALI Study* at 261 n.50. Capping

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<sup>32</sup> The various state statutes of repose have been subjected to constitutional challenges by plaintiffs arguing they violate due process or equal protection. However, our preliminary review of these cases indicates that no court has invalidated a state statute based on the Federal Constitution. *See, e.g., Thornton v. Mono Manufacturing Co.*, 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981); *Dague v. Piper Aircraft Corp.*, 513 F. Supp. 19 (N.D. Ind. 1980). Injured consumers, however, have been successful in attacking the constitutionality of statutes of repose under the "Open Court" clause found in many state constitutions. *See, e.g., Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (1980). *See Laurie L. Kratky, Statutes of Repose in Products Liability: Death Before Conception?*, 37 Sw. L.J. 665 (1983); Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579 (1981); Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627 (1985). Given this litigation, before the Administration takes a position favoring this provision, it might be advisable to seek further guidance from the Office of Legal Counsel.

punitive awards eliminates these inefficiencies, but can also destroy the deterrent impact of punitive damages. Specifically, because each defendant's economic situation is different, such caps may serve to underdeter large corporations or companies selling products with high profit margins. *See Report of the ABA Working Group on Civil Justice, ABA Blueprint for Improving the Civil Justice System* 84 (1992) (opposing the Council on Competitiveness' proposal to cap punitive damages).

An 1987 Action Commission of the ABA, as well as many commentators, have suggested that a better way to negate the effect of this windfall is to require a losing defendant to pay a portion of the punitive award to the state.<sup>33</sup> At least ten states have taken this route, while employing a variety of approaches. Colorado, for example, allocates one-third of a punitive damage award to the state general fund and two-thirds to the plaintiff. Colo. Rev. Stat. Ann. § 13-21-102(4). Florida allocates sixty-five percent to the plaintiff (who must bear his or her own litigation expenses) and thirty-five percent to the state general fund, unless the cause of action was based on personal injury or wrongful death, in which cases the state's share is paid to a Public Medical Assistance Trust Fund. Fla. Stat. Ann. ch. 768.73(2). Missouri, Kansas and Oregon allocate fifty percent of certain punitive damage awards to the state, after deduction of the plaintiff's attorney's fees and expenses. In these

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<sup>33</sup> The late Professor Robert B. McKay, former Dean of New York University School of Law, chaired the ABA Action Commission to Improve the Tort Liability System, which issued a report in January, 1987, recommending: "In carefully selected cases, courts should be authorized to award some portion of a punitive damages award to 'public purposes,' always being mindful that the plaintiff and counsel are reasonably compensated for bringing the action and prosecuting the punitive damages claim." American Bar Association, *Report of the American Bar Association Commission to Improve the Tort Liability System* 15 (1987). *See also* American Bar Association, *ABA Blueprint for Improving the Civil Justice System: A Report of the American Bar Association Working Group on Civil Justice System Proposals* 81-85 (1992). A smattering of the articles supporting this concept includes: Clay R. Stevens, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 *Pepp. L. Rev.* 857 (1994); E. Jeffrey Gube, Note, *Punitive Damages: A Misplaced Remedy*, 66 *S. Cal. L. Rev.* 839 (1993); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 *Vand.L.Rev.* 1233, 1270 (1987); Robert H. Arnold, *Punitive Damages in Products Liability Litigation: Redirecting the Windfall*, 6 *J. Prod. Liab.* 367 (1983); James E. Duffy, Jr., *Punitive Damages: A Doctrine Which Should Be Abolished*, in Defense Research Inst., *The Case Against Punitive Damages* app. (1969). *Cf.* American College of Trial Layers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* 9 (1989) (opposing the allocation of punitive awards in favor of other reforms, such as caps on punitive damages).

states, the apportionment goes to various funds.<sup>34</sup> Iowa allocates one hundred percent of a punitive damage award to the plaintiff if the act was directed at that individual; if not, seventy-five percent of the award goes to a state fund used for indigent civil litigation or insurance assistance programs. Iowa Code Ann. § 668A.1(2)(a)-(b). *See also* Ga. Code Ann. § 51-12-5.1(e)(2) (allocating 75 percent to a state fund). Finally, Illinois affords the trial court judge discretion to determine what, if any, special distribution scheme should take place among the plaintiff, the state, and the plaintiff's attorney, with regard to the punitive damage award. Ill. Ann. Stat. ch. 110, para. 2-1207.

We believe a Federal provision allocating punitive awards is preferable to capping punitive damages at some absolute level (as is proposed in Section 103(c)(2) of the Republican's Common Sense Legal Reform Bill). Such an allocation would change the *destination*, not the *amount*, of punitive damages. It, therefore, would neither alter the current method of assessing punitive liability on defendants nor diminish the traditional deterrence and punishment goals associated with punitive damages. The split-recovery, however, would allow a portion of a punitive award to benefit society as a whole.<sup>35</sup> Under

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<sup>34</sup> Mo. Ann. Stat. § 537.675(2) (Tort Victims' Compensation Fund); Kan Stat. Ann. §60-3402(e) (State Health Care Stabilization Fund); Or. Rev. Stat. §18.540 (1993) (Criminal Injuries Compensation Account). *See also* Utah Code Ann. §78-18-1(3) (1993) (allocating 50 percent of punitive damages in excess of \$20,000 to the state general fund); N.Y. Civ. Prac. L. & R. 8701 (allocating 20 percent of punitive awards to the state).

<sup>35</sup> Actions challenging the constitutionality of state allocation statutes have been brought in Georgia, Florida, Iowa, and Colorado, with the Colorado and Georgia statutes having been found violative of the U.S. Constitution by at least some courts. *Compare Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Col. 1991); *McBride v. General Motors Corp.*, 737 F.Supp. 1563 (M.D.Ga. 1990) *with Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993); *Gordon v. State*, 608 S.2d 800 (Fla. 1992); *Shepard Components Inc. v. Brice Pertrides-Donohue and Associates, Inc.*, 473 N.W.2d 612 (Iowa 1991). The principle challenge to state allocation statutes has been that such schemes effect an unconstitutional taking of the plaintiff's property in violation of the Fifth Amendment. However, the courts appear to agree that there is no "taking" for this purpose if the government's interest attaches prior to or simultaneously with the entry of judgment. *See, e.g., Shepherd Components, supra* at 619. This point is highlighted by *Kirk, supra*, where a split Colorado Supreme Court concluded the Colorado statute was unconstitutional because it contained a clause explicitly indicating that it attached only *after* judgment. It has also been argued that allocation statutes violate the excessive fines clause of the Eighth Amendment. To be sure, the Supreme Court's decision in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 278, 275 n.21 (1989), suggests that the Federal government's receipt of a portion of a punitive award would implicate this clause. However, this problem could be avoided by establishing definite and clear guidelines and procedures to preclude excessive awards of punitive damages. In sum, it appears that any potential constitutional problems posed by the Fifth and Eighth

such a provision, a plaintiff could retain sufficient punitive damages to cover his or her litigation expenses and then receive a percentage of the remaining award to provide tort victims an incentive to pursue punitive damages. As in many states, the portion of an award received by the Federal Government (or directly by a state) could either be deposited in the General Fund, thereby reducing the tax burden on all taxpayers, or be dedicated to a special fund for a deserving cause, such as victim compensation, defraying indigent legal expenses, providing no-fault compensation for injuries caused by certain vaccines and drugs, or medical insurance stabilization. To the extent allocations were received by the Federal Government, such funds could either be distributed through existing Federal programs or could be provided to the states either in block grants or as seed money to encourage states to pursue particular types of programs.<sup>36</sup>

### (9) Pursue Mass Tort Reform

Product liability actions often involve products sold widely across the country which have injured many individuals. This phenomenon is reflected in case statistics. According to a report made to the Federal Judicial Conference, while there were 85,694 product liability suits filed in Federal court between 1970 and 1986, only 34 companies were the lead defendants in over 35,000 of these cases. *Ad Hoc Comm. on Asbestos Litig., Report to the Judicial Conference of the United States 7-10 (1991)*. See also Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System -- And Why Not?*, 140 U. Pa. L. Rev. 1147, 1204-05 (1992). Moreover, about 60 percent of the cases filed in Federal court, as well as a significant portion of those filed in state courts, were attributable to a handful of products, notably Benedectin, DES, Agent Orange, the Dalkon shield and

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Amendments could be avoided by careful drafting. See Note, *The Constitutionality of State Allocation of Punitive Damage Awards*, 50 Wash. & Lee L. Rev. 843, 873 (1993). Nonetheless, we believe that any specific provision in this area would need to be carefully reviewed by the Office of Legal Counsel.

<sup>36</sup> Such an allocation provision might also be crafted to encourage plaintiffs to consolidate mass tort actions in a single court. Plaintiffs willing to submit to Federal mass tort jurisdiction might either be allowed to retain a higher percentage of a punitive award or be exempted from the allocation provision altogether. See Briggs L. Tobin, *The 'Limited Generosity' Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 Emory L.J. 457 (1989) (supporting the concept of linking mass tort adjudications with punitive damage allocation). Such a mechanism would lessen the likelihood that a "first comer" would receive a windfall at the expense of other injured parties who later might be unable to recover compensatory damages from a financially depleted defendant.

asbestos. *Id.*<sup>37</sup> Experience suggests that these cases are most fairly and efficiently dealt with by consolidating them in a single Federal court. This not only allows for the establishment of discovery libraries and facilitates global settlements, but also has the potential for reducing a defendant's exposure to multiple punitive damage awards. However, there are jurisdictional impediments that complicate, and in some instances preclude, these consolidation efforts. *See, e.g., Note, Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions Under Rule 23*, 49 *Brooklyn L. Rev.* 517 (1983).

Various groups have proposed ways to overcome these hurdles to consolidation. Among the major approaches that have been suggested are the following:

- The American Law Institute recently proposed a set of procedures to govern complex cases, including mass torts. The ALI would create a Complex Litigation Panel (CLP) to replace the existing Judicial Panel on Multidistrict Litigation. Under a new version of 28 U.S.C. §1407, the CLP would be authorized to transfer civil actions pending in more than one district to any district for consolidated pretrial proceedings or trial, or both. A separate provision would allow the CLP to remove state actions to a designated Federal court. The transferee Federal court would be afforded broad discretion to consider ancillary claims and to group and handle separately categories of individual claims. The ALI proposal also includes a mechanism for resolving choice of law questions and for making the results of the consolidated action binding on parties with related claims who have not filed suit. *See American Law Institute, Complex Litigation: Statutory Recommendations* (1994).
- A special committee of the American Bar Association that studied punitive damages proposed that Congress establish a process for creating a national class action for multiple punitive damage claims arising out of conduct that results in similar injuries. This proposal would carve out an exception to the State Anti-Injunction Act that would allow a federal judge to assume control of all state cases. This procedure would be triggered by a district court's finding that there is a reasonable possibility that adequate compensatory damages would not be available if punitive damages are not handled in consolidated

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<sup>37</sup> Asbestos alone accounted for 20,888 of the Federal cases. *Id.* at 1204. *See also* Terrence Dungworth, *Product Liability and the Business Sector: Litigation Trends in Federal Courts* 35-38 (1988).

manner. Special Committee on Punitive Damages, Section of Litigation, **Punitive Damages: A Constructive Examination**, *supra* at 78-81. *See also* ABA Commission on Mass Torts, **Revised Final Report and Recommendations** (1989). The American College of Trial Lawyers has made a similar recommendation. American College of Trial Lawyers, **Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice** 20-26 (1989).

- Judge William Schwarzer (until recently the Director of the Federal Judicial Center) and others have proposed to amend the multidistrict litigation statute to permit discovery and pre-trial coordination of large-scale litigation pending in state and federal courts. This proposal would amend the Federal multistate litigation statute (28 U.S.C. §§ 1404-1407) to authorize removal on a minimal diversity basis of state court cases related to federal multidistrict litigation to a "multidistrict transferee court." Unlike the proposals of the ABA, ALI and American College of Trial Lawyers, however, this proposal would leave all merit determinations (and hence any choice of law rulings) to be made in the court where the suit originated. *See* William W. Schwarzer, Alan Hirsch and Edward Sussman, *Judicial Federalism -- A Modest Legislative Proposal* (1993) (unpublished).<sup>38</sup>

Variations on these proposals have surfaced in Congress in bills such as the "Multiparty, Multiforum Jurisdiction Act of 1991," H.R. 2450, 102d Cong., 1st Sess. (1991). *See* Robert W. Kastenmeier & Charles G. Gegh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature*, 73 *Marq. L. Rev.* 535 (1990). *See also* Thomas D. Rowe, Jr., *Jurisdictional and Transfer Proposals for Complex Litigation*, 10 *Rev. Litig.* 325 (1991) (cataloging additional proposals)

As the summaries above illustrate, proposed legislation to improve the resolution of complex mass torts can itself be dauntingly complex. Most proposals are designed to diminish or eliminate obstacles to consolidated treatment of related litigation scattered among

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<sup>38</sup> Although it did not deal extensively with the subject of mass torts, the Federal Courts Study Committee similarly recommended that the Congress amend the multi-district litigation statute to permit consolidated trials as well as pretrial proceedings and that it create a special Federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of mass tort cases. **Report of the Federal Courts Study Committee** 44 (1991). This proposal is noteworthy as most of the Federal Courts Study Committee's recommendation were to constrict, rather than expand, Federal jurisdiction.

various courts. The proposals differ primarily depending upon whether they would: (i) be limited to mass torts or include other categories of complex cases, including those involving mass accidents; (ii) statutorily define the concept of "mass tort" or allow some court to exercise discretion in invoking a mass tort procedure; (iii) affect only cases originally filed in Federal court or allow for the consolidation of cases spread between state and federal courts or among courts of different states; and (iv) consolidate only pretrial and discovery proceedings or consolidate all or a part of trials on the merits. The broader-reaching proposals are necessarily more intricate, and include detailed procedures for enjoining state court proceedings, removing cases from state courts and resolving questions involving choice of law. Such proposals, moreover, are more readily criticized as infringing upon state sovereignty and the autonomy of the parties to control their own destinies. More streamlined proposals are less subject to these criticisms often because they do not envision the removal of state cases. However, such less ambitious proposals may leave unresolved some of the more nagging problems posed by mass torts which principally derive from the current lack of intersystem coordination between state and federal courts.

Striking a balance between these shifting concerns is not an easy task. Yet, the existing proposals can be distilled into several building blocks from which we might develop a viable Federal mass tort reform legislation.

High on the list of jurisdictional obstacles to the consolidation of mass tort cases is the complete diversity requirement of 28 U.S.C. § 1332, which requires *all* plaintiffs to be of diverse citizenship from *all* defendants. This requirement now irredeemably divides much mass tort litigation between state and federal courts because parties who can satisfy this requirement file in federal court while others with related claims are forced to remain in state courts. Judge Schwarzer, the Federal Courts Study Committee and others would address this problem by adopting minimal diversity in mass tort cases, using the full range of Congress' Article III authority to confer jurisdiction on the federal courts whenever *any* plaintiff is of diverse citizenship from *any* defendant.<sup>39</sup> According to Judge Schwarzer, "minimal diversity would open the jurisdictional door much wider because few cases in mass litigation would not have at least one pair of diverse parties." Schwarzer, *supra* at 13-14. Precedent for the use of such minimal diversity is found in the federal statutory interpleader statute, 28

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<sup>39</sup> See Report of the Federal Courts Study Committee, *supra* at 44-45; Schwarzer, *supra* at 35. Cf. Linda Mullenix, *Complex Litigation Reforms and Article III Jurisdiction*, 59 *Fordham L. Rev.* 169, 196 (1990) (arguing that complex cases do not deserve an exception to normal diversity).

U.S.C. § 1335, which has passed constitutional muster. See State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967).<sup>40</sup>

Expanding Federal jurisdiction alone, however, would not necessarily result in the desired aggregation of cases in a single court. Some parties doubtlessly would perceive tactical advantages in filing in state court, choosing either to proceed independently or to await the outcome of a consolidated Federal action. Leaving such cases in the state courts might fail to achieve a fair and efficient resolution of a mass tort controversy. To avoid this, the most common approach suggests authorizing a federal multidistrict transferee court to remove state court cases related to federal multidistrict litigation either on the motion of a party or *sua sponte*. See, e.g., ABA Commission on Mass Torts, Revised Final Report and Recommendations at i-iii; ALI, **Complex Litigation: Statutory Recommendations**, at 446-447. Sensitive to the federalism concerns posed by the prospect of involuntary removals, some of these proposals would vest the authority to remove state cases not in a single judge, but rather in a judicial panel similar to the judicial panel on multidistrict litigation currently authorized by 28 U.S.C. § 1407(d). As a precondition to invoking this authority, the panel would determine whether consolidation of federal and state cases was necessary, either by making certain statutorily prescribed findings or by weighing a set of statutory factors or guidelines.<sup>41</sup> Proponents of such removal procedures assert that this authority will need to be invoked only rarely once the advantages of proceeding in a consolidated fashion become apparent. ALI, **Complex Litigation: Statutory Recommendations**, at 446-447.

The passage of jurisdictional and removal mechanisms along these lines could result in most mass tort cases being brought into the Federal system. To complete the loop, any federal legislation would then have to address how to improve the actual coordination and

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<sup>40</sup> The ALI proposal would go farther and would grant federal courts ancillary or supplemental jurisdiction over claims and indemnification arising "from the same transaction, occurrence, or series of related transactions or occurrences" as a claim before the court. Such jurisdiction would be used to support removal efforts to allow for the consolidation of state cases with related cases already before the Federal courts. ALI, **Complex Litigation: Statutory Recommendations**, at 446. By comparison, the ABA Commission on Mass Torts recommended giving federal courts "federal question" jurisdiction over certain mass torts, while requiring the courts to apply state substantive law. ABA Commission on Mass Torts, Revised Final Report and Recommendations, *supra*.

<sup>41</sup> In some instances, similar authority might be used, in cooperation with state authorities, to consolidate actions involving a particular mass tort in a single state court. Having such "reverse removal" authority might be beneficial in situations in which the wide majority of actions involving a particular mass tort are filed in a single state and only a few cases are filed in Federal court or in other states. Under those circumstances, it might be inappropriate to remove the litigation from the local courts. See ALI, **Complex Litigation: Statutory Recommendations**, at 439.

resolution of mass tort cases. Several proposals would accomplish this by modifying substantially the multidistrict litigation procedures found in 28 U.S.C., § 1407(a). *See, e.g., ALI, Complex Litigation: Statutory Recommendations, supra* at 442-44. Currently, that section provides that "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings ...." This section might be amended to allow a transferee court to retain a transferred action for trial, perhaps with a presumption in favor of remanding the case to the transferor court for individual determinations of damages. However, as noted above, the prospect of having joint trials on the merits raises a host of thorny issues, none the least of which is the need to adopt some standard convention for resolving choice-of-law issues. While several proposals provide just such a convention, there is so much disagreement on this point as to raise the prospect that this issue could derail any major reform of consolidation authority. *See Rowe, Jr., supra* at 333 ("A specter lurking in the background is the possibility that choice of law problems could be so daunting and agreement on approaches so elusive, as to prevent major expansions in consolidation authority.")

An alternative proposed by Judge Schwarzer would be to limit consolidation to discovery matters and related pretrial activity and, at least in cases removed from state courts, leave all dispositive rulings to be made in the courts of the originating state. Schwarzer, *supra* at 42-45. This approach would eliminate duplicate and uncoordinated interrogatory and document discovery, clearly the most significant and readily identified source of inefficiency in large-scale litigation. Moreover, it would provide for equal access to and ready dissemination of discovered information, thereby creating a setting conducive to global settlements. Finally, absent a settlement, the proposal would return state court actions back to the state courts for final disposition, either by motion or trial, thereby largely avoiding the choice-of-law thicket. The results of the coordinated discovery, including the scope of discovery, would remain binding in these subsequent proceedings. *Id.*

These are only a few of the policy and mechanical issues that will need to be resolved in developing Federal mass tort reform legislation. The most important point, however, is that we strongly believe that mass tort proposals hold significant promise for ameliorating the lions-share of problems being experienced in product liability cases and, particularly, could introduce efficiencies into the civil justice system that would benefit plaintiffs and defendants alike.

## **PROBLEMS WITH DOJ'S AGENDA FOR PRODUCTS LIABILITY REFORM**

- \* It is inconsistent with President Clinton's past campaign statements and with Vice President Gore's opposition to tort reform while a Senator.
- \* It inexplicably contradicts DOJ's own conclusion that "the available evidence neither made a positive, empirical case for across-the-board national tort reform, nor even began to demonstrate that the problems that exist are of such magnitude as to exceed the remedial abilities of state legislatures."
- \* It naively hopes that its moderated-version of the Rockefeller bill ("Rockefeller-minus") would emerge as a compromise, when it provides the President with no leverage for negotiations and when the Rockefeller bill represents business' bare minimum this year.
- \* It is a weak position from which to negotiate:
  - It gives away the federalism argument.
  - It allows Republican reform proponents to coopt the President's support by taking one or two of DOJ's proposed modifications and by dropping only the English rule (the "we've-met-you-halfway" response).
  - It does not provide a credible veto threat, thus leaving DOJ and the President with virtually no leverage on the legislative process.
- \* It does not challenge the premises of Republican reforms (that lawyers, plaintiffs, and frivolous suits in state law cases have become a drag on the economy deserving national reforms); accordingly, the debate will remain driven by anti-lawyer sentiment.
  - It does not reflect a political or communications strategy to reframe the debate by raising consumer and investor concerns.
  - It misses the opportunity to use legal reform as part of our "middle-class" strategy.
- \* It would likely lead to the passage of a pro-defendant bill which the President, because we would not have developed a credible veto rationale, would have little choice but to sign.
- \* By supporting compromise for admittedly inadequate reason, it fits the perceived version of this President's "image problem": that he tries to please everyone and will not stand on principle (consumer groups would accuse the President of flip-flopping, of lacking core convictions, and of selling out to the business community).



U. S. Department of Justice

Office of the Associate Attorney General

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The Associate Attorney General

Washington, D.C. 20530

February 6, 1995

**MEMORANDUM**

TO: Joel Klein  
Deputy White House Counsel

FROM: John R. Schmidt *RS*

SUBJECT: Product Liability Reform

Attached is a memorandum which has been approved by the Attorney General setting forth our view that we should get actively involved in the debate over Product Liability Reform. If you want this in any different form, please let me know.

Attachment



Washington, D.C. 20530

February 6, 1995

SUBJECT: **Proposed Justice Department Involvement in the Debate on Product Liability Reform**

Product liability reform legislation has been introduced in the Congress each session for the last fourteen years. With each succeeding year, the reform proposals have become more modest as sponsors have stripped out controversial provisions in an attempt to obtain the votes needed for passage. Yet, even these muted attempts have failed to produce a Federal product liability statute. In the last session of the Senate, the "Product Liability Fairness Act" (the Fairness Bill), introduced by Senator Rockefeller (D-WV), died on the floor after supporters from both parties fell short of invoking cloture by a narrow margin (57-41). In the House, Chairman Jack Brooks for years kept product liability measures from ever reaching the floor, bottling them up in the Judiciary Committee.

With the ascendancy of Republicans to power and the defeat of Congressman Brooks, supporters of product liability reform now believe that the major impediments to reform have been removed. However, these supporters are by no means unified in what type of reform to pursue. Section 103 of the Common Sense Legal Reform Act (CSLRA), which is part of the Republican "Contract with America," takes an aggressive stance and includes a measure that would cap punitive damages at \$250,000 or three times an award for economic damages, whichever is greater. Supporters of this bill include House Judiciary Chairman Henry J. Hyde (R-Ill), who has not yet scheduled a hearing on this provision (although other provisions of the CSLRA will be the subject of hearings on February 6 and 10, 1995.) On January 31, 1995, Senator Mitch McConnell (R-Ky) introduced a civil justice reform bill, S. 300, that contains some of the product liability provisions in the CSLRA, including the cap on punitive damages. This bill also contains new provisions, including one that would allow for limited fee shifting in all state and Federal product liability actions. At the same time, Senators Rockefeller and Slade Gorton (R-Wash) are expected to reintroduce the Fairness Bill. While the Fairness Bill shares features with the CSLRA -- both, for example, include a requirement that punitive damages be proven by clear and convincing evidence -- it does not contain a cap on punitive damages.

It is unclear how industry and bar groups will react to these competing bills. While the Association of Trial Lawyers of America has publicly announced its opposition to section 103 of the CSLRA and has historically opposed even the watered-down versions of the Fairness Bill, that group might eventually temper its opposition to moderate reform if the alternative were the enactment of caps. Industry groups, such as the Product Liability Coordinating Committee, the National Manufacturer's Association and the U.S. Chamber of Commerce, may support section 103 of the CSLRA. Undoubtedly, some of these groups will

also strongly support some of the provisions in S. 300. However, there are rumblings that some corporate members of these groups would prefer to support more moderate legislation rather than risk losing all reform in pursuit of legislation that includes caps and other controversial provisions. In addition, Senator Hatch has recently expressed doubts about the advisability of a cap on punitive damages.

The Justice Department believes that the Administration (or at least the Justice Department) should take an active role in the public debate on this subject and should advance a more "moderate" alternative to the Fairness Bill. A Justice Department Product Liability Working Group (the Working Group) has drafted a Proposed Agenda for Product Liability Reform (Attachment A) which provides the basis for taking such a position. Attachment B provides a side-by-side comparison of the provisions of this agenda, Section 103 of the CSLRA, S. 300 and the Fairness Bill (as introduced last term). The Department believes that its involvement in advancing a moderate alternative would be desirable for a number of reasons, among them the following:

- ***There is a bona fide need for targeted product liability reform.*** Considerable evidence suggests that there never was a widespread product liability "crisis," or at least that any incipient trend towards a crisis has subsided either on its own accord or as the result of state product liability reforms. However, there is also ample evidence that the fear of product liability suits and, particularly, multi-million dollar punitive damage awards, may be causing some companies to withhold new products and withdraw useful old products from the market. At recent Congressional hearings on the Fairness Bill, three major suppliers of raw materials essential for use by medical device manufacturers announced that they would limit or cease their shipments because of the risks of huge litigation expenses or damage awards. And both the National Academy of Sciences and the Rand Institute have recently concluded that research into new vaccines and other drugs has been discouraged. Moreover, according to a 1992 Tillinghast study, insurance premiums and legal defense costs associated with products liability have grown remarkably over the last fifteen years, shrinking, if not eliminating, the profit margin of certain products. At the same time, there is widespread concern about the extent to which the existing procedures used for determining punitive damage awards and for handling cases involving mass torts result in arbitrary judgments and in litigation which is complex and cumbersome.
- ***The reform agenda we have developed soundly addresses product liability reform.*** The attached Proposed Agenda for Product Liability Reform provides an excellent basis from which to construct a useful product liability reform bill. Many of the provisions in this agenda are procedural reforms (*e.g.*, the use of the clear and convincing evidence standard, bifurcation of trials) designed to work in combination to produce more rational and fair punitive damage awards, thereby obviating the need for an absolute cap or ceiling on punitive damages. Some of these proposals arise directly from the Working Group's consideration of the Fairness Bill, while others stem from major studies that have been conducted on the tort system by groups such

as the American Bar Association, the American Law Institute, and the American College of Trial Lawyers.

- ***This is an important public issue on which the Justice Department should take a position.*** This is not simply an issue for corporate America. Ensuring that product liability reforms are reasonable and well-balanced is also important to the thousands of individuals harmed by products each year, the millions of Americans who depend -- some direly -- upon a steady stream of new products and technology reaching the market place, and the tens of millions of Americans who view irrational punitive damage awards as symptomatic of a civil justice system that is broken and does not meet their needs. The Justice Department believes it should take a leadership role in molding the debate on this type of issue. This need not involve the President directly, if it desired to keep him aloof from this issue. Rather, the Justice Department could take the lead -- initially in a cautious form of suggesting ideas for consideration -- carrying out its natural institutional role in dealing with issues relating to the justice system.
  
- ***The Administration's failure to participate in this debate could lead to the passage of flawed legislation.*** Last year, the Administration refused to take a position on the Fairness Bill, possibly calculating that without its support no legislation would pass. This year, however, the President likely will be faced with having either to sign or veto product liability legislation. Given that eventuality, it makes sense to ensure that any legislation that reaches the President's desk is sound. Moreover, involvement by the Justice Department will allow the Administration legitimately to claim some credit for what is likely to be viewed as a positive reform of the legal system.
  
- ***The Administration's failure to participate risks making the President appear passive and arguably captive to a major interest group (the plaintiffs' bar).*** Having the Justice Department participate in a constructive way in the debate on this issue would convey that the Administration is serious about legal reform in areas where it is needed, irrespective of the influence of special interest groups. The Department would not propose to engage in debate at this point on the other civil justice provisions of the Republican "Contract," but would emphasize a positive approach to the product liability area as one where a constructive bipartisan approach can be productive.

Attachments

THE WHITE HOUSE  
WASHINGTON

February 8, 1995

MEMORANDUM FOR THE PRESIDENT

THROUGH: ABNER MIKVA & BO CUTTER  
FROM: JOEL KLEIN, BRUCE LINDSEY & PETER YU  
SUBJECT: LEGAL REFORM ISSUES

This memorandum presents a strategic choice regarding the Administration's position on legal reform issues and offers two draft "statements of principle" for your consideration.

I. BACKGROUND

Congress is currently considering legal reforms including civil justice reforms (such as changes in attorneys' fees), product liability reforms (such as changes in the law of damages), and securities litigation reforms (such as limits on stockholder class-action suits). Proponents of reform claim that the current system is unfair, encourages wasteful litigation, stifles innovation, and undermines US competitiveness. Opponents of reform contend that the proposals are unnecessary provisions that serve only to shield defendants from liability and, in the case of product liability, to federalize an area traditionally controlled by state law.

Both you and the Vice President have been critical, or at least skeptical, of reforms of the legal system through preemptive federal legislation. Attachment A offers selected press accounts of your statements on these issues.

The empirical evidence regarding the need for reform is far from definitive. While each side marshals data that appear to support its claims, independent studies have reached mixed conclusions. These studies suggest that in the 1980s litigation increased significantly (largely due to asbestos-related claims), but also that the filings in more recent years evidence no clear trends. With regard to product liability cases, the studies also fail to support charges that damage awards have been increasing dramatically. In response, proponents of reform emphasize that the mere threat of large awards has a deleterious impact on American innovation and competitiveness.

The legal reform legislation included in the Contract with America is, by most accounts, quite extreme; Attachment B outlines the primary provisions of the bill. For several years, Senator Rockefeller has championed an approach to product liability reform more moderate than the Contract bill; last session, a cloture vote on the bill failed by only 3 votes. Senator Dodd has introduced a securities litigation reform bill that is less extreme than the Contract provisions; Congressman Markey has introduced an even more shareholder-friendly bill. Most observers

believe that the House will pass legal-reform legislation relatively quickly (perhaps within the first 100 days) but that the Senate will not begin work on a bill until late spring. Senator Rockefeller has not reintroduced his bill and it is not clear whether his bill or a more extreme version championed by someone else will be the primary vehicle in the Senate. It is possible that a Rockefeller-type bill and a Dodd-type bill will emerge as "compromise" approaches that could attract the required 60 votes.

The Chief of Staff charged an interagency group with developing a proactive approach and a "statement of principles" that would serve as an outline of the Administration's position.

## II. OPTIONS

The group agreed that, with regard to *securities litigation reform*, the Administration should work closely with the SEC to encourage reforms that fall somewhere between the Dodd and Markey bills. Such a package could include extensions of the statutes of limitation and measures to reduce the "race to the courthouse" and the risk of meritless claims. At the same time, the Administration would oppose reforms--such as some of those in the Contract bill--that would effectively end private enforcement of the securities laws.

With regard to *civil justice reform and product liability reform*, the group focused on two primary options for an Administration statement of principles.

- Option 1: Oppose the Contract Bill. One approach would emphasize that the legal system should protect the middle class from injustice and fraud, and would emphasize federalism concerns. Republican reforms (and the Rockefeller bill) would preempt state law to limit the liability faced by defendants in products litigation rather than decrease litigation costs and delay for all parties. This option (illustrated by Attachment C) attacks the premises of such reforms with the following principles:
  - the Contract approach *limits corporate liability* to the detriment of product safety and full compensation for injured plaintiffs;
  - outcomes that offend common sense in products cases should be dealt with by the States (or through comprehensive federal reform as in the case of medical malpractice), *not by the federal government*
  - the Administration supports legal reforms in federal court to encourage alternatives to litigation and decrease frivolous suits, high costs and delay, *without undetering corporate negligence.*
  
- Option 2: Indicate Your Support for "Balanced" Reform. A second approach (illustrated by Attachment D) would focus less on the Contract bill and offer a more modulated approach. The central elements of that approach are:
  - a legal reform bill should be *balanced* and address the concerns of both businesses and consumers;

- legal reform is generally a *matter of state law* and thus the Administration supports *reforms in federal courts* to reduce frivolous litigation and accelerate resolution in the federal courts;
- the Administration supports *pro-consumer provisions* such as limits on secrecy in settlements;
- the Administration *opposes universal preemptive limits on compensatory and punitive damages*, but does not oppose uniform (preemptive) standards for punitives to enhance predictability for businesses.

### III. ANALYSIS

These options reflect two quite different strategies. Option 1 takes advantage of the extreme nature of the Contract bill and its inconsistency on federalism grounds to attempt to reframe the debate in a manner consistent with our middle-class theme. By challenging the Contract directly, this option could make it less likely that an anti-consumer bill will pass. Your credibility on the federalism argument would be enhanced by your support for reasonable securities-law and federal-court reforms. This option, which is arguably more consistent with your campaign statements, could lead to a veto of preemptive legislation, even that which is more moderate than the Contract bill. This option would send a strong signal to Congress and strengthen the hand of consumer and plaintiff-attorney interests. It may, however, trigger negative reactions from the business community, and could, given the strong anti-lawyer animus in the general public, be misinterpreted as "a defense of lawyers." For that reason, it also recommends that you favor contingency-fee reform in federal courts.

Option 2 does not directly address the Contract but rather attempts to acknowledge the concerns of both business and consumer interests. Unlike Option 1, it indicates a willingness to entertain *some* preemptive federal legislation (a position consistent with your signing of the general-aviation reform bill). The emphasis on a balanced bill could improve the legislation passed, in part by encouraging business interests to reconsider any overly ambitious reform efforts or couple such an effort with meaningful pro-consumer reforms. Consumer interests may be deeply disappointed by this option; attorney groups would likely tolerate, but not embrace, it. Business groups--in particular high-technology companies--are likely to react positively to this approach which recognizes the economic dimensions of legal reform; the approach may also find some support in the public's current anti-lawyer sentiment. However, while intended to be more accommodating, this Option could be viewed by some as tentative and equivocal.

In short, Option 1 conveys a strong middle-class message and lays the groundwork for a veto; Option 2 emphasizes balance and leaves greater room for either signature or veto.

### IV. RECOMMENDATIONS

DPC, Counsel's office, and CEA support Option 1. Legislative Affairs, NEC, Justice, Treasury, and Commerce support Option 2. The Vice President, as noted, was involved in this

issue during his service in the Senate and would like to consult with you prior to your decision on this matter.

V.    DECISION

\_\_\_ Pursue Option 1 statement of principles.

\_\_\_ Pursue Option 2 statement of principles.

\_\_\_ Let's discuss.

## ATTACHMENT A: PRESS ACCOUNTS OF PAST STATEMENTS

### President Clinton

- "The proposals advanced by George Bush and Dan Quayle [presumably including S.640, the Rockefeller bill] are dramatically tilted toward big polluters, manufacturers and insurance companies, and against consumers and victims." *The Candidates on Legal Issues*, ABA J., Oct. 1992, at 57.
- "Bush and Quayle want to cap the ability of juries to award victims punitive damages, even when that is the only way to bring a powerful offender to justice, or to keep a dangerous product off the market." *Id.*
- "[Bush and Quayle] want to make victims pay the legal fees of big manufacturers, if, for some reason, they sue and lose. It is nothing more than trickle-down justice." *Id.*
- "As a general matter, I believe that legal reform should be enacted in the laboratories of the States, rather than at the federal level." *Id.*
- "In my view, the best reforms are those that make it less likely for people to go to court. We should encourage greater use of alternative dispute resolution to give consumers redress without having to litigate, such as mediation, mini-trials, and the multi-door courthouse. We should also encourage the use of special masters to help sort through complex cases. And we should restrict the use of secrecy agreements, which too frequently force litigants to refight the same battles, over and over, while endangering public health." *Id.*
- "But I will oppose any proposals that pretend to 'reform' lawsuits while actually encouraging dangerous products or marketplace fraud." *Id.*

### Vice President Gore

- Voted against S.640, the Rockefeller Bill, in the Commerce Committee in 1992.
- Co-authored Minority Views in the Commerce Committee report on product liability legislation in 1990.
- Widely quoted in press as having deemed the Rockefeller bill "anti-consumer."

## ATTACHMENT B: LEGAL REFORM BILLS

The more controversial provisions of the Contract bill (the so-called "**Common Sense Legal Reform Act**") include:

- Civil justice reforms for federal courts:
  - a "loser pays" or "English rule" attorney-fee regime for diversity actions brought in federal court; and
  - tighter rules regarding expert scientific testimony.
- Product liability reforms that govern both federal and state court claims:
  - limits on the liability of product retailers;
  - uniform "clear-and-convincing" and "actual malice" standards for punitive damages;
  - a cap on punitive-damages awards; and
  - a bar on joint-and-several liability for noneconomic damages.
- Securities litigation reforms:
  - an English rule for all securities-fraud claims;
  - a scienter requirement that effectively eliminates joint-and-several liability; and
  - an "actual reliance" requirement that greatly increases a plaintiff's burden of proof.

The civil justice reform provisions could significantly reduce suits by smaller parties (such as consumers) against larger parties. The product liability provisions preempt an area long the province of state courts and legislatures. The securities litigation provisions would eviscerate private enforcement actions.

The primary features of **S. 687**, introduced last session by Senator Rockefeller, include:

- establishment of a federal fault standard for punitive damages (including a safe harbor for FDA- and FAA-approved products), but no cap on punitive damages;
- elimination of joint and several liability for noneconomic damages;
- incentives for out-of-court settlements and for the use of alternative dispute resolution;
- uniform statutes of limitation and repose for product liability claims.

Consumer and attorney groups were particularly critical of the distinction between economic and noneconomic damages, limitations on joint and several liability, and the FDA/FAA safe harbor.

The **Dodd bill** on securities-litigation reform includes:

- guardians ad litem and steering committees for class actions;
- a scienter requirement;
- limits on attorneys fees to a "reasonable percentage of the amount recovered";
- restrictions on the use of civil RICO in securities law claims; and
- proportionate liability in federal securities fraud actions.

Consumer and attorney groups were particularly critical of the proportionate liability provisions and the limits on attorneys fees.

ATTACHMENT C  
STATEMENT OF PRINCIPLES (OPTION 1): OPPOSE THE CONTRACT

**The Contract with America limits corporate liability to the detriment of product safety and full compensation for injured plaintiffs.**

*How would the middle class benefit from:*

- Making a losing plaintiff pay General Motors' legal fees?
- Capping the award of punitive damages against corporations that knowingly fail to correct design flaws leading to consumer death or injury?
- Enacting rules that discriminate against victims suffering loss of reproductive ability and other noneconomic damages?
- Preempting state laws in a one-sided fashion: only where helpful to defendants, but not where helpful to consumers.

**Outcomes in state law cases that offend common sense should be addressed by the States, not by federal regulation.**

**The Administration supports reasonable reforms of the federal securities laws and federal court reforms that reduce costs and delays for plaintiffs and defendants.**

*The middle class would benefit from reforms in federal courts, such as:*

- Limits on the fees attorneys can charge plaintiffs when suits settle early in the litigation process.
- Alternatives to trial such as court-annexed arbitration and mediation which allow the middle class to seek resolution of disputes at lower cost.
- Procedural reforms that encourage defendants to make reasonable settlement offers in meritorious cases and plaintiffs to accept them.
- A legal presumption against secrecy provisions that prevent the release of information relevant to public health or safety.

*Business defendants should benefit from reforms directed at frivolous suits, not meritorious ones.*

**Reforms should respect the freedom of the individual to sue if her legal rights have been violated; litigation reflects a free-market approach to enforcing public safety and health concerns.**

**Controversial reforms should not be enacted in the absence of empirical data supporting claims about their effectiveness.**

ATTACHMENT D:  
STATEMENT OF PRINCIPLES (OPTION 2): SUPPORT BALANCED REFORM

**More than anything, a legal-reform measure must be balanced.** It must improve the civil justice *system*--not as a process that serves one class of parties or another, but as a system that serves all: potential plaintiffs, potential defendants, public health and safety, competitiveness and innovation.

**Whenever possible the federal government should lead by example, not by mandate--this is as true in legal reform as in welfare reform and regulatory reform.** Thus, reform efforts should focus on the *reform of federal rules and procedures*. In particular, reforms should:

- *Reduce frivolous litigation* through measures such as mandated sanctions for such frivolous filings and higher pleading standards for product liability claims. Such targeted reforms would be more effective at eliminating frivolous litigation--and more fair--than a blanket "English rule."
- *Improve the efficiency of the legal system* through measures such as a broad expansion of alternatives to litigation, and meaningful incentives (such as limited fee-shifting) to use such alternatives and to encourage early settlements.
- *Protect the public interest* by establishing a presumption against secret settlement that would prevent the release of information relevant to public safety or health.

**Legal reforms that preempt state laws and supplant traditional state authority should be undertaken only if justified by sound analysis and a strong federal interest.** Thus:

- The Administration opposes preemptive legislation to *limit the recovery of compensatory damages* as well as *limits on punitive damages*. With regard to the latter, punitive damages are appropriate to deter or punish extraordinarily irresponsible behavior. In such rare cases, punitive damages are and should be imposed based on the facts and circumstances of the particular claim--not subject to some arbitrary or formulaic amount or cap.
- At the same time, there may be justification for *federal guidance establishing when punitive damages are appropriate*, such as a "clear and convincing evidence" requirement. Particularly as the vast majority of commerce is interstate, the federal government has an interest in providing businesses with some predictability.

## OPTIONS FOR STATEMENT ON LEGAL REFORM

\* Presidential event. *Very unlikely between now and beginning of next week.*

\* Presidential remarks inserted in some other event. Would make sense if the President were riffing generally on "they've gone too far, they're extreme." Options: Friday press conference opening statement.

NOTE: Q&A and brief briefing materials needed for the press conf.

\* Senior administration officials state our position/unveil our proposals, if any. The most likely scenario would be for the senior legal officers of the administration -- the Attorney General and the White House Counsel -- to jointly issue a statement or hold a press conference. This could be done Friday.

ALTERNATIVE: VPOTUS?

\* Written statement/SAP.

# 3/1 Discussion Draft

## CIVIL JUSTICE REFORM STATEMENT

### Introduction

The United States is debating how its government should function. At the federal level, Americans want their government to be leaner and more efficient. At the state level, government is experimenting with different kinds of change, providing flexibility and varying solutions to society's problems.

Between the two levels of government -- federal and state -- the debate has focused on the extent to which Washington should return certain responsibilities to the states which the federal government too long has usurped. On issue after issue -- unfunded mandates, welfare reform, school lunch programs, education reform -- voices have urged Washington to appreciate the prerogatives and advantages of state control.

Accordingly, the administration already has begun the work of shrinking the federal bureaucracy through its reinventing government initiatives, which have improved governmental efficiency and reduced waste.

The administration also has begun to reform the culture of regulation that has permeated the federal government for decades -- during both Republican and Democratic administrations. Too often, Americans face a profusion of overlapping and sometimes conflicting rules. We must move beyond the point where Washington always tells businesses, consumers and workers what to do, when to do it, and how.

Today, the administration begins its efforts at reforming our legal system. The American civil justice system is one of this nation's greatest inventions, and one of its most valuable assets. Much of the genius of this system lies in its federal structure: the federal courts safeguard many of our most important rights, while the state civil justice systems truly have served as successful "laboratories of democracy." ?

Despite this basic soundness, our legal system needs reform. Business groups and others are concerned about frivolous lawsuits and unpredictable liabilities and their effects on innovation and competitiveness; consumer groups and others are concerned about meaningful and prompt access to justice and the impact of the legal system on public health and safety.

The administration believes that reform of the civil justice system is desirable, but significant changes to that system must be preceded by, and based upon, careful and thoughtful analysis. In particular, constructive reform of the civil justice system must respect both the balance between federal and state authority and the states' traditional role in developing the substantive law governing tort and contract actions.

If a thoughtful bill comes out, we'll look at - balanced reform

work prior Presidential statements in also vice President

Don't take tort reform away from states should lead with opposition, then go to reform

## The Administration Supports Reform of Federal Rules and Procedures

As a first priority, legal reform efforts should focus on *the reform of federal rules and procedures*: whenever possible the federal government should lead by example, not by mandate -- this is as true in legal reform as in welfare reform and regulatory reform. In particular, the administration believes the following areas provide opportunities to improve the functioning of the federal courts:

- *Reduce frivolous litigation*: The problem of meritless litigation and "nuisance suits" could be addressed by mandating sanctions for such filings (i.e., strengthening FRCP 11) and by imposing higher pleading standards on product liability actions (extending FRCP 9). The Administration supports these and similar revisions to the federal Rules.
- *Improve the efficiency of the legal system*: Long delays in a legal system disserve all interests, denying relief to legitimate plaintiffs and repose to responsible defendants. The administration supports a broad expansion of alternatives to litigation. Legal reform legislation should include meaningful incentives to use alternative dispute resolution (ADR) systems such as court-annexed arbitration. For example, a party (or in the case of a plaintiff, her counsel) who declines to participate in ADR and who ultimately fails in her claim could be required to bear some portion of the prevailing party's costs and attorney's fees (up to a specified limit).

Another example of a measure that would increase early settlements and reduce litigation and transaction costs in product liability cases is a limited fee-shifting provision for parties who declined an early offer of settlement and who obtained a significantly smaller judgment after trial. The Administration supports such targeted reforms in federal product liability cases.

- *Protect the public interest in the approval of settlements and orders*: In approving settlements and protective orders, a federal court must balance the interests of the parties and the public interest. In light of the significant public interest in preserving health and safety, the Administration supports a legal presumption against secrecy provisions that would prevent the release of information relevant to public health or safety.

## The Administration Supports Reform of the Federal Securities Laws

In addition, in areas of established federal authority, further substantive and procedural changes may improve the functioning of the legal system. For example, with regard to *litigation brought under federal securities law*, changes in the way that class

actions are brought, pleaded, and managed would reduce the wasteful "race to the courthouse" and the risk of meritless claims that has emerged in recent years. The administration is prepared to work closely with Congress and the Securities and Exchange Commission to enact reasonable reforms to redress these problems, so long as reforms preserve the rights of defrauded investors and the integrity of the American financial markets.

### **The Administration Opposes the Federalization of State Tort Law**

As a general rule, the administration opposes efforts to federalize state tort law. Product liability law has traditionally been the purview of state courts and legislators. If changes in state law are needed, those changes should be left to the states rather than have Congress pass laws governing the civil justice system at the national level. This allows for flexibility in a state's ability to respond to its civil justice system needs and the health and safety of its residents. It also allows for experimentation at the state level, so that reforms can be tested and empirical evidence generated to verify the claimed benefits of particular solutions.

Twenty states currently are engaged in tort reform efforts. Our system of federalism is working. *As in other spheres of government, proponents of Washington solutions to state and local problems should face a heavy burden of persuasion in justifying new and untested Washington regulation.*

Admittedly, some circumstances might create an important national interest that justifies a federal decision to preempt state law. History teaches that such usurpation of state authority ought be exercised with significant caution. Federalism concerns and public dissatisfaction with a too-often followed tendency to try Washington solutions argues strongly against federal preemption. Nevertheless, because Congress certainly has the constitutional authority to preempt state law, the administration would consider preemptive federal legislation if an important national interest justifying it has been clearly demonstrated.

### **H.R. 10, The Common Sense Legal Reform Bill, Is Unfair to Consumers, Would Undermine the Manufacture of Unsafe Products, and Threatens the Ability of Defrauded Investors to Gain Appropriate Redress**

#### **Products Liability Reform**

The administration believes Republican efforts at legal reform go too far. First, with respect to its provisions that would preempt state law, there has been little justification offered for a federal preemptive law of products liability: According to the National Center for State Courts, in recent years, products liability cases have represented only .36% of the state civil caseload -- and the number of products liability

filings has been on the decline. Products liability cases can hardly be blamed for the travails of our legal system.

H.R. 10 is particularly unwarranted where *the need to ensure full compensation for victims and responsibility for unsafe products are paramount concerns*:

- While each State has reconciled the various goals of the tort system differently, many States have emphasized compensation -- "making the innocent victim whole" -- as a central objective of their systems. To limit the recovery of compensatory damages -- whether directly or through differential treatment of noneconomic damages or through changes in joint-and-several liability rules -- is to trump the decisions of the courts and legislatures of these States. Because the federal interest in overriding state law has not been demonstrated to be significant, the Administration opposes preemptive legislation to limit the recovery of compensatory damages.
- With regard to arbitrary caps on or unreasonable standards for the awarding of punitive damages, the Administration's position is similar. All parties agree that, in certain rare circumstances, punitive damages are appropriate. There is not, however, any *a priori* basis for fixing a ceiling on the award of punitive damages, measured either by a dollar amount or as a multiple of compensatory damages; instead punitive damages are and should be imposed based on the facts and circumstances of the particular claim: one claim may warrant \$100 in punitive damages, another \$1 million. Accordingly, the Administration believes that preemptive legislation to place a cap on punitive damages collectible under state law -- or to place unreasonably high standards on the award of such damages -- is unsound. To do so would undeter the manufacture of unsafe products.

#### Federal Court and Securities Law Reforms

The administration also believes that several of the Republican reforms offered for federal courts and the federal securities laws are too extreme:

- With respect to fee-shifting, the administration strongly opposes the "English rule" proposal in H.R. 10 (which would apply to all diversity actions in federal court). Such a rule is grossly unfair to innocent plaintiffs and, according to economic studies, may actually increase total litigation costs.
- With respect to reforms of the federal securities laws, the administration supports reasonable reforms but believes that certain provisions in the House bill -- including those concerning fee-shifting, proportionate liability,

pleading reform, a definition of recklessness, the fraud-on-the-market theory, statute of limitations, plaintiff steering committees, damages calculations, and a safe harbor for predictive statements -- are problematic. Again, the Administration hopes to work closely with Congress and the SEC to resolve its concerns so that balanced and targeted legislation can be enacted that addresses the problem of frivolous suits while preserving the integrity of the American financial markets.

THE WHITE HOUSE

WASHINGTON

February 24, 1995

MEMORANDUM FOR THE PRESIDENT

THROUGH: LEON PANETTA, ABNER MIKVA & BO CUTTER  
FROM: JOEL KLEIN, BRUCE LINDSEY & PETER YU  
SUBJECT: LEGAL REFORM ISSUES

This memorandum outlines for your approval a proposed strategy for addressing legal reform issues currently before Congress.

I. BACKGROUND. Congress is considering (i) civil justice reforms (such as the "loser pays" or English rule for actions brought under federal diversity jurisdiction), (ii) securities litigation reforms (such as limits on shareholder class-action suits), and (iii) product liability reforms (such as changes in the law of damages). Proponents of reform claim that the current system is unfair, wasteful, stifles innovation, and undermines US competitiveness. Opponents of reform contend that the proposals are unnecessary and serve only to shield defendants from liability and, in the case of product liability, to federalize an area traditionally controlled by state law.

Both you and the Vice President have been critical, or at least skeptical, of reforms of the legal system through preemptive federal legislation. Attachment A offers selected press accounts of your statements on these issues.

The empirical evidence regarding the need for reform is far from definitive. While each side marshals data that appear to support its claims, independent studies have reached mixed conclusions. These studies suggest that in the 1980s litigation increased significantly (largely due to asbestos-related claims), but also that the filings in more recent years evidence no clear trends. With regard to product liability cases, the studies also fail to support charges that damage awards have been increasing dramatically. In response, proponents of reform emphasize that the mere threat of large awards has a deleterious impact on American innovation and competitiveness.

The legal reform legislation included in the Contract with America is, by most accounts, quite extreme (see Attachment B). However, the House Commerce Committee recently moderated the securities provisions somewhat. Senator Dodd has introduced a securities litigation reform bill that is less extreme than the modified Contract provision; Congressman Markey has introduced an even more shareholder-friendly bill. With regard to product liability, Senator Rockefeller has for several years championed a more moderate approach than the Contract bill; last session, a cloture vote on his bill failed by only 3 votes. Most observers believe that the House will pass legal reform legislation relatively quickly (perhaps within a few weeks) but that the Senate will not begin work on a bill until late spring. Senator Rockefeller has not

reintroduced his bill and it is not clear whether his bill or a more extreme version championed by someone else will be the primary vehicle in the Senate. It is possible that a Rockefeller-type bill on products reform and a Dodd-type bill on securities reform will emerge as "compromise" approaches.

A White House team led by the Counsel's office and the NEC has consulted with Justice, Treasury, Commerce, and the SEC to develop the following strategy for addressing these issues. The Vice President was involved with this issue in the Senate, and would like to discuss it with you prior to your decision.

II. CONSENSUS RECOMMENDATION. The group supports a three-part approach.

- With regard to **civil justice reform**, the group recommends that the Administration firmly oppose the "English rule" proposal in the Contract bill (which applies to *all* diversity actions in federal court), arguing that it is grossly unfair to innocent plaintiffs and may increase total litigation costs.
- With regard to **securities litigation reform**, the group recommends that the Administration work with the SEC to encourage reforms that fall somewhere between the Dodd and Markey bills. Such a package might include measures to reduce the "race to the courthouse" and the risk of meritless claims, but would not include reforms that would significantly weaken private enforcement of the securities laws, encourage fraud, or be inconsistent with the Administration's position on product liability reform. The Administration's initial public position would be to favor "reasonable" reforms and to list those provisions in the House bill that are problematic.
- With regard to **product liability reform**, the group recommends that the Administration emphasize a **strong presumption against preemptive legislation, the need to ensure full compensation for victims and responsibility for unsafe products, and a package of federal-court reforms.** This position would stress that product liability reform is generally a matter of state law (a position bolstered by a proactive position on federal securities litigation reform). The Administration would consider preemptive legislation only if the federal interest in preemption was clearly demonstrated. For example:
  - If we were convinced an important national interest had been clearly demonstrated, we would not oppose reasonable preemptive *standards* (such as "clear and convincing evidence") for punitives. (Business groups argue such standards provide businesses with needed predictability.)
  - At the same time, there has been little justification for federal preemptive provisions in other proposed areas -- particularly where the need to ensure full compensation for victims and responsibility for unsafe products are paramount concerns:

- \* *arbitrary caps on or unreasonable standards for the awarding of compensatory or punitive damages and the discriminatory treatment of noneconomic damages* -- such standards are not only unfair to consumers, they also underdeter the manufacture of unsafe products; and
- \* *regulatory defenses that immunize manufacturers* -- as demonstrated by DES, Copper-7 IUDs, and high-estrogen birth control, simply because a product survives government review does not ensure its safety and should not provide immunity to a manufacturer.

The Administration would also *advocate pro-consumer positions* such as limits on secrecy agreements in settlements in federal court and *reforms in federal court* designed to encourage alternatives to litigation and decrease frivolous suits without underdetering negligence.

### III. ANALYSIS

This approach balances several purposes. First, it is consistent with your expressed concerns regarding both the fairness of reforms and the federalization of tort law. Second, it plays upon the extreme nature of the English rule as well as the Republicans' inconsistent positions (in supporting federalization of the legal system but devolution in every other sphere of government). Third, it indicates a willingness to entertain *justified* preemptive legislation and thus will not wholly alienate business interests. Fourth, it raises consumer concerns and challenges the premises of Republican reforms by highlighting portions of the Contract bill you find to be unjustified, especially given federalism's strong presumption against preemptive legislation and the lack of empirical data to support proponents' claims.

As always, there is some risk that such a modulated approach--while sound policy--will be viewed in the current environment as equivocal. However, the group believes that this approach places the Administration in the best position to influence the development of this legislation and to threaten a veto if consumer interests remain unaddressed.

### IV. DECISION

\_\_\_ Proceed with consensus recommendation.

\_\_\_ Let's discuss.

## ATTACHMENT A: PRESS ACCOUNTS OF PAST STATEMENTS

### President Clinton

- "The proposals advanced by George Bush and Dan Quayle [presumably including S.640, the Rockefeller bill] are dramatically tilted toward big polluters, manufacturers and insurance companies, and against consumers and victims." *The Candidates on Legal Issues*, ABA J., Oct. 1992, at 57.
- "Bush and Quayle want to cap the ability of juries to award victims punitive damages, even when that is the only way to bring a powerful offender to justice, or to keep a dangerous product off the market." *Id.*
- "[Bush and Quayle] want to make victims pay the legal fees of big manufacturers, if, for some reason, they sue and lose. It is nothing more than trickle-down justice." *Id.*
- "As a general matter, I believe that legal reform should be enacted in the laboratories of the States, rather than at the federal level." *Id.*
- "In my view, the best reforms are those that make it less likely for people to go to court. We should encourage greater use of alternative dispute resolution to give consumers redress without having to litigate, such as mediation, mini-trials, and the multi-door courthouse. We should also encourage the use of special masters to help sort through complex cases. And we should restrict the use of secrecy agreements, which too frequently force litigants to refight the same battles, over and over, while endangering public health." *Id.*
- "But I will oppose any proposals that pretend to 'reform' lawsuits while actually encouraging dangerous products or marketplace fraud." *Id.*

### Vice President Gore

- Voted against S.640, the Rockefeller Bill, in the Commerce Committee in 1992.
- Co-authored Minority Views in the Commerce Committee report on product liability legislation in 1990.
- Widely quoted in press as having deemed the Rockefeller bill "anti-consumer."

## ATTACHMENT B: LEGAL REFORM BILLS

The more controversial provisions of the Contract bill (as revised in committee) include:

- Civil-justice reforms for federal courts:
  - a "loser pays" or "English rule" attorney-fee regime for diversity actions brought in federal court; and
  - tighter rules regarding expert scientific testimony.
- Product liability reforms that govern both federal and state court claims:
  - limits on the liability of product retailers;
  - "clear-and-convincing" and "actual malice" standards for punitive damages;
  - a cap on punitive-damages awards; and
  - a bar on joint-and-several liability for noneconomic damages.
- Securities litigation reforms (as modified by the House Commerce Committee):
  - a fee-shifting provision if the court finds that a losing party's position was not substantially justified;
  - a recklessness standard and pleading requirements significantly greater than the law of several circuits; and
  - a proportionate liability provision in certain fraud actions.

The civil justice reform provisions could significantly reduce suits by smaller parties (such as consumers) against larger parties. The product liability provisions preempt an area long the province of state courts and legislatures. The securities litigation provisions would eviscerate private enforcement actions.

The primary features of S. 687, introduced last session by Senator Rockefeller, include:

- establishment of a federal fault standard for punitive damages (including a safe harbor for FDA- and FAA-approved products), but no cap on punitive damages;
- elimination of joint and several liability for noneconomic damages;
- incentives for out-of-court settlements and for the use of alternative dispute resolution;
- uniform statutes of limitation and repose for product liability claims.

Consumer and attorney groups were particularly critical of the distinction between economic and noneconomic damages, limitations on joint and several liability, and the FDA/FAA safe harbor.

The Dodd bill on securities-litigation reform includes:

- guardians ad litem and steering committees for class actions;
- a more stringent scienter requirement;
- limits on attorneys fees to a "reasonable percentage of the amount recovered";
- restrictions on the use of civil RICO in securities law claims; and
- proportionate liability in certain fraud actions.

Consumer and attorney groups were particularly critical of the proportionate liability provisions and the limits on attorneys fees.

document name: newsweek.int Douglas Letter

POSSIBLE QUESTIONS IN NEWSWEEK INTERVIEW  
REGARDING CIVIL LITIGATION REFORM

6. Is the fact that the legal system costs too much and is too slow the fault of lawyers, judges, or both? Is it the fault of Americans who sue over every little thing?

- Blame cannot be placed on any single group
- True that there are suits in court systems that should not have been brought -- some fault must be assigned to lawyers and litigants
- Personal experience as a judge in DC Circuit showed that many cases could be settled or resolved fairly without full litigation -- these litigation avoidance and minimization mechanisms must be expanded and used more.
- Important in federal sphere to have full complement of judges so that the federal system can work optimally; this Administration is working hard to fill judicial vacancies, and looks forward to cooperation from Senate in getting qualified judges confirmed.

7. Do you think there is room for a "loser pays" system for attorney fees, with the losing lawyer paying the bill?

- No; no reason to think in general this is a good way to address problems in legal system
- Would deter too many valid suits
- Mechanism already exists for judges to penalize frivolous claims in federal system
- Must understand that just because one side loses does not mean that side did not have a good case; often law in many areas is unclear and it develops over the course of several decisions by judges; many cases I have seen could have gone either way

[Note that we might agree with SEC and support an expansion of the current statutory provision that a judge can award fees when the loser's case was "without merit" in the limited securities fraud area. However, judges appear to apply that current provision in a conservative way, and thus, in practice, it might be little or no different from FRCP 11.]

16. Hasn't Congress already provided for a loser pays system in the Equal Access to Justice Act?

- Congress has provided in the Equal Access to Justice Act for payment of fees by the US Govt when an agency has not acted or litigated in a way that is substantially justified. This is a one-way mechanism for Congress to encourage certain small businesses and individuals to sue the Government.

- Nothing in the experience with that statute leads me to think that it would make sense to do something totally different and provide for a loser pay system across-the-board

8. Is the contingency fee system a good one, or is it part of the problem?

- Not aware that contingency fee system is the cause of problems in the nation's legal system
- Seems to be a good mechanism for allowing those who would not be able to afford to pay hourly rates to lawyers nevertheless to obtain counsel to bring valid cases when they are injured
- It may be that lawyers' charges need to be regulated in some instances; definitely not a task to be done for entire nation from Washington, D.C.; best left to individual states or bar associations to analyze and determine based on factors in local area.
- Moreover, if fees charged by plaintiffs' lawyers are to be regulated by Washington, legitimate to ask if defendants' lawyers hourly-based fees should also be regulated; litigation is a two-way street.

[Note that in at least two areas of strictly federal practice, atty fees have been regulated for years. Those representing veterans could charge only minimal fees; those representing Social Security claimants are limited to getting maximum of 25% of the amount awarded the claimant, with the actual fee being set by the judge in the individual case.]

11. Does the fact that the President and First Lady are lawyers undermine the possibility for reform in this Administration? Are they under the influence of trial lawyers, who like the current system because it means great financial rewards for lawyers?

- Fact that President and First Lady are lawyers should not affect issue at all; if anything, means they have inside knowledge of problems with system, and are thus well qualified to weigh changes that must be made.

- Not under influence of trial lawyers, either for plaintiffs or defendants. Focus of this Administration is on fairness and balanced reform; look to what is fair, and properly compensates injured consumers and victims, while at same time ensuring that the nation's legal system does not inappropriately hinder economic performance and growth.

12. Do you see a need for reform of the private securities fraud law suit area?

- Yes; staff and I have met with Chairman of SEC, as well as representatives from Treasury, Commerce, and Justice. We are consulting and coordinating closely on this issue, which involves some very technical questions. Administration and SEC are in agreement that reforms are needed, and basically agree on what those changes should be. Working with SEC to figure out best way to change law.
- Expect to be working with Congress on this. Have strong disagreements with bill now in House, but hope to cooperate with Senate and ultimately with House to decide on what reforms are most likely to work.
- Like the SEC, we do not favor reforms that will hinder ability of investors to seek redress when there has been fraud or recklessness by corporations, and their accountants and lawyers.
- At same time, we are well aware of the possible past abuses of the legal system that might have discouraged corporate innovation by some of the nation's great success stories in the high-tech field; we are working to address the best and fairest way to meet interests of all parties involved.

13. Have your views on legal reform changed since you left the bench and came to the White House? Did you on the bench sanction lawyers who brought frivolous suits?

- My views on this issue have been the same for a number of years, and appear to be consistent with those expressed by the President in statements; I am wary of changes to the judicial system that do not protect the ability of victims to collect appropriate compensation, and for punitive damages to be imposed in those few, rare instances when they are appropriate.

- As Chief Judge on the DC Circuit, I gave considerable attention and time to making that court's mediation program work in order to shorten litigation and get cases out of court. That program is working well, and I would like to see this type of effort greatly expanded in courts throughout the US.

- I learned from being a judge on the DC Circuit that rules and procedures that work on that court are not necessarily appropriate for other courts, even other federal courts of appeals. Reinforces my impression that an attempt at centralized regulation of state court systems from Washington DC is a big mistake unless there is first a strong showing of necessity for national uniformity.

[Did you impose sanctions against attys or litigants?]

14. There have been recent reports (in the LA Times, I believe) that the compulsory arbitration scheme in the securities area works in practice to protect the securities dealers against investors; isn't there a danger that arbitration schemes can have that result?

- Certainly a danger of that; not personally aware of evidence whether the scheme in the securities field works well or poorly.

- Good reasons from experience to think that binding arbitration to head off litigation can work fairly and efficiently.

15. Do you know any good lawyer jokes? How many lawyers does it take to change a light bulb?