

**NLWJC - Kagan**

**DPC - Box 070 - Folder-005**

**Miscellaneous Emails, Notes etc.**

Victor Schwartz 11/19/96

Sen. bus common w/ Hroch - Gingrich / Allor  
Chamber / NFIB / NAM

saying - let's not repeat  
do prod bill w/in 100 days -  
one that can be signed

vs - talked w/ Rockefeller - he + Lieberman want to be key  
players.

→ Garten  
Votes are abt the same ~~here~~ in Senate  
60 or 61.

Collins (Osher)  
Enzi (Trumpson)  
Sessions (Bethlin)

Cleland (Nunn)  
Landriscan  
Hatchinson

↓  
b/w h business

↓  
worse

Imp. not to have diff Admin views  
(Schmidt + / Harper / Lindsay / Quinn -  
all saying different things)

Window of abt 100 days.  
Then crises on both sides get in.

Have little history -

Quinn  
Schwartz  
Belue

rearrange follow - Twigg (AFCA)  
his deputy

THE WHITE HOUSE

WASHINGTON

June 14, 1996

MEMORANDUM FOR LINDA MOORE

CC: JACK QUINN, BRUCE LINDSEY, KATHY WALLMAN  
FROM: ELENA KAGAN *EK*  
SUBJECT: TELEPHONE CALL WITH JIM RUVOLO

As you requested, I called Jim Ruvolo earlier this week to discuss the President's veto of the products liability bill. Ruvolo requested that I send him the text of the veto message, along with a letter indicating a willingness to have further discussions on the subject (but with no specific timeframe mentioned). I am attaching that letter (without enclosure). Let me know if you or Harold would like me to take any further action.

THE WHITE HOUSE

WASHINGTON

June 14, 1996

Mr. Jim Ruvolo  
Ruvolo and Associates  
405 Madison Avenue, 12th Floor  
Toledo, Ohio 43604-1220

Dear Jim:

As we discussed, I am sending you a copy of the President's veto message on the Product Liability Reform Act.

As the message states, and as the President often has said in the past, the President supports meaningful product liability reform, so long as appropriately limited in scope and balanced in application. He gladly would sign a bill meeting these standards.

We would be happy to have further discussions with you on possible legislation. It was certainly good and useful to meet with you earlier this year.

Sincerely yours,



Elena Kagan

Associate Counsel  
to the President

Jim Ruolo -

Veto msg

letter from me  
or Harold

Here's veto msg.  
Further discussions on subset  
points. (no mention of <sup>time</sup> frame.)

from me -

# Ruvolo & Associates

405 Madison Avenue 12th Floor  
Toledo, Ohio 43604-1220

To: Elana Kagan Room 125  
Re: Linda Moore

419/242-6100

419/241-1244

FAX: 419/241-5210

*per our discussion*

*sent  
4/12/96*

## MEMO

To: Harold Ickes  
From: Jim Ruvolo *JR*  
Re: Product Liability

Thank you again for the time that you spent with us on Friday. Both Owens-Illinois and Owens Corning appreciated the opportunity to present their views on this issue.

I would like to restate the points that were made by the group:

- The veto message should point the way to some future agreement.
- If possible, contact should be made with Senator's Rockefeller and Liberman to see if a compromise can still be reached this year. If the administration and the senators can agree it will be up to the industry to seek Republican support.
- If the issue must wait until next year, the administration will have direct contact with representatives of industry in trying to reach an agreement on a bill.

I believe that the industry leaders on this issue want a compromise that will allow them to make more investments for job creation while also protecting those who seek compensation due to defective products.

I look forward to hearing from you.

**CROWELL & MORING**  
1001 PENNSYLVANIA AVENUE, N.W.  
WASHINGTON, D.C. 20004-2595  
(202) 624-2500

*Elena*

VICTOR E. SCHWARTZ  
(202) 624-2540

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FACSIMILE (714) 263-8414  
*Crowell*  
180 FLEET STREET  
LONDON EC4A 3HD  
44-171-413-0011  
FACSIMILE 44-171-413-0333

June 12, 1996

Jack Quinn, Esq.  
Counsel to the President  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

Dear Jack:

Just a note to thank you and Elena Kagan for your time and thought in discussing whether an alternative Product Liability Bill might be fashioned, that could be supported by the Administration, Congress and reasonable persons in the business community. After almost two decades of trial and error, the issue should come to a fair and rational conclusion.

After you have had some time to discuss the approach that we exchanged views about with other appropriate folks in the White House, let us get in touch to see if any further progress can be made.

With appreciation again,



6-3-96 Mtg w/ Victor Schwartz

1. Exempt wholesalers/distributors <sup>unless</sup> if manufacturer aware.

2. 18 yr SOL

3. Punitive - get rid of by history

Std of misconduct/care. Negligent disregard of safety ? 2 was  
burden of proof | clear + convincing ev. } Preemption

But caps would stay - basic  
They would be 1-way preem

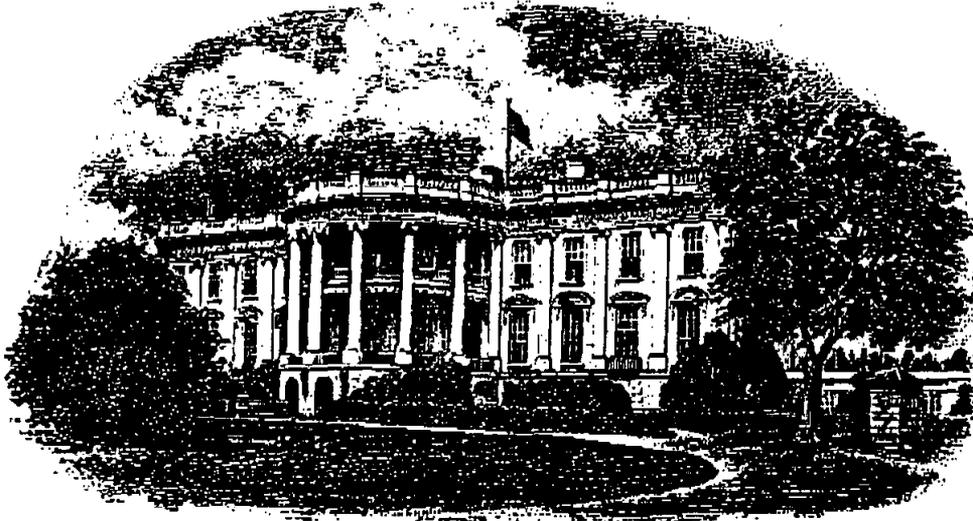
4. ST liability -

same de minimis approach - e.g. less than 25%  
responsible

Patent electric

4. Repubs may hold hostage -  
can deal w/ them?

The White House  
Office of Presidential Letters and Messages



Facsimile from Jeff Dalley

Phone: (202)456-5517

Fax: (202) 456-2806

To: Elana Kagan

No. of pages (including cover): \_\_\_\_\_ Date: 5-3

Phone: \_\_\_\_\_ Fax: 61647

Comments: Search letter...

Do you have any advice on how to respond? Should we use our 956 veto language?

Thanks,  
JEFF

11-E  
*[Handwritten signature]*

28 96438

# MILBERG WEISS BERSHAD HYNES & LERACH

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SAN DIEGO, CALIFORNIA 92101-3356

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JEROME M. CONIGRES\*  
KEITH F. BARK\*  
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PAUL S. YOUNG\*

OF COUNSEL  
JARED SPECTHRE  
RICHARD M. MEYER\*

LAWYERS MILBERG (1913-1980)  
\*ADMITTED IN NY  
\*ADMITTED IN PA

May 2, 1996

FEDERAL EXPRESS

Honorable William J. Clinton  
THE WHITE HOUSE  
1600 Pennsylvania Avenue, N.W.  
Washington, DC 20500

Re: Ford Motor Recall

Dear Mr. President:

Enclosed is The New York Times report of the massive Ford Motor recall of over 8 million vehicles with defective ignition switches. These defective ignition switches posed a serious safety hazard and have resulted in hundreds of vehicle fires.

I wanted you to know that Ford was forced to recall these vehicles as a result of a consumer class action lawsuit that I and a few other lawyers filed in federal court. On two occasions in the past, the federal agency overseeing automobile safety investigated this situation and took no action! It took a class action lawsuit by consumers and private lawyers to achieve the largest auto recall in history.

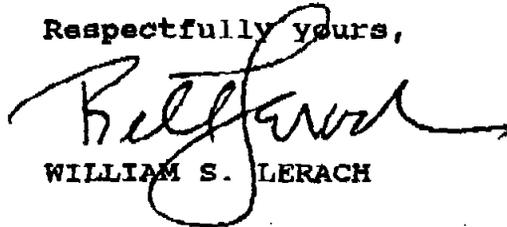


WEISS BERSHAD HYNES & LERACH LLP

May 2, 1996  
Page 2

I commend you for your efforts to try to preserve the private litigation system in our country. The Ford recall case highlights how important that system is to the protection of American consumers.

Respectfully yours,



WILLIAM S. LERACH

WSL:kl  
Enclosure

cc: Hon. Albert Gore, Jr.  
Bruce Lindsey  
Harold Ickes  
w/Enclosure

P.S. Polls Look GREAT -  
Hope to see you in  
Calif. soon.



E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

01-May-1996 11:32am

TO:           (See Below)

FROM:         Jeremy D. Benami  
              Domestic Policy Council

SUBJECT:     Product Liability Veto

Wanted to pass along a message from Phyllis Greenberger re the Product Liability veto.

Phyllis is Executive Director of the Society for the Advancement of Women's Health Research and is also a member of the President's AIDS Advisory Council. She is a friend of the administration's and of the First Lady.

She wanted to stress that it would not be a good idea for the President to highlight the breast implant issue as part of the veto ceremony - i.e., not have one of the people with the President tell that particular story.

I don't know whether this is good or bad advice since I am not involved in the issue, but I did want to pass it along to you folks who I assume are putting the event together.

Marilyn: I suggested that Phyllis call you directly to discuss.

Distribution:

TO: Marilyn Yager  
TO: Victoria L. Radd  
TO: Elena Kagan  
TO: Jennifer L. Klein

CC: Deborah L. Fine  
CC: Carol H. Rasco



U.S. Department of  
Transportation  
Office of the Secretary  
of Transportation

# Memorandum

Subject: The Impact of H.R. 956 on Transportation Safety

Date: March 27, 1996

From: Nancy E. McFadden  
General Counsel

Reply to  
Attn. of:

To: Kris Balderston  
Office of Cabinet Affairs

This is in response to your request for information regarding the impact of H.R. 956, the Common Sense Product Liability Legal Reform Act of 1996, on transportation safety. The attached material outlines possible consequences of the bill's statute of repose and presents examples of how manufacturers' liability concerns have influenced product safety enhancements.

We will continue to gather additional information concerning the safety impact of this legislation. Should you have any questions or comments regarding the enclosed material, please do not hesitate to contact me at 202/366-4702.

Attachment

## The Impact of H.R. 956 on Transportation Safety

### 15-Year Statute of Repose

- Latent defects in transportation-related products that have useful lives exceeding 15 years could result in serious injuries and substantial loss of life after the expiration of the statutory period. While the exceptions to the statute of repose preserve a consumer's cause of action in some of these cases, lawsuits over defects in a wide array of conveyances and other transportation-related products are absolutely barred after 15 years, as are suits over accidents in which harm resulted from the spill, release, or explosion of non-toxic hazardous materials. The following persons, for example, would be precluded by this provision from recovering any damages for death or injury caused by defective products:
  - Families of children killed or injured when their school bus is hit by a train at a grade crossing if the accident is caused by a faulty warning signal that is more than 15 years old.
  - Persons killed or injured by an underground gasoline pipeline explosion caused by a defective pipeline that is more than 15 years old.
  - Persons killed or injured in a subway collision caused by a faulty signal or switch that is more than 15 years old.

### Punitive Damage Provisions

- The bill's strict limitations on punitive damage amounts and its requirement that they be proven by "clear and convincing" evidence, as opposed to the traditional preponderance of the evidence standard, remove strong legal incentives to manufacture products that provide an appropriate level of safety. Accordingly, H.R. 956 could be a disincentive for the manufacture of safe modes of transportation and could discourage safety-related research and product improvements. Of course, no manufacturer would concede that a particular product safety improvement was prompted by liability concerns. However, a number of safety improvements in transportation-related products were prompted at least in part by such concerns:
  - A study published by the Brookings Institution in 1991 concludes that liability concerns were a factor in the following motor vehicle design changes that enhanced safety: Ford Pinto fuel tank re-design, discontinuation of three wheel All Terrain Vehicles and curtailed marketing of such vehicles to children.

**Jeep CJ roll bar re-design, introduction of rear-seat shoulder belts.**

- In 1979, the railroad industry voluntarily adopted a tank car skid protection design and began a program to retrofit existing tank cars with the safer design. Skid protectors shield the valves on the underside of tank cars in the event of a derailment and thus help prevent spills of hazardous materials -- a derailed tank car without such protection caused a hazardous spill last week in Ada, Oklahoma. Product liability concerns were a key factor in adopting this design change.
- Commercial aircraft manufacturers have made numerous voluntary design changes to aircraft after major accidents have revealed design defects. These changes may have been followed by similar FAA requirements, but were initiated by the manufacturers themselves. While concerns over future liability were not necessarily the only factors that motivated these changes, such concerns could have arisen after court judgments and settlements following the accidents. The following are examples of these design changes:
  - Enhancement of DC-10 hydraulic system to ensure retained directional control where hydraulic system has been damaged -- outcome of United Sioux City accident.
  - Installation of floor lighting to aid passenger egress from smoke-filled cabin -- outcome of Air Canada Cincinnati accident.
  - Addition of third locking system on B-767 thrust reversers -- outcome of Lauda Air Thailand accident.



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

*Legislative Reference Division*  
*Economics-Science-General Government Branch*

411

TO: Elana Kagan

AGENCY: \_\_\_\_\_

FROM: **JEFFREY WEINBERG**  
(Tel(202)395-3457 Fax(202)395-3109)

1 PAGES FOLLOW THIS COVER SHEET

**COMMENTS:**

FYI - HHS views letter on

HR 956 - Product Liability.

62



THE SECRETARY OF HEALTH AND HUMAN SERVICES  
WASHINGTON, D.C. 20201

MAR 22 1996

The Honorable Alice M. Rivlin  
Director, Office of Management  
and Budget  
Washington, DC 20503

Dear Mrs. Rivlin:

This is in response to the request of the Office of Management and Budget (OMB) for the views of the Department of Health and Human Services (HHS) on H.R. 956, an enrolled bill entitled the "Common Sense Product Liability Legal Reform Act of 1996".

The portion of the enrolled bill chiefly of interest to HHS is title II (Biomaterials Access Assurance). That title would protect biomaterials suppliers who furnished raw materials or components to manufacturers of medical devices, but who were not themselves manufacturers of those devices, from liability in suits alleging that the devices were defective. As HHS has advised OMB on numerous occasions while H.R. 956 and similar bills were being considered by the Congress, we have no objection in principle to legislation sheltering biomaterials suppliers from liability to the extent provided in the bill.

However, we have also made clear that we strongly oppose such a proposal if it would involve this Department in product liability litigation or increase the workload of the Food and Drug Administration (FDA). The enrolled bill falls afoul of this test. It would allow defendants in such litigation to establish relevant facts concerning compliance with FDA requirements for registration of device manufacturers and products either by using their own records as supporting documentation, or by petitioning the Secretary for a declaration concerning the relevant issues. HHS would be required to act on the petition within 180 days. The negative consequences we wish to avoid--entanglement in litigation and increased burdens on the FDA--would be the inevitable result.

HHS would therefore oppose enactment of title II of H.R. 956 if it were a separate bill. However, we defer to the Department of Justice on the merits of the bill as a whole.

Sincerely,

Handwritten signature of Donna E. Shalala in cursive script.  
Donna E. Shalala

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

01-Apr-1996 10:00am

TO:            Elena Kagan

FROM:          Todd Stern  
                Office of the Staff Secretary

SUBJECT:      veto gal

I understand you've got the contract on the product liability veto. Can you let me know when you've got a draft suitable for circulating. I'd like to get it around as soon as you're ready. Thanks.

Products 3/30

Ohio cos: OC / OT

Corp. responsib. OC imulatic  
electronics components

OI - glass bottles

plastic containers

veho shut - why have to be so strict?

Able to retain vision of possibility  
need running room.  
hope + promise.

should have positive indic.

room for latitude.

crit. shaker's vts - never a bill  
stank like this.

1) Punitive cap - runaway juris.

2) Jt + several

↳ Judicial flexibility - let judge waive  
the rule when unfairness to woman.

Even this year - still possible.

Many ways to compromise this issue.

Other comp:

Threshold of responsibility - e.g. 50% responsible.

This bill is a compromise - even v. narrow.

Veto msg - scoured carefully by business.

→ Letter - didn't leave much of door open.

Make deal w/ Rock / Liberman

Good politics

Then see whether they'll accept.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

28-Mar-1996 01:22pm

TO:           Bruce R. Lindsey  
TO:           Jennifer D. Dudley

FROM:         Marilyn Yager  
              Office of Public Liaison

SUBJECT:     chief justices

Justice Felman (chief Justice of Arizona) not only wants to be helpful on the product liability issue, but wants to talk about a resolution the Conference of Chief Justices are going to pass ( or have just passed) opposing the Product liability Conference Report. Justice Feldman will be in Washington until tomorrow morning (202/429-2400, room 1045) and then can be reached in Arizona at 602/542-4532.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

26-Mar-1996 12:14pm

TO:            James J. Jukes

FROM:          Peter Jacoby  
                Office of Legislative Affairs

SUBJECT:      RE: Product Liability

Jim: The House Rules Committee meets tomorrow to consider a rule for floor consideration of the product conference report in the House. It is not clear however, whether this means the House will take up the report this week. The floor schedule is very full already and there is some thought that proponents of the conference report would like to use the recess to whip up support for the veto override. Alternatively, the House Democratic leadership staff is somewhat apprehensive about the conference report coming up late in the week when Members are trying to get out of town and the Democrats needed to oppose the bill are in relatively short supply.

I will keep you posted as things develop.

THE WHITE HOUSE

WASHINGTON

March 28, 1996

MEMORANDUM FOR HAROLD ICKES, GEORGE STEPHANOPOULOS,  
JOHN HILLEY, DON BAER, ALEXIS HERMAN

THROUGH: JACK QUINN, BRUCE LINDSEY

FROM: ELENA KAGAN *EK*

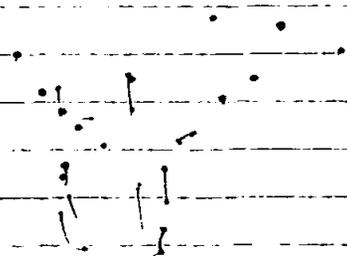
SUBJECT: PRODUCTS LIABILITY

Attached is a draft veto statement for the products liability bill. Let me, Jack, or Bruce know if you have any suggestions or comments.

# Products

Get draft veto shut around  
note anecdotes in back.

circulation?



# Randy Picher

Daw  
breast

Robbins  
↓  
TUD

Mannille  
↳ as to tort

Injury from device prior to Barker.  
filed suit already

suit stopped - automatic stay

people need relief from stay -

gets judgment  
then ask for <sup>if from</sup> ~~banker~~ ct.

if not <sup>highly</sup> a suit -  
file proof of claim  
unsecured CTEs

stops pending suits  
prevents new suits

same  
point

could get  
Q → something

puts all in banker  
ct.

banker ct  
excludes surplus of all assets of a  
Dr.

Most of mess -

p. exposed but haven't manifested injury yet.  
Can we ID them as claimants today?

← May have disposed of all assets.

Ways of dealing:

1) Fund held - let claims roll in. - liquidated

2) If bus. is near'd - claims continue  
(as you'll see - claims are discharged).  
(but here - claims may survive discharge)

post-bankr. injuries. | claims you don't know abt  
at time of banker.

Assume victim  
bankrupt co. | stayed

need relief from stay. - not automatic

if provided,  
that's OK.  
then you can  
go file.

so can you toll your claim  
as the S of L runs out on  
you?

1080 - later of  
end of S of L  
or 30 days after end of  
stay.

but can file proof  
of claim.

no  
adjud on the merits  
yets.

judge will estimate - re what msec. does get

you have op to bring  
claim within the  
time set by 1080

So, it would have effect -  
a) when there are assets for a  
claimant to get (already filed  
proof of claim)  
b) claimant doesn't meet the  
30-day deadline.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

22-Mar-1996 02:46pm

TO:           John O. Sutton  
TO:           Jennifer D. Dudley  
TO:           Marilyn Yager  
TO:           Elena Kagan  
TO:           Barry J. Toiv

FROM:          Adam R. Kreisel  
              Office of the Chief of Staff

SUBJECT:      Product Liability prep

Leon Panetta is meeting with consumer groups (product liability) on Tuesday at 10:00 am in the Roosevelt Room. There will be a prep for the meeting at 9:30 am in the Chief of Staff's office.

Participants for 9:30 am prep:

Leon Panetta  
Harold Ickes  
Marilyn Yager  
Bruce Lindsey  
Elena Kagan  
Barry Toiv

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

22-Mar-1996 12:59pm

TO:           (See Below)

FROM:         Marilyn Yager  
              Office of Public Liaison

SUBJECT:     product liability meeting

We have scheduled a brief internal meeting today at 3:30 pm in Room 122 (lee Satterfield's office) to discuss coordination of public response to our product liability position, and more specifically to organize the Tuesday morning meeting between Leon Panetta and consumer groups. Please come or assign someone from your office to come.

Distribution:

TO: Kathryn Higgins  
TO: Bruce R. Lindsey  
TO: Elena Kagan  
TO: Ellen S. Seidman  
TO: Barry J. Toiv  
TO: John P. Hart  
TO: Karen L. Hancox  
TO: Susan Brophy  
TO: Tracey E. Thornton  
TO: Lorraine McHugh  
TO: Mary Ellen Glynn  
TO: Michael Waldman

br. implant that causes injury

~~Vets stand~~

For example  
adversely affect

br. implant

man X

man Y -

supplier of  
gel - Tith II  
protected

~~Causes of  
differences~~

~~innocent  
suppliers  
of raw mat'l~~

~~gel is a manufactured  
product.~~

~~said unacceptable  
cost report  
needed such  
in.~~

paint m. therapy

50% - back-up T

50%

so

~~lay down market now~~

Even supporters would  
salute this result

Real p. w/ real problems.  
Compelling example

~~work → gun purchase  
tax  
cute w/ violence apt  
guns  
net. gun-type crgs.  
- small funds  
- net embasment~~

~~WOMEN~~

~~newborn  
wear  
manicure  
laid down~~

~~Senate bill  
part report  
move back to  
unaccept task  
house bill  
- not accept  
position by us.~~

~~Ex: all gun dealer  
 star or repair -  $\phi$   
 $\rightarrow$  durable prod!  
 otherwise  
 no punis  
 if bankrupt, no non-ecur  
 picked up~~

woman w/ breast implant

50% bankrupt -  $\phi$

50% gel supplier -  $\phi$

usually events picked up  
but " support

50% + this  
partic

even if come  
out of bankruptcy,  
may miss  
chance!

~~(Thurs)  
 Title (that  
 make us  
 percent  $\phi$ )  
 shapes gun hole  
 - banking  
 - S4 Report  
 - way Eub.  
 Utilities  
 Examples (2)  
 Gen Dealer  
 Breast implants~~

Conclusion -

Propr Bullentine.

102 (c)

Provision of bill -

"remediate  
year"

meant to carve out  
Superfund??

Change can't figure out  
"or the threat of such  
remediation"

Narrowing the  
exemption ~~is~~  
But what King  
means exactly?

EXECUTIVE OFFICE OF THE PRESIDENT

19-Mar-1996 10:13am

TO: Elena Kagan  
TO: Ellen S. Seidman

FROM: Jennifer D. Dudley  
Office of the Counsel

SUBJECT: Bruce wonders if you can take a stab at this. Let me know.

Ellen - Jack sija?

Jennifer D.

456 266 J

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

18-Mar-1996 06:04pm

TO:           (See Below)

FROM:         Mary Ellen Glynn  
              Office of the Press Secretary

SUBJECT:     Product Liability

USA Today has asked us to write a 350 word op ed (for Wednesday's paper) outlining the President's position on product liability. They will pair our piece with an editorial that opposes our position.

McCurry thinks this is a good idea.

Thoughts? Who should write it?

Distribution:

TO:           Jack M. Quinn  
TO:           Donald A. Baer  
TO:           Bruce R. Lindsey  
TO:           Victoria L. Radd

CC:           Angus S. King  
CC:           Jennifer D. Dudley

Def of products -

Now def. cover oil + gas refineries  
oil + gas line.

CAPS

Peter Jacobi

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

22-Mar-1996 11:26am

TO: Elena Kagan  
FROM: Jennifer Palmieri  
Office of the Chief of Staff  
CC: Marilyn Yager  
SUBJECT: Product Liability

On Tuesday, Leon is meeting with consumer groups on product liability. After the meeting, the groups on are going to go to the stake out to talk about their opposition to the bill.

Would you please send over a comprehensive set of the talking points you have on product liability to help us prepare for this event?

thanks.

## Products Mts

1.  $T++$  general.

Remedy - used  $T$

Any other? Not complete fix

2. Punitive

eliminating leg history

Worth living still if no  $T+S$  possible.

General only

unless  $\Delta$  more than 50% responsible

Compromise -

we already made it  
by keeping  $T/S$  for  
econ damages.

Show to Jack  
distribute it

Last H on 1st pp.

First the Admin, as noted, ...

Section 10K and  
import

opposes an artificial ceiling

While the Sen bill & the Comb Report<sup>III</sup> in cert  
circs, the expln in the SPM that

...  
does not satisfy our concern.

Sec 105

The CR invites a wealthy ...

Fair to what our  
point has  
been.

In addn, the Admin is concerned that  
~~tax~~ steps backward

the CR takes  
several steps  
backward from  
the Senate version.

Anything else.

lost IP

bec of those concerns,  
which, in the Admin's view,  
unduly interfere etc.

broader

EXECUTIVE OFFICE OF THE PRESIDENT

14-Mar-1996 10:42am

*one-way only  
statute of repose*

TO: Elena Kagan  
TO: Jon Yarowsky  
TO: James J. Jukes

FROM: Ellen S. Seidman  
National Economic Council

SUBJECT: prodcuts problems

These are in page order, not order of importance:

① Findings and purposes (particularly the findings): These were in the House bill and dropped in the Senate because they were so inflammatory, but they are obviously there to deal with Lopez (yes, I've learned a case name). I would like to say that while there may be problems with the civil justice system, these assertions are unsupported by any record and in fact contrary to [DOJ] research. If we can say something good about civil juries and the constitution I'm for that too.

2. There are federalism issues in a number of places, where the bill tries to define, e.g., an evidentiary standard, that is clearly a matter of state law. See definition of "clear and convincing evidence," "punitive damages." (The definition of clear and convincing was in the Senate bill, but the punitive damages def was not.)

3. On page 14, line 18, the term "or threat of remediation" was deleted from the Senate bill. I couldn't parse that phrase, but undoubtedly EPA will think the deletion is important. We might want to check with them.

④ Section 103(b)(1) - pages 16 and 17 - This is John Yarowsky's favorite demagogue provision. It says that if a foreign manufacturer isn't available for suit, you can bring suit against the seller, thereby putting foreign manufacturers in a better position than domestic manufacturers. We need to be careful how we phrase any objection, but there is fun to be had here.

5. I don't quite understand how the affirmative defenses -- drugs, misuse or alteration, etc. might work in a class action. I think this problem has always been there, but can we make something of it?

6. Statute of limitations/statute of repose. We might think two years is too short, but I think it fair to say the statute of limitations is better than it has been. On the statute of repose, however, in addition to dropping to 15 years, there is a specific non-uniformity provision, which says any SHORTER (but not longer) state statute governs. You (we) might want to compare pages 15 and 18 of the conference report to show how inconsistent this is.

## 7. Punitives:

The Senate bill said the harm had to be the "result" of the act; this says "proximate cause." That's much tighter. Think of the smoking cases -- death by heart attack may well result from smoking, but my guess is you can't get someone to declare smoking to be a proximate cause.

Take a look at pages 25 and 26 - it's an incredible gift. Since they've dropped the voluteer/state carveout from punitives, paragraph (3) should be deleted. However, since they've let us in on the secret, we can now point out that they have allowed punitives NOT to be limited with respect to others even when they commit crimes, hate crimes, etc.

✓ The factors for additur are absurd, and the conference report on page 21 makes it clear the provision is not to be used -- that gives an opening to complain even though the factors were in the Senate bill.

✓ Note that the additur doesn't apply to small entities, but we can't complain about this because (i) it was in the Senate bill and (ii) the President implicitly supported it in Texas.

State remittitur is still allowed, but state additur is forbidden

✓ There is still several liability for noneconomi damages, which was one of the major points in our May statement.

✓ I don't understand the workmens' comp stuff, but it's the same as the Senate, as far as I can see.

10. I don't know how we can get this in, but finding (6) on the biomaterials stuff (page 37) relies on the fact that the FDA regulates the safety and EFFICACY of devices. The very same people who are bringing you this bill want to delete the efficacy provision in the FDA reform act.

11. Finally, there's the whole federalism/uniformity issue. We haven't made the point before publicly, but whether/when cases will get to federal courts of appeals for uniform decisions is very iffy, particularly with the no federal question jurisdiction provision. I think we can say it will not meet the goals of uniformity because of myriad state court interpretations, but we may have to be subtle about it.

See you at 11:30.

ellen

- VA  
- for of son

EXECUTIVE OFFICE OF THE PRESIDENT

14-Mar-1996 11:15am

TO: Elena Kagan  
TO: Jon Yarowsky  
TO: James J. Jukes

FROM: Ellen S. Seidman  
National Economic Council

SUBJECT: One more thing on products

On page 21, the bill deletes a section that was in the Senate bill that said that the statute of limitations was tolled if there was a stay or injunction against an action. This is CRITICAL in cases where the defendant goes bankrupt, e.g., breast implants, dalkon shield, asbestos, where a stay WILL be issued against the suit, and the bankruptcy case may take years and then dies, by which time, of course, the statute will have run. Ellen

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E

14-Mar-1996 06:35pm

TO:            Elena Kagan

FROM:          Virginia M. Terzano  
                Office of the Press Secretary

SUBJECT:      product liability points

Product Liability  
Wednesday, March 13, 1996

Background

A House and Senate conference today reached agreement on a package of product liability reforms. It would set a 15-year time limit on when a manufacturer can be held liable for its products, and caps the awarding of punitive damages.

[Per advice from OMB and Leg Affairs, Bruce Lindsey is the best person to talk to regarding the Administration's position on this bill.]

The Administration has not made a decision on whether to support the bill or not. The agreement reached today still includes a cap on punitive damages which the White House opposes.

Points

- o We are still in the process of reviewing the bill and have not yet made a determination on whether it meets the President's goals of real, balanced reform.
- o The Administration supports the enactment of limited but meaningful product liability reform.
- o SAP: Any legislation must fairly balance the interests of consumers with those of manufacturers and sellers and should respect the important role of the states in our federal system.

EXECUTIVE OFFICE OF THE PRESIDENT

06-Mar-1996 01:15pm

TO: (See Below)  
FROM: Peter Jacoby  
Office of Legislative Affairs  
SUBJECT: Products Liability

The trial lawyers report that Senator Pressler's staff is preparing to file the products liability conference report Thursday night (3/7). Additionally, Senator Pressler will seek to waive the one day layover rule for the conference report and immediately file a cloture petition. Consequently, the trial lawyers fear that a vote on cloture could occur as early as Monday or Tuesday of next week. The trial lawyers did not have any information on the substance of the conference report. FYI.

Distribution:

TO: John Hilley  
TO: Tracey E. Thornton  
TO: Bruce R. Lindsey  
TO: Katherine K. Wallman  
TO: Laura D. Tyson  
CC: Elena Kagan

# Products Liability meeting 2/27/96

Senate bill (Hunt unacceptable)

- additive provision
- D+ removal to non-ecar damages? (bill - no)

H - willing to accept S. except 2 changes:

- stat or report - applic to all cases
- cap retroactive to intro of bill (not signing date)

- additive only applic to gen laws where intentional harm (what? that is only place where str punitive?)
- charities (excluded) from punitive

Rochet - insist on sen. bill w/ additive - fix vote aft any other bill.

we assume  
if veto, are votes there?

- overridden in there
- Senate - 39 votes are solid - No override

Pres. to Roch: will veto unless you fix everything.

In any way  
Tortious - foreign cos. need agent to receive service.

Failure to comply w/ discovery - admission of fact - for foreign corps.

Laura/ Bruce memo - recommending veto?

Also w/ process, bill status  
Has to be very fast track.  
Paright

Can - strategy for business community?  
not to protect trial lawyers

subst talking points  
How to communicate across legal  
points  
Federalism issue

1/4/95 ~~Product~~ Meeting

Where are we / lay the ground for what we'll do:

Conf.

S. offer to H; rejected

Rachelle's version -

believes P. will sign.

if not true, we should let P. know.

Bruce memo - to Pres.

3 areas of concern

status of report

altern. caps.

penalties

recaps

workers coming?

anything new on caps

7 + 100 on non-ecomp?

anything else?

### Outline

prin shut

Legal work personal  
independent problem? some specific good bits.

timber but meaningful

? (federalism - border not net  
one-way ratchet - no balance

penalties

7 + 100 - non-ecomp

veh if not changed

NB - Additions improved

in this bill

Sec no new trial optin

for A

## Bruce on Products

CR2 - latter part of this week

uncert of center H

close to km. bill probably

may change stat of report  
(20 → 15)

Were thinking about STP but vote

said after  
few passed -  
we need  
if. 2 probs - if not, veto

1) additional provision -

2) It + no liab for non-ecm loans

unfair - espec women (less ecn  
loss)

would accept if  
new trial out.

Debating this yesterday

Rach wants to see Clinton

Problem may vote but it comes  
back.

Think we have enough votes not to be overridden

3/9/16 Products - Baxter

Raw mat's supplier - Teflon / prints  
Silicon

Device cos. - can't get raw mat's.

Indemnity - not enough

Afraid of device cos. going out of business

Supplier sets protective

as long as meet standards

shifts lab back to device industry.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

30-Jan-1996 04:52pm

TO:           Elena Kagan  
TO:           Kathleen M. Wallman  
TO:           Elgie Holstein  
  
FROM:         Ellen S. Seidman  
              National Economic Council

SUBJECT:     Products

Any interest in a constitutional law/federalism briefing from Cindy Lebow on products on Thursday between 11 and 1? She apparently did a fair piece of work on this over the holidays/furlough, and is convinced that there's at least an argument to be made if not a real possibility that much of the procedural structure in the Senate bill would be declared unconstitutional. Please e-mail back your interest. Kathy, do you think Bruce would be interested?

Ellen

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

13-Mar-1996 11:47am

TO:           (See Below)

FROM:         Marilyn Yager  
              Office of Public Liaison

SUBJECT:     product liability

I don't know who is working on the SAP, but wish to suggest that in addition to what are our concerns in bill, we also raise some of the issues that we recognize are good in the bill. We have been getting calls from the health companies concerned about bio materials and their comments seemed to make a fair case. If there are some issues that we could highlight in a possitive way it might help later regardless of our final decision on the bill.

Distribution:

TO:   Jacob J. Lew  
TO:   Charles E. Kieffer  
TO:   John Hilley  
TO:   Janet Murguia  
TO:   Bruce R. Lindsey  
TO:   Ellen S. Seidman  
TO:   Elena Kagan