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'97 APR 24 PM4:06

APRIL 23, 1997

Sent to POTUS

MEMORANDUM FOR ERSKINE BOWLES

FROM: BRUCE R. LINDSEY

RE: PRODUCT LIABILITY

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Another copy
Went to
POTUS
with
briefing book
on 4/24 -

MR PRESIDENT:
Bruce wanted you to
see this in advance
of your 9:30 meeting
tomorrow.
Phil Caplan

April 21, 1997

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THE WHITE HOUSE

WASHINGTON

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This issue, unlike the last, is amenable to compromise. The most likely compromise would be a proposal to eliminate joint liability for non-economic damages when, but only when, the wrongdoer is responsible for less than some specified percentage of the total judgment. Congress could say, for example, that joint liability for non-economic damages will not apply when a defendant's actions have caused less than 25% of the total harm suffered. Congress might try to compensate for this weakening of the joint liability provision by applying it to both economic and non-economic damages (perhaps using your veto statement's equation of the two kinds of damages to justify doing so), so that a "minor" wrongdoer would never have to shoulder any costs not his own.

A compromise of this kind has the apparent benefit of relieving small-scale wrongdoers (how small depends on the percentage specified) of the obligation to pay the entirety of potentially mammoth judgments. But by virtue of doing so, this compromise leaves innocent victims to bear the damage themselves when primary wrongdoers have gone bankrupt or are otherwise unable to satisfy judgments. You should consider whether you are comfortable with this kind of compromise and, if so, approximately where (10 percent?; 25 percent?; 50 percent?) you would draw the line.

Capping punitive damages. You also objected in your veto statement to imposing caps on punitive damage awards, on the ground that caps undermine the ability of punitive awards to deter and punish egregious misconduct. You noted the provision of the bill allowing judges to exceed the caps in specified circumstances, but stated that this protection was insufficient "given the clear intent of Congress, as expressed in the Statement of Managers, that judges should use

this authority only in the most unusual cases."

A compromise on this issue is also possible; indeed, it may be hard to avoid given the Administration's prior statements on the subject. The judicial override provision is essentially the brainchild of the Justice Department, which offered it as a way to alleviate our concerns about caps on punitives. If Congress deletes the legislative history to which you objected -- and especially if it also softens some of the language in the override provision -- you will have little basis for continuing to object to the bill's punitive damage ceilings.

Limiting liability of biomaterials suppliers. You expressed a "concern" in your veto statement about a provision in the bill limiting actions against suppliers of materials used in devices implanted in the body. You generally recognized this provision to be a "laudable attempt to ensure the supply of materials needed to make lifesaving medical devices." But you said that this limitation should apply only to non-negligent suppliers -- and not to suppliers who know or should know that the materials they make, when implanted in the human body, will cause injury.

The current version of the biomaterials provision contains an exception for manufacturers of the silicone gel used in breast implants, but not an exception (of the kind you requested) for all negligent suppliers. Industry engaged in good-faith negotiations with Rep. Howard Berman last year to develop such an exception, but could not find a way to exempt negligent suppliers, while adequately protecting non-negligent suppliers from the high litigation costs associated with disproving negligence. Industry is currently looking into other ways to satisfy our concern -- for example, by limiting liability for biomaterials suppliers only when the FDA has reviewed and approved the implanted device -- and may well succeed in doing so. Indeed, we may wish to send a signal that Congress should remove this provision from the products bill, so that we can sign it separately.

Other provisions. Your veto statement contained a number of objections to more minor provisions of the bill relating to the statute of repose, statutes of limitations, and negligent entrustment actions. With the possible exception of the statute of repose provision, compromise on these issues should be easy; members of Congress already have indicated a willingness to delete the offending language. On the statute of repose, the current bill precludes any suit alleging a defect in a product that is more than 15 years old; we could urge an 18-year statute of repose, as we accepted in the aviation liability bill you signed; alternatively, we could press for some kind of exception from the statute of repose for products, such as farm equipment, intended to have a useful life of longer than 15 years.

Other legislation. In the event you choose to reiterate your concerns and veto another products liability bill, you may have other opportunities to signal support for appropriate reform of the legal system. Senator Breaux plans to offer product liability legislation for people who do not like product liability legislation. This legislation would (1) strengthen pleading requirements for punitive damage claims and impose automatic sanctions for frivolous claims; (2) require states to adopt alternative dispute resolution programs and establish certain "offer of judgment"

rules meant to promote settlements; (3) impose a nationwide standard for punitive damage awards (similar to the standard most states use now); (4) provide a uniform two-year statute of limitations; and (5) commission a Department of Justice study on the product liability system.

In another area of law reform, Sens. Lieberman, Moynihan, and McConnell have proposed a so-called "auto-choice" bill, which would allow a driver to select a no-frills auto policy that would reimburse him for all economic costs, but eliminate his option to sue for non-economic losses such as pain and suffering. Trial lawyers are certain to oppose this proposal, but unlike the products liability bill, it probably would benefit consumers. Some experts say that the savings for low-income drivers could reach 45 percent of their current insurance premiums -- and that the nationwide savings over two years could exceed $80 billion.