NLWJC - Kagan

DPC - Box 037 - Folder 006

Product Liability - Notes [2]

Products liability — notes + memos

EK — Interesting, but why does NEC always send 20-pp memos? Esp. if the recommendation is to do nothing much. I defer to you + Mr. Lindsey on this, counselor. BR

THE WHITE HOUSE

WASHINGTON

July 2, 1997

MEMORANDUM FOR **SECRETARY RUBIN**
SECRETARY DALEY
SECRETARY SHALALA (WILLIAM CORR)
DIRECTOR RAINES
ADMINISTRATOR ALVAREZ (GINGER LEW)
CHAIR YELLEN
CHAIR BROWN
DEPUTY SECRETARY SUMMERS
JOHN DWYER
ERSKINE BOWLES
BRUCE LINDSEY
JOHN HILLEY
CHARLES RUFF
BRUCE REED
ELENA KAGAN
JOHN PODESTA
SYLVIA MATHEWS
RON KLAIN
CHARLES BURSON

FROM: **GENE SPERLING**

SUBJECT: **Draft product liability memo**

Attached is a draft memo to the President on federal product liability law, based on our discussions last week. We ask two things: (i) your comments, edits and thoughts; and (ii) your choice among the three recommendations set out.

Ideally, we would like your response by noon tomorrow, July 3. Please forward comments to Ellen Seidman of my staff, who can be reached at 456-5359 or by fax at 456-1605. We apologize for the short timeframe, but we are attempting to get this memo in to the President before he leaves Washington tomorrow evening. Even noon is going to be hard; we hope the memo is sufficiently ~~reflective~~ of our discussions that turning it around in time is feasible. Please call me if you have any serious problems with this time frame.

Thank you all for your help, and for that of your staffs, in getting through this process.

cc:
Andrew Pincus
Jeffrey Hunker
Fran Allegra
Donald Remy
Tom McGivern
Ed Murphy
Ron Matzner
Pam Gilbert
Michael Deich
Steve Aitken
Tim Brennan
Tracey Thornton
Peter Jacoby
Bill Marshall
Lisa Brown

Draft:July 2, 1997 (3:47pm)

SUBJECT: **Product liability legislation**

I. ACTION FORCING EVENT: On May 1, on a strict party line vote, the Senate Commerce Committee reported out S.648, Senator Gorton's revision of the product liability bill you vetoed last year. Senator Rockefeller not only voted against S.648, but has made it very clear that he will not join until your concerns are satisfied, and Senator Gorton understands that without Senator Rockefeller's support, the bill cannot pass. On the other hand, Senator Lott has been pushing to bring the bill to the floor, leading Senator Rockefeller (together with Mr. Dingell) to press us to negotiate changes in the bill to meet your concern. Senator Lott may well want to move soon after the July 4 recess. Meanwhile, Senator Breaux is urging us to work with him on an alternative to the Gorton bill.

II. BACKGROUND: The 104th Congress passed product liability reform law -- a part of the Contract with America -- by a vote of 259 to 158 in the House and 59 to 40 in the Senate. The bill would have partially preempted state law as to both standards of liability for sellers and manufacturers of products that cause bodily harm and measures and allocation of damages. On May 2, 1996, you vetoed the bill, citing eight issues:

- Interference with state prerogatives in tort law
- One-way preemption, where pro-consumer state laws were preempted, but laws that limited consumer rights were not
- The cap on punitive damages, particularly in light of the Statement of Managers, which virtually directed judges not to use the "additur" provision included in the bill under which caps could be superseded
- Several -- not joint -- liability for non-economic damages
- A too-short (15 years), too-broad (all products) statute of repose
- Preemption of state negligent entrustment statutes, which make sellers of dangerous goods (e.g., firearms and liquor) responsible for certain actions of the buyers
- Failure to toll the statute of limitations during the period of a stay issued by a bankruptcy court
- Application of the limits on liability of biomedical materials suppliers to negligent suppliers

The House failed to override your veto by a vote of 258 to 163 to override. The House having failed to override, the Senate never took a vote.

III. CURRENT CONGRESSIONAL ACTIVITY

A. S.648

S.648 fixes the bankruptcy tolling problem, and makes an honest -- although not complete -- attempt to respond to the negligent entrustment issue. Moreover, it lengthens the statute of repose to 18 years, and establishes two-way preemption for the statute of repose, so that shorter state statutes would be lengthened (all state statutes that are set in years are shorter than 18 years). The bill does not respond to the two major problems you cited -- the cap on punitives and several liability for non-economic damages -- nor does it change the biomedical materials provision.

B. Senator Rockefeller and Mr. Dingell

Senator Rockefeller and Mr. Dingell are clearly looking for guidance on how to resolve the remaining issues (punitive damages, several liability for non-economic damages, statute of repose and biomedical materials) to meet both the concerns and fact patterns in your veto message. They have said they will engage in negotiations with us (clearly they do not expect to be able to accept our initial proposal) to develop legislation that will pass and will not be vetoed. Senator Rockefeller, in particular, has said he has no interest in another veto.

C. Senator Breaux

Senator Breaux would like to deal with this issue in an entirely different way. He has developed a bill focused far more on reducing frivolous lawsuits and less on substantive product liability standards. Senator Breaux/s bill would include a statute of repose that is more flexible than that in S.648, would establish uniform federal standards for punitives damages but no cap, and would do nothing to change state law concerning joint and several liability for non-economic damages.[1] His bill would also set stricter pleading standards for federal and state court product liability actions, restrict multi-state product liability class actions, enact a very weak form of alternative dispute resolution, and require a study by the Attorney General of the product liability system. It is unclear how far Senator Breaux can get in moving support off the Gorton bill without the Administration's support for his approach.

D. Consumer groups and other advocates

Consumer groups and others are strongly opposed to any legislation in this area, and have stated that they view you as "the last bastion against tort deform." The American Bar Association has written you in opposition to any federal legislation primarily on federalism grounds, but also raising concerns that overlaying partial tort law preemption on the legal systems of fifty states will cause more confusion and uncertainty, not less.

III. MAJOR ISSUES PRESENTED:

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[1] As discussed below, many states, including California, already have several liability for non-economic damages.

Over the past eight weeks, we have jointly run an interagency process to consider whether there might be ways to alter S.648 to respond to the concerns in your veto message in a manner that could be acceptable to at least Democratic proponents of the legislation. Participants in the process included: OVP, NEC, DPC, OMB, CEA, White House Counsel, White House Legislative Affairs, Justice, Treasury, Commerce, and SBA and the Consumer Product Safety Commission as an advisor. FDA is participating in the discussion of biomedical materials. The working group surveyed the law in all the states on the critical issues of punitive damages, joint and several liability and statute of repose, and developed a number of alternatives in each area that we believe could move the bill closer (and in some cases, all the way) to your goals but may have a chance of not being rejected out of hand by proponents.[2] Two meetings of the NEC principals were held, on June 24 and 26.

A. Whether there should be federal legislation in this area at all

The arguments of the business community in favor of national legislation rest on three propositions:

- Concern about product liability litigation, and particularly concern about disproportionate awards for non-economic damages and punitive damages, is sapping American productivity by misdirecting management time and energy and capital and by putting an excessive -- and frequently non-insurable tax -- on innovation.
- In a national economy, subjecting products and manufacturers to 50 different liability regimes is not only inefficient but also -- because of the opportunities for forum shopping by plaintiffs, particularly in class actions, unfair.
- Manufacturers are the deep pocket focus of liability suits that are in fact generated by the activities of those who repair and service products; making manufacturer liability more limited an predictable -- as occurred when the 18-year statute of repose was instituted for aircraft -- will put the burden of care of those most responsible for and able to accomplish it.

Consumer groups, as well as lawyers (the ABA as well as ATLA), argue against the need for federal legislation based on:

- The lack of any explosion of product liability suits, and in particular, excessive punitive damage awards that survive judicial remittitur, suggesting there's no problem to be fixed.
- The fact that all recent proposals in this area would cut back on traditional principles of tort law that benefit plaintiffs, suggesting that what the manufacturers want is not uniformity but a tilt in their direction

[2] Based on discussions with the Center for Violence Policy, we have also crafted a more complete fix to the negligent entrustment provision. We believe there will be no problem getting the proponents to adopt this.

- The traditional role of the states in tort law, combined with the fact that all existing proposals would only partially preempt state tort law, leading to even more non-uniformity and uncertainty as this law is overlaid on, e.g., state medical malpractice law.
- Whatever limitations are initially included in federal product liability legislation will be vulnerable to cutbacks in future Congresses; the time to stop erosion is before it starts

B. One-way or two-way preemption

One of the most contentious issues that runs through the legislation is whether federal standards should preempt all state laws ("two-way preemption") or whether they should function solely as a floor, with states free to establish more defendant-friendly standards ("one-way preemption"). For example, if the federal statute of repose were 18 years, two-way preemption would both lengthen shorter statutes and impose the 18-year limitation in states that have no statute of repose; one-way preemption would only lengthen shorter statutes. Similarly, if the federal government were to enact standards for awarding punitive damages, two-way preemption would both tighten the standard in states that, for example, allow punitives to be awarded for reckless behavior and require states that do not allow punitives at all to allow them according to the federal standards. One-way preemption would only tighten standards in some states, leaving others free to bar punitives entirely.

The bill you vetoed last year was almost entirely one-way preemptive. In your veto message you said, "As a rule, this bill displaces State law only when that law is more favorable to consumers; it defers to State law when that law is more helpful to manufacturers and sellers. I cannot accept, absent compelling reasons, such a one-way street of federalism. As noted above, S.648 is two-way preemptive as to the statute of repose (as well as with respect to the general standards of manufacturer and seller liability and the statute of limitations) but retains one-way preemption on punitive damages.[3]

While one of the arguments manufacturers and sellers make in favor of national legislation is the desire to create uniform federal standards, which would support uniform two-way preemption, on the two issues where they have made serious headway in the states -- limitations on punitive damages and imposition of several liability -- they are far more interested in a federal floor than in uniformity. We have been told, for example, that establishing the right to punitive damages in states where it does not exist, or limiting several liability for non-economic damages where state law has established it, would be totally unacceptable.

Consumer groups argue in favor of two-way preemption, ostensibly on the ground that the only good reason for federal standards is uniformity. However, many of these same groups regularly

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[3] In form, S.648 is two-way preemptive on several liability for non-economic damages. However, since it imposes the least plaintiff-friendly rule possible (totally several liability), it is effectively one-way preemptive.

argue that federal environmental and consumer protection standards should function only as a floor, allowing states to impose more rigorous rules. It is conceivable that the consumer argument for two-way preemption is more an effort to highlight the inconsistency in the manufacturers' position -- and perhaps to raise an insurmountable barrier to legislation -- than a firmly held constitutional principle.

C. Several liability for non-economic damages

Over the last several years, tort reform at the state level has essentially done away with the traditional rule of no comparative fault and full joint and several liability. (Only Alabama, Maryland, North Carolina and Virginia retain this combination.) Nine states[4] have full joint and several liability, but include comparative fault, thereby reducing the defendants' joint responsibility by the measure of the plaintiff's responsibility. Thirteen states[5] have pure several liability, for both economic and non-economic damages, and 24 states have various hybrid forms.

Both last year's vetoed bill and S.648 limit a defendant's responsibility for non-economic damages "in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant." The trier of fact is required to assign this percentage taking into account the responsibility of all persons responsible, including those not before the court, such as settling defendants.

In vetoing last year's bill with respect to this issue, you cited the provision's general effect of preventing "many persons from receiving full compensation for injury," noting in particular the problems created by insolvent defendants. You also cited the particular impact of a several rule for non-economic damages as unfairly discriminating against "the most vulnerable members of our society." You said, "Noneconomic damages are as real and as important to victims as economic damages."

Manufacturers assert that the problem with joint liability for non-economic damages is that such damages -- unlike economic damages -- are totally unpredictable and subject to the whim of the jury, thereby making any assessment of the risk, or the purchase of insurance against the risk, virtually impossible. They are particularly concerned about the potential for a large award against the only solvent defendant in a case in which that defendant is only marginally at fault. Opponents make the argument that non-economic damages are as real and as important -- particularly to the poor, the young and the old -- as economic damages, and should not be treated differently. Some also contend that the different state standards represent the innovation and experimentation that is the role of the states, and this should not be preempted.

D. Punitive damages

The process of awarding punitive damages and the amount of such damages have been the subject of some of the most intense controversy. Both last year's vetoed bill and S.648 cap punitive damages -- at the **greater** of two times compensatories (including non-economic

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[4] Arkansas, Delaware, Maine, Massachusetts, Michigan, Pennsylvania, Rhode Island, South Carolina and West Virginia

[5] Alaska, Arizona, Colorado, Illinois, Indiana, Kansas, Kentucky, North Dakota, Tennessee, Utah, Vermont and Wyoming

damages) or $250,000 for most companies and the lesser of these two amounts for individuals and small businesses. Upon consideration of a list of eight factors[6], a judge could award damages in excess of the large business cap (but not the small business cap), up to the amount awarded by the jury, which would not be informed of the cap.[7] The "additur" provision explicitly constitutes one-way preemption -- it does not permit additur where state law otherwise limits punitive damages.

The bills would also: (i) establish a uniform federal standard of proof of "clear and convincing"; (ii) establish a uniform standard for award that conduct "carried out with conscious, flagrant indifference to the rights or safety of others was the proximate cause" of the harm; and (iii) authorize any party to request that punitive damages be considered in a separate proceeding (generally so that evidence of the defendant's financial condition would not be allowed into evidence during the liability and compensatory damages phase of the trial). While these rules are meant to apply in all states that have punitive damages, they would not apply in states where punitive damages are prohibited by law.[8]

In vetoing last year's bill, you stated that you "oppose arbitrary ceilings on punitive damages, because they endanger the safety of the public. Capping punitive damages undermines their very purpose, which is to punish and thereby deter egregious misconduct." You noted that the additur

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[6] The factors are: "(i) the extent to which the defendant acted with actual malice; (ii) the likelihood that serious harm would arise from the conduct of the defendant; (iii) the degree of the awareness of the defendant of that likelihood; (iv) the profitability of the misconduct to the defendant; (v) the duration of the misconduct and any concurrent or subsequent concealment of the conduct by the defendant; (vi) the attitude and conduct of the defendant upon the discovery of the misconduct and whether the misconduct has terminated; (vii) the financial condition of the defendant; (viii) the cumulative deterrent effect of other losses, damages, and punishment suffered by the defendant as a result of the misconduct, reducing the amount of punitive damages on the basis of the economic impact and severity of all measures to which the defendant has been or may be subjected . . ."

[7] The judge would be required to hold a separate proceeding on awarding an additional amount, consider each of the items, and state the court's reasons for an award above the cap in findings of fact and conclusions of law. A separate finding on each factor is not explicitly required. The conference report on last year's bill, of course, virtually directed judges not to use this authority.

[8] In seven states punitive damages are generally forbidden; in 16 others, they are capped in one way or another. Twenty-seven states allow unlimited punitive damages in product liability cases. Most states that allow punitive damages have adopted the "clear and convincing" evidentiary standard. While the liability standards are less uniform, only a few states allow the award of punitive damages for reckless behavior without some other aggravating factor. We have not found any state that requires that the conduct leading to the punitive damages be the "proximate cause" of the plaintiff's harm, although the words "cause" and "result" are used. Bifurcated trials -- at least on the issue of the defendant's financial condition -- are allowed or required in 15 states.

provision might have mitigated this concern, but the Statement of Managers virtually directing it not be used made it ineffective in that respect.

Manufacturers assert that unpredictable and unjustifiably large punitive damage awards have driven them out of markets and impinged on innovations. Consumer advocates assert that only potentially unlimited punitive damages can deter harmful misconduct by large companies. Surveys suggest that neither the award of punitives nor the amount is skyrocketing in products cases.[9]

E. Statute of repose

At its starkest, a statute of repose bars litigation after a product has been in service a specified period of time. Twenty-two states and the District of Columbia currently have statutes of repose for product liability; 17 of the states and the District restrict lawsuits after a specified number of years (ranging from 5 to 15) and the remainder use some variation of "useful life" as the bar. In 1994, you signed legislation establishing a preemptive 18-year statute of repose for general aviation.

The bill you vetoed last year included a preemptive 15-year statute of repose for all products. The statute would, however, only have preempted states without any statute of repose, or with a statute **longer** than 15 years. Shorter state statutes would have remained effective. Your veto message referenced the length of the statute, the fact that it was broadly inclusive (you cited handguns), and the fact that the preemption was only one way. The Senate bill from the 104th Congress had covered only durable goods in the workplace and had an 18-year one-way preemptive statute.

S. 648, as reported out of the Senate Commerce Committee on a voice vote, includes a fully (two-way) preemptive 18-year statute of repose, covering all products except: (i) motor vehicles, vessels, aircraft and trains used to transport passengers for hire; (ii) products that cause toxic harm; and (iii) products with express written warranties that exceed 18 years.

Manufacturers assert that a firm, and broad, statute of repose is necessary not only to provide them some certainty, but also to put the risk of injury from long-lived products on those most able to prevent it -- owners, upgraders and servicers. They argue that the 18-year statute of repose for general aviation you signed in 1994 has not only increased the willingness of manufacturers to produce the aircraft, but has made owners and servicers far more careful,

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[9] A recently-released Rand study has found an increase in the number and amount of punitive damage awards in financial fraud cases, such as cases involving insurance or financial products misrepresentation. This does not appear to extend to cases involving products as defined in the bill, which is limited to physical goods.

because they understand the deep pocket of the manufacturers will not be available to bail them out.

Consumers, on the other hand, argue that injuries from long-lived products -- including those that have not been altered or do not need service -- are common, and often the manufacturer should have foreseen and prevented the problem that caused the injury. They argue it is particularly important that those injured by long-lived consumer goods (such as camping equipment and cedar chests) not be barred from court completely by a strict statute of repose. Workers, they note, at least can collect worker's compensation for injuries caused by long-lived defective goods in the workplace.

IV. ALTERNATIVES

Working from the alternatives developed by the working group in each of the three major areas identified, your advisors concluded that the choice of alternatives really depends on another decision, whether the Administration should:

- take the position that state law developments and the lack of strong evidence of major problems in this area that are caused by lack of national standards leads us to conclude no federal legislation is appropriate at this time;
- put forward a series of proposals that are fully consistent with both your veto statement and the principle of promoting national uniformity, even if such proposals have little or no chance of leading to a bill that can be enacted; or
- put forward a series of proposals that product liability legislation proponents will regard as an acceptable place to **start** negotiations and that can, albeit with some difficulty, be squared with your veto message.

Some of your economic advisors believe the business community may be correct in asserting that the current tort liability system, and in particular the issues raised in this legislation, over-deter businesses in their development and production of innovative products. In our discussions with the business community, we have asked them to provide empirical evidence that innovation has been stymied by litigation in general or the issues that particularly concern us: punitive damages and several liability for non-economic damages. Unfortunately, empirical evidence is not available, and the anecdotes relate to pharmaceuticals or related products, and often to the issues raised by mass tort claims for **economic compensatory** damages, not non-economic damages or punitive damages..

As your advisors looked into the issue, we came to the following conclusions:

- While logically there might be some impact on manufacturing innovation and productivity from the tort system,
  - there is no empirical evidence
  - all the anecdotal evidence is from one sector -- pharmaceuticals, including vaccines -- but the legislative proposals are far broader
  - there is no explosion of either litigation or punitive damages

  - the economy is booming and productivity is rising
- Over the past several years -- indeed, even since the start of the 104th Congress -- the states have made major moves toward making the tort system more defendant-friendly, ranging from the virtual abandonment of traditional principles of joint and several liability to the imposition of caps on punitive damages
- If federal legislation is not to lead to uniform national standards, there is little justification for it; there is little or no justification for one-way preemption
- Overlaying limited product liability preemption on the tort law and civil procedure of 50 states will likely increase confusion and uncertainty, not decrease it
- Recent Supreme Court decisions, including the Brady bill decision, may call into question the constitutionality of federal legislation that attempts to mandate changes in state law and judicial procedure

Thus, while there continues to be sentiment among your economic advisors for "doing something" to improve the tort system, it is mild and tempered by the recognition that current proposals may do as much harm as good. Your legal advisors do not believe the current proposals should be supported. Both groups of advisors feel strongly that if there is to be any federal legislation, it should establish uniform national standards, and should -- in the areas explicitly covered -- completely preempt the field. There is no justification for one-way preemption in this area.

This position can be manifest in two ways: taking a strong against any legislation, or developing an Administration bill that is consistent with both the veto statement and the current state of the law, even if that bill cannot be reconciled with the prime tenets of the Gorton bill.

A. Oppose federal product liability legislation at this time

_____[names of advisors] recommend that you take a firm and overt stance against any federal product liability legislation at this time. Recent changes in state law as well as in federal constitutional law, combined with the lack of evidence of serious widespread problems suggest that the burden of showing why traditional state prerogatives in this area should be overruled and state law overlaid with potentially incompatible federal law has not been met. If legislation is needed in the area of pharmaceuticals (including vaccines), then it should be pursued on a targeted basis, taking advantage of -- and protecting -- the strong federal regulatory system for drugs.

B. Develop an Administration bill we can support, consistent with both the veto statement and the current state of the law

The hallmarks of this option are: (i) full two-way preemption, such that states with currently more defendant-friendly laws would be brought to a uniform national level as well as states whose laws are currently more pro-plaintiff; (ii) consistency with your veto message in all

respects; and (iii) inclusion of items that were not part of either the vetoed bill or S.648 that can enhance the effectiveness of the legal system for injured plaintiffs.

This option does not include any provision on joint and several liability for non-economic damages. Since part of the focus of your veto message was on the unfairness of distinguishing between economic and non-economic damages, no provision that deals only with non-economic damages can be fully consistent with the veto message. Moreover, we have reason to believe some proponents of legislation would be willing to put forward an alternative without any change in joint and several liability. However, we also know the business community regards this as an important issue but, given current trends in state law toward several liability, they will be extremely unlikely to accept two-way preemption in this area. Appendix A contains alternative formulations of joint and several liability for non-economic damages that were developed by the working group, together with pros and cons.

This option would consist of the following:

Punitive damages - Advisory jury opinion with judicial determination and a breachable cap for small businesses, two-way preemption

- The jury would render a solely advisory opinion on punitive damages
- The actual determination of punitive damages would be made by the judge
- The judge would be required to consider the factors in S.648, and would be required to explain why the judge's award differs (either higher or lower) from the jury's advice
- The judge could allocate a portion of punitive damages to the state rather than to the plaintiff
- Cap punitive damages at the lesser of twice compensatories or $250,000 for firms that have 10 or fewer employees **and** annual revenues of $1 million or less. The jury would not be told of the cap, and the judge could award damages in excess of the cap only upon a specific finding that damages in excess of the capped amount were not only needed "to punish or deter," but also that the financial impact of the higher award had on the defendant and its employees had been explicitly considered by the judge.
- Couple this with procedural changes to set the evidentiary standard at "clear and convincing evidence," the substantive standard at "willful and wanton" (excluding recklessness), and to require bifurcation of the damages determination if requested by any party

Pros

- Is analogous to criminal law, by keeping the jury involved but placing the decision on what is essentially a punishment in the hands of the person most experienced in deciding such issues, the judge
- Since historically, punitive damage awards that seem unjustified have stemmed from jury decisions, may increase rationality in the system
- Provides some protection for truly small businesses, responding to one of the complaints about the capriciousness of punitives

- Since businesses of the size described are rarely hit with significant punitive damages, since in most states the defendant's financial condition is already taken into consideration, there may be little practical negative effect.
- Allows the Administration to agree with some sort of cap
- By adopting the S.648 factors, may be seen as a good faith offer

Cons

- Agreeing to any cap at all breaks through a clear line we established last year of "no caps on punitives"; it may be very difficult to hold the line against expansion of this cap, either to larger businesses, or by limiting the judge's discretion
- Any proposal that limits punitive damages in any way may be seen as tipping our hand -- or limiting our options -- with respect to the tobacco settlement
- Takes away from the jury what has been regarded as a traditional jury function
- While judges may determine punitive damages in many states in cases where they are the trier of fact, only Connecticut and Kansas provide for initial judicial determination (in contrast to appellate review or remittitur) where a jury has sat
- Unlikely to solve concerns of either proponents or opponents of caps; consumer groups and lawyers have not favored judicial determination
- May raise difficult Seventh Amendment issues ("no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law")
- Making it fully two-way preemptive, thus forcing some states to allow punitive damages that do not currently do so, is likely to be regarded as both unacceptable and inflammatory by the business community

Statute of repose

- Two-way preemption of state law (as in S.648)
- 18 year statute of repose (as in S.648)
- Which a plaintiff may overcome by clear and convincing evidence that the product had a longer useful safe life (not included in S.648, and responsive to the victim of the hay-baler accident cited in the veto message and to accidents involving products clearly intended to be longer-lived, such as elevators and most firearms)
- Covering only durable goods in the workplace (narrower than S.648, retaining plaintiff rights concerning consumer goods in states without any statute of repose and responding to your concern about handguns)
- With further exceptions for toxic substances, vehicles used in transportation for hire, and express warranties (as in S.648)
- And with a provision that extends the statute to allow full benefit of the two-year statute of limitations after injury or discovery of harm in, for example, year 17 (not in S.648, but not expected to be a problem)

Pros

- By building on S.648, demonstrates good faith to proponents of that legislation
- Two-way preemption is responsive to principles of veto message, and also lengthens statute in the 22 states that have them
- Number of years is longer than in any current state statute

- Rebuttable presumption protects workers injured by products clearly intended to be longer-lived
- Bright line number of years, combined with clear and convincing standard, means manufacturers will be free from arguments about whether something was intended to have a useful life slightly longer than 18 years
- By restricting statute to durable goods in the workplace, consumers in states without statutes of repose retain their access to court for injuries from long-lived or intermittently-used consumer goods such as cedar chests and camping and baby products
- Until late last year, all formulations of this statute had been limited to durable goods in the workplace, in part because those injured in such accident will at least have received some compensation through workers compensation
- Expands on an already-existing federal liability scheme -- workers compensation
- Exceptions protect access to court in latent defect cases

Cons

- Opponents of product liability reform will oppose any statute of repose as limiting plaintiffs' rights in states without such statutes
- Combination of two-way preemption and bright line (even with rebuttable presumption and limitation only to durable goods in the workplace), will restrict the access of some injured parties to court
- Proponents of S.648 may regard rebuttable presumption and limitation to durable goods in the workplace as unacceptable limitations, particularly given that they extended the statute from 15 to 18 years and made preemption two-way in response to the veto message

In addition to these proposals, we recommend that option 1 include items plaintiffs believe could make a real difference in their ability to recover, as well as provisions in the Breaux draft:

- Provision for alternative dispute resolution for small claims that both defendants and plaintiffs would find appealing
- Limitations on the use of protective orders where disclosure of the information is relevant to the public health or safety unless disclosure is clearly outweighed by a substantial interest in maintaining the confidentiality of the records
- Stricter pleading requirements and limitations on multi-state class actions where parties allege different types of damages
- A requirement for a study of the product liability system by the Attorney General

The first of these items might -- depending on how it is drafted -- gain the support of both plaintiffs (who cannot find lawyers to take small claims through the traditional legal system for a contingency fee) and defendants. The second (based on a bill that has been introduced by Senator Kohl) would be strongly supported by consumer groups and -- in light of the tobacco revelations probably could generate strong public support -- but would certainly be opposed by defendants and perhaps even by the plaintiff bar. The third and fourth provisions are from the Breaux draft. The class action may not be giving up much from the plaintiffs' perspective given the Supreme Court's recent decision overturning the asbestos settlement.

This option is recommended by _____[names of advisors]

C. Make a proposal that has a viable chance of starting negotiations with proponents

As described in the specific pros and cons below, the items in this option cannot be completely squared with your veto statement. On the other hand, they represent real movement toward responding to your objections. However, it is critical to recognize that **once these options are on the table, negotiations may take them even farther afield, and lead to a negative dynamic in which bill supporters think they've come "most of the way" toward your position and assert that refusal to support their bill amounts to "moving the goalposts."** The danger with this option rests far less in its particular parameters than in the slippery slope it sends us down.

Again, no provision on several liability for non-economic damages is included, based on indications some proponents may be willing to move without such a provision. Appendix A contains options developed by the working group, of which only Proposal 2B is likely to be acceptable at all to the business community.

This option would consist of:

Punitive damages - Cap with easier breakthrough, one-way preemption

- Cap punitive damages at the greater of $250,000 or twice compensatories (the lesser of the two for small businesses)
- Do not tell the jury of the cap
- Allow the judge to award punitive damages above the cap (for both small and large businesses) without an additional proceeding and on a simple finding that the capped amount is "insufficient to punish or deter," the standard in S.648, with no consideration of specified factors
- Insist that there be no legislative history suggesting this authority is to be used any more sparingly than implied by the statutory standard
- Couple this with procedural changes to set the evidentiary standard at "clear and convincing evidence," the substantive standard at "willful and wanton" (excluding recklessness), and to require bifurcation of the damages determination if requested by any party
- This would be two-way preemptive, except with respect to states that do not allow punitives in products cases at all

Pros

- Closest to both S.648 and earlier versions of bill, and thus likely to be most easily regarded as acceptable by proponents
- Particularly given that there are few punitive damage awards in excess of the cap and that judges now have remittitur authority, this would likely have little practical impact on actual awards
- The procedural changes may produce more uniformity across the country

- Making the additur provision two-way preemptive is a real improvement for plaintiffs compared to S.648

Cons

- This looks like a cap on punitive damages, which you said you opposed; "no caps on punitives" has been used as a shorthand description of the Administration's firmest position
- It may actually be a cap with judges reluctant to award punitives
- Holding the line on the legislative history can be very difficult, particularly if the statute is acceptable in all other respects

Statute of repose

The proposal would be the same as under option 1, which we believe will be regarded as a good faith offer to negotiate.

The primary dangers with this strategy are the likelihood that opponents will not believe even the initial positions are consistent with the veto statement, and that it will be relatively easy for the other side to make what look like cosmetic changes that may in fact be quite significant. For example, deleting the plaintiff's option to breach the 18-year statute of repose by a clear and convincing showing that the useful safe life was intended to be longer -- a likely demand of the manufacturing community -- would look minor, but in fact would work a major change in that it completely shut the courtroom door on plaintiffs in the many states with no statute of repose.

This option is recommended by _____[names of advisors]

V. DECISIONS:

____ Let's take the offensive against any federal product liability legislation

____ Propose option B to Senator Rockefeller, understanding he will not regard it as a serious offer.

____ Discuss the offer with Senator Breaux before making it public, and make common cause with him if he's interested

____ Make the offer public to head off claims by bill proponents that we did not have anything to offer

____ Propose option C to Senator Rockefeller, making explicit that this is a best and final offer and any further movement will result in a veto

____ Propose option C to Senator Rockefeller, being prepared to negotiate

____ None of the options is good. We need to talk.

APPENDIX A
Options on Joint and Several Liability for Non-Economic Damages

The formulations described below reduce the negative impact of imposing several liability for non-economic damages. However, any formulation that does not guarantee the plaintiff 100% of non-economic damages (where there is any solvent and available defendant) is discriminatory against non-economic damages in those states that retain joint liability for economic damages. Assuming you do not want to put several liability for **economic** damages into play, you should be aware that all of the options described -- except pure reallocation -- have this flaw.

Informed by various state law provisions concerning joint and several liability, your advisors considered formulations for federal preemption involving the following concepts:

- Several liability with reallocation among remaining defendants (and plaintiff if the plaintiff is at fault) in the event the amount allocated to any defendant is uncollectible (thus guaranteeing plaintiffs 100% recovery for the portion of the damage not their fault, but sparing low-fault, deep-pocket defendants the need to sue for contribution)
- Setting a level of fault below which only several liability will apply (thus responding to the concerns of low-fault deep-pocket defendants)
- Setting a threshold of fault below which several liability will apply, but with a multiplier (thereby guaranteeing the plaintiff some recovery where only the low-fault defendants are solvent)
- Guaranteeing the plaintiff a specified percentage of recovery of non-economic damages
- The extent to which plaintiff fault will be taken into account to reduce recovery for non-economic damages
- Special rules for small businesses, particularly as to responsibility for more than their share of damages
- Two-way preemption, which would be meaningful if federal law were less pro-plaintiff than some state laws

Working on the assumption that you wished us to develop proposals that include several liability for non-economic damages -- so as to be able to convince those favoring product liability of our good faith, but that are least restrictive of the rights of plaintiffs, your advisors developed the following alternative formulations relating only to non-economic damages:

Proposal 1 - Reallocation[10]

- Joint and several if the plaintiff is fault-free

[10] This is based on the statute currently in effect in Missouri.

- If the plaintiff is at all at fault, liability is several, but if the plaintiff cannot collect from one or more defendant after a specified period of time[11], the plaintiff can petition the court for reallocation of damages not attributable to the plaintiff among the remaining defendants, but no defendant less at fault than the plaintiff may be charged with more than twice his proportionate share of damages
- This would be two-way preemptive

Pros

- Preserves balance between faultless plaintiff and defendant with any fault in favor of the plaintiff
- Is generally consistent -- or at least not less pro-plaintiff -- with the laws of most states[12]
- Where plaintiff is at fault, less culpable defendants -- even if they are deep pockets -- will have their damages limited
- Of all the potential limitations, is most likely to retain 100% recovery for non-economic damages
- By retaining joint and several liability in many situations, should encourage settlement

Cons

- May be viewed as excessively pro-plaintiff, and thus not a good-faith offer, particularly if it is two-way, thus increasing defendants' responsibility in states, such as California, with several liability for non-economic damages
- May limit plaintiff's recovery where plaintiff is at fault and there are multiple defendants
- Requires fact-finders in (the 13) states that currently do not have comparative fault or several liability to assign degrees of responsibility
- Shifts from defendants to plaintiffs the responsibility for collecting from each defendant, potentially adding to delay in recovering and increased expense
- As among defendants, it is unclear why the extent of the plaintiff's responsibility should have an impact on defendants' responsibility to pay the judgment

Proposal 2A - Guaranteed recovery, two-way preemption

- Joint and several liability of any defendant is than 30% at fault (taking into account the fault of the plaintiff and settling defendants)
- If any defendant is less than 30% at fault, that defendant's responsibility would be limited to a maximum of twice the defendant's proportionate share of non-economic damages except where a greater multiplier was needed to ensure the plaintiff recovery of at least 50% of the assessed non-economic damages.

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[11] In Missouri it is 30 days, which may be too short to actually encourage the plaintiff to try to collect; in Connecticut it is one year, which may be too long.

[12] Only plaintiffs with some degree of fault in the four states that retain traditional no comparative fault/joint and several liability would be significantly disadvantaged; plaintiffs in the nine states with comparative fault and joint and several liability could be somewhat disadvantaged. Plaintiffs in states with any further restrictions would likely benefit.

Proposal 2B - Guaranteed recovery, one-way preemption

- Joint and several liability of any defendant is than 10% at fault (taking into account the fault of the plaintiff and settling defendants)
- If any defendant is less than 10% at fault, that defendant's responsibility would be limited to a maximum of twice the defendant's proportionate share of non-economic damages except where a greater multiplier was needed to ensure the plaintiff recovery of at least 60% of the assessed non-economic damages.

Pros

- Should be seen by proponents of limitation as a good-faith offer, with real limits
- Preserves joint and several liability for defendants with significant degree of fault
- Ensures that no low-fault defendant will have to pay more than 50% (or 60%, if one-way) of total non-economic damages, and that in most cases they will be limited to their proportionate share
- Although it limits responsibility of low-fault defendants, it guarantees that plaintiff will collect substantial portion of assessed non-economic damages (if there are any solvent and available defendants)
- The two-way preemption version would increase plaintiff's guaranteed level of recovery in states with several liability for non-economic damages (such as California and Illinois), and thus might be considered an acceptable tradeoff for limitation on guaranteed recovery in other states

Cons

- Setting the guaranteed recovery level at 50% or 60% (or, in fact, any level lower than 100%) may be viewed as non-responsive to both the objections in the veto statement -- not full recovery, and discrimination against non-economic damages
- Will require fact-finders in the 13 states that don't have both comparative negligence and several liability to make additional determinations
- Defendants who view themselves as likely to be low-fault deep pockets will object that their potential for payment of non-economic damages is so high that they cannot take limitations into account in either settlement discussions or purchase of insurance
- Small degrees of differentiation of fault -- e.g., between 9% and 11% -- could have major repercussions on responsibility to pay damages

Your advisors recommend that proposal 1 be the first one we explore with proponents of product liability. It is by far the most consistent with the veto statement. If, however, it is rejected out of hand by product liability proponents, and you believe it is essential that we continue to negotiate, we would recommend Proposal 2A, which includes two-way preemption. We should make it very clear that if forced to one-way preemption, we would only accept a proposal with a significantly higher level of guaranteed recovery for the plaintiff (e.g., 60%), and a significantly lower threshold of for imposition of several liability (e.g., 10%).

Areas where we believe some negotiation could be possible include:

- Some decrease in the minimum level of recovery for two-way preemption (we would put an absolute floor at 50% for one-way preemption and 40% for two-way preemption)

- Some increase in the threshold for imposition of joint and several liability (we would put an absolute ceiling of 35% for two-way preemption and 15% for one-way preemption)

Product liability - notes + memos

THE WHITE HOUSE

WASHINGTON

July 2, 1997

MEMORANDUM FOR **SECRETARY RUBIN**
SECRETARY DALEY
SECRETARY SHALALA (WILLIAM CORR)
DIRECTOR RAINES
ADMINISTRATOR ALVAREZ (GINGER LEW)
CHAIR YELLEN
CHAIR BROWN
DEPUTY SECRETARY SUMMERS
JOHN DWYER
ERSKINE BOWLES
BRUCE LINDSEY
JOHN HILLEY
CHARLES RUFF
BRUCE REED
ELENA KAGAN
JOHN PODESTA
SYLVIA MATHEWS
RON KLAIN
CHARLES BURSON

FROM: **GENE SPERLING**

SUBJECT: **Draft product liability memo**

Attached is a draft memo to the President on federal product liability law, based on our discussions last week. We ask two things: (i) your comments, edits and thoughts; and (ii) your choice among the three recommendations set out.

Ideally, we would like your response by noon tomorrow, July 3. Please forward comments to Ellen Seidman of my staff, who can be reached at 456-5359 or by fax at 456-1605. We apologize for the short timeframe, but we are attempting to get this memo in to the President before he leaves Washington tomorrow evening. Even noon is going to be hard; we hope the memo is sufficiently reflective of our discussions that turning it around in time is feasible. Please call me if you have any serious problems with this time frame.

Thank you all for your help, and for that of your staffs, in getting through this process.

cc:
Andrew Pincus
Jeffrey Hunker
Fran Allegra
Donald Remy
Tom McGivern
Ed Murphy
Ron Matzner
Pam Gilbert
Michael Deich
Steve Aitken
Tim Brennan
Tracey Thornton
Peter Jacoby
Bill Marshall
Lisa Brown

Draft:July 2, 1997 (3:47pm)

SUBJECT: **Product liability legislation**

I. ACTION FORCING EVENT: On May 1, on a strict party line vote, the Senate Commerce Committee reported out S.648, Senator Gorton's revision of the product liability bill you vetoed last year. Senator Rockefeller not only voted against S.648, but has made it very clear that he will not join until your concerns are satisfied, and Senator Gorton understands that without Senator Rockefeller's support, the bill cannot pass. On the other hand, Senator Lott has been pushing to bring the bill to the floor, leading Senator Rockefeller (together with Mr. Dingell) to press us to negotiate changes in the bill to meet your concern. Senator Lott may well want to move soon after the July 4 recess. Meanwhile, Senator Breaux is urging us to work with him on an alternative to the Gorton bill.

II. BACKGROUND: The 104th Congress passed product liability reform law -- a part of the Contract with America -- by a vote of 259 to 158 in the House and 59 to 40 in the Senate. The bill would have partially preempted state law as to both standards of liability for sellers and manufacturers of products that cause bodily harm and measures and allocation of damages. On May 2, 1996, you vetoed the bill, citing eight issues:

- Interference with state prerogatives in tort law
- One-way preemption, where pro-consumer state laws were preempted, but laws that limited consumer rights were not
- The cap on punitive damages, particularly in light of the Statement of Managers, which virtually directed judges not to use the "additur" provision included in the bill under which caps could be superseded
- Several -- not joint -- liability for non-economic damages
- A too-short (15 years), too-broad (all products) statute of repose
- Preemption of state negligent entrustment statutes, which make sellers of dangerous goods (e.g., firearms and liquor) responsible for certain actions of the buyers
- Failure to toll the statute of limitations during the period of a stay issued by a bankruptcy court
- Application of the limits on liability of biomedical materials suppliers to negligent suppliers

The House failed to override your veto by a vote of 258 to 163 to override. The House having failed to override, the Senate never took a vote.

III. CURRENT CONGRESSIONAL ACTIVITY

A. S.648

S.648 fixes the bankruptcy tolling problem, and makes an honest -- although not complete -- attempt to respond to the negligent entrustment issue. Moreover, it lengthens the statute of repose to 18 years, and establishes two-way preemption for the statute of repose, so that shorter state statutes would be lengthened (all state statutes that are set in years are shorter than 18 years). The bill does not respond to the two major problems you cited -- the cap on punitives and several liability for non-economic damages -- nor does it change the biomedical materials provision.

B. Senator Rockefeller and Mr. Dingell

Senator Rockefeller and Mr. Dingell are clearly looking for guidance on how to resolve the remaining issues (punitive damages, several liability for non-economic damages, statute of repose and biomedical materials) to meet both the concerns and fact patterns in your veto message. They have said they will engage in negotiations with us (clearly they do not expect to be able to accept our initial proposal) to develop legislation that will pass and will not be vetoed. Senator Rockefeller, in particular, has said he has no interest in another veto.

C. Senator Breaux

Senator Breaux would like to deal with this issue in an entirely different way. He has developed a bill focused far more on reducing frivolous lawsuits and less on substantive product liability standards. Senator Breaux/s bill would include a statute of repose that is more flexible than that in S.648, would establish uniform federal standards for punitives damages but no cap, and would do nothing to change state law concerning joint and several liability for non-economic damages.[1] His bill would also set stricter pleading standards for federal and state court product liability actions, restrict multi-state product liability class actions, enact a very weak form of alternative dispute resolution, and require a study by the Attorney General of the product liability system. It is unclear how far Senator Breaux can get in moving support off the Gorton bill without the Administration's support for his approach.

D. Consumer groups and other advocates

Consumer groups and others are strongly opposed to any legislation in this area, and have stated that they view you as "the last bastion against tort deform." The American Bar Association has written you in opposition to any federal legislation primarily on federalism grounds, but also raising concerns that overlaying partial tort law preemption on the legal systems of fifty states will cause more confusion and uncertainty, not less.

III. MAJOR ISSUES PRESENTED:

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[1] As discussed below, many states, including California, already have several liability for non-economic damages.

Over the past eight weeks, we have jointly run an interagency process to consider whether there might be ways to alter S.648 to respond to the concerns in your veto message in a manner that could be acceptable to at least Democratic proponents of the legislation. Participants in the process included: OVP, NEC, DPC, OMB, CEA, White House Counsel, White House Legislative Affairs, Justice, Treasury, Commerce, and SBA and the Consumer Product Safety Commission as an advisor. FDA is participating in the discussion of biomedical materials. The working group surveyed the law in all the states on the critical issues of punitive damages, joint and several liability and statute of repose, and developed a number of alternatives in each area that we believe could move the bill closer (and in some cases, all the way) to your goals but may have a chance of not being rejected out of hand by proponents.[2] Two meetings of the NEC principals were held, on June 24 and 26.

A. Whether there should be federal legislation in this area at all

The arguments of the business community in favor of national legislation rest on three propositions:

- Concern about product liability litigation, and particularly concern about disproportionate awards for non-economic damages and punitive damages, is sapping American productivity by misdirecting management time and energy and capital and by putting an excessive -- and frequently non-insurable tax -- on innovation.
- In a national economy, subjecting products and manufacturers to 50 different liability regimes is not only inefficient but also -- because of the opportunities for forum shopping by plaintiffs, particularly in class actions, unfair.
- Manufacturers are the deep pocket focus of liability suits that are in fact generated by the activities of those who repair and service products; making manufacturer liability more limited an predictable -- as occurred when the 18-year statute of repose was instituted for aircraft -- will put the burden of care of those most responsible for and able to accomplish it.

Consumer groups, as well as lawyers (the ABA as well as ATLA), argue against the need for federal legislation based on:

- The lack of any explosion of product liability suits, and in particular, excessive punitive damage awards that survive judicial remittitur, suggesting there's no problem to be fixed.
- The fact that all recent proposals in this area would cut back on traditional principles of tort law that benefit plaintiffs, suggesting that what the manufacturers want is not uniformity but a tilt in their direction

[2] Based on discussions with the Center for Violence Policy, we have also crafted a more complete fix to the negligent entrustment provision. We believe there will be no problem getting the proponents to adopt this.

- The traditional role of the states in tort law, combined with the fact that all existing proposals would only partially preempt state tort law, leading to even more non-uniformity and uncertainty as this law is overlaid on, e.g., state medical malpractice law.
- Whatever limitations are initially included in federal product liability legislation will be vulnerable to cutbacks in future Congresses; the time to stop erosion is before it starts

B. One-way or two-way preemption

One of the most contentious issues that runs through the legislation is whether federal standards should preempt all state laws ("two-way preemption") or whether they should function solely as a floor, with states free to establish more defendant-friendly standards ("one-way preemption"). For example, if the federal statute of repose were 18 years, two-way preemption would both lengthen shorter statutes and impose the 18-year limitation in states that have no statute of repose; one-way preemption would only lengthen shorter statutes. Similarly, if the federal government were to enact standards for awarding punitive damages, two-way preemption would both tighten the standard in states that, for example, allow punitives to be awarded for reckless behavior and require states that do not allow punitives at all to allow them according to the federal standards. One-way preemption would only tighten standards in some states, leaving others free to bar punitives entirely.

The bill you vetoed last year was almost entirely one-way preemptive. In your veto message you said, "As a rule, this bill displaces State law only when that law is more favorable to consumers; it defers to State law when that law is more helpful to manufacturers and sellers. I cannot accept, absent compelling reasons, such a one-way street of federalism. As noted above, S.648 is two-way preemptive as to the statute of repose (as well as with respect to the general standards of manufacturer and seller liability and the statute of limitations) but retains one-way preemption on punitive damages.[3]

While one of the arguments manufacturers and sellers make in favor of national legislation is the desire to create uniform federal standards, which would support uniform two-way preemption, on the two issues where they have made serious headway in the states -- limitations on punitive damages and imposition of several liability -- they are far more interested in a federal floor than in uniformity. We have been told, for example, that establishing the right to punitive damages in states where it does not exist, or limiting several liability for non-economic damages where state law has established it, would be totally unacceptable.

Consumer groups argue in favor of two-way preemption, ostensibly on the ground that the only good reason for federal standards is uniformity. However, many of these same groups regularly

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[3] In form, S.648 is two-way preemptive on several liability for non-economic damages. However, since it imposes the least plaintiff-friendly rule possible (totally several liability), it is effectively one-way preemptive.

argue that federal environmental and consumer protection standards should function only as a floor, allowing states to impose more rigorous rules. It is conceivable that the consumer argument for two-way preemption is more an effort to highlight the inconsistency in the manufacturers' position -- and perhaps to raise an insurmountable barrier to legislation -- than a firmly held constitutional principle.

C. Several liability for non-economic damages

Over the last several years, tort reform at the state level has essentially done away with the traditional rule of no comparative fault and full joint and several liability. (Only Alabama, Maryland, North Carolina and Virginia retain this combination.) Nine states[4] have full joint and several liability, but include comparative fault, thereby reducing the defendants' joint responsibility by the measure of the plaintiff's responsibility. Thirteen states[5] have pure several liability, for both economic and non-economic damages, and 24 states have various hybrid forms.

Both last year's vetoed bill and S.648 limit a defendant's responsibility for non-economic damages "in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant." The trier of fact is required to assign this percentage taking into account the responsibility of all persons responsible, including those not before the court, such as settling defendants.

In vetoing last year's bill with respect to this issue, you cited the provision's general effect of preventing "many persons from receiving full compensation for injury," noting in particular the problems created by insolvent defendants. You also cited the particular impact of a several rule for non-economic damages as unfairly discriminating against "the most vulnerable members of our society." You said, "Noneconomic damages are as real and as important to victims as economic damages."

Manufacturers assert that the problem with joint liability for non-economic damages is that such damages -- unlike economic damages -- are totally unpredictable and subject to the whim of the jury, thereby making any assessment of the risk, or the purchase of insurance against the risk, virtually impossible. They are particularly concerned about the potential for a large award against the only solvent defendant in a case in which that defendant is only marginally at fault. Opponents make the argument that non-economic damages are as real and as important -- particularly to the poor, the young and the old -- as economic damages, and should not be treated differently. Some also contend that the different state standards represent the innovation and experimentation that is the role of the states, and this should not be preempted.

D. Punitive damages

The process of awarding punitive damages and the amount of such damages have been the subject of some of the most intense controversy. Both last year's vetoed bill and S.648 cap punitive damages -- at the **greater** of two times compensatories (including non-economic

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[4] Arkansas, Delaware, Maine, Massachusetts, Michigan, Pennsylvania, Rhode Island, South Carolina and West Virginia

[5] Alaska, Arizona, Colorado, Illinois, Indiana, Kansas, Kentucky, North Dakota, Tennessee, Utah, Vermont and Wyoming

damages) or $250,000 for most companies and the lesser of these two amounts for individuals and small businesses. Upon consideration of a list of eight factors[6], a judge could award damages in excess of the large business cap (but not the small business cap), up to the amount awarded by the jury, which would not be informed of the cap.[7] The "additur" provision explicitly constitutes one-way preemption -- it does not permit additur where state law otherwise limits punitive damages.

The bills would also: (i) establish a uniform federal standard of proof of "clear and convincing"; (ii) establish a uniform standard for award that conduct "carried out with conscious, flagrant indifference to the rights or safety of others was the proximate cause" of the harm; and (iii) authorize any party to request that punitive damages be considered in a separate proceeding (generally so that evidence of the defendant's financial condition would not be allowed into evidence during the liability and compensatory damages phase of the trial). While these rules are meant to apply in all states that have punitive damages, they would not apply in states where punitive damages are prohibited by law.[8]

In vetoing last year's bill, you stated that you "oppose arbitrary ceilings on punitive damages, because they endanger the safety of the public. Capping punitive damages undermines their very purpose, which is to punish and thereby deter egregious misconduct." You noted that the additur

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[6] The factors are: "(i) the extent to which the defendant acted with actual malice; (ii) the likelihood that serious harm would arise from the conduct of the defendant; (iii) the degree of the awareness of the defendant of that likelihood; (iv) the profitability of the misconduct to the defendant; (v) the duration of the misconduct and any concurrent or subsequent concealment of the conduct by the defendant; (vi) the attitude and conduct of the defendant upon the discovery of the misconduct and whether the misconduct has terminated; (vii) the financial condition of the defendant; (viii) the cumulative deterrent effect of other losses, damages, and punishment suffered by the defendant as a result of the misconduct, reducing the amount of punitive damages on the basis of the economic impact and severity of all measures to which the defendant has been or may be subjected . . ."

[7] The judge would be required to hold a separate proceeding on awarding an additional amount, consider each of the items, and state the court's reasons for an award above the cap in findings of fact and conclusions of law. A separate finding on each factor is not explicitly required. The conference report on last year's bill, of course, virtually directed judges not to use this authority.

[8] In seven states punitive damages are generally forbidden; in 16 others, they are capped in one way or another. Twenty-seven states allow unlimited punitive damages in product liability cases. Most states that allow punitive damages have adopted the "clear and convincing" evidentiary standard. While the liability standards are less uniform, only a few states allow the award of punitive damages for reckless behavior without some other aggravating factor. We have not found any state that requires that the conduct leading to the punitive damages be the "proximate cause" of the plaintiff's harm, although the words "cause" and "result" are used. Bifurcated trials -- at least on the issue of the defendant's financial condition -- are allowed or required in 15 states.

provision might have mitigated this concern, but the Statement of Managers virtually directing it not be used made it ineffective in that respect.

Manufacturers assert that unpredictable and unjustifiably large punitive damage awards have driven them out of markets and impinged on innovations. Consumer advocates assert that only potentially unlimited punitive damages can deter harmful misconduct by large companies. Surveys suggest that neither the award of punitives nor the amount is skyrocketing in products cases.[9]

E. Statute of repose

At its starkest, a statute of repose bars litigation after a product has been in service a specified period of time. Twenty-two states and the District of Columbia currently have statutes of repose for product liability; 17 of the states and the District restrict lawsuits after a specified number of years (ranging from 5 to 15) and the remainder use some variation of "useful life" as the bar. In 1994, you signed legislation establishing a preemptive 18-year statute of repose for general aviation.

The bill you vetoed last year included a preemptive 15-year statute of repose for all products. The statute would, however, only have preempted states without any statute of repose, or with a statute **longer** than 15 years. Shorter state statutes would have remained effective. Your veto message referenced the length of the statute, the fact that it was broadly inclusive (you cited handguns), and the fact that the preemption was only one way. The Senate bill from the 104th Congress had covered only durable goods in the workplace and had an 18-year one-way preemptive statute.

S. 648, as reported out of the Senate Commerce Committee on a voice vote, includes a fully (two-way) preemptive 18-year statute of repose, covering all products except: (i) motor vehicles, vessels, aircraft and trains used to transport passengers for hire; (ii) products that cause toxic harm; and (iii) products with express written warranties that exceed 18 years.

Manufacturers assert that a firm, and broad, statute of repose is necessary not only to provide them some certainty, but also to put the risk of injury from long-lived products on those most able to prevent it -- owners, upgraders and servicers. They argue that the 18-year statute of repose for general aviation you signed in 1994 has not only increased the willingness of manufacturers to produce the aircraft, but has made owners and servicers far more careful,

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[9] A recently-released Rand study has found an increase in the number and amount of punitive damage awards in financial fraud cases, such as cases involving insurance or financial products misrepresentation. This does not appear to extend to cases involving products as defined in the bill, which is limited to physical goods.

because they understand the deep pocket of the manufacturers will not be available to bail them out.

Consumers, on the other hand, argue that injuries from long-lived products -- including those that have not been altered or do not need service -- are common, and often the manufacturer should have foreseen and prevented the problem that caused the injury. They argue it is particularly important that those injured by long-lived consumer goods (such as camping equipment and cedar chests) not be barred from court completely by a strict statute of repose. Workers, they note, at least can collect worker's compensation for injuries caused by long-lived defective goods in the workplace.

IV. ALTERNATIVES

Working from the alternatives developed by the working group in each of the three major areas identified, your advisors concluded that the choice of alternatives really depends on another decision, whether the Administration should:

- take the position that state law developments and the lack of strong evidence of major problems in this area that are caused by lack of national standards leads us to conclude no federal legislation is appropriate at this time;
- put forward a series of proposals that are fully consistent with both your veto statement and the principle of promoting national uniformity, even if such proposals have little or no chance of leading to a bill that can be enacted; or
- put forward a series of proposals that product liability legislation proponents will regard as an acceptable place to start negotiations and that can, albeit with some difficulty, be squared with your veto message.

Some of your economic advisors believe the business community may be correct in asserting that the current tort liability system, and in particular the issues raised in this legislation, over-deter businesses in their development and production of innovative products. In our discussions with the business community, we have asked them to provide empirical evidence that innovation has been stymied by litigation in general or the issues that particularly concern us: punitive damages and several liability for non-economic damages. Unfortunately, empirical evidence is not available, and the anecdotes relate to pharmaceuticals or related products, and often to the issues raised by mass tort claims for **economic compensatory** damages, not non-economic damages or punitive damages..

As your advisors looked into the issue, we came to the following conclusions:

- While logically there might be some impact on manufacturing innovation and productivity from the tort system,
  - there is no empirical evidence
  - all the anecdotal evidence is from one sector -- pharmaceuticals, including vaccines -- but the legislative proposals are far broader
  - there is no explosion of either litigation or punitive damages

- the economy is booming and productivity is rising
- Over the past several years -- indeed, even since the start of the 104th Congress -- the states have made major moves toward making the tort system more defendant-friendly, ranging from the virtual abandonment of traditional principles of joint and several liability to the imposition of caps on punitive damages
- If federal legislation is not to lead to uniform national standards, there is little justification for it; there is little or no justification for one-way preemption
- Overlaying limited product liability preemption on the tort law and civil procedure of 50 states will likely increase confusion and uncertainty, not decrease it
- Recent Supreme Court decisions, including the Brady bill decision, may call into question the constitutionality of federal legislation that attempts to mandate changes in state law and judicial procedure

Thus, while there continues to be sentiment among your economic advisors for "doing something" to improve the tort system, it is mild and tempered by the recognition that current proposals may do as much harm as good. Your legal advisors do not believe the current proposals should be supported. Both groups of advisors feel strongly that if there is to be any federal legislation, it should establish uniform national standards, and should -- in the areas explicitly covered -- completely preempt the field. There is no justification for one-way preemption in this area.

This position can be manifest in two ways: taking a strong against any legislation, or developing an Administration bill that is consistent with both the veto statement and the current state of the law, even if that bill cannot be reconciled with the prime tenets of the Gorton bill.

A. Oppose federal product liability legislation at this time

_____[names of advisors] recommend that you take a firm and overt stance against any federal product liability legislation at this time. Recent changes in state law as well as in federal constitutional law, combined with the lack of evidence of serious widespread problems suggest that the burden of showing why traditional state prerogatives in this area should be overruled and state law overlaid with potentially incompatible federal law has not been met. If legislation is needed in the area of pharmaceuticals (including vaccines), then it should be pursued on a targeted basis, taking advantage of -- and protecting -- the strong federal regulatory system for drugs.

B. Develop an Administration bill we can support, consistent with both the veto statement and the current state of the law

The hallmarks of this option are: (i) full two-way preemption, such that states with currently more defendant-friendly laws would be brought to a uniform national level as well as states whose laws are currently more pro-plaintiff; (ii) consistency with your veto message in all

respects; and (iii) inclusion of items that were not part of either the vetoed bill or S.648 that can enhance the effectiveness of the legal system for injured plaintiffs.

This option does not include any provision on joint and several liability for non-economic damages. Since part of the focus of your veto message was on the unfairness of distinguishing between economic and non-economic damages, no provision that deals only with non-economic damages can be fully consistent with the veto message. Moreover, we have reason to believe some proponents of legislation would be willing to put forward an alternative without any change in joint and several liability. However, we also know the business community regards this as an important issue but, given current trends in state law toward several liability, they will be extremely unlikely to accept two-way preemption in this area. Appendix A contains alternative formulations of joint and several liability for non-economic damages that were developed by the working group, together with pros and cons.

This option would consist of the following:

Punitive damages - Advisory jury opinion with judicial determination and a breachable cap for small businesses, two-way preemption

- The jury would render a solely advisory opinion on punitive damages
- The actual determination of punitive damages would be made by the judge
- The judge would be required to consider the factors in S.648, and would be required to explain why the judge's award differs (either higher or lower) from the jury's advice
- The judge could allocate a portion of punitive damages to the state rather than to the plaintiff
- Cap punitive damages at the lesser of twice compensatories or $250,000 for firms that have 10 or fewer employees **and** annual revenues of $1 million or less. The jury would not be told of the cap, and the judge could award damages in excess of the cap only upon a specific finding that damages in excess of the capped amount were not only needed "to punish or deter," but also that the financial impact of the higher award had on the defendant and its employees had been explicitly considered by the judge.
- Couple this with procedural changes to set the evidentiary standard at "clear and convincing evidence," the substantive standard at "willful and wanton" (excluding recklessness), and to require bifurcation of the damages determination if requested by any party

Pros

- Is analogous to criminal law, by keeping the jury involved but placing the decision on what is essentially a punishment in the hands of the person most experienced in deciding such issues, the judge
- Since historically, punitive damage awards that seem unjustified have stemmed from jury decisions, may increase rationality in the system
- Provides some protection for truly small businesses, responding to one of the complaints about the capriciousness of punitives

- Since businesses of the size described are rarely hit with significant punitive damages, since in most states the defendant's financial condition is already taken into consideration, there may be little practical negative effect.
- Allows the Administration to agree with some sort of cap
- By adopting the S.648 factors, may be seen as a good faith offer

Cons

- Agreeing to any cap at all breaks through a clear line we established last year of "no caps on punitives"; it may be very difficult to hold the line against expansion of this cap, either to larger businesses, or by limiting the judge's discretion
- Any proposal that limits punitive damages in any way may be seen as tipping our hand -- or limiting our options -- with respect to the tobacco settlement
- Takes away from the jury what has been regarded as a traditional jury function
- While judges may determine punitive damages in many states in cases where they are the trier of fact, only Connecticut and Kansas provide for initial judicial determination (in contrast to appellate review or remittitur) where a jury has sat
- Unlikely to solve concerns of either proponents or opponents of caps; consumer groups and lawyers have not favored judicial determination
- May raise difficult Seventh Amendment issues ("no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law")
- Making it fully two-way preemptive, thus forcing some states to allow punitive damages that do not currently do so, is likely to be regarded as both unacceptable and inflammatory by the business community

Statute of repose

- Two-way preemption of state law (as in S.648)
- 18 year statute of repose (as in S.648)
- Which a plaintiff may overcome by clear and convincing evidence that the product had a longer useful safe life (not included in S.648, and responsive to the victim of the hay-baler accident cited in the veto message and to accidents involving products clearly intended to be longer-lived, such as elevators and most firearms)
- Covering only durable goods in the workplace (narrower than S.648, retaining plaintiff rights concerning consumer goods in states without any statute of repose and responding to your concern about handguns)
- With further exceptions for toxic substances, vehicles used in transportation for hire, and express warranties (as in S.648)
- And with a provision that extends the statute to allow full benefit of the two-year statute of limitations after injury or discovery of harm in, for example, year 17 (not in S.648, but not expected to be a problem)

Pros

- By building on S.648, demonstrates good faith to proponents of that legislation
- Two-way preemption is responsive to principles of veto message, and also lengthens statute in the 22 states that have them
- Number of years is longer than in any current state statute

- Rebuttable presumption protects workers injured by products clearly intended to be longer-lived
- Bright line number of years, combined with clear and convincing standard, means manufacturers will be free from arguments about whether something was intended to have a useful life slightly longer than 18 years
- By restricting statute to durable goods in the workplace, consumers in states without statutes of repose retain their access to court for injuries from long-lived or intermittently-used consumer goods such as cedar chests and camping and baby products
- Until late last year, all formulations of this statute had been limited to durable goods in the workplace, in part because those injured in such accident will at least have received some compensation through workers compensation
- Expands on an already-existing federal liability scheme -- workers compensation
- Exceptions protect access to court in latent defect cases

Cons

- Opponents of product liability reform will oppose any statute of repose as limiting plaintiffs' rights in states without such statutes
- Combination of two-way preemption and bright line (even with rebuttable presumption and limitation only to durable goods in the workplace), will restrict the access of some injured parties to court
- Proponents of S.648 may regard rebuttable presumption and limitation to durable goods in the workplace as unacceptable limitations, particularly given that they extended the statute from 15 to 18 years and made preemption two-way in response to the veto message

In addition to these proposals, we recommend that option 1 include items plaintiffs believe could make a real difference in their ability to recover, as well as provisions in the Breaux draft:

- Provision for alternative dispute resolution for small claims that both defendants and plaintiffs would find appealing
- Limitations on the use of protective orders where disclosure of the information is relevant to the public health or safety unless disclosure is clearly outweighed by a substantial interest in maintaining the confidentiality of the records
- Stricter pleading requirements and limitations on multi-state class actions where parties allege different types of damages
- A requirement for a study of the product liability system by the Attorney General

The first of these items might -- depending on how it is drafted -- gain the support of both plaintiffs (who cannot find lawyers to take small claims through the traditional legal system for a contingency fee) and defendants. The second (based on a bill that has been introduced by Senator Kohl) would be strongly supported by consumer groups and -- in light of the tobacco revelations probably could generate strong public support -- but would certainly be opposed by defendants and perhaps even by the plaintiff bar. The third and fourth provisions are from the Breaux draft. The class action may not be giving up much from the plaintiffs' perspective given the Supreme Court's recent decision overturning the asbestos settlement.

This option is recommended by _____[names of advisors]

C. Make a proposal that has a viable chance of starting negotiations with proponents

As described in the specific pros and cons below, the items in this option cannot be completely squared with your veto statement. On the other hand, they represent real movement toward responding to your objections. However, it is critical to recognize that **once these options are on the table, negotiations may take them even farther afield, and lead to a negative dynamic in which bill supporters think they've come "most of the way" toward your position and assert that refusal to support their bill amounts to "moving the goalposts."** The danger with this option rests far less in its particular parameters than in the slippery slope it sends us down.

Again, no provision on several liability for non-economic damages is included, based on indications some proponents may be willing to move without such a provision. Appendix A contains options developed by the working group, of which only Proposal 2B is likely to be acceptable at all to the business community.

This option would consist of:

Punitive damages - Cap with easier breakthrough, one-way preemption

- Cap punitive damages at the greater of $250,000 or twice compensatories (the lesser of the two for small businesses)
- Do not tell the jury of the cap
- Allow the judge to award punitive damages above the cap (for both small and large businesses) without an additional proceeding and on a simple finding that the capped amount is "insufficient to punish or deter," the standard in S.648, with no consideration of specified factors
- Insist that there be no legislative history suggesting this authority is to be used any more sparingly than implied by the statutory standard
- Couple this with procedural changes to set the evidentiary standard at "clear and convincing evidence," the substantive standard at "willful and wanton" (excluding recklessness), and to require bifurcation of the damages determination if requested by any party
- This would be two-way preemptive, except with respect to states that do not allow punitives in products cases at all

Pros

- Closest to both S.648 and earlier versions of bill, and thus likely to be most easily regarded as acceptable by proponents
- Particularly given that there are few punitive damage awards in excess of the cap and that judges now have remittitur authority, this would likely have little practical impact on actual awards
- The procedural changes may produce more uniformity across the country

- Making the additur provision two-way preemptive is a real improvement for plaintiffs compared to S.648

Cons

- This looks like a cap on punitive damages, which you said you opposed; "no caps on punitives" has been used as a shorthand description of the Administration's firmest position
- It may actually be a cap with judges reluctant to award punitives
- Holding the line on the legislative history can be very difficult, particularly if the statute is acceptable in all other respects

Statute of repose

The proposal would be the same as under option 1, which we believe will be regarded as a good faith offer to negotiate.

The primary dangers with this strategy are the likelihood that opponents will not believe even the initial positions are consistent with the veto statement, and that it will be relatively easy for the other side to make what look like cosmetic changes that may in fact be quite significant. For example, deleting the plaintiff's option to breach the 18-year statute of repose by a clear and convincing showing that the useful safe life was intended to be longer -- a likely demand of the manufacturing community -- would look minor, but in fact would work a major change in that it completely shut the courtroom door on plaintiffs in the many states with no statute of repose.

This option is recommended by _____[names of advisors]

V. DECISIONS:

____ Let's take the offensive against any federal product liability legislation

____ Propose option B to Senator Rockefeller, understanding he will not regard it as a serious offer.

____ Discuss the offer with Senator Breaux before making it public, and make common cause with him if he's interested

____ Make the offer public to head off claims by bill proponents that we did not have anything to offer

____ Propose option C to Senator Rockefeller, making explicit that this is a best and final offer and any further movement will result in a veto

____ Propose option C to Senator Rockefeller, being prepared to negotiate

____ None of the options is good. We need to talk.

APPENDIX A
Options on Joint and Several Liability for Non-Economic Damages

The formulations described below reduce the negative impact of imposing several liability for non-economic damages. However, any formulation that does not guarantee the plaintiff 100% of non-economic damages (where there is any solvent and available defendant) is discriminatory against non-economic damages in those states that retain joint liability for economic damages. Assuming you do not want to put several liability for **economic** damages into play, you should be aware that all of the options described -- except pure reallocation -- have this flaw.

Informed by various state law provisions concerning joint and several liability, your advisors considered formulations for federal preemption involving the following concepts:

- Several liability with reallocation among remaining defendants (and plaintiff if the plaintiff is at fault) in the event the amount allocated to any defendant is uncollectible (thus guaranteeing plaintiffs 100% recovery for the portion of the damage not their fault, but sparing low-fault, deep-pocket defendants the need to sue for contribution)
- Setting a level of fault below which only several liability will apply (thus responding to the concerns of low-fault deep-pocket defendants)
- Setting a threshold of fault below which several liability will apply, but with a multiplier (thereby guaranteeing the plaintiff some recovery where only the low-fault defendants are solvent)
- Guaranteeing the plaintiff a specified percentage of recovery of non-economic damages
- The extent to which plaintiff fault will be taken into account to reduce recovery for non-economic damages
- Special rules for small businesses, particularly as to responsibility for more than their share of damages
- Two-way preemption, which would be meaningful if federal law were less pro-plaintiff than some state laws

Working on the assumption that you wished us to develop proposals that include several liability for non-economic damages -- so as to be able to convince those favoring product liability of our good faith, but that are least restrictive of the rights of plaintiffs, your advisors developed the following alternative formulations relating only to non-economic damages:

Proposal 1 - Reallocation[10]

- Joint and several if the plaintiff is fault-free

[10] This is based on the statute currently in effect in Missouri.

- If the plaintiff is at all at fault, liability is several, but if the plaintiff cannot collect from one or more defendant after a specified period of time[11], the plaintiff can petition the court for reallocation of damages not attributable to the plaintiff among the remaining defendants, but no defendant less at fault than the plaintiff may be charged with more than twice his proportionate share of damages
- This would be two-way preemptive

Pros

- Preserves balance between faultless plaintiff and defendant with any fault in favor of the plaintiff
- Is generally consistent -- or at least not less pro-plaintiff -- with the laws of most states[12]
- Where plaintiff is at fault, less culpable defendants -- even if they are deep pockets -- will have their damages limited
- Of all the potential limitations, is most likely to retain 100% recovery for non-economic damages
- By retaining joint and several liability in many situations, should encourage settlement

Cons

- May be viewed as excessively pro-plaintiff, and thus not a good-faith offer, particularly if it is two-way, thus increasing defendants' responsibility in states, such as California, with several liability for non-economic damages
- May limit plaintiff's recovery where plaintiff is at fault and there are multiple defendants
- Requires fact-finders in (the 13) states that currently do not have comparative fault or several liability to assign degrees of responsibility
- Shifts from defendants to plaintiffs the responsibility for collecting from each defendant, potentially adding to delay in recovering and increased expense
- As among defendants, it is unclear why the extent of the plaintiff's responsibility should have an impact on defendants' responsibility to pay the judgment

Proposal 2A - Guaranteed recovery, two-way preemption

- Joint and several liability of any defendant is than 30% at fault (taking into account the fault of the plaintiff and settling defendants)
- If any defendant is less than 30% at fault, that defendant's responsibility would be limited to a maximum of twice the defendant's proportionate share of non-economic damages except where a greater multiplier was needed to ensure the plaintiff recovery of at least 50% of the assessed non-economic damages.

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[11] In Missouri it is 30 days, which may be too short to actually encourage the plaintiff to try to collect; in Connecticut it is one year, which may be too long.

[12] Only plaintiffs with some degree of fault in the four states that retain traditional no comparative fault/joint and several liability would be significantly disadvantaged; plaintiffs in the nine states with comparative fault and joint and several liability could be somewhat disadvantaged. Plaintiffs in states with any further restrictions would likely benefit.

Proposal 2B - Guaranteed recovery, one-way preemption

- Joint and several liability of any defendant is than 10% at fault (taking into account the fault of the plaintiff and settling defendants)
- If any defendant is less than 10% at fault, that defendant's responsibility would be limited to a maximum of twice the defendant's proportionate share of non-economic damages except where a greater multiplier was needed to ensure the plaintiff recovery of at least 60% of the assessed non-economic damages.

Pros

- Should be seen by proponents of limitation as a good-faith offer, with real limits
- Preserves joint and several liability for defendants with significant degree of fault
- Ensures that no low-fault defendant will have to pay more than 50% (or 60%, if one-way) of total non-economic damages, and that in most cases they will be limited to their proportionate share
- Although it limits responsibility of low-fault defendants, it guarantees that plaintiff will collect substantial portion of assessed non-economic damages (if there are any solvent and available defendants)
- The two-way preemption version would increase plaintiff's guaranteed level of recovery in states with several liability for non-economic damages (such as California and Illinois), and thus might be considered an acceptable tradeoff for limitation on guaranteed recovery in other states

Cons

- Setting the guaranteed recovery level at 50% or 60% (or, in fact, any level lower than 100%) may be viewed as non-responsive to both the objections in the veto statement -- not full recovery, and discrimination against non-economic damages
- Will require fact-finders in the 13 states that don't have both comparative negligence and several liability to make additional determinations
- Defendants who view themselves as likely to be low-fault deep pockets will object that their potential for payment of non-economic damages is so high that they cannot take limitations into account in either settlement discussions or purchase of insurance
- Small degrees of differentiation of fault -- e.g., between 9% and 11% -- could have major repercussions on responsibility to pay damages

Your advisors recommend that proposal 1 be the first one we explore with proponents of product liability. It is by far the most consistent with the veto statement. If, however, it is rejected out of hand by product liability proponents, and you believe it is essential that we continue to negotiate, we would recommend Proposal 2A, which includes two-way preemption. We should make it very clear that if forced to one-way preemption, we would only accept a proposal with a significantly higher level of guaranteed recovery for the plaintiff (e.g., 60%), and a significantly lower threshold of for imposition of several liability (e.g., 10%).

Areas where we believe some negotiation could be possible include:

- Some decrease in the minimum level of recovery for two-way preemption (we would put an absolute floor at 50% for one-way preemption and 40% for two-way preemption)

- Some increase in the threshold for imposition of joint and several liability (we would put an absolute ceiling of 35% for two-way preemption and 15% for one-way preemption)

Product liability - notes + memos

AGENDA
PRODUCT LIABILTY MEETING
June 24, 1997

I. Where things stand
    A. On the hill
    B. Within Administration -- what the working group has been doing

II. Why would the Administration support a products liability reform bill?

III. Is the Gorton/Rockefeller bill an appropriate vehicle to resolve substantive problems?

IV. If not, can it be improved?

V. How?
    A. Responses to President's veto message (options)
        1. Joint and several (two-way preemption)
        2. Punitives (two-way preemption)
        3. Statute of repose (two-way preemption)
    B. Additional items?
        1. ADR
        2. Pleadings/sanctions
        3. Protective orders
        4. Incentives for medical research and development

VI. Next steps
    A. ANOTHER MEETING ON THURSDAY AT 3:00, IN RESPONSE TO ERSKINE'S REQUEST
    B. Memo to the President?
    C. Meeting with President?

Product liability - notes + memos

From: Melissa Green on 06/23/97 12:39:25 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Principals meeting

Here is the paper I promised in my last e-mail regarding Product Liability Principals Mtg. Reminder: the meeting is tomorrow 6/24 at 5:30pm in the Roosevelt Room.
---------- Forwarded by Melissa Green/OPD/EOP on 06/23/97 12:22 PM ----------

Ellen S. Seidman 06/23/97 09:23:13 AM

Record Type: Record

To: Melissa Green/OPD/EOP

cc:
Subject: Principals meeting

This is the options part of the paper. ellen
---------- Forwarded by Ellen S. Seidman/OPD/EOP on 06/23/97 09:20 AM ----------

Ellen S. Seidman 06/18/97 08:23:19 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Jennifer D. Dudley/WHO/EOP, Melissa Green/OPD/EOP
Subject: Principals meeting

What follows should be a revised version of the options. ellen

Joint and several

Proposal 1 - Reallocation

- Joint and several if the plaintiff is fault-free
- If the plaintiff is at all at fault, liability is several, but if the plaintiff cannot collect from one or more defendant after a specified period of time In Missouri it is 30 days, which may be too short to actually encourage the plaintiff to try to collect; in Connecticut it is one year, which may be too long., the plaintiff can petition the court for reallocation of damages not attributable to the plaintiff among the remaining defendants, but no defendant less at fault than the plaintiff may be charged with more than twice his proportionate share of damages

- This would be two-way preemptive

Proposal 2A - Guaranteed recovery, two-way preemption

- Joint and several liability of any defendant is than 30% at fault (taking into account the fault of the plaintiff and settling defendants)
- If any defendant is less than 30% at fault, that defendant's responsibility would be limited to a maximum of twice the defendant's proportionate share of [non-economic] damages except where a greater multiplier was needed to ensure the plaintiff recovery of at least 50% of the assessed non-economic damages.

Proposal 2B - Guaranteed recovery, one-way preemption

- Joint and several liability of any defendant is than 10% at fault (taking into account the fault of the plaintiff and settling defendants)
- If any defendant is less than 10% at fault, that defendant's responsibility would be limited to a maximum of twice the defendant's proportionate share of [non-economic] damages except where a greater multiplier was needed to ensure the plaintiff recovery of at least 60% of the assessed non-economic damages.

Punitives

Proposal 1 - Procedural changes, coupled with a breachable cap for small businesses

- Support the provisions in S.648 providing for uniform federal standards of clear and convincing evidence and the right to request bifurcation.
- Support a uniform federal liability standard for punitive damages that would not include recklessness, but (i) would not require that the conduct that is the subject of the punitive damages is the "proximate cause" of the plaintiff's harm and (ii) would explicitly permit circumstantial evidence of intent or malice.
- Cap punitive damages at the lesser of twice compensatories or $250,000 for firms that have 10 or fewer employees **and** annual revenues of $1 million or less. The jury would not be told of the cap, and the judge could award damages in excess of the cap (but only up to the amount awarded by the jury) upon a finding that the capped amount was "insufficient to punish or deter."
- This would be two-way preemption, except that it would not require states that currently do not allow punitive damages in products cases to allow such awards

Proposal 2 - Allocation of punitive damages between plaintiff and state

- Authorize the jury to impose punitive damages without any cap on large businesses; small business punitives would be capped as in Proposal 1
- Vest the plaintiff in a 25% share of the total punitive damages, which amount will be assumed to include attorney's fees (i.e., no additional attorney's fees will be payable out of the punitive award)
- The remainder of the award would be payable to the state whose substantive law applies to the determination of punitive damages.
- States would be forbidden to intervene in the proceedings at any stage.
- Combine this with the procedural reforms outlined in Proposal 1
- This would be two-way preemptive except (i) it would not require states that do not

allow punitive damages in products cases to allow such awards and (ii) states would explicitly be allowed to opt out of the allocation to the state, in which case prior state law with respect to caps and allocation would apply

Proposal 3 - Advisory jury opinion with judicial determination

- The jury would render a solely advisory opinion on punitive damages
- The actual determination of punitive damages would be made by the judge
- The judge would be required to consider the factors in S.648, and would be required to explain why the judge's award differs (either higher or lower) from the jury's advice
- Combine with procedural changes from proposal 1

Proposal 4 - Cap with easier breakthrough

- Cap punitive damages at the greater of $250,000 or twice compensatories (the lesser of the two for small businesses)
- Do not tell the jury of the cap
- Allow the judge to award punitive damages above the cap (for both small and large businesses) without an additional proceeding and on a simple finding that the capped amount is "insufficient to punish or deter," the standard in S.648, with no consideration of specified factors
- Insist that there be no legislative history suggesting this authority is to be used any more sparingly than implied by the statutory standard
- Couple this with the procedural changes described in proposal 1
- This would be two-way preemptive, except with respect to states that do not allow punitives in products cases at all

Statute of repose

- Two-way preemption of state law (as in S.648)
- 18 year statute of repose (as in S.648)
- Which a plaintiff may overcome by clear and convincing evidence that the product had a longer useful safe life (not included in S.648, and responsive to the victim of the hay-baler accident cited in the veto message and to accidents involving products clearly intended to be longer-lived, such as elevators and most firearms)
- Covering only durable goods in the workplace (narrower than S.648, retaining plaintiff rights concerning consumer goods in states without any statute of repose and responding to your concern about handguns)
- With further exceptions for toxic substances, vehicles used in transportation for hire, and express warranties (as in S.648)
- And with a provision that extends the statute to allow full benefit of the two-year statute of limitations after injury or discovery of harm in, for example, year 17 (not in S.648, but not expected to be a problem)

Product liability - notes + memos

ESDraft:June 26, 1997 (3:05pm)

June __, 1997

MEMORANDUM FOR **THE PRESIDENT**

FROM: **Bruce Lindsey**
Gene Sperling

SUBJECT: **Product liability legislation**

I. ACTION FORCING EVENT: On May 1, on a strict party line vote, the Senate Commerce Committee reported out S.648, Senator Gorton's revision of the product liability bill you vetoed last year. Senator Rockefeller not only voted against S.648, but has made it very clear that he will not join until your concerns are satisfied, and Senator Gorton understands that without Senator Rockefeller's support, the bill cannot pass. On the other hand, Senator Lott has been pushing to bring the bill to the floor, leading Senator Rockefeller (together with Mr. Dingell) to press us to negotiate changes in the bill to meet your concern. We believe Senator Lott can be held off until after the July 4 recess, but not much longer. Meanwhile, Senator Breaux is urging us to work with him on an alternative to the Gorton bill.

II. BACKGROUND: The 104th Congress passed product liability reform law -- a part of the Contract with America -- by a vote of 259 to 158 in the House and 59 to 40 in the Senate. On May 2, 1996, you vetoed the bill, citing eight issues:

- Interference with state prerogatives in tort law
- One-way preemption, where pro-consumer state laws were preempted, but laws that limited consumer rights were not
- The cap on punitive damages, particularly in light of the Statement of Managers, which virtually directed judges not to use the "additur" provision included in the bill under which caps could be superseded
- Several -- not joint -- liability for non-economic damages
- A too-short (15 years), too-broad (all products) statute of repose
- Preemption of state negligent entrustment statutes, which make sellers of dangerous goods (e.g., firearms and liquor) responsible for certain actions of the buyers
- Failure to toll the statute of limitations during the period of a stay issued by a bankruptcy court
- Application of the limits on liability of biomedical materials suppliers to negligent suppliers

The House failed to override your veto by a vote of 258 to 163 to override. The House having failed to override, the Senate never took a vote.

S.648 fixes the bankruptcy tolling problem, and makes an honest -- although not complete -- attempt to respond to the negligent entrustment issue. Moreover, it lengthens the statute of repose to 18 years, and establishes two-way preemption in that case, so that shorter state statutes (and all state statutes that are set in years are shorter) would be lengthened. However, the bill does not respond to the two major problems you cited -- the cap on punitives and several liability for non-economic damages -- nor does it change the biomedical materials provision.

Senator Rockefeller is clearly looking for guidance on how to resolve the punitives and non-economic damages issues to meet both the concerns and fact patterns in your veto message. However, he expects that once these issues are resolved, you will support the bill. Senator Breaux, on the other hand, would like to deal with this issue in an entirely different way, with a bill focused far more on reducing frivolous lawsuits and encouraging alternative dispute resolution. He would include a statute of repose that is more flexible than that in S.648, would establish uniform federal standards for punitives damages but no cap, and would no nothing to change state law concerning joint and several liability for non-economic damages.[1] His bill also would set stricter pleading standards for federal and state court product liability actions, restrict multi-state product liability class actions, enact a very weak form of alternative dispute resolution, and require a study of the product liability system. It is unclear how far Senator Breaux can get in moving support off the Gorton bill without the Administration's support for his approach. Consumer groups and others are strongly opposed to any legislation in this area, and have stated they view you as "the last bastion against tort deform."

Over the past eight weeks, we have jointly run an interagency process to consider whether there might be ways to alter S.648 to respond to the concerns in your veto message in a manner that could be potentially acceptable to at least Democratic proponents of the legislation. Participants in the process included: OVP, NEC, DPC, OMB, CEA, White House Counsel, White House Legislative Affairs, Justice, Treasury, Commerce, and SBA and the Consumer Product Safety Commission as an advisor. FDA is participating in the discussion of biomedical materials. Two meetings of the NEC principals were held, on June 24 and 26.

The working group surveyed the law in all the states on the critical issues of punitive damages, joint and several liability and statute of repose, and developed a number of alternatives in each area that we believe move the bill closer (and in some cases, all the way) to your goals but may have a chance of not being rejected out of hand by proponents.[2] The NEC principals believe that the primary, and perhaps the only, justification for federal legislation in this area at this time is to create uniform federal standards that can provide a level playing field and some degree of

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[1] As discussed below, many states, including California, already have several liability for non-economic damages.

[2] Based on discussions with the Center for Violence Policy, we have also crafted a more complete fix to the negligent entrustment provision. We believe there will be no problem getting the proponents to adopt this.

certainty for manufacturers and sellers while preserving the right and opportunity of injured plaintiffs to receive compensation. None of the NEC principals are of the opinion that an exceptionally strong case in favor of federal preemption of an area of traditional state prerogatives has been made by the business community. On the other hand, we understand how strongly that community feels about the issue, and do recognize the benefits of greater uniformity.

While you did not ask us to go back to first principles and look at the Gorton bill as a whole -- in contrast to focusing on the items cited in the veto statement -- we think it important that you be aware that other portions of the bill may pose potential difficulty. In particular:

- In an attempt to preempt only portions of state law and procedure, it is possible the bill oversteps constitutional bounds with respect to federalism. We have asked OLC to consider this issue, but they will not render an opinion until they have had a chance to analyze the Supreme Court's upcoming opinion in the Brady bill case, which raises some of these same federalism issues.
- The bill's preemption language, which is meant to leave state law in place except where explicitly preempted, is unclear and needs to be revised. DOJ will develop language to deal with this, which we will offer the sponsors.
- The bill's treatment of "misuse or alteration" would in essence relieve a manufacturer or seller of responsibility for injury caused by foreseeable misuse of a product, such as using flammable cotton playwear for as sleepwear for children. The Consumer Product Safety Act makes provision for this eventuality. [We have had one discussion about how to deal with this issue, but have not yet reached an agreement.]

III. MAJOR ISSUES PRESENTED:

A. Joint and several liability for non-economic damages

Over the last several years, tort reform at the state level has essentially done away with the traditional rule of no comparative fault and full joint and several liability. (Only Alabama, Maryland, North Carolina and Virginia retain this combination.) Nine states[3] have full joint and several liability, but include comparative fault, thereby reducing the defendants' joint responsibility by the measure of the plaintiff's responsibility. Thirteen states[4] have pure several liability, for both economic and non-economic damages. 24 states have various hybrid forms, which are described in the attached Department of Justice memo. Note particularly that in California, defendants are only severally liable for non-economic damages. Manufacturers assert that the big problem with joint liability for non-economic damages is that such damages -- unlike compensatories -- are

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[3] Arkansas, Delaware, Maine, Massachusetts, Michigan, Pennsylvania, Rhode Island, South Carolina and West Virginia

[4] Alaska, Arizona, Colorado, Illinois, Indiana, Kansas, Kentucky, North Dakota, Tennessee, Utah, Vermont and Wyoming

totally unpredictable and subject to the whim of the jury, thereby making any assessment of the risk, or the purchase of insurance against the risk, virtually impossible.

Both last year's vetoed bill and S.648 limit a defendant's responsibility for non-economic damages "in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant." The trier of fact is required to assign this percentage taking into account the responsibility of all persons responsible, including those not before the court, such as settling defendants. While the preemption is two-way, since the provision is less plaintiff-friendly than virtually any other formulation, two-way preemption is largely irrelevant.

In vetoing last year's bill with respect to this issue, you cited the provision's general effect of preventing "many persons from receiving full compensation for injury," noting in particular the problems created by insolvent defendants. You also cited the particular impact of a several rule for non-economic damages as unfairly discriminating against "the most vulnerable members of our society." You said, "Noneconomic damages are as real and as important to victims as economic damages."

The formulations described below reduce the negative impact of imposing several liability for non-economic damages. However, any formulation that does not guarantee the plaintiff 100% of non-economic damages (where there is any solvent and available defendant) is discriminatory against non-economic damages in those states that retain joint liability for economic damages. Assuming you do not want to put several liability for **economic** damages into play, you should be aware that all of the options described -- except pure reallocation -- have this flaw.

Informed by various state law provisions concerning joint and several liability, your advisors considered formulations for federal preemption involving the following concepts:

- Several liability with reallocation among remaining defendants (and plaintiff if the plaintiff is at fault) in the event the amount allocated to any defendant is uncollectible (thus guaranteeing plaintiffs 100% recovery for the portion of the damage not their fault, but sparing low-fault, deep-pocket defendants the need to sue for contribution)
- Setting a level of fault below which only several liability will apply (thus responding to the concerns of low-fault deep-pocket defendants)
- Setting a threshold of fault below which several liability will apply, but with a multiplier (thereby guaranteeing the plaintiff some recovery where only the low-fault defendants are solvent)
- Guaranteeing the plaintiff a specified percentage of recovery of non-economic damages
- The extent to which plaintiff fault will be taken into account to reduce recovery for non-economic damages
- Special rules for small businesses, particularly as to responsibility for more than their share of damages
- Two-way preemption, which would be meaningful if federal law were less pro-plaintiff than some state laws

B. Punitive damages

The process of awarding punitive damages and the amount of such damages have been the subject of some of the most intense controversy, with manufacturers asserting that unpredictable and unjustifiably large punitive damage awards have driven them out of markets and impinged on innovations, and consumer advocates asserting that only potentially unlimited punitive damages can deter harmful misconduct. Surveys suggest that neither the award of punitives nor the amount is skyrocketing in products cases.[5]

Both last year's vetoed bill and S.648 cap punitive damages -- at the **greater** of two times compensatories (including non-economic damages) or $250,000 for most companies and the **lesser** of these two amounts for individuals and small businesses. Upon consideration of a list of eight factors[6], a judge could award damages in excess of the large business cap (but not the small business cap), up to the amount awarded by the jury, which would not be informed of the cap.[7] The "additur" provision explicitly constitutes one-way preemption -- it does not permit additur where state law otherwise limits punitive damages.

The bills would also: (i) establish a uniform federal standard of proof of "clear and convincing"; (ii) establish a uniform standard for award that conduct "carried out with conscious, flagrant indifference to the rights or safety of others was the proximate cause" of the harm; and (iii) authorize any party to request that punitive damages be considered in a separate proceeding (generally so that evidence of the defendant's financial condition would not be allowed into evidence during the liability and compensatory damages phase of the trial). It appears these

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[5] A soon-to-be-released Rand study has found an increase in the number and amount of punitive damage awards in financial fraud cases, such as cases involving insurance or financial products misrepresentation. This does not appear to extend to cases involving products as defined in the bill, which is limited to physical goods.

[6] The factors are: "(i) the extent to which the defendant acted with actual malice; (ii) the likelihood that serious harm would arise from the conduct of the defendant; (iii) the degree of the awareness of the defendant of that likelihood; (iv) the profitability of the misconduct to the defendant; (v) the duration of the misconduct and any concurrent or subsequent concealment of the conduct by the defendant; (vi) the attitude and conduct of the defendant upon the discovery of the misconduct and whether the misconduct has terminated; (vii) the financial condition of the defendant; (viii) the cumulative deterrent effect of other losses, damages, and punishment suffered by the defendant as a result of the misconduct, reducing the amount of punitive damages on the basis of the economic impact and severity of all measures to which the defendant has been or may be subjected . . ."

[7] The judge would be required to hold a separate proceeding on awarding an additional amount, consider each of the items, and state the court's reasons for an award above the cap in findings of fact and conclusions of law. A separate finding on each factor is not explicitly required. The conference report on last year's bill, of course, virtually directed judges not to use this authority.

standards and procedural rules are meant to constitute two-way preemption, except that they would not permit punitive damages in states where such damages are not allowed.

In vetoing last year's bill, you stated that you "oppose arbitrary ceilings on punitive damages, because they endanger the safety of the public. Capping punitive damages undermines their very purpose, which is to punish and thereby deter egregious misconduct." You noted that the additur provision might have mitigated this concern, but the Statement of Managers virtually directing it not be used made it ineffective in that respect.

In considering alternative responses to the issue raised by the punitive damages cap, your advisors considered the present state of state law and likely trends. In seven states punitive damages are generally forbidden; in 16 others, they are capped in one way or another. Twenty-seven states allow unlimited punitive damages in product liability cases. Most states that allow punitive damages have adopted the "clear and convincing" evidentiary standard. While the liability standards are less uniform, only a few states[8] allow the award of punitive damages for reckless behavior without some other aggravating factor. We have not found any state that requires that the conduct leading to the punitive damages be the "proximate cause" of the plaintiff's harm, although the words "cause" and "result" are used. Bifurcated trials -- at least on the issue of the defendant's financial condition -- are allowed or required in 15 states.

The factors your advisors considered in developing alternatives were:

- Maintaining the quasi-criminal role of punitive damages to punish and deter egregious conduct
- Whether there are ways to reduce the perception that such damages are awarded capriciously and without uniform standards
- How to reduce the "windfall" nature of the award of punitives while retaining an incentive for plaintiffs to press for punitives in appropriate cases
- Whether a limitation on punitive damages payable by small businesses is appropriate, even if a broader cap is not, and if so, how it should be structured
- The effect of provisions allowing judges to override caps
- Whether preemption should be one-way or two-way

3. Statute of repose

At its starkest, a statute of repose bars litigation after a product has been in service a specified period of time. Twenty-two states and the District of Columbia currently have statutes of reposed for product liability; 17 of the states and the District restrict lawsuits after a specified number of years (ranging from 5 to 15) and the remainder use some variation of "useful life" as the bar. In 1994, you signed legislation establishing a preemptive 18-year statute of repose for general aviation.

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[8] Alaska, Mississippi, Missouri, New York, Oklahoma, Vermont and West Virginia.

The bill you vetoed last year included a preemptive 15-year statute of repose for all products. The statute would, however, only have preempted states without any statute of repose, or with a statute **longer** than 15 years. Shorter state statutes would have remained effective. Your veto message referenced the length of the statute, the fact that it was broadly inclusive (you cited handguns), and the fact that the preemption was only one way. The Senate bill from the 104th Congress had covered only durable goods in the workplace and had an 18-year one-way preemptive statute.

S. 648, as reported out of the Senate Commerce Committee on a voice vote, includes a fully (two-way) preemptive 18-year statute of repose, covering all products except: (i) motor vehicles, vessels, aircraft and trains used to transport passengers for hire; (ii) products that cause toxic harm; and (iii) products with express written warranties that exceed 18 years.

Your advisors considered several alternative formulations of statutes of repose, with the main variables being:

- Whether any statute of repose would be "two way," lengthening shorter statutes as well as imposing or shortening longer ones
- Whether there should be a bright line -- such as a number of years -- or a standard more linked to specific types of products -- such as "useful safe life"
- Whether any bright line would be rebuttable, and if so by what standard of proof
- The breadth of coverage, for example, all consumer products or only durable goods in the workplace
- Whether there should be exceptions, such as for toxic substances
- The relationship between the statute of repose and the statute of limitations

IV. ALTERNATIVES

Working from the alternatives developed by the working group in each of the three major areas identified, your advisors concluded that the choice of alternatives really depends on another decision, whether your primary objective is:

- to put forward a series of proposals that are fully consistent with both your veto statement and the principle of promoting national uniformity, **even if such proposals have scant chance of being accepted by Senator Rockefeller**; or
- to put forward a series of proposals that Senator Rockefeller will regard as an acceptable place to **start** negotiations and that can, albeit with some difficulty, be squared with your veto message.

1. Option 1

The hallmarks of this option are: (i) full two-way preemption, such that states with currently more defendant-friendly laws would be brought to a uniform national level as well as states whose laws

are currently more pro-plaintiff; (ii) consistency with your veto message in almost all respects[9]; and (iii) inclusion of items that were not part of either the vetoed bill or S.648 that can enhance the effectiveness of the legal system for injured plaintiffs. Full two-way preemption, particularly on joint and several liability for non-economic damages (where several states, including California, have moved to totally several liability for non-economic damages) and punitive damages (where several states disallow or very severely restrict punitives) is likely to be regarded as a total non-starter by the business community and Senator Rockefeller. Some of their concern can be characterized as simply trying to get the most favorable standard. However, they proponents may have a legitimate economic concern that any national rule that is sufficiently pro-plaintiff to be enacted on a two-way preemptive basis will be far less adequate than the law in many states in responding to their concern about the uncertainties and unassessable risks posed by joint liability for non-economic damages and unlimited punitives. This does, of course, highlight the question whether national legislation is appropriate.

Option 1 would consist of the following:

Joint and several liability - Reallocation[10]

- Joint and several if the plaintiff is fault-free
- If the plaintiff is at all at fault, liability is several, but if the plaintiff cannot collect from one or more defendant after a specified period of time[11], the plaintiff can petition the court for reallocation of damages not attributable to the plaintiff among the remaining defendants, but no defendant less at fault than the plaintiff may be charged with more than twice his proportionate share of damages
- This would be two-way preemptive

Pros

- Preserves balance between faultless plaintiff and defendant with any fault in favor of the plaintiff
- Is generally consistent -- or at least not less pro-plaintiff -- with the laws of most states[12]

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[9] It is, frankly, impossible to have any uniform federal legislation that does not infringe in some respects on state prerogatives in this area; and we assume you have no interest in opening the issue of whether there should be **several** liability for **economic** damages, which makes it impossible to both deal with the issue of several liability for non-economic damages and retain strict consistency with the veto message. In all other respects, option 1 is consistent with the veto message and the case histories cited.

[10] This is based on the statute currently in effect in Missouri.

[11] In Missouri it is 30 days, which may be too short to actually encourage the plaintiff to try to collect; in Connecticut it is one year, which may be too long.

[12] Only plaintiffs with some degree of fault in the four states that retain traditional no comparative fault/joint and several liability would be significantly disadvantaged; plaintiffs in the nine states with comparative fault and joint and several liability could be somewhat disadvantaged. Plaintiffs in states with any further restrictions would likely benefit.

- Where plaintiff is at fault, less culpable defendants -- even if they are deep pockets -- will have their damages limited
- Of all the potential limitations, is most likely to retain 100% recovery for non-economic damages
- By retaining joint and several liability in many situations, should encourage settlement

Cons

- May be viewed as excessively pro-plaintiff, and thus not a good-faith offer, particularly if it is two-way, thus increasing defendants' responsibility in states, such as California, with several liability for non-economic damages
- May limit plaintiff's recovery where plaintiff is at fault and there are multiple defendants
- Requires fact-finders in (the 13) states that currently do not have comparative fault or several liability to assign degrees of responsibility
- Shifts from defendants to plaintiffs the responsibility for collecting from each defendant, potentially adding to delay in recovering and increased expense
- As among defendants, it is unclear why the extent of the plaintiff's responsibility should have an impact on defendants' responsibility to pay the judgment

Punitive damages - Advisory jury opinion with judicial determination and a breachable cap for small businesses

- The jury would render a solely advisory opinion on punitive damages
- The actual determination of punitive damages would be made by the judge
- The judge would be required to consider the factors in S.648, and would be required to explain why the judge's award differs (either higher or lower) from the jury's advice
- Cap punitive damages at the lesser of twice compensatories or $250,000 for firms that have 10 or fewer employees **and** annual revenues of $1 million or less. The jury would not be told of the cap, and the judge could award damages in excess of the cap only upon a specific finding that damages in excess of the capped amount were not only needed "to punish or deter," but also that the financial impact of the higher award had on the defendant and its employees had been explicitly considered by the judge.
- Couple this with procedural changes to set the evidentiary standard at "clear and convincing evidence," the substantive standard at "willful and wanton" (excluding recklessness), and to require bifurcation of the damages determination if requested by any party

Pros

- Is analogous to criminal law, by keeping the jury involved but placing the decision on what is essentially a punishment in the hands of the person most experienced in deciding such issues, the judge
- Since historically, punitive damage awards that seem unjustified have stemmed from jury decisions, may increase rationality in the system
- Provides some protection for truly small businesses, responding to one of the complaints about the capriciousness of punitives

- Since businesses of the size described are rarely hit with significant punitive damages, since in most states the defendant's financial condition is already taken into consideration, there may be little practical negative effect.
- Allows the Administration to agree with some sort of cap
- By adopting the S.648 factors, may be seen as a good faith offer

Cons

- Agreeing to any cap at all breaks through a clear line we established last year of "no caps on punitives"; it may be very difficult to hold the line against expansion of this cap, either to larger businesses, or by limiting the judge's discretion
- Takes away from the jury what has been regarded as a traditional jury function
- While judges may determine punitive damages in many states in cases where they are the trier of fact, only Connecticut and Kansas provide for initial judicial determination (in contrast to appellate review or remittitur) where a jury has sat
- Unlikely to solve concerns of either proponents or opponents of caps
- May raise difficult Seventh Amendment issues ("no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law")
- Making it fully two-way preemptive, thus forcing some states to allow punitive damages that do not currently do so, is likely to be regarded as both unacceptable and inflammatory by the business community

Statute of repose

- Two-way preemption of state law (as in S.648)
- 18 year statute of repose (as in S.648)
- Which a plaintiff may overcome by clear and convincing evidence that the product had a longer useful safe life (not included in S.648, and responsive to the victim of the hay-baler accident cited in the veto message and to accidents involving products clearly intended to be longer-lived, such as elevators and most firearms)
- Covering only durable goods in the workplace (narrower than S.648, retaining plaintiff rights concerning consumer goods in states without any statute of repose and responding to your concern about handguns)
- With further exceptions for toxic substances, vehicles used in transportation for hire, and express warranties (as in S.648)
- And with a provision that extends the statute to allow full benefit of the two-year statute of limitations after injury or discovery of harm in, for example, year 17 (not in S.648, but not expected to be a problem)

Pros

- By building on S.648, demonstrates good faith to proponents of that legislation
- Two-way preemption is responsive to principles of veto message, and also lengthens statute in the 22 states that have them
- Number of years is longer than in any current state statute
- Rebuttable presumption protects workers injured by products clearly intended to be longer-lived

- Bright line number of years, combined with clear and convincing standard, means manufacturers will be free from arguments about whether something was intended to have a useful life slightly longer than 18 years
- By restricting statute to durable goods in the workplace, consumers in states without statutes of repose retain their access to court for injuries from long-lived or intermittently-used consumer goods such as cedar chests and camping and baby products
- Until late last year, all formulations of this statute had been limited to durable goods in the workplace, in part because those injured in such accident will at least have received some compensation through workers compensation
- Expands on an already-existing federal liability scheme -- workers compensation
- Exceptions protect access to court in latent defect cases

Cons

- Opponents of product liability reform will oppose any statute of repose as limiting plaintiffs' rights in states without such statutes
- Combination of two-way preemption and bright line (even with rebuttable presumption and limitation only to durable goods in the workplace), will restrict the access of some injured parties to court
- Proponents of S.648 may regard rebuttable presumption and limitation to durable goods in the workplace as unacceptable limitations, particularly given that they extended the statute from 15 to 18 years and made preemption two-way in response to the veto message

In addition to these proposals, we recommend that option 1 include items plaintiffs believe could make a real difference in their ability to recover:

- Provision for alternative dispute resolution for small claims that both defendants and plaintiffs would find appealing
- Limitations on the use of protective orders where disclosure of the information is relevant to thepublic health or safety unless disclosure is clearly outweighed by a substantial interest in maintaining the confidentiality of the records

The first of these items might -- depending on how it is drafted -- gain the support of both plaintiffs (who cannot find lawyers to take small claims through the traditional legal system for a contingency fee) and defendants. The second (based on a bill that has been introduced by Senator Kohl) would be strongly supported by consumer groups and -- in light of the tobacco revelations probably could generate strong public support -- but would certainly be opposed by defendants and perhaps even by the plaintiff bar.

2. Option 2

As described in the specific pros and cons below, the items in option 2 cannot be completely squared with your veto statement. On the other hand, they represent real movement toward responding to your objections. However, it is critical to recognize that once these options are on the table, negotiations may take them even farther afield, and lead to a negative dynamic in which bill supporters think they've come "most of the way" toward your position and assert that refusal to support their bill amounts to "moving the goalposts."

Option 2 would consist of:

Joint and several #1 - Guaranteed recovery, two-way preemption

- Joint and several liability of any defendant is than 30% at fault (taking into account the fault of the plaintiff and settling defendants)
- If any defendant is less than 30% at fault, that defendant's responsibility would be limited to a maximum of twice the defendant's proportionate share of non-economic damages except where a greater multiplier was needed to ensure the plaintiff recovery of at least 50% of the assessed non-economic damages.

OR

Joint and several #2 - Guaranteed recovery, one-way preemption

- Joint and several liability of any defendant is than 10% at fault (taking into account the fault of the plaintiff and settling defendants)
- If any defendant is less than 10% at fault, that defendant's responsibility would be limited to a maximum of twice the defendant's proportionate share of non-economic damages except where a greater multiplier was needed to ensure the plaintiff recovery of at least 60% of the assessed non-economic damages.

Pros

- Should be seen by proponents of limitation as a good-faith offer, with real limits
- Preserves joint and several liability for defendants with significant degree of fault
- Ensures that no low-fault defendant will have to pay more than 50% (or 60%, if one-way) of total non-economic damages, and that in most cases they will be limited to their proportionate share
- Although it limits responsibility of low-fault defendants, it guarantees that plaintiff will collect substantial portion of assessed non-economic damages (if there are any solvent and available defendants)
- The two-way preemption version would increase plaintiff's guaranteed level of recovery in states with several liability for non-economic damages (such as California and Illinois), and thus might be considered an acceptable tradeoff for limitation on guaranteed recovery in other states

Cons

- Setting the guaranteed recovery level at 50% or 60% (or, in fact, any level lower than 100%) may be viewed as non-responsive to both the objections in the veto statement -- not full recovery, and discrimination against non-economic damages
- Will require fact-finders in the 13 states that don't have both comparative negligence and several liability to make additional determinations
- Defendants who view themselves as likely to be low-fault deep pockets will object that their potential for payment of non-economic damages is so high that they cannot take limitations into account in either settlement discussions or purchase of insurance
- Small degrees of differentiation of fault -- e.g., between 9% and 11% -- could have major repercussions on responsibility to pay damages

Punitive damages - Cap with easier breakthrough

- Cap punitive damages at the greater of $250,000 or twice compensatories (the lesser of the two for small businesses)
- Do not tell the jury of the cap
- Allow the judge to award punitive damages above the cap (for both small and large businesses) without an additional proceeding and on a simple finding that the capped amount is "insufficient to punish or deter," the standard in S.648, with no consideration of specified factors
- Insist that there be no legislative history suggesting this authority is to be used any more sparingly than implied by the statutory standard
- Couple this with procedural changes to set the evidentiary standard at "clear and convincing evidence," the substantive standard at "willful and wanton" (excluding recklessness), and to require bifurcation of the damages determination if requested by any party
- This would be two-way preemptive, except with respect to states that do not allow punitives in products cases at all

Pros

- Closest to both S.648 and earlier versions of bill, and thus likely to be most easily regarded as acceptable by proponents
- Particularly given that there are few punitive damage awards in excess of the cap and that judges now have remittitur authority, this would likely have little practical impact on actual awards
- The procedural changes may produce more uniformity across the country
- Making the additur provision two-way preemptive is a real improvement for plaintiffs compared to S.648

Cons

- This looks like a cap on punitive damages, which you said you opposed; "no caps on punitives" has been used as a shorthand description of the Administration's firmest position
- It may actually be a cap with judges reluctant to award punitives
- Holding the line on the legislative history can be very difficult, particularly if the statute is acceptable in all other respects

Statute of repose

The proposal would be the same as under option 1, which we believe will be regarded as a good faith offer to negotiate.

The primary dangers with this strategy are not only the likelihood that opponents will not believe even the initial positions are consisent with the veto statement, but that it will be relatively easy for the other side to make what look like cosmetic changes that may in fact be quite significant. For example, it is rare that a defendant in a product liability case is both found liable and found to bear 10% or less responsibility. Therefore, authorizing several liability for non-economic damages for defendants bearing 10% or less of the fault in effect leaves joint and several liability intact.

Moving the number up to 30%, however, would not take much effort, could make a serious difference, and would be very hard to base a veto on.

V. DECISIONS:

____ Propose option 1 to Senator Rockefeller, understanding he will not regard it as a serious offer.

____ Discuss the offer with Senator Breaux before making it public, and make common cause with him if he's interested

____ Make the offer public to head off claims by bill proponents that we did not have anything to offer

____ Propose option 2 to Senator Rockefeller, making explicit that this is a best and final offer and any further movement will result in a veto

____ Propose option 2 to Senator Rockefeller, being prepared to negotiate

____ None of the options is good. We need to talk.

Product liability - notes + memos

AGENDA
PRODUCT LIABILITY MEETING
June 26, 1997

I. Review of Tuesday's discussion
   A. State of play on the Hill
   B. Why might the Administration support a federal product liability reform bill?
   C. Why are we positioned where we are on Gorton/Rockefeller?

II. What are the major issues from the veto message?
   A. Joint and several liability for non-economic damages (two-way preemption)
   B. Caps on punitive damages (two-way preemption)
   C. Statute of repose (two-way preemption)

III. What are our options?
   A. Just say no
   B. Option 1
      1. Complete two-way preemption
      2. Reallocation of several liability for non-economic damages
      3. Judicial determination of punitives (with small business cap?)
      4. 18-year breachable statute of repose
      5. ADR
      6. Limitations on protective orders
   C. Option 2
      1. Threshholds and multipliers for several liability for non-economic damages, possibly with one-way preemption
      2. More easily breachable caps on punitive damages, one-way preemption
      3. Further modifications of statute of repose

IV. Next steps
   A. Memo to President
   B. Meeting with President
   C. Discussions with Hill

Product Liability - notes + memos

June 20, 1997

BY FACSIMILE 202-456-2878

Ms. Elena Kagan
Deputy Assistant to the President
for Domestic Policy
The White House
Washington, D.C. 20500

Dear Elena:

I enjoyed seeing you at the Mikva Tribute and then speaking with you last night. The attachment is the same version sent to Bruce Lindsey, but to paraphrase Judge Mikva: this is the nothing nobody sent!

You also will be receiving a follow-up to our conversation last night about the effect of a statute of repose on products that have a longer anticipated useful life than the repose period. I hope you'll have time to review these materials. (I can't help but remember your early days at the White House, when you complained of not having enough to do. You've come a long way since then!)

Best regards.

Sincerely,

Jeffrey J. Connaughton

PRODUCTS LIABILITY REFORM

FOR YOUR EYES ONLY ~~**CONFIDENTIAL**~~

PUNITIVE DAMAGES

Some have speculated that the business community would accept the changes the White House asked for in 1995 regarding the provision that would establish a "presumptive cap" on punitive damages. Those changes would be:

(1) Permissive Rather Than Mandatory Factors

By changing "judges shall consider" to "judges may consider" (and by adding appropriate legislative history), it could be made clear that judges need not affirmatively find each of the eight factors outlined in the bill before they could increase an award of punitive damages above the presumptive cap.[1]

(2) Clarify That Finding of Actual Malice Not a Prerequisite

In 1995, opponents read the then-mandatory consideration of the first specified factor as requiring a judicial finding of "actual malice" by the defendant before a judge could increase an award above the presumptive cap. Accordingly, some have suggested that the first factor be changed from,

> "the extent to which the defendant acted with actual malice," to
>
> "the degree, if any, to which the defendant acted with actual malice."

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[1] The Supreme Court has held that the Constitution protects defendants from excessive punitive damage awards that violate due process. Thus the bill should not contemplate in any way precluding judges from providing some level of constitutionally mandated judicial scrutiny of jury awards of punitive damages. See, e.g., BMW v. Gore. Moreover, under the common law trial judges have long scrutinized punitive damage awards for excessiveness. Thus, a hard-and-fast rule preventing any judicial review of jury punitive damage awards in certain exceptional cases would be a step backward from existing law.

In conjunction with changing "shall" to "may," this modification should make it clear that a finding of actual malice is not a prerequiste for a judge to award a higher-than-capped amount of punitive damages.[2]

(3) Ensure Provisions Not Severable if Found Unconstitutional

Legislative history could provide the sense of Congress that should a court find the presumptive cap provision to be unconstituional, the entire provision should be struck. In that way, in no case would we be left with a "hard" cap if a judge were to find any of this to be unconstitutional.

Preemption

Some have said that the business community wishes to split the limited preemptive effect of the punitive damages provision in two differing ways. The bill's standard for the award of punitive damages should apply uniformly in all those states which currently allow for the award of punitive damages. Thus the punitive damages standard would be two-way preemptive (though it still would not create an ability for plaintiffs to receive punitive awards in states that have abolished them).

Respecting the presumptive cap provision, however, the business community will insist that it apply only one-way -- i.e., that it apply only to the extent that state law is more favorable to plaintiffs. In other words, not only would the bill not establish punitive damages in states where they have been abolished, but further it would not preempt states that have imposed -- or will impose in the future -- even more stringent caps on punitive damages.

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[2] The standard in the bill for the award of any punitive damages in the first instance is "conscious, flagrant indifference" to the safety of others. The White House since 1995 has insisted that the standard for determining the egregious case in which punitive damage awards might be higher than the presumptive cap must not be actual malice. *This leaves unanswered the question, What exactly is the standard for the "egregious" case in which the judge could increase an award of punitives above the presumptive cap?* Perhaps the bill is wise to leave each judge with ample room for discretion. On the other hand, if Congress and the President have a clear view of what the desired policy should be regarding when a judge should award punitive damages over and above the presumptive cap, they should provide judges with better direction.

Obviously, this is going to be a point of contention for the consumer groups and trial bar. The proponents of the bill, they will argue, have long said that the motivation for federal reform is to rationalize and impose uniformity on the law.

The proponents of the bill will respond that jury awards of punitive damages have been problematic, as the Supreme Court has repeatedly recognized, and thus deserve to be restrained by a federal policy that establishes a one-way ratchet favorable to defendants (i.e., a federal ceiling under which states can choose to be even more restrictive). A one-way presumptive cap still would deter the manufacture of unsafe goods, they will argue, because a jury and judge in tandem may impose unlimited punitive damage awards when warranted in egregious cases.

STATUTE OF REPOSE

The bill reported by the Senate Commerce Committee, S.648, includes a statute of repose which is different from last year's provision in three ways:

(1) Repose Period Extended from 15 to 18 years

The President's veto message criticized the conference report for shortening the repose period to 15 years from the 20 year period that was in the Senate version. S.648 restores the repose period to 18 years, the same repose period contained in the General Aviation Revitalization Act.

(2) Two-way Preemption

S.648 includes an 18-year statute of repose which for the first time is two-way preemptive. Therefore, plaintiffs in the ten or so states which have a shorter than 18-year statute of repose would actually benefit under the bill.

(3) Broadened to Cover All Products

The bill vetoed by the President included a statute of repose which applied only to durable goods used in the workplace. S.648 contains a repose provision which would apply to all products, regardless of where they are used.[3]

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[3] The bill needs to clarify the "toxic harm" exception to the statute of repose to mean latent harm.

There are thus two substantial concessions already reflected in this provision (i) the extension of the repose period from 15 to 18 years, and (ii) two-way preemption. Regardless, the statute of repose provision will likely be a point of contention because it has been broadened from last year's version to cover all products.

Some may question whether a repose period should be shorter than the "useful life" of a product (e.g., several states tie their repose periods to the useful life of the product). An elevator, as an example, has a useful life of far greater than 18 years.

But the policy argument justifying a statute of repose does not depend on the useful life of the product. The argument runs as follows: at some reasonable point beyond the time at which the product left the control of the manufacturer, other factors besides the manufacturer's possible negligence in making the product are far more likely to explain why someone who used the product was harmed.

An elevator, for example, might work perfectly for 18 years. But if it fails in its 19th year, it probably was due to faulty maintenance, repair and inspection — all of which in themselves could be the subject of a lawsuit. Another possible explanation is that the owner of the product may have subjected it to misuse or alteration, which caused the injury. After some reasonable period of time, common sense would dictate that a product surely must have proved itself not to have been negligently manufactured after a long enough period of satisfactory and safe use. After that time has passed, some intervening factor must have caused the harm, so why should the manufacturer be susceptible to the costs of defending a lawsuit?

Consumer groups may respond that manufacturers should remain on the hook indefinitely because sometimes juries find that the manufacturer made the product negligently, even though the product caused no injury until 19, 20 or 30 years after it was made. But that might be the case, one must suspect, because juries discount away any meaningful application of the "state-of-the-art" defense. In other words, when confronted by safety developments in recent product designs, juries may tend to find that the manufacturer should have used current thinking about safety when making the product in the first instance -- even when the product is 18 or more years old. In addition to being an unfair resort to 20/20 hindsight, such results provide a disincentive for manufacturers to make additional progress on safety.

JOINT AND SEVERAL LIABILITY

Some have speculated that the business community is prepared to make the following concessions on the existing provision in the bill, which would abolish joint liability for noneconomic damages:

(1) Expressly define economic damages to clarify their application to women, children and the elderly;

(2) Define economic damages to include $50,000 for loss of reproductive capacity; and

(3) Provide joint liability for the first $25,000 of noneconomic damages.

Preemption

It may seem surprising, but full "joint" liability is now the minority rule in the United States. The majority of states (approximately 33 states) have either abolished joint liability or modified its application through a variety of approaches. At bottom, there are only about 17 or so states that still retain full joint liability for noneconomic damages.

Following California law since 1986, S.648 would abolish joint liability for noneconomic damages. The bill would have no effect on liability for economic damages. Thus the provision has a one-way preemptive effect.

The concessions described above would only be applicable to those 17 or so states that still retain full joint liability for noneconomic damages. Because the business community believes it has been very successful in achieving reforms of joint liability at the state level, two-way preemption in this area (i.e., a provision that would restore joint liability for economic damages in states that have abolished it) would be a deal killer.

On the other hand, the consumer groups would see the concessions described above as excessively "one way" -- chipping away at joint liability for noneconomic damages wherever it still exists, without doing anything to rationalize the law. This approach, opponents will argue, would only add to the confusion in the law of joint-and-several liability across the nation.

BIOMATERIALS

Apparently the White House has expressed the wish that this provision apply only to products that have been approved by the FDA, and some believe the business community would accept such a limitation.

THE GRAND COMPROMISE

Given everything stated above, some have speculated that the following may make for an appropriate compromise that would be acceptable to the President: In exchange for *dropping the joint & several provision altogether*, the President might be willing to accept (i) a modified punitive damages provision (described above) the presumptive cap of which is only one-way preemptive, and (ii) a two-way preemptive, 18-year statute of repose which covers all products.

Such a bill would allow the President to claim victory on both the major issues he had opposed: the final cap on punitive damages would be a "soft" cap that truly allows judges to increase awards above a presumptive level in egregious cases, and the joint & several provision would be gone from the bill. The business community would be satisfied -- perhaps, it has been speculated -- with a one-way judicially managed restraint on punitive damage awards, a two-way broadened statute of repose, and the other provisions in the bill.

Product liability - costs + lawsuits

CROWELL & MORING LLP

MEMORANDUM

TO: Elena Kagan, Esq.
Deputy Assistant to the President for Domestic Policy
The White House

FROM: Victor E. Schwartz, Esq.
Counsel to the Product Liability Coordinating Committee

DATE: June 5, 1997

RE: Preemption in Federal Product Liability

This memorandum discusses three key provisions in the current federal product liability reform bill, S. 648. They are the statute of repose, joint and several liability, and punitive damages. It then discusses the subject of preemption with respect to other sections. The importance of the issue is predicated on a concern that has been raised by the Office of the President and others about the bill having "one-way" preemption.

Statute of Repose

The statute of repose in the 104th Congress and the bill initially introduced in the current Congress (S. 5) was fifteen years and was not preemptive. That was changed when S. 648 was introduced.

Consistent with the General Aviation Revitalization Act of 1994 (GARA), S. 648 is now preemptive. In addition, the period of time for the statute of repose was expanded from fifteen years to eighteen years. Consequently, S. 648 will expand injured persons' rights to sue in all states that now have a fixed time limit statute of repose.[1]

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[1] Nineteen states currently have product liability statutes of repose: Ark. Code Ann. § 16-116-105(c) (Michie 1987) (use of product beyond its "anticipated life" may be considered as evidence of fault); Colo. Rev. Stat. §13-80-107 (1987) (7 years for new manufacturing equipment); Colo. Rev. Stat. §13-21-403 (1987) (rebuttable presumption that product is not defective after 10 years); Conn. Gen. Stat. § 52-577a (1991 & Supp. 1995) (10 years); Ga. Code Ann. § 51-1-11(b)(2) (1982 & Supp. 1995) (10 years); Idaho Code § 6-1403(2) (1990) ("useful safe life" of product, rebuttable presumption of 10 years); Ill. Ann. Stat. § 735, 5/13-213(b) (Smith-Hurd 1992) (12 years from date of first sale, or 10 years from date of sale to first user, whichever is shorter); Ind. Code Ann. § 33-1-1.5-5(b) (Burns 1992) (10 years); Iowa H.B. 693 (signed by Governor May 29, 1997) (15 years); Kan. Stat. Ann. § 60-3303 (1994) ("useful safe life" of product, rebuttable presumption of 10 years); Ky. Rev.

Finally, following the model of the successful GARA law, the distinction between products used in the workplace and those not used in the workplace was eliminated. Some concerns has been expressed about this change, because opponents have characterized it as an "expansion." That characterization is not correct -- it all depends on which state one is looking at.

For example, in Oregon, the current statute of repose is eight years. The bill would expand an injured person's right to sue for nonworkplace harms from eight to eighteen years. A similar effect would occur in Illinois and in North Dakota, which have ten-year statutes of repose. A narrower statute of repose would limit the pro-plaintiff preemptive effect of the bill to a narrower category of products.

With respect to nonworkplace products, we are basically talking about consumer products that would be eighteen years old or older, except those which produce a latent harm. Latent harm cases are not covered by the statute of repose. Our research suggests that there are few successful cases involving very old consumer products, but the threat of litigation and costs associated with litigation impact insurance costs and chill innovation.

Joint and Several Liability

It may seem surprising, but full "joint" liability is now the minority rule in the United States. The majority of states (approximately thirty-five states) have abolished joint liability or modified its application through a variety of approaches. See Attachment B. Following California law since 1986, S. 648 eliminates joint liability for noneconomic damages. The bill allows the states to decide what to do about economic damages.

Stat. Ann. § 411.310(1) (Michie/Bobbs-Merrill 1992) (rebuttable presumption that product is not defective if harm occurred five years after sale to first consumer or eight years after manufacture); Mich. Stat. Ann. § 27A.5805 (Callaghan 1986 & Supp. 1995) (if product in use for 10 years, plaintiff must prove *prima facie* case without benefit of any presumption); Minn. Stat. Ann. § 604.03 (West 1988) ("useful life" of product); Neb. Rev. Stat. § 25-224 (1995) (10 years); N.C. Gen. Stat. § 1-50(a)(6) (Michie 1996) (6 years); N.D. Cent. Code § 28-01.3-08(1) (Supp. 1995) (10 years); Or. Rev. Stat. § 30.905(1) (1995) (8 years); Tenn. Code Ann. § 29-28-103(a) (1988 & Supp. 1995) (10 years); Tex. Civ. Prac. & Rem. Code Ann. § 16.012 (West Supp. 1995) (15 years for non-agricultural manufacturing equipment); Wash. Rev. Code § 7.72.060(1) (West 1992) ("useful safe life" of product, rebuttable presumption of 12 years); Ohio Rev. Code Ann. §§ 2125.02(D)(2) and 2305.10(c) (Banks-Baldwin 1997) (15 years).

Based on the work of a Professor Lucinda Finley of Buffalo Law School, a charge has been made that the "California approach" discriminates against women, the elderly, and children. The charge is not valid.

First, the Supreme Court of California has ruled that the approach satisfies equal protection guarantees found in both the California and United States Constitutions. See Evangelatos v. Superior Court, 753 P.2d 585 (Cal. 1988).

More importantly, no interest group in California has sought to repeal or modify the approach, although it has been in existence for over a decade.

While one cannot prove it, I believe that the modification of joint liability has had the effect of making so-called "non-deep pocket defendants" buy adequate liability insurance. Once joint liability is limited, non-deep pocket defendants know that if they commit a tort, plaintiffs' lawyers will pursue them and not simply depend on a deep pocket defendant.

Suzelle Smith, a prominent California trial lawyer, has observed that the approach in her state has worked well with jurors. A practical, but not often discussed, fact is if jurors know about joint and several liability, they are reluctant to find marginal defendants liable. Ms. Smith indicated that a lot of California jurors know about how joint liability works and have been much more comfortable in the approach that abolishes it for noneconomic damages.

Work can be done to assure that the term "economic loss" in federal legislation makes clear that women or men who choose to stay at home have economic losses that may be substantial if they are injured, i.e., the cost of replacement services for child care, transportation, medical assistance, *etc.* Children also have substantial economic losses if they are permanently injured, because of loss of future earnings. Even older people may have substantial economic losses if replacement services are necessary because they have suffered a severe injury. A recent suggestion to cover the issue of a woman who has suffered the loss of her reproductive ability is to deem that type of loss "economic" in nature.

Others have contended that a better approach would be a rule that provides that there is no joint liability for defendants found "at fault" below a certain percentage, e.g., fifty percent. A number of states have used that approach, but it can create a "crap shoot." If a defendant can get below that percentage, there is no liability. On the other hand, if a plaintiffs' lawyer can get just one percent above the key percentage, joint liability applies. The approach can frustrate settlements and delay recoveries.

It also is very difficult to mesh such a "percentage approach" with existing state law. If this approach were deemed preemptive of state law, the net result would be to expand joint liability in the United States, and that is not a viable option for anyone who wishes this bill to be enacted into law.

Punitive Damages

S. 648 maintains the same approach to punitive damages that appeared in S. 5 and the bill as passed by the 104th Congress. The Committee Report, however, addresses certain concerns that have been raised by the Administration.

First, it does not contain language suggesting that the so-called "presumptive cap" on punitive damages against larger businesses would apply in all but the "most unusual cases." Language of that type was used in the Statement of Managers to the Conference Report last year and specifically cited by the President as an area of concern.

Second, S. 648 makes clear that the burden of proof ("clear and convincing evidence") and standard for punitive damages liability ("conscious, flagrant indifference to the rights or safety of others") are uniform and preemptive.

The "presumptive cap" would not be preempted, because it really is not a cap. Approximately fifteen states have set limits on the size of punitive damage awards and the "presumptive cap" would undo work that is extremely important to proponents of this legislation. The bill also would not create punitive damages in the few states that do not have them, because the purpose of the bill is to set standards for punitive damages, not create them.

As you have always appreciated, these issues are quite complex, but the bill appears to be evolving into a viable, fair and balanced approach for all concerned. I would be pleased to talk with you at your convenience about any of the issues in this memorandum or others concerning the bill.

V.E.S.

Attachments
1387498

STATE LAWS REGARDING JOINT AND SEVERAL LIABILITY

Alabama

Full joint liability applies.

Alaska

Joint liability abolished; several liability applies. See Alaska Stat. § 09.17.080.

Arizona

Joint liability abolished, except in cases involving concert of action or hazardous or solid wastes. See Ariz. Stat. §§ 12-2506, 12-509.

Arkansas

Full joint liability applies.

California

Joint liability abolished for noneconomic damages. See Cal. Civ. Code § 1431.2.

Colorado

Joint liability abolished, except in cases involving concert of action. See Colo. Rev. Stat. § 13-21-111.5.

Connecticut

Full joint liability applies. See Conn. Gen. Stat. Ann. § 52-572o.

Delaware

Full joint liability applies.

District of Columbia

Full joint liability applies.

Florida

For any case in which the total amount of damages exceeds $25,000, joint liability is abolished for noneconomic damages; joint liability is abolished for economic damages as to any defendant found less at fault than the plaintiff. Full joint liability applies in any case in which the total amount of damages does not exceed $25,000. See Fla. Stat. § 768.81.

Georgia

Full joint liability applies. When the plaintiff is partially responsible for the injury, however, this rule may be disregarded and separate judgments rendered among the persons who are liable and whose degree of fault is greater than that of the plaintiff. See Ga. Code. Ann. § 51-12-33.

Hawaii

Full joint liability applies in product liability actions. See Haw. Rev. Stat. § 663-10.9(3).

Idaho

Joint liability abolished, except in cases involving concert of action, hazards to the environment, or medical devices and pharmaceutical products. See Idaho Code Ann. § 6-803.

Illinois

Joint liability is abolished; several liability applies. See 735 ILCS 5/2-1117.

Indiana

Joint liability abolished; several liability applies. See Ind. Code Ann. § 34-4-33-5.

Iowa

Joint liability abolished for noneconomic damages. Joint liability abolished for economic damages for any defendant who is found to bear less than 50 percent of the total fault assigned to all parties. See Iowa H.B. 693 (signed by Governor May 29, 1997).

Kansas

Joint liability abolished; several liability applies. See Brown v. Keill, 580 P.2d 867 (Kan. 1978).

Kentucky

Joint liability abolished; several liability applies. See Prudential Life Ins. Co. v. Moody, 696 S.W.2d 503 (Ky. 1985).

Louisiana

Joint liability abolished. See La. H.B. 21 (effective April 16, 1996).

Maine

Full joint liability applies.

Maryland

Full joint liability applies.

Massachusetts

Each tortfeasor is liable to the extent of its proportionate share of the entire common liability. Thus, in a two-defendant case, a defendant found 1 percent negligent can be compelled to pay 50 percent of the judgment amount. See Mass. Gen. Laws Ann. ch. 231B § 2.

Michigan

Joint liability abolished. See Mich. Comp. Laws § 600.6304(4).

Minnesota

Joint liability is abolished in a product liability action for any defendant whose percentage of fault is less than that of the claimant. See Minn. Stat. Ann. 604.02 Subd. 3.

Mississippi

Full joint liability applies only to the extent necessary for the plaintiff to recover 50 percent of his or her damages. See Miss. Code Ann. § 85-5-7(2).

Missouri

Full joint liability applies if plaintiff is without fault. If the plaintiff is partially responsible, defendants may seek reallocation of liability for any uncollected amounts (based on the defendant's percentage of fault). A defendant who is less at fault than the plaintiff may not be assessed liability exceeding two times his proportionate share of fault. See Mo. Stat. Ann. § 537.067.

Montana

Joint liability abolished. See Mont. H.B. 572 (signed by Governor April 1997).

Nebraska

Joint liability abolished for noneconomic damages. See Neb. Rev. Stat. § 25-21,185.10.

Nevada

Joint liability is abolished against any defendant whose percentage of fault is less than that of the claimant, except in cases involving strict products liability. See Nev. Rev. Stat. § 41.141.

New Hampshire

Joint liability is abolished against any defendant who is less than 50 percent at fault. See N.H. Rev. Stat. Ann. § 507:7-e.

New Jersey

Full joint liability applies against any defendant found to be more than 60 percent at fault. Joint liability is abolished against any defendant who is less than 60 percent at fault. See N.J. Stat. Ann. § 2A:15-5.3.

New Mexico

Joint liability is abolished, except in cases involving strict products liability. See N.M. Stat. Ann. § 41.3A-1.

New York

Joint liability is abolished for noneconomic damages against any defendant found to be 50 percent or less at fault for the claimant's harm. See N.Y. Civ. Prac. L. & R. § 1602 sub. 10.

North Carolina

Full joint liability applies.

North Dakota

Joint liability abolished; several liability applies. See N.D. Cent Code § 32-03.2-02.

Ohio

Joint liability abolished for noneconomic damages. Joint liability is abolished for economic damages for any defendant found less than 50 percent at fault. See Ohio Rev. Stat. § 2307.31 (1996).

Oklahoma

Joint liability abolished in cases where plaintiff is at fault. See Anderson v. O'Donohue, 677 P.2d 648 (Okla. 1983); Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978).

Oregon

Joint liability abolished; several liability applies. If one of the defendants is determined to be insolvent within one year of the final judgment, however, the relative fault of the parties is reapportioned so that the plaintiff and other defendants share in the financial burden of the insolvent defendant. A defendant less than 20 percent at fault would be liable for no more than two times its original exposure; joint liability would apply against any defendant greater than 20 percent at fault. See Ore. S.B. 601 (1995).

Pennsylvania

Full joint liability applies.

Rhode Island

Full joint liability applies.

South Carolina

Full joint liability applies.

South Dakota

Any party who is found to be less than 50 percent at fault for the claimant's harm may not be jointly liable for more than twice the amount of fault allocated to that party. See S.D. Codified Laws § 15-8-15.1.

Tennessee

Joint liability abolished; several liability applies. See McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).

Texas

Joint liability is abolished against any defendant who is less than 51 percent at fault. See Tex. Civ. Prac. & Rem. Code § 33.013.

Utah

Joint liability abolished; several liability applies. See Utah Code Ann. § 78-27-40.

Vermont

Full joint liability applies.

Virginia

Full joint liability applies.

Washington

Joint liability abolished where plaintiff carries a share of the fault. See Wash. Rev. Code § 4.22.070. Where plaintiff is not at fault, each tortfeasor is liable only to the extent of its proportionate share of the defendants' entire common liability. See Wash. Rev. Code § 4.22.070(1)(b). Since shares of fault are allocated to all responsible entities, the named defendants may be jointly responsible for only a portion of the plaintiff's total damages, and cannot be held jointly liable for damages allocated to nonparties. See Washburn v. Beatt Equip. Co., 840 P.2d 860 (Wash. 1992).

West Virginia

Full joint liability applies.

Wisconsin

Joint liability is abolished against any defendant who is less than 51 percent at fault. See Wis. S.B. 11 (1995).

Wyoming

Joint liability abolished; several liability applies. See Wyo. Stat. Ann. § 1-1-109(e).

1250402

JOINT AND SEVERAL

33 of the 50 States have modified the traditional rule of joint and several liability by abolishing or limiting the availability of joint liability.

- **12 states have abolished joint liability for both economic and noneconomic damages**: Alaska; Illinois; Indiana; Kansas; Kentucky; Louisiana; Michigan; Montana; North Dakota; Tennessee; Utah; Wyoming.

- **7 have abolished or limited joint liability for defendants whose percentage of fault lies below a percentage threshold**: Iowa; New Hamshire; New Jersey; New York; South Dakota; Texas; Wisconsin.

- **4 have abolished joint liability for both economic and noneconomic damages but with certain exceptions or under certain conditions**: Arizona; Colorado; Idaho; Oregon.

- **4 have abolished or limited joint liability for economic and noneconomic damages when the plaintiff bears some degree of responsibility for the injury**: Minnesota; Missouri; Oklahoma; Washington.

- **2 have totally abolished joint liability for noneconomic damages** : California; Nebraska.

- **1 has abolished joint liability for noneconomic damages and for economic damages when plaintiff's fault is greater than that of the defendant, with certain exceptions**: Florida.

- **1 has abolished joint liability for noneconomic damages and for economic damages when defendant's fault lies below a percentage threshold** : Ohio.

- **1 has limited joint liability for both economic and noneconomic damages by holding defendants jointly liable only up to the amount of their pro rata share of the damages (e.g., when there are 2 defendants, either can be compelled to pay up to 50% of a plaintiff's damages)** : Massachusetts.

- **1 has abolished joint liability after injured party recovers 50% of damages** : Mississippi.

1250402

	PRODUCT SELLER REFORM	VICARIOUS LIABILITY FOR RENTERS	DRUG & ALCOHOL DEFENSE/MISUSE	STATUTE OF LIMITATIONS	STATUTE OF REPOSE	CLEAR & CONVINCING -- PUNITIVES	PUNITIVE DAMAGE LIMITS	JOINT LIABILITY REFORM
ALABAMA	XX	XX	Contrib. negl. defense	PI: 2 years from discovery of injury. WD: 2 years from death.	XX	Yes	XX	Joint liability applies
ALASKA	XX	XX	Pure comp. fault	PI: 2 years from discovery of all elements of claim. WD: Same.	XX	Yes	3x comp. damages or $500,000, whichever is greater; but in cases involving actual malice, 4x comp. damages, or 4x aggregate amount of financial gain that the defendant received as a result of its conduct, or $7 million, whichever is greater	Joint liability abolished
ARIZONA	XX	XX	Pure comp. fault	PI: 2 years from time plaintiff knew of injury and cause. WD: 2 years from time of death.	XX	Yes	XX	Joint liability abolished
ARKANSAS	XX	XX	Modified comp. fault	PI: 3 years from manifestation of injury and awareness of cause. WD: Same.	use of product beyond its "anticipated life" may be considered as evidence of fault by the consumer	XX	XX	Joint liability applies
CALIFORNIA	XX	Vicarious liability allowed	Pure comp. fault	PI: 1 year from time plaintiff has suspicion harm caused by wrongdoing. WD: Same.	XX	Yes	XX	Joint liability abolished for nonecon. damages

	PRODUCT SELLER REFORM	VICARIOUS LIABILITY FOR RENTERS	DRUG & ALCOHOL DEFENSE/MISUSE	STATUTE OF LIMITATIONS	STATUTE OF REPOSE	CLEAR & CONVINCING – PUNITIVES	PUNITIVE DAMAGE LIMITS	JOINT LIABILITY REFORM
COLORADO	Yes	XX	Pure comp. fault	PI: 2 years from discovery of injury and its cause. WD: Later of, 2 years after death or 2 years after discovery of cause.	rebuttable presumption that product not defective after 10 years; 7 year repose period for new mfg. equip.	"Beyond reasonable doubt"	May not exceed comp. damages	Joint liability abolished
CONNECTICUT	XX	Vicarious liability allowed	Pure comp. fault	PI: 3 years from discovery of harm. WD: Later of, 2 years after death or 5 years after act.	10 years	XX	2X comp. damages	Joint liability applies
DELAWARE	Yes	XX	Modified comp. fault	PI: 2 years from time physically ascertainable, unless inherently unknowable. WD: 2 years from death with tolling for discovery of cause.	XX	XX	XX	Joint liability applies
DISTRICT OF COLUMBIA	No	Vicarious liability allowed	Contrib. negl. defense	PI: 3 years from discovery of injury. WD: 1 year from death.	XX	Yes	XX	Joint liability applies
FLORIDA	XX	Vicarious liability allowed	Pure comp. fault	PI: 4 years from discovery of defect. WD: 2 years from death.	XX	XX	3X comp. unless "clear & conv. evid." higher award is not excessive	In any case involving damages in excess of $25,000, joint liability abolished for nonecon. damages and abolished for econ. loss where plaintiff is more at fault than def.
GEORGIA	XX	XX	Modified comp. fault	PI: 2 years from discovery of relationship between conduct and injury. WD: 2 years from death.	10 years	Yes	XX	Joint liability applies, but can be disregarded in certain cases where plaintiff is partially at fault

	PRODUCT SELLER REFORM	VICARIOUS LIABILITY FOR RENTERS	DRUG & ALCOHOL DEFENSE/MISUSE	STATUTE OF LIMITATIONS	STATUTE OF REPOSE	CLEAR & CONVINCING – PUNITIVES	PUNITIVE DAMAGE LIMITS	JOINT LIABILITY REFORM
HAWAII	XX	XX	Modified comp. fault (negl.)	PI: 2 years from discovery of identity of defendant, that product is defective, and that defect caused injury. WD: Same.	XX	Yes	XX	Joint liability applies
IDAHO	Yes	Vicarious liability allowed	Modified comp. fault	PI: 2 years from occurrence if injury is knowable. WD: Same.	"Useful safe life" of product, rebuttable presumption of 10 years	XX	XX	Joint liability abolished, except in drug and medical device cases
ILLINOIS	Yes	XX	Modified comp. fault	PI: 2 years from discovery that injury was wrongfully caused. WD: Same.	12 years from date of first sale, or 10 years from date of sale to first user, whichever is earlier	Yes	3X econ. damages	Joint liability abolished
INDIANA	XX	XX	Modified comp. fault	PI: 2 years from discovery that injury resulted from tortious act. WD: 2 years from discovery that death was wrongfully caused.	10 years	Yes	3X comp. or $50,000, whichever is greater	Joint liability abolished
IOWA	Yes	Vicarious liability allowed	Modified comp. fault	PI: 2 years from discovery of wrongful act. WD: 1 year from death.	15 years	Yes	XX	Joint liability abolished for nonecon. damages. Joint liability abolished for econ. damages for defs. less than 50% at fault
KANSAS	Yes	XX	Modified comp. fault	PI: 2 years from time injury is reasonably ascertainable. WD: 2 years from death.	"Useful safe life" of product, rebuttable presumption of 10 years	Yes	Lesser of $5 million or def's annual gross income	Joint liability abolished

	PRODUCT SELLER REFORM	VICARIOUS LIABILITY FOR RENTERS	DRUG & ALCOHOL DEFENSE/MISUSE	STATUTE OF LIMITATIONS	STATUTE OF REPOSE	CLEAR & CONVINCING – PUNITIVES	PUNITIVE DAMAGE LIMITS	JOINT LIABILITY REFORM
KENTUCKY	Yes	XX	Pure comp. fault	PI: 1 year from discovery of injury and its cause. WD: 1 year from qualification of personal representative, who must be named within 1 year of death.	rebuttable presumption that product not defective if harm occurred 5 years from sale or 8 years from manufacture	Yes	XX	Joint liability abolished
LOUISIANA	Yes	XX	Pure comp. fault	PI: 1 year from injury, but latent injuries 1 year from discovery. WD: 1 year from death.	XX	No punitives	No punitives	Joint liability abolished
MAINE	XX	Vicarious liability allowed	Modified comp. fault	PI: 6 years from injury. WD: 2 years from death.	XX	XX	XX	Joint liability applies
MARYLAND	Yes	XX	Contrib. negl. defense	PI: 3 years from discovery of injury. WD: 3 years from death.	XX	Yes	XX	Joint liability applies
MASSACHUSETTS	XX	XX	Modified comp. fault	PI: 3 years from discovery of harm and cause. WD: 3 years from death.	XX	No punitives	No punitives	Joint liability limited
MICHIGAN	Yes	Vicarious liability allowed	Drug/Alcohol defense; modified comp. fault	PI: 3 years from discovery of injury and cause. WD: Same.	if product in use for 10 years, plaintiff must prove *prima facie* case without benefit of any presumption	No punitives	No punitives	Joint liability abolished
MINNESOTA	Yes	Vicarious liability allowed	Modified comp. fault	PI: 4 for negl. actions; 6 years for strict liability actions -- from injury. WD: 3 years from death.	"Useful life" of product	Yes	XX	Joint liability abolished for defs. less at fault than plaintiff

	PRODUCT SELLER REFORM	VICARIOUS LIABILITY FOR RENTERS	DRUG & ALCOHOL DEFENSE/MISUSE	STATUTE OF LIMITATIONS	STATUTE OF REPOSE	CLEAR & CONVINCING – PUNITIVES	PUNITIVE DAMAGE LIMITS	JOINT LIABILITY REFORM
MISSISSIPPI	XX	XX	Pure comp. fault	PI: 3 years from discovery of injury. WD: Same.	XX	Yes	XX	Joint liability applies to extent needed for plaintiff to recover 50% of damages
MISSOURI	Yes	XX	Pure comp. fault	PI: 5 years from ascertainment of injury. WD: 3 years from death.	XX	Yes	XX	If plaintiff at fault, joint liability limited to 2X def's percentage of fault
MONTANA	XX	XX	Modified comp. fault	PI: 3 years from discovery of injury. WD: 3 years from death.	XX	Yes	XX	Joint liability abolished
NEBRASKA	Yes	XX	Modified comp. fault	PI: 4 years from discovery of harm. WD: Same.	10 years	No punitives	No punitives	Joint liability abolished for nonecon. damages
NEVADA	XX	XX	Modified comp. fault	PI: 2 years from discovery of facts giving rise to injury. WD: 2 same.	XX	Yes	$300,000 if comp. less than $100,000; otherwise 3X comp.	Joint liability abolished for defs. less at fault than plaintiff
NEW HAMPSHIRE	XX	XX	Modified comp. fault	PI: 3 years from discovery of injury and cause. WD: Same.	XX	No punitives	No punitives	Joint liability abolished for defs. less than 50% at fault
NEW JERSEY	Yes	XX	Modified comp. fault	PI: 2 years from awareness of injury and cause. WD: Same.	XX	Yes	5X comp. or $350,000, whichever is greater	Joint liability abolished for defs. less than 60% at fault
NEW MEXICO	XX	XX	Pure comp. fault	PI: 3 years from manifestation of injury. WD: 3 years from death.	XX	XX	XX	Joint liability abolished, except in strict liability cases
NEW YORK	XX	Vicarious liability allowed	Pure comp. fault	PI: 3 years from discovery of injury. WD: 2 years from death.	XX	XX	XX	Joint liability abolished for nonecon. damages for defs. less than 50% at fault

	PRODUCT SELLER REFORM	VICARIOUS LIABILITY FOR RENTERS	DRUG & ALCOHOL DEFENSE/MISUSE	STATUTE OF LIMITATIONS	STATUTE OF REPOSE	CLEAR & CONVINCING – PUNITIVES	PUNITIVE DAMAGE LIMITS	JOINT LIABILITY REFORM
NORTH CAROLINA	Yes	XX	Contrib. negl. defense	PI: 3 years from time injury is or should be apparent. WD: 2 years from death.	6 years	Yes	3X comp. or $250,000, whichever is greater	Joint liability applies
NORTH DAKOTA	Yes	XX	Modified comp. fault	PI: 6 years from discovery of cause of action. WD: 2 years from death.	10 years	Yes	2X comp. or $250,000, whichever is greater	Joint liability abolished
OHIO	Yes	XX	Modified comp. fault	PI: 2 years from discovery of harm. WD: 2 years from death .	15 years	Yes	3X comp. or $250,000, whichever is greater, for larger businesses; $100,000 for smaller businesses	Joint liability abolished for nonecon. damages; joint liability is abolished for econ. damages if def. is less than 50% at fault
OKLAHOMA	XX	XX	Modified comp. fault	PI: 2 years from discovery of harm, but tolled if cause is beyond "pale of human knowledge." WD: Same	XX	Yes	May not exceed comp. damages	Joint liability abolished if plaintiff at fault
OREGON	XX	XX	Modified comp. fault	PI: 2 years from manifestation of harm. WD: Same.	8 years	Yes	XX	Joint liability abolished
PENNSYLVANIA	XX	XX	Modified comp. fault	PI: 2 years from discovery of harm and its cause. WD: Same.	XX	XX	XX	Joint liability applies
RHODE ISLAND	XX	Vicarious liability allowed	Pure comp. fault	PI: 3 years from injury, but discovery rule in drug product liability actions. WD: 2 years from death.	XX	XX	XX	Joint liability applies

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SOUTH CAROLINA	XX	XX	Modified comp. fault	PI: 3 years from discovery of injury resulting from wrongful conduct. WD: 3 years from death.	XX	Yes	XX	Joint liability applies
SOUTH DAKOTA	Yes	XX	Modified comp. fault	PI: 3 years from discovery of harm. WD: Same.	XX	Yes	XX	Joint liability limited to 2X percentage of fault for any def. less than 50% at fault
TENNESSEE	Yes	XX	Modified comp. fault	PI: 1 year from discovery of injury. WD: 1 year from death.	10 years	Yes	XX	Joint liability abolished
TEXAS	XX	XX	Modified comp. fault	PI: 2 years from discovery of nature of injury. WD: 2 years from death.	15 years; non-agr. mfg. equip.	Yes	2X econ. or $200,000, whichever is greater, plus am't equal to nonecon. up to $750,000	Joint liability abolished for defs. less than 51% at fault
UTAH	XX	XX	Modified comp. fault (negl.)	PI: 2 years from discovery of injury and cause. WD: 2 years from death.	XX	Yes	XX	Joint liability abolished
VERMONT	XX	XX	Modified comp. fault	PI: 3 years from discovery of injury. WD: 2 years from death.	XX	XX	XX	Joint liability applies
VIRGINIA	XX	XX	Contrib. negl. defense	PI: 2 years from date of injury (2 years from medical diagnosis in asbestos and breast implant cases). WD: 2 years from death.	XX	XX	$350,000	Joint liability applies
WASHINGTON	Yes	XX	Drug & Alcohol defense; pure comp. fault	PI: 3 years from discovery of harm and cause. WD: Same.	"Useful safe life" of product, rebuttable presumption of 12 years	No punitives	No punitives	Joint liability abolished if plaintiff at fault

	PRODUCT SELLER REFORM	VICARIOUS LIABILITY FOR RENTERS	DRUG & ALCOHOL DEFENSE/MISUSE	STATUTE OF LIMITATIONS	STATUTE OF REPOSE	CLEAR & CONVINCING – PUNITIVES	PUNITIVE DAMAGE LIMITS	JOINT LIABILITY REFORM
WEST VIRGINIA	XX	XX	Modified comp. fault	PI: 2 years from discovery of injury and its cause. WD: 2 years from death.	XX	XX	XX	Joint liability applies
WISCONSIN	XX	XX	Modified comp. fault	PI: 3 years from discovery of injury. WD: 3 years from death.	XX	XX	XX	Joint liability abolished for defs. less than 51% at fault
WYOMING	XX	XX	Modified comp. fault	PI: 4 years from discovery of injury. WD: 2 years from death.	XX	XX	XX	Joint liability Joint liability abolished

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