NLWJC - Kagan

DPC - Box 037 - Folder 007

Product Liability - Notes [3]

Product liability —
notes + memos

Ellen S. Seidman 06/10/97 03:53:16 PM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc: Elena Kagan/OPD/EOP
Subject: Re: meeting on Wednesday

good., The topics are (i) general issues with the bill (i.e., not punitives, joint and several or statute of repose); (ii) small business caps for punitives and comps (SBA should have proposals, which will probably not meet a great deal of enthusiasm); and , possibly, (iii) negligent entrustment (although the Violence Policy Center person said she might not be able to get back to DOJ until later this week). We're getting very close to the end. Ask Elena to call if she needs catchup.
Ellen

PS We need someone to deal with the biomaterials issue. DOJ says they're not competent on it, and HHS -- according to Elizabeth -- usually says they aren't interested. Do you have some suggestions?

Product Liability — notes + memos

Ellen S. Seidman 06/10/97 03:53:16 PM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc: Elena Kagan/OPD/EOP
Subject: Re: meeting on Wednesday

good., The topics are (i) general issues with the bill (i.e., not punitives, joint and several or statute of repose); (ii) small business caps for punitives and comps (SBA should have proposals, which will probably not meet a great deal of enthusiasm); and , possibly, (iii) negligent entrustment (although the Violence Policy Center person said she might not be able to get back to DOJ until later this week). We're getting very close to the end. Ask Elena to call if she needs catchup.
Ellen

PS We need someone to deal with the biomaterials issue. DOJ says they're not competent on it, and HHS -- according to Elizabeth -- usually says they aren't interested. Do you have some suggestions?

Product Liability - notes + memos

PETER G. JACOBY [redacted]
06/12/97 10:09:35 AM

Record Type: Record

To: Ellen S. Seidman/OPD/EOP, Bruce R. Lindsey/WHO/EOP, Tracey E. Thornton/WHO/EOP, Elena Kagan/OPD/EOP

cc:
Subject: Rand Study

Our former colleague Tim Keating, now a high-powered lobbyist for the American Council of Life Insurers, has offered to arrange a briefing for us with the authors of the forthcoming Rand study on punitive damage awards (Ellen, I believe this is the same study you mentioned during yesterday's meeting). According to Tim, the study will be unveiled within the next two weeks and it will be considered during a June 24th hearing in the Senate Judiciary Committee.

Tim's interest is that ACLI helped underwrite the study and they believe it will show that most punitive damages are awarded in contracts cases and not in those cases where physical harm has resulted from a tortfeasor's actions. Additionally, they expect the study to show the general rise in punitives and the necessity to cap those awards.

Given Rand's reputation for independence, it is likely that this study will have an immediate impact on the debate. My recommendation is that we meet with the Rand folks to get an idea of what's coming. I am happy to set up a meeting if everyone thinks its worthwhile. Peter

Product liability -
notes ruminess

Ellen S. Seidman 06/12/97 10:28:13 AM

Record Type: Record

To: Peter G. Jacoby/WHO/EOP

cc: See the distribution list at the bottom of this message
Subject: Re: Rand Study

yes, this is the same study, and I think we should get a briefing. From what I understand of the study, however, it's likely to REDUCE pressure on punitive caps in products cases and make the financial services industry look pretty awful, which may hurt modernization.

Message Copied To:

Bruce R. Lindsey/WHO/EOP
Tracey E. Thornton/WHO/EOP
Elena Kagan/OPD/EOP
Paul R. Carey/WHO/EOP
Daniel C. Tate/WHO/EOP

Product liability - notes + memos

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

June 2, 1997

MEMORANDUM FOR PRODUCT LIABILITY WORKING GROUP

FROM: **Tom McGivern** (MM)
Deputy Associate General Counsel

SUBJECT: **Statutes of Repose**

A review of state statutes of repose for product liability actions reveals a range of different approaches. As noted at our previous meeting, a number of state statutes of repose have been ruled invalid under state constitutions. In addition, a few states have no general product liability statute of repose, but do have statutes of repose for actions regarding topics (*e.g.*, real estate improvements) that in other states would fit under the broad heading of product liability.

States With Statutes of Repose

The following states have statutes of repose for product liability or similar actions. Many have exceptions for products with express warranties longer than the statute of repose. Most of these statutes also have survived a court challenge.

Arkansas	"anticipated life"	May be raised as a defense where the consumer knew or should have known that the product was being used beyond its anticipated life
Alaska	8 years	for actions against architects, contractors, builders, engineers, inspectors, and others for improvements to real property
Colorado	10 years	for general product liability actions, *but with rebuttable presumption*
	7 years	for actions against manufacturers, sellers, or lessors of new manufacturing equipment
	6 years	for actions against architects, contractors, builders, engineers, inspectors, and others for improvements to real property
Connecticut	10 years	limit does not apply if claimant can prove that the harm occurred during the *useful safe life* of the product
D.C.	10 years	For actions arising out of death or injury caused by defective or unsafe improvements to real property. *Not a general product liability statute.*
Georgia	10 years	
Florida	12 years	*Repealed in 1986*, but repeal held to be non-retroactive in 1992.
Idaho	"useful safe life"	*But*, presumption that useful safe life ends *10 years* after delivery of product. Presumption may only be rebutted by clear and convincing evidence.

Illinois	10-12 years	Within 12 years from the date of first sale, lease or delivery of possession by a seller or 10 years from the date of first sale, lease or delivery of possession to its initial user, consumer, or other non-seller, whichever period expires earlier.
Indiana	10 years	Includes provision to permit suit within 2 years of discovery of defect any time after the start of the 8th year.
Kansas	"useful safe life"	Product sellers are not liable if they prove by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired. Presumption that useful safe life expires *10 years* after product is delivered. This presumption may only be rebutted by clear and convincing evidence. Also, *latent disease exception* to 10-year period.
Kentucky	5-8 years	Five years after the date of sale to the first consumer or eight years after the date of manufacture.
Michigan	10 years	If product in use for 10 years or more, plaintiff must prove *prima facie* case without benefit of any presumption. *Latent disease exception* in case law.
Minnesota	"ordinary useful life of product"	From Minnesota statute: "The useful life of a product is not necessarily the life inherent in the product, but is the period during which with reasonable safety the product should be useful to the user. This period shall be determined by reference to the experience of users of similar products, taking into account present conditions and past developments...." No 10-year or other fixed term presumption regarding the end of useful life.
Nebraska	10 years	
North Carolina	6 years	
North Dakota	10-11 years	Within 10 years of the date of initial purchase for use or consumption, or within 11 years of the date of manufacture of a product.
Ohio	15 years	Exception for latent diseases, warranties in excess of 15 years, etc.
Oregon	8 years	Exceptions for various latent diseases and defects.
Tennessee	10 years	Or 1 year after the end of the *anticipated life of the product*, whichever is shorter.
Texas	15 years	
Virginia	5 years	*Only* for actions for damages arising out of defective or unsafe condition of improvements to real property. Not for product liability generally.
Washington	"useful safe life"	Presumption that products over 12 years old are beyond their useful safe life. Claimants may rebut this presumption by a preponderance of the evidence. Also, defendant's can rebut presumption that "useful safe life" is less than 12 years by a preponderance of the evidence.

States Where Statutes of Repose Have Been Ruled Invalid

Most states where courts have held statutes of repose to be invalid rely on state constitutional provisions explicitly requiring open access to courts or guaranteeing a right to seek to recover damages. Thus, these courts have held that statutes of repose deny their citizens that right.

Alabama	10 years	Ruled invalid in 1982
Arizona	12 years	Ruled invalid in 1993
New Hampshire	12 years	Ruled invalid in 1983
Rhode Island	10 years	Ruled invalid in 1984
South Dakota	6 years	Ruled invalid in 1984, repealed in 1985
Utah	10 years	Ruled invalid in 1989, repealed in 1989

Product Liability Statute of Repose Options

- No Federal statute of repose
- Simple term of years, such as the 18 years in S. 648
- Alternative statute of repose dates depending on when the product either was (1) manufactured or (2) put into use (see Illinois, Kentucky and North Dakota statutes)
- Term of years (*e.g.*, 10 years), but with rebuttable presumption for products that are meant to have a longer (or shorter) life. Standards of proof to rebut presumptions:
  - clear and convincing evidence
  - preponderance of the evidence
- "anticipated life" (see Arkansas) or "ordinary useful life" (see Minnesota) of product
- "useful safe life" of product with rebuttable presumption that after a fixed period of time (*e.g.*, 10 years) the product is presumed to be beyond its useful safe life. To determine the useful safe life, a number of states have provisions similar to Indiana's statute:

"Examples of evidence that is especially probative in determining whether a product's useful safe life had expired include:

(A) The amount of wear and tear to which the product had been subject;

(B) the effect of deterioration from natural causes, and from climate and other conditions under which the product was used or stored;

(C) the normal practices of the user, similar users and the product seller with respect to the circumstances, frequency and purposes of the product's use, and with respect to repairs, renewals and replacements;

(D) any representations, instructions or warnings made by the product seller concerning proper maintenance, storage and use of the product or the expected useful safe life of the product; and

(E) any modification or alteration of the product by a user or third party."

Other Features of Product Liability Statutes of Repose

- Presumption of safety when government standards are met in manufacturing
- Duty to warn of defects regardless of when a product is manufactured or sold
- Exceptions for specific products, such as breast implants, interuterine devices, asbestos (see Oregon statutes)
- Tolling of statute for minors (until they reach 18)
- Exception for latent disease or indicia of defect
- Exception for products with express warranties longer than the statute of repose
- Tolling of statute for products that have been updated, retrofitted, subject to recall, or serviced by the manufacturer
- Exception after a statutory period is enacted to allow an injured party a specified time period (*e.g.*, one year, as in S. 648) to commence an action
- Exception to permit an injured party the full statute of limitations period (*e.g.*, two years) to file a product liability action, even if the injury occurred a day before the end of the period specified in the statute of repose

Constitutional Concerns

- A Federal products liability statute of repose likely would trump any state "open court" constitutional provisions. In 1992, 39 states reportedly had some sort of "open courts" provision, some of which served as the basis for findings that state statutes of repose were unconstitutional. Other states with open courts provisions upheld statutes of repose.
- A Federal products liability statute of repose likely would be upheld on Commerce Clause grounds. The legislation in Congress over the past two years has been geared towards providing a Commerce Clause rational for the legislation.
- Some have argued that a Federal products liability statute of repose would not pass constitutional muster under the Equal Protection Clause, stating that the right to seek damages is a substantive right that cannot be taken away. Most state courts have not ruled on these grounds.
    - A statute with a rebuttable presumption regarding the useful life of the product likely would address any Equal Protection Clause concerns.

Product liability - notes + memos

DEPARTMENT OF THE TREASURY

OFFICE OF THE GENERAL COUNSEL
ROOM 1418
1500 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20220

TELEPHONE: 202-622-2317
FAX: 202-622-1188

DATE: JUNE 5, 1997

NUMBER OF PAGES TO FOLLOW: 3

TO: ELENA KAGAN
DPC

FROM: TOM McGIVERN
DEPUTY ASSOCIATE GENERAL COUNSEL

SUBJECT: MEMO ON STATUTES OF REPOSE OPTIONS

COMMENTS: For today's meeting.

PRODUCT LIABILITY: POLICY OPTIONS REGARDING STATUTE OF REPOSE

_____ **OPTION 1: The current version of S. 648**

_____ **OPTION 2: S. 648 with amendments** _____

_____ **OPTION 3: Useful safe life with a presumption**

DISCUSSION

OPTION 1: The current version of S. 648

Description. Section 106(b) of S. 648 provides an 18 year statute of repose that begins at the time of delivery of the product to the first purchaser or lessee, and includes exceptions for:

- products that cause toxic harm;
- motor vehicles, vessels, aircraft, or trains used primarily to transport passengers for hire; and
- products with express, written warranties that exceed 18 years.

The statute includes a one-year transition rule, and preempts all state statutes of repose.

Pros:

- Longer than most state statutes of repose.
- Complete preemption - not one-way as in some other cases in the bill.
- Relatively clear, bright line rule that deals with the "long tail" issue.

Cons:

- Inflexible - does not permit exceptions for:
  - defects which cause harm that may not be discoverable within 18 years;
  - products with a longer useful life; or
  - other features (see option 2).
- Would leave some injured parties with no remedies to pursue for their injuries.

OPTION 2: S. 648 with amendments

Description: Under this option the Administration would seek amendments to S. 648 to enhance the statute of repose provision. These amendments could include:

___ a. An exception to permit an injured party the full statute of limitations period (two years) to file a product liability action, even if the injury occurred a day before the end of the period specified in the statute of repose.

___ b. An exception to permit an injured party to present evidence (using clear and convincing standard in the definitions section of the bill) that the product was intended to last more than 18 years.

___ c. Tolling of statute for products that have been updated, retrofitted, subject to recall, or serviced by the manufacturer.

___ d. Expand the toxic harm exception to include harm caused by prolonged exposure to a defective product, or cases where the injury-causing aspect of the product that existed at the time of delivery was not discoverable by a reasonably prudent person until more than 18 years after the time of delivery, or if the harm caused within 18 years after the time of delivery did not manifest itself until after that time.

___ e. Exception for cases where the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant's harm.

___ f. Add somewhere in title I (not necessarily in the statute of repose provision) a duty to warn of defects regardless of when a product is manufactured or sold.

Pros:

- Amendment a. is a matter of fairness; it permits those injured before the end of the statute of repose time to file suits related to those injuries. An alternative would be a 20-year statute of repose, which was in the Senate version of the product liability bill (H.R. 956) in the 104th Congress.
- Amendment b. provides additional flexibility for claimants when compared to the current version of the bill, particularly for claimants injured by industrial and other durable products which clearly are meant to have a useful life in excess of 18 years.
- Amendment c. provides continued responsibility for manufacturers of products that they continue service.
- Amendment d. expands the limited toxic harm exception in S.648 to other products that have a harmful impact which is not apparent for a number of years.
- Amendment e. is a feature of many state statutes of repose and tolls the repose period when the seller of the product commits fraud.
- Amendment f. simply requires manufacturers to warn of defects.

Cons:

- With the exception of amendment a., the other amendments would reduce the bright line feature of S. 648.
- Under amendment c., it could be argued that there would be no incentive for manufacturers to provide updates or to service their products because it would extend the liability tail each time they did.
- Opponents of amendment d. would argue that it would introduce too much uncertainty and cause manufacturers to continue to spend time and money defending themselves for products made decades earlier.

OPTION 3: Useful safe life with a presumption

Description: Under this option, product manufacturers and sellers are not liable if they prove by clear and convincing evidence that the harm was caused after the product's "useful safe life" had expired. Under many of the state statutes which use this formulation, there is a presumption that useful safe life expires 10 years after the product is delivered. This presumption may only be rebutted by clear

and convincing evidence.

Pros:

- This option provides both sides the right to present evidence to support their claims that the useful life of the product either had (sellers) or had not (claimants) expired, and thus is not a "one size fits all" approach, as in the case of the 18-year provision in S. 648.
- Similar to statutes in a number of states.

Cons:

- This option also reduces the bright line feature of S. 648, and thus may not reduce litigation.
- The "clear and convincing" evidence standard is fairly difficult to meet, and for practical purposes may impose a 10-year statute of repose in many cases.

Product liability - notes + memos

Ellen S. Seidman 06/11/97 06:08:53 PM

Record Type: Record

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

cc: Ellen S. Seidman/OPD/EOP, Gene B. Sperling/OPD/EOP, Russell W. Horwitz/OPD/EOP
Subject: meeeting and options

The next meeting will be from 2:30 to 3:30 on Friday, in room 231. Everyone will be cleared in. Topics are: (i) negligent entrustment; (ii) small business exceptions; (iii) misuse and alteration; (iv) workers comp. We'll move quickly.

What follows are the options currently extant. Please be careful.

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 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.

Punitive damages

Proposal 1 - Procedural changes only

- 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.
- 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 - Personal cap plus allocation of remaining punitive damages to state

- Authorize the jury to impose punitive damages without any cap
- 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 prodeedings 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 deterimination 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 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)

- 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)

Message Sent To:

Andrew Pincus @ 482-0042 @ fax
Donald Remy @ 514-8071 @ fax
Ed Murphy @ 622-1294 @ fax
Tom McGivern @ 622-1188 @ fax
Ron Matzner @ 205-6846 @ fax
Fran Allegra @ 514-1724 @ fax
Pam Gilbert @ 301-504-0121 @ fax
John Dwyer @ 514-0238 @ fax
Jeffrey Hunker @ 482-4636 @ fax
Jeff Bromme @ 301-504-0121 @ fax
John Spotila @ 205-6096 @ fax
Charles W. Burson/OVP @ OVP
Lisa M. Brown/OVP @ OVP
Peter G. Jacoby/WHO/EOP
Tracey E. Thornton/WHO/EOP
Timothy J. Brennan/CEA/EOP
Steven D. Aitken/OMB/EOP
William P. Marshall/WHO/EOP
Bruce R. Lindsey/WHO/EOP
Elena Kagan/OPD/EOP
Ellen S. Seidman/OPD/EOP
Ingrid M. Schroeder/OMB/EOP
John E. Thompson/OMB/EOP

Product liability - notes + memos

OPTION 1: EMPLOY A CLEAR AND CONVINCING EVIDENCE STANDARD FOR AWARDING PUNITIVE DAMAGES

PROS:

- Given the quasi-criminal nature of punitive awards, the burden of proof should be higher than in the normal civil case.

- There is a trend towards permitting an award of punitive damages only upon evidence meeting the "clear and convincing evidence" standard. A number of states have already adopted the "clear and convincing evidence" standard, either by judicial decision, or by statute.

- This standard is employed in the Model Uniform Products Liability Act, § 120(A), *reprinted in* 44 Fed. Reg. 62,714 (1979), as well as the recently adopted Model Punitive Damages Act, §5.

- It has also been endorsed by each of the principal groups to analyze punitive damages since 1979, including the Special Committee on Punitive Damages of the American Bar Association Section of Litigation, the American Bar Association House of Delegates, the American College of Trial Lawyers, and a committee of the American Law Institute.

CONS:

- Use of the standard constrains a jury's discretion, potentially limiting punitive damages to only the most egregious cases. The benefits of the clear and convincing standard thus come at the cost that some culpable defendants will escape punitive damage liability.

ADDITIONAL CONSIDERATIONS:

- The "clear and convincing standard" is a potential candidate for two-way preemption -- a Federal statute could preempt both less rigorous evidentiary standards (*e.g.*, preponderance), as well as more rigorous evidentiary standards (*e.g.*, beyond a reasonable doubt).

- Many provisions in state law limiting punitive damages were passed as package reforms by legislatures attempting to strike a balance among competing concerns by enacting some provisions favoring defendants and others favoring plaintiffs. In adopting a "clear and convincing evidence" standard and other punitive damage reforms, care must be taken not to upset the balance of these states regimes.

- See note below on the relationship of this standard to bifurcation.

OPTION 2: ADOPT A FEDERAL STANDARD OF PUNITIVE LIABILITY

PROS:

- Although virtually all jurisdictions precondition an award of punitive damages upon a showing of conduct that goes beyond ordinary negligence, some permit such an award based upon a showing of reckless indifference to human safety. By comparison, the Conference Committee bill would have allowed punitive damages to be awarded only upon a showing of the seller's "conscious, flagrant indifference to the rights or safety" of those who might be injured by the product, thereby seemingly requiring more than a mere reckless indifference to, or willful ignorance of, the product's dangers.

- Given the quasi-criminal nature of punitive damages, it seems reasonable that such damages should not be based upon a finding of gross negligence, but should require a showing that the defendant had some knowledge of the risk of harm.

- Both the American Law Institute and the Special Committee on Punitive Damages of the American Bar Association Litigation Section support a minimum standard for punitive awards that requires a conscious act on the part of the tortfeasor. In addition, the "conscious and flagrant disregard" standard is employed in Section 5 of the recently-adopted Model Punitive Damages Act.

CONS:

- One-way preemption on this standard would make it more difficult to award punitive damages in states, such as West Virginia, which currently have more liberal standards for awards.

ADDITIONAL CONSIDERATIONS:

- Another potential candidate for two-way preemption. Adopting a single federal standard for punitive awards could lessen litigation by enunciating a clear standard by which triers of fact would determine awards.

- A possible alternative to the uniform standard in the Conference Bill would be to delete the word "flagrant" and to allow punitive damages to be imposed where the claimant establishes that his or her injury was the result of the defendant's "conscious indifference" to the safety of those who might be harmed by a product. To avoid ambiguity, such a statute could indicate expressly that a defendant is "consciously indifferent" if it knows of and disregards a substantial risk to health or safety. Either the statute or its legislative history could also make clear that the requisite state-of-mind could

be established by circumstantial evidence, including evidence showing that information available to the defendant made the risk obvious.

- A uniform federal standard could also include factors for either a court or a jury to consider in establishing the amount of punitive damages. The recently adopted Model Punitive Damages Act lists factors such as the nature of the wrongful conduct, the amount of compensatory damages and the defendant's financial condition. Another factor that could be considered in determining the size of an award is whether the defendant has already been subjected to punitive damage awards for essentially the same conduct.

- See point above concerning interaction with existing state laws.

OPTION 3: BIFURCATE JURY TRIALS INVOLVING PUNITIVE DAMAGES

PROS:

- Primary rationale for bifurcation is that some evidence presented for the determination of punitive damages may be irrelevant, confusing, or prejudicial to the determination of compensatory damages. For example, the defendant's wealth is a major factor in determining an appropriate punitive damage award, but is irrelevant in determining compensatory liability or damages.

- Many are concerned that the introduction of evidence of the defendant's wealth is highly inflammatory and could prejudice the jury in determining whether the defendant is liable for compensatory damages. *See* American Bar Association, **Report of the Action Committee to Improve the Tort Liability System** 17 (1987).

- Responding to these concerns, at least fourteen states have adopted a bifurcation requirement in at least some cases involving punitive damages.

- Bifurcation would ensure that the jury does not consider inflammatory evidence relevant only to the question of punitive damages when it resolves issues concerning the defendant's liability for compensatory damages. Bifurcation could also enhance judicial efficiency by shortening the overall length of trial if the defendant prevails on liability, and by eliminating any claim by the defendant that evidence concerning his wealth had biased the jury's determination of his liability for compensatory damages.

- Preserves the role of the jury as against other mechanisms for limiting jury discretion (*e.g.*, caps on punitive damages, judicial determination).

CONS:

° Bifurcating, in a second trial phase, both the determination of ***whether*** to award punitive damages and the calculation of the ***amount*** of punitive damages which should be awarded, could increase the cost of litigating claims in certain cases. Often there is some overlap between the evidence relevant to the question whether a product is defective (or a defendant is negligent), and the evidence of whether a defendant's conduct is such as to justify an award of punitive damages. Mandatory bifurcation thus could result in a loss of judicial economy in certain circumstances.

ADDITIONAL CONSIDERATIONS:

° Another potential candidate for two-way preemption.

° A mandatory bifurcation procedure could constitute a unifying structure upon which to graft other reforms, such as use of the "clear and convincing evidence" standard and a Federal standard for punitive damages. One could reasonably argue that the result of adopting these three reforms would be to award punitive damages in a more rational and consistent manner, thereby obviating the necessity for more Draconian measures, such as absolute caps on punitive damage awards. The National Conference of Commissioners on Uniform State Laws recently took this position in adopting a Model Punitive Damages Act, expressly rejecting a cap on punitives in favor of improving procedures for awarding damages.

OPTION 4: ALLOCATE A PORTION OF PUNITIVE DAMAGE AWARDS IN PRODUCT LIABILITY SUITS TO BENEFIT A PUBLIC CAUSE

PROS:

° Punitive damages are not designed primarily to compensate the plaintiff, but rather to punish a defendant for its egregious conduct against society and to deter others from engaging in similar conduct.

° To the extent they reimburse the plaintiff's litigation costs, which compensatory damages do not offset, punitive damages do serve to make the plaintiff whole. Moreover, some quantum of punitive damages compensates the plaintiff for acting as a "private attorney general," encouraging the plaintiff to pursue a suit that serves the societal goal of deterrence. In practice, then, the "windfall" portion of a punitive damage award equals the amount that exceeds the plaintiff's litigation costs and a proper economic incentive for the plaintiff to pursue punitive damages.

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

- An 1987 Action Commission of the ABA, as well as many commentators, have suggested that a better way to negate the effect of this windfall is to require a losing defendant to pay a portion of the punitive award to the state. At least eleven states have taken this route, while employing a variety of approaches (see note below on the constitutionality of these provisions).

- A Federal provision allocating punitive awards is preferable to capping punitive damages at some absolute level. Such an allocation would change the ***destination***, not the ***amount***, of punitive damages. In other words, allocation would comport with the purpose of punitive damages, which is to punish and deter the defendant, rather than compensate the plaintiff.

- The split-recovery would allow a portion of a punitive award to benefit society as a whole. A plaintiff could retain sufficient punitive damages to cover his or her litigation expenses and then receive a percentage of the remaining award to provide tort victims an incentive to pursue punitive damages.

- As in many states, the portion of an award received by the Federal Government (or directly by a state) could either be deposited in the General Fund, thereby reducing the tax burden on all taxpayers, or be dedicated to a special fund for a deserving cause, such as tort victim compensation, defraying indigent legal expenses, or providing no-fault compensation for injuries caused by certain vaccines and drugs. To the extent allocations were received by the Federal Government, such funds could either be distributed through existing Federal programs or could be provided to the states either in block grants or as seed money to encourage states to pursue particular types of programs.

CONS:

- Lessens the economic incentive for plaintiffs to act as "private attorneys general."

- The existence of an allocation mechanism could cause plaintiffs and their attorneys to inflate their requests for punitive damages. While the trier of fact

would be expected to award only appropriate punitive damages, inflated requests for punitive damages could thwart settlement negotiations.

- Depending on the public beneficiary of the allocable portion of the punitive award, juries and courts may have enough of an interest in the amount of the award to be tempted to assess higher punitive damages -- the money could be perceived as going to a "good cause."

- Does not necessarily respond to the problem of multiple punitive damage awards (*i.e.*, independent awards made by different courts designed to punish essentially the same conduct that, when accumulated, may be disproportionate to the needs of punishment and deterrence).

- Drafting a statute that would pass constitutional muster (see below) and would function smoothly in distributing funds could be a complicated task.

- Actions challenging the constitutionality of state allocation statutes have been brought in Colorado, Florida, Georgia, and Iowa, with the Colorado and Georgia statutes having been found violative of the U.S. Constitution by at least some courts. *Compare* Kirk v. Denver Publishing Co., 818 P.2d 262 (Col. 1991); McBride v. General Motors Corp., 737 F.Supp. 1563 (M.D.Ga. 1990) *with* Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635 (Ga. 1993); Gordon v. State, 608 S.2d 800 (Fla. 1992); Shepard Components Inc. v. Brice Pertrides-Donohue and Associates, Inc., 473 N.W.2d 612 (Iowa 1991). The principle challenge to state allocation statutes has been that such schemes effect an unconstitutional taking of the plaintiff's property in violation of the Fifth Amendment. However, the courts appear to agree that there is no "taking" for this purpose if the government's interest attaches prior to or simultaneously with the entry of judgment. *See, e.g.*, Shepherd Components, *supra* at 619, Kirk, *supra*. It appears that any potential constitutional problems posed by the Fifth and Eighth Amendments could be avoided by careful drafting.

ADDITIONAL CONSIDERATIONS:

- Assuming this mechanism applied to settlements -- an issue that would need to addressed -- the existence of the mechanism could have a variety of other impacts on settlement negotiations. For example, under this mechanism, plaintiffs would have an incentive to allocate as much of a settlement as possible to compensatory damages -- of course, plaintiffs already have a tax incentive to construct settlements in this fashion.

OPTION 5: CAP PUNITIVE DAMAGES

PROS:

- Two basic variations of statutory caps exist -- one version limits the dollar amount, and the other limits the award to a certain multiple of compensatory damages. Such caps negate entirely the windfall nature of punitive damage awards and eliminate the possibility of a wildly excessive award.

- Caps provide definitive guidance to trial courts and appellate courts as to the permissible level of damages reducing litigation on the appropriateness of a punitive damage award.

- Theoretically, capping punitive damages minimizes the purported chilling effect of punitive damages on innovation, research, and marketing of products.

CONS:

- Legislative caps are unnecessarily outcome determinative and undercut the fundamental purposes of punitive awards: to punish and deter.

- A legislative cap invites a wealthy defendant or potential wrongdoer to assess the risks of a maximum punitive award compared to the potential gains or profits of the wrongdoing. If a defendant is wealthy enough, an award cap negates the potential deterrent impact of an unlimited punitive award.

- Conversely, the assessment of an award against an impecunious defendant or small business might be influenced upwards by a punitive cap, resulting in an award far greater than that necessary to punish or deter.

- Punitive awards that are tied to compensatory damages are particularly lacking because a compensatory award is related neither to the degree of the defendant's actual malice nor to an amount sufficient to deter. Caps tied to some multiple of damages result in a situation where higher punitive damages are awarded to wealthy individuals than consumers in the middle class. Egregious conduct that exposes potential victims to grievous harm may warrant substantial punitive damages even though the actual damages happen to be fortuitously low in a particular case.

- The existence of legislative caps could cause plaintiffs to eschew pursuing punitive damages even in appropriate cases, based on a cost/benefit analysis.

- Does not necessarily respond to the problem of multiple punitive damage awards.

ADDITIONAL CONSIDERATIONS:

° There are several potential variations on punitive damage caps:

-- ***Large Company/Small Company.*** Adopt one rule for larger companies and another rule for very small companies -- this is the approach that was used in the Conference Bill with respect to punitive damages.

-- ***Safety Valve.*** Under this approach, either the judge or the jury would be permitted to exceed a cap where there are aggravating or other related circumstances. Such circumstances could include factors similar to those that were contained in the Conference Bill (*e.g.*, the profitability of the misconduct; the duration of the misconduct and any efforts to conceal the conduct; and the financial condition of the defendant).

OPTION 6: REQUIRE JUDGES, RATHER THAN JURIES, TO DETERMINE THE AMOUNT OF PUNITIVE DAMAGES

PROS:

° To minimize irrational awards, judges could be given the responsibility for setting the amount of punitive damages following a jury determination of liability. Judges are already involved in weighing punitive damage verdicts, both in remittitur procedures and in reviewing jury verdicts on appeal. The skills employed in these roles are essentially the same as those employed by judges in imposing fines and sentences on criminal defendants. In the latter role, judges gain experience in weighing conflicting penal purposes and in applying the legal concepts needed to identify behavior that justifies a particular level of punishment.

° Most do not question the juries' ability to resolve questions whether defendant should be liable for punitive damages. A jury can scrutinize the evidence and weigh the behavior it establishes to determine whether conduct was based on the defendant's conscious indifference to the rights of others. Juries, however, are arguably less outfitted to resolve questions concerning the size of the award. Nothing in the juror's knowledge of the "common affairs of life" qualifies them to assign a specific dollar value to achieving the twin goals of punishment and deterrence.

° The unfettered discretion generally given to juries determining the size of an award enhances the possibility that improper factors will creep into the decisionmaking process, such as prejudice and bias.

- Congress has also required judges to determine the amount of total damages or of punitive damages under several federal statutes. *See, e.g.*, Equal Credit Opportunity Act, 15 U.S.C. §1691e(b); Patent Act, 35 U.S.C. §284; Fair Housing Act, 42 U.S.C. §3612(c); Fair Credit Reporting Act, 15 U.S.C. §1681n(2). These statutes provide precedent for shifting the assessment function to judges in punitive damage cases.

- Allowing judges to determine the amount of punitive damages is preferable to absolute caps.

CONS:

- While, overall, judicial determination should reduce irrational awards, some might argue that this approach neither eliminates the potential for irrational awards (as would caps) nor eliminates the potential for the plaintiff receiving a windfall (as would caps or allocating a portion of the damages to a public purpose).

- Deprives juries of a role that they have traditionally exercised.

ADDITIONAL CONSIDERATIONS:

- Forms of judicial determination have been adopted by four states -- Colorado, Connecticut, Kansas, and Ohio -- although the provisions in Ohio was declared unconstitutional.

- While there are constitutional concerns here, a good argument can be made that such a statute would not infringe on the Seventh Amendment. In Tull v. United States, 481 U.S. 412, 426 n.9 (1987), the Supreme Court indicated that "[n]othing in the Amendment's language suggests that the right to a jury trial extends to the remedy phrase of a civil trial." The Court explained that "highly discretionary calculations that take into account multiple factors," such as are necessary in determining a penalty, are "traditionally performed by judges." *Id.* *Cf.* Defender Industries v. Northwestern Mut. Life, 938 F.2d 502 (4th Cir. 1991) (en banc) (discounting Tull, and holding that the Seventh Amendment prohibited judicial assessment of punitive damages authorized under a state statute).

- Judicial determination could form the fourth prong -- the others being the clear and convincing evidence standard, the federal standard for liability and bifurcation -- of procedural reforms designed to rationalize the process of determining punitive damage awards.

Bill: Products liability - notes + memos

Bruce -
FYI - An update on products.
Ellen

Gene --

We just had a meeting with Dingell and Rockefeller staff. Dingell was represented by Dan Schuler and Mike(?) Quinn. Jim(?) Gottlieb, Ellen someone and another woman represented Rockefeller. Peter Jacoby, Fran Allegra (DOJ) and I were there for the whole meeting; Tracey Thornton and Elena Kagan for most of it.

The message from the Hill was (I) we're going to be forced by Lott to move this fast; (ii) you're going too slowly; (iii) we expected you to be able to negotiate with us, and expect to negotiate this out among the Admin/Rockefeller/Dingell alone; and (iv) while Rockefeller has said he wants to satisfy the President's veto message, if we don't show him how, he'll try to figure it out himself.

On the other hand, they wouldn't put any of their ideas on the table, asserting that would just be negotiating with themselves. They also explicitly said they wouldn't have any further substantive discussions until we could actually negotiate.

The working group is moving reasonably quickly toward having some alternatives on the three big issues -- joint and several, punitives and statute of repose -- to put before --WHO? Deputies? Principals? The President directly? With the veto message being pretty flatfooted and it being very much a personal Presidential decision on what to do and how, I don't see how we can proceed to work with these people -- which they're insisting means we put an offer on the table -- without some direction from the President, and I think we owe it to him to (I) make it informed direction and (ii) not have different parts of the Administration wandering off in different places.

Tracey Thornton seems to think we'll be able get get a few weeks delay from Lott before he brings it up, but who knows? In the meantime, we'll try to push the process faster, but we're still more than a week away from a Presidential options memo, even assuming we don't have a formal Deputies and Principal level part of the process.

I think it was important for you NOT to be in the meeting. If there's good news in the sense of being able to move faster to deliver, you'll be better able to do it. But frankly, given that they won't put anything on the table and are demanding we move first, the only thing we could say today is we're moving, but we're not ready yet.

Probably would make sense for you and Kathy and Bruce Reed to talk to Bruce Lindsey and John Hilley to really understand where we're going and when.

Ellen

Ell

1 set of rules for large/ another for small?
minimum guarantee — x? of recovers
de minimis rule?
multiply by econ damages

File: Product liability — notes + memos

U.S. Department of Justice
Office of the Associate Attorney General

Deputy Associate Attorney General
Washington, D.C. 20530

May 22, 1997

TO: Product Liability Group

FROM: Francis M. Allegra
Deputy Associate Attorney General

SUBJECT: **Joint and Several Liability**

A review of the literature and state codes indicates that the States have taken the following approaches to joint and several liability:

No Comparative Fault/Traditional Joint and Several Liability: Alabama, Maryland, North Carolina, Virginia.

Comparative Fault/Traditional Joint and Several Liability: Arkansas, Delaware, Maine, Massachusetts, Michigan, Pennsylvania, Rhode Island, South Carolina and West Virginia.

Comparative Fault/Pure Several Liability: Alaska, Arizona, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, North Dakota, Tennessee, Utah, Vermont and Wyoming.

Comparative Fault with Modified Joint and Several Liability. Twenty-four states have hybrid systems that rely on one or more features. The following is a survey of those features (note that certain states appear under more than one heading).

° ***Modifying Joint and Several Liability by Providing for the Reallocation of Loss Among Remaining Parties to the Litigation, Including the Plaintiff in Some Cases***: Connecticut, Mississippi, Missouri and Oregon. Examples of these systems include:

-- Connecticut: several liability, except that a plaintiff who has attempted unsuccessfully for one year to collect from a defendant may apply to the court to have the defendant's share reapportioned among other defendants; uncollectible economic damages fully reapportioned; uncollectible noneconomic damages reapportioned by multiplying the defendant's original percentage of negligence times the uncollectible amount.

-- Missouri: joint and several if the plaintiff is fault-free. If the plaintiff is assessed some fault -- joint and several except if any party, within 30 days of judgment, moves for reallocation of any uncollectible amounts, in which case the uncollectible amount shall be reallocated among all other parties including the plaintiff and no amount shall be allocated to any party whose assessed percentage of fault is less than the plaintiffs so as to increase that party's liability by more than a factor of two. Special rule for malpractice cases.

-- Mississippi: several, except that joint and several is retained to the extent necessary for the injured party to recover 50 percent of his damages.

-- Oregon: several liability, except if any party moves for reallocation, within one year of the judgment, of any uncollectible amounts, in which case the uncollectible amount shall be reallocated among all other parties including the plaintiff; no reallocation of a defendant's share if either the percentage of fault of the claimant is equal to or greater than the percentage of fault of that party or the percentage of fault of the party is 25 percent or less.

° ***Eliminating Joint and Several Liability, But Preserving It for Certain Types of Actions or Certain Types of Losses***: California, Hawaii, Florida, Nebraska, Nevada, New Jersey, New Mexico, Ohio Idaho, Iowa, Oregon, Texas and Washington. Examples of these systems include:

-- Hawaii: joint and several for economic damages; joint and several for noneconomic damages in actions involving intentional torts, pollution, toxic torts, aircraft accidents, strict and products liability, auto accidents involving highway maintenance and design, if the tortfeasor had notice of a prior similar occurrence. In addition, joint and several liability for noneconomic damages in all cases in which the defendant's share of fault is 25 percent or more; otherwise several liability for noneconomic damages.

-- California, Nebraska: defendants are jointly and severally liable for economic damages, but only severally liable for noneconomic damages.

-- Nevada (and similar rule in Idaho): joint and several liability only in cases of strict liability, intentional torts, toxic torts, product liability and concerted acts.

-- Washington: several liability, except where plaintiff was not at fault, in tortious interference with contract, certain product liability cases, hazardous waster or waste disposal.

° ***Eliminating or Modifying Joint and Several Liability for Losses Under a Specific Amount or for Defendants Who Are Under a Certain Percentage of Fault***: Florida, Hawaii, Iowa, Minnesota, Montana, New Hampshire, New Jersey, New York,

Oregon, South Dakota, Texas and Wisconsin. Some examples of these systems include:

-- Iowa, Montana, New Hampshire and Wisconsin: joint and several liability generally does not apply to defendants assessed less than 50 (or, in Wisconsin, 51) percent of the total fault of all parties.

-- New Jersey: any defendant 60 percent or more responsible for damages is joint and severally liable for entire amount. Defendants more than 20 percent but less than 60 percent at fault is jointly and severally liable for economic losses, but severally liable for noneconomic losses. Defendants who are 20 percent or less at fault are severally liable.

-- New York: joint and several liability for economic damages; any defendant found to be 50 percent or less at fault is severally liable for noneconomic losses in personal injury cases, subject to certain exceptions.

-- Oregon: liability of defendants found to be less than 15 percent at fault for economic damages is several; liability for defendants more than 15 percent at fault is joint and several, except that any defendant whose percent of fault is less than the plaintiff's is liable only for that percent of economic damages.

-- South Dakota: a defendant less than 50 percent at fault is not jointly and severally liable for more than twice his percentage of fault.

° ***Eliminating or Modifying Joint and Several Liability Only Where the Plaintiff is at Fault or Is More at Fault Than the Defendant***: Florida, Oregon, Texas, Georgia, Missouri, Oklahoma and Washington. Examples of these systems include:

-- Georgia: joint and several liability, except that if fault is assigned to the plaintiff, the trier of fact may apportion an award among certain defendants, who are then severally liable.

-- Florida: several liability, except joint and several liability for economic damages with respect to any party whose percentage of fault equals or exceeds that of a particular claimant. Also joint and several in actions where total damages do not exceed $25,000.

I will provide the survey information on the States' various approaches to punitive damages by separate memorandum.

6 options

1. Realloc scheme
   big cos v small cos.

2. Re min share
   variation - multiplier 1 or higher?

could be added 3. Limit +/- / + At which bandit is no greater than the π's

4. Way of assuring π a min level of resources necessary

Flesh out options -
- pros + cons

Product liability - notes + memos

PETER G. JACOBY [redacted]
05/29/97 03:07:07 PM

Record Type: Record

To: Kathleen M. Wallman/WHO/EOP, Ellen S. Seidman/OPD/EOP, Tracey E. Thornton/WHO/EOP, Elena Kagan/OPD/EOP

cc:
Subject: Meeting Time for Congressional Staff Meeting on Products Liability

Pending Senate staff confirmation, the products liability meeting with Congressional staff is scheduled for 3 pm on Monday in 472 OEOB. Attending will be Bruce Gwynn and Dave Schuler from Congressman Dingell's staff and Jim Gottlieb from Senator Rockefeller's office. I appreciate everyone's patience in pulling this meeting together.

Preliminary thoughts on the agenda:

1) Emphasize the need for confidentiality of Administration/Hill discussions

2) Hill staff report on status of products legislation in the House and Senate

3) Statement of the Adminstration's position regarding the President's position on products liability legislation and his desire to respect H.R. 956's veto message and the cases of those who acompanied him during the veto ceremony

4) Report on the status/progress of the Administration's working group on products liability reform (e.g. review of state actions on punitives and joint and several liability)

5) Broad discussion of "options" on state preemption, elimination of joint liability for noneconomic damages, capping punitives, statute of repose and negligent entrustment (must emphasize that all options are very preliminary and do not represent any Administration position)

6) Discussion of future process for Hill/Administration discussions

Please call or comment on the agenda at your earliest convenience.

Product liability - notes + memos

Ellen S. Seidman 05/29/97 03:21:38 PM

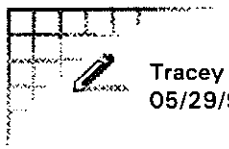
Record Type: Record

To: Tracey E. Thornton/WHO/EOP

cc: Peter G. Jacoby/WHO/EOP, Kathleen M. Wallman/WHO/EOP, Elena Kagan/OPD/EOP
Subject: Re: Meeting Time for Congressional Staff Meeting on Products Liability

If we can get away with it, I agree with Tracey, and we actually succeeded today in not talking about any specific thing we're thinking about. ellen

Product liability - notes memos



Tracey E. Thornton
05/29/97 03:18:26 PM

Record Type: Record

To: Peter G. Jacoby/WHO/EOP

cc: Kathleen M. Wallman/WHO/EOP, Ellen S. Seidman/OPD/EOP, Elena Kagan/OPD/EOP
Subject: Re: Meeting Time for Congressional Staff Meeting on Products Liability

I think a discussion of "options" at this point is premature. We have not decided whether we're going to put options on the table or respond to thiers so I think for this first meeting you should not have such a discussion no matter how general. You could talk about what certain states do as a matter of fact but going down a path that suggests that we'll be making offers sets up expectations that we may have to later dispel.

U.S. Department of Justice

Office of the Associate Attorney General

Product liability — notes + memos

Deputy Associate Attorney General

Washington, D.C. 20530

May 27, 1997

TO: Product Liability Group

FROM: Francis M. Allegra
Deputy Associate Attorney General

SUBJECT: **Product Liability State Surveys**

Attached are two surveys of state laws on product liability: (i) a revised version of the memorandum I distributed last week on joint and several liability (modified to correct the mistake on Oregon) and (ii) an chart that summarizes the various features of state laws regarding punitive damages.

cc: John Dwyer

U.S. Department of Justice
Office of the Associate Attorney General

Deputy Associate Attorney General

Washington, D.C. 20530

May 27, 1997

TO: Product Liability Group

FROM: Francis M. Allegra
Deputy Associate Attorney General

SUBJECT: **Joint and Several Liability**

A review of the literature and state codes indicates that the States have taken the following approaches to joint and several liability:

No Comparative Fault/Traditional Joint and Several Liability: Alabama, Maryland, North Carolina, Virginia.

Comparative Fault/Traditional Joint and Several Liability: Arkansas, Delaware, Maine, Massachusetts, Michigan, Pennsylvania, Rhode Island, South Carolina and West Virginia.

Comparative Fault/Pure Several Liability: Alaska, Arizona, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, North Dakota, Tennessee, Utah, Vermont and Wyoming.

Comparative Fault with Modified Joint and Several Liability. Twenty-four states have hybrid systems that rely on one or more features. The following is a survey of those features (note that certain states appear under more than one heading).

° ***Modifying Joint and Several Liability by Providing for the Reallocation of Loss Among Remaining Parties to the Litigation, Including the Plaintiff in Some Cases***: Connecticut, Mississippi, Missouri and Oregon. Examples of these systems include:

-- Connecticut: several liability, except that a plaintiff who has attempted unsuccessfully for one year to collect from a defendant may apply to the court to have the defendant's share reapportioned among other defendants; uncollectible economic damages fully reapportioned; uncollectible noneconomic damages reapportioned by multiplying the defendant's original percentage of negligence times the uncollectible amount.

-- Missouri: joint and several if the plaintiff is fault-free. If the plaintiff is assessed some fault -- joint and several except if any party, within 30 days of judgment, moves for reallocation of any uncollectible amounts, in which case the uncollectible amount shall be reallocated among all other parties including the plaintiff and no amount shall be allocated to any party whose assessed percentage of fault is less than the plaintiffs so as to increase that party's liability by more than a factor of two. Special rule for malpractice cases.

-- Mississippi: several, except that joint and several is retained to the extent necessary for the injured party to recover 50 percent of his damages.

-- Oregon: several liability, except if any party moves for reallocation, within one year of the judgment, of any uncollectible amounts, in which case the uncollectible amount shall be reallocated among all other parties including the plaintiff; no reallocation of a defendant's share if either the percentage of fault of the claimant is equal to or greater than the percentage of fault of that party or the percentage of fault of the party is 25 percent or less.

° ***Eliminating Joint and Several Liability, But Preserving It for Certain Types of Actions or Certain Types of Losses***: California, Hawaii, Florida, Nebraska, Nevada, New Jersey, New Mexico, Ohio Idaho, Iowa, Oregon, Texas and Washington. Examples of these systems include:

-- Hawaii: joint and several for economic damages; joint and several for noneconomic damages in actions involving intentional torts, pollution, toxic torts, aircraft accidents, strict and products liability, auto accidents involving highway maintenance and design, if the tortfeasor had notice of a prior similar occurrence. In addition, joint and several liability for noneconomic damages in all cases in which the defendant's share of fault is 25 percent or more; otherwise several liability for noneconomic damages.

-- California, Nebraska: defendants are jointly and severally liable for economic damages, but only severally liable for noneconomic damages.

-- Nevada (and similar rule in Idaho): joint and several liability only in cases of strict liability, intentional torts, toxic torts, product liability and concerted acts.

-- Washington: several liability, except where plaintiff was not at fault, in tortious interference with contract, certain product liability cases, hazardous waster or waste disposal.

° ***Eliminating or Modifying Joint and Several Liability for Losses Under a Specific Amount or for Defendants Who Are Under a Certain Percentage of Fault***: Florida,

Hawaii, Iowa, Minnesota, Montana, New Hampshire, New Jersey, New York, South Dakota, Texas and Wisconsin. Some examples of these systems include:

-- Iowa, Montana, New Hampshire and Wisconsin: joint and several liability generally does not apply to defendants assessed less than 50 (or, in Wisconsin, 51) percent of the total fault of all parties.

-- New Jersey: any defendant 60 percent or more responsible for damages is joint and severally liable for entire amount. Defendants more than 20 percent but less than 60 percent at fault is jointly and severally liable for economic losses, but severally liable for noneconomic losses. Defendants who are 20 percent or less at fault are severally liable.

-- New York: joint and several liability for economic damages; any defendant found to be 50 percent or less at fault is severally liable for noneconomic losses in personal injury cases, subject to certain exceptions.

-- South Dakota: a defendant less than 50 percent at fault is not jointly and severally liable for more than twice his percentage of fault.

° ***Eliminating or Modifying Joint and Several Liability Only Where the Plaintiff is at Fault or Is More at Fault Than the Defendant***: Florida, Oregon, Texas, Georgia, Missouri, Oklahoma and Washington. Examples of these systems include:

-- Georgia: joint and several liability, except that if fault is assigned to the plaintiff, the trier of fact may apportion an award among certain defendants, who are then severally liable.

-- Florida: several liability, except joint and several liability for economic damages with respect to any party whose percentage of fault equals or exceeds that of a particular claimant. Also joint and several in actions where total damages do not exceed $25,000.

I will provide the survey information on the States' various approaches to punitive damages by separate memorandum.

STATE-BY-STATE COMPARISON ON PUNITIVE DAMAGES

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Determination	Miscellaneous
Alabama	Judicially created -- subtract costs; allocate punitive damages 50% to plaintiff and 50% to state	clear and convincing	"consciously or deliberately engaged in oppression, fraud, wantonness or malice"	Except in wrongful death actions, may not exceed $250,000 absent aggravating circumstances[1]		Judicially-created bifurcation process		Jury determination subject to de novo review by trial court and appellate court.[2] Punitive damages not available except in tort actions and wrongful death.
Alaska		clear and convincing	"reckless indifference, maliciousness, wantonness"					
Arizona		clear and convincing	outrageous, malicious and fraudulent					FDA defense
Arkansas			"malicious, wanton, in violation of a relationship of trust or confidence, or which is done with a deliberate intent to injury another"					
California		clear and convincing	"guilty of oppression, fraud, or malice"		May not plead monetary figure for punitive damages; amend complaint after prima facie showing of liability for punitive damages	Bifurcated process: may not admit evidence of a defendant's profits or financial condition until plaintiff produces evidence of a prima facie case of punitive liability		Limitations on pretrial discovery of financial information absent court order

[1] The Alabama Supreme Court has held this provision violates the provision of Alabama Constitution guaranteeing a right to trial by jury. Henderson v. Alabama Power Co., 627 S. 2d 878 (Ala. 1993).

[2] This provision was held unconstitutional by the Alabama Supreme Court in Armstrong v. Roger's Outdoor Sports, Inc., 581 So.2d 414 (Ala. 1991).

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Determination	Miscellaneous
Colorado	1/3 of all damages paid into state general fund[3]	beyond a reasonable doubt	"fraud, malice, or wilful and wanton misconduct"	not to exceed amount of actual damages; court may increase award to not exceed 3 times the amount of actual damages where aggravating circumstances			See caps	evidence of net worth not considered in determining punitives. Court may reduce award if it finds purpose of punitive damages already served. Special rules in health care cases (including FDA defense).
Connecticut			"indifference or intentional and wanton"	not to exceed twice the damages awarded			judicial determination	
Delaware			"intentional or wilful conduct with reckless disregard"					
Florida	plaintiff--65%; 35% to general fund, unless for personal injury or wrongful death (then to Medical Assistance Fund[4]	see caps	"wilful, wanton or gross misconduct"	not to exceed 3 times amount of compensatory damages awarded, unless clear and convincing evidence that award is not excessive	claim for relief for punitive damages only after plaintiff establishes a reasonable basis for recovery.			limitations do not apply to class actions; jury not to be instructed or informed of limitations
Georgia	in product liability -- 75% of amount awarded, less costs, paid to state treasury.[5]	clear and convincing	willful misconduct, malice, fraud, wantonness, oppression, or want of care that would raise presumption of conscious indifference	in product liability -- only one award may be recovered in the state. Other caps in other types of tort actions	punitive damages must be specifically prayed for in the complaint	bifurcation between liability for punitives and determination of amount		

[3] This provision held unconstitutional in Kirk v. Denver Pub. Co., 818 P. 2d 262 (Colo. 1991), however state statute did not perform allocation until after judgment became property interest of the claimant.

[4] Predecessor provision (with 60% going to state) was held constitutional in Gordon v. State, 585 So. 2d 1033 (Fla. App. 1991), aff'd, 608 So. 2d 800 (Fla. 1990).

[5] This provision was held unconstitutional in McBride v. General Motors, Inc., 737 F. Supp. 1563 (N.D. Ga. 1990). However, more recently, the Georgia Supreme Court held the statute was not unconstitutional. Georgia v. Moseley, 436 S.E. 2d 632 (Ga. 1993).

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Determination	Miscellaneous
Hawaii		clear and convincing	"wantonness, oppression or malice"					
Idaho		preponderance	"oppressive, fraudulent, wanton, malicious or outrageous conduct"		No claim in initial pleadings; may amend complaint to plead if court concludes reasonable likelihood of success			"Nothing in this section is intended to change the rules of evidence or standards of proof used by a trier of fact in finding punitive damages"
Illinois	court may, in its discretion, apportion the award among the plaintiff, the plaintiff's attorney and the State Dept. of Rehabilitation Services	clear and convincing	"evil motive or with reckless and outrageous indifference to a highly unreasonable risk of harm and with conscious indifference	not greater than 3 times the economic damages awarded	No claim in initial pleadings; may amend complaint to plead if court concludes reasonable likelihood of success; if bifurcation, evidence relevant to punitives only admissible in punitive hearing	defendant may request that issues relating to punitives be tried separately		no punitive damages in cases involving healing arts and legal malpractice;[6] punitive damages only where award of actual damages; FDA defense
Indiana	25% to plaintiff, 75% to state	clear and convincing	willful and wanton misconduct	three times actual damages or $50,000, whichever is greater				
Iowa	If action directed at plaintiff, no allocation; if action directed at public in general, up to 25% paid to plaintiff, with remainder paid to civil reparations trust[7]	clear, convincing and satisfactory	"willful and wanton disregard for the rights or safety of another"		mere allegation or assertion of claim for punitives shall not form basis for discovery of wealth of defendant until claimant establishes prima facie case for punitive damages			

[6] This provision was upheld in Bernier v. Burris, 497 N.E. 2d 763 (1986).

[7] Held constitutional in Shepherd Components v. Brice Petrides, 473 N.W. 2d 612 (Iowa 1991).

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Determination	Miscellaneous
Kansas	In medical malpractice, 50% to plaintiff and other half to Health Care Stabilization Fund.[8] This provision applies only to actions accruing between July 1, 1985 and July 1, 1988.	clear and convincing	"willful, wanton, fraud or malice"	cap equal to lesser of defendant's highest gross income in any one year of the 5-years prior to the act or $5 million, unless court determines profitability would exceed this cap, in which the cap is 1 and 1/2 times the profit.	No claim in initial pleadings; court may allow filing of amended pleading if plaintiff establishes there is a "probability that the plaintiff will prevail"	separate proceeding to determine amount of punitive damages	court determines amount using specified factors[9]	
Kentucky		clear and convincing	"acted toward plaintiff with oppression, fraud or malice"					statutory factors guide determination of amount.
Louisiana								no punitive damages allowed except by statute
Maine		clear and convincing	malice					
Maryland		clear and convincing	actual malice		evidence of defendant's wealth not admissible until finding of punitive liability and that the finding is supportable			

[8] Found unconstitutional as violative of the right to trial by a jury, adequate remedy and due course of law in Kansas Malpractice Victims Coalition v. Bell, 757 P. 2d 251 (Kan. 1988)

[9] This provision was upheld by the Kansas Supreme Court in Smith v. Printup, 866 P. 2d 985 (Kan. 1993).

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Determination	Miscellaneous
Massachusetts								no punitive damages
Michigan								no punitive damages
Minnesota		clear and convincing	"deliberate disregard for the rights or safety of others"		initial complaint may not seek punitives; court may grant motion to amend where prima facie evidence to support award	if requested, trier of fact shall first determine compensatory damages (evidence of defendant's wealth not admissible); then separate proceeding on whether/what amount punitives will be awarded		statutory list of factors in determining size of award; appellate court shall review award in light of statutory factors.
Mississippi		clear and convincing	"acted with malice, gross negligence which evidence a wanton or reckless disregard for the safety of others, or committed actual fraud"			first determine compensatory damages; if compensatory damages awarded, then the court may initiate hearing related to punitive damages		Statutory list of factors in determining amount; trial court required to determine punitives are reasonable and rationally related to punishment and deterrence (must consider whether criminal fines or other civil awards have been imposed). Product seller limitations; limits do not apply to asbestos.
Missouri	50% of punitive damages after deduction of attorney's fees and expenses deemed rendered in favor of the state; amount deposited in Tort Victims' Compensation Fund	clear and convincing	"wilful, wanton, malicious or reckless disregard		where recoverable petition should state separately the amount of such damages sought	In trial by jury, if requested by party, bifurcate compensatory damages and liability for punitives from determination of amount of punitives. Net worth evidence only admissible in second part.		within time for filing motion for new trial, defendant may seek to reduce punitive award by other punitives paid for same conduct (not applicable to judgments in other states with substantially different procedures).

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Determination	Miscellaneous
Montana		clear and convincing	"actual fraud or actual malice" "conscious or intentional disregard of the high probability of injury"		evidence of net worth not admissible until proceeding to determine amount of punitives	separate proceeding to determine amount of punitive damages		when judge determines amount must make specific statutorily-required findings; statutory factors.
Nebraska								no punitive damages allowed under state constitution.
Nevada		clear and convincing	"oppression, fraud or malice, express or implied"	Except in product liability cases, three times the amount of compensatory damages if compensatory damages are $100,000 or more; $300,000 if compensatory damages are less than $100,000.	evidence of financial condition of defendant not admissible until proceeding for determining amount of punitive damages	separate proceeding to determine amount of punitive damages		cap does not apply to product liability cases or to cases involving accidents caused while driving while intoxicated
New Hampshire								punitive damages statutorily outlawed, unless specifically provided by statute
New Jersey		clear and convincing	"actual malice or accompanied by a wanton and willful disregard of the safety"	greater of five times compensatory or $350,000	see bifurcation	separate proceeding to determine liability and amount of punitive damages		statutory factors prescribed in determining whether to impose punitives and in what amount. FDA defense. No punitives in absence of an award of compensatory damages.

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Determination	Miscellaneous
New Mexico			malicious, fraudulent					
New York			oppressive, wanton, reckless					until April 1, 1994, 20% of punitive damages payable to the state
North Carolina		clear and convincing	fraud, malice or willful or wanton conduct	$250,000 or three times compensatory, whichever is greater; if jury award in excess of cap, court required to enter judgment for maximum.		upon motion of defendant, bifurcate trial of issues of liability and punitive damages		statutory factors; no punitive damages unless liable for compensatory damages; attorney fee shifting if claimant files claim for punitive damages that knew or should have known was frivolous
North Dakota		clear and convincing	"oppression, fraud, or malice"	not to exceed two times compensatory damages or $250,000, whichever is greater; provided no award may be made if claimant is not entitled to compensatory damages.	original complaint may not seek punitives; party may file motion to amend, which court shall grant if it finds prima facie evidence; evidence of defendant's net worth not admissible in proceedings on punitive damages	if either party elects, trier first determine compensatory damages; if compensatory damages awarded, tier shall then determine whether punitives shall be awarded.		statutory factors prescribed in determining liability for punitives; regulatory defense
Ohio		clear and convincing	"flagrant disregard of the safety of persons who might be harmed by the product"	lesser of three times compensatory damages or $100,000; if "large employer," greater of three times compensatory damages or $250,000		upon motion of any party, trial shall be bifurcated	(prior provision authorizing judicial determination held unconstitutional in Zippo v. Homestead Ins. Co., 644 N.E. 2d 397 (Ohio 1994))	award of compensatory damages prerequisite to award of punitives; trier to consider statutory factors in determining amount of punitive damages; no second punitive award for same conduct if caps would be exceeded unless new, substantial and previously undiscovered evidence indicates prior award insufficient; FDA defense

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Determination	Miscellaneous
Oklahoma		see caps	"conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud opr malice, actual or presumed."	statute sets out three categories of conduct with correspondingly higher ceilings on punitive awards for more egregious conduct				jury must award based on statutory factors; court must reduce award if other Oklahoma state courts have awarded punitive damages for same conduct
Oregon	split between the plaintiff (40%) and the state Criminal Injuries Compensation Account (60%); attorney's fees limited to 20% of award	clear and convincing	"malice or reckless and outrageous indifference to a highly unreasonable risk of harm"		evidence of defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover punitives			payments on judgments shall first be applied to compensatory damages and then to punitive damage; statutory factors in determining whether the award punitives; court may reduce punitive award if plaintiff has taken remedial action and, in so reducing, court may take into account prior punitive damage awards; FDA defense; separate ($500,000) cap on noneconomic damages.
Pennsylvania			"wilful or wanton misconduct"					
Rhode Island								no statutory limits
South Carolina		clear and convincing	malice, ill will, conscious and reckless disregard		claims for punitive damages shall be in general terms and not for a stated sum			

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Determination	Miscellaneous
South Dakota		clear and convincing	wilful, wanton or malicious					punitive damages outlawed
Tennessee		clear and convincing	"wilfully and maliciously, under circumstances of rudeness or oppression, or in a manner which evinces a wanton and reckless disregard of the plaintiff's rights"					actual damages must be awarded;
Texas		clear and convincing	"fraud, malice or gross negligence"	may not exceed four times the amount of actual damages or $200,000, except for instances of malice and intentional tort				may be awarded only if damages other than nominal damages are awarded; several liability for punitives
Utah	50 percent in excess of $20,000, after payment of attorneys' fees and costs, remitted to General Fund	clear and convincing	"wilful and malicious or intentionally fraudulent conduct or conduct that manifests a knowing and reckless indifference toward, and disregard of, the rights of others."		evidence of party's wealth admissible only after a finding of liability for punitive damages has been made	see pleadings/evidence		may be awarded only if compensatory or general damages are awarded; FDA defense
Vermont			insult or oppression, reckless or wanton					

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Determination	Miscellaneous
Virginia		clear and convincing	actual malice	not to exceed $350,000				no other general statutory limits; bifurcation provision in special mass tort rules for asbestos cases
Washington								recovery of punitive damages not allowed unless expressly authorized by statute
West Virginia			gross fraud, malice, oppression, wanton, wilful or reckless					may be awarded only if compensatory damages awarded; additional limits in government tort claims
Wisconsin		clear and convincing						
Wyoming								no statutory limits

Product liability - notes

PETER G. JACOBY [redacted]
04/21/97 11:23:15 AM

Record Type: Record

To: Bruce R. Lindsey/WHO/EOP, Elena Kagan/OPD/EOP, Tracey E. Thornton/WHO/EOP, Kathleen M. Wallman/WHO/EOP

cc:
Subject: Products Liability Hearings

The House Commerce Telecommunications Subcommittee has scheduled its second products liability hearing for 4/30. The hearing will focus on attorneys fees in class action suits. The House Judiciary Committee will have its second hearing on liability legislation on 4/23. The hearing will examine legislation (H.R. 911 and H.R. 1167) that grants immunity from personal civil liability to volunteers working on behalf of nonprofit organizations and governmental entities. FYI

(Product liability - notes

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 4/22 ACTION/CONCURRENCE/COMMENT DUE BY: _____

SUBJECT: Product Liability Memo

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	McCURRY	☐	☐
BOWLES	☐	☐	McGINTY	☐	☐
McLARTY	☐	☐	NASH	☐	☐
PODESTA	☐	☑	RUFF	☐	☑
MATHEWS	☐	☑	SMITH	☐	☐
RAINES	☐	☐	REED	☐	☐
BAER	☐	☐	SOSNIK	☐	☐
ECHAVESTE	☐	☐	LEWIS	☐	☐
EMANUEL	☐	☐	YELLEN	☐	☐
GIBBONS	☐	☐	STREETT	☐	☐
HALE	☐	☐	SPERLING	☐	☑
HERMAN	☐	☐	HAWLEY	☐	☐
HIGGINS	☐	☐	VERVEER	☐	☐
HILLEY	☐	☐	RADD	☐	☑
KLAIN	☐	☐	KAGAN	☐	☑
BERGER	☐	☐		☐	☐
LINDSEY	☐	☑		☐	☐

REMARKS:

This has been forwarded to the President

RESPONSE:

Staff Secretary

THE WHITE HOUSE

WASHINGTON

April 21, 1997

MEMORANDUM TO THE PRESIDENT

'97 APR 21 PM12:17

FROM: **ERSKINE B. BOWLES**

RE: **Product Liability**

(1) Attached is a memorandum from Senator John Breaux, outlining his proposal to introduce alternative legislation on the issue of product liability.

(2) Either today or tomorrow, we will schedule a meeting for you with Gene Sperling, Bruce Lindsey, Sylvia Mathews, John Podesta and myself to discuss our current position on product liability and the process for handling the issue inside the Administration.

MEMORANDUM

TO: President Clinton
FR: Senator John Breaux
DT: April 8, 1997
RE: Product Liability

I believe you have an historic opportunity to break the decade-long gridlock over the issue of product liability. Like you, I have opposed the draconian legislation long championed by the proponents of "reform." At the same time, like you, I recognize areas for improvement in the current system and support fair and balanced changes.

A New Approach

I plan to offer alternative legislation and would like you to endorse and support my bill. My bill would (1) deter and punish frivolous lawsuits; (2) encourage alternative dispute resolution and settlement of product liability lawsuits; and (3) provide a uniform standard -- without arbitrary limitations -- for the award of punitive damages in product liability suits.

This approach tracks very closely the guidelines you have set down for balanced product liability reform. You have strongly objected to arbitrary damage caps, the elimination of joint and several liability for non-economic damages, and "one-way preemption" which preempts only those state laws more favorable to claimants and preserves those more favorable to defendants. My bill is the type of reform you have called for because it addresses the fundamental issue of frivolous lawsuits while maintaining a fair balance between the interests of consumers and defendants.

The Politics of the Issue

As you well know, there are strong political forces on both sides of this issue. Having Senator Rockefeller as a major supporter of the traditional approach makes matters more difficult for some Democrats. Many of my colleagues have felt uncomfortable with the choice of either opposing all reform or supporting the "reforms" championed by the largely Republican coalition. By supporting my legislation, we can provide an alternative to the many Democrats caught between two difficult options. Those who support our bill will be squarely on record in favor of reform of our product liability system, without having to support legislation that harms consumers and alienates some of our closest supporters.

The result of our efforts may -- and should -- lead to the inability of the proponents of traditional reform to invoke cloture on their bill on the Senate floor. But by supporting my bill, you may not be presented with another decision whether to veto a "traditional" product liability bill. My legislation could clear the way for truly fair and balanced reform.

Attachment

MEMORANDUM

TO: Erskine Bowles
FR: Senator Breaux
DT: April 8, 1997
RE: Product Liability

A tremendous opportunity exists for the President to forge a new, balanced, and innovative approach to the long-contentious issue of product liability. This memorandum lays out why the President should endorse a new approach to this old issue.

I. Current Posture and Prospects of Product Liability Legislation

The Republican leadership has again made product liability a top priority. The "Product Liability Reform Act of 1997" (S. 5) was introduced with no Democratic co-sponsors. Senators Ashcroft, McCain and Gorton, are the chief proponents of the product liability bill. Senator Rockefeller has been attempting to work closely with these Republicans. S. 5 is scheduled for mark-up in the Senate Commerce Committee on May 7th. We do not expect any major changes to the four major elements of the bill: (1) limitations on punitive damages; (2) restrictions on joint liability for "non-economic damages"; (3) a "statute of repose" prohibiting lawsuits for products beyond a certain age; and (4) "one way preemption" by which state laws that are more consumer-friendly are preempted while those more favorable to defendants are left intact. Senator Lott intends to bring products liability to the floor prior to the Memorial Day recess. Democrats led by Senators Hollings, Daschle, Boxer, and myself will likely require the Republicans to invoke cloture in order to pass the bill.

II. Background

The conference report on last year's product liability bill passed the Senate on final passage by a vote of 59-40 after Republicans invoked cloture on their fourth attempt by a vote of 60-40. All but four Republicans voted for cloture, while 35 of 47 Democrats voted against cloture. Of the 45 current Senate Democrats, only six who voted for cloture last year remain in the Senate. The Democratic Caucus remains firmly opposed to the traditional approach.

III. The President's Statements

The President has been consistent in his opposition to key aspects of product liability "reform," speaking of the need to have "fair" and "balanced" legislation which protects the interests of both consumers and manufacturers and sellers (*See Statement of Administration Policy*, 4/24/95; *Statement by the Press Secretary*, 5/10/95; *Statement of Administration Policy*, 3/16/96; *Remarks of the President in Veto of Product Liability Bill*, 5/2/96).

The President has also consistently stated his opposition to limitations on joint and several liability for non-economic damages: "non-economic damages are as important to victims as economic damages and must not be relegated to second class status." *S.A.P.* 4/25/95; "[t]he Administration has consistently made clear its opposition to the provision that would make it harder for injured consumers to recover their full damages in cases involving more than one culpable defendant." *Statement by the Press Secretary,* 5/10/95; "[t]he Administration ... opposes the abolition of joint and several liability for non-economic damages." *S.A.P.* 3/16/96.

Further, the President has repeatedly stated his opposition to limitations on punitive damages: "[t]he Administration believes statutory caps are improper ... a statutory cap invites a wealthy potential wrongdoer to weigh the risks of a capped punitive award against the potential gains or profits from the wrongdoing," *S.A.P.* 4/25/95; "[t]he Administration ... opposes an artificial ceiling on the amount of punitive damages that may be awarded in a product liability action," *S.A.P.* 3/16/96.

Finally, the President has voiced strong objections to the unfairness of "one way preemption": "the Conference Report unfairly tilts the legal playing field to the disadvantage of consumers. Many provisions of H.R. 956 ... displace state law only when that law is more favorable to the consumer ... [t]his 'one way preemption' unfairly disadvantages consumers." *S.A.P.* 3/16/96; *see also, Veto Statement* at 3.

While the President has made his particular objections very clear, he has stated that he supports *balanced, limited* federal product liability reform. In his *Veto Statement* the President noted: "[w]e do need legal reform. America's legal system is too expensive, too time consuming and does -- does -- contain too many frivolous lawsuits."

IV. A New Approach -- Under the Leadership of the President

It is extraordinarily unlikely that the Republican/Rockefeller bill will remedy the defects objected to by the President. Further, this old-approach bill *will not* focus on the President's concerns about the current system. The Republican/Rockefeller product liability bill will not focus on limiting frivolous lawsuits; it will not make lawsuits less expensive, and it will not make lawsuits less time-consuming. The focus of the Republican/Rockefeller bill has always been to help defendants that have been found liable -- by limiting punitive damages and joint liability.

A. The Breaux Bill

For the first time in over a decade there is a new approach to product liability. We are crafting an alternative bill which takes a completely different approach to this long stagnated problem by focusing on the very concerns articulated by the President -- frivolous lawsuits and the time and expense of litigation. *If the President were to endorse the Breaux bill he would stand for the limited, balanced reform he has always supported while being true*

to his objections as to the most unfair and harmful provisions of the Republican/Rockefeller approach.

B. Provisions of the Breaux Bill

The Breaux bill would 1) Deter the filing of frivolous product liability actions by requiring attorneys to sign affidavits and make other claims and assurances before filing a lawsuit that the suit is not frivolous, and by providing stiff and mandatory sanctions against attorneys for frivolous lawsuits; 2) Provide extensive settlement and alternative dispute resolution procedures to resolve lawsuits in the quickest but fairest manner to both plaintiffs and defendants; 3) Provide the uniform fifty-state standard on punitive damages that manufacturers claim they need without placing arbitrary limits on the size of awards; 4) Call for a study of the product liability system to better inform lawmakers as to any true problems in the system; and, 5) Adopt the Republican/Rockefeller two year statutute of limitations from date of notice provision.

C. What the Breaux Bill *Doesn't* Do

The Breaux bill is equally important for what it does not do. It does *not* arbitrarily cap punitive damages. It does *not* relegate non-economic damages "to second class status". And it does *not* contain "one way preemption."

D. The Politics of the Breaux Bill

We are currently seeking co-sponsors from both sides of the aisle for his legislation. Because the Breaux bill is a true alternative and a true middle ground in the long contentious debate over product liability, it is likely that it will not be actively supported by either the traditional proponents of product liability reform or by consumer groups and trial lawyers. However, some of the traditional opponents of product liability reform would vastly prefer the Breaux approach to the one-sided approach of the Republican/Rockefeller bill and thus would not actively oppose the new approach.

E. Legislative Scenario

It is critical that the Breaux bill be introduced and endorsed by the President prior to the Republican/Rockefeller bill being brought to the Senate floor. There are numerous Democratic Senators who will be put in a very difficult position by having, as in past years, the choice of only opposing all product liability reform or supporting the Republican/Rockefeller bill. If by the time they are forced to vote on the matter on the Senate floor there is an Administration-backed alternative, this will provide a welcome opportunity to a number of Democratic Senators.

The result, presumably, will be the inability of the Republicans to invoke cloture on the Republican/Rockefeller bill, paving the way for alternative approaches. The President, of

course, would be in a similar position. By endorsing and supporting an alternative approach, the President will not be put in the position of either opposing all reform by again vetoing the Republican/Rockefeller bill, or signing a bill which has numerous provisions that he has repeatedly spoken out against. The timeframe, however, for this scenario is short.

Product Liability - notes

THE WHITE HOUSE

WASHINGTON

April 28, 1997

MEMORANDUM TO INTERESTED PARTIES

FROM: ELENA KAGAN EK

SUBJECT: PRODUCT LIABILITY BILL

Attached is a list of the people, mentioned by the President at our meeting last week, who attended the event at which the President vetoed the product liability bill. As described in the attachment, we used Janey Fair's case to illustrate the unfairness of the bill's joint liability provision, Jeanne Yanta's case to highlight the danger of punitive damage caps, and Carla Miller's, Lola Reinhart's, and Ruth Kamin-Nizar's cases to demonstrate the effects of the bill's statute of repose.

SARAH BRADY
On behalf of Handgun Control, Sarah Brady has been a vocal opponent of HR 956 citing concern about how the caps on punitive damages and limits on joint and several liability would apply to "negligent entrustment" cases. These are cases in which vendors knowingly sell obviously dangerous products to high risk individuals (i.e., a gun dealer who knowingly sells a firearm to a felon or minor who then injures or kills someone with that weapon). The Conference version of the bill arguably made the punitive damage and joint liability provisions applicable to such cases, through proponents of the bill contest this reading. (Attachments: Sarah Brady's Bio; Handgun Control Statement; Issue Summary)

MISSISSIPPI ATTORNEY GENERAL MIKE MOORE
The punitive damage and joint liability provisions of the bill apply to cigarettes, as they do to any other product. The Coalition on Smoking or Health believes that the punitive cap, in particular, would insulate tobacco companies from appropriate punishment for such intentional misconduct as lying to customers about the danger of cigarettes, manipulating nicotine content to hook smokers and targeting the most susceptible citizens: children. Attorney General Mike Moore's recent efforts to seek reimbursement from tobacco companies for money the state's Medicaid program paid out to treat smoking related illnesses has placed him at the forefront of the litigation debate, although his own suit is not affected by thie legislation. (Attachments: Mike Moore's Bio; Issue Summary)

JANEY FAIR
Janey Fair is a Kentucky women who lost her daughter in a defective school bus tragedy. In 1988, Shannon Fair was on a school bus with 60 other children when a drunk driver hit the bus head-on. Though everyone survived the impact, the collision ruptured the bus' fuel tank, causing it to be engulfed in flames. Twenty-seven children died in the fire along with 14 year old Shannon Fair. The Fairs filed suit against Ford and learned at the trial that Ford knew its buses had dangerous fuel-tank designs, but had successfully delayed government regulations that would have forced them to add a protective cage. This case demonstrates HR 956's unfairness in eliminating joint liability for "non-economic" losses only. In the Fair's case, the negligent acts of joint wrongdoers (the drunk driver and Ford Motor Company) combined to cause the death of Shannon Fair. Under the bill, the Fairs could not have been fully compensated for the non-economic loss resulting form Shannon's death because the drunken driver was judgment-proof (i.e., he had minimal or no assets). The death of a child generally does not involve "economic" loss because children typically have no lost wages. Further, it was the Fair's ability to bring a lawsuit against Ford and the threat of punitive damages that was instrumental in exposing the company's reckless behavior.

CARLA MILLER
Carla's 34 year old husband, James, was killed in 1990 in Blue Springs, Missouri when the 1966 Massey-Ferguson tractor he was riding hit a hidden hole and suddenly rolled over on its top, crushing him underneath. During the trial, it was discovered that this tractor was defective because it was not equipped when sold in 1966 with a "ROPS" (rollover protection system) -- a steel roll bar attached to the rear of the tractor and a seat belt which would have prevented Miller from being crushed. It was also learned that while the manufacturer did not begin equipping this model tractor with a ROPS system until 1968, it had the ability and technology to do this by 1965 and had known for many years that many people had been killed in rollover accidents involving tractors that were not equipped with a ROPS. The jury awarded Carla Miller $2 million for her loss. Under the statute of repose section of the new legislation passed by Congress, Carla Miller and her family would have been barred from even bringing a case against the manufacturer. The bill would prohibit the filing of a suit against the maker of a defective product of this kind if that item was manufactured more than 15 years ago, which this tractor was. (Attachment: Summary of Case)

JEANNE YANTA
Jeanne Yanta is one of millions of women whose lives and health were knowingly put at risk by the manufacturer of a defective intrauterine device (IUD). Within two years of the placement of the device, Mrs. Yanta developed virulent pelvic inflammatory disease that nearly killed her. She had numerous operations and extensive hospitalizations, during which she lost a rib and was left unable to have children. At the trial, Mrs. Yanta would have presented evidence that the company manufacturing the device knowingly placed women at risk of serious infection, loss of fertility, and surgery for removal of their internal organs. The manufacturer settled on the eve of the trial. There is little doubt that punitive damage awards, which this bill caps, were largely responsible for forcing companies to remove defective intrauterine devices from the market. (Attachment: Summary of Case)

LOLA REINHART AND RUTH KAMIN-NIZAR
In 1994, Mrs. Reinhart and Mrs. Nizar entered an elevator with seven other friends (several of whom survived Nazi concentration camps) in a Cincinnati apartment building. The elevator fell to the bottom of the shaft, where one passenger died at the scene and another died several weeks later. The other seven passengers were seriously injured. The company that installed the elevator in 1972, slightly more than twenty years prior to this product failure, knowingly used a cylinder that did not meet industry specifications. The elevator lacked a protection device which the industry mandated to prevent the rapid flow of hydraulic fluid out of the cylinder in the event of a rupture. As in the Miller case, this suit could not have been brought under the bill because of the 15-year statute of respose.
(Attachment: Summary of Case)

waiting for Lindsey

Mtg tomorrow

ch w/ Lindsey -

Reed
me / you / Klein

Shalala + one of her people
Kessler
Myers
1 other gov health person

call Podesta -
- waiting for Bl Lind.
- paper on review
- no calls today on crack

ch w/ Rich T.: technicals debate tomorrow
what will happen on priv. amendment ??

Lindsey
Jackson / Thurm

Product liability - notes

4-24 POTUS products intg.

Pres - superhi std?

case histories of p. who stood w/ Pres

Products - notes + memos

April 21, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: BRUCE LINDSEY

SUBJECT: PRODUCTS LIABILITY LEGISLATION

Congress may turn its attention to product liability legislation within the next month, and we need to know how to respond. As you recall, your veto message last year detailed a number of specific objections to the products bill. (The veto message is attached to this memo.) We presume that if Congress were to give you the same bill again, you would veto it for the same reasons. It is possible, however, that Congress will work to pass a bill that responds in part to your objections. This memo reviews those objections, outlines possible congressional responses to them, and solicits your views on how to proceed. We believe that we should send strong signals now about the kind of bill you would accept and the kind you would veto. We also think that knowing early where you stand on the products bill will enable the Administration to position itself correctly on other law reform proposals. We would like to meet with you soon to discuss these issues.

One-way preemption. Prior to enumerating your objections to specific provisions in the bill, your veto message noted the "general problem of displacing State authority in an unbalanced manner." You explained that problem as follows: "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." Under the bill, for example, the "national" 15-year statute of repose would have overridden the laws of states with longer or no statutes of repose, but would have left in place all shorter statutes of repose; similarly, the bill would have limited punitive damages in states that now allow unlimited punitive damages, but would not have imposed punitive damages on states that do not now have them. Your veto statement continued: "I cannot accept, absent compelling reasons, such a one-way street of federalism."

If you hold fast to this position, you probably will have to veto another product liability bill because Congress is unlikely to pass a bill that preempts, in identical fashion, both anti-consumer and pro-consumer state law. For its strongest supporters, this bill is not so much about achieving uniformity as about reducing liability burdens on manufacturers. Because a two-way preemption bill will not clearly achieve this goal, your insistence on a two-way bill will signal strongly that no compromise is possible.

The objection to one-way preemption, however, is strong on the merits. If the problem with the current tort system is a simple lack of uniformity, then two-way preemption is obviously desirable. If the problem is instead that state law often fails to balance appropriately the interests

of manufacturers and consumers, then federal law should step in to strike that balance, negating laws that tilt too much in either direction. One-way preemption is justified only if the goal is to reduce product actions to the greatest extent possible, by enabling states to "pile on" to federal limits.

Because this issue is not easily amenable to compromise, we need to know soon where you stand on it. We cannot develop a sound strategy before we know whether you could sign a bill containing one-way preemption. If you could sign such a bill, we will de-emphasize the one-way preemption concern and focus on the specific provisions of the statute discussed in the rest of this memo.

Eliminating joint liability for non-economic damages. Your veto message objected strongly to the provision of the bill that wholly eliminated joint liability for non-economic damages such as pain and suffering. You stated generally, in support of joint liability, that "when one wrongdoer cannot pay its portion of the judgment, the other wrongdoers, and not the innocent victim, should have to shoulder that part of the award." You also expressed doubt about distinguishing economic from non-economic damages, noting that a provision limiting only non-economic damages falls most heavily on non-working women, the elderly, the poor, and children.

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

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

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

this authority only in the most unusual cases."

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

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

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

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

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

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

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

Products Liability -
Notes

PETER G. JACOBY [redacted]
03/31/97 06:49:13 PM

Record Type: Record

To: Bruce R. Lindsey/WHO/EOP, Elena Kagan/OPD/EOP, Tracey E. Thornton/WHO/EOP, Kathleen M. Wallman/WHO/EOP

cc: John L. Hilley/WHO/EOP, Janet Murguia/WHO/EOP, Dainel C. Tate/WHO/EOP
Subject: House Products Update

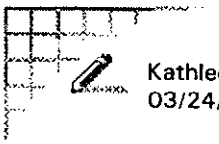
There are two products hearings scheduled on the House side for the week of April 7th. In the Commerce Committee, the Tauzin Subcommittee will hold a hearing on April 8th to look at the issue of needy patients who are being denied medical devices due to product liability laws. They plan to have two panels - one with patients and one with medical device manufacturers. As you will recall, the Republicans emphasized this same issue during an event to send last year's bill to the White House.

On April 10 the full House Judiciary Committee will hold their own hearing on products. I don't know any additional details on this hearing yet.

Additionally, Chairmen Bliley and Hyde have agreed to fully coordinate their efforts on this issue during this Congress. Consequently, there have been a series of discussions between the House Judiciary Committee Republican staff and the House Commerce Committee Republican staff in an effort to craft legislation. The discussions have centered around legislation that would fall somewhere between the vetoed bill and the House-passed bill from last session. However, the Republican leadership recently decided that there should be no Republican bill at this time -- and instead ordered a series of hearings to highlight the need for reform legislation. In the Commerce Committee that means at least one and maybe two more hearings after the April 8 hearing.

Finally, House Commerce Republican staff only last week began their overtures to the Dingell staff on this issue but they realize that Mr. Dingell very much wants legislation and they believe he can be a valuable ally.

Product liability - notes



Kathleen M. Wallman
03/24/97 12:31:41 PM

Record Type: Record

To: Bruce R. Lindsey/WHO/EOP, Elena Kagan/OPD/EOP, Tracey E. Thornton/WHO/EOP, Peter G. Jacoby/WHO/EOP

cc:
Subject: product liability

I have a note from Erskine instructing that I follow up with Mr. Dingell on his request for a process on this issue.

It seems to me that our memo is still the first key event in our internal process. (Elena is drafting this; my thought of having Ellen do it didn't work out because of her schedule.)

Meanwhile, who should make the call to Dingell's staff to make a preliminary acknowledgement of the conversation between Erskine and Mr. Dingell? Peter?

Product Liability - notes

Tracey E. Thornton
03/21/97 11:50:48 AM

Record Type: Record

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

cc: Elisa Millsap/WHO/EOP, Jennifer D. Dudley/WHO/EOP
Subject: one more revision

The Senate mark-up in Commerce was postponed until may 7. The talk is that Gorton has joined forces (at Lott's direction) with McCain and Ashcroft. Rockefeller is said to be having trouble convincing the Repubs that they should remain flexible to try to get a bill that POTUS will sign. Breaux is working on an alternative and he's trying to enlist the leaners -- Dorgan, Conrad, Robb, Feinstein.

---------- Forwarded by Tracey E. Thornton/WHO/EOP on 03/21/97 11:27 AM ----------

Kathleen M. Wallman
03/20/97 05:24:20 PM

Record Type: Record

To: KAGAN_E @ A1 @ CD @ LNGTWY, Peter G. Jacoby/WHO/EOP, Tracey E. Thornton/WHO/EOP

cc:
Subject: one more revision

This supersedes the other versions. product.wp

Message Sent To:

John L. Hilley/WHO/EOP
Peter G. Jacoby/WHO/EOP
Bruce R. Lindsey/WHO/EOP
Kathleen M. Wallman/WHO/EOP
Elena Kagan/OPD/EOP

File] Product liability - talking points

TALKING POINTS FOR MR. BOWLES REGARDING PRODUCT LIABILITY LEGISLATION

Likely purpose of Congressman Dingell's call to you: To propose that Hill staff and Administration staff set up a working group to engage in substantive discussions on product liability legislation.

Mr. Dingell is a proponent of product liability reform. He voted for the bill that came to the President last year and to override the President's veto.

Bottom line for Mr. Bowles to know: Our NEC/DPC/Counsel's Office policy process, working with Legislative Affairs, is about to send a memo to the President to see where he now is and how he wants to proceed on this subject. Until that happens, we do not know whether committing to the formal working group process that Mr. Dingell likely will propose would serve our goals. Nevertheless, it will be hard for us to say that we will not discuss the issue. Thus, in this conversation, **the desired outcome would be to agree in principle to talk without locking into a particular process.**

General talking points:

- As you know, last year the President vetoed the product liability bill (H.R. 956) because of several concerns. For example:
  - ***First,*** it wholly eliminated **joint and several liability for noneconomic damages.** The President did not agree that it was okay for the injured consumer to be left holding the bag when one of the parties responsible for the injury could not pay.
  - ***Second,*** the President opposed the idea of arbitrarily **capping punitive damages.**
- ***More broadly,*** the bill would have interfered in an area of traditional state responsibility in a way that would have disadvantaged consumers -- it **preempted state laws, but only when the state law would have given consumers more favorable treatment** when suing to vindicate their rights. This kind of picking and choosing amounts to a one-way street of federalism, and the President was very concerned about whether that was fair.
- From the President's perspective, there are a lot of things -- some of them quite fundamental -- that would need to be fixed to overcome these concerns.

- Nevertheless, we would want to engage on the legislation to explore whether these things could be fixed. We are too early in the process to have a fully formed view about whether that's possible; it's too early, even, to say whether we are pessimistic or optimistic.

Prepared by Wallman 3/20/97

Product Liability –
Notes

3/12 Product Liability
Bruce / Kathy / me

Nader: Rock wants sthing so badly – go for almost anything
(scaffolding – later fill in gaps)
Make battle over broader issue – corp. responsibility
Also: Health std on devolution (welfare / speed limits)
? Why not go w/ this? – No demonstrated need.
BL: Roadmap in veto stmt. Can't do broadscale slates its position
Q: Does 1-way preemption stop the show?
BL – Not sure. Need to know abt facts – how it would wk/ what it would do.
Q: Punitive cap – change in overide position encourage –
Then you'd agree? Critical from our pt of view.
BL – Many in Admin felt strongly on this.
Help us fashion a position!
Q: If you're going to be uniform – apply to business litigation!
Business pun dams cap! (Major PR campaign)
RN – Take decisive position now. Then, they won't push. Do there speech? (e.g. on 1-way preemption)
BL: Want info on this.

Tobacco deal —

Bad precedent to when the industry of liability (litig is what has provided info) — even tho we've won no cases.

BL: What's comp!

Sugst that wld compensate indivs + states / enact FDA rules / review to determine their efficacy on stopping teen smoking / assurance of release of info.

Med Mal

Good sam. immunity for p. providing emergency services

More gen'l MedMal. — attach as amend to s'thing.

* [We're pushing for abil to hold managed care plans accountable.

Business unilmmity — BL - I agree - sooner the better.

One-way preemptive effects

S 97 report — beyond what like.

Anything in addition

exclusion w/ review process.

BL — supplier

Biomaterials - immunity if led of review for safe + effective

TC: Bad precedent — aircraft!

Opens door to ~~of~~ #4 probs —

~~Waiving~~ Delay bill — deemed approved by FDA!

?? 3rd party review

Inadequate ~~[illegible]~~ funding of FDA

BZ — tell us in facts here are incorrect

Data — Hunter — cons. Fed of America

Wish list of pro-consumer provisions!