NLWJC - Kagan
DPC - Box 069 - Folder-011

Drafts [3]

To the House of Representatives:

I am returning without my approval H.R. 956, the so-called Common Sense Product Liability Legal Reform Act of 1996.

I support real common sense product liability reform at the Federal level. To deserve this label, however, legislation must adequately protect the interests of consumers harmed by defective products, in addition to the interests of manufacturers and sellers. Further, legislation must respect the important role of the States in our Federal system. Congress could have passed legislation, appropriately limited in scope and balanced in application, meeting these tests. Had Congress done so, I would have signed the bill gladly; were Congress to do so now, I would be delighted. But Congress instead chose to pass legislation unfairly weighted against consumers and unduly infringing on the States, thus disserving the goal of real common sense reform.

H.R. 956 represents an unwarranted intrusion on state authority, in the interest of shielding manufacturers and sellers of harmful products. Tort law traditionally has been a matter for the States, rather than for Congress. The States have handled this responsibility well, serving as laboratories for new ideas and making needed reforms. This bill unduly interferes with that process -- and does so in a way that peculiarly disadvantages consumers. As a rule, this bill displaces state law only when that law is more favorable to consumers; it allows state law to remain in effect when that law is more helpful to manufacturers and sellers. I cannot accept a law that rejects state authority in the tort field so as to tilt the legal playing field against consumers and in favor of manufacturers and sellers.

Apart from the general structure of the bill, specific provisions of H.R. 956 unfairly disadvantage consumers. These provisions would prevent even horribly injured persons including some who may be elderly, poor, or non-working women from recovering the full measure of their damages. And these provisions would encourage the worst kind of conduct on the part of manufacturers and sellers, such as knowingly introducing injurious products into the stream of commerce.

In particular, I object to the following provisions of the bill, which subject consumers to too great a risk of harm from defective products:

First, as I previously have stated, I oppose wholly eliminating joint liability for noneconomic damages (most notably, pain and suffering), because such a change would prevent many persons from receiving full compensation for injury. When one wrongdoer goes bankrupt -- as companies that sell or manufacture harmful products often do -- the other wrongdoers, and not the innocent victim, should have to shoulder its part of the judgment. Traditional law accomplishes just this result. In

contrast, this bill would relieve other wrongdoers of their obligation to pay the bankrupt company's part of the noneconomic loss, thus leaving the victim to bear these damages on her own. So, for example, the victim of asbestos, a breast implant, or an intra-uterine device would have gone partly uncompensated under this bill, because in cases involving these products one wrongdoer was bankrupt and others would have had no obligation to pick up the bankrupt company's portion of the victim's noneconomic harm.

What makes this provision all the more troubling is that it severely and unfairly discriminates against the most vulnerable members of our society. Because it applies to noneconomic, but not to economic damages, it most deeply cuts into the damage awards of people without large amounts of lost income. Thus, this provision disproportionately affects the elderly, the poor, and nonworking women. There is no reason for this kind of discrimination. Noneconomic damages are as real and as important to victims as economic damages. We should not create a tort system in which people with the greatest need of compensation stand the least chance of receiving it.

Second, as I also have stated, I oppose arbitrary ceilings on the amount of punitive damages that may be awarded in a product liability suit, because they endanger the safety of the consuming public. The purpose of punitive damages is to punish and deter egregious conduct, such as the deliberate manufacture and sale of defective products. Capping punitive damages increases the incentive to engage in such misconduct; it invites those companies willing to put economic gain above all else simply to weigh the costs of wrongdoing against potential profits. The provision of the bill allowing judges to exceed the cap if certain factors are present helps to mitigate, but does not cure this problem, given the clear intent of Congress, as expressed in the Statement of Managers, that judges should use this authority only in the rarest of circumstances.

In addition, I am concerned that the Conference Report fails to fix an oversight in Title II of the bill, which limits actions against suppliers of materials used in devices implanted in the body. In general, Title II is a laudable attempt to ensure the continued supply of materials needed to manufacture life-saving medical devices, such as artificial heart valves. But as I believe even many supporters of the bill agree, a supplier of materials who knew or should have known that the materials, as implanted, would cause injury should not receive any protection from suit. Title II's protections must be clearly limited, as I hope and believe was Congress's intent, to non-negligent suppliers.

These defects alone would justify a veto, as I have stated before. But Congress, not content with a bad bill, enacted yet a worse bill, by taking several steps back from the version passed in the Senate and toward the one approved by the House.

Most critically, the Conference Report expands the scope of the bill, inappropriately applying the limits on punitive and noneconomic damages to negligent entrustment actions -- lawsuits, for example, against a gun dealer who knowingly sells a gun to a convicted felon, who then uses it to shoot someone, or against a bar owner who knowingly serves a drink to an obviously inebriated customer, who then drives drunk and causes death or injury. I believe that lawsuits such as these should go forward unhindered. So too do such groups as Mothers Against Drunk Driving and the Coalition to Stop Gun Violence, a coalition of 44 organizations dedicated to the reduction of gun violence. Congress should not have made this last-minute change in the scope of the bill.

In addition, the Conference Report makes certain changes that though sounding technical, may completely cut off a victim's ability to sue a guilty manufacturer. The Report deletes a provision that would have stopped the statute of limitations from running when a bankruptcy court issues the "automatic stay" that prevents lawsuits from being filed during bankruptcy proceedings. The effect of this change will be that some persons injured by companies that have entered bankruptcy proceedings will lose any meaningful opportunity to bring valid claims. Given the frequency with which companies sued for manufacturing defective products go into bankruptcy -- think again of manufacturers of breast implants or asbestos or intra-uterine devices -- this seemingly legalistic change may have dramatic consequences.

Similarly, the Conference Report reduces the statute of repose from twenty years to a maximum of fifteen years (and less if states so provide), and applies the statute to a much wider range of goods, including handguns. This change, which prevents a person from bringing suit against a manufacturer of an older product even if the product has just recently caused injury, also will preclude many meritorious lawsuits.

Consider two hypothetical cases, as a demonstration of how these provisions operate in combination to prevent injured people from receiving the compensation to which they are entitled.

In the first, the mother of a boy killed in a driveby shooting sues the gun dealer who knowingly sold a handgun to a person formerly convicted of a crime of violence. Under current law in most states, the dealer (assuming, as is commonly true, that the shooter himself has no money) would pay damages equal to all the mother's economic and noneconomic damages, regardless of how these damages were allocated as between the dealer's and the shooter's misconduct; perhaps the dealer also would pay punitive damages for the egregious nature of his act. Under this bill, by contrast, the mother would have less chance of receiving an award of punitive damages sufficient to deter future misconduct. Still worse, she would receive no damages for any of her noneconomic loss, including pain and suffering, that the jury attributed to the shooter. Given that the majority of her damages would arise from pain and suffering (not economic injury) and that the jury

would have allocated some substantial part of this amount to the judgment-proof shooter, her total damage award would be but a fraction of what current law would give her. And if the gun causing the injury were an old model, thus triggering the statute of repose, the mother would receive no damages whatsoever.

In the second case, a woman suffering severe injury from a breast implant sues both the manufacturer of the implant and the supplier of its silicone gel, both of whom knew that the product could cause injury. Under current law, both wrongdoers would be liable for the harm the woman suffered; more, if one wrongdoer could not pay its portion of the judgment, the other would make up the difference. But this would not be true under H.R. 956. If this bill were enacted, even the best case scenario would be appalling: the supplier, though knowing its product posed danger, would be immune from suit, and the portion of noneconomic (pain and suffering) damages allocated to it would be lost to the woman. In addition, the manufacturer, no matter how intentional its decision to implant a harmful product, might benefit from the bill's cap on punitive damages. But there would be a worse case scenario, which very well could happen. If the manufacturer of the implant entered bankruptcy, no defendant would be left to pay the woman's damages, let alone to make a punitive award deterring future misconduct. One wrongdoer would have immunity, the other insufficient resources; as a result, the innocent injured woman would bear the full cost of the harm. In short, a woman who under current law would receive full compensation and perhaps punitive damages, under H.R. 956 would get absolutely nothing.

This example, indeed, is more than a hypothetical. There are identifiable injured women today facing situations that are substantially similar to the one I have just described. Their prospects of recovering anything at all for the harm caused by ruptured implants would decrease dramatically if H.R. 956 became law.

I cannot believe that even the supporters of the Conference Report would sanction these results. Real people with real injuries cannot be left to suffer in this fashion; more, the companies that cause these injuries cannot be left, through lack of a deterrent, to engage in misconduct. I therefore must return the bill that has been presented to me. There is nothing "common sense" about its "reforms" to the law of product liability.

THE WHITE HOUSE

WASHINGTON

March 31, 1996

MEMORANDUM FOR BRUCE LINDSEY

FROM: ELENA KAGAN EK

CC: JACK QUINN, KATHY WALLMAN

SUBJECT: PRODUCT LIABILITY VETO STATEMENT

Attached is a new draft of the product liability veto statement. I have given this to OMB for clearance, but you still have time to make changes.

There are significant changes only in the second paragraph and the second-to-last paragraph:

In the second paragraph, I added language making clear that we could sign some kind of products liability bill (just not this one). At the meeting Harold and I attended on Friday, business representatives practically begged us to include in our veto statement some opening for further negotiations. Harold thought that we should do so. Hence this paragraph. Let me know if you object.

In the next-to-last paragraph, I added material suggesting that the hypothetical case we described isn't such a hypothetical after all. I think this is a good addition. I decided not to use Janice Ferriell's name (or her precise story) because Ferriell is in a complicated situation that may yet end happily: a court may find that the successor company must make good on liability attributable to the original manufacturer. Again, let me know if you disagree.

To the House Reps:

~~Veto Message for H.R. 956~~ **DRAFT**

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I support real common sense product liability reform at the Federal level. To deserve this label, however, legislation must adequately protect the interests of consumers harmed by defective products, in addition to the interests of manufacturers and sellers. Further, legislation must respect the important role of the States in our Federal system. Congress could have passed legislation, appropriately limited in scope and balanced in application, meeting these tests. Had Congress done so, I would have signed the bill gladly; were Congress to do so now, I would be delighted. But Congress instead chose to pass legislation weighted against consumers and infringing on the States, thus disserving the goal of real common sense reform.

~~The Conference Report on~~ H.R. 956 represents an unwarranted intrusion on state authority, in the interest of shielding manufacturers and sellers of harmful products. Tort law traditionally has been a matter for the States, rather than for Congress. The States have handled this responsibility well, serving as laboratories for new ideas and making needed reforms. This bill unduly interferes with that process -- and does so in a way that peculiarly disadvantages consumers. As a rule, this bill displaces state law only when that law is more favorable to consumers; it allows state law to remain in effect when that law is more helpful to manufacturers and sellers. I cannot accept a law that rejects state authority in the tort field ~~solely~~ in the interest of tilting the legal playing field against consumers and in favor of manufacturers and sellers.

Apart from the general structure of the bill, specific provisions of H.R. 956 unfairly disadvantage consumers. These provisions would prevent even horribly injured persons -- including some who may be elderly, poor, or non-working women -- from recovering the full measure of their damages. And these provisions would encourage the worst kind of conduct on the part of manufacturers and sellers, such as knowingly introducing injurious products into the stream of commerce.

In particular, I object to the following provisions of the bill, which subject consumers to too great a risk of harm from defective products:

as I have said)

First, as noted in the Statement of Administration Policy on the Senate version of this bill, I oppose wholly eliminating joint liability for noneconomic damages (most notably, pain and suffering), because such a change would prevent many persons from receiving full compensation for injury. When one wrongdoer goes bankrupt -- as companies that sell or manufacture harmful products often do -- the other wrongdoers, and not the innocent victim, should have to shoulder its part of the judgment.

Traditional law accomplishes just this result. In contrast, this bill would relieve other wrongdoers of their obligation to pay the bankrupt company's part of the noneconomic loss, thus leaving the victim to bear these damages on her own. So, for example, the victim of asbestos, a breast implant, or an intra-uterine device would have gone partly uncompensated under this bill, because in cases involving these products one wrongdoer was bankrupt and others would have had no obligation to pick up the bankrupt company's portion of the victim's noneconomic harm.

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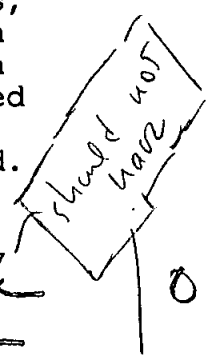
HR 956

In addition, I am concerned that ~~the Conference Report~~ fails to fix an oversight in Title II of the bill, which limits actions against suppliers of materials used in devices implanted in the body. In general, Title II is a laudable attempt to ensure the continued supply of materials needed to manufacture life-saving medical devices, such as artificial heart valves. But as I believe even many supporters of the bill agree, a supplier of materials who knew or should have known that the materials, as implanted, would cause injury should not receive any protection from suit. Title II's protections must be clearly limited, as I hope and believe was Congress's intent, to non-negligent suppliers.

These defects alone would justify a veto, as I have stated before. But Congress, not content with a bad bill, enacted yet a worse bill, by taking several steps back from the version passed

in the Senate and toward the one approved by the House.

Most critically, the ~~Conference Reports~~ final version of HR 956 expands the scope of the bill, inappropriately applying the limits on punitive and noneconomic damages to negligent entrustment actions -- lawsuits, for example, against a gun dealer who knowingly sells a gun to a convicted felon, who then uses it to shoot someone, or against a bar owner who knowingly serves a drink to an obviously inebriated customer, who then drives drunk and causes death or injury. I believe that lawsuits such as these should go forward unhindered. So too do such groups as Mothers Against Drunk Driving and the Coalition to Stop Gun Violence, a coalition of 44 organizations dedicated to the reduction of gun violence. ~~Congress was simply getting greedy when, at the last minute and for no reason, it included lawsuits of this kind within the scope of the bill.~~



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loss, including pain and suffering, that the jury attributed to the shooter. Given that the majority of her damages would arise from pain and suffering (not economic injury) and that the jury would have allocated some substantial part of this amount to the judgment-proof shooter, her total damage award would be but a fraction of what current law would give her. And if the gun causing the injury were an old model, thus triggering the statute of repose, the mother would receive no damages whatsoever.

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DRAFT

(Not most recent)

Veto Message for H.R. 956

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This bill represents an unwarranted intrusion on state authority, in the interest of shielding manufacturers and sellers of harmful products. Tort law traditionally has been a matter for the states, rather than for Congress. Over the years, states have handled this responsibility well, serving as laboratories for new ideas and making needed reforms. This bill interferes with that process -- and does so in a way that peculiarly disadvantages consumers. As a rule, this bill displaces state law only when that law is more favorable to consumers; it allows state law to remain in effect when that law is more helpful to manufacturers and sellers. I cannot accept a law that rejects state authority in the tort field solely in the interest of tilting the legal playing field against consumers and in favor of manufacturers and sellers.

Apart from the general structure of the bill, specific provisions of H.R. 956 unfairly disadvantage consumers. These provisions would prevent even horribly injured persons -- including some who may be elderly, poor, or non-working women -- from recovering the full measure of their damages. And these provisions would encourage the worst kind of conduct on the part of manufacturers and sellers, such as knowingly introducing injurious products into the stream of commerce.

In particular, I object to the following provisions of the bill, which subject consumers to too great a risk of harm from defective products:

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went bankrupt and others would have had no obligation to pick up the bankrupt company's portion of the victim's noneconomic harm.

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customer, who then drives drunk and causes death or injury. I believe that lawsuits such as these should go forward unhindered. So do such groups as Mothers Against Drunk Driving and the Coalition to Stop Gun Violence, a coalition of 44 organizations dedicated to the reduction of gun violence. Congress was simply getting greedy when, at the last minute and for no reason, it included lawsuits of this kind within the scope of the bill.

In addition, the Conference Report makes certain changes that though sounding technical, may completely cut off a victim's ability to sue a guilty manufacturer. The Report deletes a provision that would have stopped the statute of limitations from running when a bankruptcy court issues the "automatic stay" that prevents lawsuits from being brought during bankruptcy proceedings. The effect of this change will be that some persons injured by companies that have entered bankruptcy proceedings will lose any meaningful opportunity to bring valid claims. Given the frequency with which companies sued for manufacturing defective products go into bankruptcy -- think of manufacturers of breast implants or asbestos or intra-uterine devices -- this seemingly legalistic change may have dramatic consequences.

Similarly, the Conference Report reduces the statute of repose from twenty years to a maximum of fifteen years (and less if states so provide), and applies the statute to a much wider range of goods, including handguns. This change, which prevents a person from bringing suit against a manufacturer of an older product even if the product has just caused injury, also will preclude many meritorious lawsuits.

Consider two hypothetical cases, as a demonstration of how these provisions operate in combination to prevent injured people from receiving the compensation to which they are entitled.

In the first, the mother of a boy killed in a driveby shooting sues the gun dealer who knowingly sold a handgun to a person formerly convicted of a crime of violence. Under current law in most states, the dealer (assuming, as is commonly true, that the shooter himself had no money) would pay damages equal to all the mother's economic and noneconomic damages, regardless of how these damages were allocated as between the dealer's and the shooter's misconduct; perhaps the dealer also would pay punitive damages for the egregious nature of his act. Under this bill, by contrast, the mother would have less chance of receiving an award of punitive damages sufficient to deter further misconduct. Worse, she would receive no damages for any noneconomic loss, including pain and suffering, that the jury attributed to the shooter; because the majority of her damages would arise from pain and suffering (not economic injury) and because the jury would have allocated some substantial part of this amount to the judgment-proof shooter, her total damage award would be a fraction of what current law would give her. And if the gun causing the injury were an old model, thus triggering the statute of repose, the mother would receive no damages whatsoever.

In the second case, a woman suffering severe injury from a breast implant sues both the manufacturer of the implant and the supplier of its silicone gel, both of whom knew that the product could cause injury. Under current law, both wrongdoers would be liable for the harm the woman suffered; more, if one wrongdoer could not pay its portion of the judgment, the other would make up the difference. But this would not be true under H.R. 956. If this bill were enacted, even the best case scenario would be appalling: the supplier, though knowing its product posed danger, would be immune from suit, and the portion of noneconomic (pain and suffering) damages allocated to it would be lost to the woman. In addition, the manufacturer, no matter how intentional its decision to implant a harmful product, might benefit from the bill's cap on punitive damages. But there would be a worse case scenario, which very well could happen. If the manufacturer of the implant entered bankruptcy, no defendant would be left to pay the woman's damages, let alone to make a punitive award deterring future misconduct. One wrongdoer would have immunity, the other insufficient resources; as a result, the innocent injured woman would bear the full cost of the harm. In short, a woman who under current law would receive full compensation and perhaps punitive damages, under H.R. 956 would get absolutely nothing.

I cannot believe that even the supporters of the Conference Report would sanction these results. Real people with real injuries cannot be left to suffer in this fashion; more, the companies that cause these injuries cannot be left, through lack of a deterrent, to wreak further harm. I therefore must return the bill that has been presented to me. There is nothing "common sense" about its "reforms" to the law of product liability.

THE WHITE HOUSE

WASHINGTON

March 25, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: NEW DRAFT OF PRODUCTS STATEMENT

Attached is a revised draft of the products liability veto statement, responding to Bruce's suggestions and comments. I think it's now much stronger.

Of course, it's also much longer. I don't know how long veto statements usually are. Is the length a problem?

Please go over the two examples carefully; I need someone to make sure I'm right. In the meantime, I'm going to call a former colleague of mine who knows everything there is to know about the bankruptcy system. I think I need some further guidance as to how bankruptcy proceedings -- and particularly the stays enetered by bankruptcy courts -- affect claims.

Bruce tells me there's no longer a rush on this, because the House will not act until Friday at the earliest. Still, I'd like to put it into decent shape as soon as possible.

Veto Message for H.R. 956

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I support real common sense product liability reform at the Federal level. To deserve this label, however, legislation must adequately protect the interests of consumers harmed by defective products. Further, legislation must respect the important role of the States in our Federal System. The Conference Report on H.R. 956 fails these tests by a wide margin.

This bill represents an unwarranted intrusion on state authority, in the interest of shielding manufacturers and sellers of harmful products. Tort law traditionally is a matter for the states, rather than for Congress. Over the years, states have handled this responsibility well, serving as laboratories for new ideas and making needed reforms. This bill interferes with that process -- and does so in a way that peculiarly disadvantages consumers. As a rule, this bill displaces state law only when that law is more favorable to consumers; it allows state law to remain in effect when that law is more helpful to manufacturers and sellers. I cannot accept such a one-way, anti-consumer street of federalism. I cannot accept a law that makes a mockery, as this one does, of the twin goals of protecting proper state authority and preserving an appropriate balance between consumers and businesses.

Apart from the general structure of the bill, specific provisions of H.R. 956 unfairly tilt the legal playing field to the disadvantage of consumers. These provisions would prevent many horribly injured persons -- especially the elderly, the poor, and non-working women -- from recovering the full measure of their damages. And these provisions would encourage the worst kind of conduct on the part of manufacturers and sellers, such as knowingly introducing injurious products into the stream of commerce.

In particular, I object to the following provisions of the bill, which subject consumers to too great a risk of harm from defective products:

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the victim of asbestos, a breast implant, or an intra-uterine device would have gone partly uncompensated, as one wrongdoer went bankrupt and others would have had no obligation to pick up its portion of the victim's noneconomic harm.

What makes this provision all the more offensive is that it severely and unfairly discriminates against the most vulnerable members of our society. Because it applies to noneconomic, but not to economic damages, it most deeply cuts into the damage awards of people without large amounts of lost income. Thus, this provision disproportionately affects the elderly, the poor, and nonworking women. There is no reason for this kind of discrimination. Noneconomic damages are as real and as important to victims as economic damages. We should not create a tort system in which people with the greatest need of compensation stand the least chance of receiving it.

Second, as also noted in the Statement of Administration Policy on the Senate version, I oppose artificial ceilings on the amount of punitive damages that may be awarded in a product liability action, because they endanger the safety of the consuming public. The purpose of punitive damages is to punish and deter egregious conduct, such as deliberately manufacturing and selling defective products. Capping punitive damages increases the incentive to engage in such misconduct; it invites those companies willing to put economic gain above all else simply to weigh the costs of wrongdoing against potential profits. The provision of the bill allowing judges to exceed the cap if certain factors are present does not cure this problem, given the clear intent of Congress, expressed in the Statement of Managers, that judges should do so only in the rarest of circumstances.

In addition, I am concerned that the Conference Report fails to fix an oversight in Title II of the bill, which limits actions against suppliers of biomaterials used in devices implanted in the body. In general, Title II is a laudable attempt to ensure the continued supply of biomaterials needed to manufacture life-saving medical devices, such as pacemakers and heart valves. But as I believe even many supporters of the bill agree, a supplier of biomaterials who knew or should have known that the materials, as implanted, would cause injury should not receive protection. Title II must be clearly limited, as I hope and believe was Congress's intent, to innocent, non-negligent suppliers.

These defects alone would justify a veto, as I have stated before. But Congress, not content with a bad bill, enacted yet a worse bill, by taking several steps back from the version passed in the Senate and toward the one approved by the House.

Most critically, the Conference Reports expands the scope of the bill, inappropriately applying the limits on punitive and noneconomic damages to negligent entrustment actions -- lawsuits, for example, against a gun dealer who knowingly sells a gun to a

convicted felon, who then uses it to shoot someone, or against a bar owner who knowingly serves a drink to an obviously inebriated customer, who then drives drunk and causes fatal injury. I believe that lawsuits such as these should go forward unhindered. So do such groups as Mothers Against Drunk Driving and the Violence Policy Center. **[check;add?]** Congress was simply getting greedy when, at the last minute for no reason, it included these actions within the scope of the legislation.

In addition, the Conference Report makes certain changes that though sounding technical, may completely cut off a victim's ability to sue a guilty manufacturer. The Report deletes a provision that would have stopped the statute of limitations from running when a bankruptcy court (as happens often) issues an order preventing lawsuits from being brought during bankruptcy proceedings. The effect of this change will be that some persons injured by companies that have entered bankruptcy proceedings will lose any opportunity to bring valid claims. Given the frequency with which companies sued for manufacturing defective products go into bankruptcy -- think of manufacturers of breast implants or asbestos or intra-uterine devices -- this seemingly legalistic change will have dramatic consequences.

Similarly, the Conference Report reduces the statute of repose from twenty years to a maximum of fifteen years (and less if states so provide), and applies the statute to a much wider range of goods, including handguns. This change, which prevents a person from bringing suit against a manufacturer of an old product even if the product has just caused injury, also will preclude many meritorious lawsuits.

Consider two hypothetical cases, as a demonstration of how these provisions operate in combination to prevent injured people from getting the compensation to which they are entitled.

In the first, the mother of a boy killed in a driveby shooting sues the gun dealer who knowingly sold a **[kind of gun]** to a person formerly convicted of a crime of violence. Under current law in most states, the dealer (assuming the shooter himself had no money) would pay damages equal to all the mother's compensatory damages and all her pain and suffering, regardless of how damages were allocated as between his and the shooter's misconduct; perhaps the dealer also would pay a punitive award for the deliberate and egregious nature of his act. Under this bill, by contrast, the mother would have less chance of receiving a punitive award sufficient to deter further misconduct. Worse, she would receive no damages for any pain and suffering that the jury attributed to the shooter; because the vast majority of her damages would arise from pain and suffering (not economic injury) and because the jury would have allocated some substantial part of this amount to the shooter, her total damage award would be a fraction of what current law would give her. And if the gun causing the injury was an old model, thus triggering the statute of repose, the mother would receive no damages whatsoever.

In the second case, a woman suffering severe injury from a breast implant sues both the manufacturer of the implant and the supplier of its silicone gel, both of whom knew that the product would cause injury. Under current law, both wrongdoers would be liable for the harm the woman suffered; more, if one wrongdoer could not pay its portion of the judgment, the other would make up the difference. But this would not be true under H.R. 956. If this bill were enacted, even the best case scenario would be appalling: the supplier, though knowing its product posed danger, would be immune from suit, and the portion of noneconomic (pain and suffering) damages allocated to it would be lost to the woman. In addition, the manufacturer, no matter how intentional its decision to implant a harmful product, might benefit from the bill's cap on punitive damages. But there would be a worse case scenario, which very well could happen. If the manufacturer of the implant entered bankruptcy, no defendant would be left to pay the woman's damages, let alone to make a punitive award deterring future misconduct. One wrongdoer would have immunity, the other insufficient resources; as a result, the innocent injured woman would bear the full cost of the harm. In short, a woman who under current law would receive full compensation and perhaps punitive damages, under H.R. 956 would get absolutely nothing.

I cannot believe that even the supporters of the Conference Report would sanction these results. Real people with real injuries cannot be left to suffer in this fashion; more, the companies that cause these injuries cannot be left, through lack of a deterrent, to wreak further harm. I therefore must return the bill that has been presented to me. There is nothing "common sense" about its "reforms" to the law of product liability.

THE WHITE HOUSE

WASHINGTON

March 21, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: PRODUCTS VETO STATEMENT

Attached is my first crack at a veto statement for the products liability bill. John Hilley (through Tim Keating) directed me this morning to make it readable, very strong, and very pro-consumer. I take it that this was all a way of telling me not to be too lawyerly. Please think about that as you read and edit this draft. Hilley asked for the draft as soon as possible, but I'm giving it to you folks first.

I decided to discuss only the provisions on joint liability and punitive damages caps. I think the other objections -- the statute of limitations, the statute of repose, and even the application to negligent entrustment cases -- tend to trivialize our position. Moreover, our objection to the bill's application to negligent entrustment cases (which, I imagine, some people will want to talk about) is entirely derivative. We are saying that the limits on punitive damages and noneconomic damages should not apply in such cases. But we are saying, more broadly, that these limits should not apply in <u>any</u> cases. The negligent entrustment point was a fair and good one when we were focusing on changes from the Senate version to the Conference Report. But I don't think we should try to use the point at this juncture. Of course, if you disagree -- on this or anything else -- just let me know.

DRAFT

Veto Message for H.R. 956

I am returning without my approval H.R. 956, the so-called Common Sense Product Liability Legal Reform Act of 1996.

I support real common sense product liability reform at the Federal level. To deserve this label, however, legislation must adequately protect the interests of consumers harmed by defective products. Further, legislation must respect the important role of the States in our Federal System. The Conference Report on H.R. 956 fails these tests by a wide margin.

This bill represents an unwarranted intrusion on state authority, in the interest of shielding manufacturers and sellers of harmful products. Tort law traditionally is a matter for the states, rather than for Congress. Over the years, states have handled this responsibility well, serving as laboratories for new ideas and making needed reforms. This bill interferes with that process -- and does so in a way that peculiarly disadvantages consumers. As a rule, this bill displaces state law only when that law is more favorable to consumers; it allows state law to remain in effect when that law is more helpful to manufacturers and sellers. I cannot accept such a one-way, anti-consumer street of federalism. I cannot accept a law that makes a mockery, as this one does, of the twin goals of protecting proper state authority and preserving an appropriate balance between consumers and businesses.

Apart from the general structure of the bill, specific provisions of H.R. 956 unfairly tilt the legal playing field to the disadvantage of consumers. These provisions would prevent many horribly injured persons -- especially the elderly, the poor, and non-working women -- from recovering the full measure of their damages. And these provisions would encourage the worst kind of conduct on the part of manufacturers and sellers, such as knowingly introducing injurious products into the stream of commerce.

In particular, I object to the following provisions of the bill, which subject consumers to too great a risk of harm from defective products:

First, I oppose the abolition of joint liability for noneconomic damages (most notably, pain and suffering), because it would prevent many persons from receiving full compensation for injury. When one wrongdoer goes bankrupt -- as companies that sell or manufacture harmful products often do -- the other wrongdoers, and not the innocent victim, should have to shoulder its part of the judgment. Traditional law accomplishes just this result. In contrast, this bill would relieve other wrongdoers of their obligation to pay the bankrupt company's part of the noneconomic loss, thus leaving the victim to bear these damages on her own. So, for example, the victim of asbestos, a breast implant, or an intra-uterine device would have gone partly

uncompensated, as one wrongdoer went bankrupt and others would have had no obligation to pick up its portion of the victim's noneconomic harm.

What makes this provision all the more offensive is that it severely and unfairly discriminates against the most vulnerable members of our society. Because it applies to noneconomic, but not to economic damages, it most greatly cuts into the damage awards of people without large amounts of lost income. Thus, this provision disproportionately affects the elderly, the poor, and nonworking women. There is no reason for this kind of discrimination. Noneconomic damages are as real and as important to victims as economic damages. We should not create a tort system in which people with the greatest need of compensation stand the least chance of receiving it.

Second, I oppose artificial ceilings on the amount of punitive damages that may be awarded in a product liability action, because they endanger the safety of the consuming public. The purpose of punitive damages is to punish and deter egregious conduct, such as deliberately manufacturing and selling defective products. Capping punitive damages increases the incentive to engage in such misconduct; it invites those companies willing to put economic gain above all else simply to weigh the costs of wrongdoing against potential profits. The provision of the bill allowing judges to exceed the cap if certain factors are present does not cure this problem, given the clear intent of Congress, expressed in the Statement of Managers, that judges should do so only in the rarest of circumstances.

The Conference Report includes some good and useful provisions. In particular, Title II is a laudable attempt to ensure that suppliers of biomaterials will provide sufficient quantities of their products to manufacturers of medical devices. As I have said before, I am committed to working with Congress to address this difficult issue.

I must, however, return the bill that has been presented to me. This bill would intrude on States and harm consumers. There is nothing common sense about those "reforms" to the law of product liability.

I will veto H.R. 956 if it is presented to me in its current form.

This bill represents an unwarranted intrusion on state authority, in the interest of protecting manufacturers and sellers of defective products. Tort law is traditionally the prerogative of the states, rather than of Congress. In this bill, Congress has intruded on state power -- and done so in a way that peculiarly disadvantages consumers. As a rule, this bill displaces state law only when that law is more beneficial to consumers; it allows state law to remain in effect when that law is more favorable to manufacturers and sellers. In the absence of compelling reasons to do so, I cannot accept such a one-way street of federalism, in which Congress defers to state law when doing so helps manufacturers and sellers, but not when doing so aids consumers.

I also have particular objections to certain provisions of the bill, which would encourage wrongful conduct and prevent injured persons from recovering the full measure of their damages. Specifically, the bill's elimination of joint-and-several liability for noneconomic damages, such as pain and suffering, will mean that victims of terrible harm sometimes will not be fully compensated for it. Where under current law a joint wrongdoer will make the victim whole, under this bill an innocent victim would suffer when one wrongdoer goes bankrupt and cannot pay his portion of the judgment.

In addition, the bill's capping of punitive damages increases the incentive for companies to engage in the egregious misconduct of knowingly manufacturing and selling defective products. The provision of the bill allowing judges to exceed the cap in certain circumstances does not cure this problem, given Congress's clear intent, expressed in the Statement of Managers, that judges should do so only in the rarest of circumstances.

The attached Statement of Administration Policy more fully explains my position on this issue -- an issue of great importance to American consumers, and to evenly applied principles of federalism.

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The Administration supports the enactment of limited but meaningful product liability reform at the federal level. Any legislation, however, must fairly balance the interests of consumers with those of manufacturers and sellers. Further, any legislation must respect the important role of the states in our federal system. The Conference Report on H.R. 956 underscores that Congress has failed to meet these requirements.

As a general matter, tort law, including product liability law, is the responsibility and prerogative of the states, rather than of Congress. This is an area in which states have served as laboratories, testing and developing new ideas and making needed reforms. Proponents of new and sweeping federal restrictions on traditional state authority should bear the burden of persuasion. The drafters of the Conference Report have failed to show why the federal government should wrest this important responsibility from the states. Certainly the bill's findings -- which fail to recognize, for example, that the current increase in litigation is attributable to commercial suits between corporations rather than consumer-initiated product liability actions against manufacturers and sellers -- do not justify such broadscale federal intrusion.

Moreover, the Conference Report unfairly tilts the legal playing field to the disadvantage of consumers. Many provisions of H.R. 956, such as those dealing with punitive damages and the statute of repose, displace state law only when that law is more favorable to the consumer; when state law is more favorable to manufacturers and sellers, it remains in operation. This "one-way preemption" approach unfairly disadvantages consumers. So, too, do several specific provisions of H. R. 956 that would impede the ability of injured persons to gain fair and adequate recovery.

In particular, the bases for the President's veto are as follows:

First, the Administration, as noted in its Statement of Administration Policy on the Senate version, opposes an artificial ceiling on the amount of punitive damages that may be awarded in a product liability action. Statutory caps ignore the fundamental purpose of punitive awards: to punish and deter. While the Senate bill and the Conference Report allow judges to exceed the ceiling in certain circumstances, the explanation in the Statement of Managers that "occasions for additional awards will be very limited indeed" reveals a continuing basis for our concern. The Conference Report invites a wealthy potential

wrongdoer to weigh the risks of a capped punitive damages award against the potential gains or profits from the wrongdoing.

Second, the Administration, as also noted in its Statement of Administration Policy on the Senate version, opposes the abolition of joint-and-several liability for noneconomic damages (most notably, pain and suffering). This provision would severely and unfairly discriminate against those innocent victims whose injuries involve mostly noneconomic damages, rather than the sort of damages that can be measured by lost income. Elderly citizens, for example, would suffer. Noneconomic damages are as real and as important to victims as economic damages. Those who incur such damages should not suffer if one defendant has gone bankrupt or otherwise become unavailable.

In addition, the Administration is concerned that the Conference Report takes several steps backward from the Senate version. Most notably, the Conference Report deletes a provision that would have tolled the statute of limitations in the event of a stay or injunction against an action. Such a provision is critical when a potential defendant files for liquidation or reorganization, as happened in cases involving asbestos and the Dalkon Shield. In such a case, the bankruptcy court will issue a stay pending the completion of its proceedings; if the statute of limitations is not tolled, many injured persons run the risk of losing meritorious claims. Similarly, the Conference Report reduces the statute of repose from twenty years to a maximum of fifteen years (and less if states so provide). This change, which prevents a person from bringing suit against a manufacturer of an old product even if the product has just caused injury, also will preclude valid claims.

The Conference Report includes some good and useful provisions. In particular, Title II is a laudable attempt to ensure that suppliers of biomaterials will provide sufficient quantities of their products to manufacturers of medical devices. The Administration is committed to working with Congress to address this issue.

Nonetheless, the President would veto H.R. 956 because of his concern that the bill, in its present form, interferes unduly with state prerogatives and unfairly tilts the legal playing field to the disadvantage of consumers.

DRAFT

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The Administration supports the enactment of limited but meaningful product liability reform at the federal level. Any legislation, however, must fairly balance the interests of consumers with those of manufacturers and sellers. Further, any legislation must respect the important role of the states in our federal system. The Conference Report on H.R. 956 underscores that Congress has failed to meet these requirements.

As a general matter, tort law, including product liability law, is the responsibility and prerogative of the states, rather than of Congress. This is an area in which states have served as laboratories, testing and developing new ideas and making needed reforms. Proponents of new and sweeping federal restrictions on traditional state authority should bear the burden of persuasion. The drafters of the Conference Report have failed to show why the federal government should wrest this important responsibility from the states. Certainly the bill's findings -- which fail to recognize, for example, that the current increase in litigation is attributable to commercial suits between corporations rather than consumer-initiated product liability actions against manufacturers and sellers -- do not justify such broadscale federal intrusion.

Moreover, the Conference Report unfairly tilts the legal playing field to the disadvantage of consumers. Many provisions of H.R. 956, such as those dealing with punitive damages and the statute of repose, displace state law only when that law is more favorable to the consumer; when state law is more favorable to manufacturers and sellers, it remains in operation. This "one-way preemption" approach unfairly disadvantages consumers. So, too, do several specific provisions of H. R. 956 that would impede the ability of injured persons to gain fair and adequate recovery.

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wrongdoer to weigh the risks of a capped punitive damages award against the potential gains or profits from the wrongdoing.

Second, the Administration, as also noted in its Statement of Administration Policy on the Senate version, opposes Section 110, which would abolish joint-and-several liability for noneconomic damages (most notably, pain and suffering). This provision would severely and unfairly discriminate against those innocent victims whose injuries involve mostly noneconomic damages, rather than the sort of damages that can be measured by lost income. Elderly citizens, for example, would suffer. Noneconomic damages are as real and as important to victims as economic damages. Those who incur such damages should not suffer if one defendant has gone bankrupt or otherwise become unavailable.

In addition, the Administration is concerned that the Conference Report takes several steps backward from the Senate version. Most notably, the Conference Report deletes a provision that would have tolled the statute of limitations in the event of a stay or injunction against an action. Such a provision is critical when a potential defendant files for liquidation or reorganization, as happened in cases involving asbestos and the Dalkon Shield. In such a case, the bankruptcy court will issue a stay pending the completion of its proceedings; if the statute of limitations is not tolled, many injured persons run the risk of losing meritorious claims. Similarly, the Conference Report reduces the statute of repose from twenty years to a maximum of fifteen years (and less if states so provide). This change, which prevents a person from bringing suit against a manufacturer of an old product even if the product has just caused injury, also will preclude valid claims.

The Conference Report includes some good and useful provisions. In particular, Title II is a laudable attempt to ensure that suppliers of biomaterials will provide sufficient quantities of their products to manufacturers of medical devices. The Administration is committed to working with Congress to address this issue.

Nonetheless, the President would veto H.R. 956 because of his concern that the bill, in its present form, interferes unduly with state prerogatives and unfairly tilts the legal playing field to the disadvantage of consumers.

The Administration opposes, and the President will veto, the Conference Report on H.R. 956 in its current form.

The Administration would support the enactment of limited but meaningful product liability reform at the federal level. Any legislation, however, must fairly balance the interests of consumers with those of manufacturers and sellers. Further, any legislation must respect the important role of the states in our federal system. The Conference Report fails to meet these requirements.

As a general matter, product liability reform is the responsibility and prerogative of the states, rather than of Congress. This is an area in which states have served as laboratories, testing and developing new ideas and making needed reforms. As in other spheres of government, proponents of new and sweeping federal restrictions on traditional state authority should bear the burden of persuasion. The drafters of the Conference Report have failed to meet this burden. Certainly the bill's distorted set of findings -- which fails to recognize, for example, that the current increase in litigation is attributable to commercial suits between corporations rather than consumer-initiated product liability actions -- does not justify such broadscale federal intrusion.

Moreover, the Conference Report unfairly tilts the legal playing field to the disadvantage of consumers. Many provisions of H.R. 956, such as those dealing with punitive damages and the statute of repose, displace state law only when that law is more favorable to the consumer; when state law is more favorable to manufacturers and sellers, it remains in operation. This "one-way preemption" approach too greatly shifts the balance away from consumers. So too do several specific provisions of H. R. 956 that would impede the ability of injured persons to gain fair and adequate recovery.

In particular, the Administration opposes Section 108, which imposes an artificial ceiling on the amount of punitive damages that may be awarded in a product liability action. As the Administration has previously stated, statutory caps are improper because they ignore the fundamental purpose of punitive awards: to punish and deter. The provision allowing judges to exceed the ceiling in certain rare circumstances does not solve this problem, especially in light of the explanation in the Statement of Managers that "occasions for additional awards will be very limited indeed." Section 108 invites a wealthy potential wrongdoer to weigh the risks of a capped punitive damages award against the potential gains or profits from the wrongdoing.

The Administration also opposes Section 110, which would

abolish joint-and-several liability for noneconomic damages (most notably, pain and suffering). This provision would severely and unfairly discriminate against those innocent victims who suffer mostly noneconomic damages, including elderly citizens and others with little future income. Noneconomic damages are as real and as important to victims as economic damages. Those who suffer such damages, like all other victims, should not have to bear the burden of rounding up every conceivable defendant; neither should they suffer if one defendant has gone bankrupt or otherwise become unavailable.

In addition, the Conference Report takes a large step backward from the Senate version in deleting a provision that would have tolled the statute of limitations in the event of a stay or injunction against an action. Such a provision is critical when a potential defendant files for liquidation or reorganization, as happened in cases involving asbestos and the Dalkon Shield. In such a case, the bankruptcy court will issue a stay pending the completion of its proceedings; if the statute of limitations is not tolled, many injured persons run the risk of losing meritorious claims.

Finally, the Conference Report completely fails to address one significant problem: the increasingly familiar situation of a foreign national who is unavailable to receive process for a defective product put in the stream of commerce in the United States. A fair system of justice would ensure that foreign manufacturers are held to the same standard of responsibility as are domestic manufacturers.

The Conference Report includes some good and useful provisions. In particular, Title II is a laudable attempt to ensure that suppliers of biomaterials will provide sufficient quantities of their products to manufacturers of medical devices. The Administration is committed to working with Congress to address this issue.

Nonetheless, the President will veto the Conference Report if presented to him in its present form, because it interferes unduly with state prerogatives and unfairly tilts the legal playing field to the disadvantage of consumers.

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Nonetheless, the President will veto the Conference Report if presented to him in its present form, because it interferes unduly with state prerogatives and unfairly tilts the legal playing field to the disadvantage of consumers.

The Administration opposes, and the President will veto, the Conference Report on H.R. 956 in its current form.

The Administration would support the enactment of limited but meaningful product liability reform at the federal level. Any legislation, however, must fairly balance the interests of consumers with those of manufacturers and sellers. Further, any legislation must respect the important role of the states in our federal system. The Conference Report fails to meet these requirements.

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The Administration opposes, and the President will veto, the H.R. 956 in its current form.

The Administration supports the enactment of limited but meaningful product liability reform at the federal level. Any legislation, however, must fairly balance the interests of consumers with those of manufacturers and sellers. Further, any legislation must respect the important role of the states in our federal system. The Conference Report on H.R. 956 underscores that Congress has failed to meet these requirements.

As a general matter, tort law, including product liability law, is the responsibility and prerogative of the states, rather than of Congress. This is an area in which states have served as laboratories, testing and developing new ideas and making needed reforms. Proponents of new and sweeping federal restrictions on traditional state authority should bear the burden of persuasion. The drafters of the Conference Report have failed to show why the federal government should wrest this important responsibility from the states. Certainly the bill's findings -- which fail to recognize, for example, that the current increase in litigation is attributable to commercial suits between corporations rather than consumer-initiated product liability actions against manufacturers and sellers -- do not justify such broadscale federal intrusion.

Moreover, the Conference Report unfairly tilts the legal playing field to the disadvantage of consumers. Many provisions of H.R. 956, such as those dealing with punitive damages and the statute of repose, displace state law only when that law is more favorable to the consumer; when state law is more favorable to manufacturers and sellers, it remains in operation. This "one-way preemption" approach unfairly disadvantages consumers. So, too, do several specific provisions of H. R. 956 that would impede the ability of injured persons to gain fair and adequate recovery.

In particular, the bases for the President's veto are as follows:

First, the Administration, as noted in its Statement of Administration Policy on the Senate version, opposes Section 108, which imposes an artificial ceiling on the amount of punitive damages that may be awarded in a product liability action. Statutory caps ignore the fundamental purpose of punitive awards: to punish and deter. The provision allowing judges to exceed the ceiling in certain rare circumstances does not solve this problem, especially in light of the explanation in the Statement of Managers that "occasions for additional awards will be very limited indeed." Section 108 invites a wealthy potential

wrongdoer to weigh the risks of a capped punitive damages award against the potential gains or profits from the wrongdoing. [Bruce: Jack is concerned that this moves the goalposts. Did we indicate to Rockefeller that we would be satisfied with this provision so long as the additur provision was fixed by removing the opportunity for a new trial?]

Second, the Administration, as also noted in its Statement of Administration Policy on the Senate version, opposes Section 110, which would abolish joint-and-several liability for noneconomic damages (most notably, pain and suffering). This provision would severely and unfairly discriminate against those innocent victims whose injuries mostly noneconomic damages, rather than the sort of damages that can be measured by lost income. Elderly citizens, for example, would suffer. Noneconomic damages are as real and as important to victims as economic damages. Those who incur such damages should not suffer if one defendant has gone bankrupt or otherwise become unavailable.

[Third,] [In addition,] ~~Third~~, the Conference Report takes a large step backward from the Senate version in deleting a provision that would have tolled the statute of limitations in the event of a stay or injunction against an action. Such a provision is critical when a potential defendant files for liquidation or reorganization, as happened in cases involving asbestos and the Dalkon Shield. In such a case, the bankruptcy court will issue a stay pending the completion of its proceedings; if the statute of limitations is not tolled, many injured persons run the risk of losing meritorious claims.

The Conference Report includes some good and useful provisions. In particular, Title II is a laudable attempt to ensure that suppliers of biomaterials will provide sufficient quantities of their products to manufacturers of medical devices. The Administration is committed to working with Congress to address this issue.

Nonetheless, the President will veto H.R. 956 if presented to him in its present form because of the ~~three~~ provisions described above. These provsions interfere unduly with state prerogatives and unfairly tilt the legal playing field to the disadvantage of consumers.

[joint + several liability] [two ?] [three ?]

THE WHITE HOUSE

WASHINGTON

COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: 3-14-96

TOTAL PAGES (INCLUDING COVER PAGE): 3

TO: Elena Kagan

ATTN:

FACSIMILE NUMBER: 6-1647

TELEPHONE NUMBER: 6-7594

FROM: Kathy Wallman **at (202) 456-2632**

COMMENTS:

PLEASE DELIVER AS SOON AS POSSIBLE

do we get the conference report to sign? or are we vetoing the bill as embodied in the conference report.

on HR 956

The Administration opposes, and the President will veto, ~~the Conference Report on~~ H.R. 956 in its current form.

The Administration ~~would~~ supports the enactment of ~~limited but~~ meaningful product liability reform at the federal level. Any legislation, however, must fairly balance the interests of consumers with those of manufacturers and sellers. Further, any legislation must respect the important role of the states in our federal system. The Conference Report, ~~which indiscriminately overhauls the product liability system~~, fails to meet these requirements.

As a general matter, ~~product liability~~ tort law reform is the responsibility and prerogative of the states, rather than of Congress. This is an area in which states have served as laboratories, testing and developing new ideas and making needed reforms. ~~As in other spheres of government,~~ Proponents of new and sweeping federal restrictions on traditional state authority should bear the burden of persuasion. The drafters of the Conference Report have failed to ~~meet this burden.~~ show why this important responsibility should be wrested from the States wholesale. Certainly the bill's ~~distorted set of~~ findings -- which fails to recognize, for example, that the current increase in litigation is attributable to commercial suits between corporations rather than consumer-initiated product liability actions -- does not justify such broadscale federal intrusion.

~~Moreover,~~ the Conference Report unfairly tilts the legal playing field to the disadvantage of consumers. Many provisions of H.R. 956, such as those dealing with punitive damages and the statute of repose, displace state law only when that law is more favorable to the consumer; when state law is more favorable to manufacturers and sellers, it remains in operation. This "one-way preemption" approach ~~too greatly shifts the balance away from~~ unfairly disadvantages consumers. So, too, do several specific provisions of H. R. 956 that would impede the ability of injured persons to gain fair and adequate recovery.

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[Handwritten margin notes: "Mcvey? done this"; "under-scores that Congress has failed"; "against corporations"; "manufacturers and sellers"; "the bases for the President's veto would be as follows: first,"; "we just wanted the additur provision fixed. We can live w/ a cap"; "Bruce: Tack worried abt moving goal posts."]

Second,

The Administration also opposes Section 110, which would abolish joint-and-several liability for noneconomic damages (most notably, pain and suffering). This provision would severely and unfairly discriminate against those innocent victims who suffer mostly noneconomic damages, including elderly citizens and others with little future income. Noneconomic damages are as real and as important to victims as economic damages. Those who suffer such damages, like all other victims, should not have to bear the burden of rounding up every conceivable defendant; neither should they suffer if one defendant has gone bankrupt or otherwise become unavailable.

In addition, the Conference Report takes a large step backward from the Senate version in deleting a provision that would have tolled the statute of limitations in the event of a stay or injunction against an action. Such a provision is critical when a potential defendant files for liquidation or reorganization, as recently happened in cases involving asbestos and the Dalkon Shield. In such a case, the bankruptcy court will issue a stay pending the completion of its proceedings; if the statute of limitations is not tolled, many injured persons run the risk of losing meritorious claims.

Finally, the Conference Report completely fails to address one significant problem: the increasingly familiar situation of a foreign national who is unavailable to receive process for a defective product put in the stream of commerce in the United States. A fair system of justice would ensure that foreign manufacturers are held to the same standard of responsibility as are domestic manufacturers.

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The President, however, will veto the Conference Report if presented to him in its present form, because it interferes unduly with state prerogatives and unfairly tilts the legal playing field to the disadvantage of consumers.

THE WHITE HOUSE

WASHINGTON

March 14, 1996

MEMORANDUM FOR BRUCE LINDSEY

FROM: ELENA KAGAN

SUBJECT: PRODUCTS LIABILITY

Attached is a "veto statement" on the products liability conference report. The view here is that we should get to this statement to the Senate tomorrow, in preparation for a vote next week (assuming, of course, that the President has decided to veto the bill).

As you can see from the bracketed material, Jack has a couple of questions about exactly which provisions we should cite as the bases for the President's veto. (1) Should we cite the provision on capping punitive damages, even though the additur provision has been fixed? (2) Should we cite the change made in the statute of limitations, or just list that as an "additional concern"?

Tracey -

This is going to Bruce on the plane now.

Elena

The Administration opposes, and the President will veto, the H.R. 956 in its current form.

The Administration supports the enactment of limited but meaningful product liability reform at the federal level. Any legislation, however, must fairly balance the interests of consumers with those of manufacturers and sellers. Further, any legislation must respect the important role of the states in our federal system. The Conference Report on H.R. 956 underscores that Congress has failed to meet these requirements.

As a general matter, tort law, including product liability law, is the responsibility and prerogative of the states, rather than of Congress. This is an area in which states have served as laboratories, testing and developing new ideas and making needed reforms. Proponents of new and sweeping federal restrictions on traditional state authority should bear the burden of persuasion. The drafters of the Conference Report have failed to show why the federal government should wrest this important responsibility from the states. Certainly the bill's findings -- which fail to recognize, for example, that the current increase in litigation is attributable to commercial suits between corporations rather than consumer-initiated product liability actions against manufacturers and sellers -- do not justify such broadscale federal intrusion.

Moreover, the Conference Report unfairly tilts the legal playing field to the disadvantage of consumers. Many provisions of H.R. 956, such as those dealing with punitive damages and the statute of repose, displace state law only when that law is more favorable to the consumer; when state law is more favorable to manufacturers and sellers, it remains in operation. This "one-way preemption" approach unfairly disadvantages consumers. So, too, do several specific provisions of H. R. 956 that would impede the ability of injured persons to gain fair and adequate recovery.

In particular, the bases for the President's veto are as follows:

First, the Administration, as noted in its Statement of Administration Policy on the Senate version, opposes Section 108, which imposes an artificial ceiling on the amount of punitive damages that may be awarded in a product liability action. Statutory caps ignore the fundamental purpose of punitive awards: to punish and deter. The provision allowing judges to exceed the ceiling in certain rare circumstances does not solve this problem, especially in light of the explanation in the Statement of Managers that "occasions for additional awards will be very limited indeed." Section 108 invites a wealthy potential

wrongdoer to weigh the risks of a capped punitive damages award against the potential gains or profits from the wrongdoing. [Bruce: Jack is concerned that this moves the goalposts. Did we indicate to Rockefeller that we would be satisfied with this provision so long as the additur provision was fixed by removing the opportunity for a new trial?]

Second, the Administration, as also noted in its Statement of Administration Policy on the Senate version, opposes Section 110, which would abolish joint-and-several liability for noneconomic damages (most notably, pain and suffering). This provision would severely and unfairly discriminate against those innocent victims whose injuries involve mostly noneconomic damages, rather than the sort of damages that can be measured by lost income. Elderly citizens, for example, would suffer. Noneconomic damages are as real and as important to victims as economic damages. Those who incur such damages should not suffer if one defendant has gone bankrupt or otherwise become unavailable.

[Third,] [In addition, the Administration is concerned that] the Conference Report takes a large step backward from the Senate version in deleting a provision that would have tolled the statute of limitations in the event of a stay or injunction against an action. Such a provision is critical when a potential defendant files for liquidation or reorganization, as happened in cases involving asbestos and the Dalkon Shield. In such a case, the bankruptcy court will issue a stay pending the completion of its proceedings; if the statute of limitations is not tolled, many injured persons run the risk of losing meritorious claims.

The Conference Report includes some good and useful provisions. In particular, Title II is a laudable attempt to ensure that suppliers of biomaterials will provide sufficient quantities of their products to manufacturers of medical devices. The Administration is committed to working with Congress to address this issue.

Nonetheless, the President will veto H.R. 956 if presented to him in its present form because of the [joint and several liability] [two] [three] provision[s] described above. Th[is][ese] provsion[s] unduly interfere with state prerogatives and unfairly tilt the legal playing field to the disadvantage of consumers.

THE WHITE HOUSE

WASHINGTON

March 14, 1996

MEMORANDUM FOR BRUCE LINDSEY

FROM: ELENA KAGAN EK

SUBJECT: PRODUCTS LIABILITY

Attached is a "veto statement" on the products liability conference report. The view here is that we should get to this statement to the Senate tomorrow, in preparation for a vote next week (assuming, of course, that the President has decided to veto the bill).

As you can see from the bracketed material, Jack has a couple of questions about exactly which provisions we should cite as the bases for the President's veto. (1) Should we cite the provision on capping punitive damages, even though the additur provision has been fixed? (2) Should we cite the change made in the statute of limitations, or just list that as an "additional concern"?

The Administration opposes, and the President will veto, the H.R. 956 in its current form.

The Administration supports the enactment of limited but meaningful product liability reform at the federal level. Any legislation, however, must fairly balance the interests of consumers with those of manufacturers and sellers. Further, any legislation must respect the important role of the states in our federal system. The Conference Report on H.R. 956 underscores that Congress has failed to meet these requirements.

As a general matter, tort law, including product liability law, is the responsibility and prerogative of the states, rather than of Congress. This is an area in which states have served as laboratories, testing and developing new ideas and making needed reforms. Proponents of new and sweeping federal restrictions on traditional state authority should bear the burden of persuasion. The drafters of the Conference Report have failed to show why the federal government should wrest this important responsibility from the states. Certainly the bill's findings -- which fail to recognize, for example, that the current increase in litigation is attributable to commercial suits between corporations rather than consumer-initiated product liability actions against manufacturers and sellers -- do not justify such broadscale federal intrusion.

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wrongdoer to weigh the risks of a capped punitive damages award against the potential gains or profits from the wrongdoing. [Bruce: Jack is concerned that this moves the goalposts. Did we indicate to Rockefeller that we would be satisfied with this provision so long as the additur provision was fixed by removing the opportunity for a new trial?]

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[Third,] [In addition, the Administration is concerned that] the Conference Report takes a large step backward from the Senate version in deleting a provision that would have tolled the statute of limitations in the event of a stay or injunction against an action. Such a provision is critical when a potential defendant files for liquidation or reorganization, as happened in cases involving asbestos and the Dalkon Shield. In such a case, the bankruptcy court will issue a stay pending the completion of its proceedings; if the statute of limitations is not tolled, many injured persons run the risk of losing meritorious claims.

The Conference Report includes some good and useful provisions. In particular, Title II is a laudable attempt to ensure that suppliers of biomaterials will provide sufficient quantities of their products to manufacturers of medical devices. The Administration is committed to working with Congress to address this issue.

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concerns which

The Administration opposes, and the President will veto, the H.R. 956 in its current form.

The Administration supports the enactment of limited but meaningful product liability reform at the federal level. Any legislation, however, must fairly balance the interests of consumers with those of manufacturers and sellers. Further, any legislation must respect the important role of the states in our federal system. The Conference Report on H.R. 956 underscores that Congress has failed to meet these requirements.

As a general matter, tort law, including product liability law, is the responsibility and prerogative of the states, rather than of Congress. This is an area in which states have served as laboratories, testing and developing new ideas and making needed reforms. Proponents of new and sweeping federal restrictions on traditional state authority should bear the burden of persuasion. The drafters of the Conference Report have failed to show why the federal government should wrest this important responsibility from the states. Certainly the bill's findings -- which fail to recognize, for example, that the current increase in litigation is attributable to commercial suits between corporations rather than consumer-initiated product liability actions against manufacturers and sellers -- do not justify such broadscale federal intrusion.

Moreover, the Conference Report unfairly tilts the legal playing field to the disadvantage of consumers. Many provisions of H.R. 956, such as those dealing with punitive damages and the statute of repose, displace state law only when that law is more favorable to the consumer; when state law is more favorable to manufacturers and sellers, it remains in operation. This "one-way preemption" approach unfairly disadvantages consumers. So, too, do several specific provisions of H. R. 956 that would impede the ability of injured persons to gain fair and adequate recovery.

In particular, the bases for the President's veto are as follows:

First, the Administration, as noted in its Statement of Administration Policy on the Senate version, opposes an artificial ceiling on the amount of punitive damages that may be awarded in a product liability action. Statutory caps ignore the fundamental purpose of punitive awards: to punish and deter. While the Senate bill and the Conference Report allow judges to exceed the ceiling in certain circumstances, the explanation in the Statement of Managers that "occasions for additional awards will be very limited indeed" ~~does not satisfy~~ our concern. The Conference Report invites a wealthy potential wrongdoer to weigh

reveals a continuing basis for

the risks of a capped punitive damages award against the potential gains or profits from the wrongdoing.

Second, the Administration, as also noted in its Statement of Administration Policy on the Senate version, opposes Section 110, which would abolish joint-and-several liability for noneconomic damages (most notably, pain and suffering). This provision would severely and unfairly discriminate against those innocent victims whose injuries involve mostly noneconomic damages, rather than the sort of damages that can be measured by lost income. Elderly citizens, for example, would suffer. Noneconomic damages are as real and as important to victims as economic damages. Those who incur such damages should not suffer if one defendant has gone bankrupt or otherwise become unavailable.

In addition, the Administration is concerned that the Conference Report takes several steps backward from the Senate version. Most notably, the Conference Report deletes a provision that would have tolled the statute of limitations in the event of a stay or injunction against an action. Such a provision is critical when a potential defendant files for liquidation or reorganization, as happened in cases involving asbestos and the Dalkon Shield. In such a case, the bankruptcy court will issue a stay pending the completion of its proceedings; if the statute of limitations is not tolled, many injured persons run the risk of losing meritorious claims. Similarly, the Conference Report reduces the statute of repose from twenty years to a maximum of fifteen years (and less if states so provide). This change, which prevents a person from bringing suit against a manufacturer of an old product even if the product has just caused injury, also will preclude valid claims.

The Conference Report includes some good and useful provisions. In particular, Title II is a laudable attempt to ensure that suppliers of biomaterials will provide sufficient quantities of their products to manufacturers of medical devices. The Administration is committed to working with Congress to address this issue.

would

Nonetheless, the President ~~will~~ veto H.R. 956 ~~if presented to him in its present form~~ because of his concerns ~~about the provisions noted, which in the Administration's view unduly~~ that the bill, in its present form, interfere with state prerogatives and unfairly tilt the legal playing field to the disadvantage of consumers.

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Alexis
Hilley
Bruce
Ellen

EXECUTIVE OFFICE OF THE PRESIDE
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14-Mar-1996 01:02pm

TO: Jon Yarowsky
TO: Ellen S. Seidman
TO: Sally Katzen
TO: James J. Jukes

FROM: Elena Kagan
Office of the Counsel

SUBJECT: new version

The bill's

which

The Administration opposes, and the President will veto, the Conference Report on H.R. 956 in its current form.

The Administration would support the enactment of limited but meaningful product liability reform at the federal level. Any legislation, however, must fairly balance the interests of consumers with those of manufacturers and sellers. Further, any legislation must respect the important role of the states in our federal system. ~~The Conference Report fails to meet these requirements. On the basis of a~~ distorted set of findings, which for example fails to recognize that the current increase in litigation is attributable to commercial suits between corporations rather than consumer-initiated product liability actions, H.R. 956 sweeps too broadly in overhauling the product liability system.

do not meet this burden

As a general matter, product liability reform is the responsibility and prerogative of the states, rather than of Congress. This is an area in which states have served as laboratories, testing and developing new ideas and making needed reforms. As in other spheres of government, proponents of federal restrictions on traditional state prerogatives bear the burden of persuasion in justifying new federal intervention. ~~For several provisions in particular, noted below, this burden has not been met.~~

Moreover, the Conference Report unfairly tilts the legal playing field to the disadvantage of consumers. Many provisions of H.R. 956, such as those dealing with punitive damages and the statute of repose, displace state law only when that law is more favorable to the consumer; when state law is more favorable to

manufacturers and sellers, it remains in operation. This "one-way preemption" too greatly shifts the balance away from consumers. So too do several specific provisions, ~~noted below,~~ that would impede the ability of injured persons to gain fair and adequate recovery.

In particular, the Administration opposes Section 108, which imposes an artificial ceiling on the amount of punitive damages that may be awarded in a product liability action. As the Administration has previously stated, statutory caps are improper because they ignore the fundamental purpose of punitive awards: to punish and deter. The ~~so-called additur~~ provision, allowing judges to exceed the ceiling in certain rare circumstances, does not solve this problem, especially ~~given~~ ~~the gloss given to~~ that provision in the Statement of Managers, which says that

in light of the explanation

damages

"occasions for additional awards will be very limited indeed." Section 108 invites a wealthy potential wrongdoer to weigh the risks of a capped punitive award against the potential gains or profits from the wrongdoing.

The Administration also opposes Section 110, which would abolish joint-and-several liability for noneconomic damages (most notably, pain and suffering). This provision would severely and unfairly discriminate against those innocent victims who suffer mostly noneconomic damages, including elderly citizens and others with little future income. Noneconomic damages are as real and as important to victims as economic damages. Those who suffer such damages, like all other victims, should not have to bear the burden of rounding up every conceivable defendant; neither should they suffer if one defendant has gone bankrupt.

In addition, the Conference Report takes a large step backward from the Senate version in deleting a provision that would have tolled the statute of limitations in the event of a stay or injunction against an action. Such a provision is critical when a potential defendant ~~goes bankrupt~~, as recently happened in cases involving asbestos and the Dalkon Shield. In such a case, the bankruptcy court will issue a stay pending the completion of its proceedings; if the statute of limitations is not tolled, many injured persons ~~will lose~~ their claims.

run the risk of losing

Finally, the Conference Report completely fails to address one significant problem: the increasingly familiar situation of a foreign national who is unavailable to receive process for a defective product put in the stream of commerce in the United States. A fair system of justice would ensure that foreign manufacturers are held to the same ~~high~~ standard of responsibility as are domestic manufacturers.

The Conference Report includes some good and useful provisions. In particular, Title II is a laudable attempt to ensure that suppliers of biomaterials will provide sufficient quantities of their products to manufacturers of medical devices. The Administration is committed to working with Congress to address this issue.

however, for the reasons stated above,

The President ~~however~~ will ~~have to~~ veto the Conference Report, if presented to him in its present form, ~~because of its provisions on punitive damages and non-economic damages, both of which~~ interfere unduly with state prerogatives and unfairly skews the legal playing field away from consumers.

as it

files for liquidation or reorganization,

The Conf Report
HR956

The Administration opposes, and the President will veto, ___ in its current form.

The Administration would support the enactment of limited but meaningful product liability reform at the federal level. Any legislation, however, must fairly balance the interests of consumers with those of manufacturers and sellers. Further, any legislation must respect the important role of the states in our federal system. ___ fails to meet these requirements.

As a general matter, product liability reform is the responsibility and prerogative of the states, rather than of Congress. This is an area in which states have served as laboratories, testing and developing ever better ideas. As in other spheres of government, proponents of federal restrictions on traditional state prerogatives bear the burden of persuasion in justifiying new federal intervention. For several provisions in particular, noted below, this burden has not been met.

Moreover, ___ unfairly tilts the legal playing field to the disadvantage of consumers. Many provisions of ___ displace state law only when that law is more favorable to the consumer; when state law is more favorable to manufacturers and sellers, it remains in operation. This "one-way preemption" too greatly shifts the balance away from consumers. So too do several specific provisions, noted below, that would impede the ability of injured persons to gain fair and adequate recovery.

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system of joint-and-several liability.

___ includes some good and useful provisions. In particular, Title II is a laudable attempt to ensure that suppliers of biomaterials will provide sufficient quantities of their products to manufacturers of medical devices. The Administration is committed to working with Congress to address this issue.

The President, however, will have to veto ___, if presented to him in its present form, because of its provisions on punitive damages and non-economic damages, both of which interfere unduly with state prerogatives and unfairly skew the legal playing field away from consumers.

Earlier narrower

findings — unsupported by record.

- Make worse - bring back to [illegible]
- S of L - tolling | one-way only

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state remittitur

E-mail to

Ellen S.
Sally K.
Jim J.

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