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Memos

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20502
April 26, 1996

MEMORANDUM FOR MARILYN YAGER
ELENA KAGAN

THROUGH: ERNEST J. MONIZ

FROM: RACHEL LEVINSON

SUBJECT: BIOMATERIALS

As we discussed earlier, I would like to provide some background information for your consideration in developing the Administration position regarding product liability reform.

According to experts in the fields of tissue engineering and medical devices, availability of the biomaterials that form the basis for existing products and research into future innovations is rapidly becoming a serious problem. One example is DuPont phasing out the use of Teflon® for all implantable devices. As you know, Teflon® is in widespread use for vascular assist devices; grafts, valves, etc... There are many exciting new avenues of investigation that have great potential. For instance, a California company is preparing a request for FDA pre-market approval of "tissue engineered skin," a material that could be used in the treatment of severe burns and diabetic foot ulcers. Research also is being conducted on other biomaterials that form the scaffolding for artificial organs, bones and cartilage. In October, 1995, the National Institutes of Health convened a major workshop to discuss the latest research advances and future prospects in biomaterials and medical implant science. A copy of the executive summary is attached.

There are three factors that contribute to the environment of uncertainty surrounding the medical device industry: product liability, regulation and third-party reimbursement. Of these, product liability has been accorded the greatest weight among the investment community. Both product liability and regulatory concerns contribute to a small, but noteworthy shift toward offshore research, development and production. OSTP's principal interests are ensuring that research into the development of important healthcare products go forward without unnecessary barriers, and that new products are adequately tested to insure safety, efficacy and quality, prior to broad application in the general population.

Based on information about the utility of biomaterials, it appears that the concept of providing responsible manufacturers with some form of protection from product liability would be a wise investment in public health. Please let me know if there is any further information I may provide.

Attachment

cc: Jack Gibbons
Tim Newell

Biomaterials and Medical Implant Science: Present and Future Perspectives

A National Institutes of Health Workshop

October 16-17, 1995

Summary Report

EXECUTIVE SUMMARY

A new vision has emerged in the field of medical implants, that of being able to design whole organs based on a comprehensive scientific understanding of materials and their interactions with the body. Progress in advanced materials characterization and rational synthesis, together with molecular advances in understanding biological responses, has set the stage for an ultrastructural basis for biomaterials and implant design.

An estimated 11 million people in the United States have medical implants, attesting to the importance and value that implants have in both saving and improving the quality of lives. In the great majority of cases, implants have been successful in achieving the performance for which they were designed.

Despite this success, the Nation is on the brink of losing its position of leadership in the biomaterials field and in the associated $40-50 billion per year medical device industry. Progress toward reaching our vision is threatened by the current fragmented approach to funding research in this area, and the resulting absence of integration of efforts among the biological, health, and material sciences. The whole enterprise must be put on a firmer scientific and technical basis to counteract liability issues. This can be accomplished by providing the needed realistic determination of risk-benefit assessments of individual implants as well as realistic expectations for the performance and safety of medical devices.

In response to the scientific opportunities and public concerns in this area, the National Institutes of Health (NIH) convened a 2-day workshop October 16-17, 1995, bringing together more than 100 university, industry, and government experts in biomaterials, medical implants, and the clinical sciences. These experts were charged with recommending directions that would advance the science in this important field.

A number of workshop presenters provided exciting examples of recent scientific progress and described their visions for the future. In addition, six working groups convened to discuss topics relevant to improving the quality of medical implants. The findings of these working groups, upon which unanimous and integrated recommendations are based, are summarized in the attached report. The integrated recommendations are provided below and can be divided into two categories: (1) scientific priorities leading to full understanding and creation of successful implants and (2) an implementation strategy to help realize the future potential of the research advances in the field of biomaterials and medical implants.

Scientific Priorities

1. ***Biologically Based Materials Design.*** Materials and devices endowed with biological structures and functions must be designed and developed. This will involve multidisciplinary approaches to synthesizing new, perhaps "smart" or self-monitoring materials designed for cell-based, drug-based, and gene-based therapies.

2. ***Scientific Basis for Determining Performance and Quality of Implants.*** More efficient methods to assess human acceptance of biomaterials must be developed, as must more predictive, less costly in vivo and in vitro models. This will require a focus on reliability, accelerated testing, failure analysis, imaging, models, clinical trials, outcomes analysis, and improved understanding of the biology-biomaterial (host-implant) interface.

3. ***Advanced Processing and Manufacturing.*** Attention must focus on the processing and manufacture of well-characterized materials, including biostable materials as well as bioresorbable and scaffold materials.

Implementation Strategies

The primary recommendation is the promotion of mechanisms to facilitate multidisciplinary research and design through mission-directed and hypothesis-driven programs. In light of this primary recommendation, workshop participants recommended the following three specific actions:

1. ***Programmatic Changes.*** Programs of excellence (both local and distributed) are needed to provide an adequate range of crossdisciplinary core infrastructures in research, design, and education.

2. ***Central Resources.*** A central resource of databases relating to materials and devices as well as reference materials for research and education should be created.

3. ***Integration of Approach.*** An integrated programmatic approach and review of biomaterials activity is needed, including coordinated, cooperative funding among NIH components as well as other agencies, such as the National Science Foundation and the National Institute of Standards and Technology.

All workshop participants shared enthusiasm for the challenges and opportunities that motivated the NIH to convene this review. They believe that if the workshop recommendations are implemented, the vision of being able to design whole organs based on a comprehensive scientific understanding of materials and their interactions with the body will become a reality. Both the patient population and the medical device industry in the United States will benefit greatly from achieving this vision.

THE WHITE HOUSE

WASHINGTON

April 25, 1996

MEMORANDUM TO DON BAER

FROM: BRUCE LINDSEY

SUBJECT: PRODUCT LIABILITY VETO CEREMONY

If and when Congress sends us the Product Liability Conference Report, we should consider a veto "event" involving real people.

Attached is a memo outlining possible cases. One of the more compelling cases is the young man who lost both arms in a hay baler accident. The jury award came on the same day the Senate passed the conference report. As the memo indicates, because of the 15 year statute of repose in the conference report, this young man would not have been able to bring the case if the bill had been law.

CC: Jack Quinn
Doug Sosnik
John Hilley
Alexis Herman
George Stephanopoulos

Proposed Cases for Use in a Product Liability Veto Media Event

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The following are proposed cases and individuals/organizations that could be used in a Product Liability bill veto media event, and for later media availability. These cases represent compelling victims of defective products who can show how this bill would have changed the outcome of their cases, their lives and the lives of all of us.

A media event is necessary to give this fight the proper focus: it is not about lawyers; it is about consumers who are hurt -- and even killed -- by reckless companies.

A media event with the President surrounded by victims, police officers, fire fighters, attorneys general, state legislators and consumer group leaders, would show the public that by vetoing this bill the President is:

- Standing up for the thousands of average Americans who are injured by defective products each year.
- Strongly pro-consumer, fighting to protect public health and safety.
- Tough against corporate crime and indifference, which results in the manufacture of defective products.
- Expecting corporate America to be good citizens and to be held accountable for their actions.

SPECIFIC CASES THAT WOULD HAVE BEEN AFFECTED BY THE BILL

NOTE: This is a preliminary list of the cases that could be used to highlight various harmful effects of the bill. More will be forthcoming.

1) Wisconsin/Oregon Worker Injury Case: The same day the Senate passed the Product Liability bill a jury in Racine, WI, ordered a company to pay $8.5 million (reduced to $6.3 million) in damages to a young man who lost both arms in a tractor hay baler. He would not have been able to bring the case if the bill had been law -- even to recover health costs and lost wages -- because the hay baler was 20 years old.
The young man and his parents are available to speak with the news media.

2) Texas Gas Explosion Case: This past February a Houston jury assessed a $72 million punitive damages judgment against a gas firm after an explosion killed three people and injured 21 others. One month later, a provision was secretly inserted into the Product Liability Conference Report that would make such cases subject to the punitive damages cap. Therefore, if this bill had been law the maximum punitive damages award that could have been assessed is $10.9 million, 85 percent less than what the jury awarded.
Members of two families are available to speak with the news media.

3) Ford Bronco Case: In 1995, an Indiana jury awarded two women $58 million in punitive damages against Ford for faulty design of the Bronco II vehicle, and another $4.4 million in compensatory damages for permanent injuries and medical care. The vehicle's design was unusually prone to rollovers -- more than 260 people have been killed this way, several times more than for any comparable vehicle. If H.R. 956 had been law the punitives cap would have

allowed for an award of only $8.8 million, 85 percent less. Original design changes proposed by Ford engineers would have cost only $83 per vehicle.
The victims mother is available to speak with the news media.

4) GM Forced to Change Dangerous Pickup Truck: In 1993, a Georgia jury assessed a $101 million punitive damage award against GM for a defective fuel-tank design. Compensatory damages were only $4.2 million; a doubling of that amount would hardly have garnered the attention of the public and the National Highway Transportation Safety Administration, which asked GM to recall the vehicles two months after the jury award.
The parents of one dead victim are available to speak with the news media.

5) Tobacco Companies Potentially Escape Liability: The cap on punitive damages could affect tobacco litigation, particularly against those firms that lied to consumers about cigarette dangers, manipulated nicotine content and targetted children.
Mississippi Attorney General Mike Moore might participate in an event. Representatives of the American Heart Association, American Lung Association and the American Cancer Society might also be available.

ADDITIONAL CASE EXAMPLES THAT ILLUSTRATE THE BILL'S HARMFUL EFFECTS

1) Minnesota Garage Door Death: Many automatic garage door openers are older than 15 years, the bill's statute of repose. A Minnesota child was among at least 45 children who have died from defective openers, which used to lack adequate safeguards allowing the closing door to reverse direction. As a result of a defective product case brought on behalf of the Minnesota child, the state and then Congress passed legislation requiring automatic back-up devices on garage door openers.
The child's mother is available to speak with the news media.

2) Maryland Man Killed While Testing Defective Equipment: In 1989 a Maryland man was killed while inspecting a defective machine that had earlier injured a fellow worker. His death was recorded on videotape while testing the machine for the product manufacturer. His family was awarded $2.8 million in compensatory damages. If the machine had been more than 15 years old the family could not have even brought the lawsuit.
The wife of the product tester is available to the news media.

3) Protection for Gun Sellers: The seller liability provision in the bill would let gun dealers who knowingly sell firearms to convicted felons, minors, and high-risk individuals who then use the weapons to injure or kill to receive the bill's protections. Most gun dealers would have their liability capped at $250,000 because they are a small business. A Florida gun dealer sold a gun to an intoxicated man, who required assistance in filling out the paperwork. The man shot his estranged girlfriend and rendered her a quadriplegic. A jury ordered the reckless dealer to pay $11.5 million in compensatory damages. Note: There was no punitives award, so this case would not have been affected by the bill.
Gun control groups and police officials could speak to the news media.

Recent Wisconsin\Oregon Case Illustrates Draconian Effect of Product Liability Bill

Oregon Man Who Had Both Arms Cut Off Would Have Been Barred From Court

On March 21, the Senate passed the final conference report on the product liability bill, which would greatly limit citizens' rights and access to the courts. That same day, a jury in Racine, Wisconsin, ordered manufacturing giant J.I. Case Corporation of Racine to pay $6.5 million in compensatory and $2 million punitive damages to a young man who had both arms cut off in an Oregon farm accident involving a defectively designed tractor hay baler. *This case could not have been tried under the proposed product liability bill because it bars lawsuits where a product is more than 15 years old, regardless of whether the product was built to last 15, 20 or even 50 years. J.I. Case could not have been sued to compensate the victim for medical costs or lost wages due to the accident.*

In the Racine case, the defective 970 Case tractor hay baler was 20 years old at the time of the accident. During the trial, it was learned that J.I. Case could have made the tractor hay baler safe if a 70-cent part had been included in the original manufacture of each machine. Even though the manufacturer inspected the tractor involved in the accident, and found that the systems in question functioned in the same way as when the tractor left the factory 20 years ago, the arbitrary age limit established under this bill would have prevented this young man from even getting in the courthouse door.

The victim in the J.I. Case farm accident, Steven Sharp, was 17 years old in 1992 when the diesel tractor's baler from which he was clearing hay self-started without warning, pulling him into the baler and cutting off both of his arms. The jury, which heard the case in a courtroom five blocks from the J.I. Case corporate headquarters, took its responsibilities in this case with utmost seriousness and determined that the young man was partly to blame for his injuries. Accordingly, the compensatory award was reduced to $4.3 million.

Two previous tragedies were a direct result of this same design defect. In 1985, Mickey Jones of Minnesota had his right arm mangled and in 1990 Raymond Tautges of Tennessee was decapitated. There are reportedly as many as 40,000 Case tractors like the ones that caused these tragedies in use by farmers nationwide.

William H. Manning, Sharp's attorney with the firm of Robins, Kaplan, Miller & Ciresi, is available to discuss this case. His direct number is (612) 349-8461. **Steven Sharp, Mickey Jones and Michael Tautges,** the son of Raymond Tautges, also are available to present the perspective of injured consumers and families.

FEDERAL PRODUCT LIABILITY BILL WOULD JOLT TEXANS AGAIN

Natural Gas Companies Responsible For Disaster
Would Have Gotten a Slap on the Wrist

The companies responsible for a deadly natural-gas blast in April 1992 near Brenham, Texas, would have made out like bandits had the product liability bill recently passed by Congress been the law in that state at the time: *the punitive damages judgment against them would have been reduced 85 percent, from $72 million to $10.9 million*. The explosion killed three people and injured 21 others, and caused more than $9 million in property and livestock damage in two counties. The blast was recorded on seismic monitors in Austin, about 70 miles from the site, and rattled windows more than 90 miles away.

A Houston jury decided this case in February 1996. One month later a provision was secretly inserted into the Conference Report that expanded the scope of the bill to include energy-related disasters -- a special interest benefit that would protect wrongdoers such as the gas companies responsible for the Brenham blast.

The jury found that MAPCO and subsidiaries Seminole and Mid-America Pipeline, all of Tulsa, Oklahoma, placed profit over the safety of their workers and community by recklessly overfilling a storage cavern with highly volatile natural gas to twice its operating permit capacity. The jury learned that regulatory agencies uncovered numerous flaws in operating and safety procedures at the time of the explosion and that the companies were aware that the site was understaffed and lacked adequate safety equipment.

This "flagrant disregard" for others earned these companies a $138 million punitive damage verdict, subsequently reduced to $72 million by the trial judge. A juror said afterward that this unanimous decision "should make a real statement for safety concerning something as dangerous as this gas." The companies redesigned and upgraded safety systems at the site following this tragedy.

Regina and W.W. O'Donnell's lives and land were hit hard. All they wanted was fair compensation for their losses, but the companies' indifference to their plight left them no choice but to seek redress through the justice system. Gayle and Bill Tonn's lives also were forever changed by the explosion, which destroyed their home and killed several cattle. Gayle summed up the feelings of all those affected by the blast when she stated that a "big, giant corporation like that should have had more regard for the people around [it]."

This legislation would arbitrarily limit punitive damages in cases involving natural gas, no matter the underlying facts of the specific case, to $250,000 or two times "compensatory" damages, whichever is greater. Because compensatory damages in this case totalled $5.4 million, the most the jury could have awarded in punitive damages had this cap been in place is $10.9 million -- a drastic cut from what the jury deemed sufficient to punish these reckless companies, which have a combined net worth of about $1 billion.

Attorneys **George Chandler, Jeff Paradowski** and **Joseph Garnett** are available to discuss this case and provide insight into the effects of the product liability legislation. Mr. Chandler and Mr. Paradowski can be reached at (409) 632-7778; Mr. Garnett at (713) 951-1016. The O'Donnell and Tonn families may be available to give a consumer perspective on this issue and may be reached through Mr. Garnett.

DEFECTIVE FORD BRONCO II DEVASTATES INDIANA FAMILY

260 People Killed in Vehicle Rollovers

In August 1991, Lana Ammerman Caskaden, 15, and Pamela Ammerman, 19, were severely injured when they were ejected from the Ford Bronco II in which they were passengers. The Bronco II rolled over four times after the driver swerved to avoid an accident. Caskaden suffered disfiguring facial cuts and partially disabling neurological damage, while Ammerman was severely brain damaged and is now in the care of a legal guardian.

Testimony at trial revealed that the Bronco II's high, short and narrow design made it unusually prone to rolling over during normal use and that more than 260 people have died in Bronco II rollovers, several times more than in any comparable vehicle. It also was learned that Ford engineers knew of the Bronco II's propensity to roll over in early production tests, but opted for cheap fixes and adjustments instead of taking the time and making the proper investment to adequately stabilize the vehicle. Most telling, Ford's in-house lawyers had created an unprecedented set of internal procedures to brace for anticipated lawsuits.

As a result of this testimony, in 1995 an Indiana jury awarded $58 million in punitive damages against Ford, and $4.4 million to compensate the two women for their permanent injuries and medical care. The jury reached its punitive damage figure by multiplying the number of Bronco II vehicles produced by $83 -- the amount Ford should have invested in each vehicle to lower and widen the design as suggested by its own engineers.

Under the Product Liability Conference Report (HR 956), punitive damages would be limited, no matter the underlying facts of the specific case, to $250,000 or two times "compensatory" damages, whichever is greater. Because compensatory damages in this case totalled $4.4 million, the most the jury could have awarded in punitive damages had this cap been in place is $8.8 million -- about 85 percent less than the amount the jury deemed sufficient to punish this corporate giant.

Punitive damages, which are rare, serve a vital societal purpose by punishing manufacturers when their conduct threatens the safety of the community. Capping these awards would allow wrongdoers such as Ford to calculate their potential liability and would give the worst actors greater incentive to weigh their liability against the cost of changing the harmful conduct. The limits on damages advocated in the legislation would weaken the deterrent power of these awards and allow reckless manufacturers to escape full responsibility and conceal their products' dangers from the public.

Vickie Ammerman (mother) can be reached through attorney Scott Montross at (317) 264-4444.

TOBACCO COMPANIES WOULD REAP GREAT BENEFITS UNDER PRODUCT LIABILITY BILL

In late March, Congress passed a product liability bill that would make it much more difficult for Americans injured by defective products to seek fair compensation and hold wrongdoers accountable. There has been little, if any, attention on how this legislation would insulate tobacco companies from punishment for allegedly lying to customers about the danger of cigarettes, manipulating nicotine content to hook smokers and targeting the most susceptible citizens: children.

This legislation would cap punitive damage awards at $250,000 or two times compensatory damages, whichever is greater, thereby severely limiting a major potential deterrent to tobacco industry wrongdoing. While extremely rare, punitive damages are assessed to punish flagrant or intentional wrongful conduct and to serve as a disincentive to future misbehavior.

The $45 billion tobacco industry would benefit tremendously from this legislation, despite its alleged fraud and deception regarding the health risks and addictive qualities of its product:

- In March, three former managers and scientists from Philip Morris revealed that tobacco companies knew that nicotine was addictive and that they controlled the manufacturing process to enhance nicotine levels. These assertions contradict statements made under oath by Philip Morris president William Campbell and other top industry executives when they testified before a House subcommittee in 1994.

- In November 1995, a former research chief of Brown & Williamson stated in a deposition how the company and senior executives perjured themselves in front of Congress, destroyed incriminating evidence, quashed research into safer cigarettes and recklessly used possibly harmful additives.

- A Philip Morris memo written sometime between 1992 and 1995 compares nicotine with cocaine and morphine and accepts without question that the main reason people smoke is to get nicotine into their bodies.

- A memo from the 1970s details how tobacco companies strategically targeted children as potential consumers and considered ways in which to capture the "youth market." The memo reveals that hooking this age group was essential in order for the companies to prosper.

Right now in New Orleans, Dianne Castano, whose cigarette-smoking husband Peter died at age 47 of lung cancer, is heading a class-action lawsuit against big tobacco that accuses the industry of defrauding the public by hiding its knowledge that nicotine is highly addictive. Dianne is convinced her husband could not quit a habit he started when he was 16 because of the manipulated levels of nicotine in this product. Even if a jury found that a smoker such as Castano bore some responsibility for his habit, this does not diminish the fact that tobacco manufacturers ensnared their customers by deliberately lying about the dangers of their product. In a case like this, punitive damages clearly would be warranted if these allegations prove true. By arbitrarily capping punitive damages, this bill would severely limit a major deterrent to tobacco industry wrongdoing.

Russ Herman, an attorney in the Castano case, is available to discuss the tobacco issue and can provide direct insight into the effects and implications of the product liability legislation on these lawsuits. His direct number is (504) 581-4892.

GEORGIA FAMILY'S TRAGEDY EXPOSES DANGER OF PRODUCT LIABILITY BILL

Had the product liability bill recently passed by Congress been the law in 1989, the Moseleys might never have been able to bring General Motor's wrongdoing to light and to fully punish the reckless manufacturer for the misconduct that resulted in their son's death.

The Moseley family was devastated in 1989 when Shannon Moseley's GM Sierra pickup was hit on the side by a drunk driver who ran a red light. Though Shannon survived the impact, the collision ruptured the truck's fuel tank, causing the vehicle to be engulfed in flames. Shannon died in the fire. He was 17.

GM was eager to settle this case. A secret settlement would ensure that this defect remained safely hidden from the public. But the Moseleys were determined to hold GM fully accountable in order to expose the company's indifference to public safety.

In February 1993, a Fulton County jury ordered General Motors to pay $101 million in punitive damages to Tom and Elaine Moseley, Shannon's parents. The jury found that GM knew its trucks had a defective fuel-tank design but had failed to correct it. GM had placed the fuel tank outside the frame of the pickup, which safety advocates said made it vulnerable to puncturing during a crash. Trucks manufactured between 1973 and 1987 had this tank design. Beginning in 1988, GM moved the tanks inside the truck frame, but denied it did so for safety reasons.

A former GM safety engineer revealed during the Moseley trial that GM had intentionally hidden its knowledge of this dangerous safety defect for fear of alerting the public. In addition, videotapes of GM's own crash tests between 1981 and 1983 showed that when the pickup was struck on the side by another vehicle its fuel tank broke open.

Though the award was reversed on appeal, as many punitive awards are, it sent a powerful message. Just two months after the verdict, the National Highway Transportation Safety Administration called for GM to voluntarily recall its defective trucks. This led to an agreement between GM and the government in 1994 requiring the manufacturer to initiate safety and research programs to better its vehicles.

If GM had its way, it would have continued covering up the deadly defect in its vehicles by entering into confidential settlements with injured consumers and their families. The Moseley case, which settled on the eve of retrial, and the jury's punitive damage award exposed the corporation's reckless behavior.

Under the product liability bill, punitive damages would be arbitrarily limited to $250,000 or two times "compensatory" damages, whichever is greater. Because compensatory damages in this case totalled $4.2 million, the most the jury could have awarded in punitive damages had this cap been in place is $8.4 million -- a drastic cut from what it deemed after hearing all the facts to be necessary to sufficiently punish a corporate giant such as GM. The public might never have been alerted to this safety hazard.

James E. Butler, the Moseley's attorney, is available to discuss this issue and can provide direct insight into the effects and implications of the product liability legislation. His direct number is (404) 321-1700. **Tom and Elaine Moseley** are also available to present a consumer perspective on this issue.

MINNESOTA WOMAN TOUCHED BY TRAGEDY OPPOSES DANGEROUS PRODUCT LIABILITY BILL

In late March, both Houses of Congress passed the final conference report on the product liability bill, which would severely limit citizens' rights and access to courts. This bill would completely bar lawsuits where a product is more than 15 years old, regardless of whether the product was built to last 15, 20 or even 50 years.

Patti Fritz's story puts a face on the tragedy that killed her little girl, Katie, and killed and injured many other innocent children. Katie was 6 years old when she was crushed to death in June 1989. She was getting her bike from the garage to ride to a neighborhood birthday party when an automatic garage door failed to reverse after closing on her. It was discovered that the automatic garage door opener lacked adequate safeguards to prevent such a catastrophe from occurring. In fact, the U.S. Consumer Product Safety Commission found that at least 45 children died nationwide between 1982 and 1990 by failed automatic garage door openers.

Devastated by the tragedy inflicted by this household death trap, Patti made sure that her little girl would not be forgotten. Using our justice system, she held those responsible for Katie's death accountable. Encouraged, she kept up the fight for positive change, testifying before legislators and urging the adoption of better safeguards and warning labels. In April 1990, Minnesota became the first state to mandate safe automatic garage door openers. Later that year, this law became a model for the nation when Congress required manufacturers to include automatic back-up devices on garage door openers. In America today, you can no longer buy a garage door opener like the one that killed Katie Fritz.

Patti now feels compelled to speak out again after learning of the product liability bill and its absolute bar on claims by persons injured by defective products more than 15 years old. Many unsafe automatic garage door openers well past this age limit are still in use by unsuspecting citizens. A family whose child is now injured by one of these openers would not be able to hold the careless manufacturer accountable.

Shawn Bartsh, Patti Fritz's attorney, is available to discuss this issue and can provide direct insight into the effects and implications of the product liability legislation. Her number is (612) 699-0601. **Patti Fritz** is also available to present a consumer perspective on this issue.

MARYLAND WOMAN'S TRAGEDY HIGHLIGHTS DANGER OF PRODUCT LIABILITY BILL

In late March, both Houses of Congress passed the final conference report on the product liability bill, which would greatly limit citizens' legal rights and access to the courts. Most notably, this bill would absolutely bar lawsuits where a product is more than 15 years old, regardless of whether the product was built to last 15, 20 or even 50 years.

Penny Tognocchi's husband, Ronald, was killed in June 1989 by a machine he was testing in order to protect other workers from harm. A week earlier, a man at the plant was injured when this motorized man lift -- a hydraulic work platform -- buckled under him. Ronald, a safety engineer at the company, had the machine's manufacturer inspect it, but the representative the manufacturer sent found nothing wrong with the man lift. Not satisfied with this scrutiny, Ronald decided to inspect it himself. While conducting this test, the man lift went out of control and threw Ronald into the air; he crashed down into a steel bar, which punctured his heart. He died seconds later. On October 18, 1991, a Maryland jury that heard all the facts awarded the Tognocchi family $1.3 million for economic loss and $1.5 million for loss of husband and father.

Though the machine that killed Ronald was not yet 15 years old at the time of this tragedy, most industrial equipment is designed to last -- and is indeed used -- for decades. Had this man lift been one day over 15 years, Penny would have been absolutely stripped of her basic right to hold the manufacturer accountable for producing such a dangerous product. Even if the manufacturer came and inspected the machine involved in the accident and found that it functioned in the same way as when it left the factory, the arbitrary age limit established under this bill would prevent those injured and the families of those killed from even getting in the courthouse door. The company even could not have been sued to compensate the victim for medical costs or lost wages due to the accident.

Daniel M. Clements, Penny's attorney, is available to discuss this issue and can provide direct insight into the effects and implications of the product liability legislation. His direct number is (410) 539-6633. **Penny Tognocchi** is also available to present an articulate consumer perspective on this issue.

PRODUCT LIABILITY BILL WOULD GIVE SPECIAL PROTECTION TO UNSCRUPULOUS GUN DEALERS

Legislation Also Would Grant Immunity to Defective Firearm Manufacturers

The final conference report on the product liability bill, recently passed by the Senate and House of Representatives, is a vote against gun control and the victims of death and injury by firearms. This legislation contains provisions that primarily would benefit unscrupulous gun dealers and manufacturers of defective firearms and make it very difficult for many victims of gun violence and defective weapons to recover fair compensation.

Consider these cases:

- In December 1987, a gun store in Tampa sold a rifle to Thomas Knapp, who was so intoxicated at the time that the sales clerk had to help him fill out the paperwork. Knapp then hunted down Deborah Kitchen, his estranged girlfriend, and shot her in the neck, rendering her a quadriplegic. A Florida jury ordered the reckless gun seller to pay $11.5 million in damages. The case is currently on appeal to the state Supreme Court.

- In December 1988, Nicholas Elliot, barely 16, walked into his school in Virginia Beach and shot and killed one teacher and wounded another with a rifle he purchased from Guns Unlimited, a local dealer. The boy, though with an older cousin in the store, told the sales clerk which gun he wanted and carried the firearm from the store.

The bill's *seller liability* provision would let gun dealers who knowingly sell firearms to convicted felons, minors and high-risk individuals who then use the weapon to inflict death or injury to get away with their misconduct. Such "negligent entrustment" cases now fall under the protections of the bill, meaning that these dealers can benefit from the punitive damage cap of $250,000 or two times "compensatory" damages, whichever is greater. They would enjoy the elimination of joint liability for "non-economic" losses such as permanent loss of health and disfigurement. Although rarely used, joint liability guards injured citizens from having to absorb costs just because some guilty parties have gone out of business or are beyond the reach of the law. Now this legal protection is gone. Gun dealers would also benefit from the bill's "small business" cap, limiting punitive damages to a maximum of $250,000 for businesses with fewer than 25 employees.

Arbitrary damage caps eliminate a major deterrent to gun seller misconduct. These cases clearly warrant meaningful punitive damages.

The conference report also would arbitrarily cut off the right of citizens to hold gun manufacturers accountable when they are injured by a defective weapon that is more than 15 years old, regardless of the fact that these products are made to last much longer. Consider how the bill would have affected this case:

- In January 1996, Richard Jaramillo of Santa Fe was killed when a Sturm, Ruger & Co. "Old Model" gun fell from his hands, hit the ground and discharged into his abdomen. These guns, manufactured between 1953 and 1972, have been responsible for more than 600 accidental discharge deaths and injuries. Despite Ruger's knowledge of the Old Model's design defect (it modified the design in 1972 to eliminate this hazard), it refuses to issue a recall of the gun.

-- continued --

The Jaramillo family would be absolutely barred from holding the manufacturer liable for Richard's death under the bill's 15-year limit, even though this gun was built to last for decades. The family would not be able to even recover compensation for the victim's medical costs or lost wages, which could be a considerable amount given the young age at which he was killed.

Kristen Rand, director of federal policy at the national non-profit Violence Policy Center, is available to discuss this issue and can provide direct insight into the ramifications of the product liability legislation as well as cases that would be affected. Her number is (202) 822-8202. **Robert Garvey**, Kitchen's attorney, is available to discuss this case. His direct number is (810) 779-7810. **Deborah Kitchen** also is available to present the perspective of injured consumers and families.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20502

April 17, 1996

NOTE TO MARILYN YAGER

FROM: RACHEL LEVINSON REL

SUBJECT: BIOMATERIALS

Background:

The Office of Science and Technology Policy (OSTP) is pleased to clarify misinformation regarding its interest in biomaterials. Congress has established the Critical Technologies Institute (CTI) to serve as a research resource to OSTP. The contract to operate CTI was awarded to the Rand Corporation. Part of CTI funding is a core grant which allows the Director to start projects. Out of these, OSTP may choose to support further activities in specific areas of interest. In October 1995, CTI approached OSTP with a proposal for a workshop on biomaterials and product liability. The proposal stemmed from a research paper that was written by a temporary employee of CTI, without OSTP knowledge or approval, using core grant funds. The research paper had been reviewed by a number of people, including government scientists, academicians and industry, thus allowing it to circulate in the pubic domain. OSTP reviewed the workshop proposal and expressed interest only in the scientific and technological aspects; i.e., assessing the current state-of-the-art of biomaterials research, how it is being used in developing novel medical products, the status of availability of biomaterials and what research advances, if any, are being constrained through lack of availability of source materials.

CTI came back with a revised proposal for a workshop that retained a central focus on product liability issues. The proposal would have required programs funds approved by OSTP. OSTP rejected the workshop proposal. OSTP is still interested in learning about biomaterials in a research and development context. Rand, through its Institute on Civil Justice, may choose to pursue the product liability issue, without any support or connection with OSTP.

A letter confirming this information is expected shortly from Bruce Don, CTI Director. I will forward a copy of this to you as soon as it arrives.

Talking Points:

OSTP was approached with a proposal for funding a workshop on biomaterials and product liability. The proposal was denied.

cc: Jack Gibbons
Ernie Moniz

Critical Technologies Institute

April 17, 1996

Bruce W. [illegible]
Director

Dr. Ernest Moniz
Associate Director
Science Division
Office of Science and Technology Policy
Old Executive Office Building
Washington, DC

Dear Ernie:

As we discussed yesterday, it seems appropriate for me to clarify some matters about the project that CTI/RAND is conducting to assess the potential for a strategic shortage in key biomaterials and the technical issues that underpin this situation.

It appears that a "for-comment" draft of this research that we have shared with colleagues outside RAND has come to the attention of others who have an interest in this issue. I should reiterate that we welcome specific comments from all who have a perspective on this issue and its technical considerations. I invite them to contact me directly at CTI to discuss their concerns and perspective.

It may be helpful to others to explain that as part of our core research program CTI hosts several Fellows each year with unique credentials from the private sector's Science and Technology community. These Fellows are invited to conduct research during their tenure at RAND to investigate issues they believe to be of national importance. Under these auspices, and at my discretion as the Director of CTI, we are exploring the possibility and nature of a potential strategic shortage of biomaterials. This research has yet to undergo our peer review process. If it passes that review and produces what we believe to be important results we would plan to put the findings in the public domain, as we do with all our research, by publishing a RAND report.

In further support of the RAND/CTI mission to help improve public policy through unbiased, independent analysis CTI had proposed to OSTP that the peer reviewed findings of this analysis be used to inform a roundtable to discuss the wide range of perspectives on this issue. As you and I have discussed, OSTP feels that a roundtable is not needed and we recognize that our question of OSTP interest in a roundtable is a closed matter.

I hope this helps clarify matters relating to this research and would like to reiterate that RAND welcomes the views of others with a perspective on this matter.

Sincerely,

BWD:lt

cc: Rachel Levinson
Ram Bhat

RAND

2100 M Street, N.W.
Washington, D.C. 20037-1270
Tel: (202) 296-5000
Fax: (202) 872-0117

THE WHITE HOUSE

WASHINGTON

April 9, 1996

MEMORANDUM FOR JACK QUINN

FROM: ELENA KAGAN EK

SUBJECT: CONVERSATION WITH JOHN SCHMIDT

In a conversation yesterday, John Schmidt expressed real displeasure about where the Administration is on products liability reform. He believes we should try to get a bill this year. He believes the President wants a bill this year. He believes we have led our friends in the Senate to think that we want a bill this year. He doesn't understand why we are making public statements -- including the proposed veto statement -- that will prevent us from getting a bill this year.

As this suggests, his complaints about the veto statement are mostly big-picture complaints: he thinks the statement is inconsistent with the goal of getting a new and improved bill this year. I agreed with him that this is the wrong veto statement if we want another bill. I told him I would raise his big-picture concerns with you. But I also told him that at least for now, the thinking around here is that (1) we do not wish to invite another bill and (2) we therefore want a strong veto statement.

I invited him to propose changes to the veto statement short of making it an invitation to pass a new bill. I told him we might be able to tone down some language, moderate some arguments, and so forth. I said I would be especially anxious to hear whether anything in the statement was legally wrong. He said he would go over the statement with all this in mind and get back to me with any suggested changes.

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.

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

29-Mar-1996 09:14am

TO: Elena Kagan
TO: Ellen S. Seidman

FROM: Jeffrey A. Weinberg
Office of Mgmt and Budget, LRD

SUBJECT: Here's the draft enrolled bill memo on HR 956

DRAFT - For Executive Office of the President Use Only

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 956 - Common Sense Product Liability Legal Reform Act of 1996
Sponsors - Reps. Hyde (R) IL and Hoke (R) OH

Last Day for Action

Purpose

Establishes Federal standards governing product liabi lawsuits and preempts certain State laws governing such lawsuits.

Agency Recommendations

Office of Management and Budget	Disapproval (Ve message attac
Department of Commerce	
Department of Health and Human Services	
Department of the Treasury	
Small Business Administration	
Department of Labor	No comment (Inf

Department of Justice	No response

Discussion

Your March 16th letter to the congressional leadershi stated that you would veto H.R. 956. The provisions of H.R. 956 to which your letter objected are described below other provisions are described in the Attachment.

The conference report on H.R. 956 was agreed to in th Senate by a vote of 59-40 and in the House by _____.

Joint-and-Several Liability. H.R. 956 would abolish ?joint-and-several? liability for non-economic damages (e. pain

and suffering) in product liability cases. Each defendant would only be liable for its percentage of liability as determined at trial. In cases where a defendant goes out business or is unable to pay its part of a judgment, the o defendants would not be responsible.

Your letter stated that this provision means that ?an innocent victim would suffer when one wrongdoer goes bankr and cannot pay his portion of the judgment.?

Cap on Punitive Damages. Punitive damages would gene be limited to the greater of: (1) $250,000; or (2) two ti the award for compensatory damages (economic loss and non-economic loss). However, in an action against an individu whose net worth does not exceed $500,000 or a business wit fewer than 25 full time employees, punitive damages would limited to the lesser of these two amounts. A court could award additional punitive damages if it determines that th award is insufficient to ?punish . . . egregious conduct? ?deter such conduct in the future?.

Your letter stated that the cap on punitive damages w increase an irresponsible company?s incentive to knowingly manufacture and sell defective products.

Preemption of State Law. H.R. 956 preempts State law that are inconsistent with the bill?s standards for produc liability lawsuits. Your letter characterized the manner which H.R. 956 preempts State law as a ?one-way street of federalism, in which Congress defers to state law when doi helps manufacturers and sellers, but not when doing so aid consumers.? H.R. 956 would allow a State to have:

- ? A shorter -- but not a longer -- time limit for f product liability actions than the bill?s limit o years after delivery of the product.

- ? Lower -- but not higher -- ceilings for punitive damages than those established by the bill (descr in the Attachment).

Proponents? Arguments in Favor of H.R. 956

Proponents of H.R. 956 argue that the enrolled bill w improve the competitiveness of American businesses by:

- ? Preventing firms with a small share of responsibi for a claim from having to pay a large share of t damages.

? Precluding excessive awards of damages.

? Removing burdens associated with the need to comp with 50 different State laws governing product liability.

Conclusion and Recommendations

We join _____ in recommending that you veto H.R. 956.

Attached for your consideration is a veto message tha prepared by the Office of the White House Counsel. It has reviewed and approved by _____.

Alice M. Rivlin
Director

Enclosures

Attachment

Other Provisions of H.R. 956

This will be discussed in the veto message.

Statute of Repose. A product liability action involv durable good could not be filed more than 15 years after t delivery of the product to the first purchaser or lessee. However, State law could shorten the period. The Senate-p version of H.R. 956 provided a 20-year period.

Statute of Limitations. A product liability action c not be filed more than 2 years after the claimant discover should have discovered: (1) the harm that is the subject the action; and (2) the cause of the harm.

This too

A provision in the Senate-passed version that stopped statute of limitations from running in the event of a stay injunction against an action was dropped. (Such a provisi protects claimants when a potential defendant files for liquidation or reorganization, because the bankruptcy cour ~~will usually~~ issue a stay pending completion of its proceedings.) By an automatic

Legal Standard for Punitive Damages. A higher legal standard for punitive damages in product liability cases t the current ?preponderance of the evidence? standard [used [some] [many] [most] States] would be established. A plai would have to establish by ?clear and convincing? evidence the defendant?s conduct demonstrated a ?conscious flagrant indifference to the rights and safety? of those who might harmed.

Liability of Retailers. Retailers, including those w rent or lease products, generally would be liable only for damages caused by their own actions -- not for selling or renting a defective product.

Misuse of Alteration of the Product. Damages would h to be reduced by the percentage of responsibility of the claimant?s harm attributable to misuse or alteration of th product.

Use of Product When Intoxicated. H.R. 956 would reli defendant from liability if: (1) the claimant was intoxic or under the influence of alcohol or a drug that was not prescribed for the claimant or was not being used as presc when the accident or other event occurred; and (2) the claimant, as a result, was was more than 50 percent

responsible.

Alternative Dispute Resolution Procedures. A claiman a defendant in a product liability action could, within a specified time limit, offer to proceed under certain volun nonbinding alternative dispute resolution procedures.

Workers? Compensation Subrogation. An insurer would given the right to recover from a manufacturer or product seller the workers? compensation benefits paid to a claima that are subject to a product liability action.

Biomaterials Suppliers. Suppliers of component parts raw materials for use in the manufacture of a medical devi that is implanted in the body would generally be excluded liability for harm to a claimant caused by an implant. Th Administration supported these provisions of H.R. 956.

We now have a more complicated position. Though we support the general purpose of this section, we object to its failure to exempt negligent suppliers of biomaterials from its protection. See draft veto statement.

MEMORANDUM FOR LEON PANETTA
JOHN HILLEY

FROM: BRUCE R. LINDSEY

RE: PRODUCTS LIABILITY

DATE: MARCH 20, 1996

Senators Rockefeller and Gorton are prepared to send the Products Liability Conference Report back to the Conference Committee and make all of the changes we have proposed **except** the elimination of proportionate liability for non-economic damages. I asked whether there was any wiggle room on this issue (e.g. two times proportionate liability or exempt the 30 states that have passed some form of reform in this area) and was told that the House of Representatives will accept no change in this provision.

I indicated it would be difficult for us to back completely off our position, but that I would check with the "powers that be."

Time is of the essence since the cloture vote is scheduled for this afternoon.

NECESSARY FIXES ON PRODUCTS LIABILITY BILL

1. Elimination of provision that liability for noneconomic damages shall be several only.

2. Elimination of all legislative history suggesting that judges should exceed punitive damages caps only in rare circumstances. Slight modification of statutory language to make clear that judges have flexibility in this area.

3. Exemption of negligent entrustment cases (against, for example, gun dealers or bar owners) from the entire bill (as in the Senate version) rather than from Section 103 only. This change will make clear that any limitations on punitive or noneconomic damages in the bill will not apply in such actions.

4. Relengthen statute of repose on durable goods (20 years in Senate version, 15 in Conference Report); return to definition of "durable goods" in the Senate version to make clear that the phrase applies only to workplace goods.

5. Reinsertion of provision in the Senate version tolling the statute of limitations while a stay or injunction on the commencement of civil actions (issued, for example, by a bankruptcy court) is in effect.

January 4 , 1996

MEMORANDUM FOR THE PRESIDENT

FROM: Bruce R. Lindsey

RE: Products Liability Reform

As you may know, products liability reform legislation is currently in conference. As with securities litigation reform, you are again caught between a good friend and supporter in Senator Rockefeller, who is the main sponsor of the legislation, and a number of Democratic constituencies -- labor, consumer groups, trial lawyers -- who are strongly opposed. Unlike securities litigation reform, most Democrats in Congress oppose the legislation. In the House, a broader tort reform bill passed 265 to 161; and in the Senate, the Rockefeller/Gorton bill passed 61 to 37.

Substantively, we have a greater philosophical disagreement with products liability reform -- federalism; but fewer specific disagreements. The Senate bill would:

-- Limit punitive damages in products liability cases to two times compensatory damages, or $250,000, whichever is greater, but allow judges to increase the award in certain egregious cases. In the case of small businesses with fewer than 25 employees and individual defendants with a net worth of less than $500,000, punitive damages would be limited to the lesser of twice compensatory damages or $250,000.

Caps

-- Eliminate joint and several liability for noneconomic damages, i.e., pain and suffering.

-- Make retailers and wholesalers liable only if they were themselves negligent.

-- Require that compensatory damages be reduced by the amount a defendant receives from collateral sources, such as insurance or workers' compensation.

-- Establish a statute of repose that would prohibit suits involving products that were 20 years old.

-- Establish a statute of limitations that would require plaintiffs to file suits within two years after discovering they were harmed.

OMB's April 25, 1995 Statement of Administration Policy indicated that we opposed an arbitrary ceiling on the amount of punitive damages that may be awarded in a products liability lawsuit and the abolishment of joint-and-several liability for

noneconomic damages. Senators Rockefeller and Gorton, working with John Schmidt and Frank Hunger, attempted to address the "cap" issue by allowing the judge to increase a punitive damage award in some cases. The bill that passed the Senate, however, would allow a defendant who is unhappy with the judge's additur to obtain a new trial on the punitive damages issue. Senator Rockefeller has promised to "correct" this in conference. No Senator offered an amendment to change the joint and several provision and Senator Rockefeller has not indicated a willingness to delete the limitation on joint and several liability in conference.

In their discussions with Senators Rockefeller and Gorton, John and Frank have made it clear that they are not speaking for the Administration. Nevertheless, Senator Rockefeller believes -- based in part on a conversation with you -- that if his bill emerges from conference, you will sign it. He has also stated publicly that he would expect you to veto any bill that went beyond his. As with securities litigation reform, if the Senate bill is substantially adopted by the conference, the House, as the price for going along, will probably be allowed to write the Statement of Managers, thereby putting a troublesome "spin" on ambiguous provisions, such as the judicial additur provision.

After passage of the Senate bill, the White House issued the following statement:

> The Senate-passed product liability bill is a clear improvement on the extreme legal reform measures passed by the House. Unfortunately, the legislation in its present form does not go far enough toward balancing the interests of consumers with those of manufacturers and sellers.
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> The Senate approach on punitive damages is an improvement on an absolute cap, but it still has flaws. Moreover, the 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.
>
> President Clinton supports balanced legal reform and will work with a House-Senate conference to address these and other concerns.

Our "official" statements to date have not emphasized the issue of federalism, although you have expressed this concern in the past. For example, you told the ABA in 1992: "As a general matter, I believe that legal reform should be enacted in the laboratories of the states, rather than at the federal level." You expressed similar thoughts to the newspaper editors in Dallas in April, 1995. Pam Leopakis, the President of ATLA, reports that during a conversation with her and Senator Kennedy at a Kennedy fundraiser in April, 1995, you ridiculed House Republicans on the federalism issue, saying "I get it, we should

See also 3/6/95 AG/ Mikva ltr to Ginsburg

devolve everything to the states, no unfunded mandates, block grant everything, etc., but we should take over the civil justice systems of the states." When Senator Kennedy called tort reform "outrageous," you supposedly said "I'm with you." Our statements have said that the Administration would support "the enactment of limited, but meaningful, product liability reform at the Federal level," as long as it "fairly balance[s] the interests of consumers with those of manufacturers and sellers" and "respect[s] the important role of the States in our federal system."

The basic argument in favor of federal products liability legislation is that it will promote uniformity, and thus predictability. John Schmidt has been quoted in the Wall Street Journal as saying that product liability "is the one area where there is a real case for federal action," and in the New York Times as saying "We need some [federal] standards in this field. After all, these products are sold in a national market." While it is true that certain provisions of the bills -- the statutes of limitations and repose, exclusion of joint and several liability for non-economic damages, the cap on punitive damages -- will provide some degree of uniformity in products liability cases, most lawsuits will remain in state courts, with state court procedural and evidentiary rules and state court judges interpreting the statute. Thus, in a broader sense, the legislation will not achieve its stated goal of uniformity, while nevertheless sacrificing state preeminence in this area of the common law. Opponents of the legislation also point out that the uniformity is "one-way uniformity." Thus, (1) the legislation "caps" punitive damages, but does not make punitive damages available in states that do not have them nor does it preempt states that provide for lower caps; (2) the bill's statute of repose preempts only those states that do not have a statute of repose or that provide for longer periods; and (3) the bill mandates to the states federal "comparative negligence" whereby awards are reduced by a percentage equal to the plaintiff's own fault, unless a state has a "contributory negligence" standard whereby all damages are barred by any plaintiff fault.

It is unclear how long the conference will take or whether the differences in the Senate and House approaches can be resolved. In order to avoid a repeat of the criticism for last minute decision-making we received after you vetoed the securities litigation reform bill, we should decide sooner rather than later what our position is. If possible, we should make our objections broad-based, rather than overly technical, and we should make certain that our position is well understood by our friends, including Senator Rockefeller.

January 4 , 1996

MEMORANDUM FOR THE PRESIDENT

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RE: Products Liability Reform

As you may know, products liability reform legislation is currently in conference. As with securities litigation reform, you are again caught between a good friend and supporter in Senator Rockefeller, who is the main sponsor of the legislation, and a number of Democratic constituencies -- labor, consumer groups, trial lawyers -- who are strongly opposed. Unlike securities litigation reform, most Democrats in Congress oppose the legislation. In the House, a broader tort reform bill passed 265 to 161; and in the Senate, the Rockefeller/Gorton bill passed 61 to 37.

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-- Eliminate joint and several liability for noneconomic damages, i.e., pain and suffering.

-- Make retailers and wholesalers liable only if they were themselves negligent.

-- Require that compensatory damages be reduced by the amount a defendant receives from collateral sources, such as insurance or workers' compensation.

-- Establish a statute of repose that would prohibit suits involving products that were 20 years old.

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OMB's April 25, 1995 Statement of Administration Policy indicated that we opposed an arbitrary ceiling on the amount of punitive damages that may be awarded in a products liability lawsuit and the abolishment of joint-and-several liability for

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January 4, 1996

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96 JAN 4 P2:32

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GET why don't I have?

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Our "official" statements to date have not emphasized the issue of federalism, although you have expressed this concern in the past. For example, you told the ABA in 1992: "As a general matter, I believe that legal reform should be enacted in the laboratories of the states, rather than at the federal level." You expressed similar thoughts to the newspaper editors in Dallas in April, 1995. Pam Leopakis, the President of ATLA, reports

that during a conversation with her and Senator Kennedy at a Kennedy fundraiser in April, 1995, you ridiculed House Republicans on the federalism issue, saying "I get it, we should devolve everything to the states, no unfunded mandates, block grant everything, etc., but we should take over the civil justice systems of the states." When Senator Kennedy called tort reform "outrageous," you supposedly said "I'm with you." Our statements have said that the Administration would support "the enactment of limited, but meaningful, product liability reform at the Federal level," as long as it "fairly balance[s] the interests of consumers with those of manufacturers and sellers" and "respect[s] the important role of the States in our federal system."

The basic argument in favor of federal products liability legislation is that it will promote uniformity, and thus predictability. John Schmidt has been quoted in the Wall Street Journal as saying that product liability "is the one area where there is a real case for federal action," and in the New York Times as saying "We need some [federal] standards in this field. After all, these products are sold in a national market." While it is true that certain provisions of the bills -- the statutes of limitations and repose, exclusion of joint and several liability for non-economic damages, the cap on punitive damages -- will provide some degree of uniformity in products liability cases, most lawsuits will remain in state courts, with state court procedural and evidentiary rules and state court judges interpreting the statute. Thus, in a broader sense, the legislation will not achieve its stated goal of uniformity, while nevertheless sacrificing state preeminence in this area of the common law. Opponents of the legislation also point out that the uniformity is "one-way uniformity." Thus, (1) the legislation "caps" punitive damages, but does not make punitive damages available in states that do not have them nor does it preempt states that provide for lower caps; (2) the bill's statute of repose preempts only those states that do not have a statute of repose or that provide for longer periods; and (3) the bill mandates to the states federal "comparative negligence" whereby awards are reduced by a percentage equal to the plaintiff's own fault, unless a state has a "contributory negligence" standard whereby all damages are barred by any plaintiff fault.

It is unclear how long the conference will take or whether the differences in the Senate and House approaches can be resolved. In order to avoid a repeat of the criticism for last minute decision-making we received after you vetoed the securities litigation reform bill, we should decide sooner rather than later what our position is. If possible, we should make our objections broad-based, rather than overly technical, and we should make certain that our position is well understood by our friends, including Senator Rockefeller.

At your convenience, we should probably meet to discuss.

THE WHITE HOUSE

WASHINGTON

April 22, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: PRODUCTS LIABILITY VETO STATEMENT

I am attaching a memorandum written by a member of John Schmidt's staff that Schmidt sent on to me. The memo criticizes, in the harshest terms, our draft veto message for the products bill. (I am also attaching that message.) Below, I summarize each criticism and give my thoughts on whether we should respond by amending the veto message.

1. Federalism. The memo criticizes the emphasis that the veto statement places on federalism, arguing that "State legislatures are inherently limited in their ability to address problems that are extraterritorial." In particular, the memo attacks our "one-way preemption" argument, noting that certain provisions of the bill -- such as the statute of limitations -- would displace all state law (whether more or less consumer-friendly) and then asserting that the provisions displacing only consumer-friendly state law are consistent with "the purpose of the bill [which] is to establish limits on state product liability actions, in order to enable productive economic activity to go forward."

I believe we should continue to stress issues of federalism, including one-way preemption. These arguments, more than any other, signal our disinclination to reach a quick compromise. That is why Schmidt so dislikes the arguments, but also why (given our overall strategy) we should retain them. In addition, we used these arguments only recently, on our March 16 SAP. (Attorney General Reno and Judge Mikva similarly stressed the issue of federalism last year. Finally, there is nothing inaccurate in what we say; for example, we never claim that all the bill's provisions preempt in only one direction.

I think there is nothing wrong, however, with noting the concern, expressed above, that States cannot solve this entire problem by themselves. That concern may provide the appropriate basis for our approval of limited product liability (just not this product liability reform) at the federal level. I can easily put in a sentence -- indeed, I recommend doing so -- giving credence to this argument.

Recommendation: Add language re basis for some federal action

2. Negligent Entrustment Actions. The memo makes a credible

argument -- the strongest I've seen to date -- that the bill's provisions on joint liability and punitive damages do not extend to negligent entrustment actions. According to this argument, the explicit exemption of such actions from just one section of the bill -- that governing liability of sellers, renters, and lessors -- rather than from the entire bill (as in the Senate version) follows from the fact that only the seller/renter liability section encompasses such actions in the first place. This single section, or so the argument runs, applies to actions "for harm caused by a product or product use;" the rest of the bill applies to actions "for harm caused by a product." Because negligent entrustment actions are for harm caused by "product use" rather than by a "product," they fall under just one section of the bill and need an exemption from only that section.

The opposing argument might go as follows. The bill as a whole applies to actions for "harm caused by a product." That definition, viewed alone, might well cover negligent entrustment actions; the question here, to borrow the slogan of the NRA, is whether guns kill people (if so, negligent entrustment actions fall within the definition) or whether people kill people (if so, such actions fall outside the definition). The Senate version, recognizing the possibility of the former interpretation, made a point of exempting negligent entrustment actions from the bill; the Conference Report, by shifting that exemption to the section governing seller/renter liability, indicated that while state law governed initial liability in these cases, federal law governed as to matters such as punitive damages. The use of the phrase "product use" in the seller/renter section does not provide an alternative explanation for this shift, both because the Senate version also included that phrase and because the bill uses that phrase only with respect to the subsection governing renter and lessor liability and the exemption of negligent entrustment actions applies to the section as a whole.

All in all, it is simply not clear whether the punitive damages and joint liability sections of the bill currently apply to negligent entrustment actions. This lack of clarity will leave us somewhat vulnerable to those who say that we have made up this issue. And because we have made no prior statements on this issue, we could drop it without looking inconsistent. On the other hand, the argument appears to have real political resonance. John Hilley said a number of people on the Hill (e.g., Sen. Feinstein) lapped it up, and the President also loved it. Unlike many of our objections to this bill, it is easy to explain to the public.

Currently, we make a lot out of the claim that the joint liability and punitive damages extend to negligent entrustment actions: in addition to asserting this claim, we base our first hypothetical on it. In the end, I recommend retaining all of this material pretty much as is. But I am not averse, should any of you wish it, to adding language indicating that the extension of the bill to negligent entrustment actions is something of an

open question, rather than the simple fact of the matter.

Recommendation: Do nothing or soften language by recognizing ambiguity.

3. Punitive Damages. The memo criticizes our assertion that the "clear intent of Congress, as expressed in the Statement of Managers, [was] that judges should use this authority only in the rarest circumstances." The actual language in the Statement of Managers is that "occasions for additional awards will be very limited indeed." The memo argues that this language does not justify use of the phrase "only in the rarest circumstances."

I'm not sure I see the problem here, but if it makes John Schmidt happy to use "only in rare circumstances" or "only in very rare cases" or "only in very unusual cases" or something of the sort, I am perfectly happy to do so.

Recommendation: Soften language

4. Statute of Limitations. The memo criticizes our argument regarding the deletion in Conference of a provision that would have tolled the statute of limitations when a bankruptcy court issues a stay. The memo claims that this provision was unnecessary because bankruptcy law already tolls the limitations period in such circumstances.

In fact, the deleted provision would have done more than bankruptcy law does. Suppose Mr. Smith has two years to file a claim. Two months into the limitations period, a bankruptcy court issues a stay, which remains in effect for the next two years. Under the bankruptcy code, when the stay is lifted, Mr. Smith has 30 days to bring suit. (Bankruptcy law essentially allows the clock to expire, but then gives any person screwed in this way a 30-day grace period.) Under the deleted provision, Mr. Smith would have 22 months (the limitations period minus what had elapsed when the stay went into effect).

Granted, this is not an enormous deal, but we don't really treat it as an enormous deal: we say that "some" persons will lose a "meaningful" opportunity to bring claims, which seems to me true, and that the change "may" have "dramatic consequences," which may be a reach. We could (1) make this a bit softer by fiddling with the language -- for example, by deleting the phrase "dramatic consequences;" (2) provide more detail (as above) on how the deleted provision differs from current law (though I suspect this is not worth the space); or (3) delete the argument entirely (though we used it in our recent SAP). I vote for (1).

Recommendation: Soften language

5. Statute of Repose. The memo argues that the Conference Report did not apply the statute of repose to non-workplace goods, which is a claim that we make and then use in a

hypothetical. The memo notes that the only difference between the Senate version and the final version is in the placement of commas.

Call me over-technical, but I think the placement of commas makes all the difference in the world here: the Senate definition of durable goods (with the commas in one place) applies only to workplace goods; the final version (with the commas in another place) applies to some nonworkplace goods as well. I suppose we could take all this out on the ground that it doesn't matter much. But I am convinced that we are right on the merits.

Recommendation: Do nothing

6. Joint Liability. The memo urges that we craft the veto statement carefully to leave open the possibility of a compromise on joint liability. In one sense, we have done this by saying the President opposes "wholly eliminating" joint liability for noneconomic damages. But in another, more real sense, we have not, because the arguments we give for the President's opposition would apply, at least in part, to a compromise provision.

In the end, I do not recommend any changes in this part of the veto message. The objection to the joint liability provision is the strongest basis for our veto. It is an objection we have made, in one form or another, many times in the past. Softening the objection would be the surest way to invite a new bill and thus to defeat our overall strategy.

Recommendation: Do nothing

TO: Elena Kagan

FROM: John Schmidt

Fran Allegra on my staff gave me the attached memo which I think is helpful in identifying problems with the draft veto statement.

April 15, 1996

DRAFT MEMORANDUM

TO: John R. Schmidt
Associate Attorney General

FROM: Francis M. Allegra
Deputy Associate Attorney General

SUBJECT: **Comments on Draft Veto Message for H.R. 956**

As requested, the following are my comments on the draft veto message for H.R. 956.

The draft veto message contains a number of inaccuracies and is written in a style that seems more suitable for a press release than a careful statement of Administration policy. The document erects a number of strawmen using strained constructions of the bill -- in several instances these constructions are directly controverted by the bill's legislative history. As currently written, this document may well leave the public with the impression that the Administration could not veto this legislation on its actual terms and had to manufacture concerns. In taking this kind of approach to criticizing the bill, the draft leaves the false impression that there is no difference between the President's position and those that oppose any form of Federal product liability legislation.

The following are the major problems:

Federalism. The second paragraph of the draft reiterates the President's support for limited, but meaningful product liability reform at the Federal level. The very next paragraph, however, seems to negate this statement, strongly implying there is no need for Federal reform because the States have handled product liability law "well" and have made "needed reforms." As the President recognized when he was the Governor of Arkansas, and as you have emphasized in your own statements on the subject, Federal product liability reform is warranted not because the States have performed poorly in dealing with the subject, but because State legislatures are inherently limited in their ability to address problems that are extraterritorial and arise in interstate commerce. Any fair discussion of Federalism in this context must recognize -- as the National Governor's Association has recognized since 1986 -- that no one State has the ability to alleviate the problems faced by small and large businesses with regard to the myriad state product liability laws. The pending bill thus invokes the Federal government's unique ability to affect interstate commerce (*see* Sen. Rep. No. 104-69 (hereinafter "Senate Report"), 104th Cong., 1st Sess. 13-14 (1995)), as does the President in his support of meaningful Federal product liability reforms.

Paragraph three of the draft also incorrectly states that "[a]s a rule, this bill displaces state law only when that law is more favorable to consumers." In fact, the bill contains several important pro-consumer provisions. For example, section 106 of the bill permits a plaintiff to file a complaint within 2 years after he or she discovers or, in the exercise of reasonable care, should have discovered the harm and its cause. This provision would preempt laws in states (such as California) that have shorter statutes of limitations and would liberalize in favor of consumers rules in states (such as Virginia) whose statutes discriminate against latent injuries. *See* Senate Report at 41; 142 Cong. Rec. S2553 (March 21, 1996) (statement of Sen. Gorton). In addition, section 108 of the bill ameliorates features in some state punitive damage laws. As described by Senator Rockefeller during the final floor debate, this provision would: (i) lessen the evidentiary standard for allowing punitive damages in states (such as Colorado and Maryland), from proof "beyond a reasonable doubt" or "actual malice" to "clear and convincing evidence;" and (ii) allow judges to award damages in excess of state punitive damage caps in every state in which such dollar limitations exist, regardless whether such limitations are lower or higher than the limit in the bill. *See* 142 Cong. Rec. S2561, S2562 (March 21, 1996) (statements of Sen. Rockefeller). Accordingly, it is inappropriate to state that the preemption provisions in the bill strike only in the favor of product developers.

In general, moreover, the purpose of the bill is to establish limits on state product liability actions, in order to enable productive economic activity to go forward. It does not matter for this purpose if some states want to further limit such action. To characterize this as "one way preemption" is a red herring that simply misses the basic thrust of the bill.

Scope of the bill. A major theme in the draft message is that the bill would apply to negligent entrustment actions in which individuals, for example, sell guns to felons or alcohol to drunkards and those purchasers then cause harm to third parties. This is simply untrue. The bill applies to product liability actions, which are defined as civil actions brought for "harm caused by a product;" the definition does not refer to actions for "harm caused by the use of a product." As discussed below, the latter omission was purposeful. Any notion that actions involving the use of a product are subsumed into the statute's general definition of product liability actions is countered by the fact that in another provision of the bill the "use" of products is explicitly covered. Section 103(c)(2) of the bill provides that, for the purpose of that section's product seller protections, a "product liability action" is defined as "a civil action brought on any theory for harm caused by a product **or product use.**" (emphasis added). However, in section 103(d), this provision also explicitly excepts negligent entrustment actions. The lone reference to "product use" in this special definition makes it clear that Congress did not intend the general definition of "product liability action" to encompass actions deriving from the use of products. Had Congress intended injuries from the use of products to be included in the general coverage of the bill, it would not have needed a special definition in section 103.

This proposition is confirmed by the legislative history of the bill, which is replete with statements that the bill does not apply to negligent entrustment cases. For example, during the final floor debate, Senator Rockefeller emphasized this point, stating:

> Drunk drivers, gun users, etc. will NOT be protected from liability in any way. Opponents are intentionally trying to confuse harm caused by a product, which IS covered in the bill, and harm caused by the products' use by another, which is NOT covered in the bill and remains totally subject to existing state law.

See 142 Cong. Rec. S2562 (March 21, 1996) (emphasis in original). *See also id.* at S2559 (statement of Senator Rockefeller); *id.* at S2567-68 (statement of Sen. Gorton) ("This is a product liability bill. It is not a negligent entrustment bill. It has nothing to do with someone who deliberately sells a gun to someone to kill a third person, or deliberately allow someone to become drunk and is sued under dram stop statutes at all"); Statement of Managers at 7 ("State law, for example, will continue to apply to lawsuits predicated on the alleged negligence involved in giving a loaded gun to a young child or allowing an unlicensed and unqualified minor below driving age to operate an automobile. Similarly, the potential liability of a service station that sells gasoline to an obviously drunk driver will be determined under State law.").

In light of this legislative history, the assertions in the first full paragraph on page 3 of the draft, as well as in the first example given at the bottom of that page, that the bill applies to negligent entrustment cases are untenable.

Punitive damages. Regarding the punitive damage provision in section 108 of the bill, the draft message states: "[t]he provision of the bill allowing judges to exceed the cap if certain factors are present helps to mitigate, but does not cure [the problems associated with capping punitive damages], given the clear intent of Congress, as expressed in the Statement of Managers, that judges should use this authority only **in the rarest circumstances**" (emphasis added). The highlighted statement overstates the comment made in the Statement of Managers, which actually provides that "[a]lthough the conferees establish a mechanism for awarding additional punitive damages in limited circumstances ('egregious conduct' on the part of the defendant and a punitive damages jury verdict insufficient to punish such egregious conduct, or to deter the defendant), it is anticipated that occasions for additional awards will be very limited indeed." There is nothing in this language to suggest that judges should (or will) ignore the factors listed in the statute bearing on the need for additional punitive damages (*e.g.*, the profitability of the misconduct, the duration of the conduct, the financial condition of the defendant) and not award additional punitive damages that they might otherwise deem appropriate. As to the number of cases where this is likely to happen, moreover, it is worth noting (as plaintiff's lawyers frequently point out) that the number of cases where large punitive damages are awarded is currently very small -- and the extra judicial authority would be needed only to go beyond twice the total compensatory damages (economic and noneconomic), which is typically a very large figure. Thus, under current law, it is almost certainly the case that the number of cases where juries award punitive damages in excess of that amount is "very limited."

The legislative history of the bill repeatedly makes clear that Congress did not intent to establish a cap on punitive damages. For example, regarding this point, Senator Rockefeller stated on the floor:

> Opponents of the bill say we cap punitive damages. Untrue. Untrue. I will not vote for legislation which caps punitive damages, as I would not vote for legislation that caps what lawyers can make... So there are no caps on punitive damages, and I will assert that there could not be because I was part of this bill. I was not going to go along with a bill that would allow such a thing.

142 Cong. Rec. S2560 (March 21, 1996). *See also id.* at S2561. The coauthor of the bill, Senator Gorton, also stated on the floor that "we have a form of control which is not a cap." 142 Cong. Rec. S2567 (March 21, 1996). *See also* 141 Cong. Rec. S6248 (May 8, 1995) (statement of Sen. Gorton) (" [t]his removes the cap entirely, but only where a judge determines that the limitation would be unreasonable and finds the action of the defendant sufficiently egregious to warrant it"). Statements of other Senators are to similar effect. *See* 142 Cong. Rec. 2578 (March 21, 1996) (statement of Sen. Snowe) (accepting the inclusion of judicial discretion "as a means of providing the opportunity for additional punishment in cases where a judge -- staying within the parameters set by the jury -- deems it necessary"); *id.* at S2580 (statement of Sen. Mosley-Braun) ("the bill does not put a hard cap on punitive damages"); *id.* at S2582 (statement of Sen. Glenn) ("I believe that the judge additur provision included in the bill will allow for appropriate punitive damages in egregious cases").

Statutes of limitations and repose. Likewise erroneous are various assertions in the draft message regarding the bill's statutes of limitation and repose:

- **Statute of limitations.** The second full paragraph on page 3 incorrectly suggests that the statute of limitations in the bill would not be tolled by the filing of a bankruptcy action. To the contrary, 11 U.S.C. 108(c), a provision in the Bankruptcy Code, would automatically toll the uniform statute of limitations in the bill to allow for the adjudication of product liability claims during or following the completion of bankruptcy proceedings. *See also* 142 Cong. Rec. S2562 (March 21, 1996) (statement of Sen. Rockefeller) (referring to section 108(c)). The Conference Committee eliminated a provision in the bill that would have explicitly tolled the statute of limitations in cases of bankruptcy -- an action that was apparently predicated on the preexistence of a similar provision in the Bankruptcy Code, which made the bill provision unnecessary. Moreover, even outside bankruptcy, it is reasonable to assume that the concept of judicial tolling -- under which most state statutes are tolled -- would equally apply to the statute of limitations in the bill.

- **Statute of repose**. The third full paragraph on page 3, as well as the first example that follows involving a "driveby" shooting, suggest that, as compared to the Senate Bill, the statute of repose in the Conference bill would apply "to a much wider range of goods, including handguns." In both bills, the statute of repose applies to "durable goods." But for an extraneous comma, that term is defined exactly the same in the Conference bill as in the Senate bill and, in both instances, encompasses only property used in a trade or business, held for the production of income, or sold or donated for certain training purposes (*see* Section 101(7)). As noted by Senator Rockefeller in the legislative history

of the bill, the statute of repose thus applies to "goods in the workplace." 142 Cong. Rec. S2562 (March 21, 1996) (statement of Sen. Rockefeller). *See also* 142 Cong. Rec. S2580 (March 21, 1996) (statement of Sen. Mosley-Braun) ("the 15-year statute of repose applies to workplace goods only"); *compare* S. Rep. at 18 ("a statute of repose ... is established for durable goods used in the workplace") *with* Statement of Managers 18 ("Section 106(b) adopts Senate language making the time bar applicable only to durable goods"). Given this evidence, the statements in paragraph 3 of the third page, as well as the last sentence in the first example, are simply inaccurate.

Clarifications. Finally, the segment of the draft dealing with the joint and several provision in the bill (section 110) needs to be carefully crafted to avoid suggesting that the Administration opposes any form of joint liability reform, if there is any desire to preserve the possibility of future negotiations designed to produce a bill the President would sign. The SAP on the Senate Bill always indicated opposition to the complete elimination of joint and several liability for noneconomic damages, but did not express opposition to more limited forms of reform in this area. If any compromise is going to be possible, we need to be more careful in how we oppose the bill's current provision on joint and several liability.

DRAFT

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 could prevent even horribly injured persons 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.

First, 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. Because the majority of her damages would arise from pain and suffering (not economic injury) and because the

3/13/96

CONFERENCE BILL

- It's my understanding that the conference version is quite close to the Senate bill, with relatively minor changes in the statute of repose and the judge's ability to override the cap on punitive damages ("additur"). Details of these issues are discussed below.

- The conference version does not address the issues raised by the Administration in its 4/95 SAP on the Senate bill -- caps on punitive damages, and limitations on joint and several liability for noneconomic damages.

ADMINISTRATION STATEMENTS

- The most relevant public statement by the Administration is its 4/95 SAP on the Senate bill in which we opposed that bill for the reasons stated above, did not make a veto threat, and stated that we would support limited, but meaningful, product liability reform at the Federal level so long as it fairly balanced the interest of consumers with those of business and respected the role of the states in the federal system.

The opposition to the elimination of joint and several is based on the concern that it would unduly burden those innocent victims who suffer mostly noneconomic damages -- e.g., the elderly and women who lose their reproductive ability. The theory of joint and several liability is that if anyone has to bear the burden of a bankrupt defendant it should be other defendants who have some liability, and not the innocent victim.

The opposition to caps on punitives is that it eliminates the effectiveness of punitives as a deterrent, and allows irresponsible defendants to do a cost benefit analysis of whether they should expose consumers to risk. All states have the ability to allow judicial reduction of punitives on a case by case basis, but there should not be a formulaic limit.

- The President did send a veto threat to the Senate on an amendment that would have capped punitive damages in all civil actions, not just product liability, and that amendment was not adopted.

- Judge Mikva and General Reno also sent a letter to the House during its deliberation raising general objections to the federalization of product liability law absent some strong evidence that the problems existed that the states could not solve. This letter also objected to specific provisions regarding fee shifting in all civil cases; new procedural rules in all state

and federal civil cases; and limitations on joint and several and punitive damages in product liability cases.

MAJOR SUBSTANTIVE ISSUES

- **Applicability to all civil cases or just product liability cases --**

  House bill -- applies to all civil cases in several areas including fee shifting (applies the English "loser pays" rule); limits on punitive damages; and elimination of joint and several liability for noneconomic damages. This is an enormously broad range of matters, including medical malpractice, employment discrimination, and civil rights cases, and was a major source of criticism of the House bill. Because of the sweep of this bill, the President called it the "drunk driver protection act."

  Senate bill -- is limited to product liability cases in all major areas.

  Conference -- addresses only product liability cases.

- **Punitive Damages/Additur/Remittitur --**

  House Bill -- Caps punitives in any civil action in state or federal courts at 3 times economic loss or $250,000, whichever is greater, to the extent that state law allows award of punitives. Noneconomic loss may not be counted in the calculation of the cap. One way preemption in the sense that it does not restore punitives in those states that have eliminated or further limited them. No "additur" provision.

  Senate Bill -- Caps: The Senate bill caps punitive damages for product liability cases at the greater of: 2 times economic and non economic damages; or $250,000 (the lesser of those two amounts for small business). The cap is to be applied by the Court, and the jury is not to be made aware of its existence, so the jury could render a verdict with higher punitive damages that would have no effect.

  Additur: The Senate bill allows the judge to increase the amount of punitives above the cap if he or she finds that the amount available under the cap is insufficient to punish egregious conduct by the defendant. These additional damages (known as additur) could be awarded only after an additional court proceeding considering a statutory list of factors. If an additur is awarded, the defendant has the option of rejecting the award and obtaining a new trial on the issue of punitive damages. During the time of the new trial the original judgment of liability and non-punitive damages will be stayed, creating a significant deterrent to the plaintiff's seeking additur.

Constitutional questions have been raised about the additur provision as written based on the right to jury trial. Case law has held that, given the quasi-criminal nature of punitive damages, increases in awards must be left to a jury and not the judge.

Conference Version -- In order to address the constitutional issue, there apparently is a change to the additur provision so that a judge could increase damages, but only within the range of damages previously awarded by the jury (remember the jury doesn't know there's a cap, and could have awarded higher damages in its original verdict.) In addition, the conference has removed the provision allowing the defendant to obtain a new trial when a judge applies an additur to the cap.

- **Statute of Repose --**

House bill -- exempted all goods over 15 years old from liability.

Senate bill -- exempted durable goods over 20 years old from liability.

Conference -- exempts durable goods over 15 years old from liability.

- **Joint and Several Liability**

House bill -- Eliminates joint and several liability for noneconomic damages in all civil cases. Several liability is applied as in the Senate bill. This is one way preemption, and explicitly preserves state law in states which have further limited joint and several liability.

In addition, House bill caps noneconomic damages in medical malpractice cases at $250,000. Again, this is one way preemption and explicitly preserves any state law that has further limited noneconomic damages.

Senate bill -- Eliminates joint and several liability for noneconomic damages (such as pain and suffering) in product liability cases. For noneconomic damages each defendant shall only be responsible for the percentage of damages that is in direct proportion to his percentage of responsibility for the harm to the plaintiff. The trier of fact is to determine each parties' percentage of responsibility, and to include all parties involved whether or not they are parties to the action.

Conference -- Adopts Senate version.

General Issues of Balance, Federalism and Uniformity -- All Administration statements on these bills have emphasized that any bill the President signs must balance the interests of consumers with those of business and respect the

rights of the states in the federal system. There is a strong argument that neither the House, Senate nor Conference versions meets this standard.

Federalism -- Product liability law is currently state law, and the various states have been dealing with perceived problems in the system in a variety of ways -- the veritable laboratories for new ideas. The Reno/Mikva letter pointed out that federalizing these laws should not be done unless a strong burden of proof has been met that state law is failing, a burden which has not been met. In this climate of states' rights in particular there is a strong measure of hypocrisy in business' desire to federalize selected portions of state tort law.

Balance -- All three bills are written to address business defendants' concerns, not consumers. They all engage in one way preemption -- that is, they preempt state law in the areas addressed only to the extent that the state has a law less favorable to business. If the current state law goes further in the direction of business than this federal bill, the state law is retained (see, e.g., discussion of joint and several and caps on damages above).

Uniformity -- A major argument made for the need to federalize this area of the law is the need for a uniform set of rules for products that move in interstate commerce. This bill clearly does not achieve that. It preempts only certain aspects of state law, and then only if the state law currently is unfavorable to business, so that the courts and juries will have to apply an amalgam of federal and state law in the same case. In addition, it will create a strange new system of case law in which both state and federal courts will have to interpret the new federal law through parallel systems of appellate courts. The state courts are not bound by any decision of the federal courts except for the Supreme Court, so passage of this bill will result in years of inconsistent interpretations even within the same state.

- **New Issues** -- There had been ongoing efforts to add exemptions from liability for charitable organizations and changes in workers' compensation. Depending on how these were drafted, they could have been quite controversial. The latest information indicates that Sen. Rockefeller has been successful in getting Republican support without adding these provisions, so they appear to have gone away for now.