TORT REFORM

**Abroad at Home**

ANTHONY LEWIS

# *Tilting the Scales*

ATLANTA

Prevent victims of securities fraud from suing. Immunize company officials who manipulate the price of stock by false statements. Stop lawsuits against accountants and lawyers who were involved in savings-and-loan scams.

Good ideas? Not many Americans would think so. But those are some of the things that would result from passage of a bill, H.R. 10, that is expected to reach the House floor in about two weeks. It would carry out point 9 of Newt Gingrich's Contract With America.

"The Common Sense Legal Reform Act," it is called — another of the wonderfully Orwellian names coined for provisions of the contract. A more accurate title would be the Protect the Wrongdoers Act.

Title I of H.R. 10, on tort reform, makes proposals to limit ordinary damage suits, especially those over faulty products. Title II, which has had less attention, would make drastic changes in securities law.

## A dangerous legal-reform bill.

Under present law, for example, an investor who claims he was a victim of securities fraud must prove that the defendant he is suing had a reckless disregard for the truth. H.R. 10 would impose an even higher standard of proof: that the defendant knowingly engaged in securities fraud. That would be extremely hard for victims to prove, perhaps impossible in many cases.

The chairman of the Securities and Exchange Commission, Arthur Levitt Jr., said last week that the standard of knowing fraud "could create a legal incentive [for company officials] to *ignore* indications of fraud. The phrase 'ignorance is bliss' could take on new meaning."

Another provision of Title II would make the loser in any private lawsuit over securities pay the lawyers' fees of the winner. This would be extremely intimidating to small, middle-class investors — because company defendants could run up huge legal bills and an investor who sued would risk bankruptcy if he or she lost.

Utah's securities director, Mark Griffin, warned last week against the loser-pay rule. He is the spokesman for all 50 state securities regulators on the pending legislation.

"If we make the courts the playground for the very rich," Mr. Griffin said — "that is, those who can afford to pay the expenses of the other party — we have profoundly changed our judicial system."

Title I of H.R. 10, on tort suits, would also make losers pay the winners' legal fees. That rule, used in England, has been a rallying cry for conservative tort reformers in this country.

But now a powerful English voice has been raised against the English rule. The Economist, a conservative magazine skeptical of lawyers, urged in its Jan. 14 issue that Britain abandon the loser-pay rule.

"Enormous numbers of mostly middle-class people" simply cannot use the courts, The Economist said, because they must pay for the other side's lawyers if they lose. "For most people this means that they are risking financial ruin."

Today in Britain, The Economist said, "only the very wealthy can afford the costs and risks of most litigation. This offends one of the most basic principles of a free society: equality before the law."

Some proposals for reform of American tort law make good sense. One is to limit punitive damages. The Supreme Court has just agreed to review the award of $2 million to a man who bought a car without being told that its paint had been refinished to correct a defect. Such absurdities should not happen.

But H.R. 10 sweeps far more broadly than what could be called reform. As Mr. Griffin of Utah put it, in the name of stopping "frivolous lawsuits" it sees to it that "there are no lawsuits at all."

The bill might well kill the suits filed on behalf of pension funds and other entities that hold Orange County, California, bonds — suits against Merrill Lynch, the firm that gave the county investment advice. Wall Street firms, not surprisingly, are among the enthusiastic supporters of H.R. 10.

Accounting firms, too. Some had to pay heavy damages for their failures in the S.&L. scandal. Their political action committees have given $4.4 million to Congressional candidates in the last four years, and they are pressing for "reform."

The effect of H.R. 10, and its real purpose, are to insulate the rich and powerful from being called to account at law. □

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By

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PRESERVATION

TORT REFORM

Tort Reform

# MEDICAL MALPRACTICE TORT REFORM
# EXCLUDING ENTERPRISE LIABILITY

This paper sets forth my reaction as a trial lawyer, based upon a limited review of materials, to the various proposals of medical malpractice tort reform. I have discussed the proposals primarily with Dr. Bob Berenson, chair of the malpractice working group, as well as Greg Lawler, and have reviewed the group's briefing memo, together with selected articles among the source materials for their conclusions. I met with Ira on May 20.

The written analysis of issues, problems and proposals in the briefing memo is very well done and well-balanced, albeit short on practical experience from the viewpoint of trial practitioners. While I have made some political observations, obviously others are more informed and better qualified to assess the political realities of the various options.

Malpractice premiums represent only 1% or less of health care costs and less than 5% of an individual physician's gross practice revenues. The cost of defensive medicine is impossible to determine; one independent study concludes it is less than 1% of health care costs. I doubt the most optimistic proponents could support an estimate that the most stringent reforms will lower the costs of premiums and defensive medicine by more then 25-35%. Thus, your working group properly concludes that tort reform is not appropriately considered in the context of cost savings.

Since there is an expectation of <u>some</u> reform, however, the policy focus should be on what measures address the three recognized process problems: (1) a significant percentage of malpractice-injured persons do not pursue a claim or do not receive a remedy, (2) too many non-meritorious claims are filed, and (3) the litigation process is too slow and too expensive.

Two types of "tort reform" are usually debated - procedures which limit damages and procedures which have the effect of limiting access. As a policy matter the proposal should avoid "reforms" primarily designed to limit access of claimants with meritorious claims.

1. ADR. Studies indicate a significant percentage of patients injured by malpractice do not bring suit for reasons ADR may solve: traditional litigation is perceived as expensive, taking too long for resolution, or not justifiable for attorneys where the claim is of low dollar value. Addressing this need to increase access should increase the number of claims, thus likely increasing malpractice premiums, not reducing them, even assuming there is an indirect deterrent benefit of the effect of increased claims. The use of ADR could offset increased premiums somewhat though because it has lower costs than traditional litigation.

In the context of medical malpractice, ADR is generally either arbitration, mediation, or, in limited circumstances, no-fault. The group's recommendation is that the federal role is limited to mandating that Plans require/provide some form of ADR as a precondition to a medical malpractice lawsuit, within options allowable under individual state law, and to providing ADR models and pilot projects. State law prohibiting ADR as a precondition to suit (possibly only Missouri) is preempted. The trial lawyers' suggestion that mandatory ADR be mutually waiveable is reasonable.

ADR has been underutilized under existing state laws. The managed care systems believe ADR is underutilized because of the trial lawyers' hope/threat to hit the jackpot

with a jury. Unless the parties are motivated to use mediation or arbitration and the claimants are enticed to accept the results, mandating its use adds a layer of bureaucracy and increases the cost of the claims process. The room for creativity is probably in the models to be developed, rather than in the initial legislation. The challenges are to level the playing field for the small claim-claimant and to entice the larger claim-claimant to utilize ADR. An example of a model providing incentives to accept the result of ADR would be one in which a successful claimant was entitled to recover reasonable attorneys fees but would forego noneconomic damages, or accept caps on them.

2. Certificate of Merit. Credible studies conclude that too many nonmeritorious claims are filed. Screening panels are not considered very successful. A tort reform enacted by a few states, including Illinois, is a requirement that as a prerequisite to filing a malpractice lawsuit the Plaintiff attach to the complaint a certificate of merit, either by counsel representing that he or she has obtained a written medical opinion opining that as to each defendant the claim has merit or the written opinion itself. As these opinions are a necessary element of proof in the trial, requiring them early puts little additional burden on the Plaintiff, but offers the possibility of weeding out frivolous claims before a provider's reputation is impugned and money is wasted on defense and discovery. Bob Fogel, whose home state has a similar requirement, reported that this was a reform which he thought trial lawyers would not strongly oppose. Some of the consumer groups also have expressed agreement with the concept of this reform. The fact that the medical interests do not seem

to be pressing it may indicate that it is not considered to be a significant reform. [The Illinois State Medical Society, which provides malpractice insurance to its members, contends this requirement has had a significant effect in reducing superfluous defendants, on the other hand, a Kaiser senior counsel told me that this requirement is merely superficial and had not had a very significant impact because any Plaintiff's lawyer can obtain any expert opinion as needed.] It is certainly worthy of debate but it will take a little longer to survey those with experience with this type requirement.

3. Attorneys Fees. Providers have little legitimate interest in the issue of contingency attorneys fees since fees are paid from a claimant's recovery rather than tacked on, thus there is no additional cost to a provider. The real interest of providers and their insurers is in limiting the profitability of malpractice claims so that attorneys are less encouraged to take them to suit.

If this issue is instead approached on the policy of assuring more recovery dollars in the claimant's pocket, it must be determined whether this is considered worthy of federal preemption as a policy matter or a legislative strategy. If so, there are three reasonable approaches:

(a) require all states to limit contingency attorneys fees to not more than an established cap, say 30% or the standard one-third;

(b) require states without sliding scales to limit contingency fees to not more than an established cap; or

(c) require states to have awards of attorneys fees after judgment reviewed by the courts for reasonableness; alternatively the requirement that the parties may not contract for and the courts may not approve fees in excess of the lesser of an established cap, such as one-third, and existing state law. (The Kassebaum/Glickman proposal also suggests courts determine reasonable fees.)

Options (b) and (c) recognize that 10 states already have sliding scale limits which may require fees of less than one-third. Conversely, option (a) would allow higher fees than 10 states currently allow.

I found persuasive the argument against legislating sliding scale attorney fee limits because of the conflict it presents between attorney and client.

Although it is more complex, I like option (c) for three reasons: (1) court review for reasonableness is a fair method of checking abuses; (2) the bar and consumers groups do not challenge the adequacy of a one-third contingency; (3) the freedom of states to impose more stringent fee limits is preserved.

4. Collateral Sources. The rationale for this rule is to not permit a tortfeasor a free ride on the fruits of the prudence of the victim to obtain insurance or of government insurance. The opponents point out the additional burdens of subrogation on the system and the windfall to the plaintiff if subrogation is not pursued. Also, the plaintiff's attorney stands to receive a contingency fee computed on medical already recovered.

There are two alternatives on the table:

(a) the working group's proposal to permit the introduction into evidence of any compensation paid to the claimant from collateral sources; and

(b) alternatively, reduce damages by payment from collateral sources. (The Kassebaum/Glickman proposal takes this route.) In theory, this is anti-deterrent.

One 1986 study concludes the effect of such change in the rule is to reduce claim frequency (not claim recovery) by 14%, and that alternative (a) is as effective as alternative (b) in reducing claim frequency.

I recommend against invoking this modification. On its face it shifts the burden of the premium from the tortfeasor to the victim.

5. Punitive Damages. This is the one area where the effect of a tort reform which may not be too controversial is at cross purposes with the health care reform policy of improving quality of care. Because of the rarity of assessment of punitive damages against providers there may not be strong resistance to the elimination of or capping punitive damages (although some attorneys argue that in addition to the deterrent, the threat of punitive damages helps force a higher settlement). The elimination of punitive damages, however, is somewhat inconsistent with the theme of improving quality of care, including disciplining negligent providers by terminating them from plans, etc. Alternatives would be to cap punitive damages at a significant but not bankrupting sum, e.g. $500,000, or to limit them to an amount equal to compensatory (the Kassebaum/Glickman proposal) or a multiple thereof.

6. Damage Caps.

(a) Economic damages. Eight states have limits on total damages. The working group proposes to prohibit limits on economic damages. This would be well received by trial lawyers and is consistent with a right of full recovery of medical costs and loss of wages caused by malpractice. But for consistency, preemption should depend on the position taken on noneconomic damages.

(b) Noneconomic damages. There is some evidence that the establishment of caps can reduce malpractice premiums although even this conclusion is debated.

An AMA study concludes as of 1991 physicians paid an average of $14,900 in premiums, representing 4.2% of average practice revenues. There may be a legitimate concern that higher premiums for high risk specialties, e.g., obstetrics, have limited the numbers of such specialists and thus access. In my view, applying caps to address these limited though potentially serious problems is overkill. There is a need for creative reforms to deal with the risks and concurrent high malpractice insurance for obstetrics, surgery and anesthesiology but the approach should not be caps which would also limit the rights of victims of malpractice by G.P.s or by pediatricians whose premiums are one-half the national average.

The working group recommends an establishment of caps on noneconomic damages at a range of $1 to 2 million tied to a schedule based on the severity and duration of injury, grounded on historical awards. I do not think this is workable, aside from political

considerations. Mike Lux recommends against a cap on damages but suggests instead a sliding scale on a contingency fee limitation.

You are well acquainted with the arguments of whether caps on damages can survive a battle on the Hill between doctors who are emotionally entrenched and lawyers who fear that caps will be a beachhead in products liability reform. If you conclude that some measure of caps must be included in the package because the other reforms are insufficient to engender provider support, there are at least four other options of varying degree of federal involvement:

(1) Preempt state laws which prohibit caps on noneconomic damages but do not require establishment of caps. This would generate limited debate in at least those five states which had enacted caps then stricken as unconstitutional. Currently 22 states have enacted caps; but five states have ruled the caps unconstitutional.

(2) Require states to impose a limit or limits on noneconomic damages, require that limits be indexed for inflation or revised periodically, but leave to the state the amount of the limits. The policy statement should assert that in the imposition of a limit each state should balance: (1) the need for accuracy, consistency and predictability in verdicts to send effective deterrent signals, improve confidence in the process, encourage settlement and provide stability in malpractice insurance underwriting, and (2) the citizen's right to full compensation for loss.

This should be significantly less palatable to the trial lawyers because it would insure some legislation in the 33 states without caps and would require them to fight to push the

caps upward. By the same token, it allows each state to arrive at its independent policy decision in balancing these competing interests. This approach acknowledges the wide geographical variation of malpractice costs and of claims per physician. In 1991 the mean malpractice premiums per self-employed physician ranged from $10,600 in West South Central (Arkansas, Louisiana, Oklahoma, Texas) to $19,700 in the Middle Atlantic (New York, New Jersey, Pennsylvania). In 1991 there were 4.8 claims per 100 physicians in New England whereas there were 12.1 claims in the West South Central region.

(3) Require states to establish caps on noneconomic damages within a range, e.g., $250,000 to $750,000. (The Kassebaum/Glickman proposal sets the cap at $250,000 with no range.) The $250,000 cap passed in California in 1975, adjusted for inflation is worth less than $100,000 today. I am unaware whether the insurers believe that a "high" cap saves little or no premium. Some insurers argue against "high" caps on the theory the jury will consider the caps as a target instead of a ceiling.

As a policy matter, given the small percentage of health care costs involved, caps on noneconomic compensatory damages are not justified. In any event, given the wide variation of malpractice costs from state to state, a federal standard is not justifiable.

7. Eliminate Joint Liability for Noneconomic Damages.

Twenty-six states have modified the Rule of Joint Liability among tortfeasors, either eliminating the doctrine or restricting its application to defendant's whose negligence

exceeds some threshold, e.g., 50%, 25%, etc. Five additional states apply such modified rule to noneconomic damages only.

The working group did not seriously consider eliminating joint liability because of the focus on enterprise liability which should have severely limited the prospect of joint liability. Several of the pending proposals eliminate joint liability for noneconomic damages, as does Senator Rockefeller's Product Liability Fairness Act. Presumably the policy distinction is that while the public has an interest in assuring a victim's economic loss is covered, with respect to noneconomic loss the interest in fairness as between tortfeasors prevails. If there must be reform on the issue of noneconomic damages, I recommend this change rather than caps.

8. Miscellaneous.

(a) There is a suggestion that health reform establish a uniform statute of limitations. The Kassebaum/Glickman proposal includes a 2/4 year limitation. (Similar to the 1/3 year federal securities fraud scheme). The differences between the limitations of individual states and the minimal advancement toward the goals of health reform which such an effort would make, however, are not significant enough to warrant preemption. But if there is a need to have a laundry list of reforms, this is an easy one to add.

(b) Elimination of ad damnum clauses to complaints. This lessens the damage of publicity of complaints. Likewise, this could be added to a laundry list.

(c) There has been a proposal to permit periodic payment of judgments (for economic loss) under the Uniform Act. There is so much confusion about the operation of this Act, however, making it mandatory hardly seems worth the debate; making it optional isn't worth the effort.

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September 16, 1993

Melanne Verveer

TO: Michael Lux
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RE: ADR

The denial of a consumer's right to legal advice for the ADR process demands that the consumer be represented by some type of ombudsman. All the explanatory pamphlets in the world cannot soothe, calm, or reassure an injured or traumatized individual. Whether the claim relates to the wrongful death of a parent or child or relates to a catastrophic injury (brain damage or loss of limb use), the consumer will not be in a state of mind to rationally proceed alone through any ADR process.

With respect to "minor" claims, you will find a tremendous influx of good and bad claims; true malpractice and bad results/risks of the procedure. The screening process will be incredibly voluminous and time consuming.

For example, if Chicago had 8 health care alliances, the 8 million citizens will result in 1,000,000 per alliance. If only 1% attempted to make claims per year that would amount to 10,000. The review board and consumer advocate would be overwhelmed. There will be paperwork, computers, forms, files, staff -- in other words, a shift of overwhelming paperwork and bureaucracy from today's excesses to tomorrow's ADR system. No savings will be realized.

One must weigh the possible goals of expedited resolution of claims by pre-suit and pre-attorney ADR with the probable increased volume of claims without the benefit of attorney screening or guidance through the ADR system. It may be possible to involve attorneys in an abbreviated ADR process at a reduced fee (e.g., 25%).

Additionally, one must remember that there is absolutely no incentive for physicians to accede to an early settlement even through pre-suit ADR. Every settlement or verdict is required to

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be reported to state and federal agencies. The physician is concerned about her/his record and presently refuses to settle claims because of an extremely high success rate of defense verdicts (probably 80-90% nationally). Thus, the incentive is to defend most claims to verdict to avoid reporting. Furthermore, the insurance industry generally finds a benefit by holding onto its reserved funds for as long as possible.

Consideration should be given to excusing the reporting requirement for claims settled pre-suit through the ADR program. If, however, any physician has more than 3 (or 4 or 5) pre-suit ADR settlements, then a reporting requirement could be triggered retroactive to the first such settlement. The delay in reporting to official agencies, however, should not prevent record-keeping for any form of "consumer report cards".

Finally, the volume of claimants, claim evaluation process and attempted claim resolution will create a backlog threatening the expiration of statutes of limitation for filing lawsuits. If the Statute of Limitations is tolled or extended during the ADR process, such delay could result in various post-suit problems including faded memories, delay in recovery of damages, and the hardships such delays can cause, etc.

The foregoing represent a brief review of potential problems in a pre-suit ADR program. In summary:

- high volume of claimants;
- bureaucracy and paperwork;
- inadequate screening and guidance of claimants;
- disincentives to ADR claim resolution;
- delay in recovery, staleness of evidence, statute of limitations problems.

I would be pleased to discuss these and other concerns further and to participate in any efforts to develop a viable ADR program.

Very truly yours,

Robert L. Fogel

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Additionally, one must remember that there is absolutely no incentive for physicians to accede to an early settlement even through pre-suit ADR. Every settlement or verdict is required to

## Alternative Dispute Resolution

1. The preferred mechanism is non-binding mediation using outside, impartial mediators.

2. The injured person must have an absolute right to be represented at ADR by an attorney of his or her choice.

3. There should be no penalty for the failure of the claimant to agree to resolve the dispute at ADR and there should be no penalty of any nature if, at trial, it turns out that the offer at ADR was reasonable.

4. The claimant must have the right to obtain all necessary records prior to the mediation.

5. There should be no absolute requirement that evidence be put on during ADR, particularly expert testimony; such a requirement would greatly increase litigation expense if the dispute is not resolved at ADR.

6. There should be safeguards against the statute of limitations running during the ADR process, particularly when the injured person chooses not to be represented by counsel.

7. Recommendations or offers made during the ADR process should not be admissible in evidence at the subsequent trial of a matter not resolved at ADR.

8. Attached is a paper by Gerald L. Montroy setting forth many of the pitfalls of alternative dispute resolution mechanisms. In addition to the pitfalls pointed out in the Montroy paper, any mechanism which denies the injured person the right to an attorney of his or her choice for the ADR process and which, for example, appoints a consumer advocate for the injured person puts the injured person at a serious disadvantage in the process and most likely will add tremendous cost to the overall system. Currently, when an injured person sees an attorney for a potential medical malpractice claim, the attorney obtains records relating to the occurrence, obtains relevant prior medical records and retains consultants to review those records to determine whether there is a potentially meritorious and winnable case. The attorney's training and experience, in evaluating the potential for winning a case at trial and the potential damages, is crucial to the adequate representation of an injured victim of medical malpractice and is critical in order to advise the injured person whether or not a settlement offer is reasonable and whether or not it ought to be accepted. In addition, the attorney must deal with probate and estate issues relating to claims by family members of deceased victims, represent individuals who are not legally competent and work through complex questions involving division of settlement proceeds between those entitled to recover for the injury or death of an individual. It is respectfully submitted that this cannot be

done by a consumer advocate who may have been trained in the workings of a bureaucratic process but not in the proper representation of injured victims and proper evaluation of such claims.

Such a system would surely lead to an increased number of claims being filed, less recovery to deserving claimants and would substantially increase the cost of the overall system. If a health care alliance in a State like Illinois had one million members and if just one percent bring claims each year because of perceived bad results, that alliance's ADR mechanism will have to deal with ten thousand claims each year, resulting in unnecessary bureaucracy with tremendous cost to the system.

# ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AND PROTECTING RIGHTS OF THE VICTIMS OF MALPRACTICE

BY

GERALD L. MONTROY[1]

In an attempt to provide early settlement of disputes, mediation and arbitration, alternative dispute resolution systems can severely limit victim's rights, increase substantially the cost of litigation and provide inadequate compensation for the victims of medical or hospital malpractice. Alternatively, if means are used to protect victim's rights and remedies, early and just settlements of malpractice lawsuits can be effected through ADR. A DuPage County, IL model has provided early settlement with substantial savings to both plaintiff and defendant.

## I. PITFALLS OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

### 1. VULNERABILITY OF MALPRACTICE VICTIMS AND FAMILIES OF MALPRACTICE VICTIMS.

Families who are victims of medical negligence are extraordinarily vulnerable to early offers of settlement, mediation and arbitration. The family has suffered a substantial loss through death or disability. There are frequently astronomical medical and hospital bills. When a bread winner is disabled, frequently financial worries abound. In addition, the tragic loss is frequently at the hands of a trusted family physician or physician specialist to whom the family physician has referred the patient. In some instances, the physician has assured the shocked and aggrieved family he did everything he could to save the patient from loss of life or limb.

Sometimes months or even a year passes after the personal tragedy of malpractice before the family can sort out the conflicts of trust and loss to decide whether or not to seek legal counsel who has the resources to obtain an independent medical review of the case. Alternatively, if the injured person or his family is pressured without legal counsel to sign a binding contract, the compensation is often inadequate to compensate the victim for his injuries.

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The victim in a malpractice case, if unrepresented by counsel, has no advocate to assist him or her in evaluating his claim to assure he or she obtains adequate compensation.

Thus, it is imperative that in any mediation or arbitration wherein the victim is not represented by an attorney, the family has a full two years, without penalty, to set aside the settlement.

2. THE COSTS OF LITIGATION CAN BE SIGNIFICANTLY INCREASED THROUGH THE DUPLICATION OF EXPERT WITNESS TESTIMONY.

Expert witnesses are needed to establish liability and prove damages. In most cases, the attorney representing the victim of malpractice cannot determine liability and the nature and extent of the injuries without conferring with expert witnesses.

The serious obstetrical malpractice case involves one or more obstetrician, a neonatologist, a pediatric neurologist, a physical rehabilitation physician, an obstetrical nurse, and an economist. The obstetrician reviews the case to determine whether or not there were deviations from standard of care. The neonatologist testifies as to the time when the injury occurred. The pediatric neurologist determines the nature and extent of the injury resulting from the malpractice. The physical rehabilitation physician determines the extent of future care needed. The obstetrical nurse speaks to hospital liability. The economist indicates the present cash value of economic loss. Expert physician witnesses charge between $250 and $500 per hour for their reviews. Nurses and economists charge $100 to $200 per hour for their reviews.

Typically, the defense counsel will have expert witnesses in the same areas of medicine, nursing and an economist who will review and testify. As the defense counsel has an opportunity to test the opinions of plaintiff's experts, plaintiff's counsel has an opportunity to test the opinions of defense experts.

The cost of expert witnesses in the discovery phase of a medical malpractice case is typically 50% of the cost of the expert witnesses coming to Court and testifying at trial. While attorneys for the parties go to the offices of the various expert witnesses to obtain their deposition testimony, at the time of trial the expert witness must leave his or her work place and travel to the Court House for testimony.

In the event of an alternative dispute resolution mechanism involving live testimony from expert witnesses, the cost of the duplication of the expert witnesses before an arbitrator or panel of arbitrators will increase the expenses of litigation by 50%. Increasing the cost further through duplication of expert witness testimony can make prohibitive the cost of litigation in medical negligence cases.

**It is thus important that in any alternative dispute resolution mechanism there be no duplication of expert witness testimony.**

3. THE VICTIM OF MALPRACTICE CAN BE PENALIZED AS A RESULT OF THE ALTERNATIVE DISPUTE RESOLUTION MECHANISM.

The jury is instructed that it is the judge of fact. It chooses to believe or disbelieve the parties and the expert witnesses as the parties and expert witnesses are tested by the cross-examination of opposing counsel. Furthermore, in malpractice cases the jury is instructed that substandard care as well as proximate causation can be determined only by expert witness testimony.

If the result of a malpractice mediation or deliberation is introduced into evidence, the jury does not have the opportunity of weighing the credibility of the witnesses. He or she may be persuaded that the arbitrator or panel of arbitrators have superior knowledge and/or abilities to judge whether or not medical negligence occurred resulting in the injuries claimed. Admission into evidence of the findings or decisions of the arbitrator or panel of arbitrators creates an additional hurdle which the victim must overcome. Furthermore, the victim's common law rights and remedies are limited through the admission into evidence of these findings.

**It is thus imperative that the victim of malpractice be penalized in no manner as a result of an alternative dispute resolution.**

4. ALTERNATIVE DISPUTE RESOLUTIONS CAN THWART THE SETTLEMENT PROCESS.

Attorneys in Illinois including the author who regularly represent victims of malpractice find that up to 50% of their cases are settled within the first year of filing suit. Alternative dispute resolution systems can thwart these early settlements.

In Illinois, the Illinois State Medical Inter-Insurance Exchange, the physician owned insurance company which insures 50% of the physicians in the State, follows a particular procedure after a suit is filed which frequently results in early settlement. The company, through the claims agent, obtains the medical and hospital records and sends these records for a confidential review by physicians in the same specialty who are unknown to both the defendant and victim. The results of these confidential reviews are presented to a Physician Review Committee (PRC) on a monthly basis. The PRC decides whether or not the lawsuit is meritorious. If the lawsuit is deemed meritorious by the PRC, the PRC recommends the claims agent seek settlement. The claims agent thereupon seeks consent of the defendant physician. If he consents, an immediate settlement is attempted. If the defendant physician refuses, he argues his case before the PRC. If the PRC again votes to accept a settlement posture, the claims agent will seek settlement.

The claims agent keeps records of settlements and jury verdicts in the state. Frequently, before extraordinary expenses are incurred by the victim for expert witness depositions, the lawsuit is settled. In many of these cases since the victim of malpractice saves $25,000 to $50,000 in expenses, he or she through the attorney will settle the case for 5% less than he might get if he went to trial. There is a early settlement for the victim and a financial savings for the insurance company not only in settlement but in defense and expert witness costs.

The great danger of alternative dispute resolution mechanisms is that unless carefully crafted the insurance company would be foolish to seek early settlement. The insurance company will wait until after the alternative dispute resolution mechanism has been exhausted before reviewing the case internally. As a result, the victim must wait a longer period of time for compensation and the plaintiff's discovery costs have increased as have defense costs.

## II. ALTERNATIVE DISPUTE RESOLUTION MECHANISMS WHICH CAN OFFER EARLY SETTLEMENT OF MEDICAL MALPRACTICE DISPUTES

In fashioning an alternative dispute resolution mechanism that works, it must be understood that victims of malpractice and their attorneys have nothing to gain through a delayed settlement, trial, or appeal. Expert witness fees are extraordinarily high when malpractice cases go to trial. Appeals substantially delay the victim obtaining adequate compensation. Defense attorneys who bill by the hour gain if settlement is late or the case is tried and appealed. Insurance companies frequently do not have internal reviews which speed up settlement.

There are two ways known to this author in which disputes can be resolved early saving money to the insurance company and victim alike:

1. Insurance companies and large corporate health care providers should be required to internally review the malpractice lawsuit shortly after the case has been filed. Using the model of Illinois State Medical Inter-Insurance Exchange, the insurance company or health care provider, through its risk manager, should be required to obtain a confidential review by physicians unknown to defendant and victim. The results of these confidential interviews should be presented to a Physician Review Committee who has an interest in holding down the costs of litigation. This Physician Review Committee should then decide whether or not a settlement should be sought. Contrary to the Illinois plan, however, the defendant physician should not be able to black ball the Physician Review Committee deliberations. If the Physician Review Committee agrees the case should be settled, the claims agent or risk manager should then through a pre-trial hearing attempt settlement. At the pre-trial hearing held within one year of the filing of the lawsuit, the judge should require the claims agent or risk manager and the victim be present with the attorney representing the plaintiff and defendant. When the parties are brought together for the settlement conference, they can with judicial guidance attempt settlement. If no settlement is reached, the case can be set for trial.

2. An alternative to the internal review is an Alternative Dispute Resolution System used for a brief time in DuPage County, Illinois.

Under the DuPage County Plan in which the author represented the victim, the judge who was to hear the case called the attorneys and their clients together within a few days of the beginning of the medical malpractice trial. The judge then appointed a plaintiff's attorney and a defense attorney, both acquainted with medical malpractice cases, to sit with the judge in arbitration. Both plaintiff's attorney and defense attorney were allotted a thirty minute statement of their evidence on both liability and damages. Thereafter, a fifteen minute rebuttal was granted both sides.

The panel of attorneys and the judge then decided independent of each other whether or not the plaintiff would prevail. If any of the consulting attorneys or judge decided the plaintiff would be successful, the consulting attorneys and the judge, independent of each other, provided their opinion as to the amount of verdict a jury would award.

Once the trial judge had reviewed the results of the deliberations by the consulting attorneys along with her own deliberation, she announced to the attorneys and their clients the decisions on liability. Thereupon, the judge gave the parties the independent opinions of the three consultants as to the amount of the verdict.

Next the trial judge ordered the plaintiff's attorneys and defense attorney to consult with their respective parties and then with each other in an attempt to settle the case. Two hours later, the judge met with the attorneys to determine whether or not the negotiations were successful.

In the case in which the author represented the plaintiff, the judge and the two consulting attorneys all decided plaintiff's attorney would be successful at trial. One of the consulting attorneys opined the verdict would be $500,000. Another consulting attorney opined the verdict would be $1,500,000. The judge opined the verdict would be $1,000,000. After two hours of deliberation between plaintiff's attorney and defense attorney, the case was settled for $850,000. Through the one day alternative dispute resolution mechanism, a two week trial was averted and substantial savings were effected in attorney's fees and expert witness costs by defense counsel. Plaintiff saved substantial monies because he did not have to have expert witnesses fly to the Chicago, IL area in order to testify. Plaintiff also avoided an appeal.

## CONCLUSION

An Alternative Dispute Resolution Mechanism can be successful in obtaining early settlement through mediation if it is carefully crafted so that there are no penalties if a party does not accept the mediation, the victim of malpractice is not deprived of attorney representation, and if further costs are not incurred in an attempt to save time and money.

Mandating an early peer review by the insurance company or health care provider along with following the DuPage County, IL Plan for Alternative Dispute Resolution can effect an early resolution of malpractice disputes saving both the insurance company or health care provider and the victim expenses of litigation.

## Certificate of Merit

We believe that the Clinton Administration has already seen and evaluated the Illinois model for the certificate of merit which is an excellent model.

Any requirement for a certificate of merit should provide the following:

A. That the plaintiff's attorney submit an affidavit attaching a report or affidavit from a medical specialist where the identity of that specialist may be kept anonymous, if so desired.

B. That at trial, plaintiff's proof is not limited to the criticisms contained in the report or affidavit of the medical specialist. The plaintiff must be free to expand his or her claims based on information discovered through depositions and other discovery conducted after the certificate of merit is filed.

C. There must be provisions for an extension of time to file the certificate of merit where the statute of limitations runs and there has not been time to obtain the physician's report or where the injured person and his or her lawyer have been thwarted in their attempts to obtain medical records from potential defendants.

D. It should not be a requirement that the physician signing the report or affidavit be of the exact same specialty as the potential defendant. It should be sufficient if the physician or other health care provider is of the same school of medicine and, if not in the same specialty, is knowledgeable in the areas of medicine involved, familiar with the standard of care and is otherwise competent to render the opinion.

## Practice Guidelines

The proposal as it exists, while vague, clearly is fraught with serious potential problems. There is a great danger that practice guidelines will be used as a weapon in defending lawsuits rather than a method to improve medical care and lower health care costs. If at all possible, practice guidelines should be eliminated from the plan.

Problems are as follows:

1. A practice guideline by its nature will have to be general and can not possibly cover all clinical situations. There is a danger that the general guidelines will be substituted for specific standard of care requirements, i.e. if a doctor complies with the general guidelines, that compliance will be a complete defense, even if a specific standard of care (not covered by the general guidelines), applicable under the existing circumstances, was violated.

2. Practice guidelines will not eliminate allegedly unnecessary tests performed in the practice of "defensive medicine". At trial, the parties will argue, probably using expert testimony, that a specific guideline was or was not applicable under the circumstances and facts of that case. This seems unavoidable since it would be impossible for every conceivable situation to be covered by practice guidelines. An additional trial issue will be created and battled over by the experts. If physicians truly do order unnecessary tests motivated by the fear of potential medical malpractice claims, such a fear will not be eliminated by practice guidelines.

3. The concept of practice guidelines raises complex issues with respect to who creates the guidelines, overlapping specialties, and how the guidelines will be updated in a timely fashion to keep up with the changing standard of care as the standard evolves through new technology and new medical understanding based on medical research and experience and disseminated through the publication of medical literature. The concept of a rather static codification of guidelines in a profession where available technology and knowledge changes and is made available on a daily basis is frightening. A physician may be more motivated to stay current in practice guidelines than in the available literature or knowledge of the profession or specialty.

4. See the enclosed paper by Ellenberger and Montroy.

If practice guidelines become a part of the plan then we should argue that if the guidelines cover the specific factual circumstances of a case and the physician offers evidence of compliance with those guidelines, there should be a rebuttable presumption that the physician has complied with the standard of care (as long as the guideline represents the specific and not just the general standard of care). Similarly, if the plaintiff establishes a deviation from the guidelines, there should be a rebuttable presumption that the physician deviated from the applicable standard of care.

# STANDARDS BASED ON PRACTICE GUIDELINES WILL PROMOTE SUBSTANTIAL SUBSTANDARD HEALTH CARE AND PROVIDE A LEGAL DEFENSE FOR MEDICAL MALPRACTICE

BY

DIANE M. ELLENBERGER, MS, RN[1]
and
GERALD L. MONTROY[2]

Historically, guidelines for patient care have been watered down and have been rendered ineffective in an attempt to protect physicians from substandard medical care. Giving a health care provider an absolute defense if his professional conduct or treatment complies with appropriate practice guidelines will likewise result in poor patient care and lack of compensation for victims of medical negligence.

In 1983 Guidelines for Perinatal Care, authored jointly by the American Academy of Pediatrics and the American College of Obstetrics and Gynecologist (ACOG), stated, "continuous electronic monitoring should be used for patients identified as high-risk." In a joint statement issued by ACOG and the Nurses Association of American College of Obstetrics and Gynecologists (NAACOG, now AWHONN) in January, 1986, electronic monitoring of the fetal heart was an important tool in attaining the goal of insuring optimal maternal fetal outcome.

As a result of the 1983 Guidelines physicians and hospitals were provided a better method of surveying fetal health in the critical period immediately prior to birth. Physicians and nurses became aware of fetal distress earlier and intervened to change maternal position and oxygenate the mother along with expediting delivery, occasionally by performing Cesarean Sections resulting in improved fetal outcome, particularly in high risk situations.

The Guidelines for Perinatal Care thus became standard in high-risk obstetrics. Internal or external electronic monitoring with continuous electronic printout in hospitals became the standard of care for safe deliveries in high-risk obstetrics.

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Physicians and hospitals who failed to follow the 1983 guidelines when the obstetrical patient was high-risk and the fetus was injured as a result of inadequate monitoring were successfully sued for medical negligence.

However as a result of physicians and hospitals being held to the standards promulgated by the American College of Pediatrics and the American College of Obstetrics and Gynecologists in medical negligence law suits, the standards were changed in the 1988 edition of Guidelines for Perinatal Care. The diluted guidelines for fetal heart rate monitoring indicated that intermittent auscultating (listening to) fetal heart rate was equivalent to continuous electronic fetal heart rate monitoring. Electronic fetal heart rate monitoring was an option but not mandated, if risk factors were present.

The 1988 guidelines were written for the sole purpose for providing a defense to obstetrical medical negligence cases. Continuous internal or external electronic fetal monitoring provides much better information about fetal health because the electronic fetal monitoring indicates the variability of the fetal heart rate and abnormal patterns while auscultation or intermittent listening to the fetal heart does not.

The standards based on practice guidelines as proposed in the areas of anesthesia, emergency medicine and gynecology will result in physicians and hospitals being provided a defense for failing to provide optimum patient care. These guidelines will be written with an eye towards litigations as were the 1988 perinatal standards. They will promote mediocrity in patient care. They will also provide an additional hurdle for the victim of medical negligence to overcome when substandard patient care is provided.

Substandard patient care is found where physicians and hospitals fail to improve their practice with new research, new knowledge and technology. Guidelines which are defensively written will promote less than optimum patient care. The patient will be forced into a pattern of "appropriate" care based upon outdated practices which remains solely to save the health care system from liability. Such standards while providing an absolute defense for poor patient care will promote substandard care in the practice of the three specialty areas of anesthesia, emergency medicine and gynecology.

## Periodic Payments

The Illinois provisions are attached. The Illinois law is a good model if there is going to be periodic payments.

## Part 17. Healing Art Malpractice

**§ 2—1701. Application.**

Subject to the provisions of Section 2—1705, in all medical malpractice actions the provisions of this Act shall be applicable.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

**§ 2—1702. Economic/Non-Economic Loss.**

As used in this Part:

(a) "Economic loss" means all pecuniary harm for which damages are recoverable.

(b) "Non-economic loss" means loss of consortium and all nonpecuniary harm for which damages are recoverable, including, without limitation, damages for pain and suffering, inconvenience, disfigurement, and physical impairment.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

**§ 2—1703. Past/Future Damages.**

As used in this Part:

(a) "Past damages" means damages that have accrued when the damages findings are made.

(b) "Future damages" includes all damages which the trier of fact finds will accrue after the damages findings are made, including, without limitation, damages for future medical or health treatment, care or custody, loss of future earnings, loss of bodily function, future pain and suffering, and future physical impairment and inconvenience.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

**§ 2—1704. Medical Malpractice Action.**

As used in this Part, "medical malpractice action" means any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice. The term "healing art" shall not include care and treatment by spiritual means through prayer in accord with the tenets and practices of a recognized church or religious denomination.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

**§ 2—1705. Election for Periodic Payment.**

(a) In order to invoke the provisions of Section 2—1706 through 2—1718, a party to a medical malpractice action must make an effective election in accordance with this Section.

(b) The election must be made by motion not less than 60 days before commencement of a trial involving issues of future damages unless leave of court is obtained. Any objection to the election must be made not more than 30 days after the election.

(c) An election is effective if:

(1) all parties have consented; or

(2) no timely objection is filed by any party; or

(3) a timely objection is filed, but:

(i) the electing party is a plaintiff and shows there is a good faith claim that future damages will exceed $250,000, or

(ii) the electing party is responding to a claim for future damages in excess of $250,000 and shows both that security in the amount of the claim for past and future damages or $500,000, whichever is less, can be provided and that future damages are likely to accrue over more than one year.

(d) If an effective election is made prior to the commencement of trial, all actions, including third-party claims, counterclaims, and actions consolidated for trial, must be tried under Sections 2—1706 through 2—1718, unless the court finds that the purposes of these Sections would not be served by doing so or in the interest of justice a separate trial or proceeding should be held on some or all of the claims that are not subject of the election.

(e) An effective election can be withdrawn only by consent of all parties to the claim to which the election relates.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

§ 2—1706. Special findings required.

(a) If liability is found in a trial under Sections 2—1706 through 2—1718, the trier of fact, in addition to other appropriate findings, shall make separate findings for each plaintiff specifying the amount of:

(1) any past damages; and

(2) any future damages for each of the following types:

(i) medical and other costs of health care;

(ii) other economic loss; and

(iii) non-economic loss.

(b) If the trier of fact finds that certain future damages will accrue for a definite number of years, the amount of periodic payments for those damages must be calculated based on that definite number of years. Payment for such damages shall be made periodically for that number of years.

(c) If the trier of fact finds that certain future damages will accrue for the remainder of the plaintiff's life, the trier of fact shall make a specific finding specifying the remaining life expectancy of the plaintiff and the amount of periodic payments for those damages must be calculated based on the remaining life expectancy of the plaintiff. Payment for such damages shall be made periodically and shall continue until the plaintiff's remaining life expectancy is reached or the plaintiff dies, whichever is later.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

§ 2—1707. Calculation of future damages.

(a) In all trials under Sections 2—1706 through 2—1718, future damages must be calculated by the trier of fact without discounting future damages to present value.

(b) In all jury trials in which special damages findings are required under Sections 2—1706 through 2—1718, the jury must be informed that with respect to future damages:

(1) the law takes into account the fact that those payments may be made in the future rather than in one lump sum now; and

(2) the jury will make their findings on the assumption that appropriate adjustments for the present value of those payments will be made later and that the jury should not discount those payments to present value.

Added by Act approved June 23, 1955, eff. Aug. 15, 1955. P.A. 84-7.

§ 2—1708. Basis for determining judgment to be entered.

In order to determine what judgment is to be entered on a verdict requiring findings of special damages under Sections 2—1706 through 2—1718, the court shall proceed as follows:

(1) The court shall apply to the findings of past and future damages any applicable rules of law, including set-offs, comparative fault, additurs, and remittiturs, in calculating the respective amounts of past and future damages each plaintiff is entitled to recover and each party is obligated to pay.

(2) The court shall calculate the equivalent lump sum value of future damages in accordance with Section 2—1712.

(3) Any contingent attorneys' fees shall be calculated based on the sum of the past damages recoverable and equivalent lump sum value of future damages recoverable. Any judgment for periodic installments must specify payment of attorneys' fees and litigation expenses in lump sum, separate from the periodic installments payable to the plaintiff, pursuant to an agreement entered into between the plaintiff and his or her attorney.

(4) Upon election of a subrogee, including an employer or insurer who provides workers' compensation, filed within 10 days after verdict, any part of future damages allocable to reimbursement of payments previously made by the subrogee is payable in equivalent lump sum to the subrogee.

(5) The court shall determine the amount of future damages to be awarded in equivalent lump sum. This amount shall be that part of the equivalent lump sum value of future damages which does not exceed $250,000. In the event that the equivalent lump sum value of the total amount of future damages recoverable is $500,000 or more, the court may, upon a showing by the plaintiff that he will incur greater expenses for future damages immediately after judgment in order to secure appropriate necessities including, but not limited to, equipment, supplies, medication, residence or other items, allow additional amounts of future damages to be awarded in equivalent lump sum value so that the total amount awarded in equivalent lump sum is sufficient to secure the aforementioned items, but in no event shall any increase under this sentence cause more than 50% of the

equivalent lump sum value of total future damages recoverable to be awarded in lump sum. The amount of future damages awarded in equivalent lump sum shall be added to the total amount of past damages recoverable and this total shall be known as the present award. The periodic award shall consist of the total amount of future damages without reduction to an equivalent lump sum value, reduced in the proportion that the equivalent lump sum value of the amount of future damages included in the lump sum present award bears to the equivalent lump sum value of the total amount of future damages.

(6) Any attorneys' fees and litigation expenses shall be allocated proportionately between the amount of the present award and the amount of the periodic award.

(7) The court shall enter judgment in lump sum for the present award including that portion of attorneys' fees and litigation expenses allocable to the present award, for amounts payable under subsection (4), and for that portion of attorneys' fees and litigation expenses allocable to the periodic award.

(8) The court shall enter judgment in accordance with Section 2—1709 for the payment in installments of the periodic award, less that part of future damages allocable to reimbursement of payments previously made by a subrogee under subsection (4), and less that portion of attorney's fees and litigation expenses allocable to the periodic award.

(9) In an action for wrongful death, the calculation of all amounts, values, and awards under this Section must be based on the total recovery for all beneficiaries of the action.

(10) Upon petition of a party before entry of judgment and upon a finding of incapacity to post the required security, the court, at the election of the plaintiff or beneficiaries in an action for wrongful death, shall:

(i) enter a judgment in accordance with subsections (7) and (8); or

(ii) determine the equivalent lump sum value under Section 2—1712 in the amount otherwise to be paid in periodic installments under subsection (8) and enter judgment for that equivalent lump sum value and for those amounts payable under subsection (7).

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

**§ 2—1709. Payment of periodic installment obligations.**

(a) Except in those cases specified in this Part concerning the death of the person receiving periodic payments, the amount of periodic payments may not be adjusted or otherwise modified following final judgment.

(b) Unless the court directs otherwise or the parties otherwise agree, payments must be scheduled at one-month intervals. Payments for damages accruing during the scheduled intervals are due at the beginning of the intervals.

(c) If the trier of fact has found that different elements of future damages will accrue over different periods of time the court shall direct that amounts to be periodically paid in the future be proportionately divided into the same periods of time.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

§ 2—1710. Form of security.

(a) Security authorized or required for payment of a judgment for periodic installments entered in accordance with this Section must be in one or more of the following forms and approved as to quality by the court:

(1) bond executed by a qualified insurer;

(2) annuity contract executed by a qualified insurer;

(3) evidence of applicable and collectible liability insurance with one or more qualified insurers;

(4) an agreement by one or more qualified insurers to guarantee payment of the judgment; or

(5) any other satisfactory form of security.

(b) Security complying with this Section serves also as a required supersedeas bond.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

§ 2—1711. Posting and maintaining security.

(a) If the court enters a judgment for period installments, each party liable for all or a portion of the judgment, unless found to be incapable of doing so under subsection (10) of Section 2—1708, shall separately or jointly with one or more others post security in an amount equal to the equivalent lump sum value of the unpaid judgment, including past damages, in a form prescribed in Section 2—1710, within 30 days after the date the judgment is subject to enforcement. A liability insurer having a contractual obligation and any other person adjudged to have an obligation to pay all or part of a judgment for periodic installments on behalf of a judgment debtor is obligated to post security to the extent of its contractual or adjudged obligation if the judgment debtor has not done so.

(b) A judgment creditor or successor in interest and any party having rights under subsection (d) may move that the court find that security has not been posted and maintained with regard to a judgment obligation owing to the moving party. Upon so finding, the court shall order that security complying with this Section be posted within 30 days. If the security is not posted within that time, the court shall calculate the equivalent lump sum value of the obligation and enter a judgment for that amount in favor of the moving party.

(c) If a judgment debtor who is the only person liable for all or a portion of a judgment requiring security under this Section fails to post and maintain security, the right to lump sum payment described in subsection (b) applies only against that judgment debtor and the portion of the judgment so owed.

(d) If more than one party is liable for all or a portion of a judgment requiring security and the required security is posted by one or more but fewer than all of the parties liable, the security requirements are satisfied and those posting security may proceed under subsection (b) to enforce rights for security or lump sum payment to satisfy or protect rights of reimbursement from a party not posting security.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

§ 12—1712. Equivalent lump sum value.

When required to do so under Part 17 of Article II of the "Code of Civil Procedure", the court shall determine the equivalent lump sum value in accordance with this Section.

Non-economic loss shall not, under any Section of this Part, be subject to discounting. The only portion of damages subject to discounting in this Part is future economic loss.

The court shall determine the equivalent lump sum value of any future economic loss by applying the discount factor, compounded annually, to those elements of damages for future economic loss, and then adding, without discounting, those elements of damages for future non-economic loss. The discount factor shall be 6%.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

§ 2—1713. Effect of death.

(a) For all future damages which the trier of fact has determined will accrue for the remainder of the plaintiff's life, payment for those damages shall continue until the later of the plaintiff's death or the time when the remaining life expectancy is reached. For all future damages which the trier of fact has determined will accrue for a definite number of years, payment for those damages shall continue for that number of years irrespective of the plaintiff's death.

(b) If, in an action for wrongful death, a judgment for periodic installments provides payments to more than one person entitled to receive benefits for losses that do not terminate under subsection (a) and one or more but fewer than all of them die, the surviving beneficiaries succeed to the shares of the deceased beneficiaries. The surviving beneficiaries are entitled to shares proportionate to their shares in the periodic installments not yet paid, but they are not entitled to receive payments beyond the respective periods specified for them in the judgment.

(c) If, in an action other than one for wrongful death, a judgment for period installments is entered and a person entitled to receive benefits for losses that do not terminate under subsection (a) under the judgment dies and is survived by one or more qualifying survivors, any periodic installments not yet due at the death must be shared equitably by those survivors.

(d) "Qualifying survivor" means a person who, had the death been caused under circumstances giving rise to a cause of action for wrongful death, would have qualified as a beneficiary at the time of death according to the law that would have applied in an action for wrongful death by the jurisdiction under which the issue of liability was resolved in entering the judgment for periodic installments.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

§ 2—1714. Liability insurance policy limits.

(a) In determining whether or to what extent a judgment for periodic

installments exceeds limits under a liability insurance policy, the present equivalent lump sum value of future periodic payments must be added to the amount of the judgment awarded in lump sum. The sum so calculated must be compared to applicable limits under the policy.

(b) If the sum calculated under subsection (a) does not exceed applicable policy limits when the judgment is entered, amounts due by reason of future periodic payments are entirely within those limits.

(c) If the sum calculated under subsection (a) exceeds applicable policy limits when the judgment is entered, the future periodic payments must be allocated proportionately to amounts within and amounts in excess of those limits.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

**§ 2—1715. Assignment of periodic installments.**

An assignment of or an agreement to assign any right to periodic installments for future damages contained in a judgment is enforceable only as to amounts:

(1) to secure payment of alimony, maintenance, or child support;

(2) for the costs of products, services, or accommodations provided or to be provided by the assignee for medical or other health care; or

(3) for attorney's fees and other expenses of litigation incurred in securing the judgment.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

**§ 2—1716. Exemption of benefits.**

Periodic installments for future damages for loss of earnings are exempt from garnishment, attachment, execution, and any other process or claim to the extent that wages or earnings are exempt under any applicable law. Except to the extent that they may be assigned under Section 2—1715, periodic installments for all future damages are exempt from garnishment, attachment, execution, and any other process or claim.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

**§ 2—1717. Settlement agreements and consent judgments.**

(a) Parties to a medical malpractice action may file with the clerk of the court in which the action is pending or, if none is pending, with the clerk of a court of competent jurisdiction over the claim, a settlement agreement for future damages payable in periodic installments. The settlement agreement may provide that one or more of Sections 2—1705 through 2—1718 apply to it.

(b) Upon petition of the parties, a court of competent jurisdiction may

enter a consent judgment adopting one or more of Sections 2—1705 through 2—1718.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

§ 2—1718. Satisfaction of judgments.

If security is posted in accordance with Section 2—1711 and approved under a final judgment, the judgment is satisfied and the judgment debtor on whose behalf the security is posted is discharged.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

§ 2—1719. Duties of Director of Insurance.

The Director of Insurance shall establish rules and procedures:

(1) for determining which insurers, self-insurers, plans, arrangements, reciprocals or other entities under his or her regulation are financially qualified to provide the security required under Section 2—1711 and to be designated as qualified insurers;

(2) to require insurers to post security under Section 2—1711 if found by the court to be obligated and capable of posting security; and

(3) for publishing prior to January 1 of each year the rate of discount per annum set out in subsection (c) of Section 2—1709.

Added by Act approved June 25, 1985, eff. Aug. 15, 1985. P.A. 84-7.

## Part 18. Mittimus

§ 2—1801. Mittimus.

(a) In all cases, including criminal, quasi-criminal and civil, when a person is imprisoned, incarcerated, confined or committed to the custody of a sheriff, warden, Department of Corrections or other executive officer by virtue of a judgment or order which is signed by a judge, a copy of such judgment or order shall, in each case, constitute the mittimus, and no separate mittimus need be issued.

(b) Where no written judgment or order was signed by a judge, the practice heretofore prevailing in such cases in the courts of this State shall be followed.

Added by Act approved Sept. 20, 1985, eff. Sept. 20, 1985. P.A. 84-622.

## Part 19. Lis Pendens

§ 2—1901. Lis Pendens—Operative date of notice.

Except as otherwise provided in Section 15—1502

# Officials Predict Deluge of Suits On Health Plan

By ROBERT PEAR
with STEPHEN LABATON
Special to The New York Times

WASHINGTON, Sept. 26 — Even before President Clinton sends a formal legislative proposal to Congress, the Administration is preparing for a flood of constitutional and civil rights challenges to his health care plan.

Officials at the Justice Department and the Department of Health and Human Services say the Administration is only beginning to understand the potential wave of legal challenges. With the exception of handling antitrust, fraud and malpractice issues, the Justice Department had only a limited role in developing the plan and was consulted only in the last few weeks, after the plan was completed, these officials said.

A major reason for the delay is that the people who devised the plan were health and social policy experts who focused mainly on health policy and paid little attention to legal questions of the type that have bedeviled major social programs in the last half century. Another factor was that lawyers at the Department of Health and Human Services were preoccupied with scores of other issues and the Justice Department is only now gaining confirmation of the people who would handle these questions.

Officials expect lawsuits and legal claims for a variety of reasons. Some employers are likely to challenge a Government requirement that forces them to buy health insurance for their

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employees, as Mr. Clinton proposes. Insurance companies may resist Government efforts to regulate their premiums. And drug companies may challenge Government efforts to penalize them for charging prices deemed excessive by the Government. The American Medical Association is already developing a legal strategy to attack limits on doctors' fees.

In his speech to Congress on Wednesday, Mr. Clinton told Americans that would soon have a new right to health care. But a right without some means to enforce it is virtually meaningless, and Government lawyers say they must limit the types of appeals that could be pursued. Otherwise, they fear, the courts would be deluged.

Furthermore, if Congress approves the plan, the Administration wants to move quickly to put it into effect. The White House wants to issue emergency rules without the usual opportunity for public comment in advance, a move also likely to provoke complaints.

### Profound Legal Changes

In offering a plan to control health costs and guarantee insurance coverage for all Americans, Mr. Clinton is proposing the biggest Government program since creation of Social Security in 1935. His proposal would affect virtually every American and would profoundly alter legal relationships among patients, doctors, hospitals, insurance companies, state governments and the Federal Government.

Mr. Clinton and his wife, Hillary, both have law degrees. But some critics say that in its effort to remake the health care system, the Administration has overlooked fundamental legal issues that it is only now beginning to understand.

"Legal issues have not been getting as much attention as they need in development of the Clinton plan," said Lynn Shapiro Snyder, a lawyer at Epstein, Becker & Green who specializes in health care law.

Attorney General Janet Reno was not a member of Mrs. Clinton's Task Force on National Health Care Reform, which included six other Cabinet Secretaries. She was not in office when Mr. Clinton appointed the task force on Jan. 25. But in recent weeks, as the Administration has begun drafting a large, complex bill for Congress, the White House has directed the Justice Department's Office of Legal Counsel to study the problems and devise solutions.

**Constitutional Rights**

## Asking if a Plan Goes Too Far

From Roosevelt's New Deal to Johnson's Great Society, ambitious new social programs have faced constitutional challenges from people arguing that the Government exceeded its legitimate powers. Federal officials expect similar challenges to Mr. Clinton's health plan.

"There was lots of litigation against the New Deal," said Nan D. Hunter, deputy general counsel at the Department of Health and Human Services. "There will be a similar round of litigation after enactment of the President's health care plan."

Some of the most important New Deal programs, including parts of the National Industrial Recovery Act of 1933, were struck down by the courts. But since the end of the Great Depression, the Supreme Court has generally upheld Federal benefit programs. As a result, Government lawyers say they are confident that the Clinton health plan will survive any court challenges. Still, in recent days, the Administration has begun preparing for constitutional challenges.

"Like the New Deal, health care reform will necessarily involve the creation of new structures of Government and new relationships between the private and public sector, and I am confident the provisions will be drafted to survive all constitutional challenges," said Walter Dellinger, the Acting Assistant Attorney General at the Office of Legal Counsel.

The New York Times

Walter Dellinger, an Acting Assistant Attorney General, is confident that the health care plan "will be drafted to survive all constitutional challenges."

### Questioning Price Limits

Elements of the health plan likely to be challenged include limits on insurance premiums, new drug prices and some doctors' fees. Plaintiffs and the Government will probably support their positions by citing different parts of the Constitution.

One clause gives Congress the authority to regulate commerce "among the several states." The Administration can argue that health care is a form of interstate commerce so the Federal Government can regulate

# CLINTON TO OUTLINE NEW U.S. PROPOSALS FOR LIMITING ARMS

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## ADDRESS TO U.N. ASSEMBLY

## President to Give Overview of American Foreign Policy in the Post-Cold-War Era

By THOMAS L. FRIEDMAN

In his first comprehensive effort to spell out his vision of the world and the role of American foreign policy, President Clinton today will lay out several new proposals for limiting the spread of nuclear arms, ballistic missiles and chemical weapons, Administration officials said yesterday.

In an address to the United Nations General Assembly at 11 A.M., Mr. Clinton will also discuss how the United States plans to make up the roughly $1 billion in unpaid dues and peacekeeping bills that it owes.

As one official remarked, "We're not going to go and ask the United Nations to do all kinds of things without at least saying something about how we might pay for it."

### Change Sought at U.N.

But officials said Mr. Clinton would emphasize that payments had to be made in the context of changes of United Nations institutions. He will argue that just as his Administration is trying to "reinvent government," the United Nations needs to be "reinvented" if it is to remain relevant and become cost-efficient, a senior Administration official said.

"He will make clear that it is important that the United Nations undertake some internal reforms, just as our own Government is," the official said.

The President will also underscore Washington's support for expanding international sanctions against Libya if Col. Muammar el-Qaddafi's Government does not turn over two Libyan suspects to be tried in the bombing of a Pan Am jetliner in 1988. The United Nations set an Oct. 1 deadline last August.

### An Activist U.S. Policy

The broad theme of Mr. Clinton's speech, aides said, will be that as the first President born after the United Nations came into being, and the first to serve after the cold war, he wants to assure the world and his own fellow citizens that he remains committed to an activist foreign policy aimed at enlarging the family of free-market democracies.

But, he will argue, three basic sources of instability threaten the trend toward free-market democracies around the world.

The first, and most dangerous, is

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weapons proliferation. Since taking office, the Administration has said that it plans to focus less on American-Russian arms control efforts and more on stemming the global spread of nuclear weapons. But it has been short of initiatives to accomplish that goal.

### Treaty on Uranium Enrichment

Among the proposals the President will make, aides said, will be a call for a worldwide treaty that would ban the production of highly enriched uranium and the reprocessing of plutonium for use in nuclear weapons.

With the signing of the last series of arms control agreements with Russia, the biggest problem the United States faces now is not producing more materials for warheads, but figuring out how to dispose of all the material that will have to be removed from Russian and American weapons.

To set an example that the Administration hopes will be followed by Russia, China, France, Israel, Pakistan, India and other nuclear powers or potential nuclear powers, Mr. Clinton will offer to make all warhead materials taken out of dismantled nuclear weapons subject to inspection by the International Atomic Energy Agency, which monitors the spread of nuclear arms for the United Nations.

### Limiting Spread of Missiles

In addition, Mr. Clinton will present proposals on how an international agreement called the Missile Technology Control Regime can be strengthened to limit the spread of ballistic missiles, as well as a call for a comprehensive ban on the testing of nuclear weapons.

For now Mr. Clinton has suspended American testing of nuclear weapons, but he has reserved the right to lift that ban if any other country tests. American intelligence agencies recently detected Chinese preparations for such a test. His renewed call for a comprehensive ban must be seen as being directed at Beijing.

Parallel with this move, aides said, the Pentagon and the National Security Council are about to start a long-term review of nuclear deterrence. The review will question what constitutes nuclear deterrence in the post-cold-war world, where the United States faces many small threats, stretching from Iraq to North Korea, rather than one large one from Moscow.

"We got all these missiles that we built to aim at the Russians, and now what do we do with them?" asked one Administration official.

The second set of threats the President will discuss are regional conflicts and the role the United Nations needs to play in conflict resolution and peacekeeping.

Aides said the President would not detail conditions for taking part in a peacekeeping force in Bosnia. But they said the conditions publicly discussed so far — that all the sides to the conflict there must invite the United States in, that financing must not be borne by the United States alone and that a clear time limit and terms for evacuation if peace falls apart be stipulated from the start — were all accurate.

The third set of threats Mr. Clinton will discuss, aides said, concern the humanitarian, population and environmental threats to the international system and how they might be more effectively addressed.

In the last week the Administration has been trying to present its own vision of foreign policy.

even the smallest details of health insurance and medical care.

But another clause of the Constitution prohibits the Government from taking private property for public use without "just compensation." Doctors, drug companies and insurers may cite this provision, in the Fifth Amendment, to challenge limits on their prices. Although the Supreme Court has found that the Constitution does not prohibit price controls, it does limit the power of government to regulate prices. So the big question in these cases will be whether the controls on prices and premiums are fair and reasonable.

Other challenges may cite the 10th Amendment, which reserves to the states those powers "not delegated to the United States by the Constitution." Employers and some states may try to use the amendment to resist the expansion of Federal power sought by Mr. Clinton.

**Consumers' Rights**

## Predicting a Flood Of Lawsuits

Administration officials drafting proposed legislation say they are concerned about how to provide remedies for consumers who are denied what may become a new Federal right: the right to adequate health care.

"Every time the Government by law, regulation or other acts creates a reasonable expectation that a benefit will be forthcoming, then that benefit becomes constitutionally protected property," said Leon Friedman, a professor of constitutional law at Hofstra University in Hempstead, L.I. "You can sue if you are deprived of your constitutionally protected right."

Officials fear that the new health care plan will lead to tens of thousands of cases under an old civil rights law that has been increasingly used in recent years to press claims for benefits under Government programs.

**Challenging Officials**

The law, referred to as Section 1983 (from its location in Title 42 of the United States Code), permits lawsuits against state officials for violations of "any rights, privileges or immunities secured by the Constitution and laws" of the United States. The law was passed in 1871 by a Reconstruction-era Congress to protect former slaves from maltreatment by local officials. In recent years, it has been frequently used to challenge official actions that have nothing to do with race.

Using this law, hospitals and nursing homes across the country have sued states and forced them to increase Medicaid payments to levels that more closely reflect what it costs to treat patients. Those multi-million-dollar judgments have strained the budgets of the Federal Government and the states, which jointly finance Medicaid for low-income people.

Under Mr. Clinton's proposal, the Federal Government would require states to establish health insurance purchasing groups, known as alliances, to buy coverage for state residents. Cases that are now purely private disputes between patients and health care providers — or even disputes among providers like hospitals and insurers — may be transformed into claims against state and Federal governments.

"You can imagine a whole range of possible disputes," said Prof. Jerry L. Mashaw, an authority on social legislation and administrative law at Yale Law School. "A patient has a dispute with his provider. The provider says, 'The health alliance made me do it.' The health alliance will say, 'The state made me do it.' At which point you're talking about the legality of their actions, plus the regulations behind them."

To minimize lawsuits, Administration officials say they will probably design an alternative to the courts as a way of initially trying to resolve disputes. But critics say this would require patients, doctors, hospitals and insurers to go through a new level of bureaucracy before getting to the Federal courts.

**Public's Rights**

## Seeking to Bypass Comment Periods

If Congress approves Mr. Clinton's health plan or anything like it, the Government will have to issue scores of regulations. The Administration wants to issue emergency rules, without the usual opportunity for public comment, because it sees an urgent need "to assure access to health care for millions of Americans and to reduce the runaway growth in health care spending."

Under a 1946 law, the Administrative Procedure Act, Federal agencies are supposed to publish proposed rules in the Federal Register and then allow at least 30 days for public comment. The agencies must consider the comments before issuing final rules. In practice, this process sometimes takes a year or more.

Consumers, doctors, hospitals, trade associations and state and local officials would all presumably want to comment on rules carrying out Mr. Clinton's health plan. The Clinton Administration says it would accept public comment on such rules after they take effect.

People now working for President Clinton denounced the Reagan Administration in 1982 when it tried to curtail the public's right to comment on regulations before they were issued. Reagan officials said then that the Government did not have time to allow "notice and comment" on rules making urgently needed changes in Social Security, Medicaid and welfare programs.

# BOSNIANS CONTINUE OFFENSIVE ON VITEZ

### Muslim and Croatian Forces Cool Fighting in Mostar

SARAJEVO, Bosnia and Herzegovina, Sept. 26 (Reuters) — Government forces continued their offensive today against a Croatian stronghold in central Bosnia where there is an explosives factory.

The Bosnian Croat radio reported that fighting had killed 5 civilians and wounded 11 in the stronghold, Vitez, and in Novi Travnik, Kiseljak and Busovaca.

The capture of Vitez would provide the Muslim-led Government with crucial matériel after being cut off from weapons supplies by embargoes against the former Yugoslavia. Vitez would also provide the Government with control of more territory prior to any peace agreement.

On another Muslim-Croatian battlefront, a military spokesman for the Bosnian Croats said today that fighting had subsided in Mostar, which has been the scene of fierce combat between the two factions. Bosnian Croat forces say they signed a cease-fire with the Muslim forces in Mostar, but the United Nations and the Muslims have not confirmed this.

The continued fighting took place as Parliament prepared to meet on Tuesday to debate the latest plan to end the war. Its chances for approval, however, seemed uncertain as Bosnian political and military leaders have voiced misgivings. The plan would partition Bosnia into three ethnic states that would have the option of seceding two years later.

In Croatia, the United Nations today accused Government forces of firing on peacekeepers who were trying to two wounded comrades from a minefield on the edge of a Serb-held enclave on Saturday. No casualties were reported in the shooting.

The peacekeepers had entered a no man's land in the Medak pocket of the Krajina enclave after two French peacekeepers patrolling the area were wounded by a land mine, said a United Nations spokeswoman, Shannon Boyd.

On the way to rescue their comrade, two more peacekeepers from France were injured as their armored vehicle hit a land mine and another vehicle was shot at, the United Nations said. All of the wounded were evacuated to a United Nations hospital in Zagreb, the capital.

There and in other cities, thousands of Croatian refugees from Serb-held regions of Croatia demonstrated against the United Nations Protection Force, known as Unprofor, accusing it of failing to return them to their homes.

Demonstrators, some of them weeping, gathered in the main downtown square of Zagreb with flags and banners in Croatian, English and French reading: "We want our homes back," "Unprofor — Serbprofor" and "Implement U.N. resolutions."

The rallies were held three days after the Croatian Government issued an ultimatum to the United Nations to set a deadline for disarming rebel Serbian forces or withdraw its peacekeeping troops by Nov. 30.

About 250,000 Croats fled or were expelled from territory seized by Croatian Serbs rebelling against Zagreb's secession from Yugoslavia in 1991.

United Nations peacekeeping troops were deployed in Croatia 18 months ago to gradually return Serb-held land to Zagreb's sovereignty and repatriate refugees. But after negotiations between the two sides failed to yield progress, the Croatian Government said last week that it would not renew the United Nations mandate when it expires on Thursday unless it was strengthened to enforce compliance by the rebel Serbs.

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THE NEW YORK TIMES, MONDAY, SEPTEMBER 27, 1993

# *Clinton's Road Show Visits, And Dinkins Hitches a Ride*

By TODD S. PURDUM

President Clinton came to town yesterday to give a lift to Mayor David N. Dinkins's re-election campaign, and began by giving the Mayor himself a lift on Air Force One from Washington, where Mr. Dinkins had gone Saturday night just for a morning meeting at the White House and airborne face time with his Commander in Chief.

"Did you see that shot on the tarmac at Kennedy?" asked Representative Thomas J. Manton, the Queens County Democratic leader, ebullient at the pose by the two men at the airport. "I can't imagine a better image. That showed there's a closeness there that's important."

That airport happens to be in a borough where Mr. Dinkins will undoubtedly lose to Rudolph W. Giuliani, and where polls have shown some Democrats drifting away from him. But with a little help from friends like Mr. Clinton — and Mr. Manton — he is hoping to hold down the margin.

From the White House lawn to the Future Diner in Fresh Meadows, Queens, to a private fund-raiser for big donors at the home of a whiskey magnate to a gala at the New York Sheraton intended to raise $1 million for the Dinkins camp, the Mayor stuck to the President like wallpaper sticks to the wall. Beaming broadly, he introduced him as "our fearless leader."

"President Clinton and I belong to the party of affordable health care," he told the crowd at the diner, where the President conducted one of his trademark Oprah-esque seminars on health care, with Mr. Dinkins nodding solemnly in a front-row booth. "We are against the right-wing Republican philosophy that says if you can't afford it, you can't have it."

In remarks prepared for delivery at the dinner, where figures as diverse as the Rev. Al Sharpton and Dr. Ruth Westheimer gathered last night,

*Continued on Page B3, Column 1*

# Dinkins Basks in the Glow, and Cash Flow, of a Presidential Visit

*Continued From Page A1*

Mr. Dinkins lit into Mr. Giuliani even more explicitly. "The Republican models himself so closely after Ronald Reagan, he even joined the actors' union three years ago. But I say: At least Ronald Reagan knew how to act."

Of course, this election is likely to be decided by a range of local concerns and anxieties, such as crime, the economy and race, which no presidential photo opportunity can easily allay, and Mr. Clinton cannot deliver much in the way of tangible government aid. On the other hand, the contest figures to be close enough that a day of stumping and money-raising with the President qualifies — in the spirit of the diner — as chicken soup: It can't hurt, and it might help.

Richard Bryers, a spokesman for the Giuliani campaign, measured his words in measuring the event.

"It's good that the President has come into town to see the problems of New York and meet with the people of New York, because New York needs all the help it can get," he said. "But this is politics as usual and we offer a different approach to government that goes beyond partisan politics."

In his 1989 race against Mr. Dinkins, Mr. Giuliani himself relied on the fund-raising power of George Bush, who came to town and managed to embarrass him a bit by mangling the pronunciation of his name. But inviting a Republican President to a traditional Democratic stronghold like New York was tricky, and the two never stumped together.

Mr. Clinton missed no chance to let the Mayor bask in his reflected glow, at the end of a week in which the President introduced his proposed health-care changes and was riding a crest of publicity much more favorable than the daily crises that dogged him a few months ago, and in a state where Mr. Clinton's popularity ratings have consistently been higher than in the nation as a whole.

Early last evening, the President planned to join the Mayor at the Park Avenue apartment of Edgar Bronfman Jr., of the Seagram distilling family, for a private party for major donors. Then, at the Sheraton, Mr. Clinton, Gov. Mario M. Cuomo, Senator Daniel Patrick Moynihan and virtually the entire state Democratic establishment were to join in singing the Mayor's praises and filling his coffers as the campaign moves into the final five weeks.

**Clinton's stumping may not decide the mayoral race. But it can't hurt.**

For the Mayor, it was a day to reap the rewards he hoped for early in his term when he sought to play host to the 1992 Democratic Convention, despite the early skepticism of some party leaders, including Mr. Clinton, that the Democrats had no business coming to a place that was such a symbol of urban problems. In the end, Mr. Clinton saw the convention as a smashing success, and is now willing to risk his own prestige to help the embattled Mr. Dinkins and thus avoid a Republican mayoralty, which might make New York tougher territory for his own re-election in 1996.

It was also a day calculated to fulfill the Mayor's passion for ceremony.

### Lots to Talk About

"I think it's the only way to travel," Mr. Dinkins said in a interview between events. "The President was gracious enough to invite me to come down. I went to the White House this morning. I greeted the President as he came in from jogging and we spent a few minutes chatting there." Then the two flew by Marine helicopter to Andrews Air Force Base in Maryland, boarded Air Force One and shared a limousine to the diner.

What did they talk about, campaign business or city business?

"Some of each," Mr. Dinkins replied. "He's concerned about gun control, as I am. And we talked about what we're doing with increasing the police force here. We talked a little bit about the campaign, where I think we are, how he might be helpful, and so on. It was a most rewarding, refreshing time. He's terrific. He's certainly knowledgeable."

Indeed, as Mr. Clinton fielded question after insurance question — interspersing them with deejay's segues, like, "Let's talk about the flip side of the pre-existing condition; that is, people who keep their job 'cause they don't want to lose coverage" — Mr. Dinkins's attention sometimes seemed to drift just a bit, overloaded like that of the rest of the audience by the mass of detail.

It was a field day for other local politicians, from Geraldine A. Ferraro, who kissed Mr. Clinton at the airport, to the State Assembly Speaker, Saul Weprin, who walked down the hill from his apartment building in Fresh Meadows to the diner with his four grandchildren in tow. (He got in, they did not.)

file tort reform

THE WHITE HOUSE

WASHINGTON

December 22, 1994

MEMORANDUM FOR PAT GRIFFIN & MELANNE VERVEER

FROM: PETER YU

SUBJECT: ATTACHED MEMORANDUM

Attached is a draft memorandum to the Chief of Staff regarding legal reform issues. Judge Mikva, Joel Klein, and Bruce Lindsey have reviewed an earlier version. I would greatly appreciate any comments or thoughts you might have; ideally, we would like to submit this to Leon during the first week of January.

Please call me at 6–2801 if you have any questions.

Thank you.

THE WHITE HOUSE

WASHINGTON

DRAFT

December 22, 1994

MEMORANDUM FOR THE CHIEF OF STAFF

THROUGH: ABNER MIKVA

FROM: JOEL KLEIN, BRUCE LINDSEY, & PETER YU

SUBJECT: LEGAL REFORM ISSUES: PRELIMINARY RECOMMENDATIONS

Legal reform issues pose a political conundrum for the Administration. On the one hand, the President and the Vice President have publicly criticized certain legal reforms, most notably in the area of product liability (see Attachment), and several traditional constituencies are strongly opposed to the current reform proposals. At the same time, the new Congress appears likely to pass a legal-reform bill--a bill that could have broad public support. This memorandum offers background and outlines a range of actions the Administration could take in this area.

*Background*. The category of "legal reforms" includes three distinct but related issue areas:

- civil justice reforms (such as changes in attorneys' fees and rules of evidence);
- product liability reforms (such as changes in the law of damages and statutes of repose); and
- securities litigation reforms (such as limits on stockholder class-action suits).

Proponents of reform voice similar arguments in all three areas, claiming that the current system is unfair, encourages wasteful litigation, stifles innovation, and undermines US competitiveness. Opponents of reform characterize the proposals as result-oriented provisions that serve only to shield defendants from liability and to federalize an area traditionally controlled by state law.

Although the legal-reform debate has raged for at least a decade, the empirical evidence is far from definitive. While each side is able to marshal data that appear to support its claims, independent studies (such as those by Rand and GAO) have reached mixed conclusions. These studies suggest that in the 1980s litigation increased significantly (largely due to asbestos-related claims), but also that the filings in more recent years evidence no clear trends. With regard to product liability cases, the studies also fail to support charges that, at the median, damage awards (compensatory or punitive) have been dramatically increasing.

*Legislative Activity and Context.* Last session, after lengthy negotiations that significantly altered (in a pro-consumer direction) the initial bill, Congress established an 18-year statute of repose for product liability claims concerning general aviation aircraft. In addition, Congress considered:

- S. 687, sponsored by Sen. Rockefeller, which would establish uniform federal standards in several areas of product liability law; a cloture vote on the bill failed by 3 votes.

- several health care bills that would reform malpractice and medical products liability laws, limiting contingency fees and noneconomic damages.

- legislation designed to reduce class-action lawsuits in securities litigation by establishing a fee-shifting rule and eliminating joint-and-several liability.

Chairman Brooks' ability to delay product liability legislation in the House led proponents to concentrate on the Senate. In 1992 and 1994, Sen. Rockefeller introduced a compromise bill that did not limit either punitive damages or attorneys' fees, two of the most controversial elements of previous proposals. Then-Sen. Gore voted against the bill in committee in 1992 and in had opposed earlier versions of the bill on the Senate floor.

The "Common Sense Legal Reform Act," which the Republicans plan to introduce next session, goes further than most of these bills. More precisely, it provides for:

- civil justice reforms for federal courts:
  - a "loser pays" or "English rule" attorney-fee regime for diversity actions brought in federal court; and
  - amendments to the rules of evidence regarding expert scientific testimony.

- product liability reforms that govern both federal and state court claims:
  - a uniform limit on the liability of product retailers;
  - a uniform "clear-and-convincing" evidentiary standard for punitive damages;
  - a cap on punitive-damages awards; and
  - a bar on joint-and-several liability for noneconomic damages.

- securities litigation reforms:
  - an English rule for all securities-fraud claims;
  - a strict scienter requirement that effectively eliminates joint-and-several liability; and
  - an "actual reliance" requirement that severely increases a plaintiff's burden of proof.

The legislative politics surrounding legal reform is in a state of flux. In general, legal reform has not been a partisan issue, although the Contract may change that dynamic (at least in the House). Given current information, the most likely scenario is that reforms in the three

areas--civil justice, product liability, and securities--will proceed on separate tracks, and that the latter two may move fairly quickly. It also appears that the House will move more quickly than the Senate.

Many observers believe that the Rockefeller bill could easily pass the reconstituted House, and could receive more than 65 votes in the Senate. Accordingly, proponents of reform are weighing plans to press for more radical reform. If they do, moderate Democrats and Republicans who voted for earlier versions of Rockefeller's bill will be in a critical position.

*Brief Analysis*. The Justice Department is undertaking a comprehensive analysis of the Contract. In general, it is worth noting that the Contract provisions tend to address the problems of the legal system faced by business interests, and to leave unaddressed problems with access to justice faced by citizen, consumer, and labor interests. With regard to the specific issue areas, we offer the following observations.

- *Civil Justice Reforms*--Adoption of the English Rule, even if limited to federal diversity jurisdiction, would fundamentally alter the American legal system. It is far from clear that such a reform is justified and how such a change would affect state court filings. Reform of evidentiary rules by statute is also a dangerous business: it may be best to leave such changes to the authority and accumulated experience of the courts.

- *Product Liability Reforms*--The threshold question here concerns federalism: the Contract bill would preempt state standards in several areas. While it certainly is the case that the vast majority of commerce is interstate (or international), it is not clear that the federal interest in uniformity is sufficient to trump the interests of the States in an area that is traditionally the province of state courts and legislatures. (Indeed, in the 1980s, 48 States enacted various versions of "tort reform.")

  Assuming one were to support *some* federal standards, a few are particularly problematic. Limitations on retailers' liability and a clear-and-convincing standard for punitive damages, for example, are less problematic than a cap on punitives or the elimination of joint-and-several liability for noneconomic damages. The latter two would create troubling inequities and arguably represent a far greater intrusion into state sovereignty than the former two.

- *Securities Litigation Reforms*--The federalism issue is not present here, as this is an area long governed by federal law. The data--which are more complete than those regarding product liability--suggest that the number of suits (both absolutely and as a percentage of IPOs) is not increasing, although the dollar amount of the awards is increasing. Unlike in the product liability area, the plaintiffs' bar has its own legislative agenda, which includes overruling the Supreme Court's recent *Central Bank* ruling (in order to create a statutory cause of action for aiding and abetting a 10b(5) violation) and extending the statute of limitations for 10b(5) actions. Some reform in this area may be appropriate,

although far-reaching changes (such as adoption of the English Rule or an actual reliance requirement) would be very problematic.

*Options*. As of this writing, it seems likely that Congress will disaggregate the Contract bill and set aside its most severe provisions. It also seems fairly likely that Congress will pass a product liability reform bill and a securities litigation reform bill, with support from the business community and increasing expectations of a Presidential veto among consumer groups and the plaintiffs' bar.

Both as a policy matter and a political matter, it would be unsound for the Administration to embrace the Contract bill. In general, one can distinguish among four plausible options.

- *Option 1: Oppose any significant legal reforms.* This would be viewed positively by traditional constituencies: consumer, labor, and seniors groups, as well as the trial lawyers. However, it could be viewed more broadly as "politics as usual," given the widespread anti-lawyer animus in the general public. If a veto threat were not credible, the Administration could be marginalized in the legislative process.

- *Option 2: Wait and see.* This posture would be difficult to maintain, and could also leave the Administration in a highly unfavorable position: facing a bad bill and the narrow options of a controversial veto or a severely criticized signing.

- *Option 3: Articulate clear policy principles, challenge the Contract bill, and engage the debate.* A third option would be to address directly legal reform issues. To do so, the President could articulate policy principles that would frame his position. Under an overall theme of "making the legal system work better for the middle class," the President could identify changes that he believes are essential to meaningful reform, such as:

  - a bar on secret settlements in federal product cases that implicate public health;
  - alternative dispute resolution (ADR) mechanisms that work;
  - insurance reporting requirements; and
  - changes to reduce the "race to the courthouse" in securities litigation.

  Moreover, the President could identify reforms that he believes are *not* tolerable, such as:

  - broad application of the English rule in federal courts;
  - restrictions on compensatory damages;
  - favorable treatment for business (as opposed to consumer) litigation; and
  - changes that would eviscerate private enforcement of the securities laws.

  Such a statement could help frame the debate and might encourage proponents of the Contract bill to consider an approach that served consumer as well as business interests.

- *Option 4: Emphasize the federalism dimensions of this issue.* This option would involve either (i) developing and supporting reforms limited to the *federal* courts or (ii) calling for elimination of federal diversity jurisdiction and deferring to States on legal reforms. Either approach would emphasize the States' role in this area and expose the Republicans' inconsistent positions on States' rights.

Recommendations. At this point, we believe that Option 3 makes the most sense. Toward that end, we propose the following next steps.

- With the assistance of Legislative Affairs, Counsel's office and the NEC would begin discussions with consumer groups, ATLA, Sen. Rockefeller's staff, and others to explore the possibility of revising Sen. Rockefeller's bill to address more completely consumer concerns (e.g., by addressing secrecy in settlements and enhancing ADR).

- A working group would evaluate the various legal reform proposals and their interaction with other Administration initiatives (such as health care reform and reauthorization of environmental statutes). By mid-January, the group will draft, for your--and ultimately, the President's--consideration, an Administration statement of principles for sound legal reform. At that time, the President would be able to decide which sorts of reforms, if any, he wishes to support and which he wishes to oppose. If approved, these principles would facilitate and inform ongoing discussions with the parties.

_____Agree; proceed with preliminary conversations and draft statement of principles.

_____Disagree.

_____Let's discuss.

file
tort reform

THE WHITE HOUSE

WASHINGTON

February 2, 1995

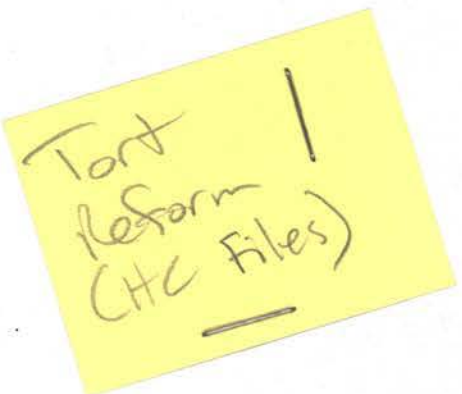
MEMORANDUM FOR THE ATTACHED DISTRIBUTION LIST

FROM: Peter Yu

SUBJECT: Revised Presidential Decision Memorandum

Attached please find a revised and red-lined draft of the decision memorandum for the President, reflecting my effort to incorporate the comments offered at yesterday's meeting. Please provide any further comments by **noon tomorrow, Friday, February 3**. At that time, please also provide your office's recommendation to the President. A number of upcoming events militate in favor of sending this to the President as soon as possible.

Thank you.



THE WHITE HOUSE

WASHINGTON

DRAFT

February 2, 1995

MEMORANDUM FOR THE PRESIDENT

THROUGH: ABNER MIKVA & BO CUTTER

FROM: JOEL KLEIN, BRUCE LINDSEY & PETER YU

SUBJECT: LEGAL REFORM ISSUES

This memorandum presents a strategic choice regarding the Administration's position on legal reform issues and offers two draft "statements of principle" for your consideration.

## I. BACKGROUND

Congress is currently considering legal reforms including civil justice reforms (such as changes in attorneys' fees), product liability reforms (such as changes in the law of damages), and securities litigation reforms (such as limits on stockholder class-action suits). Proponents of reform claim that the current system is unfair, encourages wasteful litigation, stifles innovation, and undermines US competitiveness. Opponents of reform contend that the proposals are unnecessary provisions that serve only to shield defendants from liability and, in the case of products liability, to federalize an area traditionally controlled by state law.

Both you and the Vice President have been critical, or at least skeptical, of reforms of the legal system through preemptive federal legislation. Attachment A offers selected press accounts of your statements on these issues.

The empirical evidence regarding the need for reform is far from definitive. While each side marshals data that appear to support its claims, independent studies have reached mixed conclusions. These studies suggest that in the 1980s litigation increased significantly (largely due to asbestos-related claims), but also that the filings in more recent years evidence no clear trends. With regard to product liability cases, the studies also fail to support charges that damage awards have been dramatically increasing. In response, proponents of reform emphasize that the mere threat of large awards has a deleterious impact on business.

The legal reform legislation included in the Contract with America is, by most accounts, quite extreme; Attachment B outlines the primary provisions of the bill. For several years, Senator Rockefeller has championed an approach to product liability reform more moderate than the Contract version; last session, a cloture vote on the bill failed by only 3 votes. Senator Dodd has introduced a securities litigation reform bill that is less extreme than the Contract provisions;

Congressman Markey has introduced an even more shareholder-friendly bill. Most observers believe the House will pass legal-reform legislation relatively quickly (perhaps within the first 100 days) and that the Senate will not move until late spring. It is possible that a Rockefeller-type bill and the Dodd bill will emerge as "compromise" approaches that could attract the required 60 votes.

The Chief of Staff charged an interagency group with developing a proactive approach and a "statement of principles" that would serve as an outline of the Administration's position.

## II. OPTIONS

The group agreed that, with regard to *securities-litigation reform*, the Administration should work closely with the SEC to encourage reforms that fall somewhere between the Dodd and Markey bills. Such a package could include extensions of the statutes of limitation and measures to reduce the "race to the courthouse" and the risk of meritless claims. At the same time, the Administration would oppose reforms--such as some of those in the Contract bill--that would effectively end private enforcement of the securities laws.

With regard to *civil justice reform and product liability reform*, the group focused on two primary options for an Administration statement of principles.

- *Option 1: Oppose the Contract Bill.* One approach would emphasize that the legal system should protect the middle class from injustice and fraud, and would emphasize federalism concerns. Republican reforms would preempt state law to limit the liability faced by defendants in products litigation rather than decrease litigation costs and delay for all parties. This option (illustrated by Attachment C) attacks the premises of Republican reforms with the following principles:
  - the Contract approach *limits corporate liability* to the detriment of product safety and full compensation for injured plaintiffs;
  - outcomes that offend common sense in products cases should be dealt with by the States, *not by the federal government*.
  - the Administration supports legal reforms in federal court to decrease frivolous suits and high costs and delay, *without underdeterring fraud and corporate negligence*.

- *Option 2: Indicate Your Support for "Balanced" Reform.* A second approach (illustrated by Attachment D) would focus less on the Contract bill and offer a more modulated approach. The central elements of that approach are:
  - a legal reform bill should be *balanced* and address the concerns of both businesses and consumers;
  - legal reform is generally a *matter of state law* and thus the Administration supports *reforms in federal courts* to reduce frivolous litigation and accelerate resolution in the federal courts;

- the Administration supports *pro-consumer provisions* such as limits on secrecy in settlements;
- the Administration *opposes universal preemptive limits on compensatory and punitive damages*, but does not oppose uniform (preemptive) standards for punitives to enhance predictability for businesses.

## III. ANALYSIS

Though substantively similar, these options reflect two quite different strategies. Option 1 takes advantage of the extreme nature of the Contract bill and its inconsistency on federalism grounds to attempt to reframe the debate in a manner consistent with our middle-class theme. Your credibility on the federalism argument would be enhanced by your willingness to consider reasonable federal securities law and federal court reforms. This option would send a strong signal to the Congress and strengthen the hand of consumer and attorney interests (and recognizes that a veto must be politically defensible before the threat of a veto becomes effective). It may, however, trigger negative reactions from the business community, and could, given the strong anti-lawyer animus in the general public, be misinterpreted as "a defense of lawyers." For that reason, it also recommends that you favor contingency-fee reform in federal courts.

Option 2 does not directly address the Contract but rather attempts to acknowledge the concerns of both business and consumer interests. Unlike Option 1, it indicates a willingness to entertain *some* preemptive federal legislation (a position consistent with your signing of the general-aviation reform bill). The emphasis on a balanced bill could improve the legislation passed, in part by encouraging business interests to reconsider any overly ambitious reform efforts. Consumer interests may be deeply disappointed by this approach; attorney groups would likely tolerate, but not embrace, it. While intended to be more accommodating, this Option could be viewed by some as tentative and equivocal.

In short, Option 1 conveys a strong middle-class message and lays the groundwork for a veto; Option 2 emphasizes balance and leaves greater room for either signature or veto.

## IV. RECOMMENDATIONS

[to be completed]

## V. DECISION

____ Pursue Option 1 statement of principles.
____ Pursue Option 2 statement of principles.
____ Let's discuss.

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ATTACHMENT A: PRESS ACCOUNTS OF PAST STATEMENTS

President Clinton

- "The proposals advanced by George Bush and Dan Quayle [presumably including S.640, the Rockefeller bill] are dramatically tilted toward big polluters, manufacturers and insurance companies, and against consumers and victims." *The Candidates on Legal Issues*, ABA J., Oct. 1992, at 57.

- "Bush and Quayle want to cap the ability of juries to award victims punitive damages, even when that is the only way to bring a powerful offender to justice, or to keep a dangerous product off the market." *Id.*

- "[Bush and Quayle] want to make victims pay the legal fees of big manufacturers, if, for some reason, they sue and lose. It is nothing more than trickle-down justice." *Id.*

- "As a general matter, I believe that legal reform should be enacted in the laboratories of the states, rather than at the federal level." *Id.*

- "In my view, the best reforms are those that make it less likely for people to go to court. We should encourage greater use of alternative dispute resolution to give consumers redress without having to litigate, such as mediation, mini-trials, and the multi-door courthouse. We should also encourage the use of special masters to help sort through complex cases. And we should restrict the use of secrecy agreements, which too frequently force litigants to refight the same battles, over and over, while endangering public health." *Id.*

- "But I will oppose any proposals that pretend to 'reform' lawsuits while actually encouraging dangerous products or marketplace fraud." *Id.*

Vice President Gore

- Voted against S.640, the Rockefeller Bill, in the Commerce Committee in 1992.

- Co-authored Minority Views in the Commerce Committee report on product liability legislation in 1990.

- Widely quoted in press as having deemed the Rockefeller bill "anti-consumer."

The more controversial provisions of the **"Common Sense Legal Reform Act"** include:

- Civil justice reforms for federal courts:
  - a "loser pays" or "English rule" attorney-fee regime for diversity actions brought in federal court; and
  - tighter rules regarding expert scientific testimony.
- Product liability reforms that govern both federal and state court claims:
  - limits on the liability of product retailers;
  - uniform "clear-and-convincing" and "actual malice" standard for punitive damages;
  - a cap on punitive-damages awards; and
  - a bar on joint-and-several liability for noneconomic damages.
- Securities litigation reforms:
  - an English rule for all securities-fraud claims;
  - a scienter requirement that effectively eliminates joint-and-several liability; and
  - an "actual reliance" requirement that greatly increases a plaintiff's burden of proof.

The civil justice reform provisions could significantly reduce suits by smaller parties (such as consumers) against larger parties. The product liability provisions preempt an area long the province of state courts and legislatures. The securities litigation provisions would eviscerate private enforcement actions.

The primary features of **S. 687**, introduced last session by Senator Rockefeller, include:

- establishment of a federal fault standard for punitive damages (including a safe harbor for FDA- and FAA-approved products), but no cap on punitive damages;
- elimination of joint and several liability for noneconomic damages;
- incentives for out-of-court settlements and for the use of alternative dispute resolution;
- uniform statutes of limitation and repose for product liability claims.

Consumer and attorney groups were particularly critical of the distinction between economic and noneconomic damages, limitations on joint and several liability, and the FDA/FAA safe harbor.

The **Dodd bill** on securities-litigation reform includes:

- guardians ad litem and steering committees for class actions;
- a scienter requirement;
- limits on attorneys fees to a "reasonable percentage of the amount recovered";
- restrictions on the use of civil RICO in securities law claims; and
- proportionate liability in federal securities fraud actions.

Consumer and attorney groups were particularly critical of the proportionate liability provisions and the limits on attorneys fees.

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ATTACHMENT C

STATEMENT OF PRINCIPLES (OPTION 1): OPPOSE THE CONTRACT

**The Contract with America limits corporate liability to the detriment of product safety and full compensation for injured plaintiffs.**

*How would the middle class benefit from*:

-- Making a losing plaintiff pay General Motors' legal fees?
-- Capping the award of punitive damages against corporations that knowingly fail to correct design flaws leading to consumer death or injury?
-- Enacting rules that discriminate against victims suffering loss of reproductive ability and other noneconomic damages?
-- Preempting state laws in a one-sided fashion: only where helpful to defendants, but not to consumers.

**Outcomes in state law cases that offend common sense should be addressed by the States, not by federal regulation.**

**The Administration supports reasonable reforms of the federal securities laws and federal court reforms that reduce costs and delays for plaintiffs and defendants.**

*The middle class would benefit from reforms in federal courts, such as:*

-- Limits on the fees attorneys can charge plaintiffs when suits settle early in the litigation process.
-- Alternatives to trial such as court-annexed arbitration and mediation which allow the middle class to seek resolution of disputes at lower cost.
-- Procedural reforms that encourage defendants to make reasonable settlement offers in meritorious cases and plaintiffs to accept them.
-- A legal presumption against secrecy provisions that prevent the release of information relevant to public health or safety.

*Business defendants should benefit from reforms directed at frivolous suits, not meritorious ones.*

**Reforms should respect the freedom of the individual to sue if her legal rights have been violated; litigation reflects a free-market approach to enforcing public safety and health concerns.**

**Empirical data should support claims made about the effectiveness of controversial reform measures.**

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ATTACHMENT D:
STATEMENT OF PRINCIPLES (OPTION 2): SUPPORT BALANCED REFORM

**More than anything, a legal-reform measure must be balanced.** It must improve the civil justice *system*--not as a process that serves one class of parties or another, but as a system that serves all: potential plaintiffs, potential defendants, public health and safety, competitiveness and innovation.

**Whenever possible the federal government should lead by example, not by mandate--this is as true in legal reform as in welfare reform and regulatory reform.** Thus, reform efforts should focus on the *reform of federal rules and procedures*. In particular, reforms should:

-- *Reduce frivolous litigation* through measures such as mandated sanctions for such frivolous filings and higher pleading standards for product liability claims. Such targeted reforms would be more effective at eliminating frivolous litigation--and more fair--than a blanket "English rule."

-- *Improve the efficiency of the legal system* through measures such as a broad expansion of alternatives to litigation, and meaningful incentives (such as limited fee-shifting) to use such alternatives and to encourage early settlements.

-- *Protect the public interest* by establishing a presumption against secret settlement that would prevent the release of information relevant to public safety or health.

**Legal reforms that preempt state laws and supplant traditional state authority should be undertaken only if justified by sound analysis and a strong federal interest.** Thus:

-- The Administration opposes preemptive legislation to *limit the recovery of compensatory damages* as well as *limits on punitive damages*. With regard to the latter, punitive damages are appropriate to deter or punish extraordinarily irresponsible behavior. In such rare cases, punitive damages are and should be imposed based on the facts and circumstances of the particular claim--not subject to some arbitrary or formulaic amount or cap.

-- At the same time, there may be justification for *federal guidance establishing when punitive damages are appropriate*, such as a "clear and convincing evidence" requirement. Particularly as the vast majority of commerce is interstate, the federal government has an interest in providing businesses with some predictability.