THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release **May 4, 1995**

STATEMENT BY THE PRESIDENT

The Senate is engaged in the laudable goal of seeking to reform our legal system. Yesterday they went much too far by adopting an amendment to cap punitive damages in all civil lawsuits. In its present form the Senate bill sharply limits the damages paid by many classes of offenders who deserve to pay much more to their victims for the harm they have inflicted upon them.

The bill now before the Senate might be called the "Drunk Drivers Protection Act of 1995" -- for what it does is insulate drunk drivers and other offenders from paying appropriate amounts of punitive damages justified by their deeds. I insist that we hold drunk drivers fully responsible. When they cause injury and death to innocent adults and children, we should throw the book at them, not give them a legal limit on damages to hide behind.

The Senate should reconsider its position. At the least, it should remove damage caps on lawsuits involving drunk drivers, murderers, rapists and abusers of women and children, despoilers of our environment like the Exxon Valdez and perpetrators of terrorist acts and hate crimes.

All of these receive undeserved protection from the present bill. The Senate should reserve its compassion for the people who deserve it. If this bill comes to my desk as it is now written I will veto it, and therefore I encourage the Senate not to vote to limit debate on the bill at this time.

The Administration supports the enactment of limited, but meaningful, product liability reform at the Federal level. Any legislation must fairly balance the interests of consumers with those of manufacturers and sellers.

-30-30-30-

The Senate has begun debate on the Gorton/Rockefeller products liability bill. On Tuesday, the Senate voted 53-47 to add medical malpractice legislation to the bill by amendment. In contrast to the version of medical malpractice reform the Administration supported last year in the context of health-care reform, this medical malpractice legislation includes a cap on punitive damages and a provision to abolish joint-and-several liability for noneconomic damages. The Senate is also considering other amendments that would expand the product liability bill's application, such as a pending Dole amendment that would apply the bill's punitive damages cap to all civil cases.

The Administration issued a statement on April 25th opposing the bill's punitive damages cap and its provision to abolish joint-and-several liability for noneconomic damages. That statement also noted that we would oppose these two provisions in any bill, including medical malpractice legislation.

Senate opponents of product liability reform hope to filibuster the bill and defeat attempts to invoke cloture. Because their strategy has worked in the three past Congresses, Senator Rockefeller has stated that he opposes the medical malpractice amendment because it jeopardizes his bill's chance of passage. The Gorton/Rockefeller strategy may be to strip the bill prior to cloture of all successful amendments that garnered less than 60 votes -- including the medical malpractice legislation. The first cloture vote is not expected until later this week.

With regard to the product liability bill's punitive damages cap and its provision to abolish joint-and-several liability for noneconomic damages, it may be that amendments to strike these two provisions would have a greater chance of success if they were offered after the first (hopefully unsuccessful) cloture vote. In fact, if the first cloture vote does fail, we think we might achieve these key changes.

If the final Senate bill had no punitives cap and at least a modified joint-and-several provision, the Administration's opposition to the most objectionable, anti-consumer provisions would have achieved major improvements to the bill. If that occurs, we would then need to hold firm on these improvements in the conference committee.

Date: 05/02/95 Time: 17:11

Senate Weighs Proposal To Broaden Punitive Damages Legislation

WASHINGTON (AP) After voting to limit medical malpractice awards, the Senate on Tuesday considered a sweeping proposal by Republican leader Bob Dole to put limits on punitive damage awards in all civil lawsuits.

Dole's amendment would significantly broaden a product liability measure written by Sens. Slade Gorton, R-Wash., and Jay Rockefeller, D-W.Va. Their bill would impose a cap on punitive damage awards in faulty-products cases of $250,000 or three times economic damages, whichever is greater.

Dole said his proposal ''offers needed protections from lawsuit abuse to every American small business or large, volunteer or charitable organizations. The spectre of lawsuit abuse hangs over us all.''

But Rockefeller repeatedly urged his colleagues to stick to the product liability legislation, warning that widening its focus could jeopardize final Senate passage.

''This just opens up an entire new range of problems and possibilities for product liability and its chances of passage,'' he said.

The debate followed a Senate vote earlier in the day to limit punitive damage awards against doctors and other health care providers. Senators approved, 62-38, a provision by Sen. Olympia Snowe, R-Maine, that would cap punitive damages in medical malpractice cases at two times a claimant's compensatory damages.

Compensatory damages are the combined total of economic damages, such as lost salary and medical bills, and less tangible non-economic damages to compensate patients for loss of an eye or limb and for pain and suffering. Snowe said her approach was fairer to claimants who are less wealthy because it takes non-economic damages into account.

The malpractice cap became part of a broader amendment adopted by the Senate, 53-47, to establish a uniform, nationwide standard of medical malpractice law. That amendment also would limit attorneys' contingency fees in malpractice cases to one-third of the first $150,000 awarded to clients and one-quarter of any award over $150,000.

Dole's provision would apply to all civil litigation and would cap punitive damages at two times a claimant's compensatory damages.

Comprehensive legislation to overhaul the civil justice system was passed by the House in March, but the Senate started its debate last week with the narrower product liability bill. The House package includes a punitive damages cap in all civil lawsuits of $250,000 or three times economic damages, whichever is greater.

The Clinton administration has expressed opposition to some provisions of the House legislation but has not explicitly threatened to veto it.

Senate Democrats have been trying to turn back the more drastic limits on lawsuits included in the House package, which was part of the Republicans' ''Contract With America.''

''We are all potential victims,'' said Sen. Barbara Boxer, D-Calif.

The battle over such legislation has raged for 13 years. Supporters say it is needed to free business from a patchwork of state laws and to limit the growth of frivolous lawsuits. Critics contend the measures would deprive consumers of legal redress if they are harmed by defective products and would usurp states' rights.

Also on Tuesday, the Senate approved by voice vote an amendment by Sen. Craig Thomas, R-Wyo., that would make it tougher to win punitive damages from an obstetrician or other health care professional who delivered a baby and didn't treat the woman during the pregnancy.

But the lawmakers threw out a provision, 65-35, written by freshman Sen. Jon Kyl, R-Ariz., that would have put a $500,000 cap on awards for patients' pain and suffering, in addition to the cap for punitive damages.

The American Medical Association, which helped engineer a last-minute vote in the House for a $250,000 cap on pain and suffering awards, had been pushing hard to find backers for it in the Senate.

APNP-05-02-95 1712EDT

April 27, 1995

MEMORANDUM TO THE PRESIDENT

FROM **BRUCE LINDSEY**

SUBJECT Products Liability Update

The Senate has begun debate on the Gorton/Rockefeller products liability bill. At this point, it is unclear whether medical malpractice legislation will be added to the bill by amendment. Other amendments that would expand the bill's application, such as an expected Dole amendment that would apply the bill's punitive damages provisions to all civil cases, may also be added.

The successes or failures of these amendments -- which would make the bill even more onorous to consumers -- will affect vote counts on cloture. The Gorton/ Rockefeller strategy may be to strip the bill prior to cloture of all successful amendments that garnered less than 60 votes -- thereby giving the business community its shot at passing the broadest bill that would overcome a filibuster attempt. The first cloture vote is not expected until next week.

We have opposed the bill's punitive damages cap and its provision to abolish joint-and-several liability for noneconomic damages. It may be that amendments to strike the punitive damages cap and the joint-and-several provision would have a greater chance of success if they were offered after the first (hopefully unsuccessful) cloture vote. In fact, if the first cloture vote does fail, we think we might achieve these key changes.

While we envision no compromise on the punitives cap issue, we do see one on joint-and-several liability. Joint-and-several liability is important in cases where all but one defendant has fled or gone bankrupt. On the other hand, it may be unfair to always stick a minimally culpable "deep-pocket" with the entire amount of damages. Accordingly, an appropriate compromise might involve a de minimis exception for defendants held only, for example, twenty percent or less at fault. That percentage could be higher or lower (or combined with a multiple of some sort -- e.g., defendants held less than 30 percent at fault would pay three times their proportion of the damages). Senator Snowe has suggested a compromise along these lines.

If the final Senate bill had no punitives cap and a modified joint-and-several provision, the Administration's opposition to the most objectionable, anti-consumer provisions would have achieved major improvements to the bill. If that occurs, we would then need to hold firm on these improvements in the conference committee.

The Gorton/Rockefeller bill may be an item of discussion at Saturday's Williamsburg retreat.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 25, 1995
(Senate)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 956 - Common Sense Legal Reform Act of 1995
(Hyde (R) Illinois and Hoke (R) Ohio)

The Administration opposes the Gorton substitute to H.R. 956 (text of S. 565 as reported by the Senate Committee on Commerce, Science, and Transportation), because of two objectionable provisions. These provisions, which are described below, should be deleted from the Gorton substitute:

- Section 8(b), which would impose an artificial ceiling on the amount of punitive damages that may be awarded in a product liability action. The Administration believes statutory caps are improper because they ignore the fundamental purpose of punitive awards: to punish and deter. A statutory cap invites a wealthy potential wrongdoer to weigh the risks of a capped punitive award against the potential gains or profits from the wrongdoing.

- Section 10, which would abolish joint-and-several liability for noneconomic damages (e.g., pain and suffering). Noneconomic damages are as important to victims as economic damages and must not be relegated to second-class status. There is no reason for a Federal statute to preempt State laws that recognize the importance of noneconomic damages.

The Administration would strongly oppose these provisions in any legislation, including medical malpractice legislation.

The Administration, however, would support the enactment of limited, but meaningful, product liability reform at the Federal level. Any legislation must fairly balance the interests of consumers with those of manufacturers and sellers and should respect the important role of the States in our federal system.

* * * * *

April 18, 1995

MEMORANDUM TO THE PRESIDENT

FROM AB MIKVA, BRUCE LINDSEY, PAT GRIFFIN

SUBJECT Products Liability Strategy

Recent press accounts suggesting that the Department of Justice was "open" to products liability reform and Senator Rockefeller's statements implying your support for his bill have created confusion with respect to the Administration's position on legal reform. Your remarks in Dallas and the Attorney General's speech at Mercer University restating the Administration's opposition to caps on punitive damages and extreme legal reform have helped, but there is still uncertainty on the part of both supporters and opponents of legal reform as to what kind of bill you would ultimately sign.

Senate floor debate on the Rockefeller bill is expected to begin after the recess ends on April 24. We recommend that you openly support two proposed amendments to the Rockefeller bill -- one to delete the punitive damages cap and one to delete the joint-and-several provision -- and oppose cloture as long as the two unacceptable provisions remain in the bill.

A decision to oppose cloture carries certain risks. First, and most importantly, if the Administration openly opposes cloture, you would probably have to be willing to veto a bill that had the objectionable provisions in it, or at least veto a bill containing the punitive damages cap provision since we have been more vocal in our opposition to it. Second, opponents to the Rockefeller bill currently do not have the necessary 41 votes. (They believe they are three or four votes short.) If a cloture motion fails with our active assistance, Senator Dole might pull the bill and blame you as an obstructionist. (You might counter this risk by proposing an Administration bill encompassing the DOJ proposed reforms.) Third, supporters of the Rockefeller bill might obtain cloture over your opposition, indicating weakness on your part and strengthening the resolve of those who want an even more pro-business, anti-consumer bill.

A decision not to openly oppose cloture also carries certain risks. First, this decision would greatly disappoint the consumer groups and trial bar, both of whom have been supportive of you in the past. Second, without your opposition, cloture is more likely to be invoked, increasing the likelihood that a bill containing provisions that you and the Administration specifically have opposed will reach your desk.

On balance, it is our view that the Administration should support amendments striking the punitive damages cap and joint-and-several provision and oppose cloture as long as the two unacceptable provisions remain in the bill. A final recommendation to oppose cloture will be based on a current vote count that protects a veto if you decide to use it.

_____ **Proceed with amendment/cloture strategy**

_____ **Proceed with amendment strategy only**

_____ **Let's discuss**

THE PRESIDENT HAS SEEN 3/6

THE WHITE HOUSE

WASHINGTON

March 3, 1995

MR. PRESIDENT:

Attached is a decision memo from Joel Klein, Bruce Lindsey and Peter Yu on legal reform. As you know, this is an element of the Republican Contract **and is likely to be taken up on the House floor beginning Monday.** The memo outlines the following consensus approach worked out by Counsel's Office and NEC, in consultation with Justice, Treasury, Commerce and the SEC:

Civil justice reform -- reject the "loser pays" rule in the Contract as grossly unfair to innocent plaintiffs. **Securities litigation reform** -- work with the SEC on a package of reasonable reforms. **Product liability reform** -- indicate some openness to reasonable federal standards (e.g., clear and convincing evidence) for punitive damages, but oppose caps on damages, unreasonable federal standards, rules that discriminate against non-economic damages, and defenses based on having received regulatory clearance.

Joel, Bruce and Peter describe this "modulated approach" as consistent with your previous statements, faithful to concerns about consumers and federalism, and not wholly alienating to business -- although it obviously doesn't go nearly as far as business would like. **Leon concurs in this approach. The Vice President has indicated that he would like to discuss the issue with you before your decision.**

Approve___ Disapprove___ Discuss___

John Podesta
Todd Stern

THE PRESIDENT HAS SEEN 3/6

THE WHITE HOUSE

WASHINGTON

February 24, 1995

95 MAR 2 P3:46

MEMORANDUM FOR THE PRESIDENT

THROUGH: LEON PANETTA, ABNER MIKVA & BO CUTTER

FROM: JOEL KLEIN, BRUCE LINDSEY & PETER YU

SUBJECT: LEGAL REFORM ISSUES

This memorandum outlines for your approval a proposed strategy for addressing legal reform issues currently before Congress.

I. BACKGROUND. Congress is considering (i) civil justice reforms (such as the "loser pays" or English rule for actions brought under federal diversity jurisdiction), (ii) securities litigation reforms (such as limits on shareholder class-action suits), and (iii) product liability reforms (such as changes in the law of damages). Proponents of reform claim that the current system is unfair, wasteful, stifles innovation, and undermines US competitiveness. Opponents of reform contend that the proposals are unnecessary and serve only to shield defendants from liability and, in the case of product 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 increasing dramatically. In response, proponents of reform emphasize that the mere threat of large awards has a deleterious impact on American innovation and competitiveness.

The legal reform legislation included in the Contract with America is, by most accounts, quite extreme (see Attachment B). However, the House Commerce Committee recently moderated the securities provisions somewhat. Senator Dodd has introduced a securities litigation reform bill that is less extreme than the modified Contract provision; Congressman Markey has introduced an even more shareholder-friendly bill. With regard to product liability, Senator Rockefeller has for several years championed a more moderate approach than the Contract bill; last session, a cloture vote on his bill failed by only 3 votes. Most observers believe that the House will pass legal reform legislation relatively quickly (perhaps within a few weeks) but that the Senate will not begin work on a bill until late spring. Senator Rockefeller has not

reintroduced his bill and it is not clear whether his bill or a more extreme version championed by someone else will be the primary vehicle in the Senate. It is possible that a Rockefeller-type bill on products reform and a Dodd-type bill on securities reform will emerge as "compromise" approaches.

A White House team led by the Counsel's office and the NEC has consulted with Justice, Treasury, Commerce, and the SEC to develop the following strategy for addressing these issues. The Vice President was involved with this issue in the Senate, and would like to discuss it with you prior to your decision.

II. CONSENSUS RECOMMENDATION. The group supports a three-part approach.

- With regard to **civil justice reform**, the group recommends that the Administration firmly oppose the "English rule" proposal in the Contract bill (which applies to *all* diversity actions in federal court), arguing that it is grossly unfair to innocent plaintiffs and may increase total litigation costs.

- With regard to **securities litigation reform**, the group recommends that the Administration work with the SEC to encourage reforms that fall somewhere between the Dodd and Markey bills. Such a package might include measures to reduce the "race to the courthouse" and the risk of meritless claims, but would not include reforms that would significantly weaken private enforcement of the securities laws, encourage fraud, or be inconsistent with the Administration's position on product liability reform. The Administration's initial public position would be to favor "reasonable" reforms and to list those provisions in the House bill that are problematic.

- With regard to **product liability reform**, the group recommends that the Administration emphasize **a strong presumption against preemptive legislation, the need to ensure full compensation for victims and responsibility for unsafe products, and a package of federal-court reforms**. This position would stress that product liability reform is generally a matter of state law (a position bolstered by a proactive position on federal securities litigation reform). The Administration would consider preemptive legislation only if the federal interest in preemption was clearly demonstrated. For example:

  - If we were convinced an important national interest had been clearly demonstrated, we would not oppose reasonable preemptive *standards* (such as "clear and convincing evidence") for punitives. (Business groups argue such standards provide businesses with needed predictability.)

  - At the same time, there has been little justification for federal preemptive provisions in other proposed areas -- particularly where the need to ensure full compensation for victims and responsibility for unsafe products are paramount concerns:

* *arbitrary caps on or unreasonable standards for the awarding of compensatory or punitive damages and the discriminatory treatment of noneconomic damages* -- such standards are not only unfair to consumers, they also underdeter the manufacture of unsafe products; and

* *regulatory defenses that immunize manufacturers* -- as demonstrated by DES, Copper-7 IUDs, and high-estrogen birth control, simply because a product survives government review does not ensure its safety and should not provide immunity to a manufacturer.

The Administration would also *advocate pro-consumer positions* such as limits on secrecy agreements in settlements in federal court and *reforms in federal court* designed to encourage alternatives to litigation and decrease frivolous suits without underdeterring negligence.

III. ANALYSIS

This approach balances several purposes. First, it is consistent with your expressed concerns regarding both the fairness of reforms and the federalization of tort law. Second, it plays upon the extreme nature of the English rule as well as the Republicans' inconsistent positions (in supporting federalization of the legal system but devolution in every other sphere of government). Third, it indicates a willingness to entertain *justified* preemptive legislation and thus will not wholly alienate business interests. Fourth, it raises consumer concerns and challenges the premises of Republican reforms by highlighting portions of the Contract bill you find to be unjustified, especially given federalism's strong presumption against preemptive legislation and the lack of empirical data to support proponents' claims.

As always, there is some risk that such a modulated approach--while sound policy--will be viewed in the current environment as equivocal. However, the group believes that this approach places the Administration in the best position to influence the development of this legislation and to threaten a veto if consumer interests remain unaddressed.

IV. DECISION

____ Proceed with consensus recommendation.

____ Let's discuss.

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."

ATTACHMENT B: LEGAL REFORM BILLS

The more controversial provisions of the Contract bill (as revised in committee) 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;
  - "clear-and-convincing" and "actual malice" standards for punitive damages;
  - a cap on punitive-damages awards; and
  - a bar on joint-and-several liability for noneconomic damages.
- Securities litigation reforms (as modified by the House Commerce Committee):
  - a fee-shifting provision if the court finds that a losing party's position was not substantially justified;
  - a recklessness standard and pleading requirements significantly greater than the law of several circuits; and
  - a proportionate liability provision in certain fraud actions.

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 more stringent 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 certain fraud actions.

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

Summary of the Product Liability Fairness Act (Rockefeller bill)

Alternative Dispute Resolution (ADR): Either party may offer to participate in a voluntary, non-binding state-approved ADR procedure. If a defendant unreasonably refuses to participate and a judgment is entered for the claimant, the defendant must pay the claimant's reasonable legal fees and costs. There is no penalty for claimants who refuse to participate in an ADR procedure. No penalty may be assessed against a defendant unless judgment is entered for the claimant.

Product Sellers: Product sellers will be liable only for their own negligence or failure to comply with an express warranty. However, if the manufacturer cannot be brought into court or is unable to pay a judgment, the seller shall be liable as if it were a manufacturer. This assures that injured persons will always have available an avenue for recovery.

Alcohol and Drugs: The defendant has an absolute defense if the plaintiff was under the influence of intoxicating alcohol or illegal drugs and the condition was more than 50 percent responsible for plaintiff's injuries.

Misuse and Alteration: The bill limits a defendants liability if the product user has misused or altered the product in an unforseeable manner.

Punitive Damages: Punitive damages may be awarded if a plaintiff proves, by clear and convincing evidence, that the harm was caused by defendant's "conscious, flagrant indifference to the safety of others." To streamline litigation, trials may be bifurcated so the punitive damages phase is separate from the proceedings on compensatory damages. Courts may award punitive damages up to three times economic damages, or $250,000, whichever is greater.

Statute of Limitations: The pro-plaintiff statute of limitations is two years, which begins to run when the claimant reasonably should have discovered both the harm and cause.

Statute of Repose: The statute of repose is for capital and durable goods used in the workplace, and is set at 20 years.

Joint and Several Liability: The bill abolishes joint liability with respect to non-economic damages, such as pain and suffering. States are permitted to provide joint liability for economic damages, such as medical expenses and lost wages, so that these damages are always fully compensated in all cases.

Workers' Compensation Offset: An employer's right to recover workers' compensation benefits from a manufacturer whose product allegedly harmed a worker is preserved unless the manufacturer can prove, by clear and convincing evidence, that the employer caused the injury.

3/13/95

Comparison of
Senate Bill and H.R. 956

I. The bills contain many similar provisions. Each bill contains a product seller provision, a drug and alcohol defense, and a provision reducing awards for product misuse or alteration. The contents of these provisions in both bills are essentially the same.

II. Each bill reforms the punitive damages awards system, establishes a statute of repose, and eliminates joint liability for non-economic damages, but the House bill is broader in scope in these areas.

Punitive Damages

The punitive damages reforms in the House bill are similar to those in the Senate bill, with one major difference. The provisions of the House bill would apply in all civil actions brought in federal or state court, not just product liability actions. The reforms proposed in both bills include a heightened standard of proof ("clear and convincing evidence" of conduct manifesting a "conscious, flagrant indifference" to safety); a requirement that punitive damages be awarded in proportion to the harm caused (three times a claimant's economic loss or $250,000, whichever is greater); and, to streamline litigation, the bifurcation of punitive damages trials at the request of either party.

Statute of Repose

Each bill includes a statute of repose provision which prescribes the time after delivery of a product during which a claimant may commence a product liability action. The House bill contains a 15-year statute of repose for all products (excluding injuries with a latency period of greater than fifteen years). The Senate bill applies a 20-year statute of repose to workplace "durable goods" only (excluding toxic harm and actions involving cars and common carriers), and specifically preserves shorter state statutes of repose.

Joint and Several Liability

Each bill abolishes joint liability with respect to non-economic damages, such as pain and suffering, but permits states to provide for joint liability for economic damages. The provision in the House bill would apply to all civil actions brought in state and federal courts. The House bill also would limit non-economic damage awards in medical malpractice cases to $250,000. The Senate provision applies only to product liability actions.

III. The Senate bill contains several provisions that are not found in H.R. 956.

Alternative Dispute Resolution (ADR)

This provision would allow a claimant the option of using a non-binding state alternative dispute resolution mechanism. It allows a court to penalize a defendant, but not a plaintiff, for unreasonable refusal to proceed to ADR.

Statute of Limitations

This provision contains a pro-plaintiff "discovery rule" statute of limitations. The provision would allow a claimant 2 years to bring an action after the claimant discovered, or should have discovered, both the harm that is the subject of the action and its cause. This provision would expand claimants' ability to bring a lawsuit in several states.

Workers' Compensation Subrogation Standards

This provision provides an incentive for employers to maintain safe workplaces. It does not affect or in any way limit a worker's recovery in a product liability action.

IV. H.R. 956 contains several provisions not included in the Senate bill.

Frivolous Pleadings

This provision is modeled after Rule 11 of the Federal Rules of Civil Procedure and would provide courts with the discretion to sanction attorneys who file frivolous pleadings in state court product liability actions.

Service of Process

This provision requires corporations to appoint an agent for service of process anywhere in the United States in order to benefit from the provision of the legislation.

Biomaterials Suppliers

This provision addresses the biomaterials availability crisis affecting manufacturers of medical devices, and is intended to promote the supply of raw materials essential to the manufacture of certain medical devices.

FDA Defense

This provision would exempt manufacturers and sellers of pharmaceuticals and medical devices from punitive damages in product liability cases if the drug or product had been pre-market approved by the Federal Drug Administration (FDA). The exemption would not apply in cases in which the defendant withheld or misrepresented pertinent information or illegally influenced the FDA approval.

Comparison of the Senate Bills on Product Liability Reform

104th Congress to S. 687 in the 103rd Congress

I. Substantive Provisions Added to the Bill

Statute of Repose

The statute of repose in S. 687 applied only to capital goods, and extended for a twenty-five year period. The repose period is shortened to 20 years in the current bill to more closely track state statutes of repose, almost all of which are for a period of ten or twelve years. This provision also includes workplace durable goods, defined as products used in the workplace with an economic life three years or greater. The enactment of the General Aircraft Revitalization Act of 1994, which created an eighteen year federal repose period for general aviation aircraft, supports this reform.

Punitive Damages Awards

The punitive damages reforms in the current bill are substantially similar to the reforms in S. 687. The standard for awarding punitive damages is essentially unchanged. A provision requiring punitive damages to be awarded in proportion to the harm caused (three times a claimant's economic loss or $250,000, whichever is greater) has been added to encourage fairness in the imposition of punitive damages. This provision is supported by, among others, the American College of Trial Lawyers and the American Law Institute.

Misuse or Alteration

This added provision would require the reduction of a claimant's award if any person misused or altered the product causing harm. It is unfair to hold a manufacturer liable for product misuse or alteration that cannot be foreseen. The provision appeared in last year's House bill, H.R. 1910, and appears in the bill passed by the House this Congress.

II. Substantive Provisions Deleted from the Bill

Expedited Settlement

This provision of S. 687 was designed to encourage the early settlement of cases, but questions concerning its effectiveness led to its exclusion from the current bill.

FDA/FAA Punitive Damages Defense

These provisions are not included in the current bill.

3/14/95

SUMMARY OF McCONNELL-LIEBERMAN HEALTH CARE
LIABILITY REFORM AND QUALITY ASSURANCE ACT OF 1995

Title I - Liability Reform
Subtitle A - Health Care Liability Reform
1. Scope
a. Applies to any action, filed in federal or state court, against a health care provider, professional, payor, hmo, insurance company or any other defendant (except vaccine-related injuries);
b. Preempts state law to the extent it is inconsistent with the provisions herein; no preemption for state laws which:
1) provide additional defenses;
2) greater limitations on attorneys' fees;
3) greater restrictions on punitive or non-economic damages;
4) permit state officials to institute action;
5) permit provider-based dispute resolution.
c. Does not create federal jurisdiction for health care liability actions.

2. Uniform Statute of Limitations
Two years from the date injury discovered or should have been discovered, except that any person under a legal disability may file within two years after the disability ceases.

3. Limit on Punitive Damages
a. Awarded if proved by clear and convincing evidence defendant:
1) intended to injure;
2) understood claimant was substantially certain to suffer unnecessary injury and deliberately failed to avoid injury; or
3) acted with conscious disregard of substantial and unjustifiable risk which defendant failed to avoid in a way which constitutes a gross deviation from the normal standard of conduct.
b. No punitive damages where compensatory damages of less than $500 are awarded.
c. Punitive damages may not be pleaded in original complaint. A complaint may be amended within, the earlier of, 2 years of original complaint or 9 months before the case is set for trial, and after court finds substantial probability that claimant will prevail on the claim for punitive damages.
d. At the defendant's request, punitive damages must be considered in a separate proceeding and, if so requested, no evidence relevant to the claim for punitive damages may be admitted in the proceedings for compensatory damages.
e. In determining the amount, court must consider only:
1) severity of harm;
2) duration of defendant's conduct and any concealment;
3) profitability of defendant's conduct;
4) number of products sold/procedures rendered which caused similar harm;
5) similar awards of punitive damages in similar circumstances;

6) prospective awards of compensatory damages to similarly situated persons;
7) criminal penalties imposed on defendant;
8) civil fines imposed.

f. No award may exceed the greater of 3 times the amount of economic damages or $250,000.

4. Periodic Payment of Damages

No more than $100,000 may be required to be paid in one single payment. The court will determine the schedule for payments, based on projection of future losses and reduced to present value. This requirement may be waived, in the interests of justice.

5. Several, not Joint, Liability

Defendant liable only for the amount of non-economic and punitive damages allocated to defendant's direct proportion of fault or responsibility. The trier of fact determines percentage of responsibility of each defendant. No vicarious liability for direct acts or omissions.

6. Collateral Source

Total damages must be reduced by payments from other sources made, or to be made, to compensate individual for injury that is the subject of the health care liability action. The offset is reduced by any amount paid by the injured party (or family member) to secure the payment. The reductions must be determined by the judge in a pretrial proceeding.

7. Attorneys' Fees

Limits attorney contingent fees to 33 1/3% of the first $150,000 and 25% of any amount in excess of $150,000.

8. Obstetric Cases

No malpractice award against a health care professional relating to delivery of a baby, if the health care professional did not previously treat the woman during the pregnancy, unless malpractice proved by clear and convincing evidence.

9. State Based Alternative Dispute Resolution

a. Prior to the filing, or immediately following the filing of the action, the parties must participate in a state administered alternative dispute resolution system.

b. The Attorney General will develop adr methods for use by the states, including arbitration, mediation, early neutral evaluation, early offer and recovery. The parties may elect binding arbitration.

c. Adr must promote resolution of health care liability claims in an affordable, timely, fair and convenient manner. States may be granted waivers if they have programs that meet these standards.

d. Any party dissatisfied (except where binding arbitration selected) may continue the action in court and may prevail only if each element of the case is proved beyond a reasonable doubt,

including that the defendant was grossly negligent or intentionally caused injury. State law governs the admission of adr proceedings.

10. Certificate of Merit
Requires that, prior to bringing a lawsuit, an individual (or his or her attorney) to submit an affidavit declaring that the individual reviewed the facts with a qualified specialist and that the specialist has concluded the claim is meritorious. A qualified specialist means a health care professional with expertise (the specialist practices or teaches or has experience or demonstrated competence) in the same or substantially similar area of practice as that involved in the case. A court may impose sanctions for the submission of a false affidavit.

Subtitle B -- Biomaterial Access Assurance

1. Summary
The Biomaterial Access Assurance Act would allow suppliers of the raw materials (biomaterial) used to make medical implants, to obtain dismissal, without extensive discovery or other legal costs, in certain tort suits in which plaintiffs allege harm from a finished medical implant.

The Act would not affect the ability of plaintiffs to sue manufacturers or sellers of medical implants. It would allow raw materials suppliers, however, to be dismissed from lawsuits if the generic raw material used in the medical device met contract specifications, and if the biomaterial supplier cannot be classified as either a manufacturer or seller of the medical implant.

2. Scope
a. Establishes that any biomaterial supplier may seek its dismissal from a civil action within the parameters of the Subtitle.
b. Applies to any civil action brought by a claimant in Federal or State court against a manufacturer, seller, or biomaterial supplier, on the basis of any legal theory, for harm allegedly caused by an implant.
c. Preempts State law to the extent the bill establishes a rule of law.

3. Grounds for Dismissal
a. Requires dismissal of a biomaterial supplier unless the claimant establishes that the supplier:
   1) was itself the manufacturer of the implant;
   2) was itself the seller of the implant; or
   3) furnished raw materials that failed to meet applicable contractual requirements or specifications.
b. A supplier may be deemed to be a manufacturer only if the supplier registered as such with the FDA pursuant to medical device requirements or if the HHS Secretary issues a declaration

that the supplier should have registered as such. Establishes a procedure for the Secretary to issue such a declaration.
c. A supplier may be deemed to be a seller if the supplier itself resold the implant after it had been manufactured and had entered the stream of commerce.
d. With respect to contractual requirements, a supplier may be liable for harm only if the claimant shows that the biomaterial were not the actual product for which the parties contracted or the biomaterial failed to meet certain specifications and that failure was the cause of the injury. The relevant specifications are those:

1) provided to the supplier by the manufacturer,
2) provided by the manufacturer (either published, given to the manufacturer, or included in an FDA master file), or
3) included in manufacturer submissions that had received clearance from the FDA.

4. Procedures for Dismissal
a. A supplier named as a defendant or joined as a co-defendant may file a motion to dismiss based on the defenses set forth above.
b. A plaintiff must sue a manufacturer directly whenever jurisdiction over the manufacturer is available. A plaintiff must submit an expert's affidavit certifying that the biomaterial were actually used and were the cause of the alleged harm and that the case has merit.
c. Specific rules are established for the handling of a motion to dismiss, including discovery limitations, summary judgment procedures, and staying the proceedings.
d. The manufacturer, not the supplier, may conduct the proceeding on the motion if an appropriate contractual indemnification agreement exists. The possibility of frivolous claims against a supplier is reduced by permitting the court to require the plaintiff to pay attorney fees if the plaintiff succeeds in making the supplier a defendant, but ultimately is found to have a meritless claim.

5. Effective Date
The bill will apply to civil actions commenced on or after the date of enactment.

Title II -- Protection of Patient Health and Safety

1. Quality Assurance
Requires each state to establish a health care quality assurance program and fund, approved by the Secretary of HHS. Allocates 50% of all punitive damage awards to be transferred to the fund for the purpose of licensing and certifying health care professionals, implementing programs, including programs to reduce malpractice costs for volunteers serving underserved areas.

2. Risk Management Programs
Professionals and providers must participate in risk management

program to prevent and provide early warning of practices which may result in injuries. Insurers must establish risk management programs and require participation, once every 3 years, as a condition of maintaining insurance.

3. National Practitioner Data Bank
Requires that information on the discipline of health care practitioners, including suspension or revocation of licenses or hospital privileges, be accessible to the public.

PRESIDENT'S REMARKS IN DALLAS

Let's talk about legal reform. Are there too many lawsuits? Of course, there are. Do jury awards once in a while get out of hand? Yes, they do. Does this affect the insurance system in the country? It has an impact on it. But at a time when we're giving more and more responsibility to the states in which one of the signal ideas of the Republican Contract that I largely agree with is that the state and local governments should have more responsibility, do we really want to take the entire civil justice system away from the states for the first time in 200 years? I don't think so.

Let me give you a couple of examples. Should we put justice out of the reach of ordinary people with a "loser pay" rule? No. Think about it this way -- "loser pays" will keep ordinary citizens from exercising their rights in court just as a poll tax used to keep ordinary people of color and poverty from exercising their right to vote. I will veto any bill with a "loser pay" requirement such as that that was in the House bill. I don't think it's right.

Punitive damages -- they could stand some reform, but not artificial ceilings. Punitive damages are designed to deter bad future conduct. Now, if you have a national ceiling of $250,000 think what that means -- $250,000 may be too burdensome for a small businessperson who loses a lawsuit. You don't want to put them out of business unless they're malicious. But does anybody seriously believe that $250,000 will have any kind of significant deterrent impact on a giant multinational corporation? So let's negotiate realistic reforms that improve the system, but don't wreck it.