

For the President Reading

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PHOTOCOPY
PRESERVATION

Return to the Staff Secretary

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THE WHITE HOUSE
WASHINGTON

May 1, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: TODD STERN *TS*

SUBJECT: Product Liability Reform Bill -- H.R. 956

You are scheduled to veto the product liability reform bill at an event tomorrow afternoon. Proponents of the bill argue that it would improve competitiveness by (i) preventing firms with a small share of responsibility from getting stuck with large share of damages; (ii) precluding excessive punitive damage awards; (iii) removing burdens of complying with 50 different State laws. Opponents say the bill is anti-consumer and one-sided.

Key provisions to which Administration has raised objections:

Joint and Several Liability. Bill would abolish joint and several liability for non-economic damages, such as pain and suffering. Each defendant would be liable for only its share of fault, as determined at trial.

Cap on Punitive Damages. Punitives would be capped at greater of (i) \$250,000 or (ii) two times the award for compensatory damages, unless defendant is an individual whose net worth doesn't exceed \$500,000 or a business with fewer than 25 full-time employees. In that case, punitives would be the lesser of those two amounts.

Statute of Limitations. Two years after claimant discovered the harm and the cause of the harm. Also, statute *not* tolled by a stay or injunction, which could be particularly problematic in connection with bankruptcy, since bankruptcy courts issue automatic stays pending completion of bankruptcy proceedings.

Statute of Repose. An action involving a durable good can't be filed more than 15 years after product delivered to the first purchaser or lessee. (Senate-passed bill had a 20-year period.)

Preemption of State Law. Bill preempts State laws that are inconsistent with the bill's standards for product liability cases -- but in a one-way direction. Thus, State could have a shorter, but not longer Statute of Repose; or lower, but not higher, ceilings for punitive damages.

TO THE HOUSE OF REPRESENTATIVES:

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

I support real commonsense product liability reform. To deserve that label, however, legislation must adequately protect the interests of consumers, in addition to the interests of manufacturers and sellers. Further, the legislation must respect the important role of the States in our Federal system. The Congress could have passed such legislation, appropriately limited in scope and balanced in application, meeting these tests. Had the Congress done so, I would have signed the bill gladly. The Congress, however, chose not to do so, deciding instead to retain provisions in the bill that I made clear I could not accept.

This bill inappropriately intrudes on State authority, and does so in a way that tilts the legal playing field against consumers. While some Federal action in this area is proper because no one State can alleviate nationwide problems in the tort system, the States should have, as they always have had, primary responsibility for tort law. The States traditionally have handled this job well, serving as laboratories for new ideas and making needed reforms. This bill unduly interferes with that process in products cases; moreover, it does so in a way that peculiarly disadvantages consumers. As a rule, this bill displaces State law only when that law is more favorable to consumers; it defers to State law when that law is more helpful to manufacturers and sellers. I cannot accept, absent compelling reasons, such a one-way street of federalism.

Apart from this general problem of displacing State authority in an unbalanced manner, specific provisions of H.R. 956 unfairly disadvantage consumers and their families. Consumers should be able to count on the safety of the products they purchase. And if these products are defective and cause harm, consumers should be able to get adequate compensation for their losses. Certain provisions in this bill work against these goals, preventing some injured persons from recovering the

full measure of their damages and increasing the possibility that defective goods will come onto the market as a result of intentional misconduct.

In particular, I object to the following provisions of the bill, which subject consumers to too great a risk of harm.

First, as I previously have stated, I oppose wholly eliminating joint liability for noneconomic damages such as pain and suffering because such a change would prevent many persons from receiving full compensation for injury. When one wrongdoer cannot pay its portion of the judgment, the other wrongdoers, and not the innocent victim, should have to shoulder that part of the award. Traditional law accomplishes this result. In contrast, this bill would leave the victim to bear these damages on his or her own. Given how often companies that manufacture defective products go bankrupt, this provision has potentially large consequences.

This provision is all the more troubling because it unfairly discriminates against the most vulnerable members of our society -- the elderly, the poor, children, and nonworking women -- whose injuries often involve mostly noneconomic losses. There is no reason for this kind of discrimination. Noneconomic damages are as real and as important to victims as economic damages. We should not create a tort system in which people with the greatest need of protection stand the least chance of receiving it.

Second, as I also have stated, I oppose arbitrary ceilings on punitive damages, because they endanger the safety of the public. Capping punitive damages undermines their very purpose, which is to punish and thereby deter egregious misconduct. The provision of the bill allowing judges to exceed the cap if certain factors are present helps to mitigate, but does not cure this problem, given the clear intent of the Congress, as expressed in the Statement of Managers, that judges should use this authority only in the most unusual cases.

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

My opposition to these Senate-passed provisions were known prior to the Conference on the bill. But instead of addressing these issues, the Conference Committee took several steps backward in the direction of the bill approved by the House.

First, the Conference Report seems to expand the scope of the bill, inappropriately applying the limits on punitive and noneconomic damages to lawsuits, where, for example, a gun dealer has knowingly sold a gun to a convicted felon or a bar owner has knowingly served a drink to an obviously inebriated customer. I believe that such suits should go forward unhindered. Some in the Congress have argued that the change made in Conference is technical in nature, so that the bill still exempts these actions. But I do not read the change in this way -- and in any event, I do not believe that a victim of a drunk driver should have to argue in court about this matter. The Congress should not have made this last-minute change, creating this unfortunate ambiguity, in the scope of the bill.

In addition, the Conference Report makes certain changes that, though sounding technical, may cut off a victim's ability to sue a negligent manufacturer. The Report deletes a provision that would have stopped the statute of limitations from running when a bankruptcy court issues the automatic stay that prevents suits from being filed during bankruptcy proceedings. The

effect of this seemingly legalistic change will be that some persons harmed by companies that have entered bankruptcy proceedings (as makers of defective products often do) will lose any meaningful opportunity to bring valid claims.

Similarly, the Conference Report reduces the statute of repose to 15 years (and less if States so provide) and applies the statute to a wider range of goods, including handguns. This change, which bars a suit against a maker of an older product even if that product has just caused injury, also will preclude some valid suits.

In recent weeks, I have heard from many victims of defective products whose efforts to recover compensation would have been frustrated by this bill. I have heard from a woman who would not have received full compensatory damages under this bill for the death of a child because one wrongdoer could not pay his portion of the judgment. I have heard from women whose suits against makers of defective contraceptive devices -- and the punitive damages awarded in those suits -- forced the products off the market, in a way that this bill's cap on punitives would make much harder. I have heard from persons injured by products more than 15 years old, who under this bill could not bring suit at all.

Injured people cannot be left to suffer in this fashion; furthermore, the few companies that cause these injuries cannot be left, through lack of a deterrent, to engage in misconduct. I therefore must return the bill that has been presented to me. This bill would undermine the ability of courts to provide relief to victims of harmful products and thereby endanger the health and safety of the entire American public. There is nothing common sense about such reforms to product liability law.

TO THE HOUSE OF REPRESENTATIVES:

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

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This provision is all the more troubling because it unfairly discriminates against the most vulnerable members of our society -- the elderly, the poor, children, and nonworking women -- whose injuries often involve mostly noneconomic losses. There is no reason for this kind of discrimination. Noneconomic damages are as real and as important to victims as economic damages. We should not create a tort system in which people with the greatest need of protection stand the least chance of receiving it.

Second, as I also have stated, I oppose arbitrary ceilings on punitive damages, because they endanger the safety of the public. Capping punitive damages undermines their very purpose, which is to punish and thereby deter egregious misconduct. The provision of the bill allowing judges to exceed the cap if certain factors are present helps to mitigate, but does not cure this problem, given the clear intent of the Congress, as expressed in the Statement of Managers, that judges should use this authority only in the most unusual cases.

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effect of this seemingly legalistic change will be that some persons harmed by companies that have entered bankruptcy proceedings (as makers of defective products often do) will lose any meaningful opportunity to bring valid claims.

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THE WHITE HOUSE,

4-30-96

Bill is
Here

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THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

April 1, 1996

96 APR 1 P 5:34

4/30
Bill is here

MEMORANDUM FOR THE PRESIDENT

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

Last Day for Action

Purpose

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

Agency Recommendations

Office of Management and Budget	Disapproval
Department of Health and Human Services	Defers to Justice
Department of the Treasury	No comment (Informally)
Small Business Administration	No comment (Informally)
Department of Labor	No comment (Informally)
Department of Justice	No response
Department of Commerce	No response

Discussion

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

The conference report on H.R. 956 passed the Senate by a vote of 59-40 and the House by 259-158.

Joint-and-Severall Liability. H.R. 956 would abolish "joint-and-severall" liability for non-economic damages (e.g., pain and suffering) in product liability cases. Each defendant would only be liable for its percentage of liability as determined at trial. In cases where a defendant goes out of business or is unable to pay its part of a judgment, the other defendants would not be responsible.

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

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

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

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

- A shorter -- but not a longer -- time limit for filing product liability actions than the bill's limit of 15 years after delivery of the product.

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

Proponents' Arguments in Favor of H.R. 956

Proponents of H.R. 956 argue that the enrolled bill would improve the competitiveness of American businesses. They argue that the bill would improve competitiveness by: (1) preventing firms with a small share of responsibility for a claim from having to pay a large share of the damages; (2) precluding excessive awards of damages; and (3) removing burdens associated with the need to comply with 50 different State laws governing product liability.

Conclusion and Recommendation

In light of your earlier letter to the congressional leadership on this legislation, we recommend that you veto H.R. 956. The Office of White House Counsel will submit a veto message separately for your consideration.


Alice M. Rivlin
Director

Enclosures

Attachment

Other Provisions of H.R. 956

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

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

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

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

Negligent Entrustment Actions. The limits on punitive and non-economic damages under H.R. 956 would apply to lawsuits for negligent entrustment. For example, they would apply in a lawsuit against a gun dealer who knowingly sells a gun to a convicted felon who uses it to shoot someone.

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

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

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

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

Workers' Compensation Subrogation. An insurer would be given the right to recover from a manufacturer or product seller the workers' compensation benefits paid to a claimant.

Biomaterials Suppliers. Suppliers of component parts or raw materials for use in the manufacture of a medical device that is implanted in the body would generally be excluded from liability for harm to a claimant caused by an implant. The Department of Health and Human Services, in its attached views letter, objects to these provisions. The Department believes that the provisions would entangle the Food and Drug Administration (FDA) in litigation and increase its workload concerning compliance with FDA's requirements by device manufacturers.

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

01-May-1996 06:54pm

TO: Todd Stern

FROM: James C. Murr
 Office of Mgmt and Budget, LRD

SUBJECT: Veto Message on Product Liability Bill

I thought I would comment directly to you on the subject veto message, which your office circulated earlier for comment. In light of this bill's background and the Administration's position on the bill, I have made no attempt to edit the message, but would like to make the following points.

If you haven't already done so, I urge that the Justice Department be given the opportunity to review the message before it is released. It would take someone knowledgeable from Justice to determine the factual accuracy of many of the statements contained in the message.

For a veto message, at least from my perspective, the tone is too harsh for a formal governmental communication to the Congress by the President. This communication will be part of the President's official papers. This tone would be more appropriate for a press release or other document related to the veto. This message as written is not Presidential. It reads like a lawyer's brief that is trying to score points.

In the second paragraph on page 3, the references to private groups (e.g., MADD and Handgun Control) are not appropriate for a veto message.

The message is too long.



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

96 MAR 18

March 16, 1996
(Conference)

STATEMENT OF ADMINISTRATION POLICY

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

H.R. 956--Common Sense Product Liability Legal Reform Act of 1996 (Hyde (R) IL and Hoke (R) OH)

The President will veto H.R. 956 if it is presented to him in the form of the Conference Report.

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

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

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

In particular, the bases for the Administration's opposition to H.R. 956 are as follows:

First, the Administration, as noted in its Statement of

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Administration Policy on the Senate version of this bill, opposes an artificial ceiling on the amount of punitive damages that may be awarded in a product liability action. Statutory caps ignore the fundamental purpose of punitive awards: to punish and deter. While the Senate bill and the Conference Report allow judges to exceed the ceiling in certain circumstances, the explanation in the Statement of Managers that "occasions for additional awards will be very limited indeed" reveals a continuing basis for concern. The Conference Report invites a wealthy, irresponsible potential wrongdoer to weigh the risks of a capped punitive damages award against the potential gains or profits from the wrongdoing.

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

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

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

Nonetheless, the President will veto H.R. 956 if presented, because in its current form, it interferes unduly with State prerogatives and unfairly tilts the legal playing field to the disadvantage of consumers.

* * * * *

THE PRESIDENT HAS SEEN

3/15/96

THE WHITE HOUSE

WASHINGTON

March 14, 1996

MEMORANDUM FOR BRUCE LINDSEY

FROM: ELENA KAGAN *ek*

SUBJECT: PRODUCTS LIABILITY

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

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

*Just
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Elena - as-p
KAG
Bruce*

Prosser

**PHOTOCOPY
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Element asap

Did they change the
statute of repose?

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

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

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

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

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

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

does not satisfy our concern. The Conference Report

While the Senate bill and the Conference

Report

PHOTOCOPY
PRESERVATION

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

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

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

The Conference Report includes some good and useful provisions. In particular, Title 11 is a laudable attempt to ensure that suppliers of biomaterials will provide sufficient quantities of their products to manufacturers of medical devices. The Administration is committed to working with Congress to address this issue.

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

*Provisions which, in the
Administration's view,*

THE WHITE HOUSE
WASHINGTON

March 15, 1996

RECOMMENDED TELEPHONE CALL

TO: Senator John D. Rockefeller

DATE: March 15, 1996

RECOMMENDED BY: John Hilley
Assistant to the President for Legislative Affairs

PURPOSE: To inform the Senator of your intention to veto the Conference Report for the Products Liability Reform Act (H.R. 956).

BACKGROUND: After several months of negotiations, the House and Senate Conferees finally reached an agreement on the Products Liability Act and made public the Conference Report yesterday (March 14). While, in many respects the bill follows the more narrowly drawn Senate bill (passed last April) it still tilts the legal playing field to the disadvantage of consumers.

The Administration opposed the Senate passed bill based on two issues that are still relevant in the context of this conference report. First, in the area of punitive damages caps, the conferees adopted the Senate's so-called additur provision which allows judges to exceed the cap but only in certain rare circumstances. As in the case of the Securities Litigation bill, the conferees here again used the Statement of the Managers to put a troublesome spin on the judicial additur provision by further explaining that "occasions for additional awards will be very limited."

Second, the conference agreement abolishes joint-and-several liability for noneconomic damages (most notably, pain and suffering). There is no reason for a Federal statute to preempt State laws that recognize the importance of noneconomic damages. This provision would severely and unfairly discriminate against those innocent victims whose injuries involve mostly noneconomic damages, rather than damages that can be measured by lost income. Those who incur such damages should not suffer if one defendant, for example, has gone bankrupt.

A third matter of deep concern is that the conference agreement takes a rather severe step backwards from the Senate bill by deleting a provision that would have tolled the statute of limitations in the event of a stay or injunction against an

action. Such a provision is critical when a potential defendant files for liquidation or reorganization, as happened in cases involving asbestos and the Dalkon Shield. In such a case, the bankruptcy court will issue a stay pending the completion of its proceedings; if the statute of limitations is not tolled, many injured persons run the risk of losing meritorious claims.

Similarly, the conference report reduces the statute of repose from twenty years to a maximum of fifteen years (and less if states so provide). This change, which prevents a person from bringing suit against a manufacturer of an old product even if the product has caused injury, also will preclude valid claims.

Senator Rockefeller was quoted in the Washington Post yesterday as saying that he expects you to sign this bill. He also said that the additur provision was suggested by the White House. While it is true that John Schmidt and Frank Hunger of the Justice Department did work with Senator Rockefeller on this provision when the bill was first considered in the Senate, they made it clear they were not speaking for the Administration. Nonetheless, Senator Rockefeller believes--based on a previous conversation with you-- that this conference report satisfies the concerns you raised and therefore you will sign the bill.

Harold Ickes spoke to the Senator just last week and in that conversation the Senator was expressing confidence that he had accommodated your concerns. He said he had worked very hard over the past nine years to get this bill; he has been very loyal to this administration; and, most importantly, he feels he has been misled in the past about what it would take for you to sign his bill.

TOPICS OF DISCUSSION: 1. You should let the Senator know that you recognize and very much appreciate all the effort he has put into trying to get an agreement that reflects your concerns. While there are some good and useful provisions your fundamental concerns remain.

 2. Express your apologies if past conversations with members of your staff and the Senator were either unproductive or, in the Senator's opinion, misleading. But let the Senator know that the purpose of the more recent overtures by Bruce Lindsey were designed to clarify any misunderstanding prior to the conference ending.

 3. Let the Senator know that it would be your intention to veto the conference report if it reached your desk.

 4. Remind the Senator that he requested that you not single his bill out for veto, i.e., that you should not sign the Securities Litigation Reform bill and veto his bill. He argued that, for the sake of consistency and overall political appearance, you should either sign both or veto both. He did not want your only veto to date to be of his bill.

CONTACT PERSON AND
TELEPHONE NUMBER(S): 202-544-8073

DATE OF SUBMISSION:

ACTION: _____

DRAFT

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

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

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

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

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

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

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

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

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

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

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

THE WHITE HOUSE

WASHINGTON

96 FEB 27 P6:57

February 27, 1996

Leon --

Bruce and Laura are recommending that the President call Rockefeller ASAP to avoid the risk that a Conference Report is agreed to in the next day or two and voted on with veto-proof majorities in both Houses.

Don't you, and others as you think necessary, need to meet with the President before he calls Rockefeller? (Recall that game plan originally was for President to talk to Breaux to hear clear case against the bill before talking to Rockefeller. It may be that things are moving on the Hill too quickly for that to be feasible, but I would think we'd still need to do that internally.)

I will talk to you about this at tomorrow morning's meeting if I haven't heard from you before.

Todd
Todd

cc: Ickes
Hilley

→ Laura and Leon are meeting w/ POUS on product liability tomorrow.

Jim P.

THE WHITE HOUSE

WASHINGTON

February 27, 1996

96 FEB 27 P5:11

MEMORANDUM FOR THE PRESIDENT

FROM:

LAURA D'ANDREA TYSON
BRUCE LINDSEY

Laura D. Tyson
Bruce R. Lindsey

SUBJECT:

Products liability bill

Action needed

Within the next day or two, House and Senate conferees may well agree on a products liability bill that, with no direction from the White House, could pass both Houses by a substantial enough majority to make sustaining a veto difficult. **To avoid this result, we strongly recommend that you quickly inform Senator Rockefeller of your strong and continuing objections to any bill likely to pass -- including the more moderate Senate bill.**

Issues presented

In commenting on the Senate-passed bill last May, we stated that, although you support **balanced** legal reform, even the Senate bill was flawed in two major areas:

- It contains a cap on punitive damages. Although there were complex procedures for the judge to lift the cap in certain cases, the fact that this decision is taken out of the hands of the jury is unacceptable. (The Senate bill also allowed the defendant a new trial on damages if he didn't like the judge's addition to punitives; Senator Rockefeller says he won't support a bill that continues to include this provision.)
- It eliminates joint and several liability for non-economic damages.

In addition, we had earlier stated our concern that tort law, including products liability, has always properly been the province of the states, the vast majority of which have substantially modified their products liability laws since 1980.

The House is reported to have offered to take the Senate bill, but without fixing these objections, and, in fact, making them marginally worse.

Message

The bill hurts consumers and other little people, while simultaneously not buying business the uniformity they desire. The bill discriminates against low income people -- including many women and elderly -- will be less able to recover their very real losses than will those who earn high wages. Juries are in fact responsible about punitive damages; there were only 355 punitive damage awards in products liability cases between 1965 and 1990, and only 3 in 1992. But capping punitives will mean that defendants will no longer have to be concerned about serious punitive damages should they act outrageously irresponsibly. And yet, because the bill properly leaves much to be interpreted by state courts, businesses will not achieve the national uniformity on this issue they are searching for. This is a lose-lose bill.

For the President

Products Liability
Bill:
requesting contact
w/ Senator Rockefeller

ACTION

Topp - Do you want this
in Recommended Telephone

Call format

NO

S

Return to the Staff Secretary

PHOTOCOPY
PRESERVATION

UP

THE WHITE HOUSE
WASHINGTON

February 27, 1996

96 FEB 27 P5:11

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153277

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Products

2-28

- tell Rockefeller
Full Sept
for addition
not pt. & serv'
not beyond products
- 1st learn LT & BL clear w/ G.
then OSL talk to Rock.
- try small ES by Reg. ~~from~~
bill ~~so that~~ be
in veto posture on big Reg
bill

2-27 notes

Handwritten:

~~unofficially changed
the provision
to go-control
Public
Sanctions~~

Projects 2-27 Luma mtg.

Nowse fixes on Genate:

Start. of response to a C prod.

Case retroactive to intro of bill

addition only apply to punishment where intention has an ^{element}

James P. Brennan to help to P & then P-Rocket (Mars)

[key same for all probs - addition; ft. 2 servers]

Rock. v.11 MUST on Senate bill + Day ^{Here is} non-starter

The 39 votes against solid in Senate so no override but override likely in Hsu

WHITE HOUSE STAFFING MEMORANDUM

DATE: 1-4 ACTION/CONCURRENCE/COMMENT DUE BY: 1-5SUBJECT: PRODUCT LIABILITY

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☒	☐	McCURRY	☐	☐
PANETTA	☒	☐	McGINTY	☐	☐
McLARTY	☐	☐	NASH	☐	☐
ICKES	☒	☐	QUINN	☒	☐
BOWLES	☐	☐	RASCO	☐	☐
RIVLIN	☒	☐	SOSNIK	☒	☐
BAER	☐	☐	STEPHANOPOULOS	☒	☐
CURRY	☐	☐	STIGLITZ	☒	☐
EMANUEL	☐	☐	STREETT	☐	☐
GIBBONS	☐	☐	TYSON	☒	☐
GRIFFIN	☒	☐	WALLEY	☐	☐
HALE	☐	☐	WILLIAMS	☐	☐
HERMAN	☐	☐		☐	☐
HIGGINS	☐	☐		☐	☐
KLAIN	☒	☐		☐	☐
LAKE	☐	☐		☐	☐
LINDSEY	☐	☐		☐	☐

REMARKS:

Please advise if you have any

RESPONSE:

comment.

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GRIFFIN	☒	☐	WALLEY	☐	☐
HALE	☐	☐	WILLIAMS	☐	☐
HERMAN	☐	☐		☐	☐
HIGGINS	☐	☐		☐	☐
KLAIN	☒	☐		☐	☐
LAKE	☐	☐		☐	☐
LINDSEY	☐	☐		☐	☐

REMARKS:

Please advise if you have any

RESPONSE:

comment.

January 4, 1996

MEMORANDUM FOR THE PRESIDENT

96 JAN 4 P2:32

FROM: Bruce R. Lindsey

RE: Products Liability Reform

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

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

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

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

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

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

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

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

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

noneconomic damages. Senators Rockefeller and Gorton, working with John Schmidt and Frank Hunger, attempted to address the "cap" issue by allowing the judge to increase a punitive damage award in some cases. The bill that passed the Senate, however, would allow a defendant who is unhappy with the judge's additur to obtain a new trial on the punitive damages issue. Senator Rockefeller has promised to "correct" this in conference. In addition, Senator Rockefeller has indicated a willingness to reduce the statute of repose from 20 to 17 years and to extend the limitation on punitive damages to certain charitable organization. No Senator offered an amendment to change the joint and several provision and Senator Rockefeller has not indicated a willingness to delete the limitation on joint and several liability in conference.

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

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

The Senate-passed product liability bill is a clear improvement on the extreme legal reform measures passed by the House. Unfortunately, the legislation in its present form does not go far enough toward balancing the interests of consumers with those of manufacturers and sellers.

The Senate approach on punitive damages is an improvement on an absolute cap, but it still has flaws. Moreover, the Administration has consistently made clear its opposition to the provision that would make it harder for injured consumers to recover their full damages in cases involving more than one culpable defendant.

President Clinton supports balanced legal reform and will work with a House-Senate conference to address these and other concerns.

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

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

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

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

At your convenience, we should probably meet to discuss.

January 4, 1996

Lindsey
memo re
Products
Liability
Reform

MEMORANDUM FOR THE PRESIDENT

96 JAN 4 P2:32

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January 4, 1996

MEMORANDUM FOR THE PRESIDENT

96 JAN 4 P2:32

FROM: Bruce R. Lindsey

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WHITE HOUSE STAFFING MEMORANDUM

DATE: 1-4 ACTION/CONCURRENCE/COMMENT DUE BY: 1-5

SUBJECT: PRODUCT LIABILITY

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☒	☐	McCURRY	☐	☐
PANETTA	☒	☐	McGINTY	☐	☐
McLARTY	☐	☐	NASH	☐	☐
ICKES	☒	☐	QUINN	☒	☐
BOWLES	☐	☐	RASCO	☐	☐
RIVLIN	☒	☐	SOSNIK	☒	☐
BAER	☐	☐	STEPHANPOULOS	☒	☐
CURRY	☐	☐	STIGLITZ	☒	☐
EMANUEL	☐	☐	STREETT	☐	☐
GIBBONS	☐	☐	TYSON	☒	☐
GRIFFIN	☒	☐	WALLEY	☐	☐
HALE	☐	☐	WILLIAMS	☐	☐
HERMAN	☐	☐		☐	☐
HIGGINS	☐	☐		☐	☐
KLAIN	☒	☐		☐	☐
LAKE	☐	☐		☐	☐
LINDSEY	☐	☐		☐	☐

REMARKS:

Please advise if you have any

RESPONSE:

comment.

Todd:
We need meeting.

(G)

Staff Secretary
Ext. 6-2702

January 4, 1996

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BOWLES	☐	☐	RASCO	☐	☐
RIVLIN	☒	☐	SOSNIK	☒	☐
BAER	☐	☐	STEPHANOPOULOS	☒	☐
CURRY	☐	☐	STIGLITZ	☒	☐
EMANUEL	☐	☐	STREETT	☐	☐
GIBBONS	☐	☐	TYSON	☒	☐
GRIFFIN	☒	☐	WALLEY	☐	☐
HALE	☐	☐	WILLIAMS	☐	☐
HERMAN	☐	☐		☐	☐
HIGGINS	☐	☐		☐	☐
KLAIN	☒	☐		☐	☐
LAKE	☐	☐		☐	☐
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REMARKS:

Please advise if you have any

RESPONSE:

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