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Civil Justice Reform

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OFFICE OF THE VICE PRESIDENT

WASHINGTON

March 10, 1992

Civil Justice Reform Roundtable.

DATE: March 12, 1992
LOCATION: Holiday Inn Conference Center
Lansing, Michigan
TIME: 3:20 p.m.
FROM: John L. Howard *JLH*

I. PURPOSE

To discuss the Administration's Civil Justice Reform initiative and to seek support for reforms at the federal and state levels.

This also is an opportunity to assist Governor John Engler advance medical liability reform measures currently pending.

II. BACKGROUND

This Civil Justice Roundtable is hosted by Governor Engler. The event has been designed to focus primarily on how unnecessary litigation impacts the availability of health care.

In addition to reducing the costs and delay inherent in our litigation process, the Administration's Civil Justice Reform initiative can be helpful in containing medical costs. The high costs of defending against frivolous lawsuits or unfounded demands for punitive damages are a direct, and major, component in increasing physician's liability insurance. Equally important are the indirect costs incurred when physician's are forced to order vast batteries of costly, and often unnecessary, tests in order to protect themselves from the possibility of lawsuits.

The impact of medical liability litigation on the availability, costs, and quality of health care is a matter of longstanding concern of the Administration. In addition to the Civil Justice Reform proposal, the Administration has introduced the Health Care Liability Reform and Quality of Care Improvement Act of 1991 to reform the substantive tort laws underlying most malpractice actions. Among the substantive changes proposed for containing health care costs are: 1) eliminating joint and

several liability for non-economic damages, 2) capping non-economic damages, and 3) promoting ADR. Together, the two Administration initiatives would improve the quality of care and lower legal costs.

Last November, the Michigan Senate approved SB 248, which establishes an alternative dispute resolution mechanism for medical liability claims; and SB 249, which provides tighter expert witness requirements, a shortened statute of limitations for actions by minors, and a sliding scale for attorney contingency fees.

Both of these bills are now pending in the Michigan House of Representatives. The bills are supported by the Michigan Medical Liability Reform Coalition which, in addition to health care providers, includes the Michigan State Chamber of Commerce, the National Federation of Independent Businesses, and the Michigan Insurance Federation.

Governor Engler strongly supports these medical liability reform measures.

III. PARTICIPANTS

The Vice President
Governor John Engler

IV. EVENT OUTLINE

3:25 p.m. The VICE PRESIDENT arrives in Imperial Room A and participates in Photo Opportunity.

- 3:35 p.m. The VICE PRESIDENT concludes Photo Opportunity and participates in Civil Justice Reform Roundtable.

4:00 p.m. The VICE PRESIDENT concludes Roundtable and proceeds to Holding Room.

4:05 p.m. The VICE PRESIDENT departs Holding Room and proceeds to Imperial Room B for Press Roundtable.

4:30 p.m. The VICE PRESIDENT concludes Press Roundtable and proceeds to Holding Room.

V. PRESS PLAN

Press Pool Coverage (beginning only)

VI. ATTACHMENTS

List of Participants
Fact Sheet on the President's Health Reform Program
Talking Points
Biography of Governor Engler

VII. FOLLOW-UP ACTION REQUIRED

Thank You Notes
Mail Photographs

Jacque Sammet	Medical Liability Insurance Executive
Richard Kitch	Defense Attorney, Michigan Hospital Association, Michigan Association of Osteopathic Physicians and Surgeons
Richard Whitmer	President & CEO, Blue Cross Blue Shield of Michigan
Spencer Johnson	President, Michigan Hospital Association
Dennis Paradis	VP, Michigan Hospital Association
Jack Ryan, M.D.	Hospital CEO & Insurance Board member
Mike Schwartz	CEO, Sisters of Mercy
Young Suh	CEO, St. Joseph, Flint
John McVeety	CEO, Alpena Hospital
Thomas E. Brennan	Former Michigan Supreme Court Justice, President, Cooley Law School
Larry Burns	President, Michigan Society Hospital Attorneys
Pat O'Leary	Attorney, Plunkett, Cooney
Ed McRee	CEO, Ingham Medical Center
Robert Yellan	VP, Detroit Medical Center
Dave Benfer	VP, Henry Ford Health System
Nancy McKeague	Michigan State Chamber of Commerce
Vernice D. Anthony	Director of Public Health
Dr. Charles Vincent	Physician, Hutzel Hospital
Eugene Sikorski, D.O.	Chair of Council of Public Education and Health, Michigan Association of Osteopathic Physicians and Surgeons
Eugene Oliveri, D.O.	Michigan Association of Osteopathic Physicians and Surgeons Board President
Tom Payne	President Elect - Michigan State Medical Society; Ingham Medical Center - Radiologist
Bob Burton	Current President - Michigan State Medical Society; Ear, Nose and Throat - Grand

Rapids

Peter McCabe

**Vice Chair - Michigan State Medical
Society Board; Plastic Surgeon - Wayne City**

Jack Barry

**Chair - Michigan State Medical Society
Board; Family Physician**

Bob McDonough

VP, Upjohn; Certificate of Need Board

John Wortman

President, Amerisure

Jack Wintemute

President, Citizens Insurance

Dr. Susan Adelman

Immediate Past President, MSMS

Senator Dan DeGrow

R-Port Huron

Senator Joe Schwarz, M.D.

R-Battle Creek

Representative Rick Banstra

R-Grand Rapids

Representative Joe Young, Sr.

D-Detroit

Representative Tom Hickner

D-Bay City

Representative David Gubow

D-Huntington Woods

OFFICE OF GOVERNOR JOHN ENGLER

"A Prescription for a Healthy Michigan" Governor John Engler's Special Message on Health Care

*"Our goal must be a healthy Michigan, with
affordable, accessible, quality health care for all."*

In his Special Message on Health Care, Governor Engler outlined a comprehensive set of reforms designed to increase access, reduce costs, and improve the quality of health care services available to Michigan's citizens.

The Governor's "Prescription for a Healthy Michigan" stressed prevention as the key to increasing our long term health status and highlighted a number of innovations that will control skyrocketing costs and improve the quality of care available to all citizens.

The most vital part of Governor Engler's overall cost containment strategy is reform of Michigan's medical malpractice liability laws to more efficiently resolve disputes, cut the cost of liability, and encourage more doctors to participate in programs that serve the poor and uninsured. The Governor emphasized that liability reform is closely linked with improvements he supports in Michigan's licensing and health professional discipline system and that both initiatives must become law.

"In striving to achieve our goal, we cannot diminish the rights, the choices or the freedom of patients to receive quality care. But we must seek to limit the ability of a few to unfairly profit at the expense of the health of Michigan's citizens."

EXPANDING PREVENTION

"Increased prevention efforts are the cornerstone of my long term strategy to improve the health status of the people of our state."

Five major initiatives to prevent smoking, especially among young people, are featured in the Governor's prevention plan:

- Banning smoking in state buildings, prohibiting tobacco sales on state property, and ending the production of cigarettes by state prison industries.
- Establishing the right of K-12 students to smoke-free schools, the right of patients to smoke-free health care facilities, and the right of college students to smoke-free student housing.
- Banning sales of cigarettes through vending machines and prohibiting distribution of free samples and the sale of individual cigarettes.

- Requiring cigarettes sold by the pack to be placed behind the counter and putting stiff fines on the retailer and the seller of cigarettes to minors, as well as the minors who purchase them.
- Supporting amendments to Michigan's Clean Indoor Air Act to increase the percentage of non-smoking restaurant seating to 50 percent.

In addition, Michigan's Department of Public Health has received a \$9 million grant through the ASSIST program (Americans Stop Smoking Intervention Study) to further promote our anti-smoking agenda.

Governor Engler highlighted the fact that Michigan will receive more than \$15 million from the federal government to offer breast and cervical cancer screening to 15,000 uninsured women.

In addition, the WIC program has been expanded to help prevent low birth-weight babies and to reach more recipients than ever before. By the end of this year, more than 180,000 needy women, infants, and children will benefit.

Further efforts to improve awareness of vital pre-natal care is provided by an expanded "Baby Your Baby" campaign. Calls to the program hotline have increased a thousand times over. The Governor also created the Task Force on Drug Exposed Infants to offer recommendations on how to prevent drug abuse among pregnant women and how to treat the smallest victims of America's drug epidemic.

Governor Engler and HHS Secretary Louis Sullivan recently launched the Detroit Immunization Initiative to help immunize 15,000 additional pre-schoolers, raising immunization rates to a target of 90%.

The Governor also announced that he will reinvigorate the Governor's Council on Physical Fitness to encourage Michigan's citizens to adopt healthy lifestyles through awareness and public recognitions of achievement.

The success of prevention programs is displayed in MDPH's Upper Peninsula Diabetes Outreach Network. This initiative has reduced both diabetes deaths and hospitalization for that disease by about one-third.

Statewide implementation of Governor Engler's prevention plan is linked to his commitment to "50-50" state/local cost sharing for required basic health care services by 1994.

CONTROLLING COSTS

"For our job providers, the high cost of health care means higher product costs and prices -- killing our ability to compete in world markets....A competitive Michigan is a healthy Michigan. And to be competitive and healthy, we must cut costs....The most important action the state can take to control costs and increase access is to reduce the cost of medical liability."

Governor Engler endorsed the following liability reforms already passed by the Michigan Senate:

- A no-exceptions cap on non-economic damages
- A limit on attorney fees
- Improved expert witness qualifications
- And a realistic statute of limitations

Governor Engler also announced that he would support legislation to create a Health Care Fraud Strike Team that will combine elements of Michigan's licensing boards, the Insurance Bureau, and the Attorney General's Office. This anti-fraud unit will be responsible for cracking down on practitioners who improperly bill Medicaid and other insurance carriers in various illegal activities that account for as much as 10% of our total health care bill. The Strike Team will be empowered to offer rewards of as much as 10% of the restitution paid by convicted offenders.

Another highlight of the Governor's cost containment agenda is getting the most and the best care from taxpayer dollars spent in the Medicaid program. To accomplish this goal, all of Michigan's one million Medicaid recipients will be enrolled in managed care programs by the end of the 1993 fiscal year. Managed care provides every patient with a doctor, providing better, more personalized care that costs 10% less than typical fee-for-service medicine.

Governor Engler offers help in controlling costs to Michigan's job providers by calling for a moratorium on new state mandated health care benefits. This action will help businesses maintain coverage they already provide and keep their products competitive in world markets.

The Governor also endorsed legislative action to create a more efficient Certificate of Need system that focuses on high cost capital expenditures rather than excessive regulatory burdens that tend to push up costs.

In order to cope with the increasing costs associated with expansion of the "scope of practice" of licensed professionals, Governor Engler plans to increase scrutiny and demand justification of any expansion that adds to insurance liability.

INCREASING ACCESS

"The real question is this: Are we making the best use of our health care dollar? Hutzel Hospital recently paid \$10 million to settle a lawsuit. That \$10 million could have paid for pre-natal care for the 10,000 mothers who gave birth at Hutzel last year....My goal is fairness and an efficient system to resolve disputes that adequately compensates the injured without penalizing those who make a good faith effort to provide care."

In his efforts to increase access to medical care, the Governor highlighted RBRVS -- the Resource Based Relative Value Scale New Reimbursement system. Michigan is the first state in the nation to implement this initiative to increase payments for primary care by 21% as well as those for ob-gyn services by 29%. By emphasizing these high value, relatively low cost services that poor families need most, more providers will be encouraged to participate in Medicaid and more patients will be helped with the care they need.

At the same time, the shift to managed care through the Physician Sponsor Plan gives Medicaid recipients direct access to a personal doctor who will be in charge of managing all their health care interests.

By reducing the cost of liability, doctors who are currently being forced to leave the state may choose to remain in Michigan, especially obstetrician/gynecologists who are so desperately needed.

In addition, Good Samaritan Immunity for Emergency Room providers and for those who volunteer to serve the poor and uninsured will dramatically increase the number of practitioners willing to help.

The Governor's plan also proposes allowing small job providers who purchase employee health coverage for the first time be freed from the burden of mandated benefits. Experts estimate this action will benefit 10 to 20 percent of Michigan's uninsured workers -- as many as 200,000 people.

To increase access to care for uninsured children, the Governor continues to support expansion of the Caring Program for Children. During this year, the number of participants helped by the WIC nutrition program will climb to more than 180,000 -- more than ever before.

Governor Engler's commitment to make state and local governments equal partners in providing required health services will ultimately result in more individuals gaining access to those services, regardless of their ability to pay.

By investigating the best possible "small market" reforms, the Governor hopes to increase access by finding ways to end the practices of health redlining, exclusions for pre-existing conditions, and "churning" -- among other risk-avoiding underwriting strategies that currently deny many people insurance coverage.

Finally, with the 1993 budget, Governor Engler has recommended spending \$18 million to restore the Medicaid Dental Program that provides dentures and preventive dental care.

IMPROVING QUALITY

"In conjunction with my support for liability reform, I am pleased to announce my support for legislative proposals to improve licensing and strengthen enforcement mechanisms to better discipline poor practitioners. In any profession and any walk of life, there are those who fail to meet their responsibilities to the people they are entrusted to serve. It is in the interest of both the public and the medical profession that incompetent or negligent doctors are disciplined and have the chance to get needed help."

The centerpiece of the Governor's strategy to improve quality is his endorsement of a legislative package of health professional licensing reforms. These initiatives include:

- Dedication of licensing fees to support the investigative and disciplinary process.
- Improved "whistleblower" protections, and mandated confidential peer reporting of licensing violations.
- Improved public participation in the licensing and disciplinary process.
- A new, enlightened, and non-punitive way for licensing boards to help impaired professionals.
- And new, definitive deadlines for completion of the investigation, determination, and discipline process.

Governor Engler stressed that these licensing reforms must be passed in conjunction with liability reform legislation and should not be separated.

The Governor also announced that he will appoint 8 new members to the Board of Medicine. In his letter of appointment, he will instruct them to live up to their statutory obligation and get tough on bad practitioners.

Another part of Governor Engler's strategy to improve the quality of care includes getting a waiver from the federal government to provide home and community based care for senior citizens and disabled individuals. Further improvement in care for senior citizens will result from implementation of a plan to provide acuity-based reimbursement for nursing home care paid by Medicaid. This plan will improve quality and access to care for older Michigianians by paying nursing homes in accordance with care needs of individual patients, not a flat rate.

In addition, by guaranteeing that every Medicaid client has a personal doctor, patients will develop doctor/patient relationships that will improve the overall quality of care.

THE IMPORTANCE OF NATIONAL HEALTH CARE REFORM

"The reforms I have talked about today are important, but they cannot be considered a complete solution to the problem. They are realistic and achievable steps state government can take to reduce costs, increase access, and improve quality. A complete solution must be national in scope....While significant reform is needed, we simply cannot throw out our system of health care and just start anew....Our responsibility is to build upon what works and reform what doesn't."

Governor Engler emphasized that the most intractable of our health care problems -- like providing coverage for the working uninsured -- must be addressed by a national plan. He offered his endorsement of President Bush's initiatives to:

- Help the uninsured afford health insurance through tax credits.
- Help middle income families pay for coverage with tax deductions.
- Improve the efficiency of the health care system by developing health insurance networks.
- Put a lid on medical malpractice lawsuits.
- Get federal programs under control and encourage state innovations.

The Governor also indicated that under his leadership, Michigan is at the national bargaining table, helping to shape the national strategy in forums like:

- The SEIU Labor/Management Joint Committee on Health Care Reform
- The Engler/Poling Health Care Group
- The National Governor's Association Health Care Task Force

He made it clear that a completely government-run system is not the right answer because such a bureaucracy would limit choice, create shortages and delays, and stifle the development of life-saving innovations.

A PRESCRIPTION FOR A HEALTHY MICHIGAN

"Concrete action to cut costs, expand prevention programs, and increase access to care are the best things one state can do to move ahead on this vital issue. We won't see results overnight, but this is a long term strategy for the long term health of Michigan's people. I urge the Legislature to act promptly and adopt this Prescription for a Healthy Michigan."



MEDICAL LIABILITY REFORM

I. Why liability reform is needed in Michigan

Medical liability reform is needed in Michigan because affordable, available health care is threatened by unfair medical liability laws.

A. Access problems

The medical liability environment in Michigan has resulted in many access problems including the following:

- 93% of Michigan's smaller and rural hospitals are having difficulty recruiting health care professionals, especially obstetricians, primarily because of liability costs. (Source: 1991 MHA survey of smaller hospital executives)
- Only five of the sixteen Upper Peninsula hospitals have a physician who specializes in obstetrics.
- During the past five years, 92% of the hospitals in the Detroit area have experienced difficulties retaining or recruiting physicians in high risk specialties, including orthopedic surgery, and neurosurgery, due to medical liability costs. (Source: SEMHC)
- Nearly 87% of the medical residents trained in Michigan who originally planned to practice in the

state, but changed their minds during their residency training, cited liability as a major factor in their decision to leave Michigan. (Source: MSMS 1991 study)

- In recent years, one in ten Michigan hospitals has closed its obstetrical unit, in part because of the medical liability climate and the resultant difficulty in recruiting obstetricians. (Source: State of Michigan commissioned study)

Approximately 20% of Michigan's obstetricians do not deliver babies anymore and another 20% do not perform high risk deliveries. (Source: Michigan section of the American College of Obstetricians and Gynecologists, 1991)

- Because of the negative liability climate, many physicians, including neurosurgeons and orthopedic surgeons, are not performing high risk procedures.

B. Cost Problems

- In 1989, physician charges were 17% higher because of the cost of liability insurance and the cost of "defensive medicine" procedures to protect against lawsuits. (Source: USA Today, 1991)
- Ever escalating medical liability costs for health care providers mean higher costs for consumers and businesses. Approximately \$300 of the average hospital bill goes to cover liability costs.
- Nearly one-half billion dollars is spent annually by hospitals (\$239 million) and physicians (\$251 million)

Nancy Feeder
517-323-3443.
Mich. Hosp. Assn.

★ in MI
can be sued up to
15 yrs. after birth

on medical liability premiums. (Source: Lewin Study, 1990, commissioned by State of Michigan)

- Michigan's medical liability costs for physicians and hospitals are among the highest in the nation and are projected to double in seven years, topping \$1 billion, if reforms are not enacted. (Source: Tillinghast Company, nationally recognized insurance actuarial firm, 1991)
- The average hospital per bed medical liability cost in Michigan is more than three times higher than the national average. Michigan -- \$4,600, national average --\$1,400.
- A dollar saved cutting medical liability costs is a dollar that could go toward improving the access and quality of our health care.
- Small Michigan hospitals pay higher per bed rates than large hospitals in major U.S. cities. Example: Rural Michigan -- \$2,800 per bed; Chicago -- \$2,753; Cleveland -- \$2,351; San Francisco -- \$2,797. (Source: St. Paul Insurance Co. study)
- Detroit area hospitals pay the highest liability rates in the nation. Detroit -- \$6,900 per bed; national average -- \$1,400 per bed. (Source: St. Paul Insurance Co.)
- The cost of \$1 million/\$3 million coverage for Detroit area obstetricians is \$134,000 annually. The same coverage in Chicago would cost \$59,000; \$80,000 in New

York City; and \$51,000 in Ohio. (Source: MHA survey, 1991)

- The cost annually of \$100,000/\$300,000 coverage for Detroit area obstetricians is \$63,000. The same coverage is \$23,000 in Chicago, and \$25,000 in Ohio.
- The size of awards for liability suits continues to rise for Michigan hospitals and doctors. The average payout per paid claim by the Michigan Hospital Association Insurance Company (MHAIC) went from \$51,000 in 1986, to \$139,000 in 1990, a 173 percent increase in the past four years. The average payout by the Michigan Physicians Mutual Liability Company (MPMLC) increased from \$61,000 in 1985 to \$85,000 in 1990. The average payout by the Physicians Insurance Company of Michigan (PICOM) went from \$39,000 in 1985 to \$73,000 in 1990. (Source: MHAIC, MPMLC and PICOM, 1991)

C. Miscellaneous

- Only 37 cents of each medical liability dollar goes to the injured party. Most of the rest of the medical liability dollar goes for court costs and attorney fees. (Tillinghast)
- The average medical liability case in Michigan takes three to five years to resolve. One-third of the cases take from five to ten years to resolve. (Source: Michigan Commissioner of Insurance)

- The number of medical liability claims fell after the glut of suits filed to beat the effective date of the 1986 tort reforms. However, since 1989, an increase in the number of medical liability claims has occurred. The medical liability insurance companies expect this trend to continue. (Source: PICOM, MPMLC, MHAIC)
- Medical liability reform would redirect millions of dollars now spent on insurance premiums and legal costs to necessary medical care for patients.

II. Widespread recognition of medical liability problem

The negative medical liability climate in Michigan is widely recognized. Debbie Dingell, a General Motors Company executive and chairwoman of the "Baby Your Baby" initiative, believes there is a serious medical liability problem in Michigan. In a Detroit Free Press column earlier this year, Ms. Dingell stated:

"There are numerous factors contributing to the rate of infant deaths, but one very important factor that requires immediate attention is the acute shortage of doctors willing to practice obstetrics because of concerns over medical malpractice and high insurance premiums. All Michigan women are affected by this shortage, but low-income women in particular are being denied access to important prenatal care...Clearly, the unresolved malpractice liability problem is a growing threat to the availability and accessibility of prenatal care."

In addition, Robben Fleming, former Governor Blanchard's medical liability factfinder wrote in his report that "there

is very widespread dissatisfaction with the present system" of resolving medical liability cases. He also stated that

"Health care costs in all their ramifications are now a major factor in state and federal budgets. It is naive to suppose that as the pressure to control these costs increases, the problem of medical malpractice can escape attention and reform."

Several newspapers throughout the state including the Flint Journal, the Bad Axe Huron Daily Tribune, the Jackson Citizen Patriot, and the Oakland Press have endorsed medical liability reform during 1991. Moreover, many non-health groups, including the Michigan State Chamber of Commerce and the Michigan Association for Local Public Health, have joined the Medical Liability Reform Coalition.

III. Tort reform legislation

The medical liability reform legislation (SBs 248-249) supported by MSMS is based on California's highly successful Medical Injury Compensation Reform Act (MICRA) of 1975. MICRA has resulted in California physicians paying only a fraction of the medical liability premiums paid by Michigan physicians. (See attached sheet) The law also has resulted in higher policy limits and fewer physicians going without insurance coverage.

The key elements of the California law, which are included in SB 249, are a strict limit on non-economic damages, a sliding scale contingency fee, a requirement that notice be provided to a physician before a medical liability

suit can be filed, and a reduction in the statute of limitations for minors.

Michigan law currently limits non-economic damages to \$225,000 but provides seven exceptions to the limit. These exceptions have served to render the existing cap meaningless, because virtually every case can come under one of the exceptions. SB 249 proposes to establish a limit of \$250,000 and to eliminate all of the exceptions and thereby establish a strict cap on non-economic damages, similar to the California law.

The establishment of a sliding scale contingency fee is preferable to the current system under which plaintiff attorneys can recover up to one-third of a plaintiff's award. Under the sliding scale system, the percentage of the recovery that goes to the plaintiff's attorney decreases as the amount recovered by the plaintiff increases. This provision should help ensure that injured parties receive a higher percentage of the medical liability dollar.

The provision in SB 249 that would require a plaintiff to give 180 days notice to a physician before a medical liability suit can be filed would result in many liability claims being resolved before a lawsuit is actually filed. The experience under a similar provision in California has shown that many claims are either settled or dropped during the notice period. The result is considerable savings in defense attorney fees and court costs.

The requirement in SB 249 that lawsuits on behalf of children eight years of age or less must be filed by the child's tenth birthday is reasonable. In fact, many states including California, have a more restrictive statute.

California law provides that children who have not reached their sixth birthday have either three years from the date of the alleged wrongful act or until their eighth birthday, whichever period is longer, to sue.

COMPARISON OF LIABILITY RATES
FOR MATURE CLAIMS MADE POLICIES
\$1 MILLION - \$3 MILLION

Family Physician (Minor Surgery)

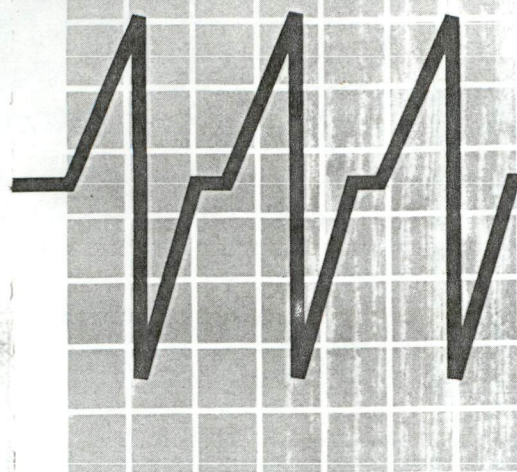
Northern California	\$ 8,400
Wayne, Oakland, Macomb Counties	\$ 34,700*
Rest of Michigan	\$ 20,000

Obstetrics/Gynecology

Northern California	\$ 38,000
Wayne, Oakland, Macomb Counties	\$133,900**
Rest of Michigan	\$ 77,000

* \$100,000 - \$300,000 coverage - \$16,000

** \$100,000 - \$300,000 coverage - \$63,000



MICHIGAN'S MEDICAL LIABILITY CRISIS

A Continuing Threat to Accessible, Affordable Health Care

Our medical liability crisis continues despite the tort reform efforts of 1986. The crisis continues to reduce patient access to care and adds to everyone's health care cost.

Michigan's medical liability system is among the most expensive and inefficient systems in the country.

Every year our physicians and hospitals pay nearly \$500 million dollars for medical liability coverage. Michigan's per-bed hospital rate is more than three times the national average. These costs increase everyone's health care bill.

In Michigan, claims can take many years to be resolved. Michigan's Insurance Bureau reported a third of the cases filed between 1983 and 1988 remained unresolved five years later.

Michigan hospitals continue to have tremendous difficulty recruiting physicians in high-risk specialties including obstetrics, orthopedic surgery, neurosurgery and emergency medicine. This forces patients to travel long distances from home for services that were once available at their local hospital.

It's time to change Michigan's medical liability system. The current system reduces access to health care by driving away our young physicians, causing older physicians to retire early and forcing those remaining to reduce services to high risk patients.

A medical liability system that works better and more equitably is possible. The Legislature must be decisive and enact reform legislation to provide better access to care while moderating health care costs.





Public Will Accept Alternatives to Our Current System

Michigan voters overwhelmingly support changes in Michigan's medical liability laws including limits on attorney fees, limits on awards and an alternative to the tort system.

A Michigan Hospital Association poll of 600 voters conducted in January found:

- 77 percent think the system of allowing a trial lawyer to take one-third of the patient's award needs to be changed to make it more equitable.
- 69 percent support a maximum of \$225,000 for non-economic losses.

A Michigan State Medical Society poll of 500 voters conducted in 1989 found similar results including:

- 75 percent support a new, more equitable system for settling medical liability claims as long as it is quick, uniform and available to all regardless of income.

Medical Liability Premium Survey Reveals the Problem

Michigan physicians continue to pay among the highest premiums in the country, from three to seven times as high as physicians in surrounding Great Lakes states. Though rates held steady in 1990, they are more than 400 percent above what they were in 1977. This adds to office "overhead" and the cost of doing business which ends up costing everyone more for health care. The rates below are annual premiums based on 1990 data. The Michigan data is from MPMLC.

	Ob/Gyn	Internal Med.	Limits in \$1,000's
Florida	116,436	13,862	2,500/7,500
New York	84,026	15,759	200/600
Michigan	79,808	12,913	200/600
Colorado	46,444	6,700	500/1,500
California	43,868	5,924	500/1,500
Wisconsin	42,722	8,505	400/1,000
Texas	38,400	8,665	200/600
Ohio	28,470	9,668	200/600
Pennsylvania	28,009	6,286	200/600
Illinois	27,964	5,832	2,500/7,500
Indiana	24,615	2,896	100/300
Minnesota	11,431	2,386	2,500/7,500

Increase in New Claims Filed Expected to Continue

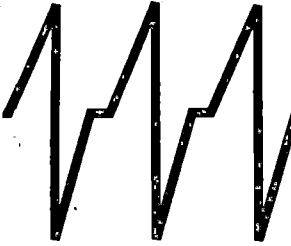
The number of new claims against the two major physician insurers, Michigan Physicians Mutual Liability Company (MPMLC) and Physicians Insurance Company of Michigan (PICOM), is increasing again. The dip following the glut of suits filed to beat the deadline before the 1986 tort reform went into effect is over. The insurance companies expect this upward trend to continue.

	MPMLC	PICOM
1977	51	195 (Brown-McNeely)
1978	179	314 (Brown-McNeely)
1979	210	356 (Brown-McNeely)
1980	500	421
1981	670	377
1982	1026	526
1983	1217	549
1984	1256	706
1985	1220	839
1986	1330	984
1987	1007	820
1988	849	778
1989	811	670
1990	950	750

Average Payouts Per Paid Claim Rise Rapidly

Average payouts per paid claim have risen rapidly—a 41 percent increase in the last five years for MPMLC and 87 percent for PICOM. Huge jury awards coupled with the increased number of suits drive up the cost of health care by increasing the cost of liability insurance premiums.

	MPMLC Average Payout	PICOM Average Payout
1985	\$61,100	\$39,000
1986	\$78,700	\$52,000
1987	\$58,500	\$51,000
1988	\$80,800	\$57,000
1989	\$84,300	\$64,000
1990	\$85,800	\$73,000



Recommendations to Help Solve the Medical Liability Crisis

The Michigan Alternative – Senate Bills 248-249

Legislation including tort reforms and an alternative to the traditional court system for settling medical liability claims has been proposed by Senator Dan DeGrow, R-Port Huron, and Senator John J.H. Schwarz, MD, R-Battle Creek. This legislation is supported by the coalition of the Michigan State Medical Society, the Michigan Hospital Association and the Michigan Association of Osteopathic Physicians and Surgeons.

Under this proposed legislation, patients may bring suit either through the traditional, costly, time-consuming court system or they may choose a streamlined system to resolve the dispute quicker with more of the settlement money going to the patient. Specifically, the proposed legislation includes:

- an alternative dispute resolution system
- a limit of \$225,000 on non-economic damages, such as pain and suffering
- elimination of death, injury to the reproductive system and loss of vital bodily function as exceptions to the limit on non-economic damages
- a limit of \$1.5 million for economic damages, such as medical costs and lost income
- sliding scale for attorney fees
- stricter statute of limitations
- stricter criteria for qualification as an expert witness
- 180 day notice before a medical liability suit can be filed
- interest to be paid only on plaintiff's portion of award
- elimination of the lost chance doctrine

Sliding Scale Contingency Fee

The Coalition is asking hundreds of businesses, senior groups, professional associations, local governments and others throughout the state to join in a petition to the Michigan Supreme Court asking it to adopt a sliding scale contingency fee under which the percentage that an attorney is allowed to charge would decline as the amount recovered increases. Currently, the huge percentage carved out for the plaintiff's attorney unreasonably reduces compensation to the injured patient and increases costs to defendants.

The Coalition is Examining Several Other Issues Including:

Physician Licensure and Discipline

A bi-partisan effort to strengthen Michigan's physician licensure and discipline system, strongly supported by the profession for more than half a decade, is now underway in the Legislature. Major elements include a nine-month limit on actions and additional funding for more investigative staff.

Immunity for Emergency Care in Hospitals

Senate Bill 268 would offer immunity to health care personnel providing emergency care when no previous physician-patient relationship existed.

Countersuit Legislation

Legislation is needed that would allow a defendant in a liability suit to file a countersuit against the plaintiff and the plaintiff's trial lawyer for damages incurred by the defendant if certain conditions exist.

Hospital-Physician Risk Management Programs

Incentives are being offered by insurers to physicians and hospitals implementing risk management programs and participating in risk management educational seminars. Further programs are under development by MSMS and MHA.

In addition, MSMS is studying the potential benefits of a State Legal Expense Fund that would provide governmental liability coverage to physicians treating obstetrical, prenatal and pediatric needs of Medicaid-eligible women and children.



State Liability Factfinder Finds Real Problems in Our System

Detroit News, November 5, 1990

State near top in malpractice costs

■ **Paying price:** Study backs claims that suits, huge awards make Michigan 'one of riskiest.'

By Dwight E.M. Angell
THE DETROIT NEWS

Michigan hospitals and doctors shell out nearly \$500 million a year in medical malpractice premiums, one of the highest statewide outlays in the country, according to a yet-to-be-released study.

The study documents for the first time the state's total cost for malpractice premiums, and bolsters arguments by medical and hospital officials that numerous lawsuits, sympathetic juries and uncontrolled awards inflate malpractice premiums.

Last month, the medical and hospital community was stunned by a \$19-million Wayne County Circuit Court jury verdict against Detroit's

Hutzel Hospital from a birth in 1981. With interest, the award could exceed \$30 million.

The study, obtained by The Detroit News, was commissioned by Robben Fleming, Gov. James J. Blanchard's appointed fact-finder on medical malpractice.

It will be included among recommendations Fleming is to send to Blanchard by Nov. 30 on the liability issue. The study compares Michigan with other large industrialized states such as New York and New Jersey.

As in other forms of insurance, medical malpractice premiums reflect such factors as past and future claims, inflation and return on the insurer's own investments.

The study was done by Lewin/ICF, an international health care con-

sulting firm based in Washington.

It was paid for by the Michigan Hospital Association, the Michigan State Medical Society, the Michigan State Bar, Blue Cross-Blue Shield of Michigan, two physician insurers and one hospital malpractice insurer.

The study found:

■ Michigan doctors paid an estimated \$251 million in premiums last year, or \$13,489 for each of the state's 18,600 doctors who treat patients.

■ Michigan hospitals paid \$238.7 million in medical malpractice premiums in fiscal year 1988. That amount ranked third overall, behind California and New York, states with more hospitals than Michigan.

■ Michigan hospitals also ranked high in other categories for malpractice premiums: second in premiums per hospital bed (\$6,902); second in premiums per capita (\$19.83) and first in premiums as a percent of total hospital expenses (2.84 percent).

In his 1990 report to the Governor, state medical liability factfinder Robben Fleming found that Michigan is one of the nation's most expensive states for physician and hospital liability insurance costs. His research showed that the two groups pay \$490 million each year for liability coverage. Since rates are established based on the number of lawsuits filed and the cost of claims, it's obvious Michigan is out of the norm when compared to other states.

This added cost of doing business ends up hurting the people of Michigan in many ways:

- higher medical costs
- higher deductibles and co-pays
- reduced access to health care

In his report, liability factfinder Robben Fleming wrote:

Widespread Dissatisfaction with Present System

"Whether or not there is at any given moment a 'crisis' in medical malpractice is a largely irrelevant consideration. There is very widespread dissatisfaction with the present system."

Medical Liability Costs Add to Overall Health Care Costs

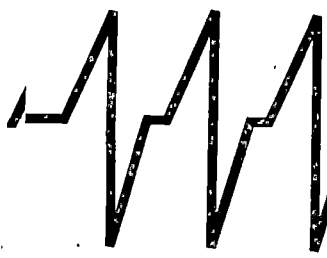
"Health care costs in all their ramifications are now a major cost factor in state and federal budgets. It is naive to suppose that as the pressure to control these costs increases, the problem of medical malpractice can escape attention and reform."

Tort Theory is Seriously Flawed

"Our system of adjudicating malpractice claims on a tort theory is seriously flawed. A tort is a civil wrong, usually classified as either intentional or negligent. Since an intentional act which damages a patient is rare, this leaves only negligence as the principal cause of action. But medical science is imperfect and many maloccurrences take place which are not attributable to negligence."

Current System is Unfair and Inequitable

"The fairly obvious conclusion from all this is that if we want all patients who suffer from a bad result to be compensated, an entirely laudable objective, we need a new system of insurance in which all of us participate in the rewards and the costs. So far we have, as a people, been unwilling to enact the appropriate legislation. Meanwhile, it is patently unfair and inequitable to burden doctors and hospitals with damages where there is no legitimate claim of negligence."



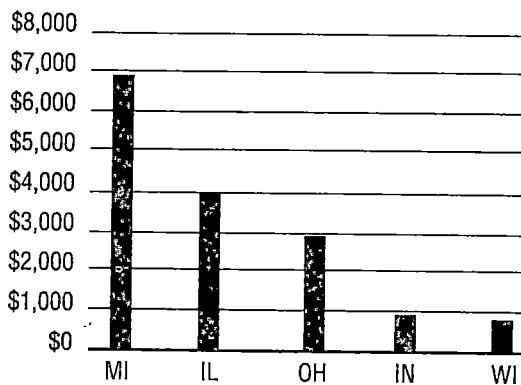
Consumers Pay for Liability Costs

"We need doctors to care for Michigan's mothers and children. The state must take immediate action to reduce the impact of liability on access to prenatal care."

— Debbie Dingell

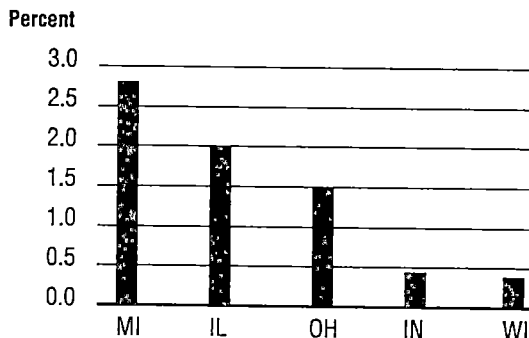
Detroit Free Press, January 14, 1991

Medical Liability Premiums per Hospital Bed
Selected States - 1988



Source: Lewin/ICF, 1990

Premiums as a Percent of Total Hospital Expenses
Selected States - 1988



Source: Lewin/ICF, 1990

Cost of "Defensive" Medicine

- AMA estimates \$14 Billion is spent each year nationwide on "defensive" medicine
- This cost creates higher co-pays and deductibles in consumer health care policies

Access Problems

- Physicians reducing services or leaving the state
- Limited treatment for Medicaid and uninsured patients
- Emergency Room staffing problems
- Rural recruitment problems
- 12.5% of Obstetrician/Gynecologists in the U.S. no longer deliver babies

A medical liability crisis puts Medicaid babies at risk

By Debbie Dingell

Last month, the Michigan Department of Public Health released Michigan's 1989 infant mortality statistics. Contrary to the national trend, Michigan's rate increased; there were 1,645 infant deaths in 1989, 103 more than in 1988.

This rate is unacceptably high and we must do something as a state to improve the chances of the newborn child to live.

There are numerous factors contributing to the rate of infant deaths, but one very important factor that requires immediate attention is the acute shortage of doctors willing to practice obstetrics because of concerns over medical malpractice and high insurance premiums. All Michigan women are affected by this shortage, but low-income women in particular are being denied access to important prenatal care.

The problem has been exacerbated in recent weeks by the astounding \$19-million jury award against Hutzel Hospital in a medical malpractice case.

At the time of that judgment, there were only four private doctors in Wayne County who agreed to treat pregnant Medicaid patients. Now it appears we will lose all of them.

That means that low-income women may only be able to get prenatal care in public health clinics. Those clinics, already overflowing with patients, simply cannot make up for the loss of private physicians.

Clearly, the unresolved malpractice liability problem is a growing threat to the availability and accessibility of prenatal care.

According to the National Commission to Prevent Infant Mortality, obstetrical providers nationwide (including family physicians, obstetricians and certified nurse midwives) have been affected by increases in liability insurance rates. Physicians are increasingly unwilling to provide maternity services to low-income and Medicaid patients because they fear lawsuits and because of low reimbursement rates. Although low-income women have higher health risks,

This crisis must be addressed.

the widely held perception that the poor, particularly those on Medicaid, tend to sue more often than people in other economic groups has not been substantiated.

According to the American College of Obstetricians and Gynecologists, the average cost of liability insurance for obstetricians in 1987 was three times higher than in 1982. During this same time, 12 percent of ob-gyns terminated their obstetrical practices, and many others limited the high-risk portion of their practice.

In response to the growing threat to the availability and accessibility of prenatal care, states are examining four potential solutions:

- Supplementing liability insurance premiums for providers of obstetrical care for medically underserved areas and medically indigent patients.
- Assuming the financial risk of large malpractice judgments against providers who treat Medicaid and indigent patients.

- Exempting from liability health services that are provided without compensation or on an emergency basis.

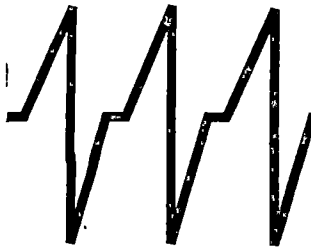
- Reforming the tort liability system by creating a no-fault approach.

Michigan legislators must recognize the significant impact the shortage of prenatal care is having on the health of children. This crisis must be addressed.

Women who are poor and pregnant face barriers to receiving the prenatal care that can improve significantly the health of their babies.

We need doctors to care for Michigan's mothers and children. The state must take immediate action to reduce the impact of liability on access to prenatal care.

Debbie Dingell, a General Motors Co. executive, is chairwoman of Baby Your Baby, a public-private initiative designed to reduce infant mortality rates.



What Michigan Newspapers are Saying About Medical Liability

"There is a clear need to establish limits for malpractice claims for all but those cases in which damages are severe and/or the negligence is great...The Legislature definitely should confront this thorny issue...A legislative solution to these problems is greatly needed. The alternative proposed by Sen. DeGrow may well provide a vehicle for a compromise retaining the advantages of the present system while also offering a speedier, less costly method of settling medical malpractice claims."

- *The Flint Journal*
February 13, 1991

"The malpractice problem in Michigan has resulted in liability insurance rates five times as high as the rest of the nation. It has made recruitment of doctors to this state nearly impossible — why would physicians come to an area where they have to pay more for malpractice insurance and may end up being sued despite having provided a patient the best care possible?"

The malpractice problem also has resulted in skyrocketing health care costs, as doctors and hospitals practice defensive medicine so patients cannot sue because of a lack of testing... However, state lawmakers first must vigorously revive the malpractice reform debate in Lansing. Then they must work to provide legislation that brings the malpractice lawsuit epidemic under control."

- *The Huron Tribune, Bad Axe*
February 27, 1991

"So, what's the truth? Is the malpractice crisis so much smoke and mirrors, as the lawyers say? Or is it for real, as the doctors and hospitals say? We are inclined to side with the medical community.

Our reason is the genuine crisis we have observed in Jackson. This community has lost many of its obstetricians. The situation grew so serious that as many as 500 Jackson County women annually have been going out of county for prenatal and maternity care. Many doctors have cited the high liability insurance as their reason for either leaving the community or a specialty.

So yes, the crisis is real and further reforms are needed. The review board is a good idea."

- *The Jackson Citizen Patriot*
February 19, 1991

"A rational person would conclude, that the Legislature needs to look at changes in the malpractice-related laws. It did make some modifications a few years ago but they seem to have been ineffectual.

The problem is that the lawyers who profit from Michigan's overly frequent and generous malpractice awards are dead set against significant change. And, reading the handwriting on the wall, they are already mounting a lobbying campaign to retain the status quo...

It's big business. Hospitals and doctors in Michigan spend \$500 million a year on malpractice premiums, a hefty percentage of which eventually finds its way into the lawyer's pockets."

- *The Oakland Press*
March 15, 1991

Call or Write Your State Representative and State Senator Today.

Ask them to support the Michigan Alternative.

The Honorable _____
Michigan Senate
P.O. Box 30036
Lansing, MI 48909

The Honorable _____
Michigan House of Representatives
P.O. Box 30014
Lansing, MI 48909

To obtain your legislators' telephone numbers, call the State Capitol at 517-337-1837.

Michigan Hospital Association, 6215 West St. Joseph Highway, Lansing, MI 48917 Ph. (517)323-3443

Michigan Association of Osteopathic Physicians & Surgeons, Inc., 33100 Freedom Road, Farmington, MI Ph. (313) 476-2800

Michigan State Medical Society, 120 West Saginaw Street, P.O. Box 950, East Lansing, MI 48826-0950 Ph. (517) 337-1351

ACCESS TO JUSTICE ACT OF 1992

A BILL

To provide greater access to civil justice by reducing costs and delay and for other purposes.

1 **Be it enacted by the Senate and House of Representatives of**
2 **the United States of America in Congress assembled, That this Act**
3 **may be cited as the "Access to Justice Act of 1992".**

4
5 **SEC. 101. FEDERAL DIVERSITY JURISDICTION; SUM IN**
6 **CONTROVERSY.**

7 **Section 1332 of Title 28, United States Code, is amended by**
8 **redesignating subsection (d) as subsection (g) and inserting**
9 **after subsection (c) the following new subsections:**

10 **"(d) In determining whether a matter in controversy exceeds**
11 **the sum or value of \$50,000, the amount of damages for pain**
12 **and suffering or mental anguish, punitive or exemplary**
13 **damages, and attorney's fees or costs shall not be included.**

14 **"(e) On February 1 of each year, the monetary amounts**
15 **referred to in subsections (a), (b), and (d) shall each be**
16 **adjusted to the nearest thousand dollars to reflect the**
17 **change in the Consumer Price Index for All Urban Consumers**
18 **(CPI-U), U.S. City Average, All Items, under its current**
19 **official reference base as designated by the Bureau of Labor**
20 **Statistics, U.S. Department of Labor. The adjusted amounts**
21 **shall be attained by multiplying the relevant monetary**
22 **amount by the annual average CPI-U for the most recent**
23 **calendar year, and then dividing that sum by the annual**
24 **average CPI-U for 1992."**

1 **SEC. 102. DIVERSITY OF CITIZENSHIP JURISDICTION; AWARD OF**
2 **ATTORNEY'S FEES TO PREVAILING PARTY.**

3 Section 1332 of Title 28, United States Code, is amended by
4 adding after subsection (e) the following new subsection:

5 "(f) For the purposes of this section:

6 "(1) The prevailing party shall be entitled to
7 attorney's fees only to the extent that such party prevails
8 on any position or claim advanced during the litigation.
9 The sum of entitled attorney's fees shall be paid by the
10 non-prevailing party but shall not exceed the attorney's
11 fees of the non-prevailing party with regard to such
12 position or claim. If the non-prevailing party receives
13 services under a contingent fee agreement, the sum of the
14 entitled attorney's fee shall not exceed the reasonable
15 value of those services.

16 "(2) Counsel of record in actions under this section
17 shall maintain accurate, complete records of hours worked on
18 the matter regardless of the fee arrangement with his
19 client.

20 "(3) The term 'prevailing party' means a party to an
21 action who obtains a favorable final judgment (other than by
22 settlement), exclusive of interest, on all or a portion of
23 the claims asserted during the litigation.

24 "(4) The court may, in its discretion, limit the fees
25 recovered under paragraph (1) of this section if the court
26 finds special circumstances that make payment of such fees
27 unjust.

1 "(5) This subsection shall not apply to any action
2 removed from a state court pursuant to Section 1441 of Title
3 28, United States Code, or to the United States or any
4 state, agency of the United States or any state, or any
5 official, officer or employee of a federal or state
6 agency."

7 SEC. 103. AMENDMENT TO EQUAL ACCESS TO JUSTICE ACT.

8 (a) Subsection (d)(2)(A)(ii) of section 2412 of Title 28,
9 United States Code, is amended by striking out "or a special
10 factor, such as the limited availability of qualified attorneys
11 for the proceedings involved," and inserting in lieu thereof "as
12 reflected by the change in the Consumer Price Index for All Urban
13 Consumers (CPI-U), U.S. City Average, All Items, under its
14 current official reference base as designated by the Bureau of
15 Labor Statistics, U.S. Department of Labor."

16 (b) Subsection (d) of section 2412 of Title 28, United
17 States Code, is amended by adding the following new paragraph
18 after paragraph (d)(5):

19 "(6)(A) If a court determines that the cost of living
20 adjustment permitted by paragraph (d)(2)(A)(ii) should be
21 made in a particular case, it shall calculate the adjustment
22 in accordance with this paragraph. When compensable
23 services are rendered in more than one calendar year, an
24 adjustment shall be made for each year in which compensable
25 services are rendered.
26

1 (i) When compensable services are rendered in the
2 present calendar year, the hourly rate shall be calculated
3 by multiplying \$75 times the CPI-U for the month in which
4 the last compensable services were rendered, and then
5 dividing that sum by the CPI-U for October, 1981.

6 (ii) When compensable services are rendered in more
7 than one calendar year, the adjustment for services rendered
8 in the present calendar year shall be calculated using the
9 formula set forth in (i) above. The hourly rate for
10 services rendered in each previous calendar year shall be
11 calculated by multiplying \$75 times the annual average CPI-U
12 for the year in which the services were rendered, and then
13 dividing that sum by the CPI-U for October, 1981."

14 SEC. 104. PRIOR NOTICE AS A PREREQUISITE TO BRINGING
15 SUIT IN THE UNITED STATES DISTRICT COURT.

16 Title 28 of the United States Code is amended by adding a new
17 section 483 as follows:

18 "Prior Notice To Suit. (a) At least 30 days before filing
19 suit, a claimant shall transmit written notice to the
20 intended defendant or defendants of the specific claims
21 involved, including the amount of actual damages and
22 expenses incurred and to be incurred. The claimant shall
23 transmit such notice to the intended defendant or defendants
24 at an address reasonably calculated to provide actual notice
25 to each such party. For purposes of this section,
26 'transmit' shall mean to mail by first class-mail, postage
27 prepaid, or contract for delivery by any company which

1 physically delivers correspondence as a commercial service
2 to the public in its regular course of business. A
3 certificate of service evidencing compliance with this
4 subsection shall be filed with the court at the commencement
5 of the action.

6 "(b) In the event the applicable statute of limitations for
7 that action would expire during the period of notice, the
8 statute of limitations shall expire on the thirtieth day
9 from the date written notice was transmitted to the intended
10 defendant or defendants. The parties may by written
11 agreement extend the tolling period not to exceed 90 days.

12 "(c) The requirements of this section shall not apply --

13 "(1) in any action to seize or forfeit assets subject
14 to forfeiture or in any bankruptcy, insolvency,
15 receivership, conservatorship, or liquidation proceeding;

16 "(2) where the assets that are the subject of the
17 action or that would satisfy the judgment are subject to
18 flight, dissipation or destruction, or where the defendant
19 is subject to flight;

20 "(3) where a written notice prior to filing suit is
21 otherwise required by law, or where the claimant has made a
22 prior attempt in writing to settle the claim with the
23 defendant;

24 "(4) in proceedings to enforce a civil investigative
25 demand or an administrative summons;

26 "(5) in actions to foreclose liens; or

1 "(6) in actions pertaining to temporary restraining
2 orders, preliminary injunctive relief, fraudulent conveyance
3 of property, or in other types of actions which by their
4 nature compel immediate resort to the courts.

5 "(d) In the event the district court finds that the
6 requirements of subsection (a) of this section have not been
7 fulfilled by the claimant, and such defect is asserted by
8 the defendant within 60 days of service of the summons or
9 complaint upon such defendant, the claim shall be dismissed
10 without prejudice and the costs of such action, including
11 attorney's fees, shall be imposed upon the claimant.

12 Whenever an action is dismissed under this section, the
13 claimant may refile such claim within 60 days after
14 dismissal regardless of any statutory limitations period if:
15 (1) during the 60 days after dismissal, notice is effected
16 under subsection (a) of this section and, (2) the original
17 action was timely filed in accordance with subsection (b)."

18 **SEC. 105. AWARD OF ATTORNEY'S FEES IN DISPUTES INVOLVING THE**
19 **UNITED STATES.**

20 Title 28 of the United States Code is amended by adding a new
21 section 2412a following 28 U.S.C. §2412 as follows:

22 "Award of Attorney's Fees in Disputes Involving The United
23 States. (a) Except as otherwise specifically provided by
24 statute, the United States is authorized to enter into an
25 agreement which provides that attorney's fees may be awarded
26 against the United States or any other party to the
27 litigation --

1 "(1) where the United States commenced the suit or

2 "(2) in civil litigation involving disputes pursuant to
3 the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613,
4 including litigation before boards of contract appeals
5 pursuant to 41 U.S.C. §§ 606 and 607; or

6 "(3) where the United States and another party have
7 agreed to the use of outcome-determinative mediation, the
8 mediation has resulted in a determination, and the United
9 States or the other party has given notice pursuant to 28
10 U.S.C. § 484(b)(8), pertaining to outcome-determinative
11 mediation, that either party accepts the determination. In
12 this event, 28 U.S.C. § 484(b)(8)(A) - (8)(C), pertaining to
13 award of costs and attorney's fees, shall apply to the award
14 of attorney's fees.

15 "(b) The following standards shall apply to the award of any
16 attorney's fees pursuant to subsection (a) (1) or (2):

17 "(1) Attorney's fees may be awarded only to a
18 prevailing party in the litigation, subject to paragraphs
19 (b)(2) and (3). The prevailing party shall be entitled to
20 attorney's fees from the non-prevailing party with respect
21 to and only to the extent that such party prevails on any
22 claim advanced during the litigation, except that the sum of
23 entitled attorney's fees shall not exceed the attorney's
24 fees of the non-prevailing party with regard to such claim.

25 "(2) In determining the amount of attorney's fees for a
26 private party, the court or board shall take into account

27

1 the degree of success obtained by that party relative to its
2 original claim or claims, the prevailing market rates in the
3 area for the kind and quality of the legal services
4 furnished, and any other factors relevant to whether an
5 award of attorney's fees would be reasonable and, if so,
6 what a reasonable amount of attorney's fees would be.

7 "(3) In determining the amount of attorney's fees of
8 the United States, the court or board shall determine the
9 number of hours spent by the attorneys employed by the
10 United States on the litigation multiplied by the salaries
11 and benefits paid those attorneys, and an amount for
12 overhead, computed as an hourly rate.

13 "(c) A party who files an application for an award of
14 attorney's fees and expenses against the United States under
15 any other provision of law may not pursue an award of
16 attorney's fees under this section. A party who files an
17 application for an award of attorney's fees under this
18 section may not pursue an award of attorney's fees and
19 expenses under any other provision of law. A party who
20 agrees to mediation under 28 U.S.C. § 484 may seek an award
21 of attorney's fees only under this section and 28 U.S.C. §
22 484.

23 "(d) A party seeking an award of attorney's fees under this
24 section shall file an application for fees within thirty
25 days of final judgment in the action. The application shall
26 show that the party is eligible to receive an award under
27

1 this section and the amount sought, including an itemized
2 statement from any attorney appearing on behalf of the party
3 which sets forth the actual time expended and the rate at
4 which fees are computed. Within thirty days after service
5 of the fee application upon the party against whom the fees
6 are sought to be awarded, that party may file a response
7 setting forth its reasons why an award of fees would not be
8 reasonable or why the amount of fees should be reduced.

9 Where an award of attorney's fees is sought against any
10 party, the attorney for that party shall submit a statement
11 of the total amount of attorney's fees incurred in the
12 litigation in order that the court or board may determine
13 that the fees sought in the application do not exceed the
14 amount of fees incurred by that party.

15 "(e) As provided in appropriations acts, agreements may be
16 entered into as authorized by this section. Awards of
17 attorney's fees received by an agency on behalf of the
18 United States pursuant to this section shall be credited to
19 an appropriate account of that agency. To the extent
20 provided in advance in appropriation acts, such amounts
21 shall be available only to pay awards of attorney's fees
22 against that agency on behalf of the United States made
23 pursuant to this section. Each such agency is authorized to
24 pay any shortfall caused if amounts credited to such account
25 are insufficient to pay amounts awarded against such agency
26

1 on behalf of the United States from funds currently
2 available in such account.

3 "(f) For the purposes of this section:

4 "(1) 'United States' includes any agency and any
5 official of the United States acting in his or her official
6 capacity;

7 "(2) 'final judgment' means a judgment that is final
8 and not appealable; and

9 "(3) 'prevailing party' means a party to an action who
10 obtains a favorable final judgment other than by settlement,
11 exclusive of interest, on all or a portion of the claims
12 asserted during the litigation."

13 SEC. 106. AVOIDANCE OF LITIGATION THROUGH MULTI-DOOR
14 COURTHOUSES.

15 Title 28 of the United States Code is amended by adding a
16 new section 484 as follows:

17 "Multi-Door Courthouses. (a) The chief judge of each
18 federal judicial circuit shall designate one district within
19 the jurisdiction of the Circuit to be a pilot Multi-Door
20 Courthouse district; provided, however, that the United
21 States Court of Appeals for the District of Columbia Circuit
22 shall not be included. The United States Court of Appeals
23 for the Federal Circuit shall designate the United States
24 Claims Court to be a pilot Multi-Door Courthouse. Such
25 designation, and the program established by this section,
26 shall terminate at the expiration of a three-year period

1 following such designation unless renewed by an Act of
2 Congress.

3 "(b)(1) Every court which has been designated as a Multi-
4 Door Courthouse, as set forth in subsection (a), shall, not
5 later than 6 months after the effective date of this Act,
6 establish an alternative dispute resolution plan.

7 "(2) The alternative dispute resolution plan
8 shall include, but not be limited to--

9 "(A) procedures for limited discovery;

10 "(B) confidentiality of proceedings as to possible subsequent
11 pretrial and trial actions; and

12 "(C) the selection, use, and payment of non-
13 judicial personnel (also referred to in this section as
14 neutrals, mediators, or arbitrators) who may be selected to
15 conduct alternative dispute resolution procedures.

16 "(3) The plan shall also establish standards for
17 determining which cases are appropriate for alternative
18 dispute resolution, considering such factors as whether
19 factual issues predominate over legal issues, whether the
20 case involves complex or novel legal issues requiring
21 judicial action, and any other factors the court considers
22 relevant.

23 "(4) Each plan shall provide that each federal judge
24 or, in a case assigned to a magistrate judge, magistrate
25 judge in a Multi-Door Courthouse established under
26 subsection (a) shall conduct a conference with counsel
27

1 within 120 days after a complaint is filed to review non-
2 binding, voluntary alternative dispute resolution procedures
3 that may be used in lieu of litigation to resolve the claims
4 in controversy.

5 "(5) Outcome-determinative mediation under this
6 section means a procedure in which either a single mediator
7 or a panel of three mediators selected by or under the
8 direction of a federal district court provides the parties
9 with a dollar amount determination that would be awarded if
10 the case is tried.

11 "(6) Each plan shall authorize the parties, if they
12 agree, to utilize non-binding alternative dispute resolution
13 procedures that may be used in lieu of litigation to resolve
14 the claims in controversy. These non-binding alternative
15 dispute resolution procedures shall include, but are not
16 limited to, early neutral evaluation, traditional mediation,
17 outcome-determinative mediation, minitrials, summary jury
18 trials, and arbitration.

19 "(7) Each plan shall provide that--

20 "(A) the parties may agree as to the use of any
21 alternative dispute resolution procedure listed in the
22 alternative dispute resolution plan to effectuate prompt
23 resolution of the claims involved; and

24 "(B) the parties may choose to utilize the
25 alternative dispute resolution procedures and neutrals made
26 available by their court or may, if all parties and the
27

1 court agree, utilize the services of other neutrals not
2 designated in accordance with the court's alternative
3 dispute resolution plan.

4 (8) Each plan shall also provide that if the parties
5 choose outcome-determinative mediation and in the event a
6 determination is reached--

7 (A) either or any party may give notice that it
8 intends to accept that determination, while the other party
9 or parties remain free to reject the determination and
10 continue with the litigation. If all parties reject that
11 determination, no costs or attorney's fees shall be assessed
12 against any party;

13 (B) a plaintiff, including the United States or
14 an officer or agency thereof, who rejects the determination
15 and fails to obtain a final judgment that is at least ten
16 percent greater than the determination shall pay the
17 defendant's costs, as set forth in 28 U.S.C. §1920, and
18 reasonable attorney's fees, as set forth in 28 U.S.C. §
19 §2412a, incurred after the rejection of the determination;
20 and

21 (C) a defendant, including the United States and
22 officers and agencies thereof, who rejects the determination
23 and fails to obtain a final judgment that is at least ten
24 percent less than the determination shall pay the
25 plaintiff's costs, as set forth in 28 U.S.C. §1920, and
26

1 attorney's fees, as established in 28 U.S.C. §2412a,
2 incurred after rejection of the determination.

3 "(9) In carrying out their plans, the district courts
4 are authorized to utilize the volunteer services of non-
5 judicial personnel (also known as neutrals, mediators, and
6 arbitrators) to conduct alternative dispute resolution
7 procedures. The courts are also authorized to establish and
8 pay, subject to amounts provided in advance in
9 appropriations acts and to limits set by the Judicial
10 Conference of the United States, the amount of compensation,
11 if any, that each neutral shall receive for services
12 rendered in each case."

13 SEC. 107. FLEXIBLE ASSIGNMENT OF DISTRICT COURT JUDGES.

14 (a) Section 292(d) of Title 28, United States Code, is
15 amended by striking out "upon presentation of a certificate of
16 necessity by the chief judge or circuit justice of the circuit
17 wherein the need arises." and inserting in lieu thereof "whenever
18 the business of that court so requires."

19 (b) Section 604(a) of Title 28, United States Code, is
20 amended --

21 (1) by striking out "; and" in paragraph (23) and
22 inserting in lieu thereof ";

23 (2) by redesignating the two paragraphs currently both
24 designated as paragraph (24) as paragraph (25) and paragraph
25 (26), respectively;

1 (3) by striking the period at the end of new paragraph
2 (25) inserting in lieu thereof "; and"; and

3 (4) by adding the following new paragraph immediately
4 after paragraph (23):

5 "(24) Secure information as to the courts' need for
6 temporary judicial resources to ease overcrowded dockets
7 (including information on delays being encountered in the
8 maintenance of civil suits) and prepare and transmit
9 annually to the Chief Justice, the chief judges of the
10 circuits, the Congress and the Attorney General, statistical
11 data, reports and recommendations summarizing the results of
12 this inquiry;"

13 **SEC. 108. IMMUNITY OF STATE JUDICIAL OFFICERS.**

14 (a) Section 1988 of Title 42, United States Code, is amended
15 by inserting before the period at the end of the second sentence
16 the following: ", except that notwithstanding any other provision
17 of law, no state judicial officer shall be held liable for any
18 costs, including attorney's fees, in any proceeding brought
19 against such judicial officer for an act or omission taken in an
20 official capacity".

21 (b) Section 1983 of Title 42, United States Code, is
22 amended by adding before the period at the end of the first
23 sentence: ", except that in any action brought against a
24 judicial officer for an act or omission committed in such
25 officer's official capacity, injunctive relief shall not be

1 granted unless a declaratory decree was violated or declaratory
2 relief was unavailable."

3 SEC. 109. AMENDMENT TO THE CIVIL RIGHTS OF INSTITUTIONALIZED
4 PERSONS ACT.

5 (a) Section 1997e of Title 42, United States Code, is
6 amended by --

7 (1) amending (a)(1) to read as follows:

8 "In any action brought pursuant to section 1983 of Title 42,
9 United States Code, by any adult convicted of a crime con-
10 fined in any jail, prison, or other correctional facility,
11 the court shall continue such case for a period not to ex-
12 ceed 180 days in order to require exhaustion of such plain,
13 speedy, and effective administrative remedies as are
14 available."

15 (2) redesignating paragraphs (b)(1) and (2) as
16 paragraphs (b)(2) and (3), respectively; and

17 (3) adding a new paragraph (b)(1) immediately after
18 paragraph (a)(2) to read as follows:

19 "(b)(1) Upon the request of a State or local corrections
20 agency, the Attorney General of the United States shall
21 provide the agency with technical advice and assistance in
22 establishing plain, speedy, and effective administrative
23 remedies for inmate grievances."

24 (b) Subsection (d) of section 1915 of Title 28, United
25 States Code, is amended to read as follows:

26 "(d) The court may request an attorney to represent any
27 such person unable to employ counsel and may dismiss the

1 case if the allegation of poverty is untrue, or if satisfied
2 that the action fails to state a claim upon which relief can
3 be granted or is frivolous or malicious."

4 **SEC. 110. IMPROVEMENTS IN CASE MANAGEMENT.**

5 Subsection (a) of Section 623 of Title 28, United States
6 Code, is amended --

7 (a) by redesignating paragraphs (5), (6), and (7) as
8 paragraphs (6), (7) and (8), respectively; and

9 (b) by adding the following new paragraph immediately after
10 paragraph (4):

11 "(5) study and determine ways in which case and docket
12 management techniques (including alternative dispute
13 resolution techniques) may be applied to improve the cost-
14 effectiveness of litigation and to eliminate unjustified
15 expense and delay, and include in the annual report required
16 by paragraph (3) of this subsection details of the results
17 of the studies and determinations made pursuant to this
18 paragraph;"

19 **SEC. 111. ASSIGNMENT OF JUDGES; PANELS; HEARING; QUORUM.**

20 (a) Subsection (c) of section 46 of Title 28, United States
21 Code, is amended to read as follows:

22 "(c) Cases and controversies shall be heard and determined
23 by a court or panel of not more than three judges (except
24 the United States Court of Appeals for the Federal Circuit
25 may sit in panels of more than three judges if its rules so
26 provide), unless a hearing or rehearing before the court in

1 banc is ordered by a majority of the circuit judges of the
2 circuit who are in regular active service. A court in banc
3 shall consist of all circuit judges in regular active
4 service, except that any senior judge of the circuit shall
5 be eligible to participate, at his election, and upon
6 designation and assignment pursuant to section 294(c) of
7 this title and the rules of the circuit, as a member of an
8 in banc court reviewing a decision of a panel of which such
9 judge was a member."

10 (b) Section 6 of Public Law 95-486, 92 Stat. 1633, is
11 amended to read as follows:

12 "Sec. 6. Any court of appeals having more than 15 active
13 judges may constitute itself into administrative units
14 complete with such facilities and staff as may be prescribed
15 by the Administrative Office of the United States Courts."

16 SEC. 112. SEVERABILITY.

17 If any provision of this Act or the amendments made by this
18 Act or the application of any provision or amendment to any
19 person or circumstance is held invalid, the remainder of this Act
20 and such amendments and the application of such provision and
21 amendment to any other person or circumstance shall not be
22 affected by that invalidation.

23 SEC. 113. EFFECTIVE DATE.

24 Except as expressly otherwise provided, this Act shall
25 become effective 90 days after the date of enactment. This Act
26 shall not apply to litigation commenced prior to the effective

- 1 date except that sections 108 and 109 shall apply to civil
- 2 actions pending in any court on the date of enactment.

ACCESS TO JUSTICE ACT OF 1992

SECTION-BY-SECTION ANALYSIS

ACCESS TO JUSTICE ACT OF 1992

SECTION-BY-SECTION ANALYSIS

This bill, the "Access to Justice Act of 1992" (the "Act"), provides for greater access to civil justice by reducing costs, delays, and excessive, needless litigation. The analysis below summarizes and explains various key provisions of the Act.

Section 101 provides that the amount in controversy required to invoke Federal court jurisdiction does not include the amount of damages sought for pain and suffering or mental anguish, punitive or exemplary damages, and attorney's fees or costs.

Section 102 adopts a "Fairness Rule" in cases brought under Federal courts' diversity jurisdiction. The rule will not apply where (1) the action is removed under 28 U.S.C. §1441; or (2) the United States or any State, agency of the United States or any State, or any official, officer or employee of a Federal or State agency is a party to the action. Under this system, the prevailing party is entitled to attorney's fees that it expended in order to prevail, limited to the amount of attorney's fees the non-prevailing party incurred. Awarded fees are also subject to limits imposed by judicial discretion in circumstances where requiring payment of all or a portion of the fees would be unjust. If the losing party received services under a contingent fee agreement, the reasonable value of those services is the award limit. The term "prevailing party" is defined for purposes

of this section and section 105 to mean a party to an action who obtains a favorable judgment, other than by settlement, exclusive of interest, on all or a portion of the claims asserted during the litigation.

Section 103 amends the Equal Access to Justice Act.

Subsection (a) establishes a uniform methodology for calculating awardable fees based upon the Bureau of Labor Statistics' Consumer Price Index. Subsection (b) provides clear standards for calculating a cost of living adjustment for compensable services. No other adjustment to the uniform methodology is to be made.

Section 104 adds a new section to title 28 of the United States Code to require that a claimant give written notice of the specific claims and the amount of actual damages prior to filing suit in the United States District Court. A certificate of service showing compliance must be filed when an action is commenced. New subsection (b) tolls an applicable statute of limitations that would expire during the period of notice for thirty (30) days from the date the written notice is transmitted.

New subsection (c) sets out exceptions to the prior notice prerequisite, which include circumstances that compel immediate resort to the courts.

New subsection (d) provides that upon a finding that the claimant has not complied with the provisions of new subsection (a) and upon the assertion of such a defect by the defendant within 60 days of service of the summons or complaint, the claim will be dismissed without prejudice, and the costs of such action, including attorney's fees, may be imposed upon the claimant. The claimant may refile such claim within 60 days regardless of any statutory limitations if notice pursuant to new subsection (a) is effected and the original action was timely filed.

Section 105 provides for an award of attorney's fees in disputes involving the United States in specified types of cases and is only to be implemented when the parties have expressly agreed to shift fees in accordance with the provisions of this section. The specified cases are (1) civil litigation initiated by the United States; (2) disputes pursuant to the Contracts Disputes Act of 1978, including litigation before boards of contract appeals, or (3) cases where the United States and another party have agreed to use outcome-determinative mediation which has resulted in a determination that either party has given notice to accept. In those cases, an award of attorney's fees may be awarded to a prevailing party in the litigation only to the extent that such party prevails on any claim advanced during

the litigation. The amount cannot not exceed the attorney's fees of the party who did not prevail on such claim.

In determining the amount of attorney's fees awardable to a private party, factors including the degree of success obtained by that party relative to its original claim or claims and the prevailing market rates in the area for the kind and quality of the legal services furnished should be considered in determining whether an award of attorney's fees would be reasonable, and, if so, in what amount. The number of hours spent by the attorneys employed by the United States on the litigation multiplied by the salaries and benefits paid to those attorneys, and an amount for overhead, computed at an hourly rate, is determinative of the amount of attorney's fees awardable to the United States.

An application for an award of attorney's fees under this Act bars pursuit of an award of attorney's fees and expenses under the Equal Access to Justice Act. Likewise, an application under the Equal Access to Justice Act precludes an application for an award of attorney's fees under this Act. Thus, a party may not initiate proceedings under either Act without waiving all rights under the other Act.

This section sets forth the procedures by which to apply for and obtain an award of attorney's fees in certain disputes

involving the United States. It also states that fee-shifting agreements may be entered into, fees received by the United States may be credited to an agency account, and payments may be made from that account to pay fee awards against the United States.

"United States" is defined for purposes of this section to mean any agency and any official of the United States acting in his or her official capacity. "Final judgment" is defined to mean a judgment that is final and not appealable.

Section 106 adds a new section to title 28 of the United States Code which creates a multi-door courthouse program to be used in selected Federal district courts for a three-year period (unless renewed by Congress). This program will foster use of alternative dispute resolution ("ADR") procedures. The designated districts will adopt plans permitting the parties to choose among specific methods for resolving their disputes, without litigation.

New subsection (a) provides that the Chief Judge of each of the Federal Circuits, except the District of Columbia, will designate one of its districts to be a pilot multi-door courthouse.

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New subsection (b) provides that each multi-door courthouse district will, within six months of the effective date of this Act, establish an ADR plan. The plan will include (1) procedures for limited discovery; (2) confidentiality of proceedings regarding possible pretrial and trial actions; (3) selection, use and payment of non-judicial personnel to conduct ADR; and (4) standards for determining which cases should go to ADR. The parties will be authorized, upon agreement, to utilize non-binding ADR in lieu of litigation. Approved forms of ADR include early neutral evaluation, traditional mediation, outcome-determinative mediation (one mediator or a panel of three mediators selected by or under the direction of a Federal district court to provide a dollar amount determination of the outcome of the case if tried), minitrials, summary jury trials, and arbitration. In addition, the ADR plan will provide for a conference with counsel conducted by the district judge or magistrate judge to whom a case is assigned within 120 days after a complaint is filed to review the use of non-binding, voluntary ADR procedures.

New subsection (b) further provides that the parties may agree to use any ADR procedure listed in the ADR plan. The parties may choose to use the ADR procedures and neutrals made available by their district court. In addition, if all parties and the court agree, the parties may use other neutrals, not

7

designated through their court's ADR plan. In the event that outcome-determinative mediation is selected and a determination is reached, new subsection (b) provides that any party may independently decide to accept or reject the determination and continue with the litigation, giving notice of such an intention. If all parties reject the determination, then no attorney's fees and costs will be assessed against any party. If any party rejects a determination and fails to obtain an outcome at least 10% more favorable than the ADR determination, that party will have to pay its opponent's reasonable expenses and attorney's fees incurred after rejection of the determination. This provision applies to the United States or any of its officers or agencies.

The district courts are authorized to use non-judicial personnel on a volunteer basis to conduct the procedures in carrying out the ADR plans. These volunteers, neutrals, mediators, and arbitrators may be compensated for services rendered by the district courts, subject to amounts provided in advance in appropriations acts and to limits set by the Judicial Conference of the United States.

Section 107 encourages more efficient use of judicial resources by requiring that information be obtained as to the courts' need for temporary judicial resources and that the

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results of such inquiry be provided annually to the Chief Justice, the chief judges of the circuits, the Congress, and the Attorney General. Collection of this information will complement the efforts of other groups interested in the efficiency and structure of the Federal court system.

Section 108 applies to the immunity of State judicial officers. Subsection (a) restores judicial immunity to State court judges for the fees and costs they incur in defending their official actions. Subsection (b) provides that injunctive relief will not be granted in any action against judicial officers for their official actions unless declaratory relief was unavailable or such a decree was violated.

Section 109 amends section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. §1997e) to remove unnecessary barriers to effective grievance procedures. The courts will be required to continue any action brought by an inmate pursuant to 42 U.S.C. §1979 for a period up to 180 days to require the exhaustion of any available administrative remedies. The Attorney General will provide States or local correction agencies with technical advice and assistance in establishing administrative remedies for inmate grievances, if requested. Subsection (b) provides that the court may dismiss a case if an attorney is appointed upon an allegation of poverty which is

untrue, or if the court is satisfied that the action fails to state a claim, or is frivolous or malicious.

Section 110 provides for the study and determination of methods of case and docket management techniques to improve the cost effectiveness of litigation and to eliminate unjustified expense and delay.

Section 111 changes current laws by eliminating "mini" in banc panels.

Section 112 is a severability clause which would preserve the balance of the Act if any portion of it is held to be invalid.

Section 113 specifies the Act's effective date.

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

October 23, 1991

FACT SHEET

EXECUTIVE ORDER ON CIVIL JUSTICE REFORM

The President today signed an Executive order to apply immediately the reforms proposed in the Council on Competitiveness report "Agenda for Civil Justice Reform in America" to civil litigation involving the United States Government. The Executive order requires agencies to implement discovery and expert witness reforms and to adopt the Fairness Rule (also known as the English Rule), whenever feasible. The Executive order also requires agencies to attempt to settle disputes prior to litigation, and to employ settlement and Alternative Dispute Resolution (ADR) techniques in order to avoid prolonged litigation.

In August 1991, the President's Council on Competitiveness recommended 50 specific changes to our current civil litigation system. These recommendations were aimed at achieving swifter justice and reducing the costs of litigation. The proposals facilitate more timely and efficient handling of civil cases.

This Executive Order on Civil Justice Reform seeks to produce a more fair American legal system by making Federal litigators a model for parties in the private sector involved in dispute resolution. Although the Executive order requires the Federal Government to implement many of these legal reforms unilaterally, the Administration expects this Executive order to be a catalyst for civil justice reform in the Congress, State legislatures, and the courts.

Background

The tremendous growth of civil litigation in the past 30 years, including litigation involving the United States Government, has overburdened the American court system. Excessive litigation imposes high costs on American individuals, small businesses, industry, professionals, and government at all levels. With 70 percent of the world's lawyers, it is not surprising that the number of lawsuits filed in the Federal courts each year has more than tripled in the last 30 years -- from approximately 80,000 in 1960 to more than 250,000 in 1988.

Excessive litigation puts America at a competitive disadvantage internationally and results in higher prices for American consumers for everything from household goods to medical treatment. Every year our legal system costs Americans, directly and indirectly, an estimated \$300 billion -- including wasted legal fees, court costs, and individual time and effort devoted to litigation.

Several current litigation practices add to these burdens and costs by prolonging the resolution of disputes, thus delaying just compensation and encouraging wasteful litigation. Although procedural changes alone cannot solve all of these problems, the excessive costs and long delays that have plagued our legal system may be reduced by encouraging voluntary dispute resolution, limiting unnecessary discovery, promoting judicious use of expert testimony and prudent use of sanctions, and where appropriate, modifying current fee arrangements.

Promoting Just and Efficient Civil Litigation

In order to promote more efficient litigation in actions involving the United States Government, the Executive order directs all Federal agencies with litigation authority to implement the following reforms:

- **The Fairness Rule.** Subject to appropriate legal authority, offer to adopt the Fairness Rule in contract disputes with the United States Government and in actions initiated by the United States, whereby the loser of the lawsuit pays an appropriate portion of the costs and fees incurred by the winner.
- **Discovery Reform.** Streamline and expedite discovery by offering to exchange core information with opposing parties, by eliminating needless discovery, and by discussing all discovery disputes with opposing counsel before seeking resolution in the courts.
- **Expert Evidence Reform.** Use expert testimony only if it is based on "widely accepted theories" and refrain from using contingency fees to compensate expert witnesses.
- **Notice of Complaint.** Where appropriate, notify parties whom the United States intends to sue, informing them of the nature of the dispute, before filing suit.
- **Settlement Discussions.** Attempt to resolve disputes by initiating settlement discussions.
- **Alternative Dispute Resolution.** Employ ADR techniques whenever appropriate.

Proposing Legislation and Regulations that Do Not Unduly Burden the Courts

The Executive order also contains provisions designed to reduce litigation caused by poorly drafted Federal legislation and regulations. Specifically:

- All legislation and regulations proposed by the Administration will be reviewed to eliminate drafting errors and to use clear and specific standards instead of more ambiguous general standards whenever practicable.
- All legislation and regulations will be reviewed against a "litigation checklist" of 15 specific issues (such as statutes of limitation, preemptive effect, retroactivity, etc.) that historically have led to needless litigation.
- Agencies proposing legislation and regulations must certify compliance with this checklist in their legislative submissions to the Office of Management and Budget.

Promoting Just and Efficient Administrative Adjudication

The Executive order also requires that, whenever reasonable and practicable, all agencies that adjudicate administrative claims employ more efficient case management procedures in administrative law proceedings.

Scope and Effective Date

This Executive order applies to civil matters only and is not intended to affect criminal matters. It shall become effective 90 days from the date of the President's signature, and will not apply to litigation commenced prior to the effective date.

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February 19, 1992

THE PRESIDENT'S COUNCIL ON COMPETITIVENESS

"AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA"

FACT SHEET

FEDERAL RULES CHANGES

The Administration today announced proposed rules of procedure and evidence designed to reduce the costs and delay in civil litigation. The proposed rules changes were developed by the President's Council on Competitiveness, chaired by Vice President Dan Quayle, to help reduce the costs of overuse and abuse of the civil justice system. The Council's 50-point initiative to help reduce overburdened court dockets and control the rapidly escalating cost of litigation is contained in its report, "Agenda for Civil Justice Reform in America."

In submitting its suggested amendments to the Federal Rules of Civil Procedure and Evidence to the Supreme Court's Advisory Committee on Civil Rules, the Administration focussed on restructuring the civil justice process toward more cooperation by litigants. The proposed rule changes add incentives to the litigation process that will promote settlement and quicker, less costly, civil trials. The proposals will also make the system more rational and efficient by encouraging careful evaluation of disputes, timely handling of cases, and speedier judicial intervention.

Among the amendments presented by the Department of Justice on behalf of the Administration are:

Reform of the Discovery Process

The current discovery process allows lawyers to ask virtually limitless questions to force their opposition to spend enormous amounts of time and money in responding. The proposed amendments would place reasonable limitations on discovery -- in particular by requiring the parties to disclose core or basic information up front, having the parties negotiate a discovery plan, and setting limits on the extent of discovery after which the side requesting the extra information would have to pay the cost of obtaining it.

Elimination of Junk Science

Many of our courtrooms are burdened by testimony of alleged "experts" whose views are not supported by a significant number of the members of their scientific community. The Administration has suggested amendments to the rules which will require that an expert's

testimony must be "widely accepted" in the relevant field. In addition, experts would be barred from receiving payment based on the results of their testimony.

Settlement Alternatives

With the ever-growing number of cases in the civil system, there is an enormous need to reduce litigation. Therefore, the Administration proposed amendments to the rules which would require that a court direct litigants to appear before it to discuss settlement and use of alternative dispute resolution procedures. In addition, the rules would be amended to provide incentives for the giving and acceptance of settlement offers by plaintiffs and defendants.

Rule 11

The Administration suggests rules amendments requiring litigants and lawyers to correct statements later learned to be untrue and to provide additional information as they learn of it. Under the proposed amendments those who do not follow this rule would be subject to sanctions.

These recommendations were prepared by the Council's Working Group on Civil Justice Reform, chaired by Solicitor General Kenneth W. Starr. The Working Group was composed of experts from the Department of Justice, the White House Counsel's Office, the Office of the Vice President, and the Departments of Commerce, Treasury, Energy, and Health and Human Services, the Office of Management and Budget, and the Council of Economic Advisers.

The Administration's commitment to the fair, efficient and early resolution of disputes is demonstrated by efforts to implement reform at all levels. As a catalyst for civil justice reform, the Administration has already implemented many of the Council's recommendations in the Federal government through Executive Order 12778 (October 23, 1991). On February 4, 1992, President Bush transmitted the "Access to Justice Act of 1992" and called upon Congress to enact reforms requiring Federal legislation. And, since most reforms are equally applicable to the states, the Administration has published the Civil Justice Reform Model State Amendments and the Model State Punitive Damages Act.

FOR IMMEDIATE RELEASE

February 13, 1992

THE PRESIDENT'S COUNCIL ON COMPETITIVENESS

"AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA"

FACT SHEET

CIVIL JUSTICE REFORM MODEL STATE AMENDMENTS

As part of the Administration's efforts to reform the civil justice system, Vice President Dan Quayle today presented the Civil Justice Reform Model State Amendments. The Amendments, which include both model legislation and model rules of procedure and evidence, would implement the recommendations proposed by the President's Council on Competitiveness Report, "Agenda for Civil Justice Reform in America."

Over the past 30 years, our legal system has become burdened with excessive costs and long delays. Many features of the current legal system no longer serve to expedite justice or to ensure fair results. Instead, overuse and abuse of the legal system impose tremendous costs upon American society. Higher costs mean higher prices for American consumers for everything from household goods to medical treatment. Higher costs also reduce America's ability to compete in the global marketplace.

To address these problems, the Council established a working group, chaired by Solicitor General Kenneth W. Starr. The resulting recommendations provide concrete steps that can be taken to restore our civil justice system as an institution that is fair to all and serves the ends of justice. The Administration's proposals seek to restore fairness to our judicial system and to eliminate the economic burden placed on American society by excessive litigation. None of the reforms impairs any substantive legal rights. Instead, they will help ensure that deserving victims actually receive their compensation earlier and with less expense.

The Problem: An Overburdened System

States reported the filing of 17,321,125 civil cases in 1989. Excessive and expensive civil litigation has overburdened our court system and imposed higher costs on small businesses, professionals, industry, and Government at all levels in the form of excessive legal fees, court costs, and wasted individual time and effort. Every year, our legal system costs Americans, directly and indirectly, an estimated \$300 billion.

While every State has its unique legal system, each can benefit by applying the principles of fair, efficient, and early resolution of disputes.

In order to reduce litigation costs, promote swifter justice, protect individual rights, and restore the integrity of our legal system, among the provisions of the "Access to Justice Act of 1992" are the following reforms:

Multi-Door Courthouse - To give consumers the opportunity to elect an effective alternative to court adjudication, courts would be required to foster alternative dispute resolution (ADR) procedures rather than trials to settle disputes. The parties would be free to select from different ADR procedures such as early neutral evaluation, traditional mediation, outcome determinative mediation, mini-trials, summary jury trials, and arbitration.

Core Disclosure and Discovery - Discovery consumes 80 percent of the time and money in litigation; it should be reformed to enable the parties to proceed to the central issues without extraneous, costly, and unproductive practices. The Model proposals will require automatic disclosure of basic or "core information" and mandate that the parties confer at discovery planning conferences. Discovery would also be partially governed by market incentives.

Expert Evidence Reform - Unlike ordinary witnesses who may offer only factual testimony, expert witnesses are allowed to testify as to their opinions. Therefore, it is necessary that the expert's opinion testimony be based on "widely accepted" theories instead of "junk science." The Model proposals will require courts to determine that proposed witnesses are legitimate experts in their field. The Model also bans contingency fees for experts.

The Fairness Rule - The United States is one of the few countries which does not allow the winning party to recover the costs of litigation. Instead, winners and losers alike pay their own legal fees. The "loser pays" rule would help those who have legitimate claims, particularly those who effectively barred from the courts because the costs of pursuing the claim would have exceeded the expected recovery. The legislation would limit the amount the loser must pay and specifies that courts should not require the loser to pay if circumstances make payment "unjust."

The Civil Justice Reform Model State Amendments also include other provisions to encourage settlement and reduce costs. This package of state legislation and rules changes, in conjunction with the Administration's proposed "Access to Justice Act of 1992" will greatly reduce the burdens of excessive, needless litigation while protecting and enhancing every American's ability to vindicate legal rights through our legal system.

February 13, 1992

THE PRESIDENT'S COUNCIL ON COMPETITIVENESS
"AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA"

FACT SHEET

MODEL STATE PUNITIVE DAMAGES ACT

Punitive damages are punishments in the nature of fines awarded in civil cases after the injured party has been fully compensated. While the award of noncompensatory, punitive damages can serve a useful purpose in deterring and punishing extreme or egregious misconduct, the current methods for awarding punitive damages often impose punishment in a random and capricious manner. Unfortunately, the specter of unlimited punitive damages encourages parties to try cases needlessly and frustrates early settlement, thereby delaying justice and impeding the swift award of compensatory damages to injured victims.

This type of inordinate cost and delay in the civil justice system was one subject of an extensive study by the President's Council on Competitiveness, chaired by Vice President Dan Quayle. As a result, the Council developed 50 recommendations for improving the civil justice system. Reported in the "Agenda for Civil Justice Reform in America," the recommendations will make the justice system more fair and accessible for all citizens. Among the Council's recommendations is the reform of unlimited punitive damages.

The current common law approach of unlimited punitive damages leads to indiscriminate awards. If punitive damages are to be an effective deterrent, they must be imposed in a rational and predictable manner. The Council's recommendations for punitive damages reform are now embodied in a Model State Punitive Damages Act. The Model Act establishes reasonable and fair standards that will promote predictability while insuring that punitive damages remain an effective deterrent.

The Model Act presents a six-part proposal for state legislative action for punitive damages reform. Each component has been proven effective in one or more states, but no state has enacted a comprehensive reform package containing all suggested measures. The Model State Punitive Damages Act is a rational and consistent approach to punitive damages that includes:

Pre-Litigation Notice of Claims - In order to provide parties with the opportunity to settle their disputes at the earliest stages, the Model Act requires pre-complaint notice when punitive damages may be requested.

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Pleading Punitive Damages - To prevent inclusion of punitive damages merely for publicity and to ensure that punitive damages remain as an issue at trial only if there is sufficient evidence, the Model Act eliminates from the complaint requests for specific dollar amounts.

Standard of Proof - Before an award of punitive damages, the plaintiff must establish, by clear and convincing evidence, that the defendant acted with malice - specific intent to cause serious injury or a flagrant indifference to the potential harm.

Bifurcated Trials - The jury would award punitive damages in a separate proceeding after liability has been determined. This insures that punitive damages are measured decisions, not the product of passion.

Judicial Determination of Amount - After the jury finds that punitive damages are appropriate, the judge draws upon his or her experience with such cases and determines the amount of punitive damages to be awarded.

Ceiling for Punitive Damages - No award of punitive damages would exceed the amount of total compensatory damages award to the plaintiff. Capping the amount of punitive damages at one times the actual damages serves as a deterrent while insuring that the injured party is fully compensated for his or her injuries.

The Administration is committed to the fair, efficient and early resolution of disputes. In addition to the Model State Punitive Damages Act, the Administration has made available Civil Justice Reform Model State Amendments for additional reform at the state level. On the Federal level, the Administration has applied the civil justice reform recommendations through Executive Order 12778 and has transmitted to Congress the "Access to Justice Act of 1992." The Administration is also proposing amendments to the Federal Rules of Procedure and Evidence through the Supreme Court's rulemaking process.

FOR IMMEDIATE RELEASE

FEBRUARY 4, 1992

THE PRESIDENT'S COUNCIL ON COMPETITIVENESS

"AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA"

IMPLEMENTATION FACT SHEET

Excessive cost and delay in our civil justice system harm the American people and impair their ability to compete in the global marketplace.

Vice President Dan Quayle

Many features of our civil justice system no longer expedite justice or insure fair results. Instead overuse and abuse of the legal system impose tremendous costs on American society.

To address these problems, the President's Council on Competitiveness, chaired by Vice President Dan Quayle, developed 50 recommendations for improving the civil justice system. Reported in the "Agenda for Civil Justice Reform in America," these recommendations help reduce the inordinate cost and delay found in the system. As most of the proposals have been tested in federal or state courts and have proven effective, the Agenda presents a comprehensive approach to effect meaningful change in our overburdened civil justice system.

The Administration is committed to the fair, efficient and early resolution of disputes. This commitment is demonstrated by efforts to implement reform at all levels: Executive branch action, Federal legislation, Federal rules changes, and model state packages.

Executive Action

As a catalyst for civil justice reform, the Administration has already implemented many of the Agenda reforms in the Federal government. To promote more efficient litigation in actions involving the United States Government, on October 23, 1991, President Bush signed Executive Order 12778. To help make the Government's litigators a model for the private sector, the President directed all Federal agencies to encourage voluntary dispute resolution, limit unnecessary discovery, avoid "junk science," and, where appropriate, use the "Fairness" or "loser pays" rule for attorneys' fees. The directive also provides a "litigation checklist" designed to reduce legislative drafting errors that cause uncertainty and unnecessary litigation.

Federal Legislation

On February 4, 1992, President Bush transmitted the "Access to Justice Act of 1992" calling upon Congress to enact reforms requiring federal legislation. Among the Act's provisions are:

Multi-Door Courthouse - Establishes alternative dispute resolution (ADR) programs to provide effective alternatives to trials. Parties would gain the opportunity to choose between several methods of resolving their disputes.

Pre-Complaint Notification - Encourages resolution at the earliest stages, in most cases the right to sue is conditioned upon giving notice to the intended parties of the nature of the dispute.

Fairness Rule - Adopts a "loser pays" rule in cases involving state law brought under the federal courts' diversity jurisdiction. This rule is grounded in the equitable principle that prevailing parties should be made "whole." The loser would pay the winner's legal expenses subject to limits, including when payment would be "unjust."

Federal Rules of Civil Procedure and Evidence

Through the Supreme Court's rulemaking process, the Administration is proposing amendments to the Federal Rules of Civil Procedure and Evidence to help make the system more rational and efficient:

Discovery Reform - Discovery consumes 80 percent of the time and money in litigation. Our proposal will require automatic disclosure of basic or "core information" and mandate discovery planning conferences. After presumptive numerical limits are met, additional discovery would be governed by market incentives.

Expert Evidence Reform - Experts, who unlike other witnesses, are allowed to present their opinions should be required to base their testimony on "widely accepted" theories instead of "junk science." Our proposal requires courts to determine that proposed witnesses are legitimate experts in their field and bans contingency fees paid to expert witnesses in return for a successful outcome.

State Legislation and Rule Changes

Most reforms proposed for the Federal system are equally applicable to the states. As a result, the Administration has published the Civil Justice Reform Model State Amendments and the Model State Punitive Damages Act to assist with reforms in the state systems. Reform at the state level could have a dramatic effect since that is where most litigation occurs.

THE WHITE HOUSE

Office of the Press Secretary
For Immediate Release February 4, 1992

FACT SHEET

ACCESS TO JUSTICE ACT OF 1992

As promised in the President's State of the Union Address, the Administration today transmitted to Congress the "Access to Justice Act of 1992" to enact major reforms in the nation's civil justice system. The Act embodies the fifty recommendations contained in the report "Agenda for Civil Justice Reform in America," written by the President's Council on Competitiveness under the chairmanship of Vice President Dan Quayle. These proposals seek to restore fairness to our judicial system and to eliminate the economic burden placed on American society by excessive litigation.

The "Access to Justice Act of 1992" provides an opportunity to elect an alternative to litigation, seeks to make the prevailing party whole by providing compensation for legal fees, permits the opportunity for pre-trial settlement, and allows legal fees to be recovered in suits initiated by the United States. None of the reforms impairs any substantive legal rights. Instead, they will help ensure that deserving victims actually receive their compensation earlier and with less expense.

The Problem: An Overburdened System

With 70% of the world's lawyers, it is not surprising that America has experienced a litigation explosion. The number of civil lawsuits filed in the federal courts each year has more than tripled in the last thirty years.

This tremendous growth of civil litigation has overburdened our court system and imposed higher costs on small businesses, professionals, industry, and Government at all levels in the form of excessive legal fees, court costs, and wasted individual time and effort. Every year, our legal system costs Americans, directly and indirectly, an estimated \$300 billion.

Higher costs mean higher prices for American consumers for everything from household goods to medical treatment. Higher costs also reduce America's ability to compete in the global marketplace.

"Access to Justice Act of 1992"

In order to reduce litigation costs, promote swifter justice, protect individual rights, and restore the integrity of our legal system, among the provisions of the "Access to Justice Act of 1992" are the following reforms:

Multi-Door Courthouse - To give consumers the opportunity to elect an effective alternative to court adjudication, federal courts would be required to establish multi-door courthouses for a three year period. Multi-door courthouses foster alternative dispute resolution (ADR) procedures rather than trials to settle disputes. The parties would be free to select from different ADR procedures such as early neutral evaluation, traditional mediation, outcome determinative mediation, mini-trials, summary jury trials, and arbitration.

Pre-Litigation Notice of Claims - In order to provide parties with the opportunity to settle their disputes at the earliest stages, the Act requires pre-complaint notice. Where appropriate, the right to sue in federal court is conditioned upon giving notice to intended parties of the nature of the dispute. This procedure will allow parties to reach an agreement and fashion appropriate remedies at lower costs without court involvement.

The Fairness Rule - The United States is one of the few countries which does not allow the winning party to recover the costs of litigation. Instead, winners and losers alike pay their own legal fees. The "loser pays" provision would help fund meritorious claims not currently initiated because the costs of pursuing the claim would have exceeded the expected recovery.

The Act proposes an experiment with the "Fairness Rule" for private parties in bringing state law claims under the Federal court's "diversity" jurisdiction. Litigants who desire the traditional arrangement, where each side pays its own attorney, may file the same cases in state courts. The Act also limits the amount the loser must pay to the sum it expended in litigating the suit and specifies that courts should not require the loser to pay if circumstances make payment "unjust." Finally, the Act allows parties the option to elect the Fairness Rule in suits initiated by the United States and disputes pursuant to the Contract Disputes Act of 1978.

Cost of Living Adjustments - The Act establishes a clear, uniform methodology for calculating federal court jurisdictional amounts and fees under the Equal Access to Justice Act.

Reform of the Judicial System - The Act re-establishes the immunity of state judicial officers. To facilitate swifter case handling, the Act encourages better case management, permits flexible assignment of federal district court judges, and clarifies appellate in banc procedures. Similarly, the Act amends the Civil Rights Act of Institutionalized Persons Act (CRIPA) to permit administrative resolution of inmate claims.

The "Access to Justice Act of 1992" will greatly reduce the burdens of excessive, needless litigation while protecting and enhancing every American's ability to vindicate legal rights through our legal system.

The "Access to Justice Act of 1992" results from the recommendations prepared by the Council on Competitiveness Working Group on Civil Justice Reform, chaired by Solicitor General Ken Starr. In August, 1991, the Council's chairman, Vice President Dan Quayle transmitted the recommendations to the President in the report "Agenda for Civil Justice Reform in America." Many of the proposals were implemented for litigation brought by the U.S. Government on October 23, 1991, when President Bush signed Executive Order 12778 on Civil Justice Reform. In addition to the Executive Order and the "Access to Justice Act of 1992," the Administration will continue to work to implement the Civil Justice Reform initiative at the federal and state level.

CIVIL JUSTICE REFORM
PROPOSED AMENDMENTS
TO FEDERAL RULES



**PREFACE TO PROPOSED CIVIL JUSTICE
REFORM AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

This pamphlet contains the Administration's proposed revisions to the Federal Rules of Civil Procedure, Federal Rules of Evidence and Federal Rules of Appellate Procedure. These revisions were submitted to the Civil Rules Advisory Committee on February 7, 1992 to implement many of the Civil Justice Reform ("CJR") recommendations made by the President's Competitiveness Council. The Amendments were submitted in conjunction with comments on pending rules amendments proposed by the Advisory Committee. Consideration of proposed amendments to the Federal Rules of Civil Procedure by the Advisory Committee precedes further consideration by the Standing Rules Committee, the Judicial Conference of the United States, the Supreme Court, and Congress. Accompanying the proposed rule changes is a commentary explaining the suggested revisions. The commentary is located at the back of this pamphlet.

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 11 CJR Recommendations 37 - 39

Introduction

Proposed additions to Rule 11 of the Federal Rules of Civil Procedure to implement Recommendations 37 - 39 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

(a) Incorrect or False Court Filings. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, or any other attorney who is not a signatory but who is responsible for the veracity of the content of the pleading, motion, or other paper, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(b) Correction of Subsequently Detected False Or Incorrect Statements. If after the filing of a document the attorney or party who signed pleadings, motions or other papers discovers or obtains knowledge, information, or belief that the document signed contains an error or falsehood, the party is obligated to provide corrected information within a reasonable period of time of learning of the error or falsehood.

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 16 CJR Recommendation 5

Introduction

Proposed additions to Rule 16 of the Federal Rules of Civil Procedure to implement Recommendation 5 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 16. Pretrial Conferences; Scheduling; Management

(a) **Pretrial Conferences; Objectives.** In any action, as soon as practicable, but in no event more than 120 days after the filing of the complaint, the court shall direct the attorneys for the parties and any unrepresented parties to appear before the court, or a neutral third party appointed by the court, for conferences to discuss settlement and possible resort to alternative dispute resolution procedures. In addition, [in any action,] the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such other purposes as

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities; and
- (4) improving the quality of the trial through more thorough preparation, [, and;]
- [(5) facilitating the settlement of the case.]

(b) **Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

- (1) to join other parties and to amend the pleadings;
- (2) to file and hear motions; and
- (3) to complete discovery.

The scheduling order also may include

- (4) the date or dates for conferences before trial, a final pretrial conference, and trial; and
- (5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) **Subjects to be Discussed at Pretrial Conferences.** In addition to discussing settlement and resort to alternative dispute resolution procedures as provided by section (a), [t]he participants at any conference under this rule may consider and take action with respect to

- (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
- (2) the necessity or desirability of amendments to the pleadings;
- (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
- (4) the avoidance of unnecessary proof and of cumulative evidence;
- (5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;
- (6) the advisability of referring matters to a magistrate or master;
- [(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;]
- [(7) [(8)] the form and substance of the pretrial order;
- [(8) [(9)] the disposition of pending motions;
- [(9) [(10)] the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and
- [(10) [(11)] such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If [a] an unrepresented party or a party's attorney fails to obey [a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a] an order of the court directing participation in a settlement conference, if an unrepresented party or [a] party's attorney is substantially unprepared to participate in the conference, or if [a] an unrepresented party or [a] party's attorney fails to participate in good faith, the judge, upon motion of either party or upon the judge's own initiative, may make such orders with regard thereto as are just;] [and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D).] and appropriate. Refusal to agree to any proposal made by any party, standing alone, shall not constitute failure to participate in good faith. In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 26 CJR Recommendations 6-13; 21-22

Introduction

Proposed additions to Rule 26 of the Federal Rules of Civil Procedure to implement Recommendations 6 - 13 and 21 - 22 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 26. General Provisions Governing Discovery and Disclosure

(a) Mandatory disclosure. Unless the court otherwise directs or the parties otherwise stipulate with the court's approval, a disclosure statement shall be filed (i) by a plaintiff within 15 days after service of an answer to its complaint; and (ii) by a defendant within 30 days after serving its answer to the complaint. Except in actions exempted by local rule or order, the disclosure statement shall include:

(1) the names (and, if known, the addresses and telephone numbers) of all persons then known to have personal knowledge of any material fact directly relevant to the particularized allegations of the pleadings, including any claim or defense, briefly indicating (if not obvious from an identification of the person) the subjects to which such personal knowledge pertains; and

(2) a general description of the location of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are then known to be directly relevant to any claim or defense;

This requirement shall apply in all cases involving adverse parties, including multiple party suits, third party claims and counter and cross actions. Information subject to a claim of privilege need not be disclosed. However, notice must be given to the opposing party that a privilege is asserted. If the court determines that a party has in bad faith failed to make adequate disclosure pursuant to this rule, the court shall bar a party from engaging in discovery absent a showing of good cause. The disclosure statement shall be accompanied by a certification by counsel that reasonable inquiry has been made and that the disclosures set forth in the disclosure statement will be supplemented promptly if additional information otherwise required to be disclosed becomes known to counsel.

[(a)] (b) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to such discovery shall be conducted by methods authorized by the treaty unless the court determines that those methods are inadequate or inequitable and authorizes other discovery methods not prohibited by the treaty.

[(b)] (c) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of

persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision [(a)] (b) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision [(c)] (d).

(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision [(b)] (c)(3) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision [(b)] (c)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) Interrogatories. A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, to list the expert's formal training and the expert's publications and the cases in which the expert has testified or given a deposition, and to state the compensation fee for the expert.

(B) Deposition. A party may, without the necessity of a court order, depose each person the other party has given notice it may call as an expert witness at trial, at a reasonable time prior to trial as long as the party requesting the deposition pays the expert a reasonable fee for the time spent in the deposition, unless by motion a court determines the payment of such fees would result in manifest injustice, or the parties agree otherwise.

(C) Document Requests. A party may, without the necessity of a court order, request all documents upon which the expert witness relies or has reviewed in preparation for his testimony.

(D) Additional Discovery. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, [pursuant to subdivision (b)(4)(C) of this rule, concerning] including fees and expenses, as the court may deem appropriate.

(E)(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

[Current F. R. Civ. P. Rules 26(b)(4)(A)(i) and (C) are to be deleted.]

(5) Limits on Discovery. Unless otherwise permitted by the court for good cause shown, or by agreement of counsel, no party shall serve upon any other party, at any one time or cumulatively, more than fifteen (15) written interrogatories, including all parts and sub-parts. Unless otherwise permitted by the court for good cause shown, or by agreement of counsel, no party shall take more than ten (10) depositions, whether upon oral examination pursuant to Rule 30, upon written questions pursuant to Rule 31, or pursuant to any other provision of these rules.

(6) After a party has admitted a fact, by response to a request for admissions, by stipulation or in any other manner of record, discovery by the party that obtained the admission as to matters relevant to establishment of that fact is barred absent an order of the court for good cause shown.

[(c)] (d) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any

party or person provide or permit discovery. The provisions of Rule 37(e)(4) apply to the award of expenses incurred in relation to the motion.

[(d)] (e) Sequence, (and) Timing and Contents of Discovery. (1) Sequence and Timing. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(2) Contents of discovery requests. Each separate discovery request shall designate the specific portion of the complaint, answer or other pleading to which the discovery request is directed and shall constitute a certification that the discovery request is reasonably calculated to be relevant to the subject matter of the designated pleading.

[(e)] (f) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

[(f)] (g) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, subject to the provisions of subdivision (c)(5) setting additional limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management

of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

[(g)] (h) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

(i) Discovery plans. After service of the disclosure statements pursuant to subdivision (a), the parties shall meet to formulate a discovery plan. The discovery plan shall be consistent with the provisions of subdivision (c)(5), absent agreement by the parties, or an order of the court for good cause shown. The parties shall submit their proposed discovery plan to the court for approval. Absent agreement, the parties shall jointly move the court for a discovery conference and shall file each party's proposed discovery plan with the motion.

Discovery beyond that authorized under the plan approved by the court may be taken by a party only if that party agrees to pay the reasonable costs and reasonable attorney's fees of the person or party to whom the discovery is directed. An unconditional commitment to pay these reasonable costs and reasonable attorney's fees, signed by counsel and by an authorized representative of the party, shall be forwarded with any such discovery request. The court may waive the requirement for payment for good cause shown.

The provisions of Rule 37(b) shall apply to any order entered under this subdivision.

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 37-CJR Recommendations 6 - 13

Introduction

Proposed additions to Rule 37 of the Federal Rules of Civil Procedure to implement Recommendations 6 - 13 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

**Rule 37. Failure to Make or Cooperate in
Discovery: Sanctions**

(a) **Motion for Order Compelling Discovery.** Upon compliance with subdivision (a), [A] party, upon reasonable notice to other parties and all persons affected thereby may apply for an order compelling discovery as follows:

(1) **Appropriate Court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to rule 26[(c)](d).

(3) **Evasive or Incomplete Answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) **Award of Expenses of Motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that [the opposition to the motion was substantially justified or that other] special circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, [unless the court finds that the making of the motion was substantially justified or that other] unless the court finds that special circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court [may] shall apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f)(2), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, [unless the court finds that the failure was substantially justified or that other] unless the court finds that special circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders

in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that [the failure was substantially justified or that other] special circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) ~~[(Abrogated)]~~

(e) Duty to Confer. The court shall not consider any motion brought pursuant to this rule or Rules 26 through 36, unless movant as part of the motion, shall make a written showing that, after personal consultation with counsel for opposing parties and good faith attempts to resolve differences, they are unable to reach agreement as to the discovery at issue. The showing shall recite additionally, the date, time and, if not conducted by telephone, place of each such conference and the names of all persons participating in the conference. A party opposing a motion pursuant to this rule or pursuant to Rules 26 through 36 shall make a written showing that, after making a personal consultation with counsel for opposing parties and good faith attempts to resolve differences, they are unable to reach agreement as to the discovery at issue and shall recite, additionally, the date, time and place of each such conference and the names of all persons participating in the conference, unless the party opposing the motion expressly adopts the moving parties' written showing pursuant to this subdivision. Absent a written showing by moving or opposing counsel or express adoption of the moving parties' statement by the opposing party pursuant to the subdivision, the court shall decline to consider an opposition to a motion subject to this subdivision absent good cause shown.

(f) [Repealed. Pub.L., 96-481, Title II, (205(a), Oct. 21, 1980, 94 Stat. 2330.]

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26[(f)](i), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 56 EJR Recommendations 16 - 17

Introduction

Proposed additions to Rule 56 of the Federal Rules of Civil Procedure to implement Recommendations 16 - 17 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

RULE 56. Summary Judgment

- (a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
- (b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
- (c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought [shall] must be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. The district court's finding regarding whether a genuine issue of material fact exists shall not be set aside unless clearly erroneous. Whenever a motion for summary judgment is granted or denied, the court must set forth specific findings which support its ruling.
- (d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and evidence before it and by interrogating counsel, shall [if practicable] ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.
- (e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

**AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 68 CJR Recommendation 4

Introduction

Proposed additions to Rule 68 of the Federal Rules of Civil Procedure to Implement Recommendation 4 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 68. Offer of Settlement

At any time more than 20 days [before the trial begins, a party defending against a claim] after the service of the summons and complaint on a party but not less than 30 days (or 20 days if it is a counter offer) before trial, either party may serve upon the [adverse party an offer to allow judgment to be taken against the defending party] other party, but shall not file with the court a written offer, denominated as an offer under this rule, to settle a claim for the money [or] property or [to the effect] relief specified in the offer [with costs then accrued.] and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. [If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeror must pay the costs incurred after the making of the offer.] The offer shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule. When the complaint sets forth a claim for money, if the offeree rejects the offer and the judgment finally obtained by the offeree was not at least ten percent more favorable than the last offer, the offeree shall pay offeror's reasonable attorney's fees and reasonable costs incurred after the rejection of the last offer. When the complaint sets forth a claim for property or other non-monetary relief, if the offeree rejects the offer and the judgment finally obtained by the offeree is not more favorable than the last offer, the offeree shall pay offeror's reasonable costs and reasonable attorney's fees incurred after rejection of the last offer. [When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.]

This rule shall not apply to class or derivative actions.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE
TO IMPLEMENT THE AGENDA FOR CIVIL JUSTICE
REFORM IN AMERICA

Rule 702 and Recommendations 19 - 20; 23

Introduction

Proposed additions to Rule 702 of the Federal Rules of Evidence to implement Recommendations 19 - 20 and 23 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 702

[If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.]

(a) Qualification of Expert Testimony. If the court finds

(1) that scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue;

(2) that a proffered witness is qualified as an expert in the field for which the expert is called to testify by knowledge, skill, experience, training, or education; and

(3) that the proffered witness' testimony is based on a widely accepted explanatory theory;

then the witness may testify thereto in the form of an opinion or otherwise.

(b) Prohibition on Contingent Fee for Expert Witness. A witness shall be qualified under Rule 702(a)(2) only if the court finds that any compensation to the witness directly or indirectly will not vary as a result of any outcome of the case.

**AMENDMENTS TO THE FEDERAL RULES OF APPELLATE
PROCEDURE TO IMPLEMENT THE AGENDA
FOR CIVIL JUSTICE REFORM IN AMERICA**

Rule 35 CAR Recommendation 32

Introduction

Proposed additions to Rule 35 of the Federal Rules of Appellate Procedure to implement Recommendation 32 of the Agenda for Civil Justice Reform in America are underlined below and deletions to the present rules are bracketed.

Rule 35. Determination of Causes by the Court in Banc

(a) When Hearing or Rehearing in Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing [is not favored and] ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, (2) when a decision of the court is in conflict with the decision of another federal court of appeals on the same matter or resolves a federal question in a way in conflict with a state court of last resort, or [(2)] (3) when the proceeding involves a question of exceptional importance.

COMMENTARY ON PROPOSED AMENDMENTS

**COMMENTARY ON PROPOSED CJR
AMENDMENTS TO RULE 11 OF THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rule 11 of the Federal Rules of Civil Procedure protects the integrity of submissions to the court. It requires that, on penalty of sanctions, pleadings, motions and other papers be based on a reasonable inquiry that the paper is well grounded in fact; be warranted by existing law or good faith argument for the extension, modification, or reversal of existing law; and that the paper not be interposed for any improper purpose. The proposed CJR amendment to Rule 11 broadens the court's power to impose sanctions to check these abuses.

Rule 11(a) extends the court's power to impose sanctions to include attorneys who are not signatories of papers but who are responsible for the truth of the content of the submission to the court.

Rule 11(b) imposes a continuing obligation to correct any errors or falsehoods in signed documents upon learning of the error or falsehood.

**COMMENTARY ON PROPOSED CJR
AMENDMENTS TO RULE 16 OF THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rule 16 of the Federal Rules of Civil Procedure authorizes pretrial conferences to permit courts to manage litigation effectively. The proposed amendments to Rule 16 require early pretrial conferences and strengthen the court's management of cases through pretrial conferences. The proposed amendments revise Rule 16(a), Rule 16(c) and Rule 16(f).

Rule 16(a) requires an early pretrial conference before the court or a neutral third-party appointed by the court to discuss settlement, possible use of alternative dispute resolution procedures, and such other subjects as the court deems appropriate.

Rule 16(c) is amended to specify settlement and use of alternative dispute resolution procedures as subjects to be discussed at pretrial conferences.

Rule 16(f) permits sanctions against unrepresented parties and attorneys representing them for failure to participate in a settlement conference in good faith. This subsection also is amended to clarify that refusal to agree to any proposal made by

a party, standing alone, does not constitute failure to participate in good faith in a settlement conference.

**COMMENTARY ON PROPOSED CJR
AMENDMENTS RULE 26 OF THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rule 26 of the Federal Rules of Civil Procedure is the rule containing general provisions governing discovery. The CJR amendments to Rule 26 are designed to facilitate exchange of limited basic information useful in formulating a discovery plan. They will also permit the parties to reach the central issues in dispute without extraneous, costly and unproductive disputes and filings. Discovery subsequent to initial core disclosures is limited, subject to exceptions specified in the rules, to avoid abuse, and expert discovery is expanded to facilitate resolution of the central issues. In addition, these amendments to Rule 26 add a flexible mechanism for developing discovery plans to streamline and expedite litigation.

Subdivision (a) requires automatic early disclosure of "core information" (i.e., the names of potential witnesses and the location of directly relevant documents). Failure to disclose the core information will bar a party from pursuing any discovery absent a court order. The terms for relevance and personal knowledge set forth in subdivision (a) are taken directly from the Federal Rules of Evidence, and are intended to be interpreted analogously. All persons known by the parties to have knowledge of any fact of consequence must be identified. The fact that a

party does not intend to call a person as a witness is not meant to be grounds for failure to make disclosure.

Subdivision (c)(4)(A), as amended, permits a more comprehensive inquiry into expert witnesses' qualifications. Under the amended rule a party may serve expert witness interrogatories to determine the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert will testify, the expert's formal training, and the expert's publications as well as the cases in which the expert has testified or given a deposition. This subdivision also allows for discovery of the expert's compensation, publications, and expected testimony prior to trial.

Subdivision (c)(4)(B) allows a party to take an expert's deposition prior to trial without court order.

Subdivision (c)(4)(C) permits a party to request all documents the expert relies upon or has reviewed in preparation for his testimony.

Subdivision (c)(4)(D) authorizes the court to order further discovery subject to restrictions, including payment of fees and expenses.

Subdivision (c)(4)(E) is the text of current Rule 26(b)(4)(B).

Subdivision (c)(5) establishes reasonable presumptive numerical limits on the number of interrogatories (15) and depositions (10). The suggested limits may be waived by agreement of counsel or modified by the court for good cause.

Subdivision (c)(6) relates to admissions of facts and confines discovery to matters that are actually in controversy, thereby helping to guard against discovery abuse.

Subdivision (e)(2) requires parties to explain the relevance of requested materials through specific references to their pleadings.

Subdivision (i) requires the parties to design a discovery plan consistent with the numerical limits imposed by subdivision (c)(5), unless other parameters have been agreed upon by the parties or ordered by the court on good cause shown. Discovery beyond that set forth in the plan may be taken only if the requesting party pays all of the producing parties' reasonable costs (including reasonable attorney's fees) caused by the request.

**COMMENTARY ON PROPOSED CJR AMENDMENTS
TO RULE 37 OF THE FEDERAL RULES
OF CIVIL PROCEDURE**

Rule 37 of the Federal Rules of Civil Procedure sets forth specific powers of the court to compel discovery and to impose discovery sanctions. The CJR amendments provide a "Fairness Rule" requiring the loser in discovery motion proceedings to pay the prevailing party's attorney's fees. This result is achieved by deleting language in subdivisions (a), (b) and (d) that bars an award if a party's position is "substantially justified." The proposed rule includes an exception that would permit the court to bar or limit fee-shifting if "special circumstances" would make it "unjust."

An amendment to subdivision (e) requires the parties to confer prior to seeking court intervention in a discovery dispute.

Taken together, these changes encourage both sides to evaluate carefully their claims and defenses.

**COMMENTARY ON PROPOSED CJR AMENDMENTS
TO RULE 56 OF THE FEDERAL RULES
OF CIVIL PROCEDURE**

Summary judgment is a well recognized and useful method for terminating litigation when there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. Under the current Rule 56, some parties urge the court to decline to enter summary judgment even if there is no genuine issue of material fact. As amended, Rule 56(c) precludes this argument; the amended rule makes it plain that summary judgment is mandatory in such cases.

Another amendment to subdivision (c) requires that judges make explicit findings of fact. This amendment will encourage judges to examine cases closely before granting or denying summary judgment and will help focus issues for trial when summary judgment is not granted. The amendments to subdivision (c) also give greater weight to the trial court's findings when a material fact exists by establishing a "clearly erroneous" standard for reversal on appeal.

**COMMENTARY ON PROPOSED CJR AMENDMENTS
TO RULE 68 OF THE FEDERAL RULES
OF CIVIL PROCEDURE**

Rule 68, as amended, is intended to encourage dispute resolution by giving parties incentives to offer and accept reasonable settlement terms prior to trial. The revised Rule 68 provides that either party may, before trial, serve on the opposing party an offer to settle the dispute. It rewards careful evaluation of settlements by requiring that the party rejecting the compromise bear the opponent's additional costs of litigation, including reasonable attorney's fees, unless that party obtains a judgment that is 10 percent more favorable than the settlement offer (for money claims) or is more favorable than the rejected offer (in other than money claims).

This Rule does not apply to class or derivative actions.

**COMMENTARY ON PROPOSED CJR
AMENDMENTS TO RULE 702 OF THE
FEDERAL RULES OF EVIDENCE**

Unlike ordinary witnesses, who generally may offer only factual testimony, expert witnesses are allowed to testify as to their opinions. Expert opinion testimony, however, ought not to contain unsupportable speculation. The expert's role as an impartial and objective witness is fundamental. Thus contingency fee arrangements with experts should be barred so an expert witness will not have any direct financial interest in the outcome of the trial. The CJR Amendments effect these reforms by amending Rule 702 of the Federal Rules of Evidence.

Subdivision (a) sets forth the requirements for testifying as an expert in civil cases. Under the amendment, expert testimony may be admitted if the court finds that specialized knowledge will substantially aid the trier of fact. To testify as an expert, a witness must be qualified in the "field for which the expert is called" and the testimony must be "based on a widely accepted explanatory theory." This requirement eliminates testimony that is too far afield from current knowledge. It is contemplated that this requirement may be satisfied by expert testimony that is accepted by at least a substantial minority of experts in the relevant field.

Subdivision (b) bars contingency fees for expert witnesses.

will be a leader in the administration's drive to create jobs, increase economic growth, and prepare America for a bright future.

I am sure that Transportation Secretary Card will insure that America continues to travel safely home and abroad and that the Nation's transportation systems are ready to move into the 21st century.

**Remarks to the Southern Republican Leadership Conference in Charleston, South Carolina
February 21, 1992**

The President. Thank you, thank you. It is great to be here in Charleston, I'll tell you. I'm delighted to be back in the South. And may I say to our Governor, my dear friend Carroll Campbell, we're grateful for your hospitality and, even more, for your leadership as one of the finest Governors in the entire country, a real leader, Carroll Campbell. And I might say how pleased I am that Governor Campbell will serve as our national cochairman of the campaign and once again as southern regional chairman. I couldn't be in better hands, and thank you very much.

May I thank the Citadel Bulldog Band over there for some fine music. I appreciate it very much. And this is a real star-studded event. And I want to salute the Governors here today, past and present. I know Governor Jim Martin's here from North Carolina. And Members of the United States Congress, I think four or five Congressmen with us here today, a couple of them with us right here: Congressman Ravenel, hometown boy, and others. And other distinguished guests. And may I say that an early supporter and friend of mine is running for the Senate here, Tommy Hartnett. And I want to see him elected to the United States Senate—former member of Congress. And I also want to acknowledge key members of our political team: Rich Bond is with us, our new chairman and Jeanie Austin, doing a superb job. And of course, the conference chairman Martha Edens' superb work here. Keep up the good work and thank you very much, Martha.

And it's great to be here in South Carolina, host for the first time, but I'm sure not the last time of this prestigious Southern Republican Leadership Conference. Four years ago, the South led our party to a great victory across the entire country. And this year, the South will lead us to victory in November 1992.

And just to be perfectly clear about it, I am confident of winning the Presidency for 4 more years. I come here fired up and confident. But I'll need your support. We have much to do these next few months because we have much to do these next few years. Together, we can finish what we've started and move this country forward.

Let me open with a true story from my own past about the old days, Midland, Texas, 1956, trying to organize—I hear Ernie Angelo over there—[laughter]—trying to organize a Republican Party. And this is the gospel truth. I was a precinct judge, a poll judge, polling judge at primary election time. The first time the Republican Party had ever held a primary in Midland County. And Barbara and I were there alternating at the polls, poll watchers. She and I voted Republican, and we represented two-thirds of the Republican vote that year, gospel truth. The only other guy that voted was a slightly inebriated Democrat. He thought he was voting in the—[laughter]—and you can go back and look up the records.

But some of you all are old enough to remember those days. And sometimes if you tried to register Republican, they'd tell you not to bother because there was no Republicans to vote for in the primary. Or times, out and out, there was intimidation, sometimes violence. And we went through a lot back then. And in fact, I'm sure many of you can share similar experiences. And you say, "Well, why did we do it? Why did we build a Republican Party in the South when some said it was impossible?" We did it because we wanted change, and we did it because we believed in some fundamental values: faith and family, responsibility and respect, community and of course country, the United States of America. And we did it because we saw the Government getting too big and getting into our pockets and to every corner of our lives. And we did it because we wor-

George Bush, 1992

South Carolina, I'm sure not the southern Republic. Four years to a great victory and this year, the try in November

clear about it, I the Presidency for fired up and con-support. We have months because e next few years. hat we've started ard.

the story from my s, Midland, Texas, -I hear Ernie An- -]—trying to orga-and this is the gos-udge, a poll judge, election time. The Party had ever held untly. And Barbara ng at the polls, poll d Republican, and s of the Republican th. The only other ly inebriated Dem-as voting in the—go back and look

e old enough to re-d sometimes if you can, they'd tell you ere was no Repub- primary. Or times, intimidation, some- went through a lot 'm sure many of you ences. And you say, ? Why did we build e South when some We did it because l we did it because fundamental values: isibility and respect, se country, the Unit- nd we did it because t getting too big and s and to every corner d it because we wor-

ried about our families and our schools and our neighborhoods. And we did it because our taxes always seem to go up at the same time America's problems got worse. And each of us in our own small way finally said, "Enough is enough."

And we were upstarts and mavericks. And we challenged the status quo. We challenged the old, what was known as the "courthouse crowd," the closed-door, one-party rule of the Democrats. And we did it because we knew Republican principles were right. And they fought us every step of the way. But we fought hard, and we fought fair. And we took our message, smaller Government, better Government, to the people of the Carolinas and Virginia and Mississippi and Florida and the rest of this great region of America.

And we started winning, at first a House seat here and a Senate race there. But our momentum grew. Momentum grew, and it grew. And we owe a great debt of gratitude to our standard bearer in those early days, those that were out front: Howard Baker, the late John Tower, the Bo Callows and Bill Brooks, Drake Edens and Clark Reeds and Bill Dickinson and John Paul Hammer-schmidt and of course, the phenomenal favorite son of South Carolina, right behind me, Strom Thurmond. When I think back to one year ago almost to this very day, the tough decision that had to be made about committing your sons and daughters into a war, Strom Thurmond was of more support to me than any single Senator in the United States Senate. And we should be grateful for him.

Well, these leaders paved the way, and they inspired a generation of talent that transformed the Nation's political landscape. And I'm thinking now of another South Carolinian, a good man and a good friend, Lee Atwater. We miss him. We miss him still. And it was great to have Sally Atwater flying down with us this afternoon on Air Force One. Sally, we're so pleased to be with you.

Well, today the Republican Party is the force for positive change in the New South, and I'm proud to have played a modest role in that success. Our message then and our message now is simple. Carroll said a lot of it. We believe Government is too big and spends too much. We believe in good schools

and safe streets and a Government worthy of the people's respect. And so, we believe in less Government, low taxes. Surely we believe in a strong defense. And we believe that we put America first when we put America's families first.

And so, we believe that parents, not the Government, should make the big decisions. Parents, not Government, should choose their children's schools. Parents, not the Government, should decide the family's health care. And parents should choose who cares for their children, not some bureaucrat in Washington, DC, telling us how to do it. And yes, we believe it ought to be okay to have a voluntary prayer for children in the classroom, and I'm not going to change my view on that ever.

Those are our beliefs. And those are why we built a party in the South and why we continue, with your help, to build it today. Those beliefs don't change from one election to the next. They still guide each and every one of us each and every day.

And now we're at the beginning of a new era in the history of our country. The cold war is over, and America won. The Soviet Union, as we remember it, has collapsed, gone. Imperial communism is finished for good. American leadership changed the world. Republican leadership will change America.

I know we've got tough times, but I am totally confident about our future. But we've got a lot of work ahead of us. There are some things that are simply on the wrong track in our country. Take our courts, for example. When fathers stop coaching Little League because they're afraid of liability lawsuits, something is wrong. And when doctors stop delivering babies because they fear a malpractice lawsuit, something's wrong. Or when people stop volunteering to help each other because they fear ambulance-chasing lawyers, something is terribly wrong. These days a sharp lawyer would tell the Good Samaritan, "Keep on walking."

We've proposed reforms to our court system. They've got them sitting up there in the United States Senate now to address the questions of frivolous lawsuits, and that's a good step. But the real answer for solving

problems is to be more concerned with helping each other than suing each other.

And then I think about our Nation's health care system. Our health care system provides—and let's not forget this—the highest quality care anywhere in the world. But it's not perfect. We all know that. And too many people do not have access to health insurance. Too many people worry that they're going to lose their coverage if they change jobs or, worse still, if they lose their job. And anybody who's had even minor surgery knows that health care costs are going through the roof.

The answer is not to go down the road of socialized medicine with its long lines and faceless, impersonal service. If that's what we wanted, we'd put our doctors and nurses to work for the department of motor vehicles. Our plan, my approach, written out in detail, is to reform our health system, make insurance available to all, keep the quality high, the bureaucracy low, and preserve choice. And that is vital. And the last thing we want is the Government standing between you and your doctor.

And then there's the sorry welfare system. It's pretty obvious that the system now too often perpetuates dependency when it should promote independence, promote initiative. We need to encourage individual success through personal responsibility, the dignity of a job. And so, I've asked the departments and agencies to make it easier—and this is upon the advice of Jim Martin and Carroll Campbell and others—to make it easier for State and local government to reform the system, reform policies that promote broken families. We need to get people to work, go after the deadbeat fathers who run out on those little kids, or as they do in Wisconsin, to make recipients work or study and to keep families together.

But we all know what the number one issue on the minds of Americans is, and it is the economy. And it's people worried about their jobs, providing for their families, meeting the everyday challenges of paying the bills and providing a home and teaching the kids and putting aside for our retirement.

The American people, your neighbors, want this economy fired up again. And so do I. And in my State of the Union Address,

I put forward a two-part plan. And the first part gets business growing again right now, instantly upgrading plant and equipment again, hiring workers again. It uses incentives like an investment tax allowance.

And yes, it is clearly time for the Congress to wake up and cut that tax on capital gains. And to get housing back on its feet, I put forth several commonsense proposals—they're sitting right there in House now—to get people buying and building homes. And perhaps the most easily understood proposal is a \$5,000 tax credit for first-time homebuyers. With our plan, young people almost able to buy that first home could do it with the extra \$5,000 in their pocket. And the plan we're fighting against in the Congress this very day gives them absolutely nothing, nothing to that first-time homebuyer.

You're worried about the Democrat's current plan. I don't want to say too much about it. It's a nice evening here, and I don't want to ruin it. Current plan, I say current because it seems to change just about every hour as they change it to garner in some votes from the special interests, to buy votes. And that's why it's really not a plan. It is simply a bad deal. It smacks of, and you've heard it before, class warfare. And listen to the tradeoff in their deal: 25 cents a day in temporary tax relief for 2 years, paid for, true to form for the Democrats, by a large permanent tax increase.

Now, some Democrats in the Senate have other ideas. They want to get a bidding war going. But to pay for that they'd have to hike tax rates for the middle class, people making \$35,000, you know, people like teachers and factory workers and everyday Americans. And they won't tell you that about their sorry plan. But that's the estimate I've been given by our experts. Any economist will tell you, the last thing our economy needs now is a tax increase by that Democratic Congress. And their plan adds almost \$30 billion to this deficit. And the jobs it creates are more likely to be for more tax collectors.

I believe the American people have about had it with this tax-and-spend thinking. And we drew a line in the sand in the Persian Gulf and kept our word, and I'll draw another line in the sand right here today. If the

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Democrats send me this nonsense they're talking about now, I will send it right back. I will veto it the minute it hits my desk.

I sent them a plan, a good one. And that's what they ought to work on, not some phony partisan maneuver that they know won't fly. And I'll say it again to the Congress: Here's the deadline: March 20th. And if we act by then we can see some results this spring. No more games, no more empty gestures, just pass this plan and get the economy going again, and then we can have all the political fights we want. But let's set it aside now and do something for the American people that are hurting out there.

I said the plan had two parts; you may remember that from the State of the Union. The second part is a long-term plan to keep this country competitive, keep us vigorous. And it's a road map for competing and leading America in this fast-changing world of the 21st century.

Our plan revolutionizes America's educational system. Our plan gets the billions of dollars' worth of cutting-edge Government research and development into the hands of our private-sector businesses and the workers faster than ever before. And that helps us get a real return on your tax dollars, investment helping to create new jobs and products.

Our plan provides tax relief to strengthen the family. We raised the tax deduction for children by \$500. Make no mistake, I want this plan passed in this session of Congress. Keep the heat on the Congress, and we can get that done.

But a central idea behind our approach is that to succeed economically at home we have to lead economically abroad. Carroll touched on this very eloquently. What he means and what I mean is jobs right here in America by opening markets for our exports all over the world. And I'm going to fight hard in every foreign market to do just exactly that. We've made headway. We have made dramatic headway with this increase in exports, but we are going to do even better.

Some people wish the rest of the world would just go away. That is naive, and that is defeatist. They're saying that a level playing field isn't level enough, that American inge-

nuity, American know-how, and the American can-do spirit are simply a bunch of hackneyed phrases. I don't believe it. I don't believe that for one minute, and neither do you. America is not going to cut and run ever. We're going to stay involved, and we are going to continue to lead the entire world.

Before I finish now, I have something to say about this primary campaign. Of course, this campaign is important, not just to me but to you and to our country. And for the sake of our country we must not turn over the Nation's leadership to the Democrats. Republican leadership must continue.

For 8 years, Ronald Reagan, I was at his side, led this country. For the last 3 years I've stood on our principles and against a Democratic Congress that would undermine them. And with the help of our Republican leadership on Capitol Hill, 25 times our principles were upheld, vetoes of bad legislation sustained.

And the next 5 years of American history are just too important to entrust to the inexperienced. I believe the American people want to hear about how we're going to address our country's challenges, how we can unite our people, create more opportunity and hope for all Americans. And I believe the American people want to hear solutions, not just a lot of name-calling and running this country down.

And frankly, I also believe that sometimes somebody's got to stand up and say what's right about the United States of America. And you can't hear it from this campaign going on out there. We are number one, and make no mistake about it, and we're going to stay that way.

And another thing, maybe this is just my personal prejudice talking, let's not listen to the gloom and doom from all those intense talking heads who are happy only when they say something negative. We are the United States of America, and we don't have to put up with all that.

Audience members. Four more years! Four more years! Four more years!

The President. Let me just say, you and I believe in America, and we are optimistic about its future. And we believe in our party. And I am tremendously fortunate to serve

as your President at this most exciting time in our Nation's history.

Barbara and I count our blessings every day for the good fortune that we have to live in that majestic White House and to do our level-best to serve the people of this great country.

These next primaries are critical. I need your help. I need your help to keep our party strong and united so that we can win this fall. And yes, we have much to do. But I guarantee you, we will get the job done. And yes, we have many challenges before us. A I guarantee you, we will meet them, each and every one of them. And yes, there's an election in November. And I guarantee you this: We will win it. I want to be your President for another 4 years.

Thank you very much. Thank you very, very much. Now let's go out and beat the Democrats in the fall. And may God bless the United States of America. Thank you.

Note: The President spoke at 4:40 p.m. at the Omni Hotel. In his remarks, he referred to Richard N. Brown, chairman, and Jeanie Austin, cochairman of the Republican National Committee; Ernie Angelo, national committeeman from Tennessee; and Martha Edens, chairman of the Southern Republican Leadership Conference.

Points of Light Recognition Program

The President named the following individuals and institutions as exemplars of his commitment to making community service central to the life and work of every American.

February 15

Bea Gaddy, of Baltimore, MD

February 17

Volunteers of Specialink, of Covington, KY

February 18

Fred Stavino, of Rosenberg, TX

February 19

Nicole Bagley, of Alma, GA

February 20

Volunteers of the Fort Smith Community Dental Clinic, of Fort Smith, AR

February 21

Volunteers of the Lend-A-Hand program, of Boulder City, NV

Digest of Other White House Announcements

The following list includes the President's public schedule and other items of general interest announced by the Office of the Press Secretary and not included elsewhere in this issue.

February 15

In the morning, the President and Mrs. Bush traveled to Nashua, NH, where they visited Nashua Mall.

In the afternoon, the President and Mrs. Bush traveled to Manchester, NH, where they met with Bishop Leo O'Neil of the archdiocese of Manchester and toured a fishing and outdoor show at the National Guard Armory.

In the evening, the President and Mrs. Bush visited Temple Adath Yeshurun.

February 16

In the morning, the President and Mrs. Bush attended services at First Congregational Church. Following the service, they greeted Sunday school students and parents.

In the afternoon, the President and Mrs. Bush returned to Washington, DC.

February 17

In the morning, the President gave interviews to New Hampshire radio stations.

In the evening, the President gave an interview to New England television stations.

February 18

The President met at the White House with:

—the Vice President; Samuel K. Skinner, Chief of Staff to the President; Brent Scowcroft, Assistant to the President for

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passed S. 2166, the
Act of 1992, which

marks a substantial milestone in implement-
ing the President's national energy strategy
issued one year ago today. This legislation
will lead to the creation of hundreds of thou-
sands of jobs and keep billions of dollars from
flowing overseas for the purchase of foreign
oil between now and the year 2010. The bill
includes increased conservation, promotes
the use of alternative fuels for motor vehicles,
and permits greater use of natural gas. We
are extremely pleased that the Senate passed
the President's legislation, and we urge the
House to also act soon on this vital adminis-
tration program.

Remarks to the American Legislative Exchange Council February 21, 1992

Thank you for the welcome. May I thank
Fred Noye and Sam Brunelli and all the oth-
ers assembled here. This has become an an-
nual ritual, one that I look forward to very,
very much. I don't know whether Jack Kemp
is here—he was going to be—been here. And
Sam spoke. I have great confidence in both
of them. But I really want to just come over
and say a few words, express my greetings
to all of you.

Thinking of ALEC, I wanted to talk here
about how you get things done, the key to
good government. And Americans, I think,
sensible ones, know that the Federal Govern-
ment simply cannot do everything and
shouldn't even try. It could get the job done
and then let everybody else do his or her
job. At ALEC, you get things done. And I
want to help you do what you do best, and
that is to lead and to innovate.

So, we want to take \$14.7 billion, maybe
Sam talked to you about this, in Federal pro-
gram funds and turn them over to the States
as a block grant. And that way people who
run the programs can do what works rather
than following some distant bureaucrat's no-
tion of what works. We tried it last year;
didn't get it. We're trying it again this year.
I hope we can make some headway, even
though it is an election year.

Another one, welfare reform. Our system
too often promotes dependency and not

independence. And so we've asked the de-
partments to go back and the agencies to go
back and make it easier to obtain the waivers
that are necessary to institute welfare reform.
Work Fair's a good example. Learn Fair, like
they're doing in Wisconsin, is a good exam-
ple. And the States are innovating. It is their
responsibility, and we are trying to give them
the support through waivers. So, I would sug-
gest where you see hangups on it, let us know
because we are trying to see that there is
not bureaucratic opposition to moving for-
ward with these flexible approaches that re-
quire waivers.

These reforms create, actually, the most
important ingredients for success, and that
is personal power and personal responsibility.
We're getting more money to States for the
important things, programs that work. We've
increased spending on education, on Head
Start, conservation fund grants, and I'm sure
Sam mentioned this, transportation. And
don't think for a minute that we measure
progress simply in terms of dollars; we do
not. We measure it by results, and we fund
these programs because they work. Head
Start helps us achieve our six educational
goals. Kids starting school ready to learn—
this year we funded it so that every 4-year-
old will have that opportunity.

So, we're moving forward on what we feel
works. Jack's program, that I'm supporting
him on and have been trying to get through
Congress, the HOPE program, H-O-P-E,
enabling low-income families to own homes.
And I like HOPE for a simple reason: It is
a sensible program, and it makes good sense.
And when you own a home, I think we all
understand, you own a piece of the commu-
nity. And you have a dignity and a self-re-
spect that simply cannot be equaled in any
other way. You all look at the world dif-
ferently. You have an interest in improving
your assets and you have an interest in safer,
cleaner, better communities. And let me sim-
ply say, HOPE works.

And this pork-barrel spending—there was
an amazing article on that in the paper
today—doesn't, and we've asked Congress to
eliminate, totally eliminate 246 programs. All
of them have noble titles. All of them have
wonderful titles, and all of them have spon-
sors in Congress. But they are not needed.

And we are in tough financial times, and so we're trying to get rid of 246 of them and put the money where it gets results.

And at the same time, we've asked Congress to take a few steps to bolster confidence in Government and to strengthen the economy. We need real tools to cut spending. And I want that line-item veto. We're going to keep on pressing for it. We have, in signing statements, I have said that we'll refute, we just are not going to accept some of the language, and so far that's gone on through in the bills that I have signed.

But we want a line-item veto, and again, I'm going to take the case to the people for this in the fall. I want a balanced budget amendment. We couldn't do it overnight, obviously. But if we got it, it would discipline not just the executive branch, but it would discipline the United States Congress which appropriates every dime and tells us how to spend every single dime. We've got to cut the deficit without raising taxes, and if that takes an amendment, let's get the amendment and get the job done.

Secondly, I want Congress to stop passing these unfunded mandates. If there is one thing we hear the most about from States, from Governors or State reps or State senators, it is unfunded mandates. And a Federal mandate is a promise that's made up there on Capitol Hill and then paid for back on Main Street. But the subcommittee chairmen up there have not changed their thinking at all. One program after another is mandated, and thus a big burden placed on the States. And so we say to Congress: Stop passing the buck back. And if you pass a mandate, pay for it, and don't go and raise taxes.

Third, I want to put a lid on nuisance lawsuits. You know, the law should foster progress, not hinder it. And when fathers stop coaching Little League because they fear lawsuits, there's something wrong. And we've gone way too far. When doctors stop delivering babies because they fear lawsuits, something's wrong. And when people stop volunteering to help other people because they fear ambulance-chasing lawyers, something is wrong. And the madness must stop.

And we have legislation up there in the Congress sitting dormant. And here's one where we can take the case to the American

people in the fall. It transcends party lines. It transcends ideology—liberal, conservative. It just does not make sense to have so many of these lawsuits settled in such an outrageous fashion. So, we are going to take that case clearly and loudly to the American people this fall. The madness has got to stop.

We've drafted a model act to help people engage in voluntary service without fear of unfair suits. And I hope your States will use this model to draft your own tort reform laws. Alabama, as Perry was telling me and reminding me because I've known it, put together such a statute, got it passed in less than 4 months. Perry Hooper—where is he, he was here right a minute ago—right over here, sponsored the legislation, and we're very proud of what he's done. It's a model for other States, and it makes me redouble our efforts here to get something done on the Federal level.

I've asked Congress to act upon our "Access to Justice Act" which encourages people to seek alternatives to court. And it used to be a joke; you'd get upset and someone would say, "Don't make a Federal case out of it." Now the joke's on us, and we've got to turn that around. People still turn small squabbles into lawsuits, and they sit in courtrooms listening to lawyers bicker about problems that should have been solved some way, over a cup of coffee at home maybe.

The "Access to Justice Act," and I urge you to take a look at it, provides alternatives and puts an end to this madness. And I'd like to challenge you to pass your own "access to justice" reforms. Lead the way. And then I think that will send a powerful message to the United States Congress.

The Council on Competitiveness here, under the able leadership of Vice President Dan Quayle, has prepared two model State statutes which are outlined for you in the packets that I am told you were given today. Take it home, and think it over, and craft your own antilitigation laws. And wouldn't it be nice to create a law that results in fewer lawsuits.

And I don't like to have this many influential people gathered here without soliciting your support, for you to ask Congress to do its part to help the economy. We've got a good plan. It is good. There's a lot of special

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interests don't like parts of it, but it is a good, sound, stimulative plan. It will protect today's jobs, and it will create new jobs for tomorrow.

Congressional leadership also has a plan. And it will protect today's congressional seats, and it'll promise action tomorrow. So, we are locked in a real fight up there. We're short on numbers, but we've got the facts and we've got the merits on our side.

So I've given Congress a long-term plan, longer—I'd like to see it pass this year—to build the foundations for the next American century. An America that is healthy and well-educated and confident and free and better in research and technology, all of these things.

The health care plan, incidentally, that I came out with fits perfectly with yours. It improves our health care system, which provides the highest quality care on Earth. We've got health care problems, but one of them is not the quality of American health care. It is the best in the entire world.

And so, our program doesn't knock that aside to pass some mandated nationalized program. It gives everybody access to health insurance. And it lets people choose where to get treatment, which doctors they like. And when people make these choices, they feel more comfortable; they get treatments sooner, much sooner than under these nationalized programs. And our plan provides something better than socialized medicine's false promises: health care itself. So I urge you to take a look at this one. I think philosophically it will be right in tune with what we all believe.

My administration also understands that we've got to meet the challenges that lie over the horizon, the challenges of the 21st century. And our America 2000 education strategy encourages revolution, a new generation, literally, a new generation of American schools. It stresses excellence. It stresses accountability. It stresses involvement. It stresses choice. And choice closes the gap between the kitchen table and the teacher's desk. It gets families involved in education. And it gives parents power over their children's schooling. And I urge you to take a look at that program again. A lot of it does not have to be enacted in Federal legislation.

A lot of it can be done simply through innovation at the State and certainly at the local level.

The family really, when you look at the problems, is the key to our future. The mayors of cities in the National League of Cities, their executive board came in to see me. I mentioned this in the State of the Union. And all of them—Mayor Bradley of Los Angeles, a great, big city; the Republican mayor of a small town in North Carolina of about 2,000; and in between, mayor of Plano, Texas, and cities of that size—all came together, and they said, "The biggest worry we've got that clearly works against these problems in the cities is the decline of the American family."

And family is a key to our future. And it's been said that the best Department of Health and Human Services is the family. And it is. And it's also been said that what happens in your house—this was a quote by the famous Silver Fox that lives with me over in the White House, Barbara Bush—it's also been said that what happens in your house—and this is the way she put it, and I think it's very relevant—is more important than what happens in the White House.

And it's true. It is very, very true. And so I've asked this Commission that these mayors suggest we set up, this Commission on Urban Families, to find family policies that work, to ferret out Federal legislation that works against the family, to suggest Federal legislation that might bring the family together and might make an errant parent more responsible.

And our laws shouldn't encourage a single-parent household or fail to punish men who abandon their children and the mothers. They should promote whole and healthy families. And that's what the purpose of that Commission is. And then when we get its suggestions, I really want to share them with ALEC and other groups because I believe you'll find some real merit in what this Commission will come up with. I'm confident I know the direction they're going to take.

So, these are in the longer term proposal. But I've also submitted a short-term economic plan. And that provides two essentials for families in our Nation, jobs and security. And this plan—I've challenged the Congress

to move on it by March 20—stimulates investment. It energizes the real estate industry, and it cuts taxes that inhibit growth. And I've asked Congress, as I say, to pass it by March 20th, 4 weeks from today.

Now, very candidly, we're caught up in a political season here. And I have not been happy with what's come out of the Ways and Means Committee so far. The Democratic leaders have come up with a sorry plan. They want higher taxes, and they want higher spending. And they hope to buy off the people with a tiny, temporary tax cut. If you belong to an average family of four, their scheme will give you about a quarter a day. And even the tooth fairy pays more than that in there. *[Laughter.]*

And we Americans, we want a large and expanding economy that offers new options and challenges and that holds the promise of job security and employment opportunity. And frankly, I think the country has a reason to join me in being tired of the games being played. For 3 straight years we've tried to get a capital gains tax reduction. It would stimulate jobs. And all the people that control Congress do is say, "Well, it's a tax sop for the rich. This is a break for the rich." It isn't. When the Steiger amendment was passed in '78, new businesses were created; new jobs were created. And it would have the same effect now.

And we're competing in this world. And Japan has a capital gains tax, an effective tax of about one percent; Germany, I think it's zero. And we're asked to compete then with two hands tied behind our back in this important world competitive market which we cannot turn our back on.

And so, we're going to keep fighting for these things that stimulate this economy and get it moving. It is my conviction that if our first-time homebuyer credit is passed, and if our incentive through rapid depreciation is passed, and if our capital gains cut is passed—these are three of our seven points in this short-time program—it would send a signal of confidence to this economy. You don't have to see the effect of it when tax time rolls around. It will give us stimulation of confidence to the small business guy that might just say, "I'm going to take a chance. I'm going to open a business here."

And so, we really need help now trying to encourage the Congress to pass this program by March 20th. And out of the budget agreement of 1990, which had things in there I didn't like, there was one good thing in it. There were a couple of things that were pretty good. But there was one good thing in it: For the first time in history, we put caps, meaningful caps, on discretionary Federal spending. The critics forget that. Those caps are in place. They can work. Federal spending's up because you have S&L's, you've had bank problems, enormous problems outside of this. You've had the entitlements going up; they're outside of the caps. But the caps are the only protection the taxpayer has against the growth of discretionary Federal spending.

And now, as the election approaches, you hear a lot of talk by the Democrats, "We want to change it. We want to change the caps, knock down the walls." Please help me keep those caps in place. I will veto any attempt to change it, but we're going to need help to keep those caps in place to protect the taxpayer as best we can until we can get some Members of Congress on both sides of the aisle to share the values that you certainly epitomize and advocate.

So we're in a fight here. And I am going to take this one all the way. After March 20th they say, "Well, what are you going to do?" I say, "Well, I don't know," because I'm not going to give up until March 20th on trying to get this sensible, short-term, stimulative program through the Congress. But I guarantee you, if we fail, the message is going to be loud and clear. And we'll put it in very clear focus so the voters next fall are going to be able to make their determination as to what should have been done and those who stood against it.

So again, I would solicit your help in the time that remains between now and March 20. Help us on the short-term program. Advocate the things you agree with us on on the longer term program, all the things I've mentioned on education and research and family credits. These things are very, very helpful for the future.

So, thank you for what you're doing. I'm glad you came by. I wish we had a little more

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time, but I'm heading off to the South. You
guess why.

Thank you all very much.

Note: The President spoke at 11:42 a.m. in Room 450 of the Old Executive Office Building. In his remarks, he referred to Fred Noye, chairman, and Sam Brunelli, executive director of the council, and Perry Hooper, a council member from Alabama.

Nomination of Sigmund A. Rogich To Be United States Ambassador to Iceland

February 21, 1992

The President today announced his intention to nominate Sigmund A. Rogich, of Nevada, to be Ambassador to the Republic of Iceland. He would succeed Charles E. Cobb, Jr.

Currently Mr. Rogich serves as an Assistant to the President for Public Events and Initiatives at the White House in Washington, DC. Prior to this, he founded and served as the president of R&R Advertising in Las Vegas and Reno, NV, and Salt Lake City, UT, 1973-89.

Mr. Rogich graduated from the University of Nevada-Reno (B.A., 1967). He was born May 17, 1944, in Iceland. Mr. Rogich has two children and resides in Washington, DC.

Letter Accepting the Resignation of John E. Frohnmayer as Chairperson of the National Endowment for the Arts

February 21, 1992

Dear John:

I received your letter of resignation today and, with sincere thanks and appreciation for your service, I accept your resignation effective May 1.

I recall your coming to talk to me about this on October 24. At that time you told me you wanted to step aside. I told you then that I certainly understood your reasons for desiring to return to private life.

Your job is one of the most difficult in government. You have worked hard for freedom of expression; and yet, at times, as you have ruled against certain grants that you felt were beyond the bounds of common decency, you have been criticized.

I thank you for the integrity and commitment that you have brought to the National Endowment for the Arts.

No two people can agree in every instance on every grant or indeed on what is good art; in fact some of the art funded by the NEA does not have my enthusiastic approval. I expect some did not have yours, but this should not obscure the overall work of the NEA nor your contribution to it.

I thank you and wish you and your family well for a very bright future.

Sincerely,

George Bush

Mr. President:

Last October I told you of my desire to return to private life. Accordingly, I submit my resignation effective May 1, 1992.

I have appreciated the opportunity to serve you and the arts; you know how much your personal support has meant to me during these difficult times. You and your administration have accomplished a great deal and I'm sure the best is yet to come.

Sincerely,

John E. Frohnmayer

Note: These letters were made available by the Office of the Press Secretary on February 21 but were not issued as White House press releases.

Statement by Press Secretary Fitzwater on the Confirmation of Andrew H. Card, Jr. As Secretary of Transportation

February 21, 1992

The President is delighted that the United States Senate unanimously voted to confirm Andrew Card to be Transportation Secretary. As Transportation Secretary, Andrew Card

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Metzger has worked on Capitol Hill for then-freshman Congressman Patrick L. Swindall. In addition, she was the Atlanta office manager for the Georgia Reagan-Bush '84 campaign.

Ms. Metzger is a graduate of Samford University in Birmingham, AL, receiving a bachelor of arts degree in 1984. She was born in Decatur, GA, and currently resides in Alexandria, VA.

Remarks to the Small Business Legislative Council February 5, 1992

Thank you all very much. And Phil, thank you for the welcome, the kind introduction. Bob Banister, congratulations on being named chairman-elect of the SBLC. John Satagaj, thanks for your hard work in putting this wonderfully successful meeting together. And greetings, also, to Ted Olsen and John Kemp, who has done wonderful work in helping small business implement the ADA, the Americans With Disabilities Act. It was great a minute ago—I don't see him this second—to see my friend, Josh Smith, the Chairman, sitting over here, of the President's Council on Minority Business, a successful businessman himself.

Today, what I wanted to do is to follow up on some of the things that I discussed in the State of the Union Address. I really do enjoy going up to the Hill to deliver the State of the Union. It's the only time all year that you can get so many politicians so polite and understanding for so long. [Laughter] It's a wonderful feeling.

As you know, we've had a hectic week, from the State of the Union Address to releasing the budget to meeting with Boris Yeltsin. During this Presidency, I think it's fair to point out that the cold war has drawn to an end. We led the coalition that shoved Saddam Hussein out of Kuwait. Peace talks between ancient enemies have begun in the Middle East. The Soviet Union has collapsed, and we've begun working with its successor States. The whole world has changed. And still, some people say, "Hey, is that all? What have you done for us lately?" [Laugh-

ter] I'd say, no, but it's a good start, and we recognize that we've got many other things to be working on, as I've been trying to do.

And now that we can look past the burdens of the cold war, we can do what we do best: create, innovate, build, produce, and lead. This afternoon, I'm going to be signing the Economic Report to the President. And it will not only describe and explain the causes of our current economic difficulties, it will also explain why virtually all economic analysts expect this economy to improve. More importantly, it will explain why if Congress enacts my progrowth policies, the improvement in the economy will be quicker, stronger, and much more certain.

In the State of the Union, I presented a comprehensive action plan for our economy. Today I want to discuss what that means for you. Think of this as my "small business State of the Union." My plans start with what I can do as President without any congressional action required. We've taken a whole series of actions—I won't mention them all—but a series of actions to stimulate investment and get the economy moving. These, as I say, don't need congressional approval.

A couple of initiatives have earned kudos from this crowd. First, I have ordered major Departments and Agencies to put a 90-day hold on implementing new regulations. Regulations ought to foster economic growth, not crush it. And we're going to make sure that the days of overregulation are over once and for all. So, we're going to take a fresh look at the rules and regulations Washington hurls your way. We'll get rid of those that do nothing more than destroy jobs and weigh down businesses. And in this, we will pick some that will speed up and foster growth and support jobs. We're going to emphasize those regulations.

But that's not all. We also declared war on nuisance lawsuits. Yesterday I announced the "Access to Justice Act of 1992." That bill will give Americans less expensive and easier alternatives to trial. Let them solve problems out of court. And we've got to stop America's long liaison with the lawsuit. If we were as good at rewarding success as we are at suing each other, this country would be a lot better off. And that goes for health care, too. With those outrageous, sky-high malpractice

awards, we've got to get those under control, and we are going to try hard.

And now the American people know better than to think that anyone, including a President, can wave a magic wand and revive something as complicated as our economy. Congress needs to do its job. And that means—and we were talking with your leaders about this earlier—that they should pass the short-term compact economic growth package that I put before the Congress and pass it by March 20th.

You know, we're all realistic that we're going into a political year. And I'm fairly realistic that we're going into a political year—[laughter]—but I would simply point out that we have time now. There's a period of time that we can lower that political controversy and get something done, a rifleshot approach to stimulate this economy. And that's where I'm going to need your help. So here we go. The plan starts with the basics. It stimulates investment by improving the alternative minimum tax and creating a new 15-percent investment tax allowance.

L.W. Locke of North Carolina—and I'm told he's in the audience today—understands. He appreciates these changes. He's delayed building a convenience store/gasoline station because he just can't do it under our present system. The investment tax allowance would let him buy fixtures and gas pumps and fuel storage tanks, a \$1 million commitment. So don't tell me—here's a practical example—don't tell me, or don't listen to the voices that say this plan is a gimmick, and don't try to tell that to L.W., either, because he's right out there trying to move forward with investment.

I also want to fire up the engine that traditionally pulls us out of tough times. And that's the real estate industry. My plan helps builders. Ask Jay Buchert, a Cincinnati homebuilder, also here with us today. He's thrown his support behind this plan. The National Association of Home Builders predicts that my bill will create at least 415,000 construction industry jobs and set off \$20 billion in economic activity associated with homebuilding. Now, that's no gimmick. That is no gimmick. That means jobs, good, solid American jobs.

And I also want to reward everyone who believes in the American dream, trying to make it work. I want Congress to cut the long-term tax on capital gains. And I want it cut to a maximum rate of 15.4 percent. The world's fastest growing economies and our major competitors, including Germany and Japan, have one thing in common: They tax capital gains at much lower rates than we do. And in many cases, capital gains isn't taxed at all.

It's ironic. Many politicians who oppose the capital gains tax cut also complain that we're not competitive. Well, they can't have it both ways. And if they really want us to be competitive then they'll slash the capital gains rate and do it now in this comprehensive short-term package. The capital gains rate cut will help families who own homes, help people who own farms, help business owners, and will help everyone who invests in our future by purchasing stock.

Now, you've heard some people claim that a capital gains cut serves only the rich. Well, maybe those people should get out of Washington and talk to people around our country. Retirees say they can't sell their homes because capital gains rates punish them too much. Business owners say they can't expand their businesses; capital gains rates punish their success. A man from Florida, a retiree who built his own business, invested, saved, put it perfectly: He worked hard for years, and now he can't afford to cash in on his success. He said, "We are being penalized for having foresight." Well, I'm tired of people getting slammed because they risked their money and effort and succeeded. And it's about time the Congress realizes we should reward these people, not turn them into targets of envy. And that, of course, creates jobs. More people that take risks and start businesses, that means jobs.

So, let's get to the heart of this thing. The people in this room, small businessmen, investors from the National Venture Capital Association, you understand the gritty fundamentals of business. And you are the real experts. Well, America really needs your help now. So, don't accept no for an answer anymore. I'll take the heat on whether it's a tax cut for the rich or not, but you make the case as to what it can do to stimulate jobs

reward everyone who has made the American dream, trying to get the Congress to cut the capital gains. And I want a rate of 15.4 percent, growing economies and jobs, including Germany, all of them have something in common: They have much lower rates than we have, capital gains isn't

politicians who oppose it also complain that it's unfair. Well, they can't have it both ways. They really want us to slash the capital gains now in this package. The capital gains will help families who own businesses, help farmers who own farms, help everyone who is purchasing stock.

Some people claim that it only helps the rich. Well, it should get out of Washington and go around our country. It's not selling their homes because they're being punished. They say they can't expand their capital gains rates. Punish them from Florida, a retiree in business, invested, saved, worked hard for years, and now he's being penalized. Well, I'm tired of people who take risks and succeed. And Congress realizes we need to turn them around that, of course, create jobs that take risks and means jobs.

Heart of this thing. The small businessmen, international Venture Capital understand the gritty fun. And you are the real thing. Really needs your help. No for an answer any- on whether it's a tax cut, but you make the do to stimulate jobs

and new businesses in this country and demand that the Congress cut the capital gains rate now.

And I might remind you when you do this work, remember that there were majorities in both Houses of Congress for what I'm proposing right now not so many months ago. The field is there for fertile reaping. And I tell you, I really hope that you can get up and help us do this job.

I'd also like to ask you that you demand action on my short-term plan without delay. You know, when I hear someone complain that this short-term plan won't do much, I wonder myself: Hadn't any of these guys ever run a business? Do they appreciate the difficulties of getting a loan, finding an investor, purchasing what you need, filling out all that Government paperwork? It's about time somebody understands that you need just a few minutes to concentrate on the customer. That's what some of this is going to do.

You may have detected this, but I'm tired of the term "fairness" being corrupted by political demagogues. You want fairness? Here's something fair: My plan will work for all Americans, and it will create jobs. How's that for fairness?

Congress has the legislation. It has a March deadline, March 20th deadline. And I ask you to circle the date on the calendar. Much beyond that, politics takes over. We've got a chance now to get something done. So while you're in Washington, visit those congressional delegations. Let them know that you want this package passed. You are at the center of this plan, and you create, small business, you create the vast majority of jobs in this country. And I am determined to support you to create more jobs.

I believe it is in your power to help lift this country and help get it moving again. I really am confident that you will do just that. Since Members of Congress will be home on break next week, drop by their offices, let them know how you feel. Send this message: No more delays, no excuses, no substitutes. And don't delay. Decision day is 6 weeks from Friday. I didn't mention all the ingredients, but that's the rifleshot, short-term, incentive-building, job-creating part of this package. Now, for the longer term, I've

also proposed an ambitious long-term agenda to ensure that our economy will continue leading the world for decades to come.

And let me discuss a critical issue in that plan, health care. I know health care has become a problem for many of you and your employees. And tomorrow I'm going to be announcing in detail my comprehensive health care plan. And I know you'll like it. I believe you'll like it a lot. People today worry about health care, yes. It costs too much, great concern. It's tough to find good comprehensive coverage. And you can't make choices like you used to. And you can't count on coverage if you move and change jobs or fall victim to a debilitating condition or disease.

I believe our plan solves these problems. And my plan ensures that people can find health care, choose health care, afford health care, and keep health care. I know that everyone with a plan promises the same thing, and that's why you have to use your common sense in evaluating the various proposals. And when you get right down to it, there are two fundamental health care choices. We can adopt a system that's been a proven failure all over the world, nationalized health care. Or we can reform our present system, which has its faults, certainly, but which also provides the highest quality care on Earth. People come from all over the world to participate in our health care. And if you want the freedom to choose your own doctor, to hold the line on costs, and to improve access to health insurance coverage, push for my plan. Look it over carefully. We're going to need your support. And it gives everyone, and I emphasize everyone, access to the world's best health care. And it doesn't exclude anybody. So, take a look at this and support us if you can.

And finally, I'd like your help on one other item. The Federal Government is too big, and it spends too much. And it's just that simple. Now, my budget holds the line on new spending. It does not violate the only protection the taxpayer has, that's the spending caps that are now in the law. These caps are the only protection the taxpayer has against more spending by Congress. And it pulls the trapdoor on a host of federally fund-

ed programs, all with noble titles—246 programs to be exact—that we simply do not need. And you shouldn't have to pay for them. And it's that simple. Each one has a protector, but I think the time has come, and the times demand that we take action on these.

And also, get Congress to give me an important weapon to control spending. This one may be a little difficult, but get them to give me that line-item veto and give me a shot at it. Forty-three Governors have it; give the President a shot. *[Laughter]*

We must stop imposing mandates on others without paying for those mandates. Too often mandates, these mandated benefits dictated out of some subcommittee, mean mandated deficits. And that just isn't right. It's not fair to the States; it's not fair to the localities and the communities. And it's got to stop.

The bottom line is we've got a lot of work to do. And we can't let anyone stall us this time. Americans can't wait to get this economy moving. We want to throw off cynicism and fear. We want to shake away the gloom and the doubt. And I am, frankly, very tired of the professional pessimists who don't have any fresh ideas for the future and who literally feast on bad times and hard feelings and who talk as if our best days have passed by. They just don't understand.

Wouldn't you hate to go through life thinking the only way I can get a step up the ladder is if somebody else is hurting? They just ought to get out of the way, these gloom-sayers and these pessimists. We can start a new economic revolution in America, one that builds on our innate optimism, our ambition, our determination, our willing to take risks, and our pride. And we're going to do just that. And that revolution will start a lot sooner if 535 people in Washington meet by the March 20th deadline that I've proposed up there.

So let them know in no uncertain terms: Business as usual won't get this job done; election-year politics as usual won't do. And tell them, we need action by March 20th. And with your help, I believe we can get it.

Thank you all very, very much. And may God bless the United States.

Note: The President spoke at 10:38 a.m. at the J.W. Marriott Hotel. In his remarks, he referred to L.W. Locke of Eastern Petroleum Corp., in Enfield, NC; Robert Buchert, of American Heritage Construction and Development Corp., in Cincinnati, OH; John Kemp, executive vice president of the United Cerebral Palsy Association; and the following officers of the SBLC: Phil Chisholm, chairman, John Satagaj, president, and Ted Olsen, treasurer.

Proclamation 6402—To Amend the Generalized System of Preferences **February 5, 1992**

By the President of the United States of America

A Proclamation

1. Pursuant to sections 501 and 502 of the Trade Act of 1974, as amended (the 1974 Act) (19 U.S.C. 2461 and 2462), and having due regard for the eligibility criteria set forth therein, I have determined that it is appropriate to designate Estonia, Latvia, and Lithuania as beneficiary developing countries for purposes of the Generalized System of Preferences (GSP).

2. Section 604 of the 1974 Act (19 U.S.C. 2483) authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTS) the substance of the provisions of that Act, and of other acts affecting import treatment, and actions thereunder.

Now, Therefore, I, George Bush, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States of America, including but not limited to title V and section 604 of the 1974 Act, do proclaim that:

(1) General note 3(c)(ii)(A) to the HTS, listing those countries whose products are eligible for benefits of the GSP, is modified by inserting "Estonia", "Latvia", and "Lithuania" in alphabetical order in the enumeration of independent countries.

(2) Any provisions of previous proclamations and Executive orders inconsistent with the provisions of this proclamation are here-

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an at 4:31 p.m. in arks, the President r Kiichi Miyazawa t available for ver- his exchange.

Statement by Press Secretary Fitzwater on the President's Meeting With President Ronald Venetiaan of Suriname

February 3, 1992

The President met today with President Ronald Venetiaan of the Republic of Suriname.

The President expressed his satisfaction at the success of Suriname's elections and orderly transition to democratic civilian government following the military coup in December of 1990. He stressed the United States deep commitment to fostering democratic civilian rule throughout the hemisphere and emphasized that President Venetiaan enjoys our full support for his efforts to strengthen democratic institutions, undertake economic reform, and curb narcotics trafficking.

The two Presidents discussed the Surinamese Government's plans for economic reform and adjustment. The President pointed out that effective action in this area will enhance Suriname's ability to stimulate private investment and trade, which are the key to long-term growth.

The two Presidents also discussed the threat to Suriname of increased narcotics trafficking, and the President pledged our support for Suriname's counternarcotics efforts.

President Venetiaan is making his first visit to the United States since his inauguration in September 1991. He entered office as a result of elections held in May 1991 with the participation of observers from the Organization of American States.

Message to the Congress Transmitting a Report on United States Government Activities in the United Nations

February 3, 1992

To the Congress of the United States:

I am pleased to transmit herewith a report of the activities of the United States Government in the United Nations and its affiliated agencies during the calendar year 1990, the second year of my Administration. The re-

port is required by the United Nations Participation Act (Public Law 264, 79th Congress; 22 U.S.C. 287b).

George Bush

The White House,
February 3, 1992.

Message to the Congress Transmitting the Annual Report of the Federal Labor Relations Authority

February 3, 1992

To the Congress of the United States:

In accordance with section 701 of the Civil Service Reform Act of 1978 (Public Law 95-454; 5 U.S.C. 7104(e)), I have the pleasure of transmitting to you the Twelfth Annual Report of the Federal Labor Relations Authority for Fiscal Year 1990.

The report includes information on the cases heard and decisions rendered by the Federal Labor Relations Authority, the General Counsel of the Authority, and the Federal Service Impasses Panel.

George Bush

The White House,
February 3, 1992.

Remarks to the National Grocers Association in Orlando, Florida

February 4, 1992

Thank you for that warm welcome, and please be seated. And Tom, thank you for that wonderful introduction. Thanks also to Bill Confer, your chairman. And before we get started, I don't know where they are, but I'd like to recognize two outstanding Congressmen from this area, Bill McCollum and Cliff Stearns. And also a former Congressman who is actively involved with me, Bill Grant, of Florida. You have three of the best right here with you today.

And it's a great pleasure, and I really mean that, to be here with this enthusiastic group. I originally had planned to be at your dinner

last night. But then I found out it was called the Asparagus Club Banquet. [Laughter] Thought I'd better not take a chance. And you know why, dangerously close. [Laughter] Okay, Barbara won the broccoli war. I said what I thought, and she got out and received all these broccoli growers. And sales shot up about 500 percent. [Laughter]

You all know, I think, of my love for sports. And this being an election year, my competitive juices are flowing more than ever. And so, today I'm making an announcement that many of you have been expecting for a long time. I'm officially declaring my entry into your best bagger contest. Just one question: Paper or plastic? [Laughter]

I'll always remember—and Tom referred to it—but from a personal standpoint, I'll always remember that warm reception that you all, the NGA, gave me when I addressed that 1985 convention. It was in New Orleans. You gave me a good education about your industry then, and I remember it still. A typical NGA member is a family-run business. Many of you carry on legacies built through the vision and sacrifice of a grandmother or a grandfather. Just met one of your directors. She was a third-generation in the grocery business, perhaps an immigrant to this country, some were. You work on the thinnest of profit margins. You challenge one another with bracing competition that clearly benefits our consumers like no others in the world. And today, as always, your success as community grocers depends not just on the bottom line but on the old-fashioned virtues of being a good neighbor.

Since I last met you all in 1985, the world has changed. We've got a lot to be grateful for. We won the cold war. We led a coalition in the Gulf to crush Saddam Hussein's aggression in Kuwait. We've created a world with the prospects of unprecedented prosperity and peace. But we've also run into some hard times here. Our economy has slowed down. We must get it fired up again.

The professional pessimists tell us America has become weak and disabled, that our economy has fallen, and it can't get up. Well, that's just plain bunk. It's not true. And I'm going to tell you what we can do about it. Day by day and step by step, we're going to get ourselves moving, and we'll do it as

Americans always have. We'll combine our common sense, our work ethic, and our determination with progrowth policies. With these, we'll carry the entire world into the next American century. You can bet on it.

You don't have to be some rocket scientist to understand how. You stick with the basics. And I proposed a commonsense comprehensive action plan last week in my State of the Union Address. It gets investment going, because you can't build new businesses and create new jobs without new investment. It strengthens the industries that historically have led us into recoveries, especially real estate and housing. It hacks away obstacles to growth. It cuts the Federal deficit by holding back spending. Government is far too big, and it spends too much. And I am going to keep it within its limits of this budget agreement that is in place right now.

Ask yourselves the question: How free are we, really, when the Government gobbles up 25 percent of our GNP? I'm demanding, I need your support, that Congress get serious about this. One thing, I've listed 246 programs that I want cut out this year, 246. Each one has a protector; each one has a noble title. None of them is essential to the well-being of the United States of America. And I want something else. I want that line-item veto so I can enforce real spending disciplines. Forty-three Governors have it.

We've got to get Washington back to common sense. To do that, I really mean this, I need your help. I know you can deliver. You know your neighbors; they know you. The grocery business grows when your neighborhood grows, when the Nation's economy grows. I've asked Congress to enact some laws that will create jobs by getting our economy growing again. And I've set a deadline, March 20th. I ask you to circle that Friday on your calendar. Remember this deadline. Congress needs to take a few simple steps to create good American jobs, now.

The Capitol Hill hearings on my program begin today. But I must say, too often when I send progrowth proposals to Congress, all the public hears is sloganeering about fairness. This twists a good concept into a weapon of envy and divisiveness, desire to divide America along class lines. I don't look at it that way. Here's what fairness means to me:

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It means if you want to work, you can get a job. It means if you have a good idea, you'll get a chance to test it, or if you build a business, you don't lose your earnings to excessive taxes or overregulation. That's what fairness means to me. Above all, the most important test of fairness for my plan is that it will work for all Americans. It will create jobs.

And now, here's what I want by March 20th. And I set that date because I do believe we have a window in which we get something done, even though this is going to be a very controversial and difficult national election year. Here's what I want: First, incentives to make productive investments. These involve a 15-percent investment tax allowance and needed changes to the alternative minimum tax. Now, these will encourage business to invest in equipment and become more productive. I just took a tour through the exhibits here, amazed by some of the technology. These proposals will stimulate that kind of investment and will help individuals invest in high technology or whatever machinery is needed.

Second, we need incentives to build and to buy real estate, a change in the passive-loss rules for active real estate developers. We need penalty-free withdrawals from IRA's for first-time homebuyers and a \$5,000 tax credit for the first purchase of a home. Housing economists predict that my plan will mean an extra 200,000 homes built and 415,000 new construction jobs to build them. Real estate and housing, with this stimulus, we'll lead our way into active recovery.

And third, incentives to succeed: Cut the capital gains tax. This tax hurts anyone who has made a sensible investment in a home, a business, or a farm. None of our key competitors taxes gains at high rates, world global competitors. Let's stop penalizing savings and investment. Let's stop punishing excellence. And yes, let's talk about fairness. Lower capital gains mean more investment, and more investment means more jobs. So, let's get that capital gains tax cut, now.

Three measures, three pieces of common sense, three things Congress should do by March 20th. I know that Congress will listen to you, you come right from the grassroots. And I'm counting on your help. In the meantime, I've initiated some reforms that will get

the economy moving without having to wait for Congress to act. I've imposed a 90-day freeze on Federal regulations that could hinder economic growth. And during that period, all Departments and Agencies will review regulations, old and new, and when possible, stop the ones that will hurt growth and speed up those that will help growth.

I see from your convention schedule that you have a workshop entitled "The Regulators Are Back." No wonder. You can't get through a day without having to worry about what some regulator is going to do to you through some thoughtless regulation. Regulations may have stated aims as wholesome as Mom and the apple pie. But you know better than anyone that when regulators carry that regulation too far, there won't be any apple pie for Mom to buy.

I ran a council on deregulation for 8 years as Vice President. And I'm here to assure you, we've not lost the spirit of deregulation. I want you to be able to spend your time working on what you can do for your customers rather than fretting about what some regulator might do to you.

And I'm also fighting hard against this epidemic of lawsuits. The costs and the delays in our legal system are a hidden tax on every single American consumer, on every business transaction in America. And that's why I'm sending to Congress today a reform bill, the Access to Justice Act of 1992. And my reform proposal will give Americans cheaper and easier alternatives to trial. And my plan will halt needless lawsuits by making changes in the way some attorney's fees are awarded. And let's stop America's love affair with the lawsuit. If we're as good at rewarding success as we are at suing each other, we'd be way ahead of the rest of the world. I might say parenthetically, health care costs would be an awful lot lower if we didn't have a lot of frivolous lawsuits going after these doctors for malpractice.

One of the great lessons of our times is this: Freedom and cooperation work, big Government doesn't. And after 70 years, the new leaders in Moscow recognize that total Government regulation produces only one thing: total failure. And now, the Russians—I had a fascinating visit with Boris Yeltsin up at Camp David on Saturday—the Rus-

sians want to try something different, like grocery stores with groceries on the shelves. [Laughter] This man's put into some tough reforms there. Got to stay with him. Got to help him make them work.

Isn't it ironic, at the exact moment the world is turning to our values of more economic freedom and competition, some in the United States Congress want to go just the opposite way. And here's an example of the trouble brewing in Congress: That's the so-called FDA enforcement bill. I'm sure those of you who sell your own private-label groceries aren't exactly thrilled by the prospect of more legal and accounting and paperwork burdens. But that's just what some in the Congress want to do. Well, let me tell you in no uncertain terms: the time for overregulation is over. And if they send me any more legislation with excessive regulation in it, I'm going to veto it and send it back. It's going right back up there.

Again, the Congress can help get the economy moving if it will just do the right thing. Last week one Member of Congress, a Democrat, said it might be smart politics for the Democrats to meet the deadline and pass my plan intact. I can't say what their motives may be, but I know one thing, my plan will help the American people. So let me take the heat. I know that my program will get the economy moving again. And again, urge the Congress to pass it intact by March 20th.

March 20 isn't a moment too soon to enact this short-term program. But we also must take a longer look, look to longer horizons. And I proposed a long-term plan in my State of the Union Address. Let me just give you a couple of the highlights here, some of the highlights.

First, let's create more American jobs by opening up and expanding markets all over the world. A new GATT agreement, we're working hard to get one, will make the world trading system come to grips with the damaging tariffs and export subsidies in agriculture. And by tearing down economic barriers with Mexico and Canada, a new North American free trade agreement can lift us to new heights of prosperity. And make no mistake about this: A sound, free trade agreement will mean more American jobs, not less, more American jobs.

Second, let free choice and free markets reform this health care system of ours. This week I'm going to ask for a new credit to help those without health insurance, employed or not, to buy such coverage. My plan will assure that both American workers and the unemployed will have access to basic health insurance even if they change jobs or develop serious health problems. We can't improve health care by threatening the health of job-intensive businesses. The last thing we want is for companies to cut costs by cutting workers. And I am wholeheartedly opposed, as I believe you are, to schemes that cost jobs by mandating benefits that an employer must pay.

And thirdly, let's strengthen the family, the cornerstone of the American dream. Let's ease the burden of child-rearing. The personal tax exemption has not kept up with inflation. I'm asking Congress, immediately, to increase the exemption for each child by \$500. It's a significant move in the right direction, and for our kids' sake, we must do no less.

Look at my economic proposals and you will find straightforward, plain solutions to our problems. Some may complain that they lack the flash of an expensive new program or that they don't have quite the right political ring for this political year. But I'm not seeking spending for spending's sake. I don't want a fancy title on a bill that will shoot interest rates right up through the roof. I want results. My plan is sound, and it will work.

If you hear people in Congress gripe that they can't get the job done by March 20th, remind them, we won the Gulf war in 44 days. Surely Congress can pass my urgent domestic program in 52 days. Remember, Congress can act with lightning speed when it wants to. So, accept no excuses. Accept no delays. And accept no substitutes.

Please don't leave this message behind when you leave this convention hall. Take it home to your families, to your customers, to your neighbors. From February 8th till February 17th, your Congressmen will be home for the President's Day recess. That's a great time for you to go to their hometown offices and tell them to meet the deadline and to pass this plan. With an effort like this,

and free markets system of ours. This for a new credit to health insurance, employment coverage. My plan American workers and have access to basic they change jobs or problems. We can't by threatening the businesses. The last companies to cut costs I am wholeheartedly you are, to schemes ing benefits that an

then the family, the American dream. Let's child-rearing. The per not kept up with in- ess, immediately, to for each child by ove in the right di- sake, we must do

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Congress gripe that one by March 20th, he Gulf war in 44 pass my urgent do- s. Remember, Con- ing speed when it excuses. Accept no stitutes.

is message behind vention hall. Take to your customers, n February 8th till ngressmen will be Day recess. That's to their hometown meet the deadline h an effort like this,

I know we'll get their attention, and we'll get America moving again.

Thank you very, very much for this reception. And may God bless the United States of America. Thank you.

Note: The President spoke at 11:35 a.m. at the Orange County Convention/Civic Center. In his remarks, he referred to Tom Zaucha, president of the National Grocers Association.

Message to the Congress Transmitting Proposed Legislation on Access to Justice February 4, 1992

To the Congress of the United States:

I am pleased to transmit today for your immediate consideration and enactment the "Access to Justice Act of 1992". The purpose of this proposal is to reduce the tremendous growth in civil litigation that has burdened the American court system and imposed high costs on our citizens, small businesses, industries, professionals, and government at all levels.

A thorough study of the current civil justice system has been conducted by a special working group, chaired by the Solicitor General, Kenneth W. Starr. The working group's recommendations, which were unanimously accepted by my Council on Competitiveness, are reflected in the bill. The legislation seeks to reduce wasteful and counterproductive litigation practices by encouraging voluntary dispute resolution, the improved use of litigation resources, and, where appropriate, modified, market-based fee arrangements. Additional reforms would permit the judicial system to operate more effectively.

The Access to Justice Act would accomplish reforms in significant areas of litigation:

- a prerequisite for Federal jurisdiction over certain types of lawsuits (the amount in controversy requirement) would be redefined to exclude vague, subjective claims;
- prevailing parties could be entitled to award of attorney's fees in certain lawsuits brought in Federal court;

- the Equal Access to Justice Act would be amended to clarify and limit litigation over the amount of attorney's fees;
- innovative "multi-door courthouses" would be established to encourage utilization of alternative dispute resolution mechanisms;
- award of reasonable attorney's fees in disputes involving the United States would be permitted in appropriate instances;
- prior notice would be required, subject to reasonable limits, as a prerequisite to bringing suit in any United States District Court;
- flexible assignment of district court judges would be authorized;
- immunity of State judicial officers would be clarified and protected;
- the Civil Rights of Institutionalized Persons Act would be amended to encourage resolution of claims administratively; and
- improvements in case management in Federal courts would be effected.

I believe this proposed legislation would greatly reduce the burden of excessive, needless litigation while protecting and enhancing every American's ability to vindicate legal rights through our legal system. I recommend prompt and favorable consideration of the enclosed bill.

George Bush

The White House,
February 4, 1992.

Memorandum on Emergency Funding for the Organization of American States Mission to Haiti February 4, 1992

Presidential Determination No. 92-13

Memorandum for the Secretary of State

Subject: Emergency Funding for OAS Mission to Haiti

Pursuant to the authority vested in me by section 614(a)(1) of the Foreign Assistance Act of 1961, as amended, I hereby determine that it is important to the security interests

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on all the challenges we confront. And let
us pray that we will strengthen the values
that this great land was founded on, that we
will reverse any threat of moral decline, and
that we will dedicate ourselves to the ethic
of service, being what I call a Point of Light
to someone else, someone in need.

And in this work, we are not without inspi-
ration. We need look no further than the
handful of men who became heroes by their
courage, their strength, and above all their
faith—last of whom returned in December.
I'm talking about our hostages. And in brutal-
izing conditions, as we've heard this morning,
they prayed together daily in what they called
the "church of the locked door." They
unwove floor mats in order to make rosaries.
These men, who every day lived the story
of Job, treasured their first book, the Bible.
When Terry Anderson was released, one of
the first things he did was to thank strangers
across the world who had prayed that he be
set free. "Your prayers made a big dif-
ference," said this man who, imprisoned, had
rediscovered the faith that sets and keeps
men free.

There's another story from last year's news
that tells of the transformation of faith. While
it's a story familiar to all of you, it's intensely
personal to Barbara and me and to others
in this room. We lost a dear friend last
March, Lee Atwater, a restless, fiercely driv-
en, fun-loving good ol' boy from South Caro-
lina who rode life as hard and fast as he
could. But he also lived a kind of miracle
because his illness reintroduced him to
something he'd put aside, his own faith. And
in his last months, he worked intensely to
come to grips with his faith. And through
reading the Bible and through prayer, he
learned that, as he put it, "What was missing
in society was what was missing in me, a little
heart and a lot of brotherhood."

He was so right. Prayer has a place not
only in the life of every American but also
in the life of our Nation, for we are truly
one Nation under God.

May God bless this very special gathering.
For those of you who have come from over-
seas, for those of you from across our land,
for those of you right here in the Nation's
Capital, thank you for participating in this
celebration of faith.

Thank you very much.

*Note: The President spoke at 9:10 a.m. at
the Washington Hilton Hotel. In his remarks,
he referred to Senator Ted Stevens; evangelist
Billy Graham; Prime Minister Kamisese
Mara of Fiji; and National Symphony Or-
chestra director Mstislav Rostropovich.*

Remarks to the Greater Philadelphia Chamber of Commerce January 30, 1992

Thank you all very, very much for that wel-
come back. Please be seated, and thank you.
Please be seated. I don't want to keep Boris
Yeltsin waiting later on. [Laughter] Thank
you, Joe. Senator Specter and Joan, laboring
in the vineyards of the city council here,
we're delighted to be with you. And coming
up with us from Washington were two of our
great Congressmen from this area, Larry
Coughlin and Kurt Weldon, over here.

And may I, too, salute the mayor. I asked
Joe earlier on how was it going, realizing that,
as in Washington, things have been tough,
and across the country in many ways. But
I said, knowing a little bit about history in
Philadelphia, I asked this question, "How's
the mayor doing?" And Joe and everybody
else I've spoken to has said he's really hit
the ground in a wonderful way, going for-
ward, bringing out the best in this city. So,
I want to salute Ed Rendell and his wife,
Midge.

Joe Paquette, who introduced me, is the
chairman of the Greater Philadelphia Cham-
ber. That was a very enthusiastic presentation
he made about how things were going, so
much so that maybe he can make a little loan
to those of us in Washington, DC, who can-
not have quite that optimistic a report.
[Laughter] But I like that can-do spirit of
this chamber, and I'm grateful to Charlie, to
Charlie Pizzi, and to Joe and all the rest of
you that have put together this opportunity
for me, all of you at the chamber.

And so, thank you very much. I am happy
to be here in Philadelphia. As you can imag-
ine, these last few weeks in Washington have
been pretty high pressure, high pressure time

for me, what with all the experts and the instant analysis and the columnists giving unsolicited advice. Thank goodness the Super Bowl is over. *[Laughter]*

I am very pleased to be here, particularly pleased to be here today because American businesses, as represented by this group gathered here, have a unique perspective on the tough times we've been going through recently. And as businessmen and businesswomen, you can separate the sensational from the sensible, the sweet-sounding quick fixes from real solutions. When it comes to America's economy, we can't accept empty symbols and slogans. We need to work together—that's what I like, what Joe was saying about the way the mayor and you all are approaching it in this city—we've got to work together nationally and turn this economy around.

Tuesday night, I came before the American people to outline a program for doing just that. And we all know this is an election year. The air back in Washington has been thick with feel-good gimmicks that have nothing to do with true prosperity and everything to do with politics. We need to get down to business, literally. In the critical weeks ahead, common sense must replace partisanship. And I came here to ask for your help.

The plan that I put before Congress and the American people contained several action steps. And one of the most critical was this, to free up American businesses by clearing away the obstacles to growth: High taxes, overregulation, and Government deficits. And I've offered the only comprehensive plan that doesn't raise taxes, doesn't throw away the spending discipline now in place on the Congress, these spending caps, and doesn't cut defense beyond what's necessary for this country's security. But let me tell you the three words that really separate my plan from what I think of the rest of them: "It will work." Those three, "it will work."

Each of us has a role to play, so I am moving forward with steps I can take right now. You may remember I divided that State of the Union Message into steps I can take, short-term areas where we need legislation and then a longer-term program. Right now, I have instructed every Cabinet department

to speed up progrowth expenditures. And we estimate that will be as much as \$10 billion worth in the next 6 months. We don't have to go to Congress to get them to do that; we just accelerate the spending plans to try to give this economy an extra kick.

I directed the Secretary of the Treasury to change the Federal tax tables so that millions of Americans can choose to have the Government withhold less from their paychecks. Now, that's a large number. That could pump as much as \$25 billion into the economy this year alone. That is money in the pockets of working men and women to help pay for clothing or to help save for college or to help buy a new car. And after all, it is their money. And there has been this schedule where really there has been overwithholding. And this I think will give, for those who elect to do it—if everyone elected to do it, it would be \$25-billion, and I think that will give the economy a jolt.

I have asked Cabinet departments and Federal agencies to institute a 90-day moratorium on new Federal regulations that could hinder growth. We'll undertake a top-to-bottom review in the fields of energy, the environment, transportation, exports, financial services, and communications, among others. Here's the test: We will accelerate any regulations that encourage growth and the creation of jobs. And whenever possible, we will scrap those that tie the hands of business and impede growth. I know that I have regulatory responsibilities affecting safety in the workplace, for example, health, environmental protection. And I will not neglect those responsibilities.

But you know as well as anyone how Government, sometimes with the best of intentions, can hobble innovation and risk-taking, the lifeblood of a successful business. Government naturally tends to expand ever outward, its redtape oblivious to anything standing in its path. It touches everyone. Every regulation that reduces efficiency slaps a hidden tax on the consumer as well. From the tab on a bag of groceries at the checkout line to the sticker price on the showroom floor, every American takes a hit when the Government overregulates.

American businessmen and women need this freedom to experiment, to compete with-

penditures. And we much as \$10 billion this. We don't have at them to do that, pending plans to try extra kick.

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as anyone how Gov-h the best of inten-tion and risk-taking, ssful business. Gov-to expand ever out-us to anything stand-es everyone. Every fficiency slaps a hid-r as well. From the at the checkout line the showroom floor, ut when the Govern-

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out looking over their shoulders for Washing-ton's approval. Small businesses and those just starting up feel the sting of overregula-tion most of all. Yet these businesses drive America forward. They create most of our new jobs. They reinvigorate our commu-nities. They embody the power of the Amer-ican dream. I make this pledge: We will set America's dreamers and doers free and put an end to this regulatory overkill.

In some of this area I will need the help of the Congress, and I promise I will take the message as strongly as I can to the Con-gress in this regard. Even now, an untold number of hard-working, responsible men and women go without needed bank loans for starting up a new business or for investing more in an existing one. We've got to ease the credit crunch and give these people a chance. That's why we've given the bank reg-ulators more than 30 policy changes and clarifications to restore common sense and balance to the regulatory system.

I've mentioned this before, but in regula-tion, again, we have a responsibility. We don't want to go back to what is known as forbearance, where we neglect the soundness that is required. But there is regulatory over-kill. The people are afraid, I think, in some instances in the financial community because of the excesses of regulation. And we're going to try very hard to achieve a better balance.

Now, I've mentioned some of the things that I can do, and there's a few more. But Tuesday night I told Congress, directly chal-lenged it, told it directly what it must do. And I started with the obvious: No invest-ment, no new jobs. Congress must reward investment and stop punishing success.

For 3 years now, I have asked the Con-gress to lower the capital gains tax. And for 3 years, that essential growth measure has been pilloried and parodied as a windfall for the rich. Now, you and I know that claim for what it is: it's nonsense. Sixty percent, sixty percent of the people who benefit from lower capital gains have incomes under \$50,000. A windfall for the rich? By freeing up investment, a cut in the capital gains tax creates new jobs for those looking for work and better jobs for those who want to move up. A lower capital gains tax helps anyone who owns a small business or a farm, anyone

who owns a home, anyone who has a single investment. We're talking about helping every working man and woman and every re-tired person in this country.

We don't have time now for any more of this demagoguery on this question. Let me remind you, in Japan the effective capital gains tax rate comes to about one percent; Germany doesn't tax long-term capital gains at all. To create jobs, to restore a vibrant economy for all Americans, Congress must lower the capital gains tax. And it must lower the capital gains tax now, 15.4 percent.

With a few simple steps, taken right now, Congress can help get the housing industry—builders, investors, buyers, and sellers—back on its feet. To those young families who want to buy their first home but can't quite afford it, I say this: We can help put your dream within reach, and we will. I have offered a plan to allow first-time homebuyers to with-draw savings from IRA's without penalty and to provide a \$5,000 tax credit for the first purchase of a home.

I might say parenthetically that Senator Specter, your Senator, has been in the fore-front of fighting for the change on how IRA's are treated. He understands what this can mean in terms of stimulating the economy and helping the homeowner.

And I have asked Congress to mark the calendar. They must put this recovery plan in place by March 20. Yesterday, right after—the State of the Union was the night before, and yesterday morning, I went up to the Congress. And I met with the leaders of both the House and the Senate up on Cap-itol Hill, and I urged them to meet this time-table. I set the deadline because of a simple fact: The American people want action. They deserve action. Our States are working over-time; so are thousands of communities across the country. They're tightening their belts, aggressively facing the future. And every day, individual Americans are working hard to get this economy back on its feet, and it's time for Congress to do the same thing. It can be done in that timeframe.

What troubles me is if we let it drag on, it's going to get really caught up in the rough and tumble of 1992 national politics. People are crying out for help now, and the Congress can move. We've seen them do it on a wide

array of legislative initiatives, and they can do it on these stimulative tax changes. So, I ask every Member of Congress—and please tell them the same thing—to set aside now partisanship for just 51 days and give this plan a chance. Get the plan, put it to work.

Immediate growth, as I mentioned at the outset, is just one part of the picture, one part of our program. We've got to look even further ahead to ensure that when the American economy regains its strength, and inevitably it will, it stays strong.

We start by opening markets to American goods. In our trade negotiations, we will continue to push for open trade, pulling down the barriers that stand in the way of international competition.

To guarantee that American goods and services are the world's finest, we must guarantee America's preeminence in another field, in the field of education. Our America 2000 strategy will revolutionize education in this country, will create new American schools, places where our kids will learn the lessons they need for a new century. And it will allow parents to choose their children's schools. Choice means competition, and you understand as well as anyone what comes from competition. Competition inspires innovation and creativity. It inspires excellence. And that's why we are going to push for our program, we're going to push for school choice.

As I look at education and the fact that we are not where we should be in world standing, it isn't a question of a change here and there. It isn't a question of adding to programs that have failed, programs mandated in Washington. It is a question, literally, of revolutionizing. And that's what we tried to do when we set the education goals, working with Republican and Democrat Governors. That's what we're trying to do with Lamar Alexander in the lead for us, our Secretary of Education, as we take this America 2000 program all across the country. We need your help. It is the best possible investment for the future of this country.

Now, we need a healthy America, and that means reforming health care. I think everyone would agree we cannot afford our present system. But we've reached a fork in the road. We can either go the way of greater

Government mandates, leading inevitably to a state system of nationalized care, with the long lines and indifferent service that such a system creates. Or we can reform our private system, preserving the greatest possible patient choice, maintaining the quality of care which, for all its faults, is still the best in the entire world. That's the approach I outlined in a rather broad detail Tuesday night, and that's the approach that I will take when we announce the full detail of our plan next week.

We've proposed another reform, one that is crucial to creating jobs. America has become the most litigious society on Earth. Frivolous lawsuits are exhausting our ability to compete. If we were as good at rewarding success as we are at suing each other, we would be a century ahead of the rest of the world. Lawsuit madness gums everything up. Needed new products never reach the marketplace because of concerns over liability. In many areas, businesses are forced either to drive prices into the stratosphere or literally close shop.

My Competitiveness Council that's chaired by the Vice President, Vice President Quayle, has offered 50 concrete recommendations to restore sanity to our civil justice system. I've enacted some of these recommendations by Executive order. Others, however, require Congress to act. And with all respect, there are 62 lawyers in the United States Senate, a lot of lawyers up there on Capitol Hill. I realize that might present a problem, but it also presents an opportunity. And I'd like to see them move forward now with these changes to cap some of these outrageous areas of unlimited liability. It's driving our small businesses right flat into the ground and costing American workers jobs.

And finally, I can use Congress' help in another all-important area. We must get the Federal deficit under control. Now, let's face the facts: The Government in Washington is too big, and it spends too much. I have proposed a freeze on all domestic discretionary budget authority as well as a freeze on Federal domestic Government employment. And I have asked Congress to get rid of 246 federally funded programs. Now, some of them have very noble titles. But in these times,

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none of them is indispensable. And I'm going to call on Congress to get rid of them. I think we're talking about something like \$4 billion in this regard.

For too long, Congress has been violating an important principle of good government: Do no harm. It's been imposing its own habits on State and local governments, and the taxpayer ends up, as you may all know, by footing the bill. These unfunded Federal Government mandates, as they're called, require the cities, require the States to provide new services or institute new programs, but the Congress doesn't provide the money to pay for them. That means the local governments must pass along Congress' wish list to the taxpayer in the form of higher taxes at the local level.

Now, the National Governors' Association, made up, obviously, of Republicans and Democrats, continually urge the Congress to stop these mandates which are killing innovation, killing savings at the State and local level. From now on, if Congress passes a mandate, it shouldn't pass the buck. Congress must pay for the mandates it imposes without heaping on new taxes.

I've spared you some of the detail. But taken together, these and other steps that I've outlined will, in my view, reinvigorate our economy, give it the boost that it needs now, and ensure that it continues to provide opportunity and create jobs for all who want to partake. That is the promise America makes to her citizens. They have a right to expect no less.

Almost two centuries ago, Philadelphia's merchants gathered together at the city tavern to form this Chamber of Commerce. They looked out on a Nation almost limitless in possibility. A special kind of faith brought them here, that if they worked hard and worked together, their young country would allow them to fulfill their dreams.

America has changed dramatically in those 200 years. And yet, the essentials remain. The pessimists are wrong; the pessimists are wrong. We are going to pull out of these tough times. Inflation is down; inventories are down. The market has been expressing optimism in the future. Interest rates are down. This is no time for gloom and doom. It is time for action in Washington to restore

confidence and get this economy moving again.

And here's where you come in. We need your help. You can affect the way Congress approaches this program that I have outlined in some detail. We need your help. And with your help, we'll get that action, and we will reaffirm our country's rightful place as the world's leader for this decade and for the next century.

Thank you all very, very much for this opportunity. Thank you.

Note: The President spoke at 12:11 p.m. at the Wyndham Franklin Plaza Hotel in Philadelphia, PA. In his remarks, he referred to Joan Specter, Philadelphia city councilwoman, and Charles P. Pizzi, president of the Greater Philadelphia Chamber of Commerce.

Meeting With Japanese Prime Minister Miyazawa in New York City January 30, 1992

The President. This gives me a chance, with our friends in the press here, to tell you how much I appreciate your hospitality.

The Prime Minister. Let me tell, Mr. President, to all the audience that we will deliver all we promised to you.

The President. I never doubted—

The Prime Minister. I make it very, very clear to the audience.

The President. I never doubted it.

The Prime Minister. There will be no misunderstanding about—

The President. Let me make clear that that was never a doubt in my mind. And secondly, I'm very grateful for the many manifestations of friendship and hospitality. And you, yourself, just went out of your way on a very personal basis.

The Prime Minister. Oh, yes.

The President. So, it's most appropriate that we see you when you first get off this airplane. But I don't want to take too much time.

The Prime Minister. You are very kind, very kind.

The President. They'll be leaving us very soon now and—[laughter]—and we can talk.

Weekly Compilation of
**Presidential
Documents**

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Monday, February 10, 1992
Volume 28—Number 6
Pages 191-230

308 LISD

Pres Documents

At the end of December 1991 Ambassador Ledsky prepared for his new consultation mission to the Eastern Mediterranean. His mission began on January 7, 1992, and will be the initial item in my next bimonthly report.

Like U.N. Secretary General Perez de Cuellar, I am disappointed that circumstances did not allow the Cyprus issue to be resolved in 1991. I would like to take this opportunity to add my personal thanks to Secretary General Perez de Cuellar for his tireless efforts over many years and share with him the sentiment he expressed in the final line of his final report on Cyprus: "... the long overdue solution can be reached and the two communities can live together in Cyprus in harmony, security, and prosperity."

Sincerely,

George Bush

Note: Identical letters were sent to Thomas S. Foley, Speaker of the House of Representatives, and Claiborne Pell, chairman of the Senate Committee on Foreign Relations.

**Letter to Congressional Leaders
Transmitting a Report on
International Agreements
February 25, 1992**

Dear Mr. Speaker: (Dear Mr. Chairman:)

Pursuant to subsection (b) of the Case-Zablocki Act (1 U.S.C. section 112(b)), I transmit herewith a report prepared by the Department of State concerning international agreements.

Sincerely,

George Bush

Note: Identical letters were sent to Thomas S. Foley, Speaker of the House of Representatives, and Claiborne Pell, chairman of the Senate Committee on Foreign Relations.

**Message to the Congress
Transmitting the Annual Report on
Alaska's Mineral Resources
February 25, 1992**

To the Congress of the United States:

I transmit herewith the 1991 Annual Report on Alaska's Mineral Resources, pursuant to section 1011 of the Alaska National Interest Lands Conservation Act (Public Law 96-487; 16 U.S.C. 3151). This report, containing pertinent public information relating to minerals in Alaska, as gathered by the U.S. Geological Survey, the Bureau of Mines, and other Federal agencies. This report is significant because of the importance of the mineral and energy resources of Alaska to the future well-being of the Nation.

George Bush

The White House,
February 25, 1992.

**Remarks at a Bush-Quayle
Fundraising Dinner in Los Angeles,
California
February 25, 1992**

Thank you all very, very much. And what a pleasure it is to be here with Pete Wilson, to be introduced by this man who is doing so much for the State. And thank you for heading our campaign and being at our side today. It is a pleasure to see you and Gayle. May I thank our master of ceremonies, Johnny Grant; say to the next team, Rabbi Greenbaum and Cheryl Ladd, who did a great job on the pledge without missing a beat; and Bobby Britt who did the national anthem. And thanks to everyone who has organized this extraordinary gathering. What did you do? Tell these folks that they had moved the Academy Awards to tonight, I think, when we look around back here. And I'm very grateful.

And let me just say it's also a great pleasure to see Don Bren, who is one of our national cochairmen, and Lod Cook, another one. And thanks to both of you for making this a highly successful event. Greetings also to Bobby Holt, who is our national finance

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chairman; former Secretary Bob Mosbacher, who did a superb job as our Secretary of Commerce, who is the chairman of our campaign; and all the other Bush-Quayle vice chairmen here tonight.

What an amazing crowd and what enthusiasm. And you all make me feel so young, especially Bob Hope. [Laughter] You know, Bob told you only half the story. That story he told was true about Desert Storm. He went over there, but what he forgot to tell you because of his modesty is I got more reports back from Norm Schwarzkopf and from Powell and from all of them about the lift that gave to those kids, many of whom had been months sitting out in the desert. And we're very, very grateful to him.

And I'm touched, to paraphrase John Kennedy, I'm touched by your warm response, but not half as touched as all of you have been. This has been a big success.

Let me start tonight by sharing my concern for all the many southern Californians who have been ravaged by the record floods here. And I'm pleased to say that today, on Air Force One, I signed a declaration to provide much-needed disaster relief to flood victims. You're hurting, and we'll get you help. And the Governor promptly moved on that for the State.

I want to talk tonight about some of the challenges that we face, about the decisions that will make this election year, that really are going to chart this country's history for the next 5 years. And let me say it straight: What Government can do and what it can't do, and what I will do as President, and then where I'll need your help.

Let's start with the number one issue on everyone's mind, and that is the economy. One month ago, as Pete said, in that State of the Union, I laid out a two-part economic action plan: for the short term, a plan to get this economy moving as early as this spring, and then a longer term plan to keep America competitive in the next century. And I asked the Democrats who control the Congress to act for the good of the country, to lay politics aside. And I gave Congress those 52 days to pass my plan.

And since then, some Democrats have been wrestling with their consciences. It's still too early to predict who will win. But

instead of working on my plan, the House Democrats surfaced their own. And true to form, it is a temporary tax cut in exchange for a permanent tax hike. And that tax cut works out to 25 cents per person. Sounds big in a package for the consumption in the political arena, but that's what it makes, 25 cents per person. And to make it permanent the Democrats would have to jack up the income tax rate for every American making more than \$35,000 a year, \$35,000. For a plan that is supposed to help the middle class, that's going to come as real news to a lot of factory workers and schoolteachers and everyday Americans struggling to make ends meet.

So let's face it, the Democrats are going to tax the middle class for the same reason that Willie Sutton robbed banks, because that's where the money is. They say they're going to hit the rich, and they end up hitting the small guy.

Now, my economic plan is built on seven specific proposals to stimulate this tired economy. And if you want to give American companies a reason to expand, then give them—and this can be done in the remaining days—my investment tax allowance. Speed up depreciation. And if you really want to do something about boosting the sagging housing market and if you want to give American families a shot at the American dream, then give those first-time homebuyers what my plan does, a \$5,000 tax credit toward that first home. Give those young families a chance.

And finally, let me say this to the Congress: If you are serious about competitiveness and if you are serious about creating the jobs, then cut the tax on capital gains and stimulate investment.

That's not the only fight I've got with the Capitol Hill crowd. Take a look at national defense. And it is important to remind ourselves that 365 days ago to this very minute we were starting that flanking movement around the Iraqi army in the sands. And a few months before that, nobody dreamed we'd be faced with that kind of aggression. For decades, we faced a dangerous enemy abroad. And we fought those at home who would have stripped this Nation of the

strength that it needed to defend itself, those that always wanted to cut defense.

Republicans fought hard on both fronts. And winning the defense battle on Capitol Hill helped us win the cold war. And no one understood that better than my predecessor, Ronald Reagan. He stood for a strong defense and stood up for our principles. And now, with the collapse of the Soviet Union, imperial communism as we know it gone, we can reduce defense spending substantially.

I sat down with the Joint Chiefs and Chairman Powell and the Secretary of Defense, and we worked out a sensible defense build-down. We're talking about \$50 billion more cut. One that will recognize post-cold-war realities, but still leave this country with the muscle that we need to meet whatever danger comes our way.

I know that's a concern here in southern California, with its proud tradition of pushing the frontier in aerospace and producing weapon systems that redefined state-of-the-art. We have a number of Federal programs aimed now, as we cut down on defense spending, at helping those workers, those good workers, those defense industry workers as they seek new careers. And we're taking steps to ease the transition that many firms will face as they shift from defense-related work to the commercial economy. And that's what my technology transfer initiative is all about, getting research done in Government labs out into the private economy. And in May we're going to bring that message to Cal Tech through our national technology initiative. Our approach is the sensible way to go, the right way to keep the economy sound and at the same time keep our Nation strong and safe.

But there are Democrats with a very different plan in mind. And they want to use the end of the cold war to open a bidding war to see who can gut defense the fastest. And one scheme would cut defense by an additional \$200 billion. And nationwide, cuts on that scale would wipe out hundreds of thousands of jobs, to say nothing about rendering us incapable of responding to aggression overseas.

Right now, \$1 out of every \$5 spent on defense is spent right here in California. And think of the shockwaves that reckless defense

cuts would touch off in the construction and in the electronics and aerospace industries and the aftershock for the real estate markets. Think of the workers, the welders to the engineers, thrown out of work and onto welfare. For the sake of national security and for the sake of just plain economic common sense and for the sake of this State and the country, I ask you to draw the line and say no to those who want to recklessly gut the national defense of this country.

We can turn this economy around provided we deal in economic reality. And it all comes down to this: To succeed economically at home, we've got to lead economically abroad. And there's no better case in point than California. This State accounts for \$1 in every \$7 of American exports. In 1990 alone, two-way trade reached nearly \$166 billion. Statewide, that means 725,000 jobs, close to three-quarters of a million jobs tied to trade.

And it's more true than ever before today that America's future lies in opening markets. But our opponents aren't about to let fact intrude on fantasy. Their prescription for the nineties is to sound an economic retreat and raise the trade barriers and build new barricades to keep imports out and take this country back to the dangerous pre-World War II isolationism. I am not going to let that happen as long as I am President of the United States. We are going to stay engaged and lead the world.

That is not the American way. And we don't cut and run; we compete. And I'll put my faith in the American worker. So clear away the trade barriers, go head-to-head, and the American worker will outthink and outperform and outproduce anybody, anyplace, anytime.

People here want to know that increased trade doesn't mean a tradeoff when it comes to concerns about our environment. And earlier this afternoon we had a wonderful meeting. I announced the new initiative to ensure that the promise of free trade includes protection for the environment. And we're working with the Government of Mexico. And we will commit well over \$1 billion in new resources over the next 3 years to protect drinking water, pay for cleanups, and enforce haz-

the construction and aerospace industries, the real estate markets, the welders to the point of work and onto national security and economic common sense. This State and the way the line and say recklessly gut the country.

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now that increased off when it comes government. And earlier a wonderful meeting initiative to ensure trade includes protection. And we're working of Mexico. And we billion in new resources to protect drink, and enforce haz-

ardous waste laws along the U.S.-Mexican border.

And I can say to the people of this great State: Here's proof that we can sustain a strong economy and a sound environment. Whether it's the environment, the economy, or any other issue, there's a new reality now in the way people live and work and look at Government. People don't really buy the old, big Government rhetoric. They've seen enough social engineering. And they know America's greatness doesn't spring from Government. Our strengths are in our people, in our families, in our communities. And Government can't raise your kids to know right from wrong. It can't legislate happy endings. Government isn't why people work hard, raise a family, save for retirement.

Year after year, the folks who control the Congress have pushed spending higher and higher. In 1993, the Federal Government will spend \$1.5 trillion of taxpayers' money. And people are entitled to ask, "Am I getting my \$1.5 trillion's worth?" We need to get back to the basics. Government is too big, and it spends too much. So give me the line-item veto, and let the executive branch try to cut some of the fat out of the budget. Forty-three Governors have it, and 43 Governors do a good job utilizing it. We need for Government to do less but do better and to focus on what people want and deserve, safe streets, good schools, a strong economy, and a strong country.

And today we see the return of responsibility, an old idea that never really went out of style. People have had it with the no-fault lifestyle. And in their private lives they know actions have consequences. And what they want is a Government whose policies and programs recognize that people are responsible for their actions and that Government is responsible to the people. And if you think about it, that's nothing more than a working definition of freedom.

Because we believe in responsibility, we believe in education reform. And we've laid out a strategy called America 2000. It literally revolutionizes our schools. Doing it the old way isn't good enough anymore. And we need to hold our kids and our teachers to a higher standard. And here's a radical notion, as our national education plan calls for:

Let's test our kids to see where we're doing well and where we need more work. And our schools need a dose of competition with each other. Right now in public schools in Los Angeles and across the country, kids are a captive audience. Now, give parents a chance to choose their children's schools, and you'll see our schools start doing their homework. School choice is right, and it is working in many States. School choice will work across this Nation.

And because we believe in responsibility we back legal reform. Sorry to say this in "L.A. Law" country, but here's the plain fact. America has become the land of the lawsuit. And we put forward a plan to cut down the number of frivolous suits. They sap our economy, and they strain our patience. And when a father can't coach Little League because he's worried about getting sued, something's wrong. And when your neighbor becomes a plaintiff, something's wrong. Our country would be a lot better off if we spent as much time helping each other as we do suing each other. And so I will challenge the Congress again and again to do something about the reforms that we have pending up there on Capitol Hill right now.

Because we believe in responsibility, we take a hard line on crime and drugs. Tomorrow Barbara and I fly down to San Antonio, and there I'll meet with five Presidents of Latin American countries, Latin American leaders, work with them to sharpen our strategy to beat this scourge. And yes, we're waging a war to cut the supply lines that funnel drugs into the crack houses that plague good neighborhoods across L.A. County. Interception of drugs coming in is way, way up.

But we're battling, also, on the demand side. And we set a goal to drive down current adolescent cocaine use by 30 percent. And we've seen a dramatic 60-percent decrease. Now, that's good news. But we all know we can't claim victory yet. We must show that here, too, actions have consequences. And that's why we need stiffer sentences for drug dealers. We need courts that punish criminals, not honest cops, out there trying to do their jobs. We need laws that make life tougher on the criminals than on the victims of crime. And we need to get that House

of Representatives to pass my crime bill and pass it now.

Because we believe in responsibility, we believe in welfare reform. And people are willing to support benefits. Look, we care. We're Americans. We care about the other guy. But Americans want to see some connection between welfare and work. They want to see governments at every level work together to track down the deadbeat fathers, those who can't be bothered to pay child support. And they want to see us break the cycle of dependency that destroys dignity and passes down poverty from one generation to the next. That's wrong to do that, and we're going to do something to change it.

Right here in California, your able Governor Pete Wilson's got a plan that will encourage people on welfare to take work when they can find it; for pregnant teens or parents to stay in school, get the education they'll need to make a better future, a future where they won't need that next welfare check. And we support him. You say, what can we do to help California? Simple, we can start by getting Washington out of the way. And I'll tell you, we will do all that we can to remove the burdensome Federal regulations, to help you cut through the web of redtape to real reform.

The reforms I've spoken about tonight can spark a revolution to bring this country home to the bedrock beliefs that have made us great. Faith and family, responsibility and respect, community and country. Simple words, certain truths that hold a world of meaning for every American.

And I might say parenthetically, if I could be prideful in my comment, I am very, very proud of what Barbara does to demonstrate strength of family and the caring that we all feel in our hearts.

But here's what I know about this country's future. No matter how tough times are right now, no matter what trials we face, America's best day always lies ahead. And I believed that when I was a little boy. I believe it now. I believe it every day I live because that is the great glory of the United States of America.

Thank you all, and may God bless our great country.

Note: The President spoke at 8:58 p.m. at the Century Plaza Hotel. A tape was not available for verification of the content of these remarks.

Exchange With Reporters Prior to a Meeting With President Alberto Kenyo Fujimori of Peru in San Antonio, Texas February 26, 1992

Drug Summit

Q. Mr. President, what do you hope to accomplish at the drug summit, sir?

President Bush. Well, I think we've already—we're going to build on the first meeting, the Cartagena meeting, and we're going to get maximum cooperation. We're going to redouble our efforts on the demand side and on the supply side. So, it's the big picture with very able leaders from south of our border that continue to address themselves to this problem. And there's been marvelous cooperation between the countries.

Q. The Ecuadorean President said today that his country needs more U.S. dollars. What's your response to him, sir?

President Bush. Well, I'll be discussing it with him when I see him.

Q. President Fujimori, will cutbacks in U.S. aid hamper your drug-fighting efforts?

President Fujimori. From the supply side, we can, we think we can do a lot on this side, but also we need the better comprehension and coordination.

President Bush. And that's all the things we'll be talking about.

Q. Do you need more U.S. money?

President Fujimori. Also. [Laughter]

President Bush. Everybody does, including us.

President Fujimori. That's the answer they want? [Laughter]

Q. President Bush, do you believe this summit is going to be of any value?

President Bush. I think there's a lot of value. I think the first one was—President Fujimori was not at it—but I believe that it set the ground rules, it set some objectives. I think this one will do the same thing. We

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Q. Pretty confident?

The President. Yes, I am.

Southern Primaries

Q. Patrick Buchanan—fire Bush immediately. Do you think he's getting a little personal in his attacks and his charges?

The President. I haven't seen that, John [John Cochran, NBC News]. I wouldn't worry too much about that.

Q. Those FBI—

The President. Yes. I think we're going to do all right down South. I feel good about it. We've got good people working, and I think the people down there understand my message. And I think as people compare the two candidates, why, we'll be fine.

Q. Will you be mentioning Buchanan by name? Last week you said you were going to take the gloves off. Do you intend to do so, sir?

The President. Well, I'm still sorting all that out. You heard me last night. I'd rather define it on the issues. There are plenty of surrogates that are willing to make it more specific. I think that's a good way to leave it.

Q.—ads starting up in Georgia against Buchanan?

The President. I think that there will be ads that define the differences in position, yes. And I expect that people will understand that, after the ads from the Democrats in New Hampshire against me and from him against me. But I'll try to keep it on a high plane—together and go on and win.

Q. You seem kind of subdued today, Mr. President. Are you feeling okay?

The President. Yes, I feel good, Rita [Rita Beamish, Associated Press].

Q. How come you're so subdued? It's early.

The President. Do you remember Lesley Stahl [CBS News] asking when the Berlin Wall came down why I wasn't jumping with joy? I said, "We're taking care of this." It's a little early. We're going on a long trip, and it's kind of a calm but determined approach.

Q. Have you added any additional stops on this trip? We heard you might add some on the end, Saturday or Sunday, additional stops.

The President. I haven't heard it yet, but I might be the last to know. [Laughter]

Q. We probably would.

The President. Have a nice trip to California, everybody.

Q. See you there.

Q. Thank you.

Note: The exchange began prior to the President's departure from Andrews Air Force Base in Camp Springs, MD, for San Francisco, CA. A tape was not available for verification of the content of this exchange.

Remarks at a Bush-Quayle Fundraising Luncheon in San Francisco, California

February 25, 1992

Thank you so much for that welcome back. Pete mentioned this was my 15th visit. But you have a wonderful way of making people feel at home in this State. Thank you very much. And may I just say from halfway across the world, or at least in the east coast, watching with wonder, what a superb job, fighting difficult conditions, your Governor is doing. It's an inspiration to all of us in politics, I'll tell you. And Gayle, our greetings to you.

May I thank the Skyline College Musicians over there and pay my respects to Eric Stratman, who got up and gave us that wonderful rendition of the Star-Spangled Banner; no pitch pipe, no nothing; just the beautiful music. And we were all so moved by that. And though he didn't confess to this—your bishop or our bishop, my bishop, put it that way, and Barbara's—he used to be our pastor in Washington, DC, before he was elevated to being bishop here in San Francisco. And Bill, thank you, sir, for being with us today and for those inspiring words.

And of course, let me single out the master of ceremonies. I've seen him in all kinds of roles in terms of dealing with world leaders. I've never seen him, I don't believe, as master of ceremonies. But George Shultz is one of the truly great public servants. And I'm delighted to see he and Obie again.

And I want to salute our former Cabinet member Bob Mosbacher; and Bobby Holt

here is our national campaign finance chairman; Jim Dignan, the California State chair; Katie Boyd and Howard Leach, who have done a superb job on this overflow luncheon. And also, Gretchen is out here who graciously met us at the airport. Thank you for all the work on the luncheon. And to all the other national vice chairs—Alex Spanos and Don Bren and Craig Berkman and Flo Crichton of the finance team. And a special thanks to Mr. Yong Kim over here, and to my old friend, Johnny Tsu over there, who have done a great job on this. Thank you all.

To paraphrase John Kennedy, I'm touched by that warm response, but not half as touched as all of you have been.

Before I begin, let me just share and express my concern for all the Californians who, after seemingly endless years of drought, have been ravaged by record floods. I am pleased to announce that today, as I came out on Air Force One, I signed a declaration to provide that much-needed disaster relief to these flood victims. They're hurting, and the Federal Government ought to do its part.

I want to talk to you today about some of the challenges that we face, Pete mentioned some of them, about the decisions we're going to make in this election year that are going to really chart the course of this country's future for the next 5 years. And let me lay it out straight, what Government can do and what it can't do, and what I will do as President, and where I will need your help.

Start, if you will, with the number one issue on everybody's mind, and that is the economy, the Nation's economy. One month ago, as the Governor said, in my State of the Union I laid out a two-part economic plan: for the short term, a plan to get the economy moving as early as this spring, seven points to stimulate investment; and a longer-term plan to keep America competitive in the new century ahead. I asked the Democrats who control all the committees in the Congress, both Houses of the Congress, to act for the good of the country. And I gave Congress 52 days to pass the plan.

Since then, some Democrats have been wrestling with their consciences. It is too

early to predict who will win. But instead of working on my plan, the House Democrats surfaced their own, a tiny tax cut across the board, written in invisible ink, in exchange for a huge tax increase chiseled into stone. Ask the people out there, your neighbors, is it really worth borrowing from our children to give families an extra 25 cents a day? That two-bit tax cut would make even the tooth fairy blush. It is not good legislation.

When the cameras are on, the Democrats say all the right things, especially in a political year, talk about a blueprint for an economic recovery. But then the doors close and the backroom brokering begins. And in the end, it is the same old Democratic deal, another "jobs bill," but this one for the tax collectors.

Now, if the Senate Democrats want to make their temporary tax cut permanent, and this is a fact, they would have to jack up the income tax rate for every American making more than \$35,000. You heard that right, \$35,000, for a plan that's supposed to help the middle class. And that's going to come as real news to a lot of factory workers and school teachers and everyday Americans that are just struggling to make ends meet. So they are going to tax the middle class for the same reason that Willie Sutton robbed the banks, because that's where the money is.

If you want to give American companies reason to expand, then give them what we are calling for, an investment tax allowance. Speed up the rates of depreciation. If you want to boost the sagging housing market and if you want to give American families a real shot at the American dream, then don't look to the liberal leadership in the Congress. Give first-time homebuyers what our plan does, a \$5,000 tax credit toward that first home.

Finally, let me just say to the Congress here: If you're serious about competitiveness, if you're serious about creating jobs, then cut the tax on capital gains.

These points I've listed, and four more, will stimulate the economy right away. Now, let's switch over to the defense side of the equation. I'm sure you're reading a great deal about defense cuts. For decades we faced a very dangerous enemy abroad, and we fought the Democrats, those liberal ones at home, who would have stripped this Nation

I win. But instead of the House Democrats, they tax cut across the table ink, in exchange chiseled into stone. So, your neighbors, is going from our children 25 cents a day? That make even the tooth legislation.

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of the strength that it needed to defend itself and to defend freedom. Republicans fought hard on both fronts—Pete Wilson was a leader in this fight when he was a United States Senator—and winning the defense battle on Capitol Hill, as George Shultz will tell you, helped us win the cold war. No one understood that better than my predecessor, Ronald Reagan. He understood it from day one and fought for a strong defense.

Now, given the changes in the world—and they're dramatic and they are wonderful in terms of the future of our kids—given the collapse of the Soviet Union, we know now we can reduce defense spending substantially. So I went to the Joint Chiefs and to Dick Cheney and based on the recommendation of the Joint Chiefs and the Secretary of Defense, I've proposed a substantial but a sensible defense build-down, one that will recognize post-cold-war realities, but still leave this country with the muscle that we need to meet whatever danger comes our way or help defend those whose freedom are at stake.

And we have a number of Federal programs aimed at helping defense industry workers as they seek new careers now because of our defense cuts. We're taking steps to ease the transition that many firms will face as they shift from defense-related work to the commercial economy. That's what this technology transfer initiative is all about that I've proposed, getting research done in government labs out into the private economy. And in May we're going to bring that message to Cal-Tech through our national technology initiative. And that's good news for the high-tech firms right here in the Silicon Valley, and all across this State. Our approach is the sensible way to go, the right way to keep the economy sound, and our Nation safe.

But there are political problems. There are Democrats with a different plan in mind in the United States Congress. They want to use the end of the cold war to open a bidding war to see who can gut the Defense Department the fastest. One plan would cut defense by an additional \$200 billion over 5 years. Nationwide, cuts on that scale would wipe out hundreds of thousands of jobs, say nothing

about rendering us incapable of responding to aggression overseas.

You might think about that. Right now, \$1 out of every \$5 spent on defense is spent right here in California. Think of the shock waves that would touch off in the construction and electronics and aerospace industries and the aftershock for the real estate markets. Think of the workers and the welders to the engineers thrown out of work and onto welfare. You can call it a double play, a Democratic double play, cripple our defenses and the same for the economy, all at the same time.

For the sake of national security—and I still view that as my most fundamental responsibility, the national security of this country. I think that is the prime responsibility of the President—for the sake of just plain economic common sense as well, and for the sake of California and the country, I ask you to draw the line and say no to those Democrats who want to recklessly cut the muscle out of the national defense of this country.

We can turn this economy around, provided we deal in economic reality. It all comes down to this: To succeed economically at home, we've got to lead economically abroad.

There is no better case in point than this wonderful State of California. None. This State accounts for one in every seven dollars of American exports. In 1990 alone, two-way trade reached nearly \$166 billion. For the past 5 years that's an average annual increase of 20 percent, and statewide, I think Pete would agree, it means something like three-quarters of a million, I believe the figure is 725,000 jobs, close to three-quarters of a million tied into trade. It is more true than ever before: America's future lies in open markets. It does not lie in this negative view of protection.

But the people we are battling in the Congress today aren't about to let the fact intrude on the fantasy. Their prescription for the nineties is to sound—really to pull back, not all of them but some of them—to pull back and sound an economic retreat, and then to raise up trade barriers—all in the name of fair trade—but to raise up trade barriers, build new barricades to keep imports out, and take this country back to a dangerous

pre-World War II isolationism. As long as I am President that will not happen to the United States of America.

That's not the American way, certainly not the California way. We don't cut and run. We compete. And we work hard. And I've got a lot of faith in the American worker because our workers have a lot of faith in themselves. If we can do better and make more progress in clearing away the trade barriers and go head to head, the American worker will outthink and outperform and outproduce anybody, anyplace, anytime. It's that direction that we've got to take this country.

There's a new reality now in the way people live and work and look at Government. People really don't buy that old "big Government" rhetoric. The American people have seen enough of what we call social engineering. They know the limits of Government. They know that our greatness doesn't spring from Government: America's strengths are in her people, in our families, in our communities. Government can't raise your kids to know right from wrong. It can't legislate happy endings. Government isn't why people work hard, raise a family, save for retirement. And people know, as Government tries to do more and more, it delivers less and less.

And year after year, the main opposition on the Hill, the liberal Democrats who control the Congress, have pushed spending higher and higher. In 1993, the Federal Government will spend \$1.5 trillion of taxpayers' money. People are entitled to ask, "Am I getting my 1.5 trillion's worth?"

We need to get back to the basics that Government is too big, and it spends too much. And that leads me to ask you to urge your Congress to give me the line-item veto. Forty-three Governors have it, and give the President, the executive branch, a chance. We need for Government to do less but do better. To focus on what people want and deserve, safe streets, good schools, strong economy and, certainly, a strong country.

Today we see the return of responsibility, an old idea that never really went out of style. People have had it with the no-fault lifestyle. In their private lives, they know actions have consequences. What they want is a Government whose policies and programs recognize that people are responsible for their actions

and that Government is responsible to the people. Now, if you think about it, that's nothing more than a working definition of freedom.

Because we believe in responsibility, we believe in education reform, fundamental reform. We've laid out a strategy called America 2000, to literally revolutionize our schools. It's not Democrat. It's not Republican. It's not liberal. It's not conservative. It is American, supported by the 50 Governors to meet our six education goals.

We need to hold our kids and our teachers to a higher standard; that's part of it. And here's a radical notion: Let's test these kids at the 4th and the 8th and the 12th grade, see what we're doing, where we're doing it well, and where we need to do more work. Our schools need a good dose of competition, with each other. Right now, kids are a captive audience. You give the parents a chance to choose their children's schools, and you'll see our schools start doing their homework. And the bad schools will be picked up by the competition. School choice is working where it's in effect, and it will work nationwide.

Because we believe in responsibility, we back legal reform. Here's the fact: America's become the land of the lawsuit. We've put forward a plan, it's up on the Hill, to cut down a number of frivolous lawsuits. They sap our economy. They strain our patience. When a father can't coach Little League because he's worried about getting sued, something's wrong. When your neighbor becomes a plaintiff, something's wrong. Our country would be a lot better off if we spent as much time helping each other as we do suing each other.

Because we believe in responsibility, we take a hard line on drugs and crime. Tomorrow I go to San Antonio, Barbara and I go down there, and will meet with five or six Latin American Presidents, working with them to sharpen our strategy to beat the scourge. Yes, we're waging a war to cut the supply lines that bring drugs into this country. Interdictions are at an all-time high. But we're battling on the demand side as well. We set a goal to drive down the current adolescent cocaine use by 30 percent. That was our national goal. And we've seen a dramatic 60 percent decrease. Now, that's good news.

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That's good news for families across this country.

But we all know that we can't begin to claim total victory yet. We must show that here, too, actions have consequences. And that's why we need stiffer sentences for these drug dealers, courts that punish criminals, not honest cops trying to do their job out there, and laws that make life tougher on the criminals than on the victims of crime.

Because we believe in responsibility, I believe as Pete does, we believe as your Governor does in welfare reform. People are willing to support benefits. They've always been willing to give a hand up. Americans care. But they want to see some connection between welfare and work. They want to see governments at every level work together to track down the dead-beat fathers, the ones who can't be bothered to pay child support. And I think most of all they want to see us break this cycle of dependency, a cycle of dependency that destroys dignity, and says to a little guy when he's just starting up, you really don't have much of a chance. Passes down poverty from one generation to another. That's wrong. We're going to do something to change it.

Right here in California, Governor Wilson's got a plan that will encourage people on welfare to take work when they can find it; for pregnant teens or parents to stay in school, get the education they'll need to make a better future, a future where they won't need that next welfare check.

What can we do to help California? What can we in Washington do? Simple: We can start by getting our bureaucracy out of the way. And we'll do all we can, Pete, to remove those Federal regulations, to help you cut through that web of redtape to real reform.

These reforms—changes we make now to boost the economy and to transform our schools and our legal and our welfare systems—can really spark a revolution. A revolution to bring this country home to the bedrock beliefs that have made us great. And they are fundamental: family and faith, responsibility and respect, community and country. Simple words, certain truths that

hold a world of meaning, I still believe, for every single American.

Here's what I know about this country's future: No matter how tough times are now, no matter what trials we face, America's best day always lies ahead. I believed that when I was a little kid. I believe it now. I am totally confident about the recovery of this country. And I'll believe it every day I live because that, in essence, is the great glory of our wondrous country.

Thank you all, and may God bless the United States of America.

Note: The President spoke at 1:13 p.m. at the Westin St. Francis Hotel. In his remarks, he referred to Governor Pete Wilson and his wife Gayle; George P. Shultz, former Secretary of the Treasury, and his wife Obie; Katie Boyd, cochairman of the dinner and vice chairman of the California Bush-Quayle campaign; Howard Leach, dinner cochairman and regional vice chairman of the Bush-Quayle campaign, and his wife Gretchen; and Yong Kim and Johnny Tsu, national vice chairmen of the Bush-Quayle campaign.

Statement by Press Secretary Fitzwater on General Motors Plant Closings

February 25, 1992

The White House made no attempt whatsoever to influence General Motors' decision over which plants to close and which plants to keep open. The White House considers such matters to be internal corporate decisions.

The President is very much aware of the human costs associated with these tough economic times. This recent plant closing announcement underscores the critical importance of the Congress acting promptly on the President's economic growth package before the March 20 deadline set down in the President's State of the Union Address.



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For Immediate Release

**New Study Examines Judges, Lawyers and Other
 Key Players' Views of Civil Litigation in State Courts**

**Assesses Key Players' Roles/Shortcomings
 in the Civil Litigation Process**

Reveals Many Perceived Problems, Reform Preferences

Compares Views of State Versus Federal Court Systems

Most Survey Respondents Say:

Page

* State Courts Perform Only Moderately Well	3
* Efficiency is Leading Court Problem	3
* Media Coverage Contributes to Clogged Dockets	4
* Court Delays Increasing	5
* Fault-Based Systems Best (But Many Judges Disagree).....	6
* Attorneys Main Culprits in High/Rising Costs	7
* Lawyer Restraint Called For	8
* Discovery Should be Controlled	9
* More Active Judicial Case Management Needed	10
* Bush Administration's Tort Reform Proposals Have Merit	11
* Other Reforms Called For	12
* Alternate Dispute Resolution Under-Utilized	12
* "Loser Should Pay" Concept has Merit	13
* State and Federal Court Problems Similar	13
* And More	

Chicago, IL, Feb. 7, 1992 -- Acknowledging numerous and growing problems with the civil litigation process in state courts, a nationwide sampling of lawyers, judges and other key players in the process believes that multiple reforms are needed. And while these key players reject making radical changes in the civil justice system as we know it, most do support more rational, self-governed and cost-effective approaches to resolving civil disputes.

These are among the key findings and conclusions of a major study released today by the 18,000-member Defense Research Institute (DRI), the nation's largest association of defense trial lawyers. Titled "Civil Litigation in State Courts: Perspectives on the Process and Preferences for Reform," the study was sponsored by Chicago-based DRI and conducted by Research & Forecasts, Inc., New York City. Study findings are drawn from 30-minute telephone interviews nationwide with a representative cross-section of 803 defense and plaintiff attorneys, state civil court judges and administrators, insurance claims executives, corporate legal counsel and state legislators serving on judicial committees. The study has a margin of error in the range of plus or minus 4 percent on the totals.

Study Objectives

The overall goals of the study, according to DRI President Robert D. Monnin, are to evaluate how the various parties directly involved in -- or in a position to influence -- civil litigation view state civil court systems, the civil litigation process overall and each other's role in the process. "Most importantly," says Monnin, "the study reveals prevailing views of what can and should be done to make the state civil courts and the civil justice system more efficient."

Most Only Moderately Satisfied with State Civil Courts

Six in 10 (59%) respondents queried in the DRI survey believe the civil litigation process in state courts today works only "somewhat well." This compares with almost two in 10 (18%) who think it functions "very well" and a slightly higher percentage (22%) who view the process negatively.

Of the seven groups surveyed, state civil court judges and court administrators have the most favorable views of civil litigation in state courts, whereas insurance executives and corporate counsel seem the least satisfied with the way the process works.

Efficiency Cited as Leading Problem, By Far

When asked to describe faults in their state court systems, almost seven in 10 (69%) survey respondents volunteered a criticism

related to "efficiency" -- and most of them particularly faulted the long duration of the court process (cited by 44%). In contrast, only one in four (25%) criticized the "quality" of the system (such as "poor judges" or "unprepared lawyers"), an almost equal percentage (23%) faulted "rules/procedures" such as the "excessive use of discovery" and one in five (20%) offered criticisms related to the "cost of litigation." Only five percent of respondents perceive the process to be working fine as is.

Media Coverage Contributes

Why do certain state court systems appear to be overwhelmed and perhaps even breaking down? Of several specific reasons evaluated by survey respondents, the two perceived to contribute most to the problem are "media sensationalize settlements and jury awards" (77% agree) and "the court process is too slow" (72% agree). In addition, 69% of all respondents agree that the "courts are not getting sufficient resources to operate efficiently," 60% agree "there is simply too much litigation" (though two-thirds of plaintiffs' lawyers do not agree), and 61% agree that "litigation is becoming too complex."

Judges Leading Controllers of Litigation Pace

When survey respondents were asked, "Who controls the pace of litigation in state courts?," judges were mentioned first by 37%,

followed closely by plaintiff attorneys (cited by 32%) and a distant third by defense attorneys (cited by only 12%). And while both defense and plaintiff attorneys agree that judges are the leading controllers of the litigation pace, defense attorneys overwhelmingly believe plaintiff attorneys have more control than they do -- whereas plaintiff attorneys believe the control is equally split between defense and plaintiffs' counsel.

Increase Seen in Court Delays

Two-thirds (66%) of all those interviewed believe delays in disposing of civil cases in state courts have increased over the past decade, including 45% who believe they have "increased somewhat" and 21% who believe they have "increased greatly."

When respondents were asked to estimate the average time to trial of civil cases in the states where they work, the nationwide average computed from these estimates is 22 months. However, when responses are compared on a regional basis, the average time to trial indicated by respondents in the eastern region of the U.S. is 30 months -- considerably longer than estimates for other regions of the country.

Fault-Based Personal Injury Systems Preferred Over Compensation-Based Systems by a 3-to-1 Ratio

Almost six in 10 (59%) respondents work in states with fault-based personal injury laws, 15% work in compensation-based states and 15% work in both fault and compensation-based states. When asked which system they would prefer if given a choice, respondents favoring a fault-based system exceeded those favoring a compensation-based system by a 3-to-1 ratio.

Plaintiff attorneys and defense attorneys are the most likely to prefer fault-based laws (75% and 62%, respectively, favor), whereas judges and court administrators are the least likely to prefer them (only 44% and 31%, respectively, favor). In contrast, the strongest supporters of compensation-based systems typically are judges and corporate counsel (25% of each group favor), with defense and plaintiffs' attorneys the least likely supporters, (only 13% and 7%, respectively, favor).

Among those who prefer fault-based systems, the main reasons cited are "only entitled to compensation if someone causes injury and if there is negligence proven" (cited by 46%), and "it's the fairest way it's more equitable, it's more objective" (cited by 44%).

Among those favoring compensation-based systems, the main reasons expressed are "fairest way/more equitable/objective" (cited by 45%), "the purpose is to compensate, not blame" (cited by 21%), and "awards what's lost/restores plaintiffs" (cited by 20%).

Increased Transaction Costs a Problem

Defining transaction costs as "the total costs incurred by all parties to civil litigation, excluding any decisions about liability or monetary damages," these (transaction) costs are perceived by the vast majority of survey respondents either to have "increased greatly" (52%) or to have "increased somewhat" (40%) over and above inflation in the past decade. Moreover, rising transaction costs are thought to be a "major problem" by 50% and a minor problem by 28% of the total survey sample.

Survey respondents offer several reasons for increased transaction costs. Those most frequently mentioned are "high attorneys fees/too many lawyers" (cited by 26% of all queried), "costs of expert witnesses" (cited by 24%), and "higher discovery costs" (cited by 19%).

Plaintiff and Defense Attorneys The Main Culprits

Plaintiff attorneys are perceived to be the leading cause of high transaction costs (cited by 47%), followed relatively closely by

defense attorneys (cited by 40%). Insurance executives and corporate counsel are especially likely to fault plaintiff attorneys for these rising costs, whereas plaintiff attorneys are more apt to attribute the problem to insurance companies and defense lawyers.

Attorneys Called Upon for Restraint

When respondents were asked to evaluate three suggested changes in the litigation process in terms of their ability to "significantly" reduce transaction costs, the action most highly favored (endorsed by 83% of the total sample) is making improvements/changes in "the manner in which defense and plaintiff attorneys exercise restraint." Approximately three-quarters of the survey sample also endorse making improvements/changes in "the discovery process" (favored by 74%) and making improvements/changes in "the manner in which judges manage cases" (endorsed by 73%).

Plaintiff and Defense Counsel Faulted Equally for Discovery Abuse

When it comes to discovery abuse, defense attorneys and plaintiff attorneys are both thought to abuse the process -- and to do so equally.

Insurance executives and corporate counsel are especially likely to view plaintiff attorneys as the prime abusers of discovery, whereas plaintiff attorneys are highly likely to put the blame on,

rather than share blame with, defense attorneys.

On a related note, more than half (54%) of the respondents believe discovery accounts for upwards of 50% of all transaction costs.

Controlling Discovery Has Widespread Support

Six specific methods to control discovery were suggested in the survey and all are favored by at least a majority of the survey sample.

The most highly favored option (by 91%) is "requiring counsel to negotiate discovery conflicts among themselves before seeking resolution." The others, in order of preference, are: "requiring early discovery conferences soon after the case is filed" (88%); "limiting the number of interrogatories and depositions in certain types of cases" (79%); "granting judges the discretion to impose some or all discovery costs on the requesting party" (75%); "limiting the scope of discovery to materials likely to be admissible in evidence" (64%); and, "limiting discoverable information beyond that initially exchanged to a standard of 'substantial need'" (55% of the total sample, but by only 39% of defense attorneys and 35% of plaintiff attorneys).

To augment the above findings, DRI survey respondents were asked to choose (from among three options) the one action that

would most improve the discovery process. Equal percentages (40% each) of respondents selected "greater exercise of judicial discretion" and "restraint in the informal unwritten practices of attorneys involved," with only one in six (16%) selecting "changes in the rules." Clearly, then, most respondents want to improve the discovery process through means other than rules changes.

Strong Support for More Active Case Management by Judges

Very few attorneys say they avoid judges or courts because of forceful case management. In fact, majorities of all survey respondents strongly support more active case management by state court judges.

More specifically, 86% of respondents believe "judges should schedule early and firm trial dates," an equal number favor "more pre-trial and status conferences to monitor and limit discovery," and 83% favor "using lawyers or judges with special expertise in the subject of dispute resolution as neutral evaluators at an early point in litigation." In addition, 70% favor "evaluating judicial nominees in part on the basis of their record as case managers," 63% favor "greater use of protective orders," and 62% support "more frequent use of sanctions."

On a related note, almost three-quarters (72%) of respondents believe "developing improved systems for classifying and grouping cases," is a desirable method for better case management, with far less enthusiastic support expressed for lengthening the official court work day (44% favor) or electing or appointing judges to longer terms of office (26% favor).

Bush Administration's Tort Reform Proposals Viewed Positively

Only 50% of survey respondents either are "familiar" with (16%) or have heard of (34%) the President's Council on Competitiveness' "1991 Agenda for Civil Justice Reform." Of this group (half of the survey sample), upwards of 70% either "strongly favor" or "somewhat favor" each of the six categories of reform proposed in the report.

The category most "strongly favored" (by 57%) is "more efficient trial procedures," followed by "discovery reform" (strongly favored by 54%), "voluntary dispute resolution" (strongly favored by 50%) and "punitive damages reform" (strongly favored by 50%). The other two reform areas -- which call for "expert evidence reform" and "enhanced incentives for encouraging meritorious litigation" -- are "strongly favored" by 40% and 38% of respondents, respectively.

Other Reforms Endorsed

In addition to evaluating the various categories of reform proposed in the "1991 Agenda for Civil Justice Reform," the DRI survey evaluated seven specific (vs. categories of) proposals for litigation reform. The one most highly favored (by 75% of the total survey sample) is "creating multi-door courthouses" where several methods of resolving disputes are available. A close second (favored by 72%) is the concept that "compliance with government standards should be considered a strong defense in a lawsuit and a guarantee against punitive damages."

Majorities of the total respondent base also favor "more power to authorize class action suits" (66%), "abolishing/modifying the collateral source rule" (favored by 55%), and, "in environmental cases, making awards based on the probability that the plaintiff's disease was caused by exposure to toxic substances" (favored by 53%). The proposal least favored (by only 35%) is developing a scale that sets dollar amounts for specific injuries when determining damages.

ADR Mechanisms Under-Utilized

What do DRI survey respondents think about alternate dispute resolution (ADR) mechanisms? Many believe they are used

too infrequently.

The ADR mechanism perceived to be most under-utilized (by 55%) is "requiring clients to attend settlement conferences."

Additionally, almost half (48%) say that "mini trials," "court-ordered or annexed arbitration" (47%) and "non-binding arbitration" (47%) are not used often enough.

Majority Support "Loser Should Pay" Concept

On a separate note, a solid majority (66%) of all respondents -- and a majority of those across all respondent groups, except plaintiff attorneys -- believes the idea of having losing plaintiffs pay for the defense's discovery costs and other legal fees has some merit.

Comparable Views of State Vs. Federal Court Systems

A section of the DRI survey report compares respondents' perceptions of the state civil court systems to perceptions of the federal litigation system elicited in a 1989 survey of attorneys, federal judges and corporate counsel sponsored by The Foundation for Change. Based on this comparison, reactions to both systems appear quite similar.

Respondents in each survey cite a moderate level of satisfaction with each system, a growing tendency toward court delays, and seriously escalating transaction costs, especially with

regard to the discovery process. Moreover, respondents want improvement at both the federal and state levels of civil justice and prefer working within the current system -- e.g. having attorneys exercise more restraint and having judges exercise more judicial discretion -- to achieve needed improvements.

Among other DRI survey findings:

- o Asked to consider 10 different types of liability cases and expected increases or decreases in case volume over the next 10 years, 91% of respondents believe the number of "hazardous waste" and "environmental liability" cases will rise. Other areas of civil liability in which most respondents anticipate increased case loads are: "wrongful terminations" (cited by 81%) "mass toxic torts" (cited by 68%) and "product liability" (cited by 62%).
- o Seventy percent (70%) of those queried find transaction costs excessive in product liability cases; 65% find them excessive in medical malpractice cases; 60% find them excessive in environmental liability cases; and 55% find them excessive in mass latent injury torts such as asbestos.

- o Judges are particularly supportive of passing on discovery costs to the requesting party (94% favor versus 75% of the total survey sample).
- o Judges do not use their sanctioning power often. On average, the state civil court judges queried report sanctioning attorneys (if their rules allow) twice in the past five years. While nearly one in five (18%) say they have not imposed sanctions, approximately one in 10 (11%) judges say they have imposed sanctions five or more times in the past five years.
- o Accordingly, from the attorneys' perspective, their median number of sanction-related experiences over the last five years is also two per attorney interviewed. While one-third (34%) have not worked in a situation where sanctions were imposed, 17% were involved in cases where five or more sanctions were imposed in the last five years.
- o Compared to 55% of the total survey sample who favor limiting discoverable information beyond that initially exchanged to a standard of "substantial need," only 39% of defense attorneys and 35% of plaintiff attorneys

favor this option.

- o A majority (57%) of those surveyed believes that using independent, court-appointed expert witnesses would play a positive role in the civil litigation system.**

- 30 -

Editors' Note: A complete copy of survey results is available on request.

A REPORT ON FOCUS GROUPS CONDUCTED ON STORYBOARDS

FOR THE

AMERICAN TORT REFORM ASSOCIATION

ADVERTISING CAMPAIGN ON LIABILITY ISSUES

PREPARED FOR

THE AMERICAN TORT REFORM ASSOCIATION

BY

ANDREW J. KELLY ASSOCIATES, INC.

FEBRUARY, 1992

SUMMARY OF FINDINGS

- o **The campaign seemed effective in making the problem of frivolous lawsuits and liability reform relevant to the respondents. Following participation in the focus groups, there was a significant increase in the number of people who believed that they were very likely, somewhat likely or likely to become a target of a frivolous, unnecessary lawsuit.**
- o **The campaign had the effect of motivating the targets to call the 1-800 number. More than half of the respondents in each focus group -- a high number given that focus group participants are typically reluctant to commit themselves -- said they would call the 1-800 number to get more information.**
- o **Usage of case histories created a personal awareness among the focus group participants that they could be affected by the lawsuit problem. However extreme the case histories, respondents seemed, for the most part, to find them ultimately credible. Some respondents said the message was especially relevant to the small business owner.**
- o **Respondents wanted more information about the exact nature of the remedy being offered to resolve the lawsuit problem. Despite this uncertainty many of the participants were still willing to call the 1-800 number to seek information about solutions.**
- o **Many respondents did not know what the American Tort Reform Association was, did not understand what a "tort" was, and some seemed rather suspicious about the identity and motives of the organization. When an alternative name was used -- the Texas Center for Lawsuit Reform -- the respondents seemed to feel more comfortable.**

BACKGROUND

The American Tort Reform Association (ATRA) is developing a campaign relating to civil justice reform. The purpose of the campaign is to raise awareness of lawsuit abuse as a personal concern. The campaign is also intended to identify and recruit supporters of reform proposals through use of a 1-800 telephone number.

To assess the campaign's effectiveness in communicating the desired message, and in order to further the development of the campaign materials, four focus groups were conducted on February 13, 1992 in Dallas, Texas. During the sessions, four video storyboards were shown. No other campaign materials, *e.g.*, fulfillment kit, print advertisements or direct mail, were shown to the focus groups.

The four video storyboards used were: (i) "Louella Wilson," which described an elderly woman aunt who was sued because she lent money to her great nephew to purchase a car that was later involved in an accident; (ii) "Exercise Equipment," which described a lawsuit where multiple people were sued despite being irrelevant to the plaintiff's claim; (iii) "Iguana," which juxtaposed a frivolous suit beside a legitimate claim; and (iv) "Sharks," which used footage of sharks to describe the aggressive behavior of lawyers in pursuing frivolous cases and sizeable contingency fees.

METHOD

Four, one-hour focus groups were conducted. Each group consisted of ten respondents. Respondents for the groups were men and women, aged 30 to 65, who were at least high school graduates and whose annual household income was at least \$30,000. Each group had one Hispanic and one black respondent. Two respondents in each group were from rural areas. And, all of the participants claimed to be "activists" on social issues. The screening questionnaire is attached.

Immediately before and after the focus group discussion, respondents completed a self-administered questionnaire that rated the likelihood of finding themselves in a number of problematic situations, including "being the target of a frivolous, unnecessary lawsuit." The questionnaire is attached.

After seeing the video storyboards, respondents shared their overall thoughts and feelings, perceptions of the main message, likes and dislikes, *etc.* They were also asked whether or not they would call the 1-800 number featured in the advertising.

GROUP INSIGHTS

Overall, the advertising seemed to be effective in making the problem of frivolous lawsuits and aggressive lawyering more relevant to the target group and in motivating them to call the 1-800 number. The effectiveness of the campaign is supported by the following evidence:

Heightening Awareness of the Issue

Results from the pre/post self-administered questionnaire showed that before the group discussion, only six respondents (15 percent) said it would be very likely that they would find themselves in this situation. After the groups, the number tripled to 18 (45 percent). Given this 30 percentage point increase, the campaign appeared to make the problem and concern over frivolous lawsuits a more relevant problem to the participants.

As shown below, respondents also changed their views dramatically regarding the concern about ever being the target of a frivolous lawsuit. Before showing the advertisements, 15 thought being a target was very unlikely. After the advertisements, only three respondents thought it very unlikely.

"Being the target of a frivolous, unnecessary lawsuit."

	<u>Pre</u>	<u>Post</u>	<u>Change</u>
Very likely	2	4	+2
Somewhat likely	1	7	+6
Likely	3	7	+4
Unlikely	8	11	+3
Somewhat unlikely	11	8	-3
Very unlikely	15	3	-12

Making the Issue a Personal Concern

The principal reason why more respondents after the discussion believed that they could become the victims of a frivolous lawsuit seems to have been the shock effect of the case histories shown in the campaign. Respondents seemed to have been emotionally moved by the case histories into an awareness that this could happen to them. However extreme the cases may have seemed to some, at first, respondents ultimately accepted them as credible indicators of the seriousness of the problem.

Respondents comments included:

"This instills fear," said one woman, "I feel pity for the people and anger at the court.

"As bizarre as it may sound," said another woman, "we need to know about the truth."

"Be alert," said one man, "prepare yourself. Every person is vulnerable, from the poor to the rich."

"We need protection from predatory lawyers," said another man.

"It caught my attention as a business owner," said a small business owner, "it could happen to me."

Translating Concern into Action

During the focus groups, respondents were asked whether or not they would call the 1-800 number that was given in the advertising. About half of the respondents of the four groups -- a fairly high number for focus group situation, where people are typically reluctant to commit themselves -- said they would call the 1-800 number to get more information. (In three of the four focus groups, more than half of the participants said they would call the 1-800 number.)

Many respondents said they would call the 1-800 number to get more information about how to help reform the liability system, reduce the number of lawsuits and avoid becoming involved in frivolous cases. Respondents, however, seemed to want more information about the solutions being offered by the 1-800 number. Typically, focus group participants will wonder what will happen when they call, but in the present case their desire to know more seemed especially strong, possibly because finding a solution was felt to be so important.

POSSIBLE AREAS FOR IMPROVEMENT/CLARIFICATION

The focus groups identified a few areas of the advertisements where by eliminating confusion or changing words or visuals, the commercials could be strengthened.

Real Cases

The focus groups reaffirmed the need to emphasize the fact that the cases used in the commercials actually happened. In the final version of the advertising, the commercials should feature "supers" that clearly indicate that the case history dramatizing the problem of frivolous lawsuits is, in fact, a true case.

Nature of Solution

While the advertising seemed to be very effective in making the problem of "lawsuit reform" meaningful and relevant to the targets and in motivating them to take action, it seemed less effective in helping people feel secure about the nature of the solution. To enhance communication about policy remedies being offered, the focus group respondents seemed to want more information about the 1-800 number, the information kit and the sponsoring organization.

The 1-800 Number. The respondents seemed to want more information about the solutions being offered once they called the 1-800 number. Despite their stated intention to call, many respondents did not seem sure about exactly what would happen if they did so.

"There is someone out there," said one woman, "who wants to start something to fight against this and I'd be interested in finding out something more about it."

"It might have information on how to avoid getting in this predicament."

"I'd be interested to find out what they're offering," said one man.

"The advertising presents a problem of too much litigation," said one man, "and says there may be a solution to this problem, call the 1-800 number."

"It's not clear whether you're going to get a sample letter to your legislature or an insurance policy."

"If there was something in there," said a woman, "that offered me some hope that maybe something could be done, I would be more likely to call."

A few respondents said they were suspicious about making the call:

"I have a real problem," said one woman, "with calling 800 numbers, what you're opening yourself up to. I'd like to know who's behind it and what they want you to do."

"Maybe they just want to get your name so they can bug you every time you turn around."

The Information Kit. The information kit promised in the advertising once the 1-800 number is called raised some questions. For the most part, the questions related to the general interest in the remedies being proposed and the overall purpose of the campaign. As one woman put it: "What's in the packet?" These questions, however, generally did not override the participant's interest in calling to request a packet. The commercials probably should indicate more clearly what is contained in the information kit.

Sponsoring Organization. Some respondents seemed to have no trouble with the American Tort Reform Association as the sponsor of the commercials and what its role would be in providing a solution to the problem. For the most part, however, the participants wanted to know what ATRA was and some seemed rather suspicious about the identity and motives of the organization. ATRA was described by participants as a lobbying group, a group of lawyers and a group of insurance companies.

Contributing to the uncertainty about ATRA's identity was the fact that most respondents did not seem to know the meaning of the word "tort." "Tort" was described as everything from a legal document to an acronym. Only one participant among the four groups seemed to have any idea about what the term meant.

Some comments heard included:

"Who's the American Tort Reform Association," asked one woman, who's supporting it, who's paying for it?"

"I want to know what's behind it," said another woman, "I think there are a lot of organizations that are nothing more than scams."

"Maybe it's an insurance company behind this," said one man, "I'm guessing that maybe insurance companies are funding that particular organization and maybe very legitimately."

"Texas Center for Lawsuit Reform" was presented to the respondents as an alternative to ATRA and this was received significantly better. "That's better," said one man, "It's common man's language." "That makes a lot more sense," said one woman. "I like that better than the other one," said another woman, "it's more descriptive, it deals with Texas laws."

Tone of the Advertising. While respondents ultimately grasped the campaign's message, there was at first some misunderstanding among those who confused the storyboards with local television advertising for litigating attorneys, particularly with the "Louella Wilson" commercial. Since the groups expressed a strong distaste for these lawyer commercials, any similarity could present an obstacle to clearly understanding the message. It is important that the ATRA advertising be as distinctive in tone and treatment as possible.

Specific Language. The advertising used the words "the lawsuit racket" to designate the problems with the civil justice system. Surprisingly few participants expressed any opinion about this term. When it was commented on, the respondents were polarized in their reactions. Some believed it was an accurate statement. Others thought it was too negative. One man advised, "change 'stop the lawsuit racket' to 'stop senseless lawsuits.' You'll never stop the racket."

Respondents also tended to differ from one another in their reactions to the terminology "junk lawsuits." Some thought "frivolous" was better and "junk" was too vague. Others thought "junk" was fine.

INDIVIDUAL COMMERCIALS: PARTICIPANT COMMENTS

"Louella Wilson"

This advertisement portrays an elderly woman who describes a lawsuit involving her great-nephew who was in an automobile accident several hundred miles from her home. The woman describes how she lent money to her great-nephew to buy the car and because he did not have any money, the plaintiff lawyers brought her into the case.

- o Hard to Believe...But True. Many respondents seemed to find the case history dramatized in "Louella" to be hard to believe, even after they were told that it was, indeed, true. "I didn't know they could sue somebody just for lending money," said one woman. "It doesn't look legal to me," said another.

However far-fetched the situation seemed, respondents nevertheless were ready to accept it as true. "But is this reality," said one woman, "and we just don't want to hear?" "You could be not even vaguely familiar with something and you could find yourself dragged into a lawsuit," commented another woman: "It's far-fetched, but it could happen." "You can get sued for everything in Texas," said another woman, "this is very believable to me." "There are a lot of things that can happen," said one man: "you never think of getting sued because of something so remote."

- o Not Relevant in Texas. In every group, people pointed out that the chances that someone would lose their home in Texas were practically nil. "It's very hard in Texas to take someone's home," said one woman, "because we have the Homestead Act here." "In Texas," explained one man, "we have the homestead laws. They can't take away your home."
- o An Emotional Approach. There seemed to be a feeling among nearly all respondents that "Louella" took an emotional approach to the problem of frivolous lawsuits. Most seemed to feel that this was effective. "You feel sorry for the little old lady," said one woman. "They're going for your heartstrings," said one man. "A lot more people would sympathize toward that approach," said another man.

"Exercise Equipment"

In this advertisement, several people are presented who were sued in a lawsuit involving an accident with exercise equipment that injured someone. Each of the people portrayed in the commercial describes how they were sued despite having limited or no relationship to the health club where the accident occurred.

- o Hard to Believe...But True. Many respondents seemed astonished that the situation depicted in "Exercise Equipment" could actually happen. "The idea of suing all these people!" said one woman. "Is this a fact that this

happened in Texas?" asked another, "it sounds made up." "When you have multiple parties like that," said one man, "it seems a little remote."

Nevertheless, respondents ultimately accepted the reality of the situation. "There's so much crap in court," said one man, "things like that happen." "Lawyers go after anyone they possible can," said another man, "anyone that seemed to have the money, even if they were somewhat remotely connected to whatever the lawsuit was all about. I think these are valid points. They appear to me to be very real and these things could happen."

- o Heavy-Handed Treatment of the Lawyer. The treatment of the lawyer in "Gym" seemed to some respondents to be somewhat overdone. "You almost expect the lawyer to cackle," commented one woman.

"Iguana"

This advertisement juxtaposes a frivolous case beside a legitimate claim. The frivolous case involves a woman who sued her veterinarian for pain and suffering following the doctor's treatment of a pet iguana. The legitimate case involved a woman who was injured in a slip and fall accident.

- o Striking a Chord. Some respondents seemed to feel that compared to "Louella" and "Exercise Equipment", "Iguana" made a more effective communication. "This seems to be more truthful," said one woman, "because the courts are backed up for months and months and months. It's more credible. It seemed more likely that someone is waiting." "You continually hear about backups in courts," agreed another woman. "I'd be more likely to respond positively to that one," said one man, "because it's hitting at the system." "Here was a person who needed her day in court," said another man: "That would get me going."

Some seemed to like this approach because it offered a clearer solution than "Louella and "Exercise Equipment". "It showed a positive result," said one man, "it presents a problem of too much litigation and says there may be a solution to this problem, call the 1-800 number."

- o The Best Example? The one element in "Iguana" that brought respondents up short was the iguana itself. "Get rid of the iguana," advised one woman, "who's going to keep an iguana?" "I don't like that one at all," said another woman, "It's not realistic. How many people have pet iguanas."

"Sharks"

This commercial shows real footage of sharks as the voice over describes several frivolous lawsuits where lawyers received almost forty percent of the award.

- o Attention-Getting and Amusing. If Perhaps Too Graphic. "The message was good," said one woman, "but they could do without the sharks eating meat." "It's a shocker," said another woman, "and it caught your attention." "Too much," commented another woman.

"It tells it like it is," said one man, "but it's a little too violent." "It's too extreme," said another man, "and the visual image overwhelms the text." "It's funny," said yet another man, "but it's hard to take seriously."



The ROPER ORGANIZATION Inc.
205 East Forty-Second Street
New York, New York 10017
(212) 599-0700
Fax: (212) 867-7008 or 687-2102

Date: 2/25/92

Job #: _____

To: Eric Anderson

Company: Office of the White House

Fax #: (202) 456-7044

From: Holly Heline

Number of pages to follow: 4

Action Required:

- ☐ **URGENT - Notify recipient**
- ☐ **Call to confirm receipt**
- ☐ **Response requested**

MESSAGE:

Mr. Eric Anderson
Office of the Vice President
(202) 456-7044

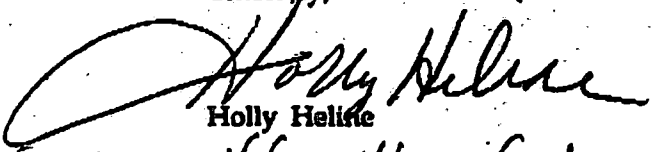
Dear Mr. Anderson:

Thank you for your recent inquiry into ROPER REPORTS data on liability lawsuits. I am enclosing an August 1991 article from Roper's newsletter, *The Public Pulse*, on that topic. Along with the article, I have included a data supplement with the national findings cited in the article.

The poll, taken in March 1991, consists of 2000 face-to-face interviews conducted with a representative sample of adults aged 18 and over.

Please contact me if you would like further information.

Sincerely,


Holly Heline

P.S. Our Roper Reports Service offers these findings as well as numerous other questions, run by various demographic groups, including party affiliation and ideology.
If you do not receive all the pages or cannot read the copy, please contact The Roper Organization (212) 599-0700

To Sue Or Not To Sue? Public Backs Liability Reform

IN HIS RECENT APPEARANCE BEFORE the American Bar Association, Vice President Dan Quayle presented a strong case for reforming the nation's civil justice system. Armed with a lengthy list of proposals to temper a "litigation happy" America, as well as some pointed criticisms of the nation's glut of lawyers, it is not surprising that his case fell flat among fellow members of the legal profession.

Yet the jury of public opinion may come down on the side of Quayle in the case for legal reform. Disgruntlement with the legal profession has grown markedly in recent years (See *The Public Pulse*, April 1990). Escalating numbers of liability lawsuits, coupled with extremely high jury awards in many cases, have undoubtedly fueled the public's disaffection.

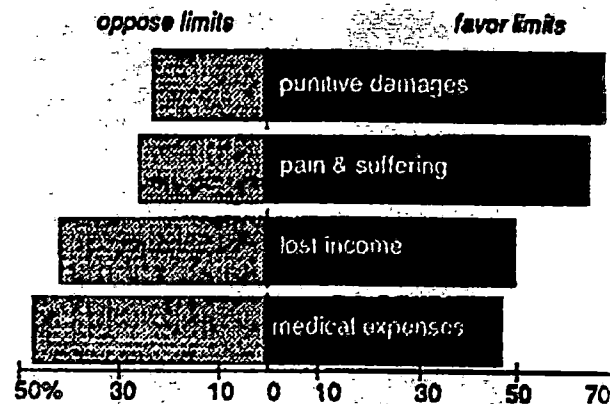
At the heart of Quayle's crusade is the notion that Americans have placed themselves at a competitive disadvantage with other countries by incessantly engaging in costly and time-consuming litigation. According to a recent report issued by the President's Council on Economic Competitiveness, on which the Vice President based his address, overuse and abuse of the legal system costs Americans an estimated \$300 billion annually. The report also argues that competitiveness is stifled because the product liability insurance costs borne by American companies are frequently 20 to 50 times greater than those shouldered by foreign competitors.

➡ Many Americans apparently share Mr. Quayle's frustrations about our "litigious society": Nearly half believe themselves to be personally affected by large jury awards made in both product liability cases (46%) and medical malpractice suits (also 46%). And many feel that the liability system has spiraled out of control. By a margin of nearly 3 to 1, more Americans agree the number of liability lawsuits has gotten "way out of hand" because people are always looking for a culprit whenever something bad happens (62%), than say most liability suits are necessary to protect consumers from the "careless actions of powerful business corporations" (23%).

Moreover, when asked what the major effects of liability lawsuits are, the public's sensitivity to costs is crystal clear. In their view, the number-one result of liability lawsuits is to enable lawyers and their firms to make more money than they deserve (70%). Majorities also think liability litigation results in higher taxes (61%) and higher prices for consumer products (65%) because government and manufacturers shift the burden of rising insurance rates onto the public.

Consequently, it should come as little surprise that widespread support exists for Quayle's proposal to place caps on monetary compensation for punitive damages in liability cases that work their way up to the federal courts. 70% of Americans favor placing limits on awards for punitive damages. Going even further than the Vice President, two-thirds also support

Public Favors Limiting Monetary Awards For Most Types Of Liability Claims



caps on compensation for pain and suffering, and half would limit amounts granted to cover lost income. The public is split however—47% to 47%—on the issue of whether to limit monetary compensation for medical expenses.

➡ Currently Americans are divided as to whether most liability lawsuits are justified (43%) or unjustified (45%). Hence, although public support exists for measures which would lower the costs of lawsuits once they are in progress, it is unclear whether Americans would support one of the Vice President's proposals intended to discourage people from starting lawsuits in the first place. Quayle has proposed that losers in liability cases should pay all legal costs for both parties, arguing that Americans would think twice before suing if faced with the prospect of paying legal costs. But his critics respond that even parties with reasonable claims would be inhibited from enforcing their legal rights, resulting in more uncompensated victims and fewer incentives for companies to make safe products. According to this argument, the average American would sacrifice the unconditional right to sue—the advantage of big business.

➡ Already the public finds the liability system ineffective in serving the ends it is supposed to: Fewer than half think that litigation results in fair punishment for guilty parties (42%) or just compensation to victims (40%). And only a slim majority think the current system encourages companies and individuals to act more responsibly in order to avoid being sued. A proposal that could make these ends even harder to achieve would not likely receive the same widespread support as those that would cut costs but preserve the basic right to sue.

Nonetheless, the Bush administration has clearly chosen an issue that piques the public's interest and appeals to a strong desire to rein in the skyrocketing costs of liability litigation.

ROPER REPORTS 91-3

questions

65. The number and size of liability lawsuits for such things as malpractice, personal injury, and product liability have increased in recent years. Do you think the increase in the number and size of awards in these cases are fully justified, mostly justified, mostly unjustified, or totally unjustified?

Fully justified	5%
Mostly justified	38
Mostly unjustified	35
Totally unjustified	10
Don't know	12

66. When a jury determines how much money to award a person who wins a lawsuit, the jury must do so by awarding money in four quite different categories. The first (second, third, last) of these categories is (read item). Do you think a jury should be allowed to award whatever it thinks is appropriate, or do you think there should be some upper limit on what a jury can award for (read words in CAPS)?

	What- ever	Limits	Don't know
a. Money to cover MEDICAL EXPENSES	47%	47	7
b. Money to cover LOST INCOME because the injured person can't work	42%	50	8
c. Money to compensate for the PAIN AND SUFFERING the person experienced, which is separate from medical expenses	26%	65	8
d. Money for PUNITIVE DAMAGES--that is additional compensation to the injured party in order to punish the individual or company judged to be at fault	23%	68	10

ROPER REPORTS 91-3

29

questions

68. Liability lawsuits can have a number of different effects on society--some good and some bad. (Card shown respondent) Here is a list of some things that might be caused by liability lawsuits. For each one, please tell me if it is a major effect of liability lawsuits, or a minor effect, or not really an effect that liability lawsuits have on society?

	Major effect	Minor effect	Not an effect	Don't know
f. Lawyers and law firms make much more money than they deserve from all the liability lawsuits	70%	17	5	8
d. Consumers end up paying more for products since manufacturers pass the high costs of liability insurance on to their customers	65%	21	5	9
g. People often start frivolous lawsuits because awards are so big and they have so little to lose	63%	21	4	11
e. People end up paying higher taxes because schools and government have to pay high liability insurance premiums	61%	23	6	10
c. Companies and individuals act more responsibly to avoid being sued	51%	27	12	11
b. Guilty companies and individuals get fair punishment for their harmful behavior	42%	33	15	11
a. Victims get fair compensation for what they have suffered or lost	40%	35	14	11

trend

FEDERAL CIVIL JUSTICE REFORM

TALKING POINTS

1. General Talking Points
2. General Background/Philosophy
3. "How This Helps the Average Litigant"
4. "Discovery"
5. "Expert Evidence Reform"
6. "Reform of Unlimited Punitive Damages"
7. "Modified English Rule for Attorney's Fees"

FEDERAL CIVIL JUSTICE REFORM

Background

- o America is awash in a sea of litigation:

Federal court filings up 300% in the last 20 years;

With 5% of the world's population, the U.S. has over 70% of the world's lawyers; and

Almost 50% of all businesses have taken products off the market due to the threat of lawsuits

Working Group

- o Council established a Working Group chaired by Solicitor General Ken Starr to address this "lawyer tax."
- o Instructed to recommend meaningful changes, not more studies:
 - Reduce costs and delay in the system;
 - Try to make the system more simple and final; and
 - Encourage people to resolve disputes without going to court.
- o No reform should limit access to the courthouse, but should make parties evaluate their cases with care.

Council Recommendations

- o Council has endorsed 50 reforms.
- o Some of the recommendations introduce market-type incentives:
 - "Loser Pays" or English Rule for attorney's fees;
 - Requiring parties to pay for excess discovery;
 - Limiting punitive damages; and
 - Requiring experts to use only "widely accepted" theories (no junk science).

Implementation

- o Will require a combination of legislation and rules changes.
- o Can be done at state level as well (especially punitive damages).
- o Federal Government will issue an Executive Order applying recommendations to itself.

GENERAL BACKGROUND AND PHILOSOPHY

Why did the Council look at Civil Litigation Reform?

1. Litigation costs too much
2. Too many frivolous suits keep meritorious suits from being decided.
3. Needless Delay = Wasted Money
4. American companies are placed at a competitive disadvantage

What were the Council's objectives?

1. Reduce costs and delay
2. Open the courthouse doors
3. Insure people their day in court, not endless delay
4. Look at PROCEDURE: Do Not Alter Substantive Law
5. Look at the incentives for litigation
- apply market discipline
6. Give People greater CHOICE

Who worked on the Reform package?

1. Department of Justice
2. Department of Commerce
3. Council of Economic Advisers
4. White House Staff Offices
5. Office of the Vice President

HOW THIS HELPS THE AVERAGE LITIGANT

Disputes will be settled earlier -- injured party will receive compensation with less costs and delay:

1. Pre-suit notice provides opportunities to resolve dispute prior to filing lawsuits.
2. Reforms encourage settlement. Parties will be required to attend settlement conferences, thereby overcoming posturing by some lawyers.
3. Other steps to reduce court backlogs will make the courts more accessible to the litigants (case management recommendations, etc.)

Parties will be given more choice in resolving their disputes:

1. "Multi-door courthouses" will provide quicker and less-costly alternatives to trials. Alternative Dispute Resolution options, such as mediation, can achieve effective results without the expense of trial.
2. Participation in ADR will be voluntary, so those wanting complete court proceedings will be able to go to trial.

Litigation will be less costly:

1. Each side will be required to provide basic information up front. It will no longer be necessary to make a formal request for names of witnesses, location of documents, etc.
2. Gamesmanship will be discouraged. The parties must plan their discovery requests within pre-set numerical limits. Unbridled discovery requests will be discouraged, because either the court would have to authorize additional inquiries not in the discovery plan or the requesting party would have to pay the opponent's "production costs."

Prevailing parties will be made "whole"

1. Usually the winner doesn't really win, because he or she still has to pay an attorney. Under the Council's "Loser Pays" recommendation, in some instances the loser will pay the winner's attorney's fees.
2. This experiment is limited to federal court cases where citizens of different states are suing each other, so the parties can always go to state court. Also, the loser will never pay more than what he spent on fees.

DISCOVERY

Recommendation: Reform the Pre-trial Discovery Process

1. **Require Disclosure of "Core Information"**
(Parties must disclose basic information, such as the names and address of people with knowledge relevant to the dispute and the location of documents. This would make it easier for parties to plan their discovery need and eliminate some gamesmanship.)
2. **Presumptive Numerical Limits on Discovery/
Pay-as-you-go for Additional Discovery**
(Parties must meet to plan their discovery needs subject to pre-set ceilings on the amount of inquiry allowed. Additional discovery would always be permitted as long as the requesting party paid the other side's "production costs." Judges would have some discretion to adjust the limits and review the costs.)
3. **Penalize Abusive Discovery**
(There should be greater penalties for discovery abuse, or when a party withholds information. The penalties should be uniform and mandatory.)
4. **Loser Pays in Discovery Motions**
(Parties should be encouraged to resolve their discovery disputes without court intervention. If it becomes necessary for the court to decide, the losing party should be required to pay the winner's costs and attorney's fees.)
5. **Retain Protective Orders**
(Trade secret and other confidential information necessary for disposition of a lawsuit should not be used outside the case. Lawsuits should not be a vehicle for industrial espionage.)

MODIFIED ENGLISH RULE FOR ATTORNEY'S FEES

Recommendation: Adopt a "loser pays" rule for attorney's fees in federal diversity cases.

1. Loser pays the Winner's Attorney's Fees

(This would encourage parties to evaluate their cases with greater care. Plaintiffs would consider whether they have a realistic chance of prevailing and thereby be discouraged from bringing frivolous or harassment suits. Defendants, too, would be encouraged to pay meritorious claims, as maintaining unreasonable defenses would result in paying the plaintiff's fees.)

(The rule also is fair. It makes the winner whole.)

2. Limitations:

a. Federal Diversity Cases Only

(The "experiment" would apply only in federal court, and only when citizens of different states are contesting issues of state law. This means that cases brought under federal and state statutes, i.e. civil rights, environment, etc., would not be discouraged. It also means that the parties would have the option of going to state court if they did not want the loser pays rule.)

b. Limited to amount loser spends

(The most the loser would be required to pay is the amount he has spent on his own case. This means that if he spends \$5,000 to bring a suit and the defendants runs a \$500,000 bill, the loser would be required to pay the winner \$5,000.)

c. Judicial Discretion

(The court would have the discretion to reduce the loser's obligations for good cause shown.)

REFORM OF UNLIMITED PUNITIVE DAMAGES

Recommendation: Develop rational and consistent approach to punitive damages.

1. **Eliminate Prayers for Specific Dollar Amounts**
(Plaintiffs currently make astronomical requests for damages. These requests, which inflame the jury, should be eliminated.)
2. **Bifurcate Trials**
(The jury would award punitive damages -- but in a separate proceeding after liability has been determined. This would insure that imposing punitive damages is a measured decision, not one of passion.)
3. **Require Higher Standards of Proof for Awards**
(Because punitive damages are "quasi-criminal," an award should be predicated on standards of proof requiring some form of intent.)
4. **Judges Award Amount of Punitive Damages**
(After the jury finds that punitive damages are appropriate, the judge would determine amount that should be award. This would remove some prejudice from the system.)
5. **Tie Punitive Damages to Amount of Actual Damages**
(Punitive damages would be capped at one times the actual damages. An injured party would still be entitled to full compensatory damages.)

EXPERT EVIDENCE REFORM

Recommendation: Reform the Rules Regarding Expert Witnesses

1. **Require "Widely Accepted" Theories**
(Theories must be "widely accepted" by others in the field before a witness can testify as an expert. The expert's "theory" need not represent the majority view, but it must be independently corroborated. Independent corroboration will lead to more "mainstream" science because the parties will desire to avoid hiring multiple expert witnesses.)
2. **Ban Contingency Fees for Expert Witnesses**
(Experts should be impartial aides in assisting the court find facts. However, when an expert's compensation is directly related to success at trial, his objectivity must be called into question. Experts should not become advocates.)
3. **Require Courts to Find that Experts are Qualified**
(Judges should be active in protecting their courtrooms from spurious experts.)
4. **Require Experts to Provide Credentials and Theories**
(Currently, parties cannot take an expert's deposition without leave of court. Experts should be subject to the same types of discovery as other witnesses.)
5. **Avoid Attempts to Require Court-Appointed Experts**
(Some suggest that only the judge should be able to seek expert testimony. It is important that the parties retain the ability to call experts (subject to the Council's restrictions).) expert.

QUESTIONS AND ANSWERS

DISCOVERY REFORM

Is it "fair" to limit discovery?

- o 80% of cost and time in a lawsuit is discovery
- o discovery is often used as a "weapon" not to find facts
- o the proposals allow for sufficient "free" discovery

Why are you making people pay for discovery?

- o provides incentives for thorough case evaluation
- o discourages discovery as a weapon
- o provision can be waived by court for "good cause"

How did you determine discovery limits?

- o we don't suggest specific numerical limits
- o many federal judges already set limits on interrogatories

How will disclosure solve discovery problems?

- o provides basic information needed to plan the case
- o eliminates unnecessary filings and delay

Why is discovery needed at all?

- o there is some benefit in "trial by truth" but it would require more trials, and the system is already overloaded
- o discovery is useful for the parties to assess their cases

EXPERT EVIDENCE

What do you mean by "widely accepted" theories?

- o we would eliminate "junk science" that has no foundation
- o a consensus is not required, only corroboration in the scientific community

Won't this limit "good" cases?

- o we aim at the "expert for hire" who changes opinions for the highest bidder
- o if there is substantial scientific support, the expert can still testify

ENGLISH RULE

Won't this limit access to the courts?

- o plaintiffs must choose to use the English Rule by bringing their cases under federal court diversity jurisdiction
- o if plaintiffs don't want the English Rule, they can go to state court

Isn't the English Rule unfair?

- o "loser pays" is similar to equitable "make whole" remedies
- o the prevailing party is restored to his original position
- o the English Rule will deter frivolous lawsuits, but because it pays attorneys fees, it provides an incentive for plaintiffs to pursue meritorious claims

(Critics almost always assume that the plaintiff is an indigent victim who will lose the lawsuit. Ask them if the rule is unfair when the indigent victim wins.)

Why is it only a test?

- o the proposal is a major change to the legal system
- o should make incremental changes

PUNITIVE DAMAGES

Isn't the proposed limitation on punitive damages unfair to victims?

- o punitives are societal deterrents - not compensation
- o victims would still receive all compensatory damages
- o punitives still available, subject to 1x cap

Is the proposed reform workable?

- o proposal, unlike common law, is coherent and rational
- o several states have similar limitations

ADR

Would ADR really increase access to the courts?

- o ADR provides quicker and cheaper decisions
- o people have more choice for resolving disputes

Isn't ADR really just another bureaucratic layer standing between litigants and a judge?

- o proposals only require parties to consider ADR - actual use of ADR is purely voluntary
- o encourages parties to evaluate their cases

IMPLEMENTATION

What are your next steps?

- o the Justice Department is drafting legislation
- o we will be working with the Congress and the courts
- o also with lawyers who want to help change the system

How does this differ from existing legislative proposals?

- o we recommend action, not further study
- o we introduce "market-type" discipline into the procedural system

Will the bill/rules changes pass?

- o we are optimistic
- o the time has come for change

MISCELLANEOUS

What are you saying about the professional prospects for aspiring lawyers such as ourselves?

- o the law is a noble profession
- o don't forget professional obligations to client and to the legal system
- o legal training should be used to resolve, not prolong, disputes
- o there will always be a need for competent, hardworking, and client-oriented counsel

What about the ABA reaction? - Weren't you asking for a hostile reception?

- o the ABA represents many of America's lawyers
- o most lawyers acknowledge there is a problem, and I heard from many of them both in Atlanta, and afterwards
- o some disagreement is always expected
- o I think that when the ABA actually reads the report, they will be of assistance

Why did you "lawyer bash" at the ABA?

- o I didn't lawyer bash
- o I told people the truth - that the legal system takes too long and is too costly
- o I honestly believe that lawyers will be part of the solution

Where did you get your data/support?

- o the Justice Department did much of the work
- o the Solicitor General spearheaded the project

What is the true cost of the civil justice system?

- o we've asked several people what the system really costs
- o one estimate is \$80 billion in direct costs and \$300 billion in indirect costs
- o difficult to calculate cost of time and lost opportunities
- o reported figures have the costs somewhere between what America spends on cars and on food.

Are market incentives appropriate in the legal process?

- o people respond to market incentives
- o market discipline works in regulation, and will work here

What do outside experts think about these reforms?

- o we consulted many experts in preparing the reforms
- o most think that the package is solid and workable
- o more importantly, I've heard from the actual consumers of legal services, and they are saying "this is needed, this will help"



Office of the Attorney General
Washington, D. C. 20530

April 13, 1992

Robert H. Simon
Research Assistant
Office of Speechwriting
The White House
OEOB - Room 111 1/2
Washington, DC 20500

Dear Bob:

The compilation and article I mentioned are enclosed. If you need more help, please give me a call.

Very truly yours,

A handwritten signature in cursive script, reading "Eugene Scalia".

Eugene Scalia
Assistant to the Attorney General

GUILTY!

TOO MANY LAWYER.
AND TOO MUCH
LITIGATION. HERE'S
A BETTER WAY

Being a lawyer at Motorola Inc. is tough these days. While attorneys at other companies might churn out lawsuits against customers or suppliers with the push of a button, Motorola's 100 in-house lawyers must seek all possible alternatives to landing in court: arbitration, mediation, even private judges who settle disputes for a fee. After all this, Motorola lawyers who still want to go to trial must fill out a form estimating legal costs, likely damages, and chances of victory. "The form is so onerous that they gladly work out an alternative settlement rather than screw around with that form," says General Counsel Richard H. Weise, the architect of Motorola's resolution program.

If that sounds like an unproductive use of an attorney's time, think again. Since starting the program in 1984, alternative dispute-resolution techniques have slashed Motorola's litigation costs by as much as 75%. "It's that dramatic an impact," Weise says.

'LOST OPPORTUNITY.' Motorola's obsession with finding new ways to settle disputes isn't typical. But it is rapidly becoming so. After years of mounting frustration, disdain for the U.S. legal system is now so intense that corporations are taking the law into their own hands. From General Mills to General Motors, companies are fighting their battles privately, through such innovative techniques as rent-a-judge services and minitrials. Pacific Gas & Electric Co. even pays for its opponents to sit down with a mediator. "What's worse than the money wasted on the court system is the lost opportunity to find solutions," says Howard V. Golub, PG&E's general counsel. "Our energies should not be spent on recreational litigation."

The legal revolt among corporations is only one facet in an unprecedented rethinking of the U.S. civil justice system. Every branch of government is pushing some package of legal reform. Congress is overseeing "advisory committees" in every federal court to try to speed up cases and cut costs. Judges are overhauling the federal rules of civil proce-



...dure. Even the White House is responding to the business backlash. Through the President's Council on Competitiveness, the Bush Administration is promoting an array of probusiness reforms, including such controversial measures as forcing losers to pay the victors' legal bills. The debate has inflamed the passions of everyone from defense lawyer Alan Dershowitz to legal scholars such as RAND researcher Deborah Hensler to lawyer and best-selling author Scott Turow.

Even the tort system, where injured parties sue for damages, stands a better chance of being reined in. Congress is again mulling a uniform product-liability law to replace the patchwork of state laws and make it tougher for plaintiffs to win damages. States are tightening up on punitive damages and pain-and-suffering awards. And they're finding faster and cheaper ways to resolve medical malpractice suits, such as by compensating injured patients regardless of whether the doctor is at fault. "There's a very strong popular revolt over excessive lawyering, excessive delays, and excessive costs," says Martin F. Connor, president of the American Tort Reform Assn. "When you add it all up, it's impressive."

OVERBALANCED SCALES? Yet many worry that a headlong rush for legal reform could do more harm than good. Some of the proposals threaten the cornerstones of the U.S. legal system: an abundance of individual rights and open access to courts. Critics fear that by making it tougher to sue, limiting access to evidence before trial, and even penalizing those who lose, reformers may be pushing the pendulum too far in the other direction. The critical question is how to make the legal system more efficient and less costly while safeguarding indi-

vidual liberties. "A broad statement that going to court is evil is very destructive to our democratic process," says Pamela Gilbert, legislative director for Ralph Nader's Congress Watch. "We should take pride in our legal system."

But even Gilbert agrees that parts of the system are breaking down. America's legal bills are going through the courthouse roof. Last year, law firms grossed more than \$100 billion, estimates a Commerce Dept. report. That doesn't include what

THE U.S. IS LOADED WITH LAWYERS...
LAWYERS PER 100,000

U.S.	BRITAIN
307.4	102.7
GERMANY	JAPAN
82*	12.1

...BUT THEIR RANKS CONTINUE TO SWELL...
LAWYERS

1971	1980
355,242	542,205
1990	2000
750,000	1 MILLION*

...AND SO DOES THE NUMBER OF LAWSUITS
STATE COURT FILINGS
MILLIONS

1984	1986
14.1	15.5
1988	1990
16.6	18.4

companies spend on their own legal departments—and what they must pay to resolve suits. Since 1971, the number of attorneys has almost tripled, to 780,000—far more per capita than in Britain or Japan (table). "The prime beneficiaries of the legal system are lawyers, not victims and not society as a whole," says Ralph Warner, co-founder of Nolo Press Inc., a Berkeley (Calif.) publisher of legal self-help books.

The overloaded courts are only making matters worse. Since 1960, the number of civil suits in federal courts has soared 300%, even after dropping from a peak in 1985. In the state courts, civil suits have jumped by more than 4 million in the past six years (table). And that's on top of an exploding backlog of criminal actions that push business cases to the back of the line. "You can't divorce the civil courts from the criminal courts," says Sol Wachtler, chief judge of the State of New York. "There are delays because of the clog in criminal cases."

DRAINING. Executives fear the U.S. legal system is crippling America's ability to compete in the global marketplace. A BUSINESS WEEK/Harris Poll of top executives at corporations drawn from the BUSINESS WEEK 1000 (page 66) found that 62% of those surveyed believe the U.S. civil justice system significantly hampers the ability of American companies to compete with Japanese and European rivals. A striking 83% of those polled say the fear of lawsuits has more impact on decision-making within their company today than it did 10 years ago. "The American economy can no longer afford this process," says Ronald L. Davis, assistant general counsel at Dow Chemical Co. "The system's inefficiencies are eating away at our industrial base." He says Dow Chemical spends "in excess" of \$100 million a year on legal services and liability insurance.

Just how much litigation drains the economy is a matter of fierce debate. Vice-President Dan Quayle claims that Americans spend more than \$80 billion a year on direct litigation costs and higher insurance premiums. Indirect costs, including the expense of avoiding liability, he says, reach \$300 billion annually—about 1.8% of the nation's \$5.7 trillion gross domestic product. But legal scholars such as Marc S. Galanter, a professor at the University of Wisconsin's school of law, attack those figures as "the product of casual speculation." Instead, he cites a 1986 study by RAND's Institute for Civil Justice. It put the cost of the U.S. tort system—including court ex-

Cover Story

penses, legal fees, and the value of lost work—at between \$51 billion and \$58 billion.

Whatever the tab, America's companies are fed up with watching their legal bills erode profits. Some are locked in unproductive court brawls with rivals. Four-year-old Cyrix Corp., a Richardson (Tex.) semiconductor maker, has been battling Intel Corp. In December, 1990, Cyrix filed an antitrust suit accusing Intel of an anticompetitive campaign to keep Cyrix co-processors out of the market. A month later, Intel sued Cyrix for patent infringement. While the judge has yet to rule in that case, Intel just filed another patent-infringement suit against Cyrix in response to reports that Cyrix was about to introduce a chip that mimics Intel's top-of-the-line 486 microprocessor. The Cyrix chip was introduced on Mar. 30 (page 95).

SUE CITY. Other companies, meantime, are shunning domestic markets out of fear of product-liability suits. Biomet Inc. sells spinal implants for back problems virtually all over the world—with one glaring exception. "We don't feel confident in the U.S. with such a product," says Dane A. Miller, CEO of the Warsaw (Ind.) orthopedics company. "Our legal system in America is totally out of control."

Countries such as Britain and Japan hold down costs by making it more difficult to sue and harder to win. In the U.S., each side in a lawsuit usually pays

"If American businesses are concerned about the burdens of legal expense, they could control their own lawyers better."

DEBORAH HENSLEY
RAND researcher who studies civil litigation trends

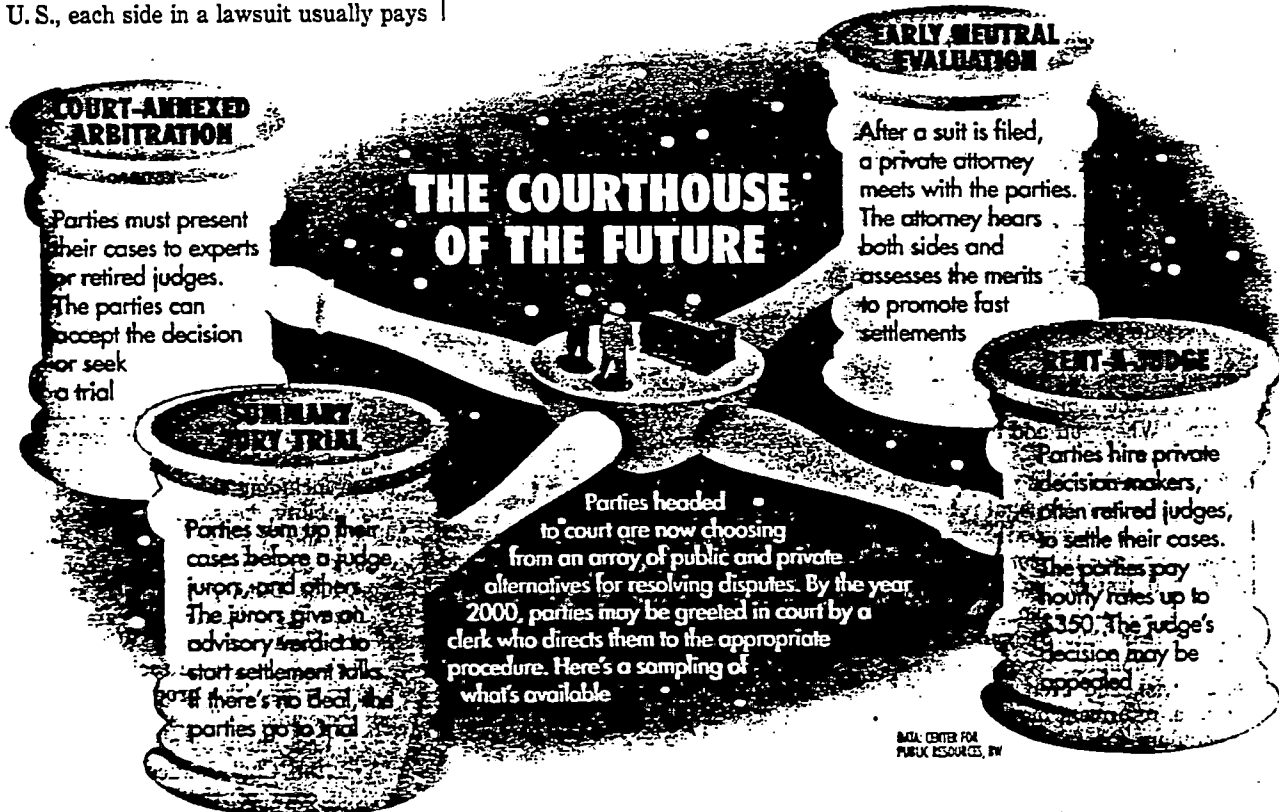
its own legal costs, regardless of the outcome. But Britain and other countries force losers to pay the winners' fees as a way to discourage frivolous suits. American companies spend as much as 80% of their legal bills on discovery, which lets parties review an opponent's evidence before trial. In Japan, discovery doesn't exist (page 64).

The hallmarks of the U.S. legal system—jury trials, contingency fees, and punitive damages—encourage the "I'll

sue" mentality. Dow Chemical gets hit with some 2,000 new product-liability claims in the U.S. every year, but only about 20 such claims are filed against it in the rest of the world, says Davis. He notes that while many European countries have adopted broad U.S.-style product-liability laws, many lack such things as contingency fees, discovery, and jury trials. The Midland (Mich.) chemical maker spends an average of \$250,000 just to get to trial. Says Davis: "Even when we win, we don't win."

Many executives say they settle even frivolous suits to avoid the legal fees. Others settle, they say, to escape the long-shot risk of punitive damages. The claims are "used to extort money," says Robert W. Pommerville, general counsel of Beverly Enterprises Inc., a leader in the nursing home industry. Pommerville says it takes "a real gutsy individual" to go to trial on punitive-damages claims, because juries are so unpredictable.

But settling can bring its own headaches. In 1984, Alan F. Shugart, CEO of Seagate Technology, was accused in a class action of artificially inflating the stock price. Attorneys for the Scotts Valley (Calif.) disk-drive maker persuaded him to settle in 1991, for \$9 million, he says. Two subsequent suits were filed in 1988 and 1991, which copied the class action verbatim—from the wording of the charges to the misspellings. Both



suits are still pending in the courts.

Now, Shugart goes on the offensive at any hint of a lawsuit. Last year, for example, the company laid off an undisclosed number of employees. When a group of them joined with a coalition of labor unions and sued for insufficient notice, Seagate publicly threatened to countersue, clearly stating it would fight to recover court costs as well as punitive damages on the grounds that the labor unions' suit was frivolous. The coalition later withdrew the case.

HUGE SAVINGS. Rather than get caught up in the system, corporations are dropping out. Already, some 600 top corporations have signed a pledge drafted by New York's Center for Public Resources, a nonprofit group that promotes alternatives to litigation. The pledge states that the signers will consider negotiation and other forms of "alternative dispute resolution" before running to court against other signers. Last year, for the first time, law firms nationwide made a similar pledge, and almost 800 firms have signed on. The Center found that avoiding court saved 142 companies more than \$100 million in legal costs for disputes concluded in 1990.

General Mills Inc. has long required a commitment to alternative dispute resolution on all contracts it signs—cutting legal costs for contract disputes to a bare minimum, says General Counsel Clifford L. Whitehill. Now, the Minneapolis food company is moving toward requiring a similar commitment from employees. But the company's best single experience with such techniques occurred in 1987. On the verge of going to court with a supplier, Whitehill says, both sides agreed to argue their case before the CEOs of both companies. After six days of arguments, the parties agreed that General Mills would get a \$45 million settlement.

Other companies are devising formal systems to settle routine disputes. In mid-1990, General Motors Corp. hired Endispute Inc., based in Washington, D.C., to set up systems in each of its divisions for resolving dealer disputes. The systems range from nonbinding, voluntary mediation at Cadillac to binding arbitration at Chevrolet, Pontiac, Oldsmobile, and GMC Trucks, and were written into the dealers' five-year franchise agreement. William Coulter of Phoenix' Coulter Cadillac just mediated a dispute with GM auditors over a warranty issue. Both sides argued their case before a GM executive, a dealer, and an Endispute staffer. They settled in a day, at a cost of \$3,000 to GM and about \$1,500 to Coulter. Says Coulter: "The process was fair."

For Motorola, the process of staying out of court starts early. Its lawyers worldwide learn how to counsel execu-

tives within the company on avoiding conflicts by focusing on better contracts, improved product quality, and truthful salesmanship. The law department also follows Motorola's total quality management program to eliminate wasteful labor and expensive errors. "Cutting legal costs is like reducing the cycle time in manufacturing," says Weise, the general

counsel. "Our goal is to reduce the 'dispute cycle'—the time between the event that causes the dispute and the resolution."

There's more to Motorola's legal program than just staying out of court. The company rides herd on its outside lawyers to deliver quality service at the lowest possible cost. In a radical break with

COMING TO TERMS —WITHOUT BRINGING IN THE LAWYERS

Lawyers for Pacific Gas & Electric, Union Oil, and Thermal Power were preparing to fight one of the largest suits ever filed in Sonoma County (Calif.) Superior Court, when the three top executives decided that there had to be a better way. Rather than spend a year at trial, the executives resolved most of the issues privately—without their lawyers. To do the rest, they called in an outfit based in Orange, Calif., known as Judicial Arbitration & Mediation Services Inc.

The JAMS mediator met often with the principals, even going up in a helicopter to survey the field at the heart of their contract dispute. The case settled last month, with JAMS's bill less than six figures.

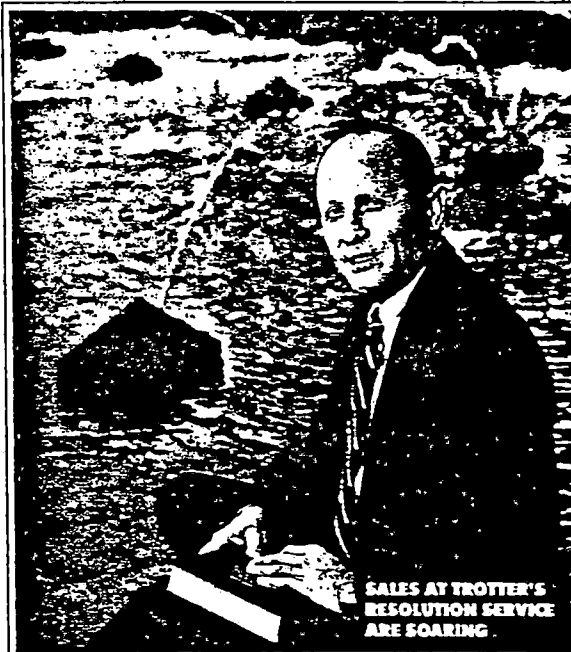
Tapping into the fervor to cut litigation costs, JAMS is a part of one of the fastest-growing sectors of the law business: alternative dispute resolution. Started in 1979, it's the U.S.'s leading for-profit resolution company. This year, it expects to hear 14,000 cases and see sales grow to \$30 million, up 25% from 1991. JAMS has 18 offices in four states and a panel of 175 former judges. With \$15 million from E. M. Warburg, Pincus & Co., JAMS plans to keep expanding.

It's not alone. Washington-based Endispute Inc. is also expanding its dispute-resolution services. And Philadelphia-based Judicate Inc. boasts more than 600 former judges offering arbitration and mediation. It's easy to see the appeal. Alternative resolution techniques save on discovery and provide privacy and flexibility in scheduling.

But the driving force is the cost. JAMS charges between \$300 and \$350 an hour—a far cry from the \$300 an hour a battery of lawyers might each charge litigants. And, unlike a litigated

case, the typical JAMS case can be resolved in hours or days. "Alternative dispute resolution is like the hula hoop—why didn't someone else think of this before?" says JAMS CEO John K. Trotter, a retired state appellate judge.

Critics say problems arise when JAMS judges go beyond simple mediation and render decisions that can be appealed in the courts. Such private judging accounts for 1% of JAMS cases, but this tactic could soar in California, where parties can leapfrog the long



SALES AT TROTTER'S
RESOLUTION SERVICE
ARE SOARING

court lines by getting a private ruling and then appealing it.

To head off government regulation, JAMS is developing guidelines for disclosing conflicts of interests, including prior contacts with parties. It's also devising a procedure for speedy handling of complaints. Given the need for faster and cheaper alternatives to the gridlocked courts, JAMS may soon be looking more and more like the Federal Express of the dispute business.

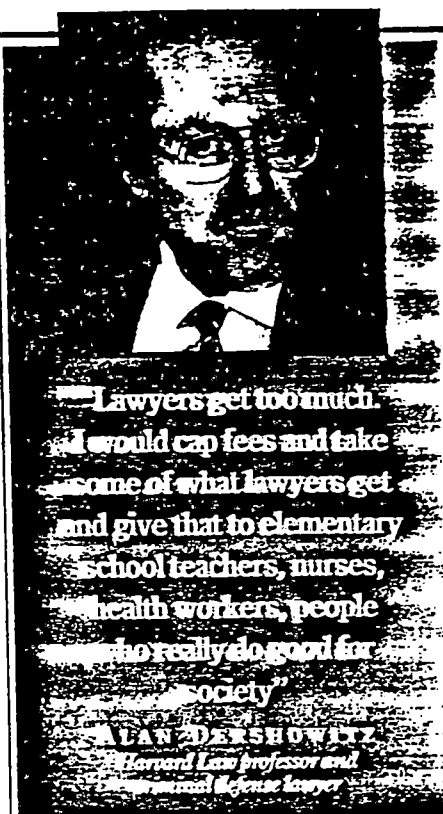
By Jane Birnbaum in Los Angeles,
with Morton D. Sosland in Philadelphia

Cover Story

tradition, Motorola also refuses to pay for lawyers' travel, meals, and other incidentals. Instead, the law firms must figure such expenses into their hourly billing rate. Motorola forces the lawyers to follow a strict script that outlines a step-by-step procedure for resolving disputes. "They really bristle, because they're not used to that kind of participation by a client," Weise says. "Some outside counsel just can't do it."

Yet even companies that support such techniques remain skeptical that the new procedures will make a dent in the amount of litigation. Alternative dispute resolution works only when both parties agree to it, they say. A small company may be muscled into court by a larger rival with more resources. Other companies insist on trials to achieve public vindication. And individuals and their lawyers may be unwilling to step outside the system. Abandoning a trial "would do away with punitive and compensatory damages," says FMC Corp. General Counsel Patrick J. Head. "That's where the big scores have been."

It may not be that way for very much longer. More than 1,200 courts across the country are offering various alternatives to trials. In Texas, a court can order a case to mediation. In Colorado, lawyers who fail to tell clients about alternative dispute resolution now can



be disciplined for breaching their ethical duties. And in California, some over-worked judges refer cases to a private settlement company, Judicial Arbitration & Mediation Services Inc., based in Orange County (page 63).

Many courts are offering alternatives to trials right in the courthouse or other neutral sites. The federal court for the Northern District of California in San Francisco sends up to 300 cases a year through a settlement program known as "early neutral evaluation." Under it, the parties meet with a volunteer attorney who is an expert in the disputed subject matter. He sizes up the cases, gives his opinion, and then asks whether the parties want to work out a deal. An early study found up to 40% of these cases settled on the spot. Such programs are redefining the role of courts. "In the future, instead of walking into a building called a courthouse, you might walk into the Dispute Resolution Center," says Scott H. Bice, Dean of the University of Southern California's Law Center. **LOSERS WEEPERS.** The debate over legal reform in Washington can only speed up these changes. Last year, President Bush signed an executive order to rein in the vast swarm of government lawyers—the largest group of lawyers litigating in the federal courts. And Vice-President Quayle delivered a scathing, widely publicized speech to the American Bar Assn., blasting lawyers for the nation's lack of competitiveness. In February, the White House unveiled a bill that draws from Quayle's 50-point agenda. The bill promotes such things as al-

THE JAPANESE SOLUTION: KILL ALL THE LAWSUITS

When IBM sued Hitachi Ltd. for industrial spying in 1982, the Japanese company got a shocking introduction to legal battles, American-style: Hitachi's first bill from its U.S. law firm exceeded its total payments for legal services in Japan since the company was founded in 1920.

No wonder legal reformers in the U.S. look wistfully at Japan. Its courts aren't cluttered with liability suits, and lawyers are about as scarce as American cars. While the U.S. prides itself on individual rights and equal access to the courts, critics charge that the Japanese legal system discourages litigation. Perhaps. But the culture's distaste for direct confrontation helps ensure that most legal disputes are resolved privately and more efficiently than in the U.S. "In Japan, a litigious person is not welcome," says Toshiro Nishimura, senior partner at Nishimura & Sanada, a top international law firm in Tokyo.

Barriers to litigation in Japan start with legal education (table). To become a *bengoshi*, or lawyer, one must win a spot in the Legal Training & Research Insti-

tute. But the government-run school admits 2% of its 35,000 applicants annually. So Japan's exclusive legal club has just 14,336 lawyers—and grows by only 400 *bengoshi* per year. There are 780,000 lawyers in the U.S., which has twice Japan's population.

COSTLY RECOURSE. Those who can find a lawyer to take their case encounter other roadblocks. Critics of the U.S. legal system complain that parties abuse discovery, which grants access before trial to potential evidence held by an opponent. Japan is at the other extreme: It has no discovery at all. And the difficulty of obtaining evidence makes it especially tough for consumers to win product-liability suits (BW—Mar. 9). "I have often said to clients that I am 100% certain that they would win their case—but where's the evidence?" says Nishimura. "You can't force the other side to disclose."

Plaintiffs also must have deep pockets. Japan bars two key methods of sharing the cost of litigation: class actions and contingency-fee arrangements. At the same time, plaintiffs must pay an up-

front fee to their lawyers of up to 8% of the damages sought in liability suits, plus a nonrefundable filing fee to the courts of one-half of 1% of the damages. In 1991, a small Seattle-based log-home maker provided a Japanese customer with \$240,000 worth of materials and labor for which the company claims it was never paid. To file a \$240,000 suit, it must pay its lawyers \$20,204, including the filing fee of \$1,200. "It's too expensive for us to pursue that course," sighs a top manager at the company. "We've already lost a lot of money."

Damage awards in Japan don't come close to the estimated average of \$1.5 million per case paid last year in U.S. product-liability suits in state courts. On Feb. 7, the Tokyo District Court ordered Chisso Corp., a chemical company responsible for one of Japan's best-known industrial poisoning cases, to compensate 42 victims. The award: \$1.3 million, or \$31,000 per victim.

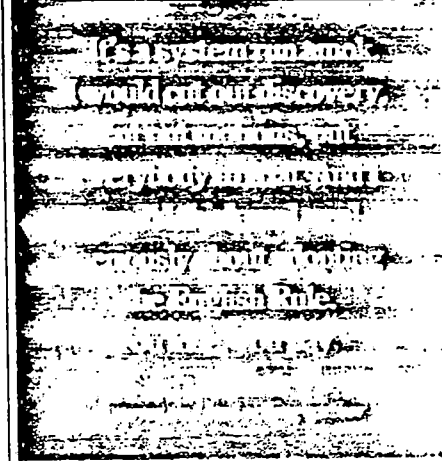
When disputes arise between companies, attorneys often are the last to get involved. Salesmen and front-line managers are the chief problem-solvers. In part,

ternatives to litigation and the English Rule, which forces losers to pay the winners' legal fees.

While the bar blasted Quayle's lawyer-bashing rhetoric, it's taking his proposals seriously. "We ought to be extremely grateful to Dan Quayle for just getting this issue on the table," says Talbot S. D'Alemberte, president of the ABA. In February, it released a report supporting many of Quayle's proposals but criticizing him for ignoring the "broader and more significant problems of our justice system"—judicial funding and inadequate access for the poor.

Others have their own visions for the future. HALT, An Organization of Americans for Legal Reform, is pushing out-of-court alternatives to tort litigation, such as no-fault auto insurance and workers' compensation. Its aim is to ensure fair and prompt compensation for victims and more predictability for defendants. Advisory committees in each of the 94 federal courts, meantime, are experimenting with improving the litigation process, including making discovery voluntary. They're also forcing judges to be managers as well as decision-makers. "The greatest single forward step would be to have district court judges set schedules and require lawyers to live up to them," says former Supreme Court Justice Lewis F. Powell Jr.

Companies and judges are wise to put a premium on negotiation rather than on



fighting until the end. But that's only the beginning. More attention must also be paid to state and federal courts so that they can run more efficiently. And Congress cannot continue to pass federal criminal laws that inundate court

dockets without also quickly filling judicial vacancies. As of Mar. 31, there were 120 vacant federal judgeships, or about 14% of the federal bench.

CHEAP AND DIRTY? Alternatives to trials such as arbitration and mediation should help lighten the courts' burdens, but certain safeguards are needed. Now, proceedings are held in private without regard to whether a public interest or important legal question is at stake. And the resolution business is largely unregulated: Anyone with a business card or stationery can set up shop.

Instead, standards must be established so that mediators are qualified. The proceedings must also be open to the public—and the press. Alternative justice shouldn't become just another way to avoid disclosure of health and safety dangers. And some disputes involving novel or constitutional issues must remain in the public courts. Private dispute resolution can only follow the law, not set new precedents.

What's good in the legal system must be protected. As lawmakers, attorneys, and executives wrestle with legal reform, they must ensure that individual rights are not sacrificed in pursuit of swifter and more economical justice.

By Michele Galen in New York, with Alice Cuneo in San Francisco, David Greising in Chicago, and bureau reports

BW/Harris Poll appears on page 66.

that's to avoid spoiling a long-term relationship. "We may lose \$1 million," says NEC Corp. legal chief Satoshi Nakaichi, "but the idea is to coexist and win that money back on the future deals."

'NEVER SUE.' Rarely do companies battle in court. Nissan Motor Co. is involved in 10 cases in Japan, only one of which involves another company. The rest concern labor and consumer disputes, which make up most of the suits against companies in Japan. "We would never sue a company like our own," says Nissan legal department manager Kenji Toriumi. Only when a case seems headed for court will companies call in a *bengoshi*. But to keep matters quiet, some companies may opt for arbitrated settlements, where three *bengoshi* arbitrators weigh the case privately and issue a binding decision. Nissan recently insisted on a 15% discount on faulty factory equipment supplied by an affiliate. Rather than sue, Nissan settled for half that. "It was an amicable agreement," says Toriumi, "and it saved us time, money, and the relationship."

That attitude keeps costs

down. Most of Nissan's legal expenses go not for pricey outside legal help but for a modestly paid staff of a dozen tax sleuths, 50 patent experts, and 30 legal specialists. Lower bills free up cash for research and other areas, and enable more competitive pricing than U.S. companies can afford.

Suits are few, but some experts argue that Japan has more legal practitioners than the statistics reveal. Japan's corporate halls are stocked with non-*bengoshi* legal experts. Sony Corp. employs 120,

for example. Japan also has about 50,000 licensed tax practitioners who offer services similar to those of U.S. tax lawyers. About the same number of scriveners draft court papers and give legal advice, while 5,000 non-*bengoshi* patent specialists perform services similar to those of U.S. patent attorneys. Add them all up, and Japan has more legal practitioners per capita than the U.S., or 42 per 10,000 people vs. 29, says Raymond August, assistant professor at Washington State University.

Some Japanese argue that Japan should have more lawyers and that certain laws should be rewritten to favor consumers. Critics also say it should be easier for the Japanese to redress clear wrongdoing. Still, the bias against courtroom solutions remains strong. "I work in the legal department," says Nissan's Toriumi, "but I would never ask a lawyer to resolve a problem in my own life." The belief that disputes should be settled amicably is something American legal reformers only now are beginning to embrace.

By Ted Holden in Tokyo

JAPAN'S APPROACH

- ▶ Limits the number of attorneys passing the bar exam to 2% of 35,000 applicants
- ▶ Forces would-be plaintiffs to pay an up-front fee to their lawyers of up to 8% of damages sought
- ▶ Bans contingency fees, class actions, and other fee-sharing devices that make it easier to sue
- ▶ Lets judges, not juries, set damage awards, which rarely exceed \$150,000, even when the victim has been killed
- ▶ Bans discovery so that plaintiffs are denied access before trial to an opponent's potential evidence
- ▶ Nurtures a strong cultural attitude that confrontation is to be avoided and looks down upon those who sue

DATA. BW

THE VERDICT FROM THE CORNER OFFICE

Corporate executives think the high cost of civil justice is a drag on U.S. business and the economy. Fully 83% say their decisions are increasingly affected by the fear of lawsuits, and a 62% majority say the legal system significantly hampers U.S. competitiveness. Executives know whom they blame for the problem: plaintiffs, the



contingency-fee system, and generous juries. They are also quite firm about the solutions. An overwhelming 97% favor much more use of alternative methods to

resolve disputes, and 91% want judicial screening of cases. But most oppose restrictions on expert witnesses and don't want to see more government spending on the courts.

HIGH COURT COSTS

■ Here are some possible reasons for the high cost of litigation and civil justice. For each one, please say whether you think it is a major reason, a minor reason, or not a reason for the high cost.

	Major reason	Minor reason	Not a reason	Not sure
The knowledge that major corporate defendants and their insurance companies have deep pockets	92%	8%	0%	0%
Contingency fees that enable people to sue without any financial risk	85%	13%	1%	1%
Juries that hand out awards that are too high	79%	17%	3%	1%
Laws or regulations that make it too easy to sue	64%	29%	6%	1%
Outside corporate lawyers who drag out cases to jack up their hourly fees	47%	45%	7%	1%
Large corporate litigants that drag the process out in an effort to outlast opponents with fewer resources	34%	55%	9%	2%
Companies that compete in the courtroom instead of in the marketplace	13%	60%	26%	1%
Companies that rush potentially dangerous products to market, opening themselves to subsequent lawsuits	9%	70%	19%	2%

POSSIBLE REFORMS

■ Here are several proposals now under consideration to rein in frivolous litigation and cut legal costs and delays in the civil justice system. Please tell me whether you favor or oppose each of the following:

	Favor	Oppose	Not sure
Making much greater use of alternative dispute resolution methods, such as arbitration, mediation, and private judges	97%	2%	1%
The judicial screening of cases to eliminate apparently frivolous or very weak claims	91%	9%	0%

Requiring the loser in civil suits to routinely pay the winner's legal costs	83%	17%	0%
Restricting the pre-trial discovery process	49%	43%	8%
Restricting the use of expert witnesses	28%	66%	6%
Increasing federal and state spending on the courts	28%	69%	3%

LITIGATION'S IMPACT...

■ In your company, would you say that the following have a major impact, a minor impact, or almost no impact on your business?

	Major impact	Minor impact	Almost no impact	Not sure
The high cost of defending and protecting the company from litigation	40%	49%	11%	0%
Fear of litigation that hampers the introduction of valuable new products or entry into new markets	10%	47%	42%	1%
Legal issues that divert valuable management time and energy from running the business	44%	50%	6%	0%

...AND HOW IT'S GROWING

■ Would you say that the fear of lawsuits has more or less impact on decision-making within your company today than it did 10 years ago?	More impact	83%
	Less impact	5%
	No difference	11%
	Not sure	1%

COMPETITIVE BURDEN

■ Do you feel that the U.S. civil justice system significantly hampers the ability of U.S. companies to compete with Japanese and European companies, or don't you feel that way?	Does hamper	62%
	Does not	32%
	Not sure	6%

Edited by Mark N. Vamos

Survey of 400 senior executives at corporations drawn from the BUSINESS WEEK Top 1000. Interviews were conducted Jan. 27-Feb. 11, 1992, for BUSINESS WEEK by Louis Harris & Associates Inc.

PRIVATE JUSTICE: GOOD IDEA, NEEDS WORK

The U. S. legal system is guilty of costly inefficiencies that hurt the competitiveness of American companies. A BUSINESS WEEK/Harris Poll of senior executives drawn from the BUSINESS WEEK 1000 found that 62% of those surveyed believe that the American civil justice system significantly hampers the ability of U. S. companies to compete with Japanese and European rivals. And 83% of those polled say that the fear of lawsuits inhibits their decision-making more than it did 10 years ago.

Now, after years of mounting frustration with soaring legal costs and lengthy court delays, companies are applying logic to the problem. They're resolving their battles privately, through mediation and arbitration, as well as such innovative techniques as mini-trials and rent-a-judge services (page 60). Some 600 top corporations have signed a pledge drafted by New York's Center for Public Resources, a non-profit group that promotes alternatives to litigation. Signers pledge to consider negotiation and other forms of "alternative dispute resolution" before heading to court against others who have taken the pledge. Some companies go further. Motorola Inc. makes its in-house lawyers seek all possible alternatives to running to court. At the same time, its lawyers counsel Motorola executives to forestall conflicts through better contracts, improved product quality, and truthful salesmanship.

Companies should be encouraged to settle their disputes, but such alternative dispute techniques have dangers that need addressing. Whether or not they embody a public interest or novel legal question, they are held in private. And the booming resolution business is largely unregulated. Almost anyone can be a self-appointed mediator. At a minimum, standards must be set so that mediators are qualified. Also, the proceedings must be open to the public. Alternative justice mustn't be used to avoid disclosure of potentially damaging information, such as health and safety risks.

Congress and the Bush Administration are right to promote alternative dispute resolution to help lift the burdens on the courts. But that should be just the beginning of efforts to bring efficiency to the legal system.

**THE CASE FOR CIVIL JUSTICE REFORM
SUPPORTING MATERIAL**

Table of Contents

Overview of the Problem	1
Economic Effects	3
General	3
Effect on International Competitiveness	5
Effect on Health Care	6
Behavior/Costs	6
Drugs/Vaccines	8
Discontinued Products/Businesses	11
New Products/Innovation	12
Effect on Cities	13
Courts, Attorneys and Expenses	15
Legal Fees and Other Expenses	15
Awards and Compensation	17
Number of Attorneys	18
Case Management	19
Filings and Delays	19
Discovery	22
Expert Witnesses	24
Punitive Damages	25
Availability and Cost of Liability Insurance	28
Product Liability	29
Generally	29
Private Planes	32
Safety	34
Effect on Recreation and Sports	35
Mass torts	38
Asbestos	38
Other Torts	39

I. Overview of the Problem

- "In the past 30 years, our legal system has become burdened with excessive costs and long delays. Many features of the current legal system no longer serve to expedite justice or to ensure fair results. Instead, overuse and abuse of the legal system impose tremendous costs upon American society."¹

- "[T]he tort system of the 1980s has come to resemble a lottery, in which a few lucky litigants recover enormous windfalls and others are not even compensated for out-of-pocket losses. Increases in damage awards have far outstripped the inflation rate and they rationally relate less and less to the injuries involved and defendants' responsibility for those injuries."²

- Senator Biden has said "Too much money is wasted on a system that serves no one well, except our economic competitors who benefit by our squandering of resources on document production and depositions instead of research and development."³

- "In recent years, the civil justice system has been examined by such groups as the Federal Courts Study Committee, the Rand Corporation, the Brookings Institution, the Senate Judiciary Committee, and most recently the President's Council on Competitiveness. While there are some differences in degree, all of these groups have concluded that the present system is flawed and in serious need of reform."⁴

- The American Bar Association (ABA) has not only examined the civil justice system but has also released its own package of reform proposals, entitled the "ABA Blueprint to Improve the Civil Justice System." Moreover, according to ABA President Talbot D'Alemberte, "[t]he ABA supports the majority of the [President's Council on Competitiveness's] agenda."⁵

¹ President's Council on Competitiveness, Agenda for Civil Justice Reform in America i (August 1991).

² Alfred W. Cortese, Jr. & Yosef J. Riemer, Defining the Agenda for Serious Tort Reform, 24 San Diego L. Rev. 903, 903 (1987).

³ The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990 Before the Committee on the Judiciary of the U.S. Senate, 101st Cong., 2d Sess. 2 (1990).

⁴ Gregory B. Butler & Brian D. Miller, Fiddling While Rome Burns: A Response to Dr. Hensler, 75 Judicature 251, 253 (Feb.-Mar. 1992) (citations omitted).

⁵ Don J. DeBenedictis, ABA Releases Civil Justice Plan, ABA J., Apr. 1992, at 30.

• D'Alemberte commented, "We ought to be extremely grateful to Dan Quayle for just getting this issue on the table."⁶

• "A survey of more than 2,000 Americans in 1987 showed that 71 percent believe that the overall cost of lawsuits is too high, and that 57 percent believe that the system fails to provide resolution of disputes without delay. . . . The unfortunate fact is that the civil justice system as we know it today is not fulfilling its basic objective of providing the 'just, speedy and inexpensive' resolution of disputes."⁷

• In a recent case a defendant spent \$500,000 defending himself against claims that were ultimately found to be completely without merit.⁵

• "[A] New Jersey stable was sued by a rider whose horse was stung by a bee. The horse reared and injured the rider. The plaintiff claimed the stable was negligent and should have known about particular swarms of bees on particular trails. And in another case, were two Western wranglers responsible for a breach of duty when a sudden thunderstorm caused a couple of horses to spook and throw their riders? In both cases, the resorts were not held liable. But both lawsuits were expensive to litigate and took time to decide."⁶

• A recent poll of business executives conducted for Business Week by Louis Harris found that 83 percent of executives polled believe corporate decisionmaking is more affected by the fear of litigation today than they were 10 years ago, and 62 percent believe that the U.S. civil justice system significantly hampers the ability of U.S. companies to compete with Japanese and European companies.⁷ Forty percent of respondents said that the

⁶ Michele Galen et al., Guilty! Too Many Lawyers and Too Much Litigation, Bus. Wk., Apr. 13, 1992, at 65.

⁷ S. Rep. No. 416, 101st Cong., 2d Sess. 6, 7 (citing Louis Harris and Associates, Inc., Public Attitudes Toward the Civil Justice System and Tort Law Reform, 15, 19 (1987)).

⁵ See Christic Inst. v. Hull, 112 S. Ct. 913 (1992) (letting stand sanctions in excess of \$1 million against the plaintiffs and their attorneys for bringing a baseless action alleging that bomb explosion in Nicaragua that injured plaintiffs was the product of criminal enterprise among defendants in violation of RICO).

⁶ Marcia Chambers, Whatever Happened to the Sandlot?, Nat'l L. J., Apr. 22, 1991, at 15.

⁷ Michele Galen et al., Guilty! Too Many Lawyers and Too Much Litigation, Bus. Wk., Apr. 13, 1992, at 61.

high cost of defending the company in litigation has a major impact on the business, while only 11 percent of those who responded said that the cost did not have even a minor impact on their company. A full 97 percent of respondents favored much greater use of alternative dispute resolution methods, and 91 percent favored judicial screening of cases to eliminate apparently frivolous or very weak claims.⁸

II. Economic Effects

A. General

- In his book Liability: The Legal Revolution and Its Consequences 4 (1988), Peter Huber describes tort liability as a tax that "directly costs American individuals, businesses, municipalities, and other government bodies at least \$80 billion a year, a figure that equals the total profits of the country's top 200 corporations. . . . The extent of [the] indirect costs [imposed by the tort tax] can only be guessed at. . . ." ⁹

- A study by Tillinghast, an actuarial consulting firm, found the gross cost of the U.S. tort system in 1987 to be \$117 billion, almost three times the 1980 estimated gross cost of \$40 billion.¹⁰

- Four out of ten companies responding to one survey said that the product liability system has had a major adverse effect on their direct costs.¹¹

- "[T]he indirect costs -- the efforts of commercial and governmental bodies to avoid litigation -- exceed insurance premiums, which essentially reflect past litigation costs.

⁸ Michele Galen et al., Guilty! Too Many Lawyers and Too Much Litigation, Bus. Wk., Apr. 13, 1992, at 66.

⁹ One critic of the \$80 billion number, Joan Claybrook, president of Public Citizen, argued that the actual direct cost of torts to the U.S. economy is "just" \$30 billion, citing a study done by the Rand Corporation's Institute for Civil Justice. But James Kakalik, coauthor of the Rand study cited by Claybrook, contends that it is the Tillinghast \$117 billion number (cited in note 10), not Rand's \$30 to \$36 billion figure, that represents the direct "tort tax" imposed on the U.S. economy. See Leslie Spencer, The Tort Tax, Forbes, Feb. 17, 1992, at 40.

¹⁰ Robert W. Sturgis, Tort Cost Trends: An International Perspective 1, 2 (Tillinghast Co. 1989).

¹¹ E. Patrick McGuire, The Impact of Product Liability, The Conference Board Research Report No. 908, at 9 (1988).

American business is now so sensitized to tort suits and expanding concepts of liability in appellate court decisions that corporate legal departments and product managers see a plaintiff attorney behind every bush and post."¹²

- "American corporations spend more than \$20 billion annually on outside counsel defending lawsuits. The outside counsel expenses for some Fortune 100 companies exceed \$30 million annually, and in one case exceed \$100 million annually."¹³

- One 1989 study concluded that between 1950 and 1987, the cost of injury litigation rose 138 percent (quadrupling every 12 years), while the size of the real U.S. economy rose only 33 percent.¹⁴

- "A substantial majority of more than 1,000 experienced litigators and Federal trial judges said that the high cost of litigation unreasonably impedes access to the courts by the ordinary citizen."¹⁵

- Critics of the Competitiveness Council Report nevertheless agree on the need for reform: "There is much to criticize in the American civil justice system. . . . Legal expenses eat up too much of the amount spent to compensate harms--about half the total expenditures for tort litigation generally, and as much as 60 percent of the expenditures for more complex personal injury litigation[, such as that associated with asbestos]."¹⁶

- "In 1984, London reinsurers labeled the U.S. liability market 'uninsurable' and started a mass exodus. By 1985, Lloyd's, the world's biggest reinsurer, was scrambling to get out. . . . By

¹² Robert V. Wills, Lawyers are Killing America, at 10 (1990).

¹³ S. Rep. No. 416, 101st Cong., 2d Sess. 7 (citing Dockser, Companies Rein in Outside Legal Bills, Wall St. J., Nov. 9, 1988.)

¹⁴ Robert W. Sturgis, Tort Cost Trends: An International Perspective 7 (Tillinghast Co., 1989); see also Walter K. Olson, The Litigation Explosion 7 (1991).

¹⁵ S. Rep. No. 416, 101st Cong., 2d Sess. 7 (citing Louis Harris and Associates, Inc., Procedural Reform of the Civil Justice System, (March 1989)).

¹⁶ Deborah R. Hensler, Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform, 75 Judicature 244, 250 (1992).

1985, ninety reinsurers -- almost one-third of the companies that were doing business worldwide in 1983 -- were gone."¹⁷

B. Effect on International Competitiveness

- A Tillinghast study found that the costs of the U.S. tort system are far greater than for any of the twelve foreign economies studied (Australia, Austria, Belgium, Canada, Denmark, France, Italy, Japan, Spain, Switzerland, Great Britain, and West Germany), ranging between three and eight times the relative cost of tort systems in those countries.¹⁸

- In 1965, U.S. tort costs were slightly more than one percent of GNP which was approximately double the average of other economies. Since then, while the costs in other economies remained stable, those in the U.S. have grown to 2.5 percent of GNP, or almost five times the average of other countries.¹⁹

- A 1989 Tillinghast study found that America spends between three and eight times as much as its major industrial competitors on personal injury wrangling as a share of its economy, and that the gap is widening rather than narrowing.²⁰

- Several government agencies, numerous research organizations, trade associations, academics and private business persons believe current U.S. product liability laws not only force manufacturers to increase the prices charged for their products to cover costs stemming from the liability laws but also decrease business innovation by making management unduly adverse to risk taking.²¹

- A study commissioned by the U.S. Department of Commerce

¹⁷ Peter Huber, Liability: The Legal Revolution and Its Consequences 141 (1988).

¹⁸ Robert W. Sturgis, Tort Cost Trends: An International Perspective 12 (Tillinghast Co., 1989).

¹⁹ Robert W. Sturgis, Tort Cost Trends: An International Perspective 13 (Tillinghast Co., 1989).

²⁰ Robert W. Sturgis, Tort Cost Trends: An International Perspective 12 (Tillinghast Co., 1989).

²¹ Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at our Own Game, 9 J.L. & Com. 167, 169 (1989) (citing, inter alia, Committee for Economic Development, E.P. McGuire, Conference Board Report, Project on Civil Justice Reform, and Manhattan Institute for Policy Research).

found that the product liability insurance costs of foreign competitors of U.S. machinery manufacturers are 20 to 100 times lower than those of their U.S. competitors. In addition, foreign competitors are not burdened with all of the other product liability related costs.²²

C. Effect on Health Care

1. Behavior/Costs

- "New York officials have estimated payouts in suits against doctors and hospitals in their state have risen 300-fold in a generation -- not 300 percent, but 300-fold. By 1990 many New York obstetricians with good records were paying liability insurance rates of \$100,000 and more a year. Miami neurosurgeons with good records paid \$220,000. . . . A major National Institute of Medicine study found that 'defensive medicine' -- the taking of steps not considered clinically justified in order to fend off charges that doctors had not done everything they could -- had seriously compromised the quality of patient care, leading, for example, to the performance of millions of unnecessary Caesarean sections. One in five rural doctors had stopped delivering babies in the past five years, with liability the overwhelming concern."²³

- "[B]etween 1965 and 1984, the frequency of Caesarean sections increased fourfold."²⁴

- A Journal of the American Medical Association editorial reports that 12 percent of obstetricians have stopped delivering babies and 38 percent of surgeons avoid high-risk cases because of liability concerns.²⁵

- According to the American College of Obstetricians and Gynecologists, as of 1990 of ob/gyns nationally:

- 12.2% had given up obstetrics due to liability concerns; ✓

- 77.6% have been sued at least once; in New York, ✓

²² Randolph J. Stayin, The U.S. Product Liability System: A Competitive Advantage to Foreign Manufacturers, 14 Can.-U.S. L.J. 193, 197 (1988).

²³ Walter K. Olson, The Litigation Explosion 5-6 (1991).

²⁴ Peter Huber, Liability: The Legal Revolution and Its Consequences 175 (1988).

²⁵ 257 J. Am. Med. Ass'n 827 (1987).

the number is 83.4%;

- on average, three suits have been filed against each ob/gyn; the average in New York is almost four; and
- 24.2% had decreased the level of high-risk obstetric care that they provided.²⁶
- In some states the problem is worse than national figures show:
 - in Idaho, 34% of Ob/Gyn's had stopped practicing obstetrics by 1986;
 - a 1987 Oregon survey shows that the number of physicians delivering babies has declined by 25% since 1984;
 - a 1987 Iowa survey shows that of all physicians who had provided obstetric services since 1981, 31% had discontinued obstetrics; and
 - in addition, 50% of North Dakota physicians and 39.1% of Wyoming physicians planned to quit obstetrics within the next year.

Large numbers of family physicians are being forced to discontinue obstetrics as a result of the high cost of obstetric liability insurance:

- one-third of California's family physicians, almost 40% of Texas family physicians and approximately one-half of Nevada rural family physicians have also stopped practicing obstetrics;
- three-hundred of 441 family physicians responding to an Alabama survey have stopped delivering babies;
- more than half of Utah's general and family physicians who were delivering babies in 1980 have stopped practicing obstetrics; and
- in Kansas, almost half of the family physicians

²⁶ Medical Liability: Its Impact on Women's Health Care, Fact Sheet provided by the American College of Obstetricians and Gynecologists (Oct. 1991).

reported having given up obstetrics by 1987.²⁷

- "The American Medical Association estimates that the average number of malpractice claims filed per 100 doctors rose from five in 1975 to 16 in 1983. Forty thousand claims were filed in 1983, triple the 1975 number. . . . The average settlement was \$5,000 in 1970, \$26,000 in 1975, and is now \$333,000-\$650,000 in California, where the plaintiff need not prove the defendant acted negligently. (The California legislature has since put a cap on the amount a lawyer can make in a contingency fee malpractice suit.)"²⁸

- "By 1985. . . , one out of four obstetrician-gynecologists had been sued. Almost three-quarters won their cases, but it cost the physician or insurer an average of \$20,000 per claim to do so."²⁹

- "According to the director of the National Cancer Institute many physicians refuse to prescribe potentially curative doses of cancer chemotherapy for fear of litigation over side effects, and thousands of patients may die needlessly each year as a result of this kind of caution."³⁰

2. Drugs/Vaccines

- Lederle Laboratories, the only remaining manufacturer of the DPT vaccine, increased the single dose cost of the vaccine from \$2.80 in 1986 to \$11.40 in 1987, primarily to recoup increased product liability costs.³¹

- The American Medical Association concluded that product liability issues are having a profound negative effect on the development and utilization of potentially life-saving medical

²⁷ Medical Liability: Its Impact on Women's Health Care, Fact sheet provided by American College of Obstetricians and Gynecologists (Oct. 1991).

²⁸ Gordon Crovitz, Lawyers on Trial: How to Take the Profit Out of Suing, 35 Pol'y Rev. 72, 76 (1986).

²⁹ Peter Huber, Liability: The Legal Revolution and Its Consequences 111 (1988).

³⁰ Peter Huber, Liability: The Legal Revolution and Its Consequences 162 (1988).

³¹ E. Patrick McGuire, The Impact of Product Liability, The Conference Board, Research Report No. 908, at 10 (1988).

technologies.³²

- The National Academy of Sciences stated that "given the extremely high cost of vaccine-related injuries, many manufacturers may be unwilling to initiate or pursue the derivation or distribution of a vaccine to prevent AIDS."³³

- The general counsel of Johnson & Johnson recently indicated that, because of the substantial liability costs to which the company would be exposed, he would urge his company to withhold an AIDS vaccine until Congress passed protective legislation.³⁴

- Union Carbide developed a suitcase-sized kidney dialysis machine that could be used at home. Due to the company's analysis of the potential liability from marketing the machine, Union Carbide decided not to market the machine and sold it to a foreign company. Union Carbide also decided not to develop a line of medical devices related to intravenous treatment.³⁵

- "Research expenditures by U.S. companies working on contraceptives peaked in 1973 and plummeted 90 percent in the next decade. Steroidal oral contraceptives in this country underwent no significant changes after 1976, and no truly new contraceptive chemical entities have been introduced since 1968. Clinical tests of a contraceptive implant system called Capronor, developed by the National Institutes of Health, were stalled for more than a year for lack of liability insurance. The implanted contraceptive Norplant, which releases a hormone for five years, was developed by

³² Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages versus New Products, Science, Dec. 15, 1989, at 1397.

³³ Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages versus New Products, Science, Dec. 15, 1989, at 1397 (citing American Medical Ass'n, Impact of Product Liability on the Development of New Medical Technologies, Proceedings of House of Delegates, 137th Annual Meeting, June 18-22, 1988, Chicago, Ill., at 86).

³⁴ Testimony of W. Kip Viscusi, George G. Allen Professor of Economics, Department of Economics, Duke University, Durham, N.C., before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business 4 (Nov. 7, 1991).

³⁵ Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages versus New Products, Science, Dec. 15, 1989, at 1397 (citing a speech by Warren Anderson, at the Annual Meeting of the National Association of Casualty and Surety Executives (Oct. 7, 1986)).

the New York Population Council and as of 1986 was on the market in five other countries. But no American firm dared to market it at home. A new and effective IUD, the Copper-T 380A, won FDA approval, but no major firm was willing to market it for several years. In late 1987, one tiny company finally announced that it would sell the product, at a price vastly above the cost of manufacture, and without any liability insurance (which was, in any event, unavailable), presumably on the assumption that if a wave of lawsuits struck, bankruptcy would provide a quick and clean exit from the market. So the United States, a leader in contraceptive research and marketing well into the early 1960s, has today lost its edge and its hunger for progress. Research on other aspects of reproduction has suffered as well. 'Who in his right mind,' the president of a major pharmaceutical company asked in 1986, 'would work on a product today that would be used by pregnant women?'"³⁶

- The number of U.S. pharmaceutical companies producing contraceptives has decreased from 13 in the early 1970s to two in 1988.³⁷

- "Liability fears have helped drive U.S. firms out of manufacturing vaccines -- DPT in particular -- explaining sharp increases in vaccine costs."³⁸

- In 1986, a new claim was being filed against the manufacturers of whooping cough vaccine every week; one former manufacturer faced 100 suits demanding more than \$2 billion in compensation, or 200 times the total annual sale revenues -- of the vaccine.³⁹

- "Only a few hundred American children suffer from cystinosis, a fatal kidney disease. About 2,000 adults suffer from Charcot-Marie-Tooth disease, a rare nerve disorder (unrelated to teeth) that severely impairs motor function. About 1,000 suffer from leprosy and experience an extremely painful allergic reaction on their skin. A tiny number suffer from a rare but incapacitating

³⁶ Peter Huber, Liability: The Legal Revolution and Its Consequences 155 (1988).

³⁷ Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at our Own Game, 9 J.L & Com. 167, 199 (1989)

³⁸ Testimony of Robert E. Litan, Senior Fellow, The Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business 6 (Nov. 7, 1991).

³⁹ Peter Huber, Liability: The Legal Revolution and Its Consequences 166-67 (1988).

disease characterized by uncontrollable twitching of the eye muscles. There are some 5,000 other orphan diseases that shorten lives or bring agonizing disability to tiny groups. Therapies are available or under development for some 500 of them. But insurance is often all but impossible to obtain. Chemie Grunenthal, for example, a West German company that once supplied thalidomide to American leprosy victims, announced in 1986 that it planned to abandon the U.S. market to avoid the risk of liability that might arise if, for example, the drug was used in excess or fell into the wrong hands. Until recently, another West German chemical company supplied Americans with botulinum, a paralytic poison that is just right for controlling the eye-twitching disease, but the company cut off supplies in 1986 for similar reasons. Orphan drugs are condemned, in a sense, to be perennial newcomers to the commercial world and are therefore forever uninsurable under the modern rules. Business realities take care of the rest."⁴⁰

- Merck & Company continues to be the only U.S. producer of a measles vaccine for American schoolchildren, continuing production solely out of a sense of social responsibility.⁴¹

D. Discontinued Products/Businesses

- WEPCO, Inc., a small business originally started to develop driving aids for the handicapped, was forced to close its doors because it was unable to secure product liability insurance, despite the fact that the company was certified by the Veterans Administration, and had never had a product liability suit filed against it.⁴²

- Dyneet Corporation stopped production of its helicopter clutches, although it had not had any product liability claims filed against it, because it could no longer afford to purchase liability insurance for the clutch.⁴³

⁴⁰ Peter Huber, Liability: The Legal Revolution and Its Consequences 158-59 (1988).

⁴¹ Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. Com. 167, 199-200 (1989).

⁴² E. Patrick McGuire, The Impact of Product Liability, The Conference Board, Research Report No. 908, at 18 (1988).

⁴³ Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. Com. 167, 200 (1989).

- Crawford Fitting Company has decided to eliminate hot air balloon valves from its product line due to a 1,535 percent increase in liability insurance.⁴⁴

- The McJunkin Corporation of Charleston, West Virginia, has decided to sell its coal-mining equipment division because the company's product liability insurance increased by 500 percent in 1985.⁴⁵

E. New Products/Innovation

- "The slowing of innovation is directly attributable to a dramatic increase in product liability lawsuits caused not by more unsafe products or injuries but by two legal developments: the shift from negligence to strict liability and a continued increase in punitive damage jury awards."⁴⁶

- U.S. auto manufacturers delayed and even fought the introduction of airbags, in part out of fears of being sued when the bags misfired.⁴⁷

- Foster-Miller, Inc. has refused to accept contracts to build equipment to produce football and hockey helmets, calling these products "lawyers' dreams."⁴⁸

⁴⁴ Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. Com. 167, 200 (1989).

⁴⁵ Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. Com. 167, 200-01 (1989).

⁴⁶ Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages versus New Products, Science, Dec. 15, 1989, at 1395 (citing P. Reuter, The Economic Consequences of Expanded Corporate Liability: An Exploratory Study, 25-27 (Rand 1988)).

⁴⁷ Innovation and Competitiveness in the Small Business Industry, 1991 Hearings Before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business, 102d Cong., 1st Sess. 7 (Nov. 7, 1991) (statement by Robert Litan).

⁴⁸ Innovation and Competitiveness in the Small Business Industry, 1991 Hearings Before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business, 102d Cong., 1st Sess. 3 (Nov. 7, 1991) (statement of Edward J. Goldman).

- Livermore Lab in California discovered that a particle accelerator, developed for a weapon system, could be used instead of harmful pesticides on newly harvested crops to kill insects, larvae and parasites. Livermore decided that the technology was too risky at least in part because of current product liability laws so the potential new use was abandoned.⁴⁹

- A research scientist at the Lawrence Livermore National Laboratory in California who has worked on a number of new product ventures claims that "There's clearly a chilling effect. Its becoming difficult to get venture capital for new ideas. People are afraid of potential liability."⁵⁰

- The fear of litigation cuts back the motivation to develop new products.⁵¹

- Industries for which liability costs (as reported to their insurers) are not a major burden relative to their sales actually increased their innovative activities (measured by R&D expenditures and new products introduced).⁵²

F. Effect on Cities

- "Cities, fearful of lawsuits from the family of a child who takes a tumble from a jungle gym and winds up a quadriplegic, have removed equipment or closed urban playgrounds entirely. City pools from Los Angeles to Chicago to New York have taken their diving boards off, leaving some to wonder where the deep end lies. In small towns, warning signs abound: No running, no swimming, no biking, no fishing, no camping."⁵³

⁴⁹ William Broad, Does Fear of Litigation Dampen the Drive to Innovate? N.Y. Times, May 12, 1987, at C9.

⁵⁰ Paul Proctor, Product Liability Costs Cited as Key Factor in Delivery Slump, Aviation Week and Space Technology, July 27, 1987, at 55.

⁵¹ Alyson Pytte, Bush Gives Presidential Nod to New Liability Standards, Cong. Q., Feb. 2, 1990, at 326 (quoting Phyllis Eisen, Director of Risk Management for the National Association of Manufacturers).

⁵² Testimony of Robert E. Litan Senior Fellow, The Brookings Institution, before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 7.

⁵³ Marcia Chambers, What Happened to the Sandlot?, Natl L. J., Apr. 22, 1991, at 15.

• "In Chicago, more than two-thirds of the area's riding stables simply closed their doors between 1983 and 1987." ⁵⁴

• "Los Angeles . . . paid nearly all of a \$2.16 million judgment on a 1979 traffic accident after a driver high on drugs ran a stop sign. The city's fault? Inadequate trimming of certain bushes that perhaps obstructed the drugged driver's vision. San Diego paid \$1.6 million to a car passenger on the scenic Torrey Pines Road who was left a quadriplegic when a speeding drunk driver crossed the center lane on a curve and smashed into his car. The drunk offered his insurance policy limit of \$25,000; the city was then sued for faulty road design."⁵⁵

• "Between 1978 and 1985, New York City's liability payments jumped from \$23 million to \$118 million. . . . [T]he city of Hartford, Connecticut, was charged \$1.8 million for \$4 million of coverage (a premium-to-coverage ratio of 0.45)."⁵⁶ "[T]he insurance deductible for the city of Baton Rouge, Louisiana, was raised from \$100,000 in 1985 to \$500,000 in 1986."⁵⁷

• "The city of Boston went without liability insurance between 1984 and 1986 when a policy was canceled by an insurer that had decided to abandon the municipal liability business entirely. Wilmington, Delaware, dropped its liability policies in January 1986. Fort Lauderdale, Florida, could not find a general liability policy to cover accidents on the sidewalks of the Intracoastal Waterway. In early 1986, thirty California cities were operating without any insurance at all."⁵⁸

• "One survey found the damage claims against cities doubled between 1982 and 1986. . . . Average verdicts against cities rose almost tenfold, to \$2 million. The first jury verdict exceeding \$1 million came in 1962; in 1975 there were fewer than

⁵⁴ Marcia Chambers, What Happened to the Sandlot?, Natl L. J., Apr. 22, 1991, at 15.

⁵⁵ Peter Huber, Liability: The Legal Revolution and Its Consequences 79 (1988).

⁵⁶ Peter Huber, Liability: The Legal Revolution and Its Consequences 140 (1988).

⁵⁷ Peter Huber, Liability: The Legal Revolution and Its Consequences 141 (1988).

⁵⁸ Peter Huber, Liability: The Legal Revolution and Its Consequences 138-39 (1988).

twenty; by 1988 there were over 400 a year."⁵⁹

- "A man mutilated after he deliberately jumped in front of a subway train sued New York City, claiming that the driver should have stopped faster, and walked off with \$650,000. The father of a thirteen-year-old who committed suicide at home sued school officials, several of the boy's teachers, and the local police, claiming they should have known of the boy's troubles and prevented the harm."⁶⁰

- "Even slightly risky activities, like law students running the annual five-mile Race Judicata at Yale Law School, have been scrapped because a financially beleaguered city can no longer provide traffic protection at intersections."⁶¹

III. Courts, Attorneys and Expenses

A. Legal Fees and Other Expenses

- "For the middle class of this country . . . the courthouse door is rapidly being slammed shut. Access to courts, once available to everyone, has become for middle-class Americans a luxury that only others can afford."⁶²

- "A report from the Federal Trade Commission showed that 97 percent of lawyers took injury cases only on contingency, refusing to consider hourly rates, however generous."⁶³

- In 1989, Forbes magazine reported that each of 63 trial lawyers earned more than \$2 million a year and that 19 plaintiffs' attorneys collected fees in excess of \$5 million in single cases.⁶⁴

⁵⁹ Peter W. Huber, Liability: The Legal Revolution and Its Consequences, 9-10 (1988).

⁶⁰ Peter Huber, Liability: The Legal Revolution and Its Consequences 78 (1988).

⁶¹ Marcia Chambers, Whatever Happened to the Sandlot?, Natl L. J. Apr. 22, 1991, at 15.

⁶² The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 Before the Committee on the Judiciary, 101st Cong., 2d Sess. 1 (1990) (statement of Sen. Biden).

⁶³ Walter K. Olson, The Litigation Explosion 47 (1991).

⁶⁴ Peter Brimelow & Leslie Spencer, The Plaintiff Attorneys' Great Honey Rush, Forbes, Oct. 16, 1989, at 197.

• "[A] federal judge awarded one of New York's biggest law firms \$62,000 for getting their 'pro bono' client an award of \$2,500. The plaintiff said the New York City police had used excessive force in arresting him after a high-speed chase."⁶⁵

• "The total price tag for processing all the various types of civil cases is estimated at \$2 billion [for 1982], including \$1.7 billion in state courts and \$0.3 billion in the federal courts--all of which is on top of what the litigants themselves pay."⁶⁶

• According to the Administrative Office of the U.S. Courts, the total daily cost of a civil jury trial is \$2,549. This figure includes the salaries of judge and staff, facilities, security, jurors' expenses and administrative office cost. It does not include attorneys' fees.⁶⁷

• A study done by the Institute for Civil Justice estimates that the total amount spent by defendants on legal fees and expenses for all tort cases in state and federal courts of general jurisdiction during 1985 was \$4.7 to \$5.7 billion or \$5,400 to \$6,600 per lawsuit.⁶⁸

• Estimated budget authority for the federal district courts is just over \$1 billion for fiscal year 1992. Litigants filing in the district courts pay a filing fee of \$120. Using the caseload figures for 1990, the most recent published figures, if these filing fees were paid in 186,000 civil cases (not including cases filed by the United States as plaintiff), the fees would amount to \$22.3 million or roughly 2.2 percent of the federal judicial budget at the trial level.⁶⁹ "[S]ome states run

⁶⁵ Gordon Crovitz, Lawyers on Trial: How to Take the Profit Out of Suing, 35 Pol'y Rev. 72, 74 (1986).

⁶⁶ Institute for Civil Justice, Rand Corporation, Annual Report April 1, 1991 - March 31, 1992 50 (1991) (citing James S. Kakalik & Randy L. Ross, Costs of the Civil Justice System: Court Expenditures for Various Types of Civil Cases).

⁶⁷ Administrative Office of the U.S. Courts, Budget Branch, Daily Cost of a Civil Jury Trial, Feb. 19, 1991.

⁶⁸ James S. Kakalik & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Costs and Compensation Paid in Tort Litigation 58 (1986).

⁶⁹ Filing fees are established at 28 U.S.C. §§ 1913 note and 1914. Caseload figures are taken from the Annual Report of the Director of the Administrative Office of the United States Courts (1990), Tables B-6 and C-2, the most recent figures available.

surpluses by charging user fees meant to cover the full costs of the system. Not surprisingly, these states do not have the case backlogs of states that charge only nominal fees."⁷⁰

• "Sixty cents of every dollar spent on malpractice liability insurance are absorbed by administrative and legal costs. The corresponding figures are 60 cents on the dollar for products liability and 50 cents for traffic-accident liability. These numbers do not account for the tax-payers' direct support of judges, law clerks, secretaries, and the rest of a swelling, increasingly bureaucratic judicial system."⁷¹

B. Awards and Compensation

• "[In 1985], the system spent \$16-19 billion in transaction costs to deliver \$14-\$16 billion to plaintiffs in net compensation. Of all the money paid in compensation and legal fees and expenses, the successful plaintiff received about 56 percent in net compensation, with the system consuming the rest. Adding the value of time spent by the litigants makes the costs even higher; injured parties' net compensation is reduced to 46 percent of the total cost."

"Plaintiffs' net compensation as a percentage of total expenditures was 52 percent for auto torts and 43 percent for all other torts, reflecting higher defendants' litigation costs for nonauto torts. Defense legal fees and expenses for nonauto tort cases were 28 percent of total compensation paid, compared with 16 percent for auto tort cases. However, litigation costs paid by plaintiffs as a percentage of total compensation were essentially the same for auto tort (31 percent) and nonauto tort cases (30 percent)."⁷²

Budget figures are taken from Budget of the United States Government, Fiscal Year 1993, Appendix One at 193. The budget documents do not segregate costs between civil and criminal cases. Although the budget figure for the district courts includes expenses for criminal as well as civil cases, it does not include other costs partially attributable to civil cases such as fees of jurors, court security, and judicial automation.

⁷⁰ Gordon Crovitz, Lawyers on Trial: How to Take the Profit Out of Suing, 35 Pol'y Rev. 72, 74 (1986).

⁷¹ Peter W. Huber, Liability: The Legal Revolution and Its Consequences, 151 (1988).

⁷² Institute for Civil Justice, Rand Corporation, Annual Report April 1, 1991 - March 31, 1992 52 (1991) (citing James S. Kakalik & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Costs and Compensation Paid in Tort Litigation).

- "Over the past five years [from 1981 to 1985], the average annual growth rate in average compensation paid per liability claim has been about 12 percent for auto claims and 17 percent for other tort claims. During the same period, the consumer price index grew an average of 7 percent."⁷³

- Professor Jeffrey O'Connell of the University of Virginia has estimated that when all costs are counted, only approximately 15 percent of the cost of injury litigation actually compensates claimants.⁷⁴

- "Almost half of all monetary awards in personal injury cases go to two percent of the claimants, who win \$1 million or more."⁷⁵

C. Number of Attorneys

- The American Bar Association estimates that by the year 2000, there will be one million lawyers available in the United States, which represents a 34 percent increase over the 748,028 in 1990.⁷⁶

- "The legal profession grew by 90% in the 1970s and an additional 48% from 1980 to 1988. During the years of fastest growth--from the mid-1970s to the early 1980s--the lawyer population increased by more than 25,000 persons per year, or almost as much as it grew during the entire generation from 1940 to 1960. By 1988, the ratio of lawyers to the general population was far more than twice its historic average."⁷⁷

- Great Britain's Cambridge Law Journal reported that the United States has twenty times the number of lawyers as Japan per

⁷³ Institute for Civil Justice, Rand Corporation, Annual Report April 1, 1991 - March 31, 1992 52 (1991).

⁷⁴ Walter K. Olson, The Litigation Explosion 10 (1991).

⁷⁵ Peter Huber, Liability: The Legal Revolution and Its Consequences 150 (1988).

⁷⁶ One Million Lawyers, Wall St. J., Jan. 21, 1992, at B-1; see also Michele Galen et al., Guilty! Too Many Lawyers and Too Much Litigation, Bus. Wk., Apr. 13, 1992, at 61.

⁷⁷ Richard H. Sander & E. Douglass Williams, Why Are There So Many Lawyers? Perspectives on a Turbulent Market, 14 Law & Soc. Inq., 431, 432 (1989).

100,000 population.⁷⁸

- "[T]he recent spectacular growth in the number of lawyers in America has been a source of renewed concern. . . . Today approximately one U.S. citizen in every 364 is a lawyer. Our nation has about twenty times more lawyers per 1,000 people than Japan; each year we graduate more than twice as many lawyers as there are in that entire society. Likewise, our society has three times as many lawyers as Germany and ten times as many as Sweden."⁷⁹

- "The United States now has nearly three times as many lawyers per capita as any other advanced industrial society."⁸⁰

- According to the National Association of Manufacturers, companies are expanding their legal departments faster than their research and development departments.⁸¹

D. Case Management

1. Filings and Delays

- "The Federal Courts are suffering today under the scourge of two related and worsening plagues. First, the costs of civil litigation, and delays that contribute to those costs, are high and are increasing; they limit access to the courts to only those who can afford to pay the rising expenses; and they undermine the ability of American corporations to compete both domestically and abroad. Second, the Federal courts have a scarcity of

⁷⁸ W. John Moore, Knocking the System, 47 Nat'l J. 2844, 2847 (1991); see also Michele Galen et al., Guilty! Too Many Lawyers and Too Much Litigation, Bus. Wk., Apr. 13, 1992, at 61 (noting that the United States has 307.4 lawyers per 100,000 versus 102.7 for Great Britain, 82 for Germany and 12.1 for Japan).

⁷⁹ Eve Spangler, Lawyers for Hire, Salaried Professionals at Work 2 (1986) (citations omitted).

⁸⁰ Richard H. Sander & E. Douglass Williams, Why Are There So Many Lawyers? Perspectives on a Turbulent Market, 14 Law & Soc. Inq., 431, 432 (1989) (citing Marc Galanter, Adjudication, Litigation, and Related Phenomena, Law & Soc. Sci. 166 (1987)).

⁸¹ Alyson Pytte, Bush Gives Presidential Nod to New Liability Standards, Cong. Q., Feb. 3, 1990, at 326 (quoting Phyllis Eisen, Director of risk management for the National Association for Manufacturers).

resources."⁸²

- The Federal Courts Study Committee found that from 1958 to 1988 the caseload in the federal district courts more than trebled. Similarly, the caseload in the federal courts of appeals increased tenfold.⁸³

- Private civil case filings in the federal district courts increased as follows: 32,000 in 1950, 64,000 in 1970, and over 161,000 in 1986.⁸⁴

- Between 1950 and 1986, aggregate filings in the federal district courts increased 197 percent, most of which increase derived from civil suits. Civil filings increased 367 percent, while the criminal caseload increased 7 percent.⁸⁵

- "The percentage growth for both U.S. [cases involving the United States as plaintiff or defendant] and private civil cases [during the period 1950 to 1986] was substantial--309 percent and 406 percent, respectively. However, private civil litigation has been moving steadily ahead of civil actions involving the United States, and by 1986 private suits represented a greater proportion of all civil suits (64 percent) than at any previous time in the history of the federal court system."⁸⁶

- The average caseload in the federal appellate courts increased by more than 350 percent from 1945 to 1985.⁸⁷

⁸² Senate Comm. on the Judiciary, The Judicial Improvements Act, S. Rep. No. 416, 101st Cong., 2d Sess. 1-2, reprinted in 1990 U.S.C.C.A.N. 6802, 6804 (1990) (committee report).

⁸³ Federal Courts Study Committee, Report of the Federal Courts Study Committee, Apr. 2, 1990, at 5.

⁸⁴ Terrence Dungworth & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Statistical Overview of Civil Litigation in the Federal Courts vi-vii (1990).

⁸⁵ Terrence Dungworth & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Statistical Overview of Civil Litigation in the Federal Courts 5 (1990).

⁸⁶ Terrence Dungworth & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Statistical Overview of Civil Litigation in the Federal Courts 5 (1990).

⁸⁷ Terrence Dungworth & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Statistical Overview of Civil Litigation in the Federal Courts 2 (1990).

• According to the National Center for State Courts, from 1984 to 1989 the number of tort cases filed increased 33.7 percent, the number of real property cases filed increased 26.0 percent and the number of contract cases filed increased 21.6 percent. During the same period, the resident population of the United States increased 5 percent.⁸⁸

• In 1986, the time to disposition in almost 40 percent of private civil cases filed in the federal district courts was more than one year. Approximately 61 percent of all private civil cases reached disposition within 1 year of filing, compared with 23 percent within two years, 9 percent within three years, and 7 percent later than that.⁸⁹

• In the pharmaceutical area "[f]or non-Dalkon Shield and non-Bendectin defendants between 1981 and 1986, the annual number of lawsuits filed doubled and the number of different defendants nearly doubled."⁹⁰

• In 1989, the General Accounting Office (GAO) studied product liability cases in five states (North Dakota, Massachusetts, South Carolina, Arizona and Missouri). The GAO reported that in these five states, product liability cases took an average of 2 1/2 years from the filing of the complaint to the beginning of the trial. The average trial lasted an additional 12 days while on average an appeal extended the process 10 months.⁹¹

• The American Insurance Association and the Alliance of American Insurers studied large products liability cases in 1985 and found that fewer than 7 percent were closed within one year. Over one half were terminated within three years, but 31 percent

⁸⁸ National Center for State Courts, State Court Caseload Statistics 1984-1989.

⁸⁹ Terrence Dungworth & Nicholas M. Pace, Institute for Civil Justice, Rand Corporation, Statistical Overview of Civil Litigation in the Federal Courts viii, 21 (1990).

⁹⁰ Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages versus New Products, Science, Dec. 15, 1989, at 1397.

⁹¹ U.S. General Accounting Office, Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness of the Committee on Energy and Commerce, House of Representatives: Product Liability, Verdicts and Case Resolution in Five States, H.R. Doc. No. 89-99, Sept. 1989, at 4.

took four years or more to be resolved.⁹²

• "The problem of civil trial delay in the Los Angeles Superior court worsened in the 1980s and is now nearing crisis proportions. The time from filing to jury trial has reached five years--far longer than the two-year period generally accepted as ideal for civil cases. The percentage of civil cases in Los Angeles in which a jury trial is held has shrunk in recent years, suggesting that long delays may discourage some litigants from waiting for trial. As more litigants opt for settlement in the face of the five-year delay, concerns have been raised about citizens' access to justice."⁹³

• "[T]he current system is cruelly slow. Last year the backlog of personal-injury, product-liability and other civil damage suits in the Law Division of the Cook County Circuit Court reached 67,776 cases, 20 percent of them 5 years old or older. Delays of 6 to 10 years between filing and trial are common."⁹⁴

2. Discovery

• "The discovery process has become, for both sides, a litigation weapon to discourage and prevent prosecution of claims, to force a settlement or merely to wear down an adversary. Counsel, regrettably, often look upon discovery as a meal ticket or annuity rather than as a quick and inexpensive quest for evidence. These were obviously not the intentions of the draftsmen of the Federal Rules of Civil Procedure, and should not be permitted to thwart the right of litigants to their day in court."⁹⁵

• "Although both judges and lawyers identify the failure to comply with discovery requests as a frequently encountered abuse of discovery, the present sanctioning system does not effectively deter such abuse principally because judges are unwilling to impose sanctions after-the-fact to punish most transgressors, preferring

⁹² American Bar Ass'n Judicial Admin. Div., Action Comm'n to Reduce Court Cost and Delay, Attacking Litigation Costs and Delay (1984), cited in Thomas C. Fischer, Toward Legal Gridlock?, 24 New Eng. L. Rev. 697, 707 (1990).

⁹³ Institute for Civil Justice, Rand Corporation, Annual Report April 1, 1991 - March 31, 1992 16 (1990).

⁹⁴ John McCarron, Too Many Lawsuits Spoil Torts, Courts, Chi. Trib., May 19, 1991, at 3.

⁹⁵ Martin I. Kaminsky, Proposed Federal Discovery Rules for Complex Civil Litigation, 48 Fordham L. Rev. 907, 922 (1980) (citations omitted).

instead to give the offending party a second chance to comply."⁹⁶

- "Discovery, like pleading, is too easily abused, the consequences of such abuse in terms of delay, expense and public resentment are too serious, and the federal judiciary is too busy to continue the present reliance on protective and sanction orders as the principal weapon against abuse. While those powers must be retained and firmly exercised, we are persuaded that the effort to state and enforce proper standards of professional conduct for attorneys offers a significant opportunity to deter excessive discovery and other abuse."⁹⁷

- In a 1988 poll of 200 federal and 800 state judges, discovery abuse was cited more often than any other factor as the cause of court delay. Approximately 80 percent of the judges polled said they have at least some problems with the discovery process.⁹⁸

- Precedent exists for both a mandatory disclosure requirement and limits on discovery:

- * Rule 6 of the Rules of Court, Central District of California, "Early Meeting of Counsel--Report to Court--Status On Conference," requires counsel (1) to exchange all documents then "reasonably available to a party which are then contemplated to be used in support of the allegations of the pleading filed by the party"; (2) to exchange "any other evidence reasonably available to the party to obviate the filing of unnecessary discovery motions"; and (3) to exchange a "list of witnesses then known to have knowledge of the facts supporting the material allegations of the pleading filed by the party." See also S.D. Fla. Ct. R. 14(A).

- * The rules of the U.S. Tax Court require parties "to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules." U.S. Tax Ct. R. of Prac.

⁹⁶ American Bar Ass'n, Section of Litigation, Second Report of the Special Committee for the Study of Discovery Abuse, 5 Litig. News 9, 10 (1980) (quoting Ellington, A Study of Sanctions for Discovery Abuse 42-43, 56 (1979)).

⁹⁷ American Bar Ass'n, Section of Litigation, Second Report of the Special Committee for the Study of Discovery Abuse, 5 Litig. News 9, 11 (1980).

⁹⁸ Louis Harris and Assocs., Inc., Judges Opinions of Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases, 69 B.U.L. Rev. 731, 733 (1989).

and Proc. 70.

* In 1987, the Supreme Court of Nevada adopted a rule, providing that, within 30 days after the service of the answer, the attorneys for the parties must meet to request and exchange discoverable documents and lists of people having knowledge of the relevant facts. Nev. Ct. R. Anno. R. 21.

* The American Bar Association has twice proposed (in 1977 and 1980) making limits on discovery part of the Federal Rules of Civil Procedure.⁹⁹

* A 1986 Federal Judicial Center survey of 12 districts with a local rule limiting the number of interrogatories found a majority of the 271 responding attorneys approved of the rule, with 73 percent reporting that the limitation controlled certain abusive, excessive or pointless discovery.¹⁰⁰

* At least one federal district court has a local rule imposing quantitative restrictions on the taking of depositions. See E.D. Va.

E. Expert Witnesses

• "There is no 'bright-line' test to distinguish real science from junk science, but there are some clear signals. . . . [J]unk science is often espoused by an 'expert' who is not really an expert (someone you would trust if your health and well-being depended on it.) The expert . . . typically has not published in the field, has not been a member of any relevant professional society, is not familiar with the relevant literature, and does not understand key principles of the relevant science. The expert is often a journeyman witness who makes a living in the courtroom, not the laboratory."¹⁰¹

• "A curious group of expert witnesses has emerged in the sympathetic sort of case where neighbors charge that pollution from a chemical factory or dump has made them ill. Lawyers for the neighbors can usually show that the defendants released at least

⁹⁹ See American Bar Ass'n, Report of the Special Committee for the Study of Discovery Abuse 18, 20 (1970) (limiting parties to 30 questions as of right); American Bar Ass'n, Second Report of the Special Committee for the Study of Discovery Abuse (1980).

¹⁰⁰ J. Shepard & C. Seron, Federal Judicial Ctr. Staff Paper, Attorneys' Views of Local Rules Limiting Interrogatories (1986).

¹⁰¹ Barry Epstein & Marc Klein, Keeping "Junk Science" Out of the Courtroom, N.J.L.J., Sept. 19, 1991, at 7.

minute quantities of hazardous substances into the local air, water, or soil. The experts then come along to testify that even very low-level exposure to chemicals can ravage people's immune systems -- the dramatically effective catch-phrase is 'chemical AIDS.'. . . The experts do their own battery of tests on the complainants and come up with immune system abnormalities that tests by other scientists fail to reveal."

"The 'chemical AIDS' idea has been emphatically rejected by leading medical authorities as without foundation. But a Missouri court awarded \$49 million after claims of this sort -- later remanded for retrial -- and complainants from Tennessee to California have been winning verdicts ranging up to \$13 million, although many get thrown out on post-trial motions or appeal."¹⁰²

• "[T]he issue should not be considered in 'pro-plaintiff' or 'pro-defendant' terms. A defendant could use junk science to defeat a plaintiff's legitimate claims for compensation every bit as well as a plaintiff could use junk science to prevail on an unjust claim. . . . Aside from yielding unjust results, [junk science] can compromise the integrity of our judicial system, undermine the public's perception of it, and drive vital products from the marketplace."¹⁰³

• "Why would you, the diligent lawyer, settle for a scientist who will say that PCBs may in some circumstances affect health, though how and at what concentrations is most unclear, if you can find one who will swear that they are one of the most lethal substances known to man, that they subvert the immune system, and they undoubtedly were to blame for this plaintiff's migraine headaches? . . . The middle of the road, in law even more so than in politics, belongs to the yellow stripes and the dead armadillos. . . . It is the strength of the expert's support for your position that comes first."¹⁰⁴

IV. Punitive Damages

• One commentator has opined: "[P]unitive damages are out of control. Certainly recent awards are unprecedented in both incidence and amount. Moreover, the explosion in punitive judgments has not been accompanied by a reform of the terms of their imposition. Punitive damages may be inflicted without adequate procedural safeguards, in the absence of meaningful

¹⁰² Walter K. Olson, The Litigation Explosion 162-63 (1991).

¹⁰³ Barry Epstein & Marc Klein, Keeping "Junk Science" Out of the Courtroom, N.J.L.J., Sept. 19, 1991, at 11.

¹⁰⁴ Peter W. Huber, Galileo's Revenge, Junk Science in the Courtroom (1991).

substantive standards, and in virtually unlimited amounts."¹⁰⁵ In cases stemming from allegedly defective product design or manufacture, he questioned the fairness of punishing a defendant "ten or twenty or a hundred times over, in cumulations so extravagant and destructive as to defy any rational justification and threaten the civil extinction of major business entities."¹⁰⁶

- From 1984 to 1988, the number of punitive awards in all pharmaceutical product liability cases was fifteen times greater than the number of awards in the entire decade of the 70s.¹⁰⁷

- According to a study by Stephen Daniels and Joanne Martin of the American Bar Foundation published in the Minnesota Law Review in 1990, punitive damages were awarded in 9 percent of the product liability cases won by plaintiffs from 1981 to 1985.¹⁰⁸

- A study released by the Roscoe Pound Foundation in early 1992 reported that in the cases in which punitive damages were awarded in the past 25 years:

- * punitive damages exceeded \$1 million in 36 percent of the cases;

- * punitive damages exceeded compensatory damages in 59 percent of the cases; and

- * the amount of the punitive damages was more than twice the amount of the compensatory damages in 38 percent of

¹⁰⁵ John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 139 (1986).

¹⁰⁶ John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 146 (1986).

¹⁰⁷ Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages versus New Products, Science, Dec. 15, 1989, at 1397 (citing Amicus Curiae Brief of the Pharmaceutical Manufacturers Ass'n and the American Medical Ass'n to the U.S. Supreme Court in Browning Ferris Industries v. Kelco Disposal, Inc., No. 88-556, at 12 n. 28).

¹⁰⁸ Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 37-38 (1990); see also John Moore, Knocking the System, 47 Nat'l J. 2844, 2849 (1991).

the cases.¹⁰⁹

- A study undertaken by the Justice Department's Tort Policy Working Group in 1987 indicated that uncertainties in the punitive damages system "serve as a significant obstacle to the settlement process by giving the plaintiff unrealistic expectations of the value of his case even where the defendant has made a generous settlement offer."¹¹⁰ The study noted: "It is close to impossible to negotiate sensibly with a plaintiff who believes that he can shoot for the moon."¹¹¹

- The plaintiff in Layman v. Xerox Corp.¹¹² sued under state tort law and federal age discrimination law and recovered \$145,000 in back pay, \$140,000 in compensatory damages, and \$8.8 million in punitive damages.

- "In Georgia in 1987, a jury awarded a construction company \$5 million in punitive damages for \$53,000 of property damage to a bulldozer where the bulldozer merely hit a petroleum line that was not buried deep enough."¹¹³

- In Aetna Life Insurance Co. v. Lavoie,¹¹⁴ an Alabama

¹⁰⁹ Michael Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts 29 (1991). It is important to note that the conclusion of Professor Rustad's study is that punitive damages are rarely awarded, even more rarely paid and frequently reduced after trial. According to Professor Rustad, his study demonstrates that "companies have nothing to worry about in punitive damages as long as they act responsibly." Milo Geyelin, Product Suits Yield Few Punitive Awards, Wall St. J., Jan. 6, 1992, at B-1.

¹¹⁰ R. Willard & R. Willmore, An Update on the Liability Crisis: Tort Policy Working Group 51 (1987).

¹¹¹ R. Willard & R. Willmore, An Update on the Liability Crisis: Tort Policy Working Group, 51 (quoting Twerski, A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution, 18 U. Mich. J.L. Ref. 575, 612 (1985)).

¹¹² (N.D. Tex. 1990), reported in Martha Brannigan & Karen Blumenthal, Who Will Lead Prosecution of Noriega, Wall St. J., Jan. 11, 1990, at B-8.

¹¹³ Griffin B. Bell & Perry E. Pearce, Punitive Damages and The Tort System, 22 U. Rich. L. Rev. 1, 2 (1987).

¹¹⁴ 470 So. 2d 1066 (Ala. 1984), vacated, 475 U.S. 813 (1986).

jury awarded \$3.5 million dollars in punitive damages against an insurance company for its bad faith refusal to pay a \$1,650.22 hospital bill. Although some jurisdictions require a reasonable relationship between the actual and punitive damages, the Alabama courts do not require such a correlation.¹¹⁵

V. Availability and Cost of Liability Insurance

• Many companies are finding it increasingly difficult to obtain the services of qualified persons to serve on their boards of directors because of the increasing threat of liability and soaring insurance costs. The number of claims against directors has gone up 257 percent since 1974, and the average total cost per claim has risen 84 percent.¹¹⁶

• "More than a dozen Pennsylvania fireworks celebrations have been called off, including one at the state capital in Harrisburg. Officials in Prairie Village, Kansas, canceled their annual display after they could not find an insurance company to provide \$1 million in coverage.

"And here in Detroit, where a 45-minute fireworks display is planned for the annual Canadian-American festival Wednesday, officials say their liability insurance premiums have doubled since last year. . . . Canonsburg, Pa. dropped plans for its fireworks show. It could get liability insurance for the stadium but only if there were no fireworks. There will be the regular parade, but the co-chairman of the festival, Stephen Zemencik, said the high point of the show that has annually brought thousands of people to his little town 23 miles from Pittsburgh would not be seen.

. . . .
"The dimming of fireworks is only the latest installment in the liability insurance problem that is pinching many forms of summer fun. A variety of facilities and business, from water slides at carnivals to horseback riding in national parks are affected.

. . . .
"Recreation industry officials say that if coverage can be obtained, premiums are double or triple last year's.

. . . .
"[Akron, Ohio's] Fourth of July ethnic festival . . . was for a while in danger of cancellation for lack of insurance. The premium on the policy that was finally obtained is the same as last year, but the coverage is only \$500,000, not the \$1 million it was last year.

¹¹⁵ Griffin B. Bell & Perry E. Pearce, Punitive Damages and The Tort System, 22 U. Rich. L. Rev. 1, 6 (1987).

¹¹⁶ Tamar Lewin, Director Insurance Drying Up, N.Y. Times, March 7, 1986, at D-1.

. . .
"On Mount McKinley . . . guides are leading tours on only limited sections of the highest peak in North America because of new restrictions in their insurance policies."¹¹⁷

- In 1987, half of all ice skating rinks reported they could not obtain liability coverage and were threatened with closure.¹¹⁸

- By 1986, most of the country's 400 largest consulting engineering firms were unable to buy pollution liability insurance in any amount, or at any price, and were refusing to handle toxic waste sites unless their clients assumed all liability.¹¹⁹

VI. Product Liability

A. Generally

- "Insurance brokers in Europe say some small companies have decided to forgo the American market rather than pay the large product liability premiums."¹²⁰

- A comprehensive analysis of jury verdicts in the United States prepared by the Rand Institute for Civil Justice shows that the growth in the average award in product liability suits "has been truly explosive, reflecting increases ranging from 200 to more than 1000 percent" from the period 1960-1964 to 1980-1984.¹²¹

- In 1974, the average product liability award was \$345,000; by 1985, it averaged more than \$1 million.¹²²

¹¹⁷ James Barron, Liability Costs Dampen Summer Fun, N.Y. Times, July 2, 1986, at A-12.

¹¹⁸ R. Willard & R. Willmore, An Update on the Liability Crisis: Tort Policy Working Group 18 (1987).

¹¹⁹ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 140 (1988).

¹²⁰ Jacques Neher, Liability Insurance Costs Discourage European Exports to U.S., Wash. Post, Dec. 28, 1986, at K-5.

¹²¹ D. Hensler, et al., Trends In Tort Litigation: The Story Behind the Statistics 18 (1987).

¹²² Dee, Chairman of the National Ass'n of Manufacturers, Blood Bath, 10 Enterprise 3 (Mar/Apr 1986), cited in Marc Galanter, The Day After the Litigation Explosion, 46 Md. L. Rev. 3, 4 (1986); see also Time, Mar. 24, 1986, at 20.

• In California, a man was injured when a drunk driver lost control of his car, veered into a parking lot, and crashed into a telephone booth where the man was standing. The man sued the companies that had designed, installed, and maintained the booth. In 1983, Chief Justice Rose Bird of the California Supreme Court held that these companies could be held liable for the injuries.¹²³

• The American product liability system inflates insurance costs, creates uncertainties for business, stifles corporate research and development, and ultimately increases consumer costs. Fear of litigation also undermines research and development of new, beneficial products, and costs American workers jobs.¹²⁴

• "[L]iability premiums tripled in a three-year period from 1984-1986."¹²⁵

• "A textile machine manufacturer that had been in business since 1830 was forced to shut down after defending against 36 product liability claims. One of these claims involved a machine that left the plant in 1895."¹²⁶ ✓

• "Consulting engineers report that they systematically favor old products over new ones in their design specifications fearing (quite correctly) that newer design options carry a greater risk of liability, whatever real decrease in risk they might actually represent."¹²⁷

• "Liability-conscious universities decline to license patents to small companies despite the fertile environment they

¹²³ Gordon Crovitz, How to Take the Profit Out of Suing, 35 Pol'y Rev 72, 72 (1986).

¹²⁴ Product Liability, Senate Panel Hears Testimony on Reform Bill; Effect on Insurance Debated, Daily Rep. For Executives, (BNA) Apr. 6, 1990, DER No. 67, at A-6.

¹²⁵ Testimony of W. Kip Viscusi, George G. Allen Professor of Economics, Department of Economics, Duke University Durham, N.C. before the Subcommittee on Competitiveness and Economic Opportunity of the U.S. Senate Committee on Small Business, at 15 (Nov. 7, 1991).

¹²⁶ Alfred W. Cortese, Jr. and Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. & Com. 167, 198 (1989).

¹²⁷ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 156 (1988).

offer for innovation, fearing that anyone suing over a patent-related product would be sure to go for the university's deep pocket as well."¹²⁸

- A 1988 survey of 500 company chief executive officers conducted by the American Tort Reform Association found the product liability system nationwide harms the ability of companies to plan for the future. Survey results showed that some companies were forced to close their operations or lay off workers, and others to cancel plans for new products.

The survey also found that CEOs believe product liability laws in this country have made the United States less competitive in world markets.

For example, the National Machine Tool Builders' Association has reported that 23 percent of its members have no product liability insurance, and for those that do have coverage, premiums have risen by 55 percent from 1986 to 1988.¹²⁹

- The costs associated with product liability suits have a disproportionate effect on small firms. Unlike some large firms, small businesses are unable to pass the increased costs of insurance and litigation onto the consumer and remain competitive.¹³⁰

- "Under the current product liability system, everyone is hurt -- the manufacturer; the injured claimants, who may be left uncompensated if all the manufacturers' resources are depleted due to the lack of available, affordable insurance; and the public, who are denied access to products."¹³¹

- "The median company in the machine tool industry is forced to spend seven times more on product liability costs than it

¹²⁸ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 156 (1988).

¹²⁹ Susan Wollner, Business Groups Back Product Liability Reform, 5 Bus. First - Buffalo, May 22, 1989, at 13.

¹³⁰ R. Wendell Moore, Acting Chief Counsel for Advocacy, U.S. Small Business Administration, statement before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business (Nov. 7, 1991).

¹³¹ Edward J. Goldman, (on behalf of NMTBA - the Association for Manufacturing Technology), statement before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business, at 2 (Nov. 7, 1991).

is able to spend on new product research and development."¹³²

- The American machine tool industry is about three quarters what it was a decade ago. Overseas competitors have filled many of the gaps. One of the impediments in competing against foreign companies is product liability costs.¹³³

B. Private Planes

- Both Beech Aircraft and Piper Aircraft suspended production of light single- and twin-engine aircraft.¹³⁴

- "In 1977 . . . for example, small-plane manufacturers paid a total of \$24 million in liability claims. By 1985, their payout was \$210 million. Companies like Beech, Cessna, and Piper curtailed or suspended production; they quickly discovered that the new-model planes, carrying a 50 percent surcharge for liability insurance, could no longer compete with used planes already on the market. Aircraft technology, however, had been advancing steadily, so the new models kept off the market were notably safer than the old ones people went on using instead. Worse still, small-plane development has traditionally been the richest source of aerodynamic research and innovation for the aircraft industry in general, so what private pilots and hobbyists lose today, the public will likely lose a decade or two later in commercial aviation."¹³⁵

- "The U.S. private aircraft industry has also been hard hit. Whereas American firms produced over 17,000 private planes in 1979, by 1987 their production had dropped to 1,085. The high

¹³² Edward J. Goldman, (on behalf of NMTBA -- The Association for Manufacturing Technology) statement before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business, at 3 (Nov. 7, 1991).

¹³³ Hearings on Product Liability Reform, Before the Subcomm. On Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy, 100th Cong., 1st Sess. at 75, 77 (statement of John B. Curcio, CEO of Mack Trucks, on behalf of the National Assn of Manufacturers) (Mar. 24, 1987).

¹³⁴ Penny Pagano, Liability Costs Cut into Airplane Sales, Los Angeles Times, June 30, 1986, Part IV, at 1.

¹³⁵ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 161 (1988).

liability costs average \$100,000 per plane."¹³⁶

- "Piper Aircraft Corp., in the midst of its second bankruptcy, is currently attempting to move its operations outside of the country, most likely to Canada. The main reason is to get out from under the product liability laws of this country, which can reach back 50 years to an aircraft's manufacturer and sue a company and force them to pay for damages even though the accident is due to pilot negligence."¹³⁷

- Senator Jake Garn (Utah), who is restoring a private plane he bought in 1969 for \$5,000, observed that the cost of liability has dramatically driven up the cost of replacement parts for airplanes. He was required to pay \$5,300 for two fuel tanks and \$72 for an oil dipstick.¹³⁸

- "Burt Rutan, the pioneering designer of the Voyager, didn't have the resources to compete with larger manufacturers, but he had a cheaper way of getting his products out into the marketplace. He sold construction plans for novel airplanes to do-it-yourselfers who built the planes in their garages. But in 1985, fearful of the lawsuits that would follow if a home-built plane based on his designs crashed, he stopped selling the plans."¹³⁹

- The President of Unison Industries, Inc., said his firm is withholding from the market a new and advanced electronic ignition system for light aircraft because of the liability risk that might result from its release and use.¹⁴⁰

- The President and CEO of Will-Burt Co. said that he gave up making aircraft parts in 1985 "because the attorneys told me to

¹³⁶ Testimony of W. Kip Viscusi, George G. Allen Professor of Economics, Department of Economics, Duke University, Durham, N.C. before the Subcommittee on Competitiveness and Economic Opportunity of the U.S. Senate Committee on Small Business, at 4 (Nov. 7, 1991).

¹³⁷ Cong. Rec. S-4682 (daily ed., Apr. 2, 1992) (Senator Jake Garn).

¹³⁸ Cong. Rec. S 4682-83 (daily ed., Apr. 2, 1992).

¹³⁹ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 156 (1988).

¹⁴⁰ Hearings Before the Subcommittee on Transportation, Aviation and Materials of the House Comm. on Science and Technology, statement of Frederick B. Sontag, President, Unison Industries, at 75 (Oct. 22, 1985).

stop doing it"; this meant laying off 80 people.¹⁴¹

- "The average cost per airplane for product liability insurance alone ranges between \$60,000-\$70,000, and this does not include accident investigation, defense and engineering costs. In some cases these total liability costs exceed the cost of the aircraft itself."¹⁴²

C. Safety

- "There's little evidence that specific liability verdicts have led to the development of safer products. To be sure, tort suits have encouraged manufacturers to change or expand their warnings, but there also is little concrete evidence that the redesigned warnings have resulted in fewer deaths and injuries."¹⁴³

- "[W]hen it comes to actual product design . . . the far more important impulses for safety come from outside the liability system, principally from safety regulation."¹⁴⁴

- "Professor John Graham of Harvard found no statistical evidence that the expansion of liability doctrines and case filings has been a significant cause of passenger safety improvements since World War II."¹⁴⁵

- "Professor Graham suggests that the decision by

¹⁴¹ Hearings on S. 1400, The Product Liability Reform Act of 1989 before the Senate Consumer Subcommittee of the Senate Commerce Comm., Statement of Harry Featherstone, at 274 (Apr. 5, 1990).

¹⁴² Hearings of the Subcommittee on Transportation, Aviation and Materials of the House Comm. on Science and Technology, statement of Edward W. Stimpson, President, General Aviation Manufacturers Ass'n, at 58 (Oct. 22, 1985).

¹⁴³ Testimony of Robert E. Litan, Senior Fellow, the Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 3.

¹⁴⁴ Testimony of Robert E. Litan, Senior Fellow, The Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 4.

¹⁴⁵ Testimony of Robert E. Litan, Senior Fellow, the Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 4.

manufacturers to phase out tension relievers in seat belts, motivated largely by liability fears, led to the replacement 'slack' belts, which are less safe than their predecessor."¹⁴⁶

- "[I]t is striking that European auto companies who operate in a less aggressive liability climate than U.S. companies have generally been more aggressive in introducing safety improvements in their cars -- more crash-worthy structures, pretensioned seat belts, and antisubmarining seats -- than their U.S. competitors."¹⁴⁷

- "U.S. auto manufacturers delayed and even fought introduction of the airbag, in part, out of fears of being sued when the airbags misfired -- suits which are now beginning to make their way to the courts since airbags have become available. . . . [Murray MacKay, professor and director of the Accident Research Unit at the University of Birmingham in England,] also suggests that U.S. companies have been reluctant to install child restraint seats out of fear of adverse liability rulings."¹⁴⁸

- "[T]he threat of liability may have discouraged both safety and innovation. Dr. Stanley Reiser of the University of Texas suggests that the spate of medical malpractice suits has eroded trust between patients and doctors that is essential for quality care. Fears of liability verdicts have discouraged doctors from admitting error, a process that is essential to improving medical practices over time."¹⁴⁹

D. Effect on Recreation and Sports

- "Youth sports activities are slowly becoming extinct --

¹⁴⁶ Testimony of Robert E. Litan, Senior Fellow, The Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 5.

¹⁴⁷ Testimony of Robert E. Litan, Senior Fellow, the Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 6.

¹⁴⁸ Testimony of Robert E. Litan, Senior Fellow, the Brookings Institution before the Subcommittee on Competitiveness and Economic Opportunity, Senate Committee on Small Business, Nov. 7, 1991, at 7.

¹⁴⁹ Robert E. Litan, Senior Fellow, the Brookings Institution, testimony before the Subcommittee on Competitiveness and Economic Opportunity of the Senate Committee on Small Business, at 4-5 (Nov. 7, 1991).

from fear of lawsuits. From expanded liability theories that win judicial approval. From soaring insurance costs. Americans are now finding their choices, their freedoms, restricted, whether it be a scuba diving vacation, a mountain climbing adventure or a flip from a diving board at a public pool. . . . Group sports are in deep trouble. Girls' and boys' clubs, fishing and hiking clubs, and roadrunners have curtailed or eliminated activities because of high insurance premiums or the inability to find insurance or the fear of lawsuits, which these days, may be brought for any conceivable reason."¹⁵⁰

- Product liability costs for American sporting goods manufacturers in 1982 were 4.2 percent of total sales compared to 0.5 percent of sales for their Japanese competitors.¹⁵¹

- In the last ten years, the number of companies that manufacture football helmets dropped from 11 to 2. Recently, one of the last two companies announced its plan to sell that business because of the liability exposure and cost. In 1985, insurance and legal costs were higher than all production costs combined.¹⁵²

- Only two makers of lacrosse equipment remain in the U.S. and both are experiencing difficulty obtaining liability insurance.¹⁵³

¹⁵⁰ Marcia Chambers, Whatever Happened to the Sandlot?, Natl L. J. Apr. 22, 1991, at 15.

¹⁵¹ Randolph J. Stayin, partner in Taft, Stettinius & Hollister, Testimony, Mar. 24, 1987.

¹⁵² Hearings on Product Liability, Before the Subcommittee on Consumers of the Senate Comm. on Commerce, Science and Transport., 99th Cong., 2d Sess. at 69 (1986); see also R. Willard & R. Willmore, An Update on the Liability Crisis: Tort Policy Working Group 19 (1987); Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. & Com. 167, 199 n.197 (1989) and accompanying text ("The number of football manufacturers decreased from 18 in 1976 to 3 in 1986.").

¹⁵³ Hearings on Product Liability, Before the Subcomm. on Consumers of the Senate Commerce, Science and Transp., 99th Cong., 2d Sess. at 69 (1986) (statement of Larry McClain, Vice President, Rawlings Sporting Goods Co, on behalf of the Sporting Goods Manufacturers Assn.), cited in Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. & Com. 167, 199 (1989); see also Brown, Insurance Costs, Lawsuits Injure U.S. Sports, J. Com., July 13, 1988, at A-1, A-5.

• Spaulding, a major sporting goods manufacturer, has withdrawn from production of protective sporting equipment entirely because of increased insurance costs and increases in the number of associated product liability suits.¹⁵⁴

• Uvex Winter Optical in Rhode Island has stopped manufacturing and distributing motorcycle and ski racing helmets because of liability costs.¹⁵⁵

• U.S. sporting goods manufacturers have stopped making hockey equipment, which now comes primarily from Czechoslovakia, Sweden, and Canada, and trampolines, which must also be obtained from foreign sources.¹⁵⁶

• Some amusement park rides have been closed, including the temporary closing of the Cyclone ride at the Coney Island Amusement Park, Astroland.¹⁵⁷

¹⁵⁴ Malott, Commentary: Product-Liability System Hampers Competitiveness, Financier, Jan. 1988, at 30; Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. & Com. 167, 199 (1989); R. Willard & R. Willmore, An Update on the Liability Crisis: Tort Policy Working Group 19 (1987).

¹⁵⁵ Hearings on Product Liability Reform, Before the Subcomm. On Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy, 100th Cong., 1st Sess. at 77 (statement of John B. Curcio, CEO of Mack Trucks, on behalf of the National Ass'n of Manufacturers) (Mar. 24, 1987), based on a letter from Douglas Wilson, President of Uvex Winter Optical; see also Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. & Com. 167, 200 n. 211 (1989).

¹⁵⁶ Hearings on Product Liability, Before the Subcomm. on Consumers of the Senate Comm. on Commerce, Science and Transp., 99th Cong., 2d Sess. at 69 (1986) (statement of Larry McClain, Vice President, Rawlings Sporting Goods Co., on behalf of the Sporting Goods Manufacturers Ass'n); cited in Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game? 9 J.L. & Com. 167, 199 (1989); see also Richard W. Stevenson, Athletic Supplies: Stakes are High, N.Y. Times, June 10, 1986, at B-9.

¹⁵⁷ Testimony of W. Kip Viscusi, George G. Allen Professor of Economics, Department of Economics, Duke University, Durham, N.C. before the Subcommittee on Competitiveness and Economic Opportunity of the U.S. Senate Committee on Small Business, at 4 (Nov. 7,

• "A seven-figure jury verdict against a Holiday Inn years ago sounded the death knell for diving boards at all but large, supervised pools."¹⁵⁸

• "Forty percent of the rafting companies in Colorado have closed or been sold in the last three years, largely due to rising liability costs. The Sierra Club discontinued its mountaineering activities in 1988 because climbing insurance had soared to \$350,000, more than double the premium for the rest of its activities."¹⁵⁹

• Part of the reason ski lift ticket prices have soared from \$5 a day in the 1960s to \$38 to \$40 a day now in Southern Vermont is that the defense of assumption of risk has been narrowed considerably in the courts, so the cost of insurance and litigation in recent years has been borne by the skier.¹⁶⁰

VII. Mass torts

A. Asbestos

• "Legal expenses eat up too much of the amount spent to compensate harms--about half the total expenditures for tort litigation generally, and as much as 60 percent of the expenditures for more complex personal injury litigation[, such as that associated with asbestos]."¹⁶¹

• "Nearly two new asbestos cases are filed for every one completed."

"While one case was pending in court, 488 of the original plaintiffs died, a result many jurists say is routine."

"For every \$1 recovered by an asbestos victim, almost \$2

1991).

¹⁵⁸ Robert V. Wills, Lawyers are Killing America 22 (1990).

¹⁵⁹ Marcia Chambers, Whatever Happened to the Sandlot?, Natl L. J. Apr. 22, 1991, at 15.

¹⁶⁰ Marcia Chambers, Whatever Happened to the Sandlot?, Natl L. J. Apr. 22, 1991, at 15.

¹⁶¹ Deborah R. Hensler, Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform, 75 Judicature 244, 250 (1992).

goes to litigation costs -- mainly to the attorneys on both sides."¹⁶²

B. Other Torts

• "The same legal forces that knocked the Dalkon Shield off the market also dispatched two other kinds of IUD. The Dalkon Shield without question deserved to go; the next two, however, were the safest effective alternatives available to many women. Leftover IUDs are still used by over 2 million Americans; when the time comes for these devices to be replaced, it has been estimated that there will be 160,000 unintended pregnancies caused by the lack of equally acceptable and effective replacements. These will result in 72,000 live births and 88,000 induced abortions -- which collectively pose a far greater risk than any IUD would ever have created.

"The demise of Bendectin marked progress of a similar kind. Here pregnant women lost their only certifiably safe relief from sometimes debilitating morning sickness. Obstetricians and gynecologists have retreated too. Many of their services have become wholly unavailable in rural and less affluent communities. So women and children won their expanded right to sue, but lost services essential to their health and safety. The complication that develops in the back seat of the car heading to the delivery room at a distant hospital is not likely to yield a munificent tort award, even though it is more likely to end in a tragedy. If the child is delivered uneventfully, the tort system will continue its assault on her welfare in later years."¹⁶³

• "[I]n the early 1970s, Bendectin claims burgeoned. In one early case, a jury decided that the child's injuries were not caused by the drug but tried to award \$20,000 for medical expenses anyway. Merrell-Dow won almost all the early cases, but each trial stimulated a flood of new claims. Eleven hundred claims were consolidated in a single class action. Faced with the staggering legal costs of taking such a case to trial, Merrell-Dow offered to settle for \$120 million. Plaintiffs' lawyers foolishly torpedoed the offer. The case was then tried, and Merrell-Dow won again. But hundreds of other claimants had opted out of the class action, and their cases were still pending. In 1987 a jury awarded \$2 million to a six-year-old boy born with club feet. Another jury awarded \$95 million for another birth defect. As of July, 1987, seventeen juries had considered the Bendectin birth defect link. Merrell-Dow won twelve times, plaintiffs five. Throughout, the

¹⁶² Steve France, Asbestos Solution Proposed, ABA Journal, June 1991, at 16.

¹⁶³ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 162 (1988).

overwhelming scientific consensus, in the FDA and in all respectable scientific circles, had not moved an inch: Bendectin does not, in fact, cause birth defects. 'With Bendectin,' a New York Times editorial commenting on the original class action concluded, 'the law has made a devastation and called it a settlement.' In 1985, under the mounting pressure of litigation, the drug was pulled from the market."¹⁶⁴

• "Five Bendectin cases produced no award at all; a sixth netted the plaintiff a \$95 million verdict."¹⁶⁵

¹⁶⁴ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 102 (1988).

¹⁶⁵ Peter W. Huber, Liability: The Legal Revolution and Its Consequences 110 (1988).