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EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL OF ECONOMIC ADVISERS

DATE: 3-7-90

TO: Bob Simon

FROM: Steve Landefeld SL

Attached is a draft copy of some "good news" talking points on the economy.

Dr. Boskin is out of town, but he has verbally approved these draft talking points, and he may send a revised draft tomorrow.

TALKING POINTS
GOOD NEWS IN THE ECONOMY

March 7, 1990

Overview of the U.S. Economy

o The U.S. economy is the largest, most productive, and strongest economy in the world.

- The United States, with less than 5 percent of the world's population, accounted for 26 percent of world GNP in 1988. This is more than 2-1/2 times that of the next largest economy (Japan).

- With exports of goods and services at an all-time high in 1989 ($589 billion), the United States once again became the world's leading exporter.

- America's standard of living, as measured by per capita income, is the highest of any major industrialized country in the world and is one-third higher than that of West Germany or Japan.

The Current Expansion

o The economy continued to expand in 1989, the seventh consecutive year of economic growth.

- GNP rose 2.5 percent in 1989. This was more moderate than the very rapid pace of economic growth in 1987 and 1988.

- A better balance between domestic spending and domestic production was achieved, as growth in government purchases slowed while net exports and business investment grew more rapidly.

- The Nation's saving rate -- the sum of business and household saving less government borrowing-- rose from a low of 12.2 percent in 1987 to 13.4 percent in 1989.

  -- During this period, personal saving by households rose from 3.2 to 5.4 percent while the federal government deficit (borrowing) fell from 3.4 to 2.9 percent.

  -- The federal government deficit

o The continued expansion has further increased employment and incomes.

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- 21.2 million jobs have been created in the current expansion. Job gains in 1989 totalled 2.5 million.

- The average unemployment rate in 1989, 5.3 percent, was at its lowest level since 1973 and was lower than in any major European country.

  -- 1989 unemployment rates for blacks (11.4 pecent) and teenagers (15.0 percent) were the lowest since the early 1970s. For Hispanics, the 1989 rate (8.0 percent) was the lowest recorded since the government began keeping separate data for this group in 1980.

  -- The unemployment rate for adult women (4.7 percent) was the lowest since 1969. During the 1980s, the unemployment rate for women has fallen to a rate about equal to that for men. This is a first since World War II.

- Personal income after taxes and adjusted for inflation, rose 3.6 percent in 1989, above the 2.9 percent average during the last 10 years.

o The trade deficit has improved markedly, falling to its lowest level since 1984.

- The merchandise trade deficit has fallen almost 30 percent from its 1987 peak.

- The merchandise trade deficit declined by 11 percent in 1989 to $113.2 billion.

  -- Exports of goods increased by 13 percent in 1989 to $361.9 billion.

  -- Imports of goods increased by 6 percent in 1989 to $475.1 billion.

- The improvement in the merchandise trade deficit in 1989 is especially striking when petroleum products are excluded.

  -- The merchandise trade balance excluding petroleum products fell by 28 percent to $63 billion in 1989.

- The merchandise trade deficit was partly offset by a substantial and growing surplus in services.

- Inflation has been contained in the expansion.

  -- Following an uptick early in 1989 due to a temporary jump in food and energy prices, inflation returned to the 4 percent range it has maintained for most of this expansion.

  -- The broadest measure of economy-wide inflation, the GNP fixed-weighted price index, rose by 4.1 percent during 1989, down from 4.5 percent in 1988 and about the same as in 1987.

- Interest rates declined substantially during most of 1989.

  -- In December short-term interest rates were 119 basis points below their peaks in March 1989. And, despite an increase of 12 basis points early this year, they remain more than a percentage point below last March's level.

  -- 10-year bond rates declined 152 basis points between March and December 1989. These rates have moved up somewhat more than short-term rates recently, but still remain about 90 basis points below last March's level.

  -- Most of the decline in 3-month T-bill rates occurred between March and October. In contrast, 10-year bond rates moved down through the end of the year.

  -- The prime rate charged by banks is 1-1/2 percentage points below last March's level.

  -- Mortgage rates also are below their mid-1989 highs, 9.91 percent in January as compared with 10.48 percent in July.

Recent Economic Data

- Recent data indicate that the economy is growing more slowly, but do not point to a recession.

  - Labor market data show continued employment growth and no increase in unemployment, pointing to continued growth in production. (To be updated Friday, March 9 when the February employment data are available.)

  - Other indicators of activity are mixed, but on balance suggest that we are in a period of weak growth.

    -- Autos, housing, and certain manufacturing sectors remain weak, but consumer confidence remains at

relatively high levels, and the trade deficit continues to improve.

- o The underlying inflation rate remains close to its average over the past 7 years.

  - The large price increases in January were distorted by special factors, including weather and sharp increases in food and energy prices.

  - Excluding volatile food and energy prices, the underlying "core" inflation rate rose 4.5 percent, similar to the average pace of the past 7 years.

  - This uptick in inflation is similar to what happened early last year, when prices rose sharply and then slowed considerably later in the year.

NATIONAL ASSOCIATION OF MANUFACTURERS
RAMADA RENAISSANCE AT TECHWORLD
THURSDAY, MARCH 15, 1990, 10:30 A.M.

THANK YOU, DAN. AND I WANT TO SALUTE YOUR PRESIDENT -- JERRY JASINOWSKI.

I TOLD BARBARA I'D BE SPENDING SOME TIME WITH PEOPLE WHO HAVE RISEN TO THE TOP OF THE FINANCIAL WORLD BY CONTROLLING THE DISBURSEMENT OF BILLIONS OF DOLLARS. SHE SAID: "YOU'RE ADDRESSING THE BASEBALL LAWYERS?" \\\\ 11

BASEBALL'S "OPENING DAY" MAY NOT BE ON THE CALENDAR YET. BUT THE TRUTH IS, THE CALENDAR OFFERS EACH OF US MANY "OPENING DAYS" -- CONVENIENT LAUNCH POINTS FOR A FRESH START. SOMETIMES IT IS A NEW DAY, A NEW YEAR. NOW, IT'S A NEW DECADE -- A DECADE BORN AMID SHOUTS OF JOY AND TRIUMPH, A DECADE FULL OF HOPE, BARRELLING WITH CONFIDENCE TOWARDS A NEW CENTURY AND A NEW ERA.

THE ROLL CALL IS EXCITING, EXHILARATING, ACCELERATING. WE CALL IT THE "REVOLUTION OF '89," BUT IN POLAND, IT TOOK ABOUT 10 YEARS. THEN IN HUNGARY ABOUT 10 MONTHS. EAST GERMANY, 10 WEEKS. CZECHOSLOVAKIA, 10 DAYS. AND BULGARIA AND ROMANIA RIGHT BEHIND.

SIX NATIONS IN 6 MONTHS. AND FROM 6 DIFFERENT TONGUES WE HEARD THE SAME ONE WORD -- FREEDOM. THE PEOPLE OF CENTRAL EUROPE BELIEVED IT. THEY FOUGHT FOR IT. AND THEY DESERVE THE CREDIT.

BUT TAKE THAT WORD "FREEDOM" SOMETIME, PICK IT UP OUT OF THE NEWSPRINT AND TURN IT OVER. AND LOOK ON THE BACK. MORE OFTEN THAN NOT, YOU'LL FIND THE SAME PROUD LABEL THAT ADORNS THE PRODUCTS YOU PRODUCE: "MADE IN AMERICA."

EIGHT YEARS AGO, RONALD REAGAN STOOD BEFORE THIS VERY GROUP AND ISSUED A BOLD AND SIMPLE CHALLENGE. HE SAID: "AMERICA CAN SERVE AS THE CATALYST FOR AN ERA OF UNIMAGINED HUMAN FREEDOM AND DIGNITY." \\\ AND THE CRY OF THAT GREAT PRESIDENT BECAME THE "SHOUT HEARD 'ROUND THE WORLD." \\\

BACK HERE, ESPECIALLY IN WASHINGTON, THERE MAY BE SOME STILL PLAGUED BY DOUBT. \\ MAYBE IN WASHINGTON. BUT NOT IN WARSAW. ASKED IF RADIO FREE EUROPE HAD BEEN IMPORTANT TO DEMOCRACY IN POLAND, LECH WALESA RESPONDED WITH A QUESTION OF HIS OWN: "WOULD THERE BE EARTH WITHOUT THE SUN?"

MAYBE IN WASHINGTON. BUT NOT IN WENCESLAUS SQUARE. LAST MONTH VACLAV HAVEL PRAISED OUR RESOLVE AS "DEFENDER[S] OF FREEDOM," TELLING CONGRESS THAT CZECHOSLOVAKIA PROBABLY WOULDN'T EXIST TODAY IF IT HADN'T BEEN FOR THE ATLANTIC ALLIANCE.

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AND NO QUOTES ARE NEEDED TO TELL YOU THE ROLE OF AMERICAN PERSISTENCE AND AMERICAN COURAGE IN STANDING FOR LIBERTY IN PANAMA AND NICARAGUA. \\\\

YES, THESE ARE HEADY TIMES./ BUT THE GOOD NEWS ISN'T ONLY OVERSEAS. BECAUSE THE REVOLUTION OF '89 MARKS THE TRIUMPH NOT ONLY OF FREE IDEAS -- BUT ALSO FREE MARKETS. \\ AND WHEN IT COMES TO FREE MARKETS, AMERICA CONTINUES TO LEAD THE WAY. \\\

HERE AGAIN, THERE ARE DOUBTERS./ SOME WHO WORRY ABOUT A SLOWDOWN. TRUE, OUR ECONOMY IS NOT PERFECT, AND I DON'T WANT TO PAINT AN UNREALISTIC PICTURE. BUT LOOK AT THE FACTS: THE U.S. ECONOMY IS THE LARGEST, STRONGEST, MOST PRODUCTIVE ECONOMY ON EARTH. OUR STANDARD OF LIVING IS ONE-THIRD HIGHER THAN THAT OF WEST GERMANY OR JAPAN. WITH LESS THAN FIVE PERCENT OF THE WORLD'S PEOPLE, IN 1988 AMERICANS ACCOUNTED FOR MORE THAN 25 PERCENT OF THE WORLD'S PRODUCTION. OUR G.N.P. IS MORE THAN TWO AND A HALF TIMES THAT OF THE WORLD'S NO. 2 ECONOMY -- JAPAN.

AND WHEN A SMALL PERCENTAGE OF PEOPLE PRODUCE A HUGE PERCENTAGE OF WEALTH, THERE'S A WORD FOR IT. IT'S CALLED "PRODUCTIVITY." AND IT'S SPELLED "U-S-A." \\\

THANKS IN NO SMALL PART TO THE COMMITMENT AND IMAGINATION OF THE PEOPLE AND COMPANIES REPRESENTED HERE IN THIS ROOM, LAST YEAR AMERICAN EXPORTS OF GOODS AND SERVICES HIT AN ALL-TIME HIGH -- OVER $600 BILLION. AND TODAY, THE UNITED STATES IS ONCE AGAIN THE WORLD'S NO.1 EXPORTER.

1989 MARKED OUR SEVENTH CONSECUTIVE YEAR OF ECONOMIC GROWTH. TODAY, WE SEE GNP -- UP. EXPORTS -- UP. PERSONAL INCOME -- UP.

NOW, SOME WOULD SAY THAT EVERY ECONOMY HAS ITS UPS AND DOWNS. BUT TAKE A LOOK AT WHAT'S DOWN:

THE TRADE DEFICIT IS DOWN. THE FEDERAL DEFICIT -- DOWN. THE PRIME RATE -- DOWN. AND LAST YEAR'S UNEMPLOYMENT RATE -- DOWN -- THE LOWEST SINCE 1973.

AND THE GOOD NEWS IS REACHING A BROAD CROSS-SECTION OF AMERICANS. 1989 UNEMPLOYMENT RATES FOR BLACKS AND TEENAGERS WERE THE LOWEST SINCE THE EARLY 1970'S. FOR HISPANICS, THE 1989 RATE WAS THE LOWEST RECORDED SINCE THE GOVERNMENT BEGAN KEEPING SEPARATE DATA FOR THIS GROUP IN 1980.

BUT WE'RE NOT JUST TALKING ABOUT STATISTICS AND NUMBERS. AS DICK DARMAN RECENTLY REMINDED ME: "TORTURE NUMBERS -- AND THEY'LL CONFESS TO ANYTHING." \\\ LL

NO, WE'RE REALLY TALKING ABOUT PEOPLE -- PEOPLE WHO HOLD THE TWO AND A HALF MILLION NEW JOBS CREATED SINCE I TOOK OFFICE ONE YEAR AGO. FOR THEM, IT MEANS FAMILIES AND FREEDOM. IT MEANS DIGNITY AND DECENCY. BECAUSE TWO AND A HALF MILLION AMERICAN JOBS MEANS TWO AND A HALF MILLION AMERICAN FUTURES. \\\

((AND, SPEAKING OF THE FUTURE -- EARLIER I ASKED ONE C.E.O. WHAT HE SEES AS THE MOST LUCRATIVE GROWTH INDUSTRY IN THE 90'S. HE SAID: "BEING A LAWYER CONNECTED WITH THE TRUMP CASE.")) \\\\ LL

OUR PEOPLE AND OUR ECONOMY ARE STRONG. AND SO IS OUR RESOLVE. IT WILL SOON BE TESTED, AS THE DRAMATIC NEW CHANGES IN THE WORLD PRODUCE DRAMATIC NEW CHALLENGES IN THE WORLD MARKET. WE MUST PREPARE NOW TO MEET THESE CHALLENGES. MY ADMINISTRATION IS COMMITTED TO AN AGENDA FOR GROWTH. IT IS FOUNDED UPON INVESTING IN OUR FUTURE -- AND EVERY SOUND INVESTMENT HAS ITS YIELD -- AMERICA'S YIELD IS THE "GROWTH DIVIDEND." \\\

THE GROWTH DIVIDEND WILL PROVIDE AMERICANS WITH JOBS AND OPPORTUNITY, HIGHER LIVING STANDARDS AND A LEGACY OF PROSPERITY. SO ACHIEVING SOLID AND SUSTAINABLE GROWTH IS MY MOST FUNDAMENTAL DOMESTIC PRIORITY. IT IS WHY I HAVE PROPOSED A STRONG AGENDA OF GROWTH INITIATIVES.

THIS IS A MARATHON -- NOT A SPRINT. WE CAN'T PRODUCE THE PRODUCTS NEEDED TO CAPTURE WORLD MARKETS BY FOCUSING ON RESULTS ONE QUARTER AT A TIME. WE NEED TO RETURN NOT ONLY TO YESTERDAY'S VALUES BUT ALSO YESTERDAY'S THINKING -- THE "LONG-TERM THINKING" AND "INVESTMENT-IN-THE-FUTURE" WAY OF DOING BUSINESS THAT PRODUCED THE HEALTHY CLIMATE WE ENJOY TODAY.

FIRST, WE NEED TO BRING MORE OF AMERICA'S INVESTMENT CAPITAL BACK INTO THE PRODUCTIVE ECONOMY. LOWERING THE COST OF CAPITAL WILL ASSURE THE CONTINUED INVESTMENT IN PRODUCTIVE ASSETS AND HUMAN RESOURCES NEEDED TO KEEP OUR MANUFACTURING SECTOR THE MOST COMPETITIVE IN THE WORLD.

THE BOTTOM LINE: IT'S TIME FOR CONGRESS TO PASS THE CAPITAL GAINS TAX CUT. \\\ HERE'S WHAT WE'RE UP AGAINST: JAPAN -- ABOUT 5 PERCENT. SOUTH KOREA -- ZERO. TAIWAN -- ZERO. WEST GERMANY -- ZERO. SINGAPORE -- ZERO. HONG KONG -- ZERO. THE LIST GOES ON. WE NEED YOUR SUPPORT FOR THIS CRITICAL TAX CUT.

AMERICA WANTS IT DONE RIGHT. \\ AMERICA WANTS IT DONE RESPONSIBLY. \\ AND AMERICA WANTS IT DONE NOW. \\\\ AP

AD LIB - jobs

SECOND, WE NEED TO KEEP INTEREST RATES DOWN. \\ AND WE'RE COMMITTED TO HELPING THAT PROCESS BY GOING TO THE HEART OF THE MATTER: MY ADMINISTRATION SUBMITTED A BUDGET THAT WILL CONTINUE TO BRING THE FEDERAL DEFICIT DOWN. AND TODAY I CALL ON THE BUDGET COMMITTEES TO FULFILL THEIR LEGAL RESPONSIBILITIES -- AND COME UP WITH A BUDGET RESOLUTION BY APRIL 1ST. THAT'S TWO WEEKS AWAY. IT'S TIME TO ACT. IT'S TIME TO BRING THE DEFICIT DOWN.\\\

THIRD, AMERICA NEEDS A BOOSTER SHOT OF NEW IDEAS ALONG WITH THE INFUSION OF NEW CAPITAL OUR TAX CUT WILL PROVIDE. MATCHING INVESTMENT CAPITAL WITH INTELLECTUAL CAPITAL. AND I CALL ON CONGRESS TO HELP SHARPEN AMERICA'S COMPETITIVE EDGE: DOUBLE THE BUDGET OF THE NATIONAL SCIENCE FOUNDATION. BRING FUNDING FOR RESEARCH AND DEVELOPMENT TO A RECORD HIGH. MAKE THE RESEARCH AND EXPERIMENTATION TAX CREDIT PERMANENT. AND EXPAND THE EISENHOWER EDUCATION GRANTS FOR MATH AND SCIENCE. AP

FOURTH, WE MUST STAND BEHIND OUR WORKFORCE AND THE QUALITY OF OUR PRODUCTS. AMERICAN WORKERS TODAY ARE GOOD WORKERS -- THE BEST IN THE WORLD. BUT WE NEED TO KEEP PACE. THEIR CHILDREN ARE THE WORKERS OF TOMORROW, AND WE OWE THEM A BETTER EDUCATION, WITH AN EMPHASIS ON BASIC SKILLS, THE SCIENCES, MATH AND ENGINEERING.

WE'RE GOING TO DO THIS IN PARTNERSHIP WITH AMERICA'S GOVERNORS AND SCHOOLS. GIVING THOSE IN NEED A FAIR START THROUGH PROJECT HEAD START. RAISING OUR HIGH SCHOOL GRADUATION RATES TO AT LEAST 90 PERCENT. AND IN SCIENCE AND MATH OUR GOAL IS UNAMBIGUOUS -- FIRST IN THE WORLD BY THE YEAR 2000. \\\

WE'VE GOT TO RE-ESTABLISH STANDARDS AND RE-ESTABLISH EXPECTATIONS -- THE KIND OF "QUALITY CONTROL" SO ESSENTIAL TO EVERYTHING AMERICA PRODUCES.

QUALITY IS SOMETHING YOU UNDERSTAND. AND QUALITY IN MANUFACTURING AND QUALITY IN EDUCATION ARE INTERTWINED.

THESE GOALS ARE AN IMPORTANT STEP TOWARDS RESTORING QUALITY IN EDUCATION. THEY HELP FOCUS OUR EFFORTS LESS ON INPUT -- THE AMOUNT OF MONEY THAT GOES INTO OUR SCHOOLS -- AND MORE ON OUTPUT -- THE QUALITY OF STUDENT THAT COMES OUT.

THIS KIND OF BASIC QUALITY CONTROL IS ALSO BASIC TO PRODUCING QUALITY GOODS. AND IT'S BEING SPURRED ON IN AMERICAN MANUFACTURING BY STEPS TAKEN WITHIN YOUR OWN RANKS -- STEPS LIKE THE PRESTIGIOUS, HIGH-LEVEL COMPETITION PRODUCED BY AWARDS LIKE THOSE NAMED AFTER THE LATE MAC BALDRIGE.

IT'S ALSO SPURRED ON BY EFFORTS TO ENSURE A LITERATE WORKFORCE. WE SALUTE MANUFACTURERS' EFFORTS LIKE THE ONE BARBARA VISITED RECENTLY IN MICHIGAN -- A MODEL OF COOPERATION BETWEEN THE FORD MOTOR COMPANY AND THE UNITED AUTO WORKERS. So many more.

AND FINALLY, IT'S ESSENTIAL THAT WE HAVE A DRUG-FREE WORKFORCE. ONE WAY TO STOP DRUGS AT WORK IS TO MAKE SURE IT NEVER STARTS. PRE-EMPLOYMENT DRUG SCREENING. BECAUSE IF YOU'RE NOT PART OF THE SOLUTION -- YOU'RE PART OF THE PROBLEM.

A DRUG-IMPAIRED WORKFORCE IS ONE OF THE WAYS IN WHICH AMERICAN COMPETITIVENESS CAN SUFFER FROM A SELF-INFLICTED BURDEN. BUT IT'S NOT THE ONLY ONE.

SO NEXT, I CALL FOR CONGRESS TO ACT NOW TO MAKE THE U.S. MARKETPLACE WORK BETTER THROUGH TWO BASIC REFORMS: PRODUCT LIABILITY REFORM -- TO INCREASE OUR COMPETITIVENESS WITHOUT COMPROMISING SAFETY. AND ANTI-TRUST REFORM -- TO REMOVE OBSTACLES TO JOINT PRODUCTION VENTURES BY U.S. COMPANIES. \\\

I AM ALSO CONVINCED THAT AMERICA'S GROWTH NEED NOT COME AT THE EXPENSE OF THE ENVIRONMENT. OUR NATURAL RESOURCES ARE INVALUABLE ASSETS -- AND LIKE ANY OTHER ASSETS, THEY NEED TO BE MAINTAINED IN ORDER TO SUSTAIN OUR ABILITY TO GROW.

FOR 13 YEARS, CONGRESS HAS BEEN UNABLE TO PASS A NEW CLEAN AIR ACT. TWO WEEKS AGO, WE REACHED A BREAKTHROUGH -- A BI-PARTISAN AGREEMENT TO UNTANGLE THE WEB OF REGIONAL POLITICS THAT HAS STOPPED CLEAN AIR. I COMPLIMENT THE SENATE LEADERSHIP FOR THEIR VERY CONSTRUCTIVE NEGOTIATIONS. AND TODAY I CALL UPON THE SENATE TO NOW PASS CLEAN AIR -- TO STAND BY THE AGREEMENT -- AND TO PROTECT OUR ENVIRONMENT WITHOUT SADDLING THE BILL WITH NEW SUBSIDIES AND CUMBERSOME RULES. \\\ APP

I MENTIONED SELF-INFLICTED BURDENS -- AND OF COURSE -- NOT ALL OUR COMPETITIVE BURDENS ARE SELF-INFLICTED. THERE ARE ALSO FOREIGN BARRIERS TO U.S. EXPORTS WHICH MUST BE ADDRESSED. AND EARLIER THIS MONTH PRIME MINISTER KAIFU AND I AGREED ON THE NEED FOR ACTION ON WHAT WE CALL THE "STRUCTURAL IMPEDIMENTS INITIATIVE" TO BREAK DOWN NON-TARIFF BARRIERS TO THE JAPANESE MARKET. AND WE ARE PRESSING HARD TO GET THE JAPANESE GOVERNMENT TO ADDRESS SPECIFIC TRADE CATEGORIES. \\\\

WE MUST MOVE AGGRESSIVELY TO OPEN MARKETS, NOT JUST IN JAPAN BUT AROUND THE WORLD -- AND EXPAND OUR SHARE OF GLOBAL TRADE.\\\ Ad Lib

I STILL BELIEVE THAT -- FOR FAR-REACHING, FUNDAMENTAL REFORM -- OUR BEST HOPE IS THE PROPOSALS WE'VE MADE IN THE URUGUAY ROUND OF THE GATT NEGOTIATIONS. WE'RE DETERMINED TO MAKE A LEVEL PLAYING FIELD. LET AMERICA COMPETE IN AN ARENA OF FAIR TRADE -- AND WE'LL TAKE ON ANYONE, ANYTIME, ANYWHERE. \\\ APP

AS IN BERLIN, BARRIERS ARE COMING DOWN ALL OVER THE WORLD. IT TOOK YEARS OF PERSISTENCE, BUT THE IDEAS CHAMPIONED BY AMERICA -- FREEDOM, DEMOCRACY, COMPETITION, AND INVESTMENT -- ARE FLOURISHING BECAUSE THEY WORK, BECAUSE THEY ARE THE BEST. IT CAN BE THE SAME FOR AMERICAN GOODS.

IN 1986, ON THE EVE OF JULY 4TH, A SINGLE BLUE LASER SPLIT THE DARKNESS OVER NEW YORK HARBOR -- A MAN-MADE LIGHTNING BOLT THAT RE-LIT THE TORCH OF A RE-BORN STATUE OF LIBERTY. THE TORCH HAS BEEN HELD HIGH EVER SINCE. AND TODAY THAT LIGHT CONTINUES TO INSPIRE HOPE FROM PANAMA TO PRAGUE, FROM MOSCOW TO MANAGUA. \\\

SOMEHOW, A RECENT BIT OF NEWS SEEMS FITTING: THE BALD EAGLE -- THE AMERICAN EAGLE -- MAY SOON COME OFF THE ENDANGERED SPECIES LIST. \\ LADIES AND GENTLEMEN -- AMERICA IS BACK. \\ AND THIS TIME, AMERICA IS BACK TO STAY. \\\

Ad lib

GOD BLESS YOU. AND GOD BLESS THE U.S.A.

# # #

THE WHITE HOUSE

WASHINGTON

March 13, 1990

INFORMATION

MEMORANDUM FOR THE PRESIDENT

THROUGH: CHRISS WINSTON cw

FROM: EDWARD McNALLY

SUBJECT: NATIONAL ASSOCIATION OF MANUFACTURERS SPEECH

I. SUMMARY

Attached are draft remarks for Thursday morning's address to the annual meeting of the National Association of Manufacturers.

II. DISCUSSION

At 10:30 a.m. on Thursday, March 15, 1990, you are scheduled to arrive onstage at the Ramada Renaissance at Techworld in Washington to address approximately 500 executives from manufacturing companies.

The address (17 minutes, TelePrompTer) emphasizes the accomplishments and initiatives of your Administration on economic and business issues. It is intended as a significant address, taking stock of the full range of your Administration's many initiatives to maintain America's strong economic leadership.

The tone is upbeat in the first half, emphasizing the good economic news and the spread of freedom around the world.

The second half emphasizes your broad-based, comprehensive proposals for ensuring continued economic growth: The capital gains tax cut, new funding for R & D, the new education goals, and drug-free workplaces. Fundamental reform in trade, product liability, and anti-trust laws. And a pitch for the Clean Air compromise.

McNally/Simon
March 13, 1990
Draft Three (B:NAM)

PRESIDENTIAL REMARKS: NATIONAL ASSOCIATION OF MANUFACTURERS
RAMADA RENAISSANCE AT TECHWORLD
THURSDAY, MARCH 15, 1990, 10:30 A.M.

Thank you, Dan [KRUMM, N.A.M. CHAIRMAN]. [ACKNOWLEDGEMENTS]

I told Barbara I'd be spending some time with people who have risen to the top of the financial world by controlling the disbursement of billions of dollars. She said: "You're addressing the **baseball lawyers**?" \\\\

Baseball's "Opening Day" may not be on the calendar yet. But the truth is, the calendar offers each of us many "opening days" -- convenient launch points for a fresh start. Sometimes it is a new day, a new year. **Now, it's a new decade -- a decade born amid shouts of joy and triumph, a decade full of hope, barrelling with confidence towards a new century and a new era.**

The roll call is exciting, exhilarating, accelerating. We call it the "Revolution of '89," but in Poland, it took about 10 years. Then in Hungary, about 10 months. East Germany, 10 weeks. Czechoslovakia, 10 days. And Bulgaria and Romania right behind.

Six nations in 6 months. And from 6 different tongues we heard the same one word -- **FREEDOM**. The people of Central Europe believed it. They fought for it. And they deserve the credit.

But take that word "FREEDOM" sometime, pick it up out of the newsprint and turn it over. And look on the back. More often than not, you'll find the same proud label that adorns the products you produce: **"MADE IN THE U.S.A."**

Eight years ago, Ronald Reagan stood before this very group and issued a bold and simple challenge. He said: **"America can serve as the catalyst for an era of unimagined human freedom and dignity."** \\\ And the cry of that great President became the **"shout heard 'round the world."** \\\

"MADE IN THE U.S.A." Back here, especially in Washington, there may be some still plagued by the demons of doom and doubt.

Maybe in Washington. But not in Warsaw. Asked if Radio Free Europe had been important to democracy in Poland, Lech Walesa responded with a question of his own: **"Would there be Earth without the Sun?"**

Maybe in Washington. But not in Wenceslaus Square. Last month Vaclav Havel praised our resolve as "defender[s] of freedom," telling Congress that Czechoslovakia probably wouldn't exist today if it hadn't been for the Atlantic alliance.

And no quotes are needed to tell you the role of American persistence and American courage in liberating the peoples of Panama and Nicaragua. \\\\

Yes, these are heady times. But the good news isn't only overseas. Because the Revolution of '89 marks the triumph not only of free ideas -- but also free **markets**.

And when it comes to free markets, America continues to lead the way. \\\

Here again, there are doubters. So let me speak as plainly as I can: **The U.S. economy is the largest, strongest, most productive economy on Earth.** With less than five percent of the

world's people, in 1988 Americans accounted for more than 25 percent of the world's production. Our G.N.P. is more than two and a half times that of the world's No. 2 economy -- Japan.

And when a small percentage of people produce a huge percentage of wealth, there's a word for it. It's called "productivity." **And it's spelled "U-S-A."** \\\

Thanks in no small part to the commitment and imagination of the people and companies represented here in this room, last year American exports of goods and services hit an all-time high -- **over $600 billion.**

Today, the United States is once again the world's No. 1 exporter. For our families, for our children, that helps keep America's standard of living far and away the highest of any major industrialized country in the world. One-third higher than that of West Germany or Japan.

1989 marked our seventh consecutive year of economic growth. Today, we see GNP -- up. Exports -- up. Personal income -- up.

Now, some would say that every economy has its ups and downs. But take a look at what's down:

The trade deficit is down. The federal deficit -- down. The prime rate -- down. And last year's unemployment rate -- down -- the lowest since 1973.

But we're not just talking about statistics and numbers. As Dick Darman recently reminded me: **"Torture numbers -- and they'll confess to anything."** \\\

You who run the factories, you who sign the paychecks, you

know what it means to have created two and a half million jobs since I took office one year ago. **It means families and freedom. It means dignity and decency. Because two and a half million American jobs means two and a half million American futures.** \\\

((And, speaking of the future -- earlier I asked one C.E.O. what he sees as the most lucrative growth industry in the 90's. He said: "Being a lawyer connected with the **Trump case**.")) \\\\

Our people and our economy are strong. And so is our resolve. It will soon be tested, as the **dramatic new changes in the world** produce **dramatic new challenges in the world market.** America must prepare now to meet these challenges. And my Administration is pressing forward with our plan to keep America competitive, and to keep America's economy **second to none**. \\\

First, we need to bring more of America's investment capital back into the productive economy. Lowering the cost of capital will assure the continued investment in physical assets and human resources needed to keep our manufacturing sector the most competitive in the world -- a world where virtually none of our competitors fully taxes capital gains.

This is a marathon -- not a sprint. We can't produce the products needed to capture world markets by focusing on results one quarter at a time. We need to return not only to yesterday's values but also yesterday's thinking -- the "long-term thinking" and "investment-in-the-future" way of doing business that produced the healthy climate we enjoy today.

The bottom line: It's time for Congress to pass the capital

gains tax cut. \\\

America wants it done right. \\ **America wants it done responsibly.** \\ **And America wants it done NOW.** \\\\

Along with this infusion of new capital, America needs a booster shot of new ideas. **Matching investment capital with intellectual capital.** And I call on Congress to help sharpen America's competitive edge by acting on our new proposals. Doubling the budget of the National Science Foundation. Record-high funding for Research and Development. Making the Research and Experimentation tax credit permanent. A 70 percent expansion of the Eisenhower education grants for math and science.

And as always, our workforce comes first. American workers today are good workers -- **the best in the world.** But we need to keep pace. Their children are the workers of tomorrow, and we owe them a better education, with more emphasis on basic skills, the sciences, math and engineering.

We're going to do this in partnership with America's governors and schools. Giving those in need a fair start through Project Head Start. Raising our high school graduation rates to at least **90 percent.** And in science and math our goal is unambiguous -- **first in the world by the Year 2000.** \\\

We've got to **re-establish standards** and **re-establish expectations** -- the kind of "quality control" so essential to everything America produces.

Quality is something you understand. **And quality in manufacturing and quality in education are intertwined.**

That's why we need a literate workforce. And we salute manufacturers' efforts like the one Barbara visited recently in Michigan -- a model of cooperation between the Ford Motor Company and the United Auto Workers.

These goals are an important step towards restoring quality in education. **They help focus our efforts less on input -- the amount of money that goes into our schools -- and more on output -- the quality of student that comes out.**

This kind of **basic quality control** is also **basic to producing quality goods**. And it's being spurred on in American manufacturing by steps taken within your own ranks -- steps like the prestigious, high-level competition produced by awards like those named after my old friend Mac Baldrige.

There's one final education goal -- maybe the most important. We need schools that are free from crime. Free from chaos. And that means -- free from drugs. \\\

And what's true for the American school goes double for the American workplace. One way to stop drugs at work is to make sure it never starts. Pre-employment drug screening. Because if you're not part of the solution -- you're part of the problem.

A drug-impaired workforce is one of the ways in which American competitiveness can suffer from a self-inflicted burden. But it's not the only one. **I call for Congress to act now to make the U.S. marketplace work better through two basic reforms: Product liability reform -- to increase our competitiveness without compromising safety. And anti-trust reform -- to**

encourage joint production ventures by U.S. companies. \\\

I am also convinced that America's growth need not come at the expense of the environment. Our natural resources are invaluable assets -- and like any other assets, they need to be maintained in order to sustain our ability to grow.

For 13 years, Congress has been unable to pass a new Clean Air Act. Two weeks ago, we reached a breakthrough -- a bi-partisan agreement to untangle the web of regional politics that has stopped clean air. I compliment the Senate leadership for their very constructive negotiations. **And today I call upon the Senate to now pass Clean Air -- to stand by the agreement -- and to protect our environment without saddling the bill with new subsidies and cumbersome rules.** \\\

I mentioned self-inflicted burdens -- and of course -- not all our competitive burdens are self-inflicted. There are also foreign barriers to U.S. exports which must be addressed. And earlier this month Prime Minister Kaifu and I agreed on the need for action on what we call the "Structural Impediments Initiative" to break down non-tariff barriers to the Japanese market. **And we are pressing hard to open Japanese markets to American satellites, telecommunications, super computers, forest products, and yes, American semi-conductors.** \\\\

We must and will move aggressively to open markets and expand our share of world trade. \\\

I still believe that -- for far-reaching, fundamental reform -- our best hope is the proposals we've made in the Uruguay Round

of the GATT negotiations. We're determined to make a level playing field. **Let America compete in an arena of fair trade -- and just like in the Olympics -- we'll always bring home our share of gold.** \\\

As in Berlin, barriers are coming down all over the world. **It took years of persistence, but American ideas were accepted, finally, because they work, because they are the best. It can be the same for American goods.**

In 1986, on the eve of July 4th, a single blue laser split the darkness over New York harbor -- a man-made lightning bolt that re-lit the torch of a re-born Statue of Liberty. The torch has been held high ever since. **And today that light continues to inspire hope from Panama to Prague, from Sophia to Seoul, from Moscow to Managua...** \\\

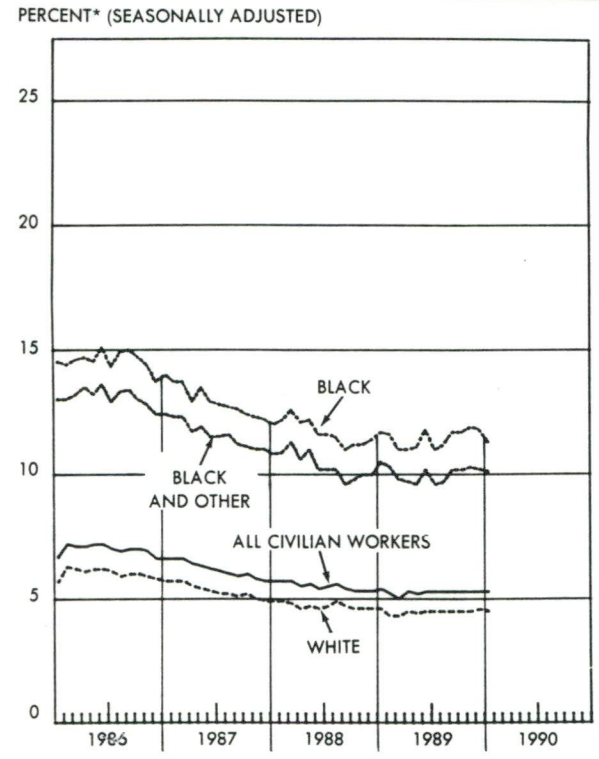
Somehow, a recent bit of news seems fitting: **The bald eagle -- the American eagle -- may soon come off the endangered species list.** \\ **Ladies and gentlemen -- America is back.** \\ **And this time, America is back to stay.** \\\

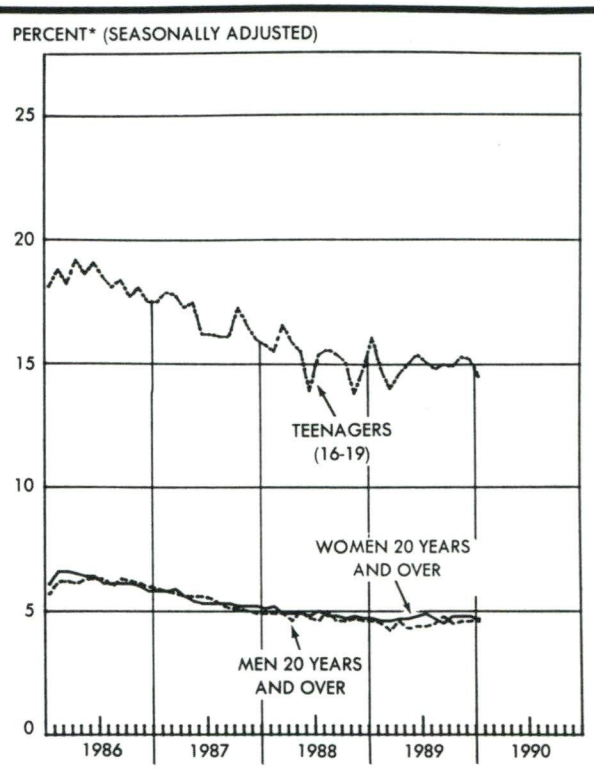
Thank you for your warm greeting. God bless you. And God bless the U.S.A.

# # #

SELECTED UNEMPLOYMENT RATES

In January, the overall unemployment rate fell slightly from its December level, to 5.2 percent; the civilian unemployment rate was unchanged at 5.3 percent.





*UNEMPLOYMENT AS PERCENT OF CIVILIAN LABOR FORCE IN GROUP SPECIFIED.

SOURCE: DEPARTMENT OF LABOR

COUNCIL OF ECONOMIC ADVISERS

[Monthly data seasonally adjusted]

Period	Unemployment rate, all workers [1]	Unemployment rate (percent of civilian labor force in group)												Labor force time lost (percent) [2]
		All civilian workers	By sex and age			By race			By selected groups					
			Men 20 years and over	Women 20 years and over	Both sexes 16–19 years	White	Black and other	Black	Experienced wage and salary workers	Married men, spouse present	Women who maintain families	Full-time workers	Part-time workers	
1981	7.5	7.6	6.3	6.8	19.6	6.7	14.2	15.6	7.3	4.3	10.4	7.3	9.4	8.5
1982	9.5	9.7	8.8	8.3	23.2	8.6	17.3	18.9	9.3	6.5	11.7	9.6	10.5	11.0
1983	9.5	9.6	8.9	8.1	22.4	8.4	17.8	19.5	9.2	6.5	12.2	9.5	10.4	10.9
1984	7.4	7.5	6.6	6.8	18.9	6.5	14.4	15.9	7.1	4.6	10.3	7.2	9.3	8.6
1985	7.1	7.2	6.2	6.6	18.6	6.2	13.7	15.1	6.8	4.3	10.4	6.8	9.3	8.1
1986	6.9	7.0	6.1	6.2	18.3	6.0	13.1	14.5	6.6	4.4	9.8	6.6	9.1	7.9
1987	6.1	6.2	5.4	5.4	16.9	5.3	11.6	13.0	5.8	3.9	9.2	5.8	8.4	7.1
1988	5.4	5.5	4.8	4.9	15.3	4.7	10.4	11.7	5.2	3.3	8.1	5.2	7.6	6.3
1989	5.2	5.3	4.5	4.7	15.0	4.5	10.0	11.4	5.0	3.0	8.1	4.9	7.3	5.9
1989: Jan	5.3	5.4	4.6	4.7	16.1	4.6	10.5	11.7	5.2	3.1	7.9	5.0	7.7	6.1
Feb	5.1	5.2	4.5	4.6	14.8	4.3	10.3	11.6	4.9	3.0	8.0	4.8	7.2	6.0
Mar	5.0	5.0	4.2	4.6	14.0	4.3	9.8	11.0	4.8	2.9	7.9	4.8	6.4	5.9
Apr	5.2	5.3	4.6	4.7	14.6	4.5	9.7	11.0	5.0	3.2	7.8	5.0	7.2	6.0
May	5.1	5.2	4.3	4.7	15.0	4.4	9.6	11.1	4.9	2.9	8.2	4.9	6.9	6.0
June	5.2	5.3	4.4	4.8	15.4	4.5	10.2	11.8	5.0	2.9	7.9	4.9	7.7	6.0
July	5.2	5.3	4.4	4.9	15.1	4.5	9.6	11.0	5.0	3.0	8.5	5.0	7.2	6.0
Aug	5.2	5.3	4.5	4.7	14.8	4.5	9.7	11.2	5.0	3.1	8.0	4.9	7.1	6.0
Sept	5.3	5.3	4.8	4.5	15.0	4.5	10.2	11.7	5.0	3.3	7.7	5.0	7.3	6.0
Oct	5.2	5.3	4.5	4.8	14.9	4.5	10.2	11.7	5.0	3.0	7.8	4.9	7.1	5.9
Nov	5.3	5.3	4.6	4.8	15.3	4.5	10.3	11.9	5.1	3.1	8.2	5.0	7.4	5.9
Dec	5.3	5.3	4.6	4.8	15.2	4.6	10.2	11.8	5.0	3.0	8.1	5.0	7.5	6.0
1990: Jan	5.2	5.3	4.7	4.6	14.5	4.5	10.1	11.3	5.1	3.4	7.5	5.0	7.0	6.0

Feb. 5.3

[1] Unemployed as percent of total labor force including resident Armed Forces.

[2] Aggregate hours lost by the unemployed and persons on part time for economic reasons as percent of potentially available labor force hours.

Source: Department of Labor, Bureau of Labor Statistics.

Document No. 121374

WHITE HOUSE STAFFING MEMORANDUM

[illegible]12 P4:59

DATE: 03/09/90 ACTION/CONCURRENCE/COMMENT DUE BY: 4:00 p.m. Monday 03/12

SUBJECT: PRESIDENTIAL REMARKS: National Association of Manufacturers (03/09 Draft one)

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	MCCLURE	☑	☐
SUNUNU	☐	☑	NEWMAN	☐	☐
SCOWCROFT	☑	☐	PORTER	☑	☐
DARMAN	☑	☐	ROGICH	☑	☐
BATES	☑	☐	UNTERMEYER	☐	☐
CARD	☐	☑	ROGERS	☐	☑
CICCONI	☐	☑	WINSTON	☐	☑
DEMAREST	☑	☐	PINKERTON	☑	☐
FITZWATER	☐	☑	BOSKIN	☑	☐
GRAY	☑	☐	_____	☐	☐
HAGIN	☐	☐	_____	☐	☐

REMARKS:

Please provide any comments/recommendations directly to Chriss Winston by 4:00 p.m. on Monday, 03/12, with a copy to my office. Thanks.

RESPONSE:

General: ① One of the continuing concerns of the NAM + its constituent members is the strangling cost of health care. (see attached article). I think a sentence or 2 acknowledging this + the DPC review announced in the State of the Union address is appropriate. (Steve Pantanasky Cabinet affairs)

James W. Cicconi
Assistant to the President
and Deputy to the Chief of Staff
Ext. 2702

② If health care language is added please notify DPC of it before sending to the President. (Cabinet Affairs-DPC)

③ Malcolm Baldrige awarded the plaque this award - ideal audience. (Commerce)

McNally/Simon
March 9, 1990
Draft One (B:NAM)

1990 MAR -9 PM 5:22

PRESIDENTIAL REMARKS: NATIONAL ASSOCIATION OF MANUFACTURERS
RAMADA RENAISSANCE AT TECHWORLD
THURSDAY, MARCH 15, 1990, 10:30 A.M.

Thank you, Dan [KRUMM, N.A.M. CHAIRMAN]. [ACKNOWLEDGEMENTS]

I told Barbara I'd be spending some time with people who have risen to the top of the financial world by controlling the disbursement of billions of dollars. She said: "You're addressing the **baseball lawyers**?" \\\\

Baseball's "Opening Day" may not be on the calendar yet. But the truth is, the calendar offers each of us many "opening days" -- convenient launch points for a fresh start. Sometimes it is a new day, a new year. **Now, it's a new decade -- a decade born amid shouts of joy and triumph, a decade full of hope, barrelling with confidence towards a new century and a new era.**

The roll call is exciting, exhilarating, accelerating. We call it the "Revolution of '89," but in Poland, it took about 10 years. Then in Hungary, about 10 months. East Germany, 10 weeks. Czechoslovakia, 10 days. ~~And Bulgaria and~~ Romania ~~right behind~~. and Bulgaria.

↓ 10 minutes (Treasury)

Six nations in six months. And from six different tongues we heard the same one word -- FREEDOM.

Take that word "FREEDOM" sometime, pick it up out of the newsprint and turn it over. And look on the back. More often than not, you'll find the same proud label that adorns the products you produce: "**MADE IN THE U.S.A.**"

Eight years ago, Ronald Reagan stood before this very group and issued a bold and simple challenge. He said: "America can serve as the catalyst for an era of unimagined human freedom and dignity." \\\ And the cry of that great President became the "shout heard 'round the world." \\\

America believed it. \\ And America did it. \\\

Back here, especially in Washington, there may be hand-wringers and doubters.

Maybe in Washington. But not in Warsaw. Asked if Radio Free Europe had been important to democracy in Poland, Lech Walesa responded with a question of his own: "Would there be Earth without the Sun?"

Maybe in Washington. But not in Wenceslaus Square. Last month Vaclav Havel praised our resolve as "defender[s] of freedom," telling a joint session of Congress that Czechoslovakia probably wouldn't exist today if it hadn't been for the American alliance.

And no quotes are needed to tell you the role of American persistence and American courage in liberating the peoples of Panama and Nicaragua. \\\\

Yes, these are heady times. But the good news isn't only overseas. Because the Revolution of '89 marks the triumph not only of free ideas -- but also free markets.

And when it comes to free markets, America continues to lead the way. \\\

Here again, there are hand-wringers and doubters. So let me speak as plainly as I can.

The U.S. economy is the largest, strongest, most productive economy on Earth. With less than five percent of the world's people, in 1988 Americans accounted for more than 25 percent of the world's production. Our G.N.P. is more than two and a half times that of the world's No. 2 economy -- Japan.

And when a small percentage of people produce a huge percentage of wealth, there's a word for it. It's called "productivity." **And it's spelled "U-S-A."** \\\

Thanks in no small part to the commitment and imagination of the people and companies represented here in this room, last year American exports of goods and services hit an all-time high -- ~~almost~~ over $600 billion.

(Treasury + Commerce)

((And you know what a **billion** is -- the number of discontinued food products that were once made with **oat bran**.))

(Inappropriate for Potus Speech (Treasury)

Today, the United States is once again the world's No. 1 exporter. For our families, for our children, ~~that means~~ that helps to keep America's standard of living ~~is~~ far an[illegible] of any major industrialized country in the wo[illegible]er than that of West Germany or Japan.

how is this measured? what does exports have to do with this? (Treasury)

suggested edit — Molly

1989 marked our seventh consecuti[illegible] growth. G.N.P. -- up. Exports -- up. Persona[illegible] -- up. savings rate -- up.

This suggests that the savings rate is up for the 7th consecutive year. = not true, it's only been the last year. (Treasury)

Now, some would say that every economy has its ups and downs. But take a look at what's down:

and Gross Natl Savings rate is not up + that statement reflects it is. (Treasury)

The trade deficit is down. The federal deficit -- down. The prime rate -- down. Mortgage rates -- down. And unemployment -- down -- the lowest level since 1973.

But we're not just talking about statistics and numbers. As Dick Darman recently reminded me: "Torture numbers -- and they'll confess to anything." \\\

You who run the factories, you who sign the paychecks, you know what it means to have created two and a half million jobs since I took office one year ago. It means two and a half million American families. It means two and a half million American futures.

Our people and our economy a[illegible] and so is our resolve. In the midst of these d[illegible] the midst of this unprecedented peacetime expa[illegible]e from time to time to catch our breath. But [illegible]re've faltered. And it sure doesn't me[illegible]on ahead.

That said, my Administration is pressing forward with our [illegible]ep America competitive, and to keep America's economy [illegible]none.

[illegible]gin with the first rule of business -- the first rule "Always do what you say you're going to do." And for me that means just three simple words: "NO NEW TAXES." \\\

Actually, that pledge caused a bit of panic when I first uttered it at the Convention. Bob Mosbacher and Jim Baker thought I said: "No new TEXANS!" \\\\

(Treasury)

Second, we need to ~~bring America's investment capital back into the productive~~ encourage long-term investment in our economy, as Nick Brady has urged.*' **It's time for Congress to pass the capital gains tax cut.** \\\ and a family savings account.

What is the investment capital figure? State a # there? (Treasury)

America wants it done right. \\ **responsibly.** \\ **And America wants it**

Way to kill an applause line! (And credit their boss, instead of POTUS...)

Along with this infusion of new ca booster shot of new ideas. Matching in intellectual capital. And I'm calling c sharpen America's competitive edge by acting on our new proposals. Doubling the budget of the National Science Foundation. A record-high funding increase for Research and Development. Making the Research and Experimentation tax credit permanent. A 70 percent expansion of the Eisenhower education grants for math and science.

And as always, our workforce comes first. American workers today are good workers -- the best in the world. But we need to keep pace. Their children are the workers of tomorrow, and we owe them a better education, with more emphasis on basic skills, the sciences, math and engineering.

We're going to do this in partnership with America's governors and schools. Giving those in need a fair start through Project Head Start. Raising our high school graduation rates to 90 percent. Re-establishing standards -- the kind of "quality control" so essential to everything America produces. And in science and math our goal is unambiguous -- **first in the world by the Year 2000.** \\\

(Treasury) Insert: *' Lowering the cost of capital in America would assure the continued investment in physical assets & human resources needed to keep our manufacturing sector the most competitive in the world. Virtually none of our competitors fully taxes capital gains; why should we be different? We can't produce the products needed to capture world markets by focusing on results →

We need a literate workforce -- and salute manufacturers' efforts like the one Barbara visited recently in Michigan -- a model of cooperation between the Ford Motor Company and the United Auto Workers. And last -- but maybe most important -- we need schools that are free from crime. Free from chaos. And that means -- free from drugs. \\\

And what's true for the American school goes double for the American workplace. And one way to stop drugs in the workplace is to make sure they never start. Pre-employment drug screening. Because if you're not part of the solution -- you're part of the problem.

A drug-impaired workforce is one of the ways in which American competitiveness can suffer from a self-inflicted burden. But it's not the only one. I call for Congress to act immediately to make the marketplace work better -- through meaningful reform of product liability laws and anti-trust reform to allow joint production ventures by U.S. companies. \\\

But of course, not all our burdens are self-inflicted. And earlier this month Prime Minister Kaifu and I agreed on the need for action on what we call the "Structural Impediments Initiative" to break down non-tariff barriers to the Japanese market. Today Bob Mosbacher is in Tokyo, pressing hard on our behalf. We must and will move aggressively to expand our ~~share of world trade~~ open markets + exports not only to Japan but to rest of world as well. (Commerce \\\

I still believe that -- for far-reaching, fundamental reform -- our best hope is the proposals we've made in the Uruguay Round

(USTR) also ~~recommend~~ mention Super 301 in this context? Chris W. has language for that from previous mention in Potus Speeches.

of the GATT negotiations. We're determined to make a level playing field. Let America compete in an arena of fair trade -- and just like in the Olympics -- we'll always bring home our share of gold. \\\

As in Berlin, barriers are coming down all over the world. That is today's trend. And that is history's verdict.

And it is no time to turn our backs on the newly prosperous overseas markets that American courage and imagination helped produce. It took years of persistence, but American ideas were accepted, finally, because they work, because they are the best. It can be the same for American goods.

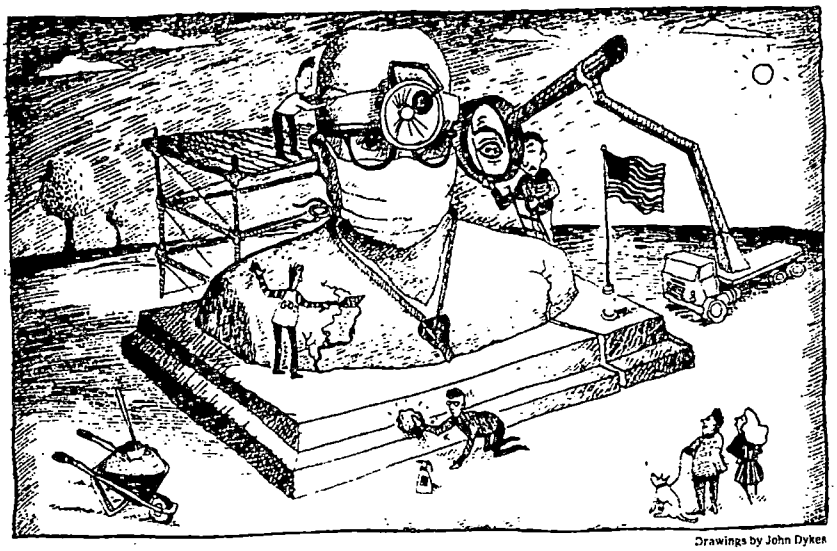
In 1986, on the eve of July 4th, a single blue laser split the darkness over New York harbor -- a man-made lightning bolt that re-lit the torch of a re-born Statue of Liberty. The torch has been held high ever since. And today that light continues to inspire hope from Panama to Prague, from Krakow to Kabul, and yes, from Moscow to Managua...

Overseas America is at peace. At home American is confident. And somehow, a recent bit of news seems fitting. Because today we hear that the bald eagle -- the American eagle -- may soon come off the endangered species list.

Ladies and gentlemen -- America is back. \\ And this time, America is back to stay. \\\

Thank you for your warm greeting. God bless you. And God bless the U.S.A.

Quality Control for Health Care



Drawings by John Dyker

JERRY J. JASINOWSKI

A painful back injury recently sent me to top medical specialists in Washington and New York. One doctor rated the injury an 8 on a scale of 1 to 10 and recommended immediate surgery. The other rated it a 2 and suggested plenty of rest and physical therapy. I opted for the latter and am in fine physical shape today.

But this mind-boggling experience — and near brush with the surgeon's knife — underscored more than statistics ever could the appalling quality deficiencies in our health care system.

Had I elected surgery, I unwittingly would have added to the alarming number of unnecessary surgical and medical procedures in this country: up to 34 percent of those performed each year, according to the Rand Corporation and other researchers. Rand says nearly $50 billion is wasted annually on such unneeded services. I'd bet the figure is substantially more than that.

Consider that more than a third of the nation's hospitals fail to meet standards designed to guard against inappropriate surgery, unnecessary blood transfusions and poorly coordinated treatment of patients in special coronary and intensive-care units, according to the Joint Commission on Accreditation of Health Care Organizations.

Consider that residents of New Haven are about twice as likely to undergo a bypass operation for coronary artery disease as their counterparts in Boston, who tend to be treated by other means. How does one explain such enormous treatment inconsistencies between two renowned medical centers whose residents are remarkably similar in demographic characteristics?

ONE reads and hears very little about these shocking quality shortfalls.

An important lesson for health care organizations can be learned from the resurgence of manufacturing in the past decade. The all-out campaign for quality that helped American manufacturers jump back into the competitive fray must now be extended to health care.

While quality is an ambiguous concept, the focus should be on how to increase the value of health care products and services without raising the costs. Operationally, that means getting the waste out of the system by striving for more appropriate and efficient care.

Quality care, for example, means setting up a system to evaluate medical technologies and services, and establishing guidelines to improve treatment and limit unnecessary procedures. It means reforming our medical liability system to curb defensive medical practices, like redundant consultations and diagnostic tests used by physicians to protect themselves from lawsuits.

Quality care also means providing consumers with the information they need to make intelligent buying decisions. The regrettable truth is we often know more about the televisions and cars we buy than about the medical care we choose. One way to foster better choices on our part is to make publicly available data on hospitals and physicians a state requirement, as is the case in Pennsylvania, Iowa and Colorado. The Hershey Foods Corporation, instrumental in getting the Pennsylvania law enacted, is convinced that it is the most powerful tool they have to boost health care quality and lower costs.

QUALITY care similarly means giving the medical payment system a shot of quality control. Consumers still pay a relatively small share of the cost of services, giving them little incentive to use those services judiciously. Employers can play an important educational role, emphasizing to workers the individual responsibility for one's own health and placing greater emphasis on preventive health care.

Companies can take other specific steps to improve the quality of health care for their employees. They can, like Honeywell Inc., negotiate cost-saving deals with medical facilities with proven track records — "centers of excellence" — for high-intensity, low-frequency procedures. They can directly contract with multi-specialty clinics that select and hire physicians based on rigid criteria and that perform ongoing quality-improvement programs.

Or, like Allied-Signal Inc., they can give employees financial incentives to use general care physicians selected by the company who have agreed to serve patients for a negotiated fee. Employees who go outside the physician network are required to pay very high deductibles.

The basic objective of quality improvements is doing the job right the first time. Companies should insist on this throughout the process — from informing the consumer, to consulting with physicians, to demanding greater hospital efficiency. ■

Jerry J. Jasinowski is president of the National Association of Manufacturers.

Employers must demand efficiency from suppliers and education for users.

East European Workers Will Need Incentives

By LEE SMITH
and LEWIS KADEN

MANY people think that laissez-faire capitalism will be a workable model for the redevelopment of the socialist economies of the Soviet Union and Eastern Europe. Western advisers have consistently pushed for the creation of markets, free pricing and currency systems and an economy built on private enterprises. But the rush to markets, and the willingness to create economic insecurity, clearly carries with it a substantial risk of political turmoil.

A safer path for Eastern Europe would lead to mixed economies that combine entrepreneurial qualities and efficiency with concern for economic security and equity.

There is much America can do to nurture the development of more effective enterprises. Joint ventures would bring managerial skills to underdeveloped Eastern European companies. In addition, the United States should encourage employee ownership and participation in enterprises in Eastern Europe. America is the world's leader in the legal, financial and organizational techniques needed to provide workers with equity in the enterprises in which they work.

When properly structured and operated, the company with employee ownership, especially when combined with employee participation, offers the incentives needed to create higher productivity, wages and profits; just what state-owned enterprises need to combat their inertia, low morale, low productivity and lack of research and development.

In practical terms, the first step on the road to an employee-driven economy is for the governments of these countries to sell off divisions of their huge state-owned enterprises to the people who work in them. The very size of these enterprises has been an impediment to efficiency. The governments could finance the acquisitions by taking a note against the future earnings of the enterprises. The state in its role as a creditor can encourage the employees to put as much of their earnings as possible back into the enterprise.

The United States and Western Europe can encourage this process by making loans available to enterprises willing to undergo this transformation. It would be a mistake to insist that loans only be available to traditionally structured private companies or joint ventures with Western companies.

A mixed economy with a large number of employee-owned enterprises has economic and political benefits. Workers with a right to share in the wealth of an enterprise and a voice in the company have incentives to create wealth and can internalize a sense of responsibility, individual and collective.

Individual responsibility is fundamental to economic efficiency. And a sense of collective responsibility is needed to bridge the gulf between the individual's interests and society's needs. Fostering both values is important because the political and economic success of these societies will depend on how well their politics and their economics balance the rights of the individual and needs of the nation.

The irony is that if America wants to see state socialism transformed into a system that has a key feature of capitalism — the market — it will have to advocate one of the key concepts of the theory of socialism — worker ownership of the means of production. ■

Lee Smith was director of the Cuomo Commission on Competitiveness. Lewis Kaden is a partner in the law firm of Davis, Polk & Wardell.

Unions Should Stick to the Basics

McNally/Simon
March 9, 1990
Draft One (B:NAM)

PRESIDENTIAL REMARKS: NATIONAL ASSOCIATION OF MANUFACTURERS
RAMADA RENAISSANCE AT TECHWORLD
THURSDAY, MARCH 15, 1990, 10:30 A.M.

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Six nations in six months. And from six different tongues we heard the same one word -- FREEDOM.

Take that word "FREEDOM" sometime, pick it up out of the newsprint and turn it over. And look on the back. More often than not, you'll find the same proud label that adorns the products you produce: **"MADE IN THE U.S.A."**

RR NAM Speech 3-18-82

Eight years ago, Ronald Reagan stood before this very group and issued a bold and simple challenge. He said: **"America can serve as the catalyst for an era of unimagined human freedom and dignity."** \\\ And the cry of that great President became the **"shout heard 'round the world."** \\\

America believed it. \\ **And America did it.** \\\

Back here, especially in Washington, there may be hand-wringers and doubters.

AP 11-17-89

Maybe in Washington. But not in Warsaw. Asked if Radio Free Europe had been important to democracy in Poland, Lech Walesa responded with a question of his own: **"Would there be Earth without the Sun?"**

Congressional Record 2-21-90 p. H393

Maybe in Washington. But not in Wenceslaus Square. Last month Vaclav Havel praised our resolve as "defender[s] of freedom," telling a joint session of Congress that Czechoslovakia probably wouldn't exist today if it hadn't been for the American alliance.

And no quotes are needed to tell you the role of American persistence and American courage in liberating the peoples of Panama and Nicaragua. \\\\

Yes, these are heady times. But the good news isn't only overseas. Because the Revolution of '89 marks the triumph not only of free ideas -- but also free markets.

And when it comes to free markets, America continues to lead the way. \\\

Here again, there are hand-wringers and doubters. So let me speak as plainly as I can.

The U.S. economy is the largest, strongest, most productive economy on Earth. With less than five percent of the world's people, in 1988 Americans accounted for more than 25 percent of the world's production. Our G.N.P. is more than two and a half times that of the world's No. 2 economy -- Japan.

And when a small percentage of people produce a huge percentage of wealth, there's a word for it. It's called "productivity." **And it's spelled "U-S-A."** \\\

Thanks in no small part to the commitment and imagination of the people and companies represented here in this room, last year American exports of goods and services hit an all-time high -- almost $600 billion.

((And you know what a **billion** is -- the number of dis-continued food products that were once made with **oat bran**.))

Today, the United States is once again the world's No. 1 exporter. For our families, for our children, that means America's standard of living is far and above the highest of any major industrialized country in the world. One-third higher than that of West Germany or Japan.

1989 marked our seventh consecutive year of economic growth. G.N.P. -- up. Exports -- up. Personal income -- up. The savings rate -- up.

Now, some would say that every economy has its ups and downs. But take a look at what's down:

The trade deficit is down. The federal deficit -- down. The prime rate -- down. Mortgage rates -- down. And unemployment -- down -- the lowest level since 1973.

CEA fact sheet by Steve Landefeld

But we're not just talking about statistics and numbers. As Dick Darman recently reminded me: **"Torture numbers -- and they'll confess to anything."** \\\

You who run the factories, you who sign the paychecks, you know what it means to have created two and a half million jobs since I took office one year ago. **It means two and a half million American families. It means two and a half million American futures.**

Our people and our economy are strong. And so is our resolve. In the midst of these dramatic times -- in the midst of this unprecedented peacetime expansion -- we may pause from time to time to catch our breath. But that doesn't mean we've faltered. **And it sure doesn't mean there's a recession ahead.**

That said, my Administration is pressing forward with our plan to keep America competitive, and to keep America's economy **second to none**.

We begin with the first rule of business -- the first rule of life. "Always do what you say you're going to do." And for me that means just three simple words: **"NO NEW TAXES."** \\\

Actually, that pledge caused a bit of panic when I first uttered it at the Convention. Bob Mosbacher and Jim Baker thought I said: "No new **TEXANS**!" \\\\

Second, we need to bring America's investment capital back into the productive economy. **It's time for Congress to pass the capital gains tax cut.** \\\

America wants it done right. \\ **America wants it done responsibly.** \\ **And America wants it done NOW.** \\\\

Along with this infusion of new capital, America needs a booster shot of new ideas. **Matching investment capital with intellectual capital.** And I'm calling on Congress to help sharpen America's competitive edge by acting on our new proposals. Doubling the budget of the National Science Foundation. A record-high funding ~~increase~~ for Research and Development. Making the Research and Experimentation tax credit permanent. A 70 percent expansion of the Eisenhower education grants for math and science.

FY 91 Budget p. 67-68

FY 91 Budget p. 104

And as always, our workforce comes first. American workers today are good workers -- the best in the world. But we need to keep pace. Their children are the workers of tomorrow, and we owe them a better education, with more emphasis on basic skills, the sciences, math and engineering.

We're going to do this in partnership with America's governors and schools. Giving those in need a fair start through Project Head Start. Raising our high school graduation rates to at least 90 percent. Re-establishing standards -- the kind of "quality control" so essential to everything America produces. And in science and math our goal is unambiguous -- **first in the world by the Year 2000.** \\\

2-26-90 WH Fact Sheet

see file BB visited on 2-22-90

We need a literate workforce -- and salute manufacturers' efforts like the one Barbara visited recently in Michigan -- a model of cooperation between the Ford Motor Company and the United Auto Workers. **And last -- but maybe most important -- we need schools that are free from crime. Free from chaos. And that means -- free from drugs.** \\\

And what's true for the American school goes double for the American workplace. And one way to stop drugs in the workplace is to make sure they never start. Pre-employment drug screening. Because if you're not part of the solution -- you're part of the problem.

A drug-impaired workforce is one of the ways in which American competitiveness can suffer from a self-inflicted burden. But it's not the only one. **I call for Congress to act immediately to make the marketplace work better -- through meaningful reform of product liability laws and anti-trust reform to allow joint production ventures by U.S. companies.** \\\

State of the Union 1-31-90

AEA speech 3-7-90

But of course, not all our burdens are self-inflicted. And earlier this month Prime Minister Kaifu and I agreed on the need for action on what we call the "Structural Impediments Initiative" to break down non-tariff barriers to the Japanese market. Today Secretary of Commerce Bob Mosbacher is in Tokyo, pressing hard on our behalf. We must and will move aggressively to expand our share of world trade. \\\

in Japan 3/13-16

I still believe that -- for far-reaching, fundamental reform -- our best hope is the proposals we've made in the Uruguay Round

of the GATT negotiations. We're determined to make a level playing field. Let America compete in an arena of fair trade -- and just like in the Olympics -- we'll always bring home our share of gold. \\\

As in Berlin, barriers are coming down all over the world. That is today's trend. And that is history's verdict.

And it is no time to turn our backs on the newly prosperous overseas markets that American courage and imagination helped produce. It took years of persistence, but American ideas were accepted, finally, because they work, because they are the best. It can be the same for American goods.

In 1986, on the eve of July 4th, a single blue laser split the darkness over New York harbor -- a man-made lightning bolt that re-lit the torch of a re-born Statue of Liberty. The torch has been held high ever since. And today that light continues to inspire hope from Panama to Prague, from Krakow to Kabul, and yes, from Moscow to Managua...

Overseas America is at peace. At home American is confident. And somehow, a recent bit of news seems fitting. Because today we hear that the bald eagle -- the American eagle -- may soon come off the endangered species list.

Ladies and gentlemen -- America is back. \\ And this time, America is back to stay. \\\

Thank you for your warm greeting. God bless you. And God bless the U.S.A.

# # #

FAX COVER SHEET

To: Bob Simon

From: Benita Somerfield

Date: 3/6/90 # of pages: 13 (incl. cover sheet)

Comments:

This is probably more than you ever wanted to know about literacy programs in the workplace, but I wanted to give you some solid examples of "what works." Please don't hesitate to call if I can be of any further help on this.

Please call (212)373-7345 if you do not receive this document in its entirety.

Thought this would be of some use (?)

Beth

WHAT INDUSTRY NEEDS IN BASIC SKILLS*

1. Fundamentals: Reading, Writing and Arithmetic.

2. Work Readiness: Sense of responsibility, Able to work well with others, Having self control, Showing pride in work.

3. Team Building: Interpersonal skills and communication abilities.

4. Math Skills: Math and statistics needed for quality control.

5. Verbal Skills: Verbal skills needed to read manuals, work with others, understand integrated systems and solve more complex problems.

6. Computer Skills: Basic computer skills for information processing and operating control systems.

7. Higher-Order Thinking Skills: Stronger conceptual and math skills in order to understand how systems relate to one another.

8. Life-long Learning: Understanding how to continue to learn.

* Adapted from a speech by Jerry Jasinowski, President-elect of NAM, at the Workplace Literacy and the Forgotten Half Conference, October 18, 1989, Washington, D.C.

Assessing Available Resources

Training programs require human, financial, and capital resources to operate. The extent and nature of these resources, particularly their availability and flexibility, are key in determining the program design.

Major factors that influence the availability of resources are:

- The support of the chief executive officer or president. If the person in charge believes that basic skills training will directly or indirectly benefit the business and communicates that belief through formal meetings, memos, newsletters, and, most important, support for budget allocations, the company usually will make the necessary resources available.
- The size of the company.
- The extent of the company's basic skills problem.
- The characteristics and location(s) of the employees in need of training.

A good example of an effective program with extensive available resources is the Skills Enhancement Program (SEP) operated by the United Auto Workers (UAW) and the Ford Motor Company. SEP is one of the six national programs under the umbrella of the UAW-Ford Employee Development and Training Program and a key feature of the 1982 collective bargaining agreement. Since its beginning, SEP projects have been established in 35 Ford locations, serving over 5,000 workers.

SEP includes learning and counseling opportunities in six main areas:

- Adult Basic Education.
- General Educational Development (GED).
- High School Completion.
- English as a Second Language (ESL).
- Educational Enrichment Services to sharpen such skills as math, reading comprehension, and science needed for technical training, college courses, or other personal goals.
- Academic Advising Services to assist in identifying and pursuing basic education goals.

Mrs. Bush visited in Dearborn 2/22/89

To meet the diverse interests and needs of the workers, each SEP project is developed cooperatively by the joint local committee at each location and the local education providers, which range from local school district adult and community education departments to community colleges and 4-year colleges and universities.

Each project is located in a dedicated area in the plant where employees' interests and needs are assessed and individualized instructional plans are developed based on personal goals. Flexibility is built into the program. Participants may attend tutorials or small groups before or after work; they can move their own pace, and an open entry/open exit structure is designed to accommodate workers' schedules to enter, move through, and complete the course of study selected.

While there are distinct program approaches and services made available to the active worker, there is also an interrelationship among the programs so workers can access other programs. For instance, a worker enrolled in a college course (under the prepaid tuition program) who needs to brush up on math skills can enroll in SEP to sharpen the math skills necessary to complete the college course.

Although participation in the UAW-Ford Skills Enhancement Program is voluntary, workers are encouraged to investigate the offerings, which are publicized in the plants through education fairs. Another invaluable resource is the Life/Education Adviser, a career counselor hired through the University of Michigan who is on-site in every major Ford location for 40 hours per week. The Life/Education Adviser, working in conjunction with the joint local committee, provides referral and on-going support to workers in defining and implementing their personal and career goals.

MAR 06 '90 16:36 CORPORATE COMM P.3

file

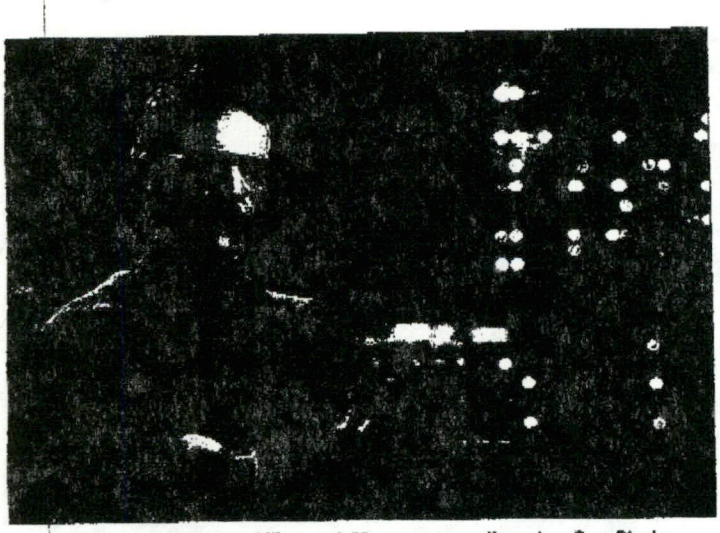
Industrial America badly needs to reeducate its work force. But as GM is learning, the three Rs aren't enough.

TOO LITTLE, TOO LATE?

BY PATRICK HOUSTON

BOB CROZIER IS SPOUTING ANSWERS LIKE THE eager schoolboy he never was. His teacher, Ginny Dingman, scratches the immutable truths of euclidean geometry across a blackboard. To etch these principles into the minds of her pupils, she conducts a what-if drill. "What if the intercepted arc is 80 degrees? Then the angle is . . . ?" Like a fish leaping at a fly, Crozier springs to each question and gets it right every time.

Dingman's classroom could have been lifted from any neighborhood school in the nation—from its sallow cinder-block walls to the neat rows of desks and shiny marbled-linoleum floors. But look again. It's only 9 o'clock in the morning, and already Dingman looks as though she's put in a full day. Small wonder: She's been teaching since 4:30 a.m. Notice the framed portrait on the wall. It's not a likeness of the nation's first president but a photo of the United Auto Workers union's current one—Owen F. Bieber. Dingman's students aren't typical either. Most are in their late 30s and 40s. Crozier, who graduated from high school in 1961 after doing just enough to scrape by, is a grizzled-bearded man who happens to be putting in the first two hours of his shift at an automobile plant.



Laboring to close the skills gap: A 20-year veteran die maker, Gary Blasius now teaches math full-time to GM factory workers.

Crozier and some 40 other students are studying geometry as part of a three-and-a-half-year program to upgrade their skills as tradesmen at General Motors Corp. As machinists they must constantly noodle with blueprints in order to figure out the dimensions of the parts they make. "Everything we work with is compound angles and radiuses," says Crozier, who operates a grinder. In the past, if he needed to decipher a diagram, "I'd go to a math whiz and say, Can you figure it out for me? Now I can do it myself."

Welcome to GM, which calls itself "the country's largest privately funded educational institution." This is no theoretical experiment in learning. It's basic survival training for a rapidly changing world. In Dingman's classroom—the former Windemere Elementary School on Saginaw Street in Lansing, Michigan—GM is laboring to bridge the ever-widening gap between labor skills and the requirements of the new workplace.

1st page.

Bob Crozier, a grinder operator, went back to school after nearly 30 years to learn how to read blueprints—and think for himself.

The urgency of retraining employees is hardly news. Every government commission, think tank, and business roundtable has grown hoarse with the same dire refrain: The days of plentiful labor are gone, and a shortage of adequately skilled manpower is already upon us; corporations can no longer afford to cast aside existing workers like spent machine parts but must retrofit them with the techniques and knowledge necessary to adapt to vast organizational, technological, and economic changes.

Corporations are not only heeding these grim prophecies; they're making retraining a quintessential crusade of the 1990s. Appalled by the failure of the nation's school system, many of the largest companies have become educators of last resort. They're grappling with roughly 25 million people—one-quarter of the American work force—who are functionally illiterate. Their mission: to overcome six or eight misspent years in school by compressing the rudiments of education into one or two years.

A close look at GM's efforts raises the question of whether companies can make up so severe a deficit. Is the teaching of basic skills *really* enough—especially considering the extraordinary ambitions of GM? Along with the rest of industrial America, the company wants to train its workers to be able to think for themselves. The idea is to improve the work force so that it becomes a strop for honing a company's competitive edge: Smarter labor turns out better products and services at lower cost.

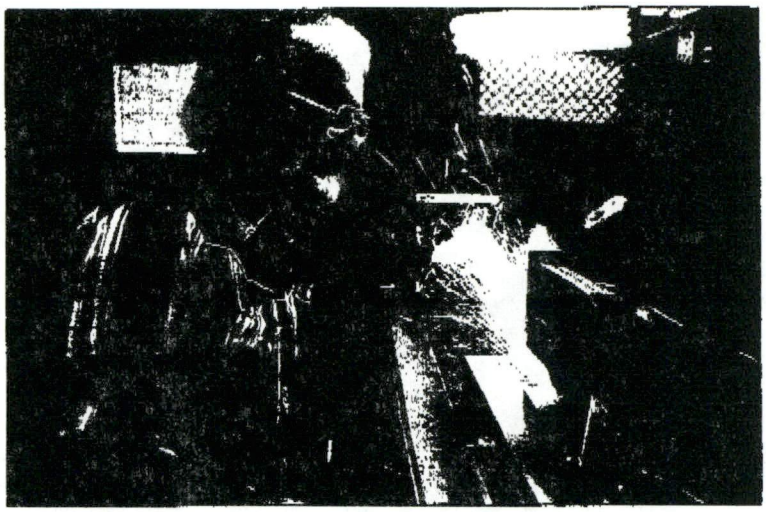
If only it were that simple. It's one thing to teach people how to read a technical manual or write a coherent report. It's quite another matter to train employees to make substantive contributions to their divisions, proposing ideas that could improve R&D, manufacturing, and corporate strategy. Crozier, for example, may now know how to read blueprints. But will he ever get the kind of instruction that can give him the self-confidence and the wherewithal to suggest design modifications?

For GM, it's a risk worth taking—and none too soon. Having suffered one of the decade's most stunning comeuppances—its share of the U.S. market plunged from 46 percent to 35 percent—GM made the humble discovery

that it needed to supplement the $50 billion plus it was pouring into plant modernization. Buying the best new equipment wasn't enough to reverse its sliding fortunes; it had to invest in its people.

The revelation that it was sitting on an unexploited pile of human capital marked the beginning of what Executive Vice President F. Alan Smith calls the "people revolution" at GM, which he describes as the linchpin of the company's comeback strategy. What does management expect? Competitive strength through a radical improvement in product quality. Hourly-wage earners looking for more decision-making muscle and increased job security.

To those ends, GM decided to concentrate its efforts—and $1 billion each year—on workplace education. Much of it goes to formal training in subjects that range from basic literacy skills and high-school-completion courses to robotics and laser measuring devices. At the Windemere school, or any of the dozen training hives GM has scattered among its 157 domestic plants, employees can also take classes in interpersonal skills, health and wellness, time management, public speaking, even the Dale Carnegie way of winning friends. If the content of such courses sounds a bit soft-headed, the intention isn't: Increasingly, the rank and file must learn to work in teams.



Crozier's course work will prepare him for new responsibilities on the shop floor—running computer-controlled equipment as well as lathes, shapers, and boring mills.

GM deliberately leaves the classroom door wide open to encourage as much schooling as its employees can take. In Lansing alone, some 12,000 workers attend more than 550 classes at Windemere and a second center on the north side of town. Some course work is mandatory, according to Jan Danford, who heads training and development for GM's Lansing operations. A lot of classes, while not compulsory, still help an employee fulfill requirements for a new job or advancement. To the relief of many participants, grades are verboten. "Grades smack of school—and school isn't always a positive experience for everyone," explains Danford, a diminutive woman with the fussily meticulous air of an elementary school principal. "What we're looking for is someone's ability to use information."

To ferret out those abilities, GM is willing to foot nearly the entire bill. In many cases, it invites hourly workers to go to school on company time, no mean commitment considering that the average worker costs GM about $28 an hour in wages and benefits. Some of those costs are covered by a fund established under the company's labor contract with the union. For each hour a UAW member works, GM contributes 19 cents to the fund, which is administered jointly by the corporation and the union.

GM wasn't always so generous. Back in 1980, when the company was headed toward a colossal $763 million loss (its first ever), it asked the UAW to renegotiate its contract and accept wage concessions. Unblithely the union agreed, but only on condition that its members be given a voice in managing the company—including the right to have an equal hand in anything related to the training of hourly workers, an agreement that has survived nine years and two contracts. In each of GM's plants, a UAW member serves as a training coordinator, often full-time.

The UAW's role is far from token; its participation gives GM's training efforts credibility and relevance. Ford has a similar joint education and development fund with the UAW. But under its agreement with the union, plant-site classes must be restricted largely to "personal enrichment." By offering courses on things like small-engine repair and bowling, Ford seems to be preparing employees less for work than for life after layoff.

Many of GM's 65 instructors in Lansing, like Gary Blasius, are UAW members recruited right from the factory floor. A journeyman die maker who has served GM for 20 years, Blasius began teaching part-time in a skilled-trades training program at a local community college. Five years ago, he was plucked from the shop floor first to teach die making, then math courses full-time at Windemere, where he receives the same $17.74 an hour he got at the plant. Blasius has a thoughtful manner more befitting a postdoctoral candidate than a factory hand. Still, he says it's easier for him to get through to his students "because I was in the shop, and I can talk to them as equals."

It's a far cry from facing a roomful of fresh-faced public school kids. "Most people are pushing 40 around here, so you've got to repeat yourself a few times," observes Dingman, a former junior high school teacher. Many workers are gripped by anxiety at finding themselves back in the classroom after so many decades. "It scared me when I first came into class," admits Crozier the grinder. "It had been 28 years since I sat down in a classroom and actually had to push a pencil to do math." Along with his peers, Crozier, a chipper man who wears a black cowboy hat bedecked with lapel pins, spends two hours twice a week studying geometry, taking weekly quizzes and exams every three weeks. He has to maintain a 70 percent average on his test scores or repeat the course.

3rd page

The idea of retooling a worker like Crozier isn't to turn him into a math whiz; it's to give him more flexibility, which, GM believes, lies at the heart of increased productivity. Crozier is certified only to operate a grinder. But after he completes his course work this summer, he'll be able to run any one of several machines—lathes, shapers, and boring mills, as well as a variety of computer-controlled equipment—as the work load dictates.

To appreciate how far GM has come in integrating classroom training and shop-floor requirements, visit the Reatta Craft Centre, a newly refurbished assembly plant just catercorner to the Windemere school. Half a dozen years ago, its 1,800 workers forged pinions and ring gears and put together rear axles. The air was so thick with dust that "we had to carry flashlights to see," recalls Don Pierce, a millwright and full-time UAW training coordinator.

More than literal darkness was descending on the factory. Pierce explains that the switch to front-wheel-drive cars drove the plant to near extinction by 1984. But workers saved the factory by agreeing to work-rule changes that reduced the number of restrictive job classifications to 11 from a bewildering 170. GM responded with nearly $150 million to transform the operation into a state-of-the-art assembly plant to produce the Buick Reatta, a sporty two-seater that sells for about $30,000.

Today, the only reminders of the old factory are the short, grease-caked cobblestone corridor connecting two sections of the plant and the 580 workers who run the show. The biggest difference is less conspicuous: Instead of doing one repetitive task on an assembly line, workers piece together large components of the car in teams.

At one assembly station, for example, three workers put together the car's dashboard, install its steering assembly, and hook up its various electronically operated functions—stereo, digital instrument panel, door locks, antenna, ignition, and lights. With its three on-board computers, "these cars are about as complicated as they get," says plant manager James C. Rucker. Before the car moves out of the station, workers run the sundry electronic systems through a series of computerized checks. What's more, the three members of one work cell switch positions each day. So they have to master dozens of tasks in all.

Most of these skills were once about as familiar to workers as the niceties of Sanskrit drama. GM required everyone to take 40 hours of team-building training. Some employees traveled to England and Japan to learn about the new equipment. GM invited a host of suppliers to hold in-plant seminars. Those assigned to electrical-assembly stations took a six-week course on basic electronics.

The new approach seems successful. In a testament to its workmanship, the Reatta received the highest ratings for customer satisfaction of any model made by GM. Rucker claims his plant always ranks in the top 10, and frequently number one, among all GM plants when judged by corporate quality audits that measure defects per car. Sales of the Reatta last year came to about 8,000 units, nearly double the number sold during its first year of production.

But GM can ill afford to sit still. Already there are signs that it has lost some momentum in its retraining efforts. After the plant conversion, complain some workers, the commitment to education tailed off significantly. Even with their newfound skills, these workers wonder whether they'd be out in the cold if the Reatta, whose sales have been slowing, were discontinued. "If this folds, we're done for," worries Bob Miles, an electrical-station worker.

For Don Davis, a UAW official who is codirector of the GM-union joint programs, it's a companywide problem. "Typically, at GM the training has been tactical instead of strategic: They train when they need to, as opposed to doing it on a long-range basis," he explains. "They shouldn't be talking about what's coming down the line five years from now without thinking about the necessary training."

By then, the demands of the workplace will require skills that make today's Reatta workers look like field hands. Plant manager Rucker frets that GM's efforts to close the skills gap are nowhere near as developed as they need to be. "It's never enough," he says. "Unlike building a facility, where you make a onetime investment, retraining people means the investment has to continue."

Some experts agree that GM is on the right track but hasn't been aggressive enough. They contend, moreover, that if workers get sufficient vocational training, they'll instinctively make larger contributions to the group. "We often forget that these are grown people who manage families and community affairs," declares Robert Zager, vice president for policy studies at the Work in America Institute, a Scarsdale, New York, think tank. "Given the opportunity to learn and a show of interest from the company, most blue-collar workers I've observed since 1955 are eager to take part in decisions about how to run the plant."

GM invests $1 billion a year in training ranging from literacy skills to robotics. Yet "it's never enough," complains the manager of a newly refurbished plant.

The biggest obstacle to workplace learning may not be America's hobbled education system but managers who mistakenly assume their subordinates are incompetent and uninterested. "Most workers feel left out because they've been told to check their brains at the door," Zager argues. "If management gives workers the chance to contribute and the right tools, they invariably get a great response." ■

Patrick Houston writes about labor and management.

The New York Times

NEW YORK, TUESDAY, SEPTEMBER 26, 1989

Companies Step In Where the Schools Fail

By JOSEPH BERGER
Special to The New York Times

SCHAUMBURG, Ill. — At the huge Motorola Inc. plant here, assembly line workers like Carritha Wells are being paid to learn not about electronic circuit boards or cellular telephones but about how much a pound of grapes would cost if 2⅔ pounds cost $3.25.

The sleek computerized equipment that Motorola is installing requires Mrs. Wells, to do far less manual labor in her job, but a lot more thinking. She must read graphs and change percentages to decimals. Yet, she has not performed such calculations since her high school days in Mound Bayou, Miss., several decades ago.

"If you don't need it, you forget it," she said.

So, in a small factory conference room she and a half dozen colleagues are taking a course in grade school arithmetic.

Motorola, Ford, Xerox, Polaroid and Eastman Kodak are in a small but growing number of American companies spending millions of dollars a year on basic reading and arithmetical instruction because, they say, America's schools are no longer meeting the companies' needs. Their jobs are becoming more sophisticated each year and many of their workers cannot read and count well enough to fill them.

A growing number of experts believe that this trend will worsen in coming years and that the groups most affected by it are the poor and minorities.

Skills vs. Jobs

The Classroom Mismatch

Second of three articles.

So far, the companies are making do by retraining current workers and casting a much wider net to find competent new workers. But soon, some executives predict, American businesses may not be able to find enough qualified workers and will have to hire tens of thousands of unqualified ones and teach them to read and write.

As a case in point, Frederic V. Salerno, president of New York Telephone Company, recalled that in 1987 the subsidiary of the Nynex Corporation had to test 57,000 people before it could find 2,100 who were qualified to become operators and repair technicians.

Louis V. Gerstner Jr., chairman of RJR Nabisco Inc., warns that, if current trends continue, American businesses will have to spend $25 billion a year providing elementary instruction to 1 million workers before they can even train them to handle modern equipment.

Like a growing number of executives, Mr. Gerstner has been speaking to audiences urging a shakeup of the country's educational system.

Susan Hooker, Motorola's director of retraining, explained the changes this way: "For many years our factory jobs did not require people to use a lot of brain power. We were really hiring people for their ability to manipulate things and put things together. Now, most of those manipulations can be performed by machinery. It isn't that they've lost skills, but the skills traditionally required have changed."

Direct Involvement in Schools

Major companies are also immersing themselves in local schools in ways that would have seemed astonishing only a decade ago. Some are writing curriculums for special "academies" in certain high schools. These schools within schools are intended to attract students to the sponsoring companies' fields. Other companies are guaranteeing jobs to graduates, deploying executives to act as mentors, lending expensive equipment and providing college scholarships.

Companies are taking this role largely for self-preservation. Forrest P. Chisman, director of the Southport Institute for Policy Analysis in Washington, said that 20 million to 30 million adults cannot read, write or calculate well enough to function effectively at work, a situation he described as "a cancer eating away at the American economy."

Some companies, worried about anemic productivity at home and fiercer competition abroad, are shifting locales just to find larger pools of qualified entry level workers. Some are moving divisions overseas.

The problem, experts say, will not wither away. Motorola officials expect to keep increasing the educational levels of the company's workers just to keep up with changing technology, a trend Ms. Hooker compared to walking up a down escalator just to stay in place. Almost one in every four jobs now requires a college degree. Banks have replaced tellers with cash dispensing machines, but the new generation of tellers must be able to process loan applications.

Moreover, companies eager to energize lackadaisical workers are giving them greater decision-making authority and responsibility. The new duties require workers to reason, to follow written instructions and to articulate their thoughts to teams of co-workers.

"I believe companies are going to have to shoulder a lot of the burden of correcting adult illiteracy because that's where the adults are during the day, not at home," Mr. Gerstner of RJR Nabisco said in a recent interview.

Educators Are Responding

For the most part, the education community is not shrugging off the criticism. In early September, the Teachers College Institute on Education and the Economy brought business leaders and educators together for three days on Cape Cod.

P. Michael Timpane, Teachers College president, opened the conference by warning that the shortage of qualified workers "strikes at the sinews of our nation" and "affects our hopes for social integration." Although he did not say so directly, a study by the college shows that black and Hispanic people are heavily represented in precisely those occupations that are lagging in growth.

Some school systems are taking dramatic steps to demonstrate their responsibility to business. The Plymouth-Carver district in Massachusetts has decided to "warranty" the skills of its high school graduates for three years. Bernard Sidman, the superintendent, said that if an employer reports that a graduate cannot make change at a cash register, for example, the district will enroll the student in "evening classes for retooling" free of charge.

Business and education are increasingly linking their worlds. Seven years ago, the American Express Company confronted hiring pools of high-school graduates whose abilities were mediocre and who often did not understand the need for courtesy and punctuality in the workplace. It decided to develop a special program to prepare students for careers in finance and helped set up academies at seven New York City high schools.

At the Academy of Finance within John Dewey High School near Coney Island, 120 students take classes in Wall Street operations, accounting, computer business applications and banking, all on top of their regular high school courses. The content was developed with with the help of Wall Street executives. Every class plays the stock market with an imaginary portfolio of $100,000.

With 150 companies now participating, the program guarantees all youngsters $6-an-hour summer jobs, and many turn those into permanent jobs after graduation. Ninety percent of the youngsters, though, pass these up and elect to go on to college because they realize that high-earning positions require advanced education.

NY Times article (cont'd).

An Investment Whiz Emerges

"They want to be the big guys, the guys working in arbitrage, the managers of departments in accounting firms," said Ada Dolch, Dewey's academy coordinator.

One student, she said, has proved to be such a canny broker that Shearson Lehman Brothers International Inc. sends a limousine to pick him up after his classes at St. John's University and drives him to work at the offices of the American Express investment service.

The American Express program is now operating in 42 schools in 18 cities and costs the company $1 million and considerable executive time a year, according to Ida Schmertz, senior vice president for corporate affairs. More than 65 percent of the students are black, Hispanic or Asian.

A similar program has been operating in 10 Philadelphia high schools, preparing 1,200 students for careers in electrical work, business, health and the automotive industry. In 1984, the business academy had a job placement rate of 86 percent, a remarkable figure for students who are often afraid to venture into corporate personnel offices.

The quality of such academies has not been consistent and, in some cases, sponsors have urged the recruitment of brighter, more ambitious youngsters rather than the dropout-prone students to which the program is directed.

Perhaps the most far-reaching effort to create a partnership between business and schools is Boston's. In 1982, 600 businesses, alarmed by the scarcity of entry-level workers, signed the "Boston compact." If the city's schools would agree to improve attendance, dropout and reading rates, businesses would reserve a quota of jobs for high school graduates.

Results Are Mixed

A 1987 study by Public/Private Ventures, a consulting concern, found that absences dropped to about 15 percent from roughly 25 percent daily and reading scores improved for students in grades 9 and 10, though not those in grade 11. Dropout rates, however, deteriorated. Businesses had generally delivered on the jobs.

Although measurable results were mixed, the study noted that the agreement increased political support for schools, improved teacher morale and physically upgraded many schools. But the Boston experience may also be demonstrating how intractable the welter of family and school problems can be, some participants say.

"We were naive to think that in five years we could have a substantial impact," said Daniel Morley, chairman of the Morley Group in Wayland, Mass., one of compact's founders. "School officials have learned that business just can't solve everything with a check."

The idea that companies should enter the remedial education business is a relatively new approach. Mr. Chisman said that only a small fraction of the $30 billion spent on training each year is devoted to basic skills, and that it is mostly spent by companies with strong unions or severe labor shortages.

Sue E. Berryman, director of the Teachers College's Institute, complains that employers principally "train the trainable and the trained."

Motorola, the multibillion producer of two-way radios, pagers, and electronic parts, has been a pioneer in basic-skills training. The company's assembly-line workers once simply inserted colored resistors and capacitors into reddish circuit boards by copying a diagram. The job did not even require a knowledge of English. Indeed, many workers are immigrants from Poland, Colombia, India and other countries.

Fewer Workers, but Literate Ones

But Motorola has been introducing chip placement machines like the Fuji CP III that assemble 11,000 components an hour with superhuman reliability. Only a third as many employees are needed to operate the robots. But those employees must be able to monitor the robots' precision by reading computer graphs that track the location, rotation and thickness of inserted parts.

This statistical process control method of monitoring has spread through much of American manufacturing, forcing companies to hire workers who are more literate than in the past.

Motorola could have dismissed illiterate employees, but it has prided itself on loyalty to workers, and also sensed that it would not be easy to find replacements. So three years ago, it commissioned Harper College, a local community college, to provide instructors to teach basic skills. About 10 percent of the 1,800 production employees at the Schaumburg plant are currently taking the classes. In 1988, Motorola spent $5 million on such training throughout the corporation, which has 60,000 employees in the United States.

A recent visit to Motorola's Schaumburg center found a class largely of black and immigrant workers practicing division of fractions. Carritha Wells and her classmates concluded that the grapes cost $1.22 a pound.

Another class, taught by Sue Thompson, discussed the meanings of comparatives like fewer, taller, smaller, fatter and thinner by studying the different sized coffee makers pictured in a catalogue.

Ford Motor Company has established "learning centers" at 11 of its major national sites. Dramatic changes in the automobile business require better educated workers. Ernest J. Savoie, Ford's director of employee development, points out that 15 years ago companies produced 100 models; now they produce 300 different ones. More frequent shifts in machinery demand greater employee resourcefulness.

Businesses are getting involved directly in local school programs.

Benefits Beyond the Job

Tennessee Eastman Company in Kingsport, an Eastman Kodak division that makes plastics for soda bottles and fibers for cigarette filters, has long trained high-skilled workers, but realized two years ago that it must also train many of its machine operators in reading and calculating.

"Things that used to be monitored by gauges and dials are now monitored by computer screen, and it takes a whole different set of skills to monitor by computer screen," said Jan Stallard, an instructor.

Such training programs have produced benefits for workers that carry beyond the job. Kathy Mitura, a Motorola worker who immigrated from Greece 13 years ago, said Motorola's arithmetic course has made her a better parent to her 12-year-old daughter and 10-year-old son.

"When I sit down with my kids to do homework, I know how to help them," she said.

Wall Street Journal

Feb 9, 1990

...sippi governor's literacy office.

Rapid growth in a thin labor market can make remediation a painful necessity, as Peavey Electronics Corp., based in Meridian, Miss., discovered. Peavey, a well-known maker of electric guitars and amplifiers, has been on a hiring binge, adding 264 jobs in the past year to a work force that now stands at 1,900. There were slim pickings in the eastern Mississippi area—"We're just tapping out the resources," says Vice President Melinda Peavey—and the company had to settle for many new workers lacking the educational tools to handle much more than the simplest work.

To upgrade them, Peavey volunteered to test a federal plan that adapts the U.S. Army's Job Skills Education Program to a corporate setting. Computers are used to teach employees up to 300 things, including basic subjects such as math, as well as specific skills such as reading graphs and interpreting blueprints and schematic drawings. Every job in the plant is being analyzed, and the curricula for worker-students are being based on what each employee needs to know to do a particular job well.

Peavey's ultimate goal is to prepare employees for more demanding, technical jobs. Currently, workers in Peavey's assembly plants put components together with the guidance of pictures. But component configurations can change almost daily, and Ms. Peavey

Continued on next page

wants employees who can punch up work changes on a computer and teach themselves to change the assemblies. "I want those picture guides off the floors," she says.

The company is pleased with progress to date. Since September, when 64 employees began taking 40 hours of classroom instruction on company time, supervisors say they have noticed an improvement in productivity.

American College of Trial Lawyers

REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE

Approved by the Board of Regents
March 3, 1989

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FOREWORD

The Board of Regents of the American College of Trial Lawyers, at its meeting in Boca Raton, Florida, February 27 to March 3, 1989, approved the following Report of the Committee on Special Problems in the Administration of Justice, dated March 3, 1989, and directed that copies be distributed to Fellows of the College and to other interested parties.

Philip W. Tone
President

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AMERICAN COLLEGE OF TRIAL LAWYERS
REPORT OF
COMMITTEE ON SPECIAL PROBLEMS
IN THE ADMINISTRATION OF JUSTICE

I. BACKGROUND

On August 8, 1986 the Board of Regents of the American College of Trial Lawyers approved the Report of the Task Force on Litigation Issues, dated July 22 of the same year. The Task Force Report addressed a number of issues regarding the tort litigation system in America and unanimously concluded that one of the greatest problems with the current tort system is the way punitive damages are handled.[1] Although a few members of the Task Force were prepared to abolish punitive damages, other members, who favored continuation of punitive damages awards, indicated that they might move toward abolition if meaningful reform were not forthcoming.[2]

Subsequent to the American College Task Force Report, the results of two other studies undertaken through the American Bar Associaton were published. In February of 1987 the American Bar Association House of Delegates approved a report by the Action Commission to Improve the Tort Liability System, chaired by Robert B. McKay, Professor and former Dean of the New York University School of Law. Among other things, the ABA Action Commission recognized that the current situation with regard to awards of punitive damages in the civil justice system presented some serious concerns[3] and made a number of general recommendations for reform.[4] In the meantime, the American Bar Association Section of Litigation had undertaken a study of the problems through a Special Committee on Punitive Damages. Recognizing the relative dearth of statistical data on the subject, the Special Committee commissioned an empirical study by the Institute for Civil Justice, a section of the Rand

1. American College of Trial Lawyers, *Report of the Task Force on Litigation Issues* 4 (1986) (hereinafter referred to as ACTL Task Force Report).
2. *Id.*
3. A.B.A., *Report of the American Bar Association Action Commission to Improve the Tort Liability System* 15-18 (1987).
4. *Id.* at 18-20. The Report supported the continued award of punitive damages in appropriate cases, but recommended that the scope be narrowed in five ways:
   i. The standard of proof for the award of punitive damages should be tightened to limit such awards to cases warranting special sanctions and should not be commonplace.
   ii. Various suggestions to the courts are advanced as a means of judicial limitation of inappropriate or excessive awards.
   iii. Appropriate safeguards should be put in force to prevent any defendant from being subjected to punitive damages that are excessive in the aggregate for the same wrongful act.
   iv. Legislatures and courts should be sensitive to adopting appropriate safeguards to protect the master or principal from vicarious liability for unauthorized acts of non-managerial servants or agents.
   v. In carefully selected cases, courts should be authorized to award some portion of a punitive damages award to public purposes, always being mindful that the plaintiff and counsel are reasonably compensated for bringing the action and prosecuting the punitive damages claim.

   McKay, *Rethinking The Tort Liability System: A Report From The ABA Action Commission*, 32 Villanova L. Rev. 1219, 1230-31 (1987).

Corporation in Santa Monica, California.[5] The Rand report, published in 1987,[6] served as a basis for the ABA Section of Litigation study. Although the latter also concluded that there were a number of problems with civil awards of punitive damages,[7] the Section of Litigation did not conclude that the problems, with one exception,[8] were sufficiently acute as to require legislative solutions. However, a careful analysis of the Rand study shows support for the opposite conclusion.[9]

Because of strong interest in the subject of punitive damages, the Board of Regents of the American College of Trial Lawyers gave approval for the Committee on Special Problems in the Administration of Justice to conduct an independent review of punitive awards in the civil justice system in the United States, including a review of the prior studies and other information on the subject.

To assist the Committee in this effort, the services of Professor Roger C. Henderson of the College of Law at the University of Arizona in Tucson were engaged. Professor Henderson is a former dean of the law school and presently is a Commissioner on Uniform State Laws. He prepared a background paper which was reviewed and discussed by the Committee on Special Problems on March 6, 1988 during the Spring Meeting of the American College in Palm Desert, California.[10] During the Spring Meeting the Committee assisted in presenting one of the main programs, which consisted of a panel on the question of whether punitive damages in the modern civil justice system constituted an anomaly which was in need of change. Subsequently, an issue paper[11] prepared by Professor Henderson was distributed to the Committee members and discussed at a special meeting on June 10, 1988. Thereafter a draft report dealing with punitive damages was the subject of a meeting of the Committee on August 6, 1988 at the Annual Meeting of the College during the American Bar Association meeting in Toronto, Canada. The Committee met again on November 11, 1988 and January 9, 1989 in New York City to discuss subsequent drafts of the report.

After deliberation and study, the Committee on Special Problems has come to certain conclusions with regard to punitive awards in the modern civil justice system and has fashioned recommendations for improvements. Initially, however, a brief review of why this study was warranted is appropriate in view of the prior efforts on the subject.

II. THE NEED FOR THE COLLEGE REVIEW

In the 1986 Report of the Task Force on Litigation Issues, serious concern was expressed regarding the role of punitive awards in the civil justice system. It was noted that awards often bear no relation to deterrence and merely reflect a jury's dissatisfaction with a defendant and a desire to punish, often without regard to the true harm threatened by a defendant's conduct.[12] The Report also noted that there was a general feeling that punitive awards should be more difficult to obtain and that the amounts of such awards should be subject to more control than was being exercised at that time.[13] The Report went on to recommend that there be some limit, either by a cap or some general formula, to the amount of punitive damages that may be recovered.[14] In addition, it was recommended that some means should be found to prevent a defendant from being subjected to duplicative punitive awards for a single act or course of conduct.[15] Finally, there were recommendations that serious consideration should be

5. Rand is a private, nonprofit institution, incorporated in 1948, which engages in nonpartisan research and analysis on problems of national security and public welfare. The Institute for Civil Justice, established within the Rand Corporation in 1979, performs independent, objective policy analysis and research on the American civil justice system. The Institute's principal purpose is to help make the civil justice system more efficient and more equitable by supplying policymakers with the results of empirically based, analytic research.
6. M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings*, Rand, The Institute for Civil Justice (1987).
7. *Punitive Damages: A Constructive Examination*, 1986 A.B.A. Sec. Litigation, Special Comm. on Punitive Damages 87-89 (hereinafter cited as A.B.A. Sec. Litigation Report).
8. The Litigation Section Special Committee found that a genuine problem exists regarding the potential for multiple punitive damages awards to be made against a defendant for essentially the same conduct. The Committee concluded that federal legislation would be required to solve the problem, *id.* at 72, and recommended that Congress enact a law creating a national class action which would allow the consolidation of all similar claims in one federal district court. *Id.* at 78-81.
9. The Rand study demonstrates that some major changes have occurred in punitive damage awards in specific areas of litigation in the 25 year period from 1960 through 1984 in the jurisdictions studied — San Francisco, California and Cook County, Illinois. The most dramatic increases occurred in the area of business and contract cases which have come to be subject to the tort of "bad faith." However, products liability and medical malpractice also showed increases in the number and rate of punitive awards. As a general proposition, the frequency of awards has increased relative to the number of cases filed and to the number of cases in which compensatory awards are made, as well as in absolute terms. When this is coupled with the rather dramatic increases in the median and average amounts awarded in all types of cases, one could easily conclude that punitive awards are playing a larger role in the civil justice system than in the past. However, if one merely focuses on the statistics in the aggregate for all types of torts one could conclude there has not been any significant change.

   It is submmitted that to view the figures in the aggregate is erroneous because certain types of tortious conduct inherently do not give rise to punitive awards. To include figures for this conduct, such as automobile negligence cases, with the more egregious forms of conduct tends to "water down" the results. The same is true if one includes figures regarding traditional intentional torts because there is little change over time in the frequency of punitive awards in these cases. Thus, the Committee on Special Problems believes that the Rand study shows that the problems regarding punitive awards in the civil justice system are more acute for specific areas of tort litigation than indicated in the A.B.A. Sec. Litigation Report.

   The Rand Corporation has recently published a follow-up report pointing out that some commentators are misinterpreting an earlier study regarding trends in tort litigation by using aggregate figures on the assumption there is a single tort system. The follow-up report shows that there are different types of tort litigation and that each must be viewed separately in order to accurately determine any changes and trends. The use of aggregate figures tends to mask the real situation. See D. Hensler, M. Valana, J. Kakalik, & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics*, Rand, The Institute for Civil Justice (1987). The same may be said for the subject of punitive damages and any analysis of the Rand study on that subject should take this point into account.
10. This paper, entitled "Punitive Damages in the Modern Civil Justice System: An Anomaly in Need of Change?", is on file at the National Headquarters, American College of Trial Lawyers, 10866 Wilshire Blvd., Los Angeles, California, 90024.
11. This paper also is on file at the National Headquarters. See *supra* n. 10.
12. ACTL Task Force Report *supra* n. 1, at 4.
13. *Id.*
14. *Id.*
15. *Id.*

given to raising the standard of proof, to developing better jury instructions and to greater judicial supervision concerning punitive damage awards.[16] In sum, the Task Force Report expressed certain expectations concerning improvements that should be made in the system. Moreover, as noted, some members indicated that they might be willing to support the abolition of punitive awards in the civil system if these improvements were not made.[17]

Following the Report of the Task Force and its approval by the College Board of Regents, the A.B.A. Action Commission to Improve the Tort Liability System and Section of Litigation reported similar concerns and made recommendations for changes in the system.[18] In addition to these reports, there has been a plethora of articles and comments in legal periodicals concerning the situation generally, the overwhelming majority of which call for some change in the process by which punitive damages are awarded.[19]

16. *Id.*
17. *Id.* As previously noted, a few members of the Task Force were in favor of abolition as the exclusive reform effort. See text at n. 2.
18. See *supra* text at nn. 3-4 and 7-8.
19. For articles arguing for:

    (1) *abolition,* see Carsey, The Case Against Punitive Damages: An Annotated Argumentative Outline, 11 Forum 57 (1975); Dubois, Punitive Damages: Bonanza or Disaster, 3 Litigation 35 (Fall 1976); Ghiardi, The Case Against Punitive Damages, 8 Forum 411 (1972); Ghiardi, Should Punitive Damages Be Abolished? — A Statement for the Affirmative, 1965 A.B.A. Sec. Ins., Negl. & Comp. L. Proc. 282; Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870 (1976); and Sales & Cole, Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vanderbilt L. Rev. 1117 (1984);

    (2) *modification,* see Barrett & Merriman, Legislative Remedies for Punitive Damages; 28 Federation of Ins. Counsel Q. 339 (1978); Bell & Pearce, Punitive Damages and the Tort System, 22 U. Richmond L. Rev. 1 (1987); Cooter, Economic Analysis of Punitive Damages, 56 S. Cal. L. Rev. 79 (1982); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Calif. L. Rev. 1 (1982); Johnston, Punitive Liability: A New Paradigm of Efficiency in Tort Law, 87 Columbia L. Rev. 1385 (1987); Launie, The Incidence and Burden of Punitive Damages, 53 Ins. Counsel J. 46 (Jan. 1986); Levit, Punitive Damages: Yesterday, Today and Tomorrow, 1980 Ins. L.J. 257; Mallor & Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings L.J. 639 (1980); Martin, The Relation of Exemplary Damages to Compensatory Damages, 22 Texas L. Rev. 235 (1944); McCormick, Some Phases of the Doctrine of Exemplary Damages, 8 North Carolina L. Rev. 129 (1930); Morris, Punitive Damages in Tort Cases, 44 Harvard L. Rev. 1173 (1931); Owen, Civil Punishment and the Public Good, 56 S. Cal. L. Rev. 103 (1982); Phillips, The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment, 1984 U. Illinois L.F. 153 (1984); Priest, Punitive Damages and Enterprise Liability, 56 S. Cal. L. Rev. 123 (1982); Riley, Punitive Damages: The Doctrine of Just Enrichment, 27 Drake L. Rev. 195 (1977-78); Wheeler, The Constitutional Case for Reforming Punitive Damages Procedure, 69 Va. L. Rev. 269 (1983); and Woodbury, Limiting Discovery of a Defendant's Wealth When Punitive Damages Are Alleged, 23 Duquesne L. Rev. 349 (1985) and 34 Defense L.J. 675 (1985);

    (3) the *status quo,* see Bedell, Punitive Damages in Arbitration, 21 J. Marshall L. Rev. 21 (1987); Belli, Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society, 49 UMKC L. Rev. 1 (1980); Corboy, Are Punitive Damages Getting Out of Control? The Existing Controls Are Effective, 70 A.B.A. J. 16 (Dec. 1984); Courtney & Cavico, Punitive Damages: When Are They Justifiable?, 18 Trial 52 (Aug. 1982); Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797 (1987); and Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 S. Cal. L. Rev. 133 (1982).

As a result of the widespread concern regarding the problems associated with punitive damages, there has been a spate of state court[20] and legislative[21] activity across the nation on this subject. Unfortunately, no clear pattern has emerged in the main, although there has been a trend in some areas which may eventually result in more uniformity among the states. For example, of those states that have addressed problems regarding punitive damages, most now require that the plaintiff meet the burden of proving by clear and convincing evidence that punitive damages should be awarded.[22]

20. See, e.g., Rawlings v. Apodaca, 151 Ariz. 149, 726 P.2d 565 (1986) (addressing standard for culpability); Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 723 P.2d 675 (1986) (addressing burden of proof); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Ca. Rptr. 348 (1981) (addressing, *inter alia,* various constitutional issues); Tuttle v. Raymond, 494 A.2d 1353 (Maine 1985) (addressing burden of proof); and Anderson v. Continental Insurance Co., 85 Wis. 2d 675, 271 N.W.2d 368 (1978) (addressing standard for culpability).
21. For example, with regard to attempts to limit the amount of punitive awards Alabama has adopted a cap of $250,000 except where there is a practice or pattern of intentional wrongful conduct, actual malice, or defamation. Ala. Code § 6-11-21 (Supp. 1988). Colorado limits the punitive award to an amount equal to actual damages except the court has the power to make an addition up to three times the actual damages in enumerated cases of aggravated conduct. Colo. Rev. Stat. § 13-21-102 (1987). Florida creates a presumption which limits the amount of punitive awards to three times that of the actual damages unless the claimant demonstrates by clear and convincing evidence that any award which is greater than this amount is not excessive. Fla. Stat. § 768.73 (Supp. 1988). Georgia limits such awards to $250,000 except in product liability cases or where the defendant specifically intended to cause harm. Ga. Code Ann. § 105-2002.1 (Supp. 1988). Kansas limits the amount of punitive damages in medical malpractice cases to the lesser of 25% of the defendant's highest gross annual income during the five year period prior to the wrongful act or $3 million. Kan. Stat. Ann. § 60-3402 (Supp. 1987). (This particular provision of the Kansas medical malpractice legislation has not been challenged as of yet on constitutional grounds, but other provisions have been held unconstitutional by the Supreme Court of Kansas. See Kansas Malpractice Victims Coalition v. Bell, _____ Kan. _____, 757 P.2d 251 (1988) and Farley v. Engelken, 241 Kan. 663, 740 P.2d 1058 (1987). There is a serious question as to the constitutionality of this particular provision under Kansas law because it limits the right to a jury trial on punitive damages. See Folks v. Kansas Power and Light Co., _____ Kan. _____, 755 P.2d 1319 (1988).) Oklahoma limits punitive awards to an amount equal to the actual damages except where evidence of the wrongful conduct is clear and convincing. Okla. Stat. Tit. 23, § 9 (1987). Texas limits awards of punitive damages to four times the amount of actual damages or $200,000, whichever is greater, for cases involving "fraud" or "gross negligence," but the limit does not apply to cases involving "malice" or to intentional torts, the terms in quotes being defined in the statute. Tex. Civ. Proc. & Rem. Code Ann. §§ 41.001-.008 (Vernon Supp. 1988).
22. For cases adopting this standard see, e.g., Linthicum v. Nationwide Life Ins. Co., *supra* n. 20; Travelers Indemnity Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982); Tuttle v. Raymond, 494 A.2d 1353 (Maine 1985); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980). For statutory adoptions see, e.g., Ala. Code § 6-11-20 (Supp. 1988); Cal. Civil Code § 3294 (Supp. 1988); Minn. Stat. Ann. § 549.20(1) (1988); Mont. Code Ann. § 27-1-221(5) (1987); and Or. Rev. Stat. § 30.925 (1983). See also Colo. Rev. Stat. § 13-25-127(2) (1987) (adopting proof beyond a reasonable doubt). Compare Fla. Stat. § 768.73 (Supp. 1988) (apparently adopting the clear and convincing test only for amounts which exceed the presumptive cap of three times the amount of compensatory damages, but continuing the use of the mere preponderance test for the treble award) and Okla. Stat. Tit. 23, § 9 (1987) (following the same pattern as Florida).

Also, it appears that the law is evolving in many jurisdictions to require that there be some conscious indifference to the rights of others before punitive damages are warranted.[23] However, it is not easy to divine this latter rule from the myriad of adjectives employed in attempting to define the standard of culpability in any particular jurisdiction.[24]

Attempts at reforming other punitive damage problem areas have been anything but satisfactory. For example, there still are serious questions concerning: (1) the standard to be applied by the trier of fact in determining the quantum, and the standard to be applied in appellate review of any punitive award; (2) the vicarious exposure facing employers and others; (3) the "windfall" nature of punitive awards and the question of who should receive the award; (4) the potential abuses in the trial process regarding pleading and discovery; and (5) the possible prejudice to defendants on the compensatory liability issue through introduction of otherwise irrelevant evidence of wealth or financial condition at the stage where that liability issue is being resolved. Moreover, there has yet to be a satisfactory solution to the situation that all agree is a very serious problem — duplicative awards for the same act or course of conduct. In fact, as a result of the recent legislative activity, the legal landscape has now been strewn with a number of pieces of disparate legislation in the various states so that in a very real sense the situation could be described as being as confused and uncertain as before the reform efforts began.[25] Considerable improvements still could be made to bring about more evenhanded treatment of litigants both within a jurisdiction and between jurisdictions. In short, the situation is very much in need of attention and clearly falls within the charge of the Committee on Special Problems, which has the responsibility of promoting improvements in the administration of

23. See, e.g., Rawlings v. Apodaca, *supra* n. 20; Freeman v. Anderson, 279 Ark. 282, 651 S.W.2d 450 (1983); Jardel Co. v. Hughes, 523 A.2d 518 (Del. 1987); Tuttle v. Raymond, *supra* n. 22; Preston v. Murty, 32 Ohio St. 3d 334, 512 N.E.2d 1174 (1987); Enright v. Lubow, 202 N.J. Super. 58, 493 A.2d 1288 (App. Div. 1985); Ala. Code § 6-11-20 (Supp. 1988); Cal. Civil Code § 3294 (Supp. 1988); Colo. Rev. Stat. § 13-21-102(1) (1987); Ga. Code Ann. § 1005-2002.1(b) (Supp. 1988); Iowa Code Ann. § 668A.1 (1986); Minn. Stat. Ann. § 549.20(1) (1988); Okla. Stat. Ann. Tit. 23, § 9 (1987); Tex. Civ. Proc. & Rem. Code Ann. §§ 41.001-.003 (Supp. 1988).
24. See the discussion in Linthicum v. Nationwide Life Ins. Co., *supra* n. 20. See also 1 J. Ghiardi & J. Kircher, Punitive Damages: Law and Practice § 5.01 (1985).
25. In addition to the different statutory approaches indicated in n. 21, *supra*, regarding attempts to limit the amount of punitive awards, a number of states have taken different approaches to the so-called "windfall" problem. For recent legislation in this area, see, e.g., Colo. Rev. Stat. § 13-21-102(4) (1987) (allocating one-third of a punitive award to the state general fund, two-thirds to the plaintiff); Fla. Stat. § 768.73 (Supp. 1988) (40% to the plaintiff and 60% to the state general fund unless the cause of action was based on personal injury or wrongful death, in which event the state's share is to be paid to Public Medical Assistance Trust Fund); Ga. Code. Ann. § 105-2002.1 (Supp. 1988) (three-fourths to the state, one-fourth to the plaintiff); Iowa Code Ann. § 668A.1 (1987) (100% to the plaintiff if the act was directed at the plaintiff; if not, three-fourths of the award goes to a state fund used for indigent civil litigation programs or insurance assistance programs); and Mo. Ann. Stat. § 537.675 (Vernon 1988) (50% of punitive award, after deduction of attorneys' fees and expenses, payable to state of Missouri). Kansas passed medical malpractice legislation which requires that punitive awards in such cases be allocated one-half to the plaintiff and one-half to the state health care maintenance fund (see Kan. Stat. Ann. § 60-3402 (1986)), but the constitutionality of this legislation is questionable. See *supra* n. 21.

justice and maintaining proper liaison with others to that end.

Finally, two other matters should be mentioned. First, there has been a movement in the criminal justice system to attempt to standardize penalties. The most notable effort in this regard has taken place at the federal level.[26] The sense that there should be evenhanded treatment of those who are subject to criminal penalties also provides part of the motivation for reform in the civil system. Secondly, a number of constitutional issues that have lain dormant for years have recently been brought to the attention of the courts. The Supreme Court of the United States has granted review to consider constitutional limits on punitive damages awards on three occasions since 1986. In particular, there appears to be concern on the part of some members of the Court as to whether the Eighth Amendment to the United States Constitution guaranteeing that excessive fines shall not be imposed applies to civil punitive awards.

In 1986 in *Aetna Life Ins. Co. v. Lavoie,*[27] the Supreme Court noted that a challenge to punitive damages as excessive under the Eighth and Fourteenth Amendments "raise[d] important issues which, in an appropriate setting, must be resolved."[28] Two years later in the case of *Bankers Life and Casualty Co. v. Crenshaw,*[29] the Court granted *certiorari* and heard oral argument as to whether the Eighth Amendment applies to civil punitive awards and whether the punitive damage award in the case violated the Due Process and the Contract Clauses of the Constitution. Although the Supreme Court declined to decide these issues in *Aetna* and *Bankers Life,* as this report was being finalized the Court again granted *certiorari,* in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,*[30] on the question of whether an award of $6 million in punitive damages, amounting to more than 100 times the plaintiff's actual damages, is excessive under the Eighth Amendment or otherwise. These cases illustrate that there are several potential problems at the constitutional level with the current rules in the various states. It is possible that these constitutional problems could be obviated through responsible reform efforts. It is the judgment of the Committee on Special Problems that this adds impetus to the need for prompt action. Thus, it is hoped that this Report, which has been approved by the Board of Regents of the American College of Trial Lawyers, will serve to expedite responsible reform efforts so as to achieve improvements in the justice system in this country.

26. The Comprehensive Crime Control Act of 1984 created a United States Sentencing Commission to recommend new sentencing guidelines to go into effect in federal courts in 1986. One of the main purposes of the legislation is to establish sentencing policies and practices for the Federal criminal justice system that provide certainty and fairness and which avoid unwarranted sentencing disparities among defendants who are similarly situated. See 28 U.S.C. § 991(b)(1) (Supp. 1987). The Supreme Court of the United States upheld the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission against an attack that Congress had delegated excessive legislative power to the Commission and that the legislation violated the separation-of-powers principle. Mistretta v. United States, 109 S. Ct. 647 (1989).
27. 106 S. Ct. 1580.
28. *Id.* at 1589.
29. 108 S. Ct. 1645 (1988).
30. 845 F.2d 404 (2d Cir. 1988), *cert. granted,* 109 S. Ct. 527 (1988).

III. CONCLUSIONS AND RECOMMENDATIONS

A. Civil Awards of Punitive Damages Should Be Retained, But Only in Carefully Limited Situations.

It has been forcefully argued that punitive awards in the modern civil justice system are an anomaly and should be abolished except where specifically authorized by statute.[31] Originally, such common law awards in large measure served as surrogates for pain and suffering and other noneconomic losses which at the time were yet to be recognized on a *de jure* basis by courts of law.[32] It is contended that now that noneconomic losses, such as pain and suffering, are fully recoverable in tort actions in their own right as compensatory damages, there is no basis for permitting punitive awards for any compensatory purpose.[33] Nor should punitive awards serve to reimburse plaintiffs for attorney fees and other litigation expenses in the absence of a specific statute or rule of court providing for such.[34] This is based on the simple proposition that the common law rule in the United States is that each party bears the cost of his or her own attorney fees and litigation expenses. The civil system does not provide the requisite constitutional and procedural safeguards for penal awards and was never designed to be a system for punishment beyond the admonition which is inherent in compensatory awards.[35] Finally, the argument goes, punishment should be limited to the criminal justice system and otherwise to specific situations expressly set out in legislative enactments, and even there the legislation should provide appropriate safeguards so as to not violate fundamental rights.

A majority of the Committee, while recognizing the force of these arguments, notes that punitive awards have long been a part of the civil justice system and that they have been recognized in addition to potential criminal sanctions. Although the early common law did recognize punitive awards in the civil system as a surrogate for noneconomic losses, they were not recognized for that purpose exclusively. Punitive awards also were recognized as serving the admonitory goal of the civil system in

31. See, e.g., Ghiardi, *supra* n. 19 at 423-24 and Sales & Cole, *supra* n. 19 at 1117.
32. Fay v. Parker, 53 N.H. 342 (1873); Stuart v. Western Union Telegraph Co., 66 Tex. 580, 18 S.W. 351 (1885). See also K. Redden, Punitive Damages 28-29 (1980) and 1 T. Sedgwick, A Treatise on the Measure of Damages 688-89 (9th ed. 1912).
33. Ghiardi, *supra* n. 19 at 423-24 and Sales & Cole, *supra* n. 19 at 1164-65.
34. Ghiardi, *supra* n. 19 at 417.
35. See C. McCormick, Handbook on the Law of Damages 276 (1935). See also 1 J. Ghiardi & J. Kircher, *supra* n. 24, ch. 3 (1985) and K. Redden, *supra* n. 32, ch. 7.

deterring and punishing wrongdoers.[36] It also is true that punitive awards in the civil justice system serve to reach certain types of conduct that either are not punishable at all under the criminal system or as a practical matter will not be the subject of a criminal proceeding. As a result, the common law ultimately has come to recognize two types of awards — one mainly to compensate for economic and noneconomic losses and one mainly to punish. Although each is designed to deter, the Committee is convinced that the more severe sanction is still needed. Notwithstanding the general conclusion of the Committee that punitive awards are still justifiable in the civil system today, it also concluded that such awards should be available only in carefully limited

36. In Huckle v. Money [K.B. 1763] 2 Wils. 205, 95 Eng. Rep. 768, one of the earliest English cases on record upholding an award of exemplary damages, it is clear that the monetary award was meant to punish and deter. Huckle was illegally taken into custody and he subsequently brought an action for trespass, assault and imprisonment. Although he was not mistreated physically and the confinement was brief, the jury assessed his damages at 300 pounds which was almost three hundred times any pecuniary loss that he could have suffered. The court upheld the award and in doing so the Lord Chief Justice stated:

> [T]he personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20*l*. damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public atttack made upon the liberty of the subject.

Id. at 206-07, 95 Eng. Rep. at 768-69

Exemplary or punitive damages are still recognized in England today, albeit on a more circumscribed basis than that in the United States. See Rookes v. Barnard [1964] 1 All Eng. Rep. 367 where the House of Lords limited punitive damages to two common law situations: (1) "oppressive, arbitrary or unconstitutional action by servants of the government" and (2) where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff." *Id.* at 410. Exemplary damages expressly authorized by statute also are permitted. *Id.* at 411.

Canadian courts have not followed the restrictions enunciated by the English House of Lords in Rookes v. Barnard, but have followed a course that generally resembles that of the courts in the United States. See K. Cooper-Stephenson & I. Saunders, Personal Injury Damages in Canada, ch. 13 (1981).

It also is to be noted that both England and Canada distinguish "aggravated damages" from punitive damages, and for that matter, from awards solely to compensate for losses and other harm. Aggravated damages are given to compensate when the harm done to the plaintiff by a wrongful act was aggravated by the manner in which the act was done; punitive damages being reserved to punish and thereby provide moral retribution or deterrence. *Id.* at p. 688.

situations.[37] Those situations and the limitations are discussed below.

B. Punitive Awards Should Not Be a Surrogate for Compensatory Damages.

The civil justice system should not recognize punitive awards for the purpose of compensating successful plaintiffs. The common law over time has recognized new rights and measures for compensation and is fully capable of doing so in the future. Economic and noneconomic losses are compensable today, and a clear distinction ought to be maintained between awards of that nature and those which are imposed solely to punish and deter. The maintenance of this distinction is important in administering the rules because there should be differences in the process for obtaining the two types of awards. For example, it has already been noted that a clear-and-convincing standard for the plaintiff's burden of proof has been adopted by a number of jurisdictions regarding punitive damages.[38] A mere preponderance is the standard for obtaining compensatory damages. As will be seen below, other distinctions arise from the recommendations of the Committee, and they should not be eroded by permitting one type of damage to serve as a surrogate for the other type. Civil punitive awards should be limited to those egregious situations which clearly call for punishment and deterrence beyond that which is inherent in compensatory awards.

C. The Standard for Culpability Should Require a Conscious and Egregious Invasion of the Rights of Others.

The appropriate minimum standard for culpability for punitive awards, recognized in some recent, more analytical decisions,[39] requires a conscious indifference to the rights of others. This test encompasses the traditional intentional torts, such as assault, battery, and false imprisonment, all of which require that the actor know or understand that there is a great degree of certainty that the invasion will take place,[40] as well as torts based on lesser degrees of cognition, such as where the defendant acts in a wilful or wanton manner, or with a certain type of recklessness.[41] This test, however, would not permit punitive awards where the element of consciousness is sufficiently lacking, such as in the case of negligent, or even grossly negligent, conduct.

The Restatement of Torts, Second, distinguishes various types of conduct on the basis of cognition, i.e., the degree to which the actor appreciates or understands that harm will or may result from his or her conduct.[42] The greater the knowledge of harm, the greater the culpability. It is the Committee's position that civil punitive awards can only be justified on the basis of the more serious or egregious conduct. Although there is strong support for this position under recent case law,[43] there still is precedent

37. Bell & Pearce, *supra* n. 19 at 17.
38. See *supra* n. 22.
39. See, e.g., Rawlings v. Apodaca *supra* n. 20.
40. "The word 'intent' is used throughout the Restatement of this subject [intentional torts] to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Restatement (Second) of Torts § 8A (1965).
41. W. Prosser & W.P. Keeton, Law of Torts 10 and 212 (1984).
42. See Comment to § 8A, Restatement (Second) of Torts (1965).
43. See, e.g., Rawlings v. Apodaca and Anderson v. Continental Insurance Co., *supra* n. 20.

which leaves much to be desired in the way of clarity.[44]

A close examination reveals that much of the confusion arises in the area where mere inadvertent conduct interfaces with the more cognitive forms of conduct. The two types of conduct are most often described as "gross negligence" and "recklessness."[45] It is the overwhelming majority rule that punitive damages are not available for mere negligence, just as it is the rule that they are available for intentional, wilful, wanton or reckless conduct.[46] As for "gross negligence," — a perplexing term at best[47] — some jurisdictions may permit punitive damages for this category of conduct.[48] It is questionable though whether mere extreme carelessness as distinguished from the type of conscious indifference that is explicit in the term intentional and

44. For example, compare City of Gladewater v. Pike, 727 S.W.2d 514 (Tex. 1987) (holding "grossly negligent" conduct sufficient, but such conduct must evidence an outrageous state of mind — one of malicious or "evil" intent) with Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981) (approving a jury instruction defining "heedless and reckless disregard," which the court stated was synonymous with "gross negligence," to mean "an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the person affected by it").
45. The term "reckless" is usually expressed as part of the phrase "wilful, wanton and reckless," and all three terms are considered to mean the same thing. W. Prosser & W.P. Keeton, *supra* n. 41 at 212.
46. See 1 J. Ghiardi & J. Kircher, *supra* n. 24.
47. "As it [gross negligence] originally appeared, this was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous, and struggling to assign some more or less definite point of reference to it, have construed gross negligence as requiring wilful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof — sometimes on the ground that this must necessarily have been the intent of the legislature. But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind. There is, in short, no generally accepted meaning; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences." W. Prosser & W.P. Keeton, *supra* n. 41 at 211-212.
48. *Id.* at 10.

implicit in the terms wilful, wanton and reckless should suffice.[49]

The Committee believes that punishment over and above that involved in a compensatory award is not warranted for conduct that does not involve a conscious invasion. It is the very element of consciousness or awareness that renders the conduct so morally reprehensible as to call for different treatment. Conduct, extreme as it may be, that lacks cognition of harm more closely resembles inadvertent or negligent conduct than it does the type of conduct which calls for a greater sanction than that inherent in a compensatory damage award. Moreover, permitting punitive awards based merely on different degrees of carelessness or inadvertent conduct exacerbates the already difficult problem of articulating a clear standard to be employed by the trier of fact and for review on appeal. Thus, the logical and practical line of demarcation should be drawn at the point where the defendant realizes that his or her conduct will, or that there is a very strong probability that it may, cause the resulting harm. Conduct, such as extreme carelessness, which does not involve this basic element of consciousness should not be the subject of punitive damages. The admonitory function of compensatory damages should suffice to deter these less egregious forms of conduct just as it is supposed to deter negligent conduct.[50]

Bare satisfaction of the conscious indifference standard, however, does not mean that punitive damages automatically follow. Whether the conduct in question is so aggravated as to justify such an award still should be a matter to be determined by the

49. The comments in the Restatement of Torts, Second, draw a distinction between these forms of conduct based on the knowledge of the actor:

> While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless.... Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

§ 500, Comments f and g (1965).

50. See Morris, *supra* n. 19 at 1177.

The position of the Committee is not entirely consistent with the definition of "recklessness" as found in Restatement (Second) of Torts § 500 (1965). The postion of the Committee requires that the actor realize, i.e., know or understand, that there is a strong probability that harm may result. It does not encompass the situation, as does the Restatement, where the actor, from facts which he or she knows, should realize that there is a strong probability that harm may result. See *supra* n. 49. The latter standard sounds more in negligence and would permit, in the opinion of the Committee, cases to go to the jury without proof of the type of state of mind which may warrant a punitive award.

trier of fact.[51] In addition to requiring knowledge, the instruction to the jury should state that punitive awards are to be made only in those cases in which it is established that the tortfeasor acted in a particularly egregious manner.[52] This element of aggravated conduct is often referred to as the requirement of a bad motive or evil mind,[53] and in some instances is best described by the term "outrageous." Case law is replete with attempts by courts to delineate these more antisocial acts. Such words as "malicious," "evil," "vindictive," "oppressive," "fraudulent," "outrageous" and the like have been employed[54] and should still be employed in jury instructions to require such findings before punitive damages are assessed.[55] Thus, it is recommended that judicial decisions and any legislation on the subject make it clear that punitive awards in the civil justice system may be justified only in cases involving the most egregious forms of conduct. If there is evidence of bad motive, recidivism, or other aggravating conduct, the trier of fact should take this into account in deciding whether to assess punitive damages at all and, if so, the amount.[56]

The Committee also observes that the articulation of a clear minimum standard for culpability should enable a trial judge to withdraw the issue of punitive damages from the jury in those cases in which there is a failure to introduce clear and convincing evidence upon which a jury could find that the defendant's conduct was of the character required for the imposition of punitive damages. In any event, no punitive award should be permitted for conduct that fails to meet the minimum standard.

D. The Quantum of Punitive Damages Should Be Limited by a Flexible Formula Based on the Amount of Compensatory Damages.

The Committee is concerned that the current state of the law provides little guidance to the trier of fact regarding the standard for assessing the amount of punitive damages. The case law, again, is replete with references to the egregious nature of the conduct, the wealth or power of the defendant, the relation of the punitive award to the compensatory award, and the like.[57] This all leaves one with a sense of frustration in trying to ascertain whether the punitive award is excessive, particularly on review by the appellate courts.[58] In fact, there is evidence that the current attempts to articulate a standard lead to excessive awards because these definitions fail to provide sufficient

51. See Restatement (Second) of Torts § 908, Comment d (1979); D. Dobbs, Handbook on the Law of Remedies 204 (1973).
52. Restatement (Second) of Torts § 908, Comment d (1979).
53. See Rawlings v. Apodaca, *supra* n. 20 at 162, 726 P.2d at 578.
54. D. Dobbs, *supra* n. 51 at 205.
55. See Restatement (Second) of Torts § 908, Comment b (1979).
56. *Id.*
57. *See K. Redden, supra* n. 32, at § 3.5. See also Restatement (Second) of Torts § 908, Comment e (1979).
58. The appellate courts have resorted to such tests as whether the award is so excessive that it must necessarily be a product of passion, prejudice, or corruption of the jury and whether the punitive award bears a reasonable relationship to the compensatory award. K. Redden, *supra* n. 32 at § 3.6. Whatever the test, it is clear that the tests are more often a rationalization of results than a means of obtaining them. Morris, *supra* n. 19 at 1180.

guidance to juries.[59] The opportunity for bias and prejudice to operate is too great. It would be unthinkable to use such vague standards to assess punishment in the criminal system, much less to let a jury do it. Consequently, the Committee has concluded that some more definite structure needs to be employed regarding the standard for assessing the amount of damages.

First, the Committee recommends that greater attention be paid to the question of whether the evidence offered is so highly prejudicial as to outweigh its probative value under Federal Rule of Evidence 403 or the equivalent state rule. This concern, which frequently arises in criminal cases, seems to be overlooked in the civil process. Since the civil punitive award serves the same purpose as the criminal sanction, the same considerations should apply. Courts should not permit the "waving of bloody shirts" in civil trials any more than in criminal.

Second, courts should pay particular attention to the jury instructions in defining the burden of proof and standard for culpability. In this vein, the courts should attempt to formulate more precise instructions regarding the methods by which juries assess punitive awards, taking care to inform the jury that it is within their discretion as to whether any punitive award is to be assessed, that the award should not be excessive and that they have to be clearly convinced that the amount is appropriate under the circumstances. A model jury instruction covering these points as well as others is contained in an appendix to this report.

The above recommendations are designed to meet the point of the American College Task Force Report that greater judicial supervision of punitive awards is needed. Although the Committee has concluded that the above suggestions will serve in that way and recommends that they be adopted, it does not feel that these changes will completely solve the problem of excessive awards, because the standards for assessing the quantum are inherently deficient insofar as providing any meaningful guidance to juries and for appellate review. Various techniques were considered in an attempt to regulate jury awards in a fair and reasonable manner. Some members of the Committee favored using a "cap" or maximum limit, while others were opposed to any such method. Even among those favoring a cap, different approaches were advocated. The merits of an absolute dollar cap were advanced, as were those of a

59. The Rand study on punitive damages, mentioned earlier, also attempted to determine what post-trial adjustments might have occurred to punitive awards and developed sufficient data to provide statistically useful information involving 33 percent of the cases in the study. It was learned that punitive awards were frequently reduced by post-trial actions, such as settlements, remittiturs, and appellate decisions. The data showed that jury verdicts were reduced in approximately one-half of the trials reported on and that the larger the award the greater the chance of significant reduction. M. Peterson, S. Sarma & M. Shanley, *supra* n. 6 at 26-30.

Both the Rand study, *id.* at *xi.*, and the A.B.A. Litigation Section Report, *supra* n. 7 at 21-22, took a somewhat optimistic view that — even though punitive awards have increased in both absolute and relative terms over the past 25 years —because of post-trial actions, the situation probably is not as dire as some might believe. However, one is equally entitled to take a more negative view — based on the same evidence — that juries exceeded or abused their discretion in many cases and that these predominated in the large awards. One could also observe that the Rand and A.B.A. positions may underestimate the overall impact of the large awards on the civil justice system, just as the latter position may overstate it. The prospect of having a jury go overboard, however, cannot be salutary even if there is the possibility of a later reduction.

formula based on compensatory damages. In the end, however, a substantial majority were in favor of the following approach.

The Committee recommends that the various legislative bodies enact a statute which limits the recovery of any punitive award by a plaintiff in a tort case to twice the amount of the compensatory award or $250,000, whichever is greater. This approach provides for flexibility. The plaintiff that suffers amounts of compensatory harm below $125,000 as the result of outrageous conduct by the defendant would be permitted to recover a substantial punitive award, but the limit of $250,000 would prevent an excessive award. On the other hand, where the compensatory harm exceeds $125,000 the ceiling on any punitive award would rise commensurately with the compensatory harm. There would be no limit in the serious injury cases except for the trebling effect provided by the formula. The Committee believes that this approach is fair to all concerned in that the award would punish and deter and yet not unjustly subject defendants to ruinous liability.

Finally, as a corollary to the proposal regarding the monetary limitation on punitive awards, the Committee recommends that the jury not be informed of the limitations. One reason for this recommendation is obvious — the jury should not be permitted to circumvent the rules by arbitrarily increasing the amount of compensatory damages. A less obvious, but a real concern nevertheless, is that the maximum amount of $250,000 in small compensatory injury cases should not become the rule. The jury should assess the punitive award on the basis of the evidence and the law as contained in the instructions from the court. The monetary limitations, which provide a range similar to that in the criminal system, should be applied by the court where necessary after the verdict has been rendered.

E. The Burden of Proof for Punitive Awards Should Be That of Clear and Convincing Evidence.

The Committee on Special Problems notes that since the Task Force Report, which recommended that the burden of proof for punitive damages should be raised, those jurisdictions which have considered the issue have reaffirmed or moved to a clear-and-convincing standard.[60] One jurisdiction has even adopted the criminal burden, by requiring proof beyond a reasonable doubt.[61]

Although some members of the Committee favored the retention of the mere-preponderance standard and others felt that the criminal standard of beyond a reasonable doubt should be employed, a majority of the Committee recommends that all jurisdictions follow the modern trend and adopt the clear-and-convincing standard. The clear-and-convincing standard, when coupled with the recommendations regarding the standards for determining liability and the rules regarding the quantum of damages, is more in harmony with a system for punishment than the mere-preponderance standard applicable in civil proceedings regarding compensatory damages and similar remedies which merely attempt to restore the *status quo*. While the beyond-a-reasonable-doubt standard is appropriate where life and liberty is literally at stake, the Committee does not feel that the criminal standard is appropriate

60. See *supra* n. 22.
61. Colo. Rev. Stat. § 13-25-127(2) (1987).

where a civil penalty is sought. The intermediate standard, requiring clear and convincing evidence, is the most appropriate, in the opinion of the Committee.

F. Vicarious Responsibility for Punitive Damages Should Only Obtain Where There Is Complicity by the Principal in the Conduct Which Gives Rise to the Punitive Award.

The Committee on Special Problems does not believe that there is any justification for holding a party responsible for an act which gives rise to punitive damages if that person or entity, through its officers or managerial employees or agents, did not commit or otherwise significantly participate in, or in some manner actually control or ratify, the act. The purpose of punitive damages is to punish and deter certain wrongful conduct. If the individual or entity did not engage in that conduct, there is no rational purpose in punishing or attempting to deter the person or entity. This is the position of the American Law Institute as found in the Restatements of Agency and Torts.[62] A number of courts follow the Restatement rule, but there are cases that adopt the so-called "liberal" rule, which imposes punitive damages in some situations merely on the basis of *respondeat superior*.[63] Under this rule, the principal is liable because of the mere relationship instead of any wrongdoing. Although this may be appropriate for compensatory damages, the Committee fails to see the justification for such a rule where punitive damages are claimed and recommends that the position adopted by the American Law Institute be followed.

G. Pleadings Regarding Punitive Damage Claims Should Not Be Permitted To Contain a Monetary Amount.

At one time, claims for punitive damages were the exception and quite rare, but it has become more common recently for some attorneys to include such counts as a routine matter. This practice often is employed for its *in terrorem* effect. Some observers feel that the mere presence of such a count increases the settlement value of the underlying lawsuit.

A number of jurisdictions have adopted statutes which prohibit plaintiffs from pleading a claim of punitive damages until a *prima facie* showing is made regarding the defendant's potential liability for such an award. For example, Illinois permits a prayer for relief seeking punitive damages only after the plaintiff, upon motion and hearing, establishes a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.[64] Florida, Idaho and Minnesota have adopted similar statutes.[65] California, however, has adopted a statute that merely prohibits a plaintiff from including a monetary figure in the pleadings.[66] These procedures are in contrast to those of most states, which continue to permit plaintiffs to include claims for punitive damages and to include monetary figures for such in the original complaint. In those states, the defendant may move to dismiss the claim or may endeavor to limit discovery of wealth or financial condition until later in the proceedings. The various approaches described make clear that the issue essentially is one of placing the initial burden. Should the plaintiff have to make some type of showing that the facts could support an award of punitive damages before being permitted to plead a claim for punitive damages?

The Committee concluded that there was no good reason to put the burden on the plaintiff to make a *prima facie* showing before being permitted to plead a claim for punitive damages, but that the California modification should be followed. The Committee noted the growing tendency for pleadings to include very large monetary amounts, the fact that these figures are arbitrary in many instances, and the unwarranted adverse publicity involved, and found that little purpose was being served by the present system. Thus, the Committee recommends that no monetary figure for punitive damages should be permitted in the petition or complaint. This modification to present practice in no way inhibits a plaintiff from pursuing a claim and obtaining an award for punitive damages, yet it would protect a defendant from needless and unwarranted adverse pretrial publicity.

H. Discovery of Evidence Regarding a Defendant's Wealth or Financial Condition for the Purpose of Proving the Amount of a Punitive Award Should Not Be Permitted Without a *Prima Facie* Showing That There Is a Legal Basis for Such an Award.

The fact that a plaintiff necessarily must engage in efforts to ascertain the facts involved in a case does not mean that all efforts at discovery should be permitted at the outset of a case that might involve a punitive damages issue. Initial efforts at discovering facts regarding liability are clearly necessary and would have to be permitted even in a jurisdiction that prohibits a plaintiff from initially pleading a claim for punitive damages. However, to subject a defendant to unlimited discovery regarding wealth or financial condition at the outset poses great potential for unwarranted invasions of privacy and other abuses.

The Committee on Special Problems recommends that the discovery of evidence regarding a defendant's wealth or financial condition for the purpose of proving the amount of a punitive award should not be permitted without a *prima facie* showing by the plaintiff that there is a reasonable likelihood of proving facts at the trial sufficient to support a determination of liability for such damages. Where it appears from the complaint or upon motion that evidence of wealth or financial condition is relevant to the issue of liability for punitive damages, the burden of persuading the court to limit dis-

62. Restatement (Second) of Agency § 217C (1958); Restatement (Second) of Torts § 909 (1979). These two provisions are identical:

> **Punitive Damages Against a Principal**
> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
> (d) the principal or a managerial agent of the principal ratified or approved the act.

63. 2 J. Ghiardi & J. Kircher, *supra* n. 24, § 24.07; W. Prosser & W.P. Keeton, *supra* n. 41 at 13.

64. Ill. Rev. Stat. ch. 110, para. 2-604.1 (Supp. 1988).
65. Fla. Stat. § 768.72 (Supp. 1988); Idaho Code § 6-1604 (Supp. 1987); and Minn. Stat. Ann. § 549.191 (West 1988).
66. Cal. Civ. Code § 3295 (Supp. 1988).

covery should be where it rests in most jurisdictions today. The defendant must move to limit discovery in this situation and convince the court such evidence is not relevant to the liability issue. Where the evidence is only relevant to the amount of the punitive award, the burden should be on the plaintiff to obtain permission from the court to engage in discovery of wealth or financial condition. This would put the burden on the plaintiff to make a *prima facie* showing that there is a plausible case for a punitive award. Defendants would be protected from unwarranted intrusions into their records and private affairs and from being unnecessarily inconvenienced, unnecessary expenses would be avoided by all concerned, and no real impediment or obstacle would be placed in the path of plaintiffs who are entitled to pursue legitimate claims for punitive damages.

I. Bifurcated Trials Should Be Employed To Avoid Prejudice to Defendants Where Evidence of Wealth or Financial Condition Is Admissible Only on Claims for Punitive Damages.

Evidence of wealth or financial condition is ordinarily irrelevant to the liability issues in a case where punitive damages are sought. Normally, such evidence bears only on the amount of money that would adequately punish and deter. In such situations, permitting evidence of wealth or financial worth to be introduced at the stage of the trial where liability is determined needlessly provides an opportunity for bias and prejudice to operate against a defendant. However, the Committee on Special Problems recognizes that there may be some situations where evidence of wealth or financial condition might bear on the punitive damage liability issue even though it has no relevance to liability giving rise to compensatory damages. For example, the fact that the defendant is in a superior economic position and able to exert a certain authority or power over the plaintiff may be relevant to whether the conduct is sufficiently egregious to warrant punitive damages.[67]

Although bifurcation of the trial is an obvious solution to this problem, it is clear that different issues would have to be separated in the two situations described. There may be other situations which would call for still different treatment, such as trifurcation. Recognizing this, the Committee recommends that the defendant be provided an opportunity to move for a division of the trial in a case where punitive damages are claimed, if undue prejudice would result from the introduction of evidence of wealth or financial condition, and that in such a case the issues be separated to afford a fair trial to all concerned.[68] The following is one approach for courts to consider.

In a trial where a punitive award is sought and evidence of wealth or financial condition has no relevance to any liability issues, the court, upon motion by the defendant, should bifurcate the trial on the following basis: During the first phase of the trial, the issues of liability should be determined and evidence of wealth or financial condition should not be permitted. In many instances, it may also be desirable to determine the

67. The Committee recognizes that there are other exceptions. Evidence of wealth or financial condition may bear on liability issues for compensatory damages as well as punitive damages issues. If this is the situation, a division of the trial may not be appropriate.

68. Several jurisdictions have adopted a bifurcated trial process for cases involving punitive damages. See, e.g., Cal. Civ. Code § 3295 (Supp. 1988), Ga. Code Ann. § 105-2002.1(d) (Supp. 1988), Mo. Ann. Stat. § 510.263 (Vernon Supp. 1988), and Mont. Code Ann. § 27-1-221(7) (1987).

issue of compensatory damages in the first phase. In either event, a special verdict form should be used to determine whether the defendant is liable for compensatory damages only, or in addition is liable for punitive damages. If the jury determines in the first phase that punitive damages also should be awarded, evidence of the appropriate amount, including that of wealth or financial condition where relevant, should be permitted in the second phase. This process would prevent undue prejudice in the situation described, but it would not be appropriate where evidence of wealth or financial condition is relevant to the issue of liability for punitive damages. In the latter case, courts should consider the procedure described below.

If a claimant sues for punitive damages and the defendant moves for a bifurcated trial, the plaintiff should be permitted to show that evidence of wealth or financial condition is relevant to the issue of liability for punitive damages. If the plaintiff prevails on this issue, the court should limit the first phase of the trial to a determination of whether the defendant is liable for compensatory damages and the amount thereof. If the jury finds liability for compensatory damages, the second phase of the trial should address the punitive damage liability issue and the amount of any such award. During the second phase of the trial, evidence of wealth or financial condition, where relevant, may be admissible. If the second type of bifurcation procedure is employed, the jury should be informed during the first phase of the trial that the plaintiff has made a claim for punitive damages, but that this issue may be addressed in a second phase of the trial after the jury has decided the issue of liability for compensatory damages.

The Committee on Special Problems has concluded that a flexible approach is needed to resolve the problem regarding undue prejudice to defendants from the introduction of evidence of wealth or financial condition during the phase of the trial dealing with liability for compensatory damages. The approaches described above will take care of most situations, but, if they do not, the court should divide the trial in other ways, possibly trifurcation, to avoid undue prejudice while, at the same time, protecting the claimant's right to pursue an award of punitive damages where the evidence would support such a claim.

J. Distribution of Punitive Awards Should Not be Diverted to Persons or Entities Other Than the Plaintiff.

There has been much discussion regarding whether all or part of a civil punitive award should be paid to someone other than the plaintiff[69] and, if so, whether there should be some restriction on the plaintiff's attorney fee. The argument for distributing the award to someone or some entity other than the plaintiff is based upon the fact that a punitive award to the plaintiff is viewed as a windfall, the plaintiff having already been fully compensated for any actual harm suffered. At first glance, the so-called "windfall" argument would seem to have some merit, but on closer examination a number of problems arise from the suggested change.

If the plaintiff is not entitled to receive any or a substantial part of the award, it is argued that there will be little incentive to bring an action for punitive damages. This would discourage lawyers from acting as "private attorneys general." Since the trier of fact might be persuaded to increase the amount of noneconomic loss in the compen-

69. See the various legislative approaches taken by different states on this subject, *supra* n. 25.

satory award if not given the opportunity to assess punitive damages, it may be that the proposal to distribute the award to someone other than the plaintiff could be circumvented. If this were to be the case, it might be ethically incumbent upon the plaintiff's attorney to seek only compensatory damages and forgo any personal or public interest in seeking a punitive award.

Assuming that the plaintiff were permitted to share in the punitive award on some substantial basis, problems still arise. How should the award be distributed? Is this to be a legislative determination, or left to the court? Does the fact that a punitive award is a "windfall" of sorts currently cause the jury, on occasion, to limit the award to an amount smaller than might otherwise be awarded? If it is distributed to an authority which levies taxes, will jurors see an opportunity to relieve the taxpayer of a burden? Even were these issues resolved, if punitive awards are limited to an amount which does not exceed twice that of any compensatory award, as recommended in subsection D, there will be fewer situations where an unseemly windfall takes place.

On balance, the Committee has concluded that the common law has long permitted the successful plaintiff to retain the punitive award, and that this is justifiable on the basis that it was the plaintiff who went to the trouble to prosecute the matter in the first place. The Committee does not see any real justification for changing the current situation. Finally, there is no more reason to change the rules with regard to the attorney-client fee arrangements in this situation than in any other area of tort litigation.

IV. THE PROBLEM OF DUPLICATIVE PUNITIVE AWARDS FOR THE SAME ACT OR COURSE OF CONDUCT.

The potential for multiple awards of punitive damages for the same act or course of conduct creates problems both for plaintiffs and defendants. From the defendant's standpoint, there is the very real possibility that the punitive awards will be duplicative and therefore result in punishing the defendant more than once for the same wrongful conduct. This obviously offends basic notions of justice. Conversely, a plaintiff runs the risk that prior punitive awards may exhaust the defendant's resources, and that, not only will there be insufficient funds from which to pay the plaintiff's punitive award, but the funds will be inadequate to pay a compensatory award. Under the current state of affairs, some defendants have resorted to bankruptcy proceedings for protection. Although this may be viewed as a limited form of protection, it is a drastic measure. Moreover, it does not address the problem of duplicative awards against a solvent defendant. In short, existing procedures are inadequate to resolve the problem satisfactorily. Although all agree that the problem needs attention and resolution, a solution is not nearly as evident as the problem.

The Committee on Special Problems has considered a number of approaches to the multiple awards problem. It is clear to the Committee that there is no simple solution. Thus, the Committee has decided that it should set out the various approaches considered, in an attempt to further discussion and facilitate debate in the hope that more efficacious approaches may eventually evolve. The Committee believes it is particularly important to follow this approach, since the American Law Institute is currently engaged in two projects that would seem to encompass the multiple awards

situation. The problem of duplicative awards most frequently arises in the context of the so-called mass tort case and involves multiparties, multiclaims, and multiforums. Both the A.L.I. projects on complex litigation and on compensation and liability for product and process injuries provide vehicles for addressing the multiple awards problem. In addition, Congress has taken some steps to deal with the situation.[70] Since these efforts are still in the initial stages, the deliberations of the Committee may prove helpful in resolving the problem. In any event, the work of the Committee should be recorded for those who come later to the task.

A. State Solutions

At the state level, only two attempts to address the problem of multiple awards for the same act or course of conduct have resulted in legislation. Georgia has adopted a statute prohibiting multiple recoveries against one defendant in product liability actions filed in that state, but it has no effect on actions filed outside of the state.[71] The effect of the Georgia statute is to allow only one punitive award — the first obtained — in that state. This award is to be deemed as sufficient punishment, regardless of the amount. No other award for punitive damages may be made thereafter in Georgia for the same conduct.

Missouri has adopted a somewhat different approach. The Missouri statute provides for a post-trial hearing wherein a defendant may file a motion "requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based."[72] This approach is broader than the Georgia statute in several respects. The statute is not limited to product liability cases, and it permits evidence of out-of-state awards, as well as evidence of in-state awards, to reduce any award in Missouri. A subsequent proceeding is required to determine any offset.

Both the Georgia and Missouri statutes suffer from a deficiency that presently is inherent in any attempt to resolve the problem at the state level. Although state A may control what goes on within its courts, it cannot control what goes on in the courts of state B.[73] Neither Georgia nor Missouri can control awards that are assessed in other states, even though those awards are based on the same conduct that gave or will give rise to liability in Georgia or Missouri. Only trials or awards in Georgia or Missouri can be affected.

One possible solution to the interstate problem is for the National Conference of

70. A bill to amend title 28, United States Code, containing a number of features that would address some of the aspects of the multiple awards problem, was passed by the United States House of Representatives late in the second session of the 100th Congress, but this part of the bill was not passed by the Senate and did not become law. See Title III(A) of H.R. 4807, 100th Cong., 2d Sess., 134 Cong. Rec. H7443 (Sept. 13, 1988) and 134 Cong. Rec. S16284 (Oct. 14, 1988).
71. Ga. Code Ann. § 105-2002.1(e)(1) (Supp. 1988).
72. Mo. Ann. Stat. § 510.263 (Vernon Supp. 1988).
73. Although a state cannot control what goes on in the federal courts either, under current law a federal court would probably be required to apply the Georgia or Missouri statutes, if otherwise applicable, in diversity cases litigated in the federal courts because the statutes clearly affect substantive rights of the litigants. See 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4508 (1982).

Commissioners on Uniform State Laws to undertake a drafting project for the purpose of achieving uniformity among the states on the subject. However, not only is this approach problematic in terms of achieving uniformity in the near future, if ever, but it may be complicated by the fact that a somewhat unconventional approach might have to be employed to obtain the desired result. A type of compact or reciprocal arrangement permitting cases to be transferred from one state to another might have to be designed and utilized if there is to be but one trial of all punitive damages claims arising out of the same act or course of conduct. In any event, the state-by-state approach, while holding the possibility of improvement of the present situation, does not appear to afford a complete solution, at least for the near future.

B. Federal Solutions

1. The A.B.A. National Class Action Proposal

The A.B.A. Section of Litigation has recommended that Congress enact legislation necessary to create a national class.[74] This would permit one court to obtain jurisdiction and control over cases which expose a defendant to multiple punitive awards rising out of the same conduct which results in similar injuries. It would be a mandatory class action, in that one mass federal trial on the punitive damages issue would be binding on all concerned — those who have not sued, including those who may not yet be injured, as well as those who are parties to pending state and federal actions.[75] State court litigants who refuse to join the class would be enjoined from pursuing punitive awards based on the same conduct, but would be included in the distribution of the penal award resulting from the federal litigation.[76] The procedures envisioned could be invoked upon defendant's motion and findings by the court that "there is a reasonable possibility that adequate compensatory damages will not be available if punitive damages are not brought under control."[77] The applicable substantive law would be "federal common law" as the court determines it to be after a full hearing.[78] The proposal also addresses issues as to how the punitive award should be distributed, including the problem regarding unknown future plaintiffs.[79]

Although the Committee on Special Problems is impressed with the careful thought that has gone into the A.B.A. Litigation Section proposal and views it as a partial improvement over the present system, it feels that other alternatives should also be explored. The A.B.A. proposal does not appear to address the problem of multiple awards against a solvent defendant, i.e., where the possibility of collecting adequate compensatory damages will not be affected by punitive awards. The unfairness of mulcting a defendant more than once for the same conduct does not diminish with the prospect that there may be sufficient funds to pay all awards. On the contrary, the unfairness is exacerbated. Moreover, consideration should be given to other methods of deciding what law should apply to the substantive issues short of developing federal common-law tort rules.

74. A.B.A. Sec. Litigation Report, *supra* n. 7 at 78-81.
75. *Id.* at 80.
76. *Id.* at 81.
77. *Id.* at 79.
78. *Id.* at 80.
79. *Id.* at 81.

2. Multidistrict Litigation

The Committee on Special Problems considered two other federal solutions to the multiple awards problem. First, it was suggested that Congress should enact a new statute providing jurisdiction in the federal courts for cases involving personal injury, death or property damage where two or more claims or actions seeking punitive damages are based on the same act or course of conduct of a defendant who is engaged in or affects interstate commerce. As a further jurisdictional requirement, the aggregate total of such claims, exclusive of claims for compensatory damages, should exceed $50,000. The suggestion contemplates that only the individual claims for punitive damages would be removed and consolidated, leaving other claims, including those for compensatory damages, for trial in the courts where originally filed. The authority of Congress to enact such legislation would rest on the powers granted to it under the Commerce Clause[80] and Article III[81] of the United States Constitution.

The procedures for removing cases filed in state courts[82] and the statutes regarding multidistrict litigation in the federal courts[83] would need to be amended to authorize removal and transfer for the limited purpose of consolidating all punitive damage claims, whether originally filed in state or federal courts, for trial in one federal forum. Proceedings to remove, transfer, or consolidate such claims should be initiated by the federal judicial panel on multidistrict litigation upon its own motion or by motion filed with the panel by any party to an action which meets the jurisdictional requirements. The transferee court should be empowered to appoint lead counsel and to implement other measures needed to administer the litigation.

Because the jurisdiction is for multiparty, multiclaim actions, absent a legislatively created standard, the substantive law of several states and perhaps even foreign nations will often apply to different aspects of the litigation. Thus, the legislation should set forth the standards to be applied in determining punitive damages or should at least provide for a single, uniform choice-of-substantive-law procedure for claims subject to the proposed proceeding.[84] The legislation also should be drafted to

80. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ." U.S. Const. art. I, § 8.
81. "The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . ." U.S. Const. art. III, § 2.
82. 28 U.S.C. § 1441 *et seq.* (1983).
83. 28 U.S.C. § 1407 (1983).
84. Currently choice-of-law questions in so-called mass tort cases in the federal courts are determined under state law. Van Dusen v. Barrack, 376 U.S. 612 (1964); Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941); Erie R.R. v. Tompkins, 304 U.S. 64 (1938). See Atwood, The Choice-of-Law Dilemma in Mass Tort Litigation: Kicking Around *Erie*, *Klaxon*, and *Van Dusen*, 19 Conn. L. Rev. 9 (1986). It is contemplated that the choice of law provision in the proposed legislation would involve the development and application of a body of substantive federal law. Arguably this could satisfy the requirement that there be a federal question in order to sustain jurisdiction in the federal courts through the "Arising Under" clause of Article III of the United States Constitution. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); Osborn v. Bank of United States, 9 Wheat. 738 (1824). The adoption of a federal standard for determining punitive awards would more clearly satisfy this constitutional requirement.

preserve the concept of *forum non conveniens* to avoid attracting cases from all over the world to American courts when such cases would be more appropriately resolved in a foreign forum. There are a number of other matters that would need to be addressed, but this provides an outline of the basic features.

3. Interpleader

The Committee considered an alternative solution to the multiple awards problem which would require a new federal statute patterned after 28 U.S.C. § 1335, the federal interpleader statute. The proposed legislation would empower a federal district court, upon petition or motion by either a plaintiff who has filed an action seeking a punitive award or a defendant against whom an action for a punitive award has been filed, to adjudicate the issues involved in the multiple awards problem regardless of the court in which the claim or action was originally filed. The trial of the tort action in which the punitive award is sought would be carried out in the court in which it was originally filed or to which it was otherwise transferred or removed. The trial of the tort case would not be enjoined. However, the federal court in which the interpleader action was filed would have the authority to enjoin[85] the enforcement of any judgment containing an award for punitive damages and to remove or transfer jurisdiction of that part of the judgment to the federal court. Thus, any judgment which contains an award of punitive damages would be the possible subject of interpleader if the jurisdictional criteria exist.

In order for the federal court to exercise jurisdiction, the plaintiff seeking interpleader would be required to allege, by petition or motion, facts which show that there is a reasonable probability that the plaintiff will not be able to satisfy a judgment for the punitive award because the defendant's assets will be depleted by other claims for punitive awards arising out of the same act or course of conduct upon which the plaintiff's claim is based. A defendant against whom an action for a punitive award has been filed also could invoke the jurisdiction of the federal court upon a showing on the same grounds, i.e., that assets are insufficient to pay all claims. In addition, the defendant may invoke the jurisdiction of the federal court by alleging that two or more actions for punitive damages are based on the same act or course of conduct and that any such awards will be duplicative.

The current federal interpleader statute has a very low amount in controversy requirement and only requires minimal diversity of citizenship, i.e., diversity between two adverse parties.[86] These, or similar provisions in the new legislation, would suffice to provide jurisdiction for most cases involving the problems sought to be addressed. Where minimal diversity does not exist because all parties are citizens of the same state, there is a good chance all suits would be filed in the courts of that state and in that event be subject to consolidation or interpleader under the rules of those courts. Where all parties are citizens of one state, but some suits are filed in other states, the defendant could argue *forum non conveniens.*

Even though most cases would fall within diversity-of-citizenship jurisdiction, the

85. This authority should be expressly set out in the legislation so that no question is raised under the federal Anti Injunction Act, § 28 U.S.C. 2283 (1982).

86. 28 U.S.C. § 1335(a) (1983).

Committee on Special Problems considered whether federal question jurisdiction would be the preferable route, as in the multidistrict proposal.[87] Not only would federal question jurisdiction assure that all cases would be covered, but it would be necessary to set out certain substantive matters in the interpleader legislation in any event. The legislation should prescribe how the federal court shall determine whether multiple awards are duplicative and on what basis and when judgments for punitive awards may be satisfied. The court also should be authorized to hold some funds in reserve or otherwise assure that there will be assets available to satisfy claims of future plaintiffs. The basis for such a determination should be set out in the statute. Arguably, this would provide the basis for federal jurisdiction.[88]

4. Comparing the Federal Solutions

The basic difference between the federal proposals involves the forum of the trial of the punitive damages claims. In the multidistrict approach, there would be one mass trial on the punitive damages claim in one federal court, because all cases could be removed from state courts and consolidated in one federal court. Although the national class action approach of the A.B.A. would leave those who refuse to join the class in the courts that would otherwise have jurisdiction, all would be bound by the result in the federal court. Under the interpleader approach, the trials of the tort actions, including the punitive damages claim would take place in the various courts that would otherwise have jurisdiction. Arguably, there would be much less inconvenience to plaintiffs regarding the trial of the tort cases under the interpleader proposal. Also, there would be no need for federal courts to have to involve themselves in new choice-of-law problems as the federal court would merely enjoin the execution of the punitive portion of the judgment. Since the punitive award does not go to compensate victims, the fact that there may be delays in distributing it should not work any hardship. Plaintiffs could nevertheless proceed to satisfy judgments regarding the compensatory awards. On the other hand, the interpleader approach may require a hearing, if not a trial, to determine whether the various punitive awards resulted from the same act or course of conduct. It may also require a hearing or trial on the issue of whether the awards are duplicative. Both the multidistrict proposal and the interpleader proposal may avoid the creation of federal common law regarding substantive tort rules whereas the national class action approach, at least as proposed by the A.B.A., contemplates some federalization of tort law. None of the proposals is perfect, but the problems may be resolved through further study.

C. The Preferred Approach

Although the problem of duplicative awards of punitive damages for the same act or course of conduct is a difficult one, the Committee has come to certain conclusions. First, a federal solution would appear to be preferable to a state-by-state enactment of a uniform or model act, because there is no assurance that every state would adopt such an act and, even if every state did, the time period that it would take to achieve near uniformity would far exceed that which Congress would require to act on the matter. Moreover, it is not clear to the Committee that the problems involved can be effectively addressed at the state level. There does not appear to be any conventional

87. See *supra* n. 84.

88. See *supra* nn. 80 & 81.

mechanism by which the states could cause cases filed in other states or the federal courts to be consolidated in a particular state court. Although the states might enter into some compact or reciprocal agreement that would permit all cases filed in the courts of the participating states to be transferred to a particular court in one of the states, this sort of arrangement would not reach cases filed in the federal courts unless Congress enacted legislation to effect such a result. The Committee believes that if Congress has to act, it might as well opt for a solution that would utilize the federal court system. The federal system already provides an existing structure and rules that are near uniform throughout the country and would appear to provide a better mechanism to handle the problems than a wholly new, if not novel, mechanism at the state level.

Of the federal solutions discussed above, the Committee prefers an approach that requires all litigants to appear in the same forum. There should be no opportunity to opt-out. This would avoid litigation subsequent to the mass trial to determine if those who opted out should be bound by the results. There would be no question that those who were parties to the multidistrict case would be bound. Any disputes as to who is a proper party should be resolved initially, not after the trial. The Committee also favors a federal choice-of-law rule, or perhaps even a federal standard, for determining punitive damages in tort cases that would be subject to the mass trial in a federal court. At the very least, the federal court should not be required to apply state choice-of-law rules in this setting.[89]

The Committee concluded that the national class action as proposed by the A.B.A. Section of Litigation could be substantially improved if the jurisdictional basis is expanded to include the situation where a defendant is subject to multiple punitive awards for the same act or course of conduct without regard to any effect on the plaintiffs' ability to collect adequate compensatory damages. This would address the problems of the defendants as well as those of the plaintiffs. At this time, the Committee believes that the interpleader approach, although it may have promise, is more novel and problematic than other approaches, and that the other federal approaches stand a better chance of being perfected and accepted by the Congress. Most, if not all, problems appear to be resolvable through the multidistrict or the national class action approach, and the Committee has concluded that these concepts should be pursued along with any others that hold promise for resolving the multiple awards problem.[90]

89. See Atwood, The Choice-of-Law Dilemma in Mass Tort Litigation, *supra* n. 84.

90. In some situations, Federal Rule of Civil Procedure 23 may provide some relief. See, e.g., In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718 (E.D.N.Y. 1983) where the trial court permitted the certification of a mandatory class for punitive damages pursuant to Rule 23(b)(1)(b). The court, while casting doubt on whether punitive damages would exhaust the defendant's resources so that early claimants might deprive later claimants of the opportunity to recover compensatory damages, indicated it would be equitable to share whatever punitive damages that were allowed among all plaintiffs who ultimately recover compensatory damages rather than permitting the punitive award to go only to the early claimants. Other aspects of the decision were affirmed on appeal, but since the case was settled, the appellate court specifically refused to address the propriety of the punitive damage class certification under Rule 23(b)(1)(b). In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 167 (2nd Cir. 1987), *cert. denied*, 108 S. Ct. 2899 (1988).

V. CONCLUSION

Although there has been a substantial amount of study and discussion which has resulted in some changes with regard to the role of punitive damages in the civil justice system, the Committee on Special Problems in the Administration of Justice has concluded that there still are serious problems that have not been adequately resolved by the courts or the legislatures. This report is intended to facilitate the resolution of the problems by offering specific recommendations on these matters. In offering them, the Committee believes that the recommendations are in the best interest of all that are affected by the civil justice system in America and that the adoption of these recommendations by the various jurisdictions involved will result in definite improvements in the administration of justice in this country.[91]

The Board of Regents of the American College of Trial Lawyers has approved this report and has ordered that it be printed and disseminated to the Fellows of the College, the American Law Institute, the American Bar Association and others interested in the subject of punitive damages.

91. We take this opportunity to express our deep appreciation to Professor Roger Henderson for his assistance in this assignment.

APPENDIX

Model Jury Instructions on Punitive Damages

The plaintiff in this case is seeking to recover punitive damages in addition to those damages that are designed to compensate the plaintiff for any injuries that have resulted in [e.g., lost earnings, medical expenses or conscious pain and suffering]. It is within your discretion whether to award any punitive damages. In determining whether to award punitive damages, you must comply with the following instructions. To justify an award of punitive damages, the plaintiff must persuade you by clear and convincing evidence that:

(1) the defendant either intended to harm the plaintiff or that the defendant realized that there was a strong probability that the plaintiff would be seriously harmed;
(2) the defendant acted with malice or with an evil mind or that the defendant's conduct was outrageous; and
(3) the defendant deserves to be punished, deterred or made an example of because of [his][her] conduct.

Punitive damages are designed to punish and deter a defendant from intentionally or consciously harming others without any good reason or justification. Such awards also are meant to deter others from committing the same acts. The fact that the defendant may have been negligent or even extremely careless is not a sufficient reason for you to award punitive damages. To award punitive damages, you must find that the defendant acted with knowledge that [his][her] conduct would cause harm to the plaintiff or that the defendant realized that there was a strong probability that the plaintiff would be seriously harmed. If you are not persuaded by clear and convincing evidence that the defendant had this knowledge, or realization, then you may not award punitive damages against the defendant.

If you find that punitive damages are to be awarded against the defendant, you must then determine the amount to be awarded. In doing so, you must find the amount that you are persuaded by clear and convincing evidence is fair and reasonable under the circumstances. In making that finding, you may take into consideration one or more of the following factors to the extent you find them relevent:

(1) the nature of defendant's conduct;
(2) the impact of defendant's conduct on the plaintiff;
(3) the relationship between the plaintiff and defendant;
(4) the likelihood that the defendant would repeat the conduct if a punitive award is not made;
(5) the defendant's financial condition; and
(6) any other circumstances shown by the evidence, including any circumstances of mitigation, that bear on the question of the size of any punitive award.

The purpose of punitive damages is to punish and deter, not to vanquish or annihilate the defendant. Although there is no fixed mathematical formula for you to use in determining the amount of a punitive award, you should strive to set the amount of any award at a level that you determine imposes a fair and reasonable punishment for the amount and type of injury that you find that the defendant has caused the plaintiff.

[Vicarious liability of principal or employer.]

[If you have found, under the instructions I have given you, that the conduct of _____ [an employee or agent, including one acting in a managerial capacity for a corporate entity] is such as to warrant an award of punitive damages, you should then consider whether any such award should be made against the defendant _____ [employer, principal or corporation].

If you find from the evidence that the defendant _____ [employer, principal or corporation] either authorized, participated in, consented to, acquiesced in, or ratified the actions of [the employee, agent or manager], with knowledge of their wrongful character, you may exercise your discretion to award punitive damages against _____ [employer, principal or corporation] too. [You may also consider such an award if you find from the evidence that the defendant _____ [employer, principal or corporation] was reckless in selecting _____ [employee, agent or manager] or in retaining him with knowledge that he would be likely to inflict injury of this nature.]]

5. Costs

47 The Price of Justice: A Look at the Public Costs of Civil Liability Claims

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50 The Costs of Asbestos Litigation: Who Pays How Much to Whom?

51 Asbestos Litigation Outcomes: Factors Affecting Compensation and Costs

53 Costs and Compensation in Aviation Accident Litigation

55 Getting a Handle on Corporate Litigation Expenditures

Costs

- Approximate national average government expenditure per liability case filed ≈ $400 to $500
- Approximate annual government expenditure nationwide for all liability cases ≈ $300 million
- Less than 10% go to trial, yet require over half the total expenditure
- Jury trials cost
  - over $8,000 apiece
  - approximately twice as much as bench trials

e Price of Justice . . . A Look at the Public sts of Civil Liability Claims . . .

hat does it actually cost in both the state and federal rts to process tort claims, whether settled voluntarily pursued to verdict? *Costs of the Civil Justice System: rt Expenditures for Processing Tort Cases* (R-2888-ICJ), James S. Kakalik and Abby E. Robyn, provides hard a on the cost increments involved at different stages the process—and shows what the taxpayers' total nual bill is for operating today's civil court system. e study is part of the Institute's program of research construct an overall "cost map"—including private as ll as public expenditures—for the workings of the civil ice system.

most state courts, tort cases include suits for damages personal injury or property damages and for "wrong- death resulting from negligence or breach of war- ty." The U.S. district courts have several categories of es related to torts—from "motor vehicle personal ury" to "airplane personal injury," and from "torts to d" to "assault, libel, and slander"—and each is resented in the report's cost breakout. California, shington, and Florida were chosen for the analysis of e courts because they keep the most detailed records court finances and workloads. Comparable data were o available for the federal court system.

e FY 1982 estimated average government expenditure judge—which includes staff time and the cost of ted court operations—ranged from $261,000 to 3,000 for California, Florida, and Washington. The penditure per judge was $752,000 for the U.S. district urts.

e estimated FY 1982 government expenditure per tort e filed in state court ranged from $279 to $536, pending on the state and type of tort case. Although three states studied are not fully representative of nation, the national average expenditure per tort case d in state courts probably falls somewhere between 0 and $500. The estimated FY 1982 federal expendi- per tort case filed in U.S. district court was $1740.

Expenditure differs dramatically from the average depending on when a case is disposed (e.g., after filing, after a settlement conference, or after trial). As noted above, if a case is only filed and then disposed of without requiring the time and attention of any court personnel other than a clerk, the expenditure per case is very low—$50 or less. Thereafter, it rises by increments.

If a tort case proceeds through one hearing and one conference before being disposed of without a trial, the state court expenditure ranges from $311 to $393, depending on the state and type of tort case. The federal court expenditure ranges from $2193 to $5213 in this situation.

If a case proceeds through one hearing, two conferences, and a nonjury trial, the average government expenditure ranges from $4225 to $4501 in California and from $4503 to $14,698 in U.S. district court, again depending on the type of case.

It is much higher, however, if a case proceeds through hearings, conferences, and a jury trial. For example, it is $8991 in Los Angeles and $8327 in the rest of California. In Florida, it is $3386 or $3709, depending on the type of tort case. In U.S. district court, the expenditure ranges from $8422 to $15,028 to dispose of the average case that goes to jury trial. The average nonjury trial is generally about half or less as expensive as a jury trial for the same case type and jurisdiction.

It can easily cost the government more to process a case than is at stake for the litigants in the smaller cases. Even though less than 10 percent of the cases filed went to jury trial, jury trials accounted for about half of all government expenditures in the states studied.

Adding all the estimated FY 1982 government expenditures for the 50 states' courts of general jurisdiction and U.S. district courts yields an estimated nationwide government expenditure of $320 million for processing tort cases.

The Price of Justice . . . An Estimate of the Public Costs of All Civil Cases . . .

What is the public cost of resolving civil cases in the United States? The total annual price tag for processing all the various types of civil cases is estimated at $2 billion, 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. These results are described in *Costs of the Civil Justice System: Court Expenditures for Various Types of Civil Cases* (R-2985-ICJ), by James S. Kakalik and Randy L. Ross.

These expenditures depend most heavily on the percentage of cases terminated before trial, the length of trials, and the percentage of the parties having jury trials (about 10 percent today). Other major influences include pay scales for judges, the number of support staff provided per judge, and the caseload assigned to each judge.

To arrive at cost estimates, the study collected data from the three state court systems that had the most complete information—California Superior Court, Florida Circuit Court, and Washington Superior Court—and used data on the U.S. district courts.

Estimates for fiscal year 1982:

- The average per judge expenditure in the three state courts ranged from $261,000 to $383,000. In the U.S. district courts, it was $752,000. These include salaries and benefits for judges and court personnel, together with costs of related court operations.
- The average per-case expenditure in the three state courts ranged from $200 to $300. In the U.S. district courts, it was $1530.

In estimating annual expenditures per type of case filed, the study classifies civil cases into seven general categories. Domestic relations include petitions to dissolve or annul marriages, and concomitant actions like child support, custody, visitation, and alimony. Mental health covers all matters relating to the status, maintenance, custody, control, and rights of the mentally incompetent. Probate and guardianship includes ordinary probate proceedings, will contests, and guardianship and conservatorship proceedings. Property rights and condemnation involves eminent domain cases and nontort property actions. Tort cases involve civil wrong or injury—other than breach of contract—for which the court may provide damages. Contracts and other civil complaints on the state level involve such matters as taxes, indebtedness, contracts, and disputes between businesses; on the federal level, they involve contracts, civil rights, labor cases, and actions brought under federal statutes not categorized elsewhere. Other civil petitions on the state level include such matters as adoption, change of name, prisoner petitions for writ of habeas corpus, and administrative law reviews; on the federal level, they include only prisoner petitions.

Expenditures vary considerably according to type of case:

- At the state level, costs per type of case range as follows: probate and guardianship, about $100 each; domestic relations, $125; other civil petitions, $170; mental health, $250; contracts and other civil complaints, $370; torts, $400; property rights, $590.
- At the federal level, courts process an insignificant number of probate and guardianship, domestic relations, and mental health cases. Costs of other types of cases range as follows: property rights, about $405 each; other civil petitions, $575; torts, $1740; contracts and other civil complaints, $1890.

Type of civil case	State court expenditure per case	U.S. District expenditure per case
Family	125	—
Mental health	250	—
Probate	100	—
Property	590	406
Contract/Other complaint	370	1890
Other petition	170	577
Tort	400	1740
All civil	300	1500

In addition, expenditures differ dramatically according when the case was disposed of:

- If a case is filed and then disposed of without requiring the time and attention of court personnel other than a clerk, the average expenditure per case is less than $50 in all courts, both state and federal.
- If a case proceeds through one hearing and one conference before being disposed of without trial, the state court expenditure ranges from $205 to $360, and the federal court expenditure is $3225.
- If a case proceeds through one hearing, two conferences, and a nonjury trial, the state court expenditure ranges from $540 to $2155, and the federal court expenditure is $6765.
- If a case proceeds through one hearing, two conferences, and a jury trial, expenditures increase dramatically. The state court expenditure ranges from $2[illegible] (in Washington) to $10,860 (in Los Angeles), and the federal court expenditure is $10,465.

Care should be exercised when comparing state and federal expenditures. The higher federal costs may derive from the greater complexity of the cases, the lower caseload per judge, and the smaller number of domestic relations, mental health, and probate and guardianship cases they hear.

In any event, one result of the analysis stands out sharply: Those civil cases that go to trial can easily cost the government much more money than is at stake for either of the litigants.

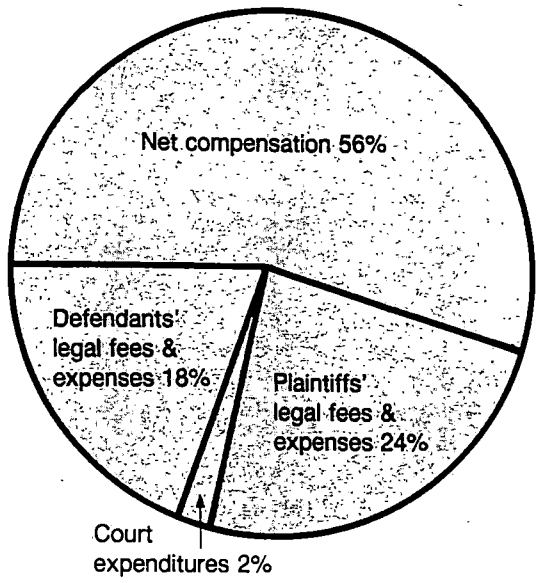
The Costs of Tort Litigation . . . How Much and to Whom?

Costs and Compensation Paid in Tort Litigation (R-3391-ICJ), by James S. Kakalik and Nicholas M. Pace, estimates the total expenditure nationwide for tort litigation and the share of that total that ultimately reaches injured parties' pockets. It offers empirical evidence to replace the anecdotes and speculation that fuel the controversy over the amount of society's resources expended on civil liability litigation. The study examines the following issues:

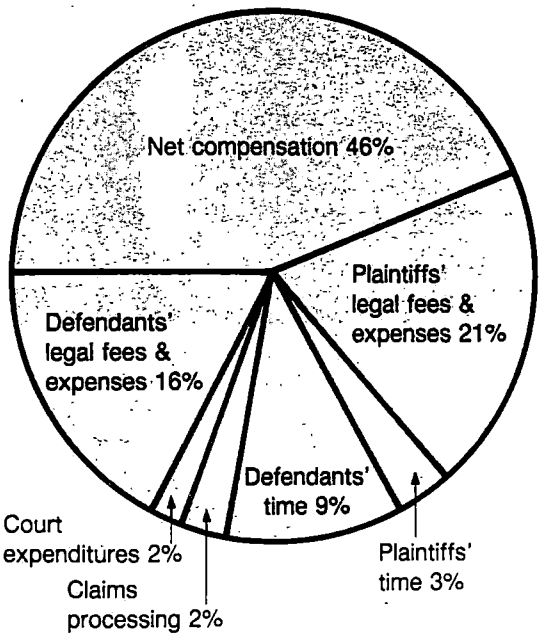
- What was the total expenditure nationwide for tort lawsuits terminated in state and federal courts of general jurisdiction in 1985?
- How much of the total was spent for the various costs of the tort litigation system: plaintiffs' and defendants' legal fees and other litigation expenses, the value of litigants' time spent on their lawsuits, the value of time spent by insurance personnel, and the costs of operating the system?
- How much of the total was received by plaintiffs to compensate them for losses?
- How do litigation costs and compensation differ for torts involving motor vehicles and all other torts?
- How fast is the tort system growing?

The research draws on available data, both published and unpublished, from insurance industry sources, the National Center for State Courts, and various special surveys on the civil litigation system, including the Civil Litigation Research Project survey, funded by the U.S. Department of Justice and conducted by the University of Wisconsin.

While this study provides useful information on the total costs of tort litigation, how these costs have changed in recent years, and how cost-to-compensation ratios vary among types of tort lawsuits, some important questions are left unanswered. The study does not, for example, make judgments about whether total costs are "too high" or "too low," nor does it make any policy recommendations for reforming the civil justice system.



Percentages of total expenditures excluding value of litigants' time and claims processing



Percentages of total expenditures including value of litigants' time and claims processing

NOTE: Totals may not sum to 100 due to rounding.

Costs and compensation paid for the average tort lawsuit terminated in 1985

(Average gross compensation paid = $24,000 to $29,000)

The study estimates that the total annual expenditure nationwide for tort lawsuits terminated in 1985 in federal and state courts of general jurisdiction was $29–36 billion. Expenditures include compensation, legal fees and related expenses, insurance company claims-processing costs for claims in suit, the value of litigants' time, and the costs to the court system of processing these cases.

A similar estimate of defendants' costs is $8–10 billion: $4.7–5.7 billion for legal fees and related expenses, $0.8 billion for insurance company costs of processing claims in suit, and $2.5–3.5 billion for the value of defendants' nonlawyer time and other expenses. The average tort lawsuit closed in 1985 resulted in about $5400 to $6600 in defendants' legal fees and related expenses.

Plaintiffs received between $21 billion and $25 billion in gross compensation. Of this amount, they paid $6.3–7.6 billion in legal fees and expenses and about $1 billion in the value of plaintiffs' time spent. After deducting these costs, they received about $14–16 billion in net compensation. The average total compensation paid per lawsuit was in the range of $24,000 to $29,000.

In sum, the system spent $16–19 billion in transactions 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).

Although the study's main focus is the analysis of litigation costs and compensation paid, the researchers are also able to comment on the rate of growth in the tort system. They estimate that the annual growth rate of tort lawsuits filed has averaged 3.9 percent since 1981. However, the growth rate in expenditures for the tort system has been substantially higher. Expenditures per claim for nonauto tort are growing faster than for auto tort cases. Over the past five years, 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. The average growth rate in insured defendants' average legal fees and expenses paid per liability claim has been about 6 percent for auto and 15 percent for other tort claims.

The Costs of Asbestos Litigation . . . Who Pays How Much to Whom . . . ?

Over the past decade, defendants and insurers in asbestos-related injury suits have poured out an estimated $1 billion in compensation and litigation expenses—with about one-third provided by defendants and two-thirds by insurers. Estimates of the number of deaths due to asbestos over the next 30 years range from 74,000 to 265,000—with expected payouts ranging into the multibillions of dollars.

Because of the huge sums likely to be involved, it is vital for policymakers to know how much is being spent, by whom, and for what. *Costs of Asbestos Litigation* (R-3042-ICJ), by James S. Kakalik, Patricia A. Ebener, William L. F. Felstiner, and Michael G. Shanley, is the first study to aggregate such costs on a systematic basis using data obtained from major defendants and insurers and from plaintiffs' attorneys.

The major findings of the study are:

- Of the $1006 million spent thus far, $345 million was expended by defendants in connection with claims against them that are still open, and $300 million was spent for closure of claims by some defendants that are still open with respect to other defendants.
- An additional $361 million was spent to resolve 33 fully closed claims that were tried, settled, or dismissed and not refiled prior to August 1982, when the Manville Corporation's Chapter 11 bankruptcy filing prevented complete closure of a substantial number of additional claims.
- Of the $361 million spent on fully closed claims, $133 million was spent in defense fees, and defendants paid $228 million in compensation to plaintiffs.
- Plaintiffs spent $95 million of the $228 million in the compensation package on legal fees and other litigation expenses, leaving them $133 million, or 37 percent of the total spent by defendants and insurers on fully closed claims.
- This means that plaintiffs in lawsuits claiming injury or death from asbestos exposure have netted 37 cents on every dollar spent by all parties on closed cases, with the remainder spent on litigation costs by both plaintiffs and defendants.

Total

Average insurers' and defendants payment $95,000 ($2.71) (100%)

In averag settlemen insurers v expenses total cost $95,000 tiff paid for attorn

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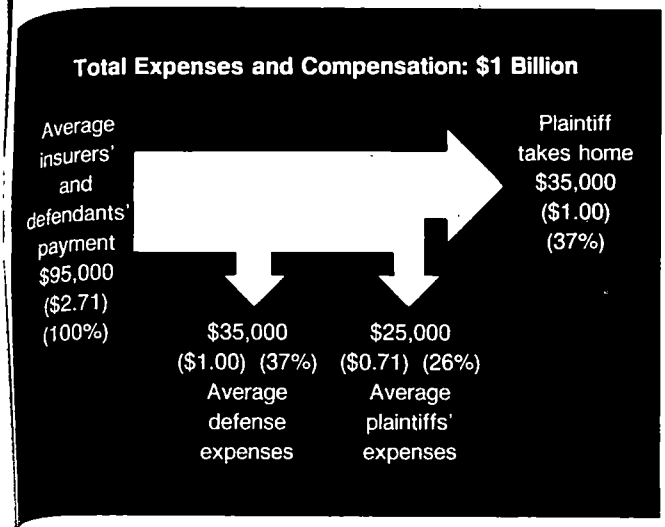


n averaging the total costs per claim, compensation in ettlements and awards paid by all defendants and nsurers was about $60,000. Total defense litigation xpenses were an additional $35,000 per claim. Thus, otal costs to defendants and insurers averaged about 95,000 per closed claim. And, after the average plain- iff paid about $25,000, or 41 percent of his total award, r attorney's fees and expenses, he received $35,000.

resented another way, for every $2.71 paid by defen- nts and insurers for closed claims, a dollar was paid r their litigation expenses, 71 cents was used by the laintiff for litigation expenses, and a dollar was netted y the plaintiff in compensation.

laintiffs don't usually sue their employers, who are pro- ected by workers' compensation laws. Instead, suits are rought against mining companies and against manufac- rers, suppliers, and processors of asbestos products. wo-thirds of all cases were filed in five states (29 per- ent in California alone), and more than half of the 3800 laims closed were filed in federal courts.

Of the cases closed, 78 percent were settled before trial began, 18 percent were dismissed or withdrawn, and only 4 percent reached trial—including those settled before trial was completed.

Asbestos litigation is certain to impose an enormous burden on society in the years ahead. The debate over litigation costs has fueled demands for mediation, arbitration, and other forms of dispute resolution—including demands for government-mandated compensation systems. This study charts the costs thus far expended in asbestos litigation, which itself may be a phenomenon unique in scale and intensity but then again may be only the forerunner of a wave of environmentally based injury claims of unprecedented dimensions.

Asbestos Litigation Outcomes . . . Factors Affecting Compensation and Costs

Variation in Asbestos Litigation Compensation and Expenses (R-3132-ICJ), by James S. Kakalik, Patricia A. Ebener, William L. F. Felstiner, Gus W. Haggstrom, and Michael G. Shanley, is the second of two ICJ studies that examine the money spent to resolve asbestos-related injury lawsuits. The study drew on data from a survey of plaintiffs' attorneys, defendants, and insurers that collected information on a sample of claims that were closed between January 1980 and August 1982. The 513 closed claims in the survey included all 132 tried claims and a nationally representative random sample of 381 claims closed before trial by all or nearly all defendants during that period. The study focuses on asbestos-related product liability litigation; it does not include costs incurred by the government, expenses and compensation in workers' compensation claims, and costs incurred in reorganization under Chapter 11.

Characteristics of closed claims. The average claimant was 57 years old, 95 percent were married, 95 percent were male, and nearly all were or had been smokers at some time in their lives. Shipyard workers accounted for 37 percent of all closed claims; asbestos-related factory workers, about 35 percent; and insulation workers, 21 percent. Asbestosis accounted for 76 percent of the closed claims; lung cancer, 12 percent; mesothelioma, 5 percent; all other types of injuries, 3 percent; and no asbestos-related injuries manifested, 4 percent. Deceased workers were involved in 15 percent of the claims. About 91 percent of claims filed for asbestosis, lung cancer, and mesothelioma received compensation (nationwide averages per closed claim were asbestosis, $54,000; lung cancer, $83,000; and mesothelioma, $265,000). Only about half of the claims for other types of injuries received compensation. About 42 percent of the closed claims were parts of multiple-plaintiff lawsuits. The average time from filing to closure was 2 years and 8 months. Plaintiffs on closed claims sued an average of 15 defendants.

Level of compensation. Type of injury was a major influence on compensation levels. Claimants with lung cancer or mesothelioma received substantially more than those with asbestosis. For those with asbestosis, average compensation was highest, intermediate, and lowest for insulation workers, shipyard workers, and factory workers, respectively. All factors being equal, given the average claimant (57 years old, who named 15 defendants in a single-plaintiff suit that settled before trial in 1982), six conclusions were reached: (1) a claim that began trial received 2.28 times the compensation of a similar claim that settled before trial; (2) claims involving death received only 88 percent of what they would have received had they not involved death; (3) average com-

pensation increased at the rate of 5 percent per year from 1980 to 1982; (4) peak compensation went to claimants 54 years old; (5) compensation per claim increased with the number of defendants; and (6) compensation per claim decreased as the number of plaintiffs in a single lawsuit increased.

Average Compensation Paid for Claims Receiving Compensation, by Type of Injury and Worker Classification in 1982, for Claimants Who Were Alive, Age 57, and Who Named 15 Defendants on a Single Plaintiff Lawsuit That Was Settled before Trial

Type of Injury and Worker Classification	Average Compensation per Claim Settled before Trial
Asbestosis	
Asbestos-related factory worker	$ 55,000
Other type of worker	58,000
Shipyard worker	75,000
Insulation worker	106,000
Lung cancer	119,000
Mesothelioma	319,000
Other type of injury	95,000

These findings should be used with caution. We had no direct data on several factors we would expect to influence compensation levels: severity of asbestosis, claimants' earning power, strength of asbestos exposure evidence, the characteristics of the lawyers, and compensation paid from other sources such as workers' compensation. Also, changes in the nature of the cases after August 1982, changes in the structure of settlement negotiations, or changes resulting from the Chapter 11 bankruptcy filings may all affect compensation levels.

Likelihood of trial. Relatively few claims went to trial. Those factors related to the likelihood of trial were:

1. Type of injury—mesothelioma claims were at least twice as likely to go to trial (14 percent) as claims with any other type of injury (7 percent or less).
2. State in which the claim was filed—in California and New Jersey, claims that were tried were 1 percent or less of those filed; in Texas and Pennsylvania, 8 percent and 16 percent, respectively; in Missouri (with fewer closed claims overall), about one-third went to trial; in all other states combined, about 6 percent began trial.
3. Claims sampled from among large lawsuits with at least 50 other plaintiffs never went to trial.

Punitive damages. Punitive damage awards appeared to be more frequent in asbestos cases than in product liability cases generally, but they were still rare. Punitive damages totaling $4,934,000 were awarded to 19 plaintiffs, involving less than 1 percent of the claims closed during the study period. Two-thirds of these awards were in Pennsylvania, where 34 percent that started trial during our study period resulted in punitive awards.

Defense litigation expenses. Total defense expenses were $37,000 for the average closed claim, of which allocated expenses (legal fees and related expenses) were 78 percent, unallocated expenses (claims processing and management expenses) were 19 percent, and organization-versus-organization litigation expenses (usually concerning insurance coverage) were 4 percent. Each case requires certain threshold litigation expenses; although those expenses rise with increased compensation, they do not rise in proportion to increased compensation. In general, the higher the average compensation paid, the higher the expense will be, but the lower the ratio of expense to compensation.

Type of injury and worker category affect defense expenses. Taking the average claimant with the average number of defendants in a single-plaintiff lawsuit that was settled before trial in 1982, mesothelioma generated the highest average defense expenses. All other things being equal, defense expenses were 13 percent greater for claims involving dead claimants; claims that began trial had 3.13 times the defense expenses as those settled before trial; average defense expenses per claim increased at about 1 percent per year from 1980 to 1982; defense expenses per claim increased substantially with the number of defendants on the claim; and defense expenses per plaintiff tended to decrease as the number of plaintiffs increased (the largest multiple-plaintiff lawsuits resulted in estimated defense expenses per claim that were less than two-thirds of those for a single-plaintiff lawsuit).

Plaintiff litigation expenses. Asbestos cases are almost always handled on a contingency fee basis by plaintiffs lawyers; the percentage is usually increased if the claim goes to trial. During 1980–1982, legal fees for tried cases were typically 33 to 45 percent of total compensation, with the average fee about 39 percent; fees for settled cases averaged 34 percent. In dollar terms, plaintiff expenses for all closed cases averaged $25,000 per claim for all claims closed before trial, $21,000; and for all tried claims, $114,000.

In summary, these figures may be better understood by considering the total amount that defendants, insurers and plaintiffs paid for every one dollar of net compensation that went to the plaintiff. For every $2.59 paid by defendants and insurers, defense litigation expenses

were an estimated $0.95, plaintiff's litigation expenses were an estimated $0.64, and the plaintiff received one dollar, or 39 percent of the $2.59 total. That percentage increased with the level of total compensation, from less than 20 percent of the total defense payout for claims with low compensation, up to 49 percent for those with average compensation over $500,000.

Costs and Compensation in Aviation Accident Litigation

The tort system's effectiveness in providing compensation for injuries and wrongful death has been the subject of extensive controversy. One question at the core of this debate is whether the costs of providing compensation are appropriate given the level of compensation. Since 1982, the ICJ has conducted a number of studies of the tort system's transaction costs, including an in-depth analysis of the costs of asbestos litigation. The recently completed study of aviation accident litigation adds another piece to the transaction cost–compensation picture. Through the cooperation of plaintiffs' and defense attorneys, defendants, and insurers, the ICJ research staff gained access to the detailed records of more than 2000 cases—the entire population of major aviation accident death cases among U.S. airlines from 1970 to 1984. These unique data permitted the ICJ to conduct a detailed analysis of the economic loss incurred, the compensation paid, and the expenditures for processing aviation accident claims. In *Costs and Compensation Paid in Aviation Accidents* (R-3421-ICJ), James Kakalik and Elizabeth King discuss the amount of compensation that aviation accident victims receive and the legal costs to plaintiffs and defendants. (A discussion of economic loss and of the methodology developed to calculate that loss can be found in Section 7. A discussion of the factors that influence litigants' behavior appears in Section 2.)

Air accident litigation has several features that distinguish it from other torts in general as well as from other mass torts, such as asbestos. First, the defendants seldom contest liability with the plaintiffs; rather, they simply agree among themselves how to share liability. Moreover, although there are multiple defendants, the defense is coordinated by the direct insurer of the airline, who takes the lead in negotiating with the plaintiffs on behalf of all defendants. Third, causation is not at issue. Thus, the dispute between plaintiffs and defendants revolves around the amount of damages to be paid.

Plaintiffs almost always file separate claims for each decedent, and almost all the claimants hired a lawyer. But only two-thirds of these resulted in suits, and only about 15 percent of the suits actually went to trial.

The stage at which the case was closed influenced the time to disposition. The average time to disposition for settled claims was about a year. Settled lawsuits took an average of 2.5 years; tried cases took nearly 5 years.

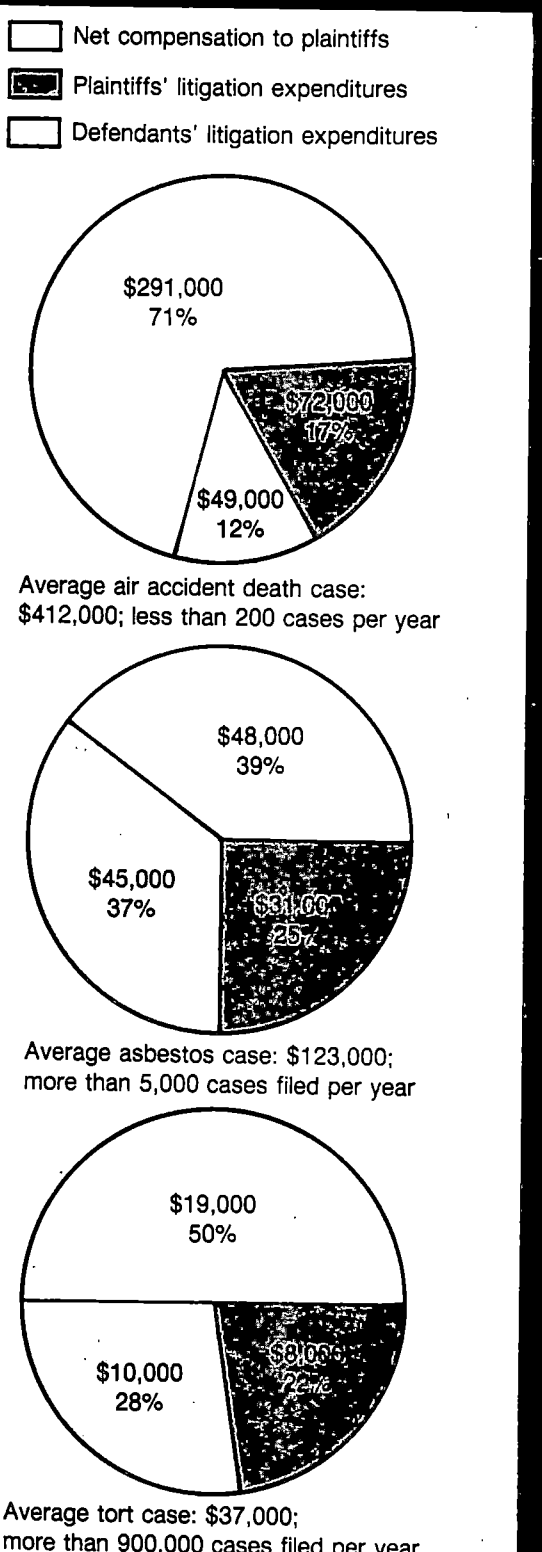
The stage at which the case was closed was also correlated with compensation levels. Average compensation was approximately $363,000. But claims settled without a suit averaged about $256,000, while settled lawsuits averaged $387,000. Average compensation for cases that went to trial was almost $600,000, nearly double the average for all cases. (Other factors, such as the amount of loss, also influence the probability of trial and the amount of compensation.)

How much of the compensation paid did claimants actually take home? From an average total compensation of $363,000, plaintiffs paid $72,000 in legal fees and related expenses and took home $291,000 in net compensation. Defendants' litigation expenditures amounted to $49,000 per death. The combined litigation expenditures for both sides totaled $121,000 per death. Thus, of the total $412,000 in expenditures per death, plaintiffs received 71 percent in net compensation, and 29 percent went for transaction costs.

Plaintiffs' expenditures varied with the time of the accident, the amount of economic loss to the decedents' survivors, and the stage at which the case was closed. Plaintiffs' legal expenditures declined from about 24 percent of their awards at the beginning of the study period to about 18 percent at the end. Interestingly, this decline almost exactly offsets a rise in average awards, so that the dollar values of loss and expenses remained nearly constant. Litigation expenses, as a percentage of compensation, were about 2 percent higher for cases with very high stakes—that is, for those with economic losses exceeding $1 million. Not surprisingly, litigation expenses for cases that went to trial were almost 3 percent higher than those for cases settled before trial.

Defendants in aviation accident litigation face two types of legal expenditures: those spent resolving issues of liability among themselves and those spent determining the compensation to be paid for each decedent. Both expenditures varied widely across the accidents we studied. The major factor determining liability litigation expenditure levels was whether there was a significant liability dispute among the defendants. Such disputes were more likely the higher the stakes—that is, the higher the total level of economic loss associated with an accident. Compensation expenditures, on the other hand, were more closely related to the fraction of deaths in an accident that resulted in lawsuits and trials. Compensation litigation expenditures are higher for accidents (1) that involve a larger fraction of lawsuits, (2) in which a larger fraction of plaintiffs' attorneys are not aviation

Comparison of Litigation Expenditures and Compensation per Case for Aviation Accident, Asbestos, and All Tort Cases (1986 dollars)



(Numbers may not sum exactly to totals due to rounding)

specialists, and (3) in which the insurer directly negotiated compensation.

Are these transaction costs reasonable in relation to the compensation provided? This study cannot provide a definitive answer because we do not have the data to compare the tort system either with revisions to it or with alternative systems that might provide similar benefits. However, we can shed some light on this issue by comparing the costs and compensation in aviation accident litigation with those in other torts.

Two previous ICJ studies of transaction costs provide a basis for such a comparison: (1) a study of the costs and compensation of all tort litigation concluded in 1985, and (2) a study of costs and compensation in asbestos worker injury litigation closed between 1980 and 1982. The first study provides a benchmark that reflects the full range of tort litigation, much of which involves modest injuries. The asbestos study yields what may be an upper bound on transaction costs relative to compensation, given the complexities of liability disputes and loss calculations in toxic tort litigation.

Average tort case. In 1985, about 866,000 tort lawsuits closed in courts of general jurisdiction. In the average case, defendants spent about $37,000 (in 1986 value dollars), about half ($18,500) of which went as net compensation to the plaintiffs, while the other half ($18,500) went to the plaintiffs' and defendants' litigation expenses.

Air accident cases. With an average of fewer than 200 cases per year, U.S. airline major accident cases represent only a tiny fraction of the total tort caseload. The average air accident death case resulted in a $412,000 payment by defendants, of which 71 percent ($291,000) was net compensation to the plaintiffs. The other 29 percent ($121,000) was spent on the total litigation expenditures for both sides combined.

Asbestos cases. The average number of asbestos claims filed per year is now over 5000. In the average case closed in 1980–1982, defendants paid $123,000 in 1986 dollars. Plaintiffs received $48,000 (39 percent) in net compensation, and $76,000 (61 percent) was for litigation expenditures for both sides combined. (*Note*: We do not have data for more recent asbestos case closures, and they may well differ.)

In sum, airline accident litigation has a lower ratio of transaction costs to total expenditures than does tort litigation in general. As a percentage of total outlays, average transaction costs in aviation cases are only 29 percent, about half the average in all tort cases combined (50 percent) and in asbestos cases (61 percent). On the

other hand, aviation accident cases have higher average transactions costs in absolute dollar terms ($121,000) than the average tort case ($19,000) or the average asbestos case ($76,000).

Getting a Handle on Corporate Litigation Expenditures

Nationwide, more than $30 billion is spent annually on liability litigation, and approximately half this amount goes to legal and other transaction costs. No one knows the total national bill for contract and other business litigation, but transactions costs are widely perceived to be high and are rising rapidly. Various changes have been proposed in both court procedures and corporate legal practices to reduce or control these costs; without any baseline data on corporate litigation expenditures, however, assessing the potential impact of these changes is difficult.

ICJ researchers plan to measure trends in corporate litigation expenditures. Using a combination of case study and survey techniques, and drawing on data from corporations in different economic sectors, the study seeks to answer the following questions:

- What are the total direct costs for corporate legal activities, including internal legal salaries and expenses and fees for outside counsel?
- How are funds allocated by legal activity and type of case?
- How have total costs and key cost components changed over time?
- How are costs affected by differences in court management policies and litigation management strategies?

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2ND STORY of Level 1 printed in FULL format.

The Associated Press

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November 17, 1989, Friday, PM cycle

SECTION: Washington Dateline

LENGTH: 741 words

HEADLINE: Walesa: Better to Tickle the Russian Bear Than Pull its Moustache

BYLINE: By BRYAN BRUMLEY, Associated Press Writer

DATELINE: WASHINGTON

KEYWORD: Walesa -Humor

BODY:

Solidarity leader Lech Walesa sums up his philosophy in dealing with the Russians in a line: "There is no point in pulling the bear by its moustache."

Pausing to let a gentle wave of laughter subside among his American listeners, he then said with the finesse of a professional comedian, "It is better to tickle him."

His audience, a group of experts on the Soviet Bloc, erupted in laughter.

Walesa, whose walrus moustache, twinkling eyes and beak-like nose are familiar to American audiences, showed many faces during his triumphant visit to Washington this week, and in this city of politics, he cemented his place as one of the premier politicians of the 1980s.

Asked why he had turned down the offer to become the first Solidarity prime minister - an honor he bestowed on his adviser Tadeusz Mazowiecki, Walesa acknowledged: "I'd like to be prime minister. That way, wherever I went, they would play the national anthem.

"But to have a prime minister who was chairman of a trade union? That would be worse than communism," he said.

When Walesa addressed the AFL-CIO convention, he was the consummate trade union leader. He even taped a television advertisement for the labor federation, closing with the slogan, in English, "Union, yes."

When he spoke to Congress, he was a Polish statesman, invoking geopolitical imagery that Housing Secretary Jack Kemp likened to that of Winston Churchill, the fiery orator who led Britain during World War II.

Those speeches were carefully crafted by Walesa's team of advisers, and like all his remarks in Washington, delivered through an interpreter.

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But a few times he threw away the text and showed off the cagey wit and graphic imagery that enabled him to lead the strike that forged Solidarity in 1980, steer the banned union through martial law and create the first non-communist government in the Soviet bloc.

"He's a real politician," said an admiring Zbigniew Brzezinski, who was President Carter's national security adviser. He shared the dais with Walesa at a conference sponsored by Radio Liberty and Radio Free Europe, the U.S.-financed radio stations that have broadcast to the Soviet Bloc since the depths of the Cold War.

Addressing the experts on Eastern Europe, Walesa showed a far more relaxed and more nimble persona than while speaking before a joint meeting of Congress or at the AFL-CIO convention.

Walesa, a regular Radio Free Europe listener, was asked whether the station had influenced him.

"The degree cannot be measured. Would there be land and earth without the sun? " he said, to a very grateful audience.

Walesa, who in his darkest days received unswerving support from Polish-born Pope John Paul II, not only attended Mass every morning of his stay in Washington, he genuflected to the church in his public remarks.

Asked how he liked dealing with his former adversaries, the communists, Walesa responded: "Of course, I am a good Christian, as you know. Therefore, I forgive.

"And secondly, if there were no adversaries, I wouldn't exist, as well. Ladies and gentlemen, if I lived in a normal, civilized country, I ... would never get a Nobel Prize. So I have gained something because of other people's stupidity," he said, invoking laughter and then applause.

His wit can be acerbic. To convey his displeasure at the level of aid that Canada has offered Poland, Walesa said: "If things keep going at this rate, they will give us a beautiful necktie - but we can only wear it in the coffin."

Walesa was asked what he would say to Gorbachev if they met.

"Dzien dobry," a friendly Polish greeting which is very close to the Russian phrase for "good day," he said without missing a beat.

"I'd ask him what language we should speak," said Walesa, again drawing laughter.

"I do have a lot to say to Mr. Gorbachev," Walesa said, weaving between gravity and humor. "Such a conference would be prepared beforehand by specialists and we would only move our lips.

"I do understand the terrible problems that Gorbachev has," he said. "He is like a juggler who has a hundred balls in the air, and somehow he is catching all of them," said Walesa, making a juggling motion.

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"Fantastic," he laughed, using the English word.

"We shouldn't show off. We should solve problems," he said, leaving his audience to guess whether he was praising or criticizing the Soviet leader, a technique Walesa perfected in the days when a wrong word to could send him to jail.

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WASHINGTON, DC,
February 20, 1990.

Hon. THOMAS S. FOLEY,
The Speaker, House of Representatives, Washington, DC.

DEAR MR. SPEAKER: Pursuant to the permission granted in Clause 5 of Rule III of the Rules of the U.S. House of Representatives, I have the honor to transmit a sealed envelope received from the White House at 2:47 p.m. on Tuesday, February 20, 1990 said to contain a message from the President waiving the application of certain subsections of the Trade Act of 1974 with regard to Czechoslovakia.

With great respect, I am,
Sincerely yours,
DONNALD K. ANDERSON,
Clerk, House of Representatives.

WAIVER OF CERTAIN TRADE PROVISIONS WITH RESPECT TO CZECHOSLOVAKIA—MESSAGE FROM THE PRESIDENT OF THE UNITED STATES (H. DOC. NO. 101-151)

The SPEAKER pro tempore laid before the House the following message from the President of the United States; which was read and, together with the accompanying papers, without objection, referred to the Committee on Ways and Means and ordered to be printed:

(For message, see proceedings of the Senate of Tuesday, February 20, 1990, at page S1252.)

RECESS

The SPEAKER pro tempore. Pursuant to the order of the House of Wednesday, February 7, 1990, the House will stand in recess subject to the call of the Chair.

Accordingly (at 10 o'clock and 8 minutes a.m.), the House stood in recess subject to the call of the Chair.

JOINT MEETING OF THE HOUSE AND SENATE TO HEAR AN ADDRESS BY HIS EXCELLENCY VACLAV HAVEL, PRESIDENT OF THE CZECHOSLOVAK SOCIALIST REPUBLIC

The SPEAKER of the House presided.

The Doorkeeper, the Honorable James T. Molloy, announced the Vice President and Members of the U.S. Senate who entered the Hall of the House of Representatives, the Vice President taking the chair at the right of the Speaker, and the Members of the Senate the seats reserved for them.

The SPEAKER. The Chair appoints as members of the committee on the part of the House to escort His Excellency Vaclav Havel into the Chamber:

The gentleman from Missouri [Mr. GEPHARDT];

The gentleman from Florida [Mr. FASCELL];

The gentleman from Michigan [Mr. BONIOR];

The gentleman from Maryland [Mr. HOYER];

The gentleman from New York [Mr. MRAZEK];

The gentleman from Illinois [Mr. MICHEL];

The gentleman from Georgia [Mr. GINGRICH];

The gentleman from Michigan [Mr. BROOMFIELD];

The gentleman from California [Mr. LEWIS];

The gentleman from Oklahoma [Mr. EDWARDS]; and

The gentlewoman from Rhode Island [Ms. SCHNEIDER].

The VICE PRESIDENT. The President of the Senate, at the direction of that body, appoints the following Senators as members of the committee on the part of the Senate to escort His Excellency Vaclav Havel into the Chamber:

The Senator from Maine [Mr. MITCHELL];

The Senator from California [Mr. CRANSTON];

The Senator from Rhode Island [Mr. PELL];

The Senator from South Carolina [Mr. HOLLINGS];

The Senator from Delaware [Mr. BIDEN];

The Senator from Arkansas [Mr. BUMPERS];

The Senator from Michigan [Mr. LEVIN];

The Senator from Illinois [Mr. SIMON];

The Senator from Kansas [Mr. DOLE];

The Senator from Wyoming [Mr. SIMPSON];

The Senator from Mississippi [Mr. COCHRAN];

The Senator from South Carolina [Mr. THURMOND];

The Senator from Indiana [Mr. LUGAR];

The Senator from Minnesota [Mr. BOSCHWITZ]; and

The Senator from South Dakota [Mr. PRESSLER].

The Doorkeeper announced the ambassadors, ministers, and charges d'affaires of foreign governments.

The ambassadors, ministers, and chargés d'affaires of foreign governments entered the Hall of the House of Representatives and took the seats reserved for them.

The Doorkeeper announced the Cabinet of the President of the United States.

The members of the Cabinet of the President of the United States entered the Hall of the House of Representatives and took the seats reserved for them in front of the Speaker's rostrum.

At 11 o'clock and 8 minutes a.m., the Doorkeeper announced the President of the Czechoslovak Socialist Republic.

The President of the Czechoslovak Socialist Republic, escorted by the committee of Senators and Representatives, entered the Hall of the House of Representatives, and stood at the Clerk's desk.

[Applause, the Members rising.]

The SPEAKER. Members of the Congress, it is my great privilege and I deem it a high honor and personal pleasure to present to you His Excellency Vaclav Havel, President of the Czechoslovak Socialist Republic.

[Applause, the Members rising.]

ADDRESS BY HIS EXCELLENCY VACLAV HAVEL, PRESIDENT OF THE CZECHOSLOVAK SOCIALIST REPUBLIC

(The following address was delivered in Czech, with a simultaneous translation in English.)

President HAVEL. Dear Mr. Speaker, dear Mr. President, dear Senators, and Members of the House, ladies and gentlemen:

My advisers advised me to speak on this important occasion in Czech. I don't know why. Perhaps they wanted you to enjoy the sweet sounds of my mother tongue.

The last time they arrested me, on October 27, of last year, I didn't know whether it was for 2 days or 2 years.

Exactly 1 month later, when the rock musician Michael Kocab told me that I would probably be proposed as a Presidential candidate, I thought it was one of his usual jokes.

On the 10th of December 1989, when my actor friend Jiri Bartoska, in the name of the Civic Forum, nominated me as a candidate for the office of President of the Republic, I thought it was out of the question that the Parliament we had inherited from the previous regime would elect me.

Nineteen days later, when I was unanimously elected President of my country, I had no idea that in 2 months later I would be speaking in front of this famous and powerful assembly, and that what I say would be heard by millions of people who have never heard of me and that hundreds of politicians and political scientists would study every word I say.

When they arrested me on October 27, I was living in a country ruled by the most conservative Communist government in Europe, and our society slumbered beneath the pall of a totalitarian system. Today, less than 4 months later, I am speaking to you as the representative of a country that has set out on the road to democracy, a country where there is complete freedom of speech, which is getting ready for free elections, and which wants to create a prosperous market economy and its own foreign policy.

It is all very extraordinary.

But I have not come here to speak for myself or my feelings, or merely to talk about my own country. I have used this small example of something I know well, to illustrate something general and important.

We are living in very extraordinary times. The human face of the world is changing so rapidly that none of the

familiar political speedometers are adequate.

We playwrights, who have to cram a whole human life or an entire historical era in a 2-hour play, can scarcely understand this rapidity ourselves. And if it gives us trouble, think of the trouble it must give to political scientists, who spend their whole lives studying the realm of the probable. And have even less experience with the realm of the improbable than us, the playwrights.

Let me try to explain why I think the velocity of the changes in my country, in Central and Eastern Europe, and of course in the Soviet Union itself, has made such a significant impression on the face of the world today, and why it concerns the fate of us all, including you Americans. I would like to look at this, first from the political point of view, and then from a point of view that we might call philosophical.

Twice in this century, the world has been threatened by a catastrophe; twice this catastrophe was born in Europe, and twice you Americans, along with others, were called upon to save Europe, the whole world and yourselves. The first rescue mission—among other things—provided significant help to us Czechs and Slovaks.

Thanks to the great support of your President Wilson, our first President, Tomas Garrigue Masaryk, could found our modern independent state. He founded it, as you know, on the same principles on which the United States of America had been founded, as Masaryk's manuscripts held by the Library of Congress testify.

In the meantime, the United States made enormous strides. It became the most powerful nation on Earth, and it understood the responsibility that flowed from this. Proof of this are the hundreds of thousands of your young citizens who gave their lives for the liberation of Europe, and the graves of American airmen and soldiers on Czechoslovak soil.

But something else was happening as well: the Soviet Union appeared, grew, and transformed the enormous sacrifices of its people suffering under totalitarian rule, into a strength that, after World War II, made it the second most powerful nation in the world. It was a country that rightly gave people nightmares, because no one knew what would occur to its rulers next and what country they would decide to conquer and drag into their sphere of influence, as it is called in political language.

All of this taught us to see the world in bipolar terms, as two enormous forces, one a defender of freedom, the other a source of nightmares. Europe became the point of friction between these two powers and thus it turned into a single enormous arsenal divided into two parts. In this process, one half of the arsenal became part of that nightmarish power, while the other—the free part—bordering on the ocean and having no wish to be driven into it, was compelled, together with you, to build a complicated security system, to which we probably owe the fact that we still exist.

So you may have contributed to the salvation of us Europeans, of the world and thus of yourselves for a third time: you have helped us to survive until today—without a hot war this time—but merely a cold one.

And now what is happening is happening: the totalitarian system in the Soviet Union and in most of its satellites is breaking down and our nations are looking for a way to democracy and independence. The first act in this remarkable drama began when Mr. Gorbachev and those around him, faced with the sad reality of their country, initiated their policy of "perestroika." Obviously they had no idea either what they were setting in motion or how rapidly events would unfold. We knew a lot about the enormous number of growing problems that slumbered beneath the honeyed, unchanging mask of socialism. But I don't think any of us knew how little it would take for these problems to manifest themselves in all their enormity, and for the longings of these nations to emerge in all their strength. The mask fell away so rapidly that, in the flood of work, we have literally no time even to be astonished.

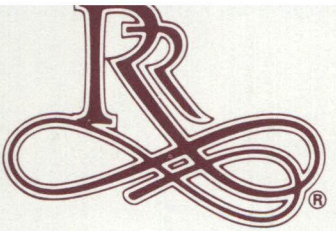
What does all this mean for the world in the long run? Obviously a number of things. This is, I am firmly convinced, a historically irreversible process, and as a result Europe will begin again to seek its own identity without being compelled to be a divided armory any longer. Perhaps this will create the hope that sooner or later your boys will no longer have to stand on guard for freedom in Europe, or come to our rescue, because Europe will at last be able to stand guard over itself. But that is still not the most important thing: the main thing is, it seems to me, that these revolutionary changes will enable us to escape from the rather antiquated straitjacket of this bipolar view of the world, and to enter at last into an era of multipolarity. That is, into an era in which all of us—large and small—former slaves and former masters—will be able to create what your great President Lincoln called the family of man. Can you imagine what a relief this would be to that part of the world which for some reason is called the Third World, even though it is the largest?

I don't think it's appropriate simply to generalize, so let me be specific:

First, as you certainly know, most of the big wars and other conflagrations over the centuries have traditionally begun and ended on the territory of modern Czechoslovakia, or else they were somehow related to that area. Let the Second World War stand as the most recent example. This is understandable: whether we like it or not, we are located in the very heart of Europe, and thanks to this, we have no view of the sea, and no real navy. I mention this because political stability in our country has traditionally been important for the whole of Europe. This is still true today. Our government of national understanding, our present Federal Assembly, the other bodies of the state and I myself will personally guarantee this stability until we hold free elections, planned for June. We understand the terribly complex reasons, domestic political reasons above all, why the Soviet Union cannot withdraw its troops from our territory as quickly as they arrived in 1968. We understand that the arsenals built there over the past 20 years cannot be dismantled and removed overnight. Nevertheless, in our bilateral negotiations with the Soviet Union, we would like to have as many Soviet units as possible moved out of our country before the elections, in the interests of political stability. The more successful our negotiations, the more those who are elected in our places will be able to guarantee political stability in our country even after the elections.

Second, I often hear the question: How can the United States of America help us today? My reply is as paradoxical as the whole of my life has been: You can help us most of all if you help the Soviet Union on its irreversible, but immensely complicated road to democracy. It is far more complicated than the road open to its former European satellites. You yourselves know best how to support, as rapidly as possible, the nonviolent evolution of this enormous, multinational body politic toward democracy and autonomy for all of its peoples. Therefore, it is not fitting for me to offer you any advice. I can only say that the sooner, the more quickly, and the more peacefully the Soviet Union begins to move along the road toward genuine political pluralism, respect for the rights of nations to their own integrity and to a working—that is a market—economy, the better it will be, not just for Czechs and Slovaks, but for the whole world. And the sooner you yourselves will be able to reduce the burden of the military budget borne by the American people. To put it metaphorically: The millions you give to the East today will soon return to you in the form of billions in savings.

Third, it is not true that the Czech writer Vaclav Havel wishes to dissolve the Warsaw Pact tomorrow and then NATO the day after that, as some eager journalists have written. Vaclav Havel merely thinks what he has already said here, that for another hundred years, American soldiers shouldn't have to be separated from their mothers just because Europe is incapable of being a guarantor of world peace, which it ought to be, in order to make some amends, at least, for having given the world two world wars. Sooner or later Europe must recover and come into its own, and



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NAMTRAK STATUS REPORT

ISSUE Product Liability

BILL NO HR 2700 SPONSOR Luken (D-OH-1)
BILL TITLE The Uniform Product Safety Act of 1989
COMPANION BILL S 1400 SPONSOR Kasten (R-WI)

STATUS
Hearings 2/22 on NAM-backed S 1400 in S-Commerce Subcmte on Consumer. Full Cmte Chairman Hollings (D-SC) has promised a speedy markup. S 1400's primary sponsors include Sens. Danforth (R-MO), Inouye (D-HI), Kasten (R-WI) and Rockefeller (D-WV). Pending in S-Commerce Cmte. with 10 of 20 cmte members as cosponsors.

HR 2700 introduced 6/21. Similar to HR 1115 from 100th Congress. Bipartisan support in both H-Judiciary Cmte and H-Energy and Commerce Cmte. Hearings expected to begin soon in H-Judiciary Subcmte.

Sen. McConnell's (R-KY) tort reform bill introduced 6/1. Pending in S-Judiciary Cmte. No action.

LEGISLATIVE HISTORY
HR 2700 introduced 6/21. Referred to H-Judiciary and H-Energy & Commerce Cmtes. S 1100 introduced 6/1 and referred to S-Judiciary Cmte. S. 1400 introduced 7/25 pending in S-Commerce Cmte.

100th Congress history: HR 1115 introduced 2/18/87. H-Energy and Commerce Cmte cleared bill 6/14/88. Referred to H-Judiciary and H-Education & Labor Cmtes. No further action.

BILL SUMMARY
HR 2700 and S 1400 would:
- o Provide incentives for settlement of product liability cases.
- o Set a "clear and convincing evidence" for liability in punitive damage awards.
- o Provide 2-year statute of limitations and 25-year time limit on liability for capital good products.
- o Limit punitive damages if a product is misused or altered.
- o Eliminate joint and several liability for noneconomic damages.
- o Include product sellers. Product sellers would be liable for harm caused by their own fault or for manufacturers' errors when manufacturer cannot be brought into court.
- o Create an illegal drug and alcohol defense. If intoxicated person was more than 50 percent responsible for injury, he could not sue someone else for damages.

S 1100 would:
- o Abolish the joint and several liability doctrine for all torts. Each party pays damages based on their share of responsibility for

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the injury.
- o Promote an alternative dispute resolution. All defense and plaintiff attorneys are required to inform clients of alternatives to civil litigation.
- o Provides for statutory liability of local government.

SIGNIFICANCE
- o The current product liability system pays an estimated $4.8 million in legal and transaction costs for every $1.9 million paid to claimants.
- o American manufacturers' ability to innovate--and be competitive--is being seriously hurt by existing product liability laws.
- o Massive product liability insurance coverage costs have led manufacturers to discontinue product lines, close plants and layoff workers.

NAM POSITION
- o Supports. Establishment of a federal product liability standard will help improve the climate of uncertainty currently facing manufacturers, consumers and product sellers.
- o Would ease the difficulty many manufacturers continue to face in securing affordable product liability insurance coverage.

OUTLOOK
S-Commerce Consumer Subcmte expected to hold hearings in early 1990, followed by H-Judiciary Subcmte on Economic & Commercial Law. Senate floor vote could occur by mid-summer.

NAM ACTIONS
- o NAM cosponsored Product Liability Rally 7/26/89.
- o NAM Issue Briefing Breakfast on Product Liability 6/21/89. Rep. Tom Luken (D-OH-1), sponsor of HR 2700, was featured speaker.
- o Second Product Liability Fly-In 3/21-22/89.
- o Delivered testimony on 5/5/87 before the H-Consumer Protection Subcmte.
- o Product Liability Fly-In to Capitol Hill on 3/11/86.
- o Product Liability Phone-In on 9/9/86.

DEPT Industrial Relations POL CMTE Risk Management
CONTACT Phyllis Eisen, (202) 637-3135

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DATA PRODUCT BG1
ISSUE LOBBYING POINTS & BACKGROUND REPORT--PRODUCT LIABILITY
DATE 1/3/89
REPORT

/nof

NAMTRAK LOBBYING POINTS AND BACKGROUND REPORT

ISSUE Product Liability

DEPT Industrial Relations POL CMTE Loss Prev. & Control

NAM STAFF CONTACT Phyllis Eisen (202) 637-3135, NAMNET ID: NAM010

DATE 1/3/89

CONGRESSIONAL COMMITTEE(S) S-Commerce; S-Judiciary; H-Energy & Commerce; H-Judiciary

LOBBYING POINTS

NAM POSITION

NAM believes a federal product liability tort statute drafted with precision could go far toward improving the climate of uncertainty currently facing consumers, manufacturers, and product sellers who deserve to know the legal standards that will be used to judge whether a product is defective.

NAM and other business groups support tort reform that includes the following standards:

o fault based liability;
o elimination of joint and several liability;
o adoption of a stringent punitive damages standard based on malice;
o elimination of double recoveries; and
o limiting product seller liability.

LOBBYING POINTS

o The current product liability system pays an estimated $4.8 million in legal and transaction costs for every $1.9 million paid to claimants.

o A recent survey of more than 500 chief executives by the Conference Board, a business research association, revealed:
* Four in 10 executives believe that product liability concerns have had a major impact on their business decisions, even if they have never been sued in a product liability case;
* One-third of all firms surveyed have canceled plans to introduce new products because of liability concerns;
* More than half of those firms reporting a major impact have discontinued product lines;
* More than one-fifth believe they have lost market share to foreign

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competitors because of product liability costs; and
* Many have closed plants and laid off workers.

o According to the Department of Justice, between 1975 and 1985, there was a 758 percent increase in the number of product liability suits filed. During roughly the same period, the cost of judgements granted in these cases rocketed 370 percent.

o Trial attorneys are the biggest winners under the current liability system. They typically retain 30-50 percent of all final judgements.

o Not complying with or observing a product's warning or use label contributed to product-caused injuries in more than a quarter of product liability claims. Moreover, changes in a product was a proximate cause of injury or damage in more than a third of all claims.

PRO/CON ARGUMENTS

o The chief opponents of product liability reform have been the trial lawyers lobby and certain consumer-advocacy groups. Trial lawyers oppose reform ostensibly because they view the issue as a matter of state, rather than federal, tort law jurisdiction. Some consumer advocates claim the issue should be addressed through greater regulation of the insurance industry. NAM rejects both arguments, stressing that in an interstate system, federal product liability standards are needed.

o Opponents of product liability reform argue the current liability system--even with its excesses--is effectively protecting consumers from faulty products. Ironically, though, the present product liability system may well be creating a more dangerous world by stifling American industry's ability to innovate. Peter Huber, a senior fellow at the Manhattan Institute of Technology, argues in his recent book "Liability: The Legal Revolution and its Consequences," that technology and innovation are on trial in today's liability system--and they are losing. Huber correctly argues that innovation--and the safety improvements that result from it--are being held hostage by the courts. In many cases, judges and juries have become the ultimate arbiters of whether products are fit for public use. Hence, the current liability system is tilted against the innovator, and tends to favor the status quo.

o Trial lawyers and consumer groups continually claim that federal product liability reform proposals are blatantly "anti-consumer" and slanted toward business interests. Consumer advocates in the 100th Congress opposed a moderate product liability measure--HR 1115--despite the fact many positions they had previously advocated were incorporated into the bill. For example, HR 1115 as reported by the full Energy and Commerce Committee contained the following consumer-backed provisions:
* A mediation or alternative dispute resolution procedure;

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* A continuing duty to warn placed on manufacturers; and
* A uniform strict liability standard established throughout the U.S.

HR 1115 would have resulted in tremendous savings in lawyers' fees and transaction costs that would have benefited all Americans--while in no way limiting the amount that an injured party would have been awarded in a product liability lawsuit.

BACKGROUND

The U.S. has never had uniform national product liability standards. Individual states have historically developed and applied their own product liability laws, which have been, in turn, subject to varying judicial interpretation. The resulting inconsistent patchwork of state laws--combined with increased litigation and higher awards and settlements--has led to spiraling product liability premiums, a shortage of insurance in some industries and widespread uncertainty on the part of consumers, manufacturers and product sellers.

Product liability first drew federal attention in 1976, when the White House held a Conference on Product Liability. In 1977, the Federal Interagency Task Force reported that uncertainties in the tort system constituted a major problem. In the years that followed, several congressional hearings were conducted on the issue. The Interagency Task Force in 1979 developed the Uniform Product Liability Act (UPLA) as a model for voluntary correction of the problems identified by the individual states. This solution was supported by the business community and efforts were begun to promote the adoption of UPLA in the states.

Unfortunately, few state legislatures responded. The states that did take action addressed only limited problems--and did so without regard to state-by-state consistency. Years of effort to correct problems at the state level demonstrated that the states lack the incentive to solve a truly national problem.

Congressional attention to the product liability situation increased in the 96th, 97th and 98th Congresses. Meanwhile, the problems associated with product liability grew to crisis proportions. The average size of product liability awards tripled between 1974 and 1986. The number of product liability suits filed in federal courts doubled between 1978 and 1985. As premiums and investment income fell short of what insurance companies needed to cover claims, they began raising premiums at a devestating pace. Premium increases of 50 to 100 to 500 percent--often with higher deductibles and lower coverage levels--became commonplace.

Meanwhile, the American Trial Lawyers Association skillfully played both sides of the issue. At the state level, the association testified that product liability was a national, not a state or local issue. Before Congress, the trial lawyers lobby testified that a federal solution was not needed and that the issue should be left for states to decide.

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99TH CONGRESS LEGISLATION

By 1985, it was apparent to many in and out of Congress that national standards were necessary. The issue then became how to fashion a national product liability bill that would both address the fundamental problems and simultaneously garner enough support to be enacted. In May of 1985, a reform bill, S 100, died on an 8-8 tie vote in Senate Commerce, Science and Transportation Committee.

Reform advocates began 1986 essentially at "square one," with legislation in the staff draft stage. NAM sponsored the product liability fly-in, where some 700 manufacturers from around the nation came to Washington to personally impress upon lawmakers the need for reform. Continued grassroots efforts kept heat on lawmakers to address the issue throughout the year.

The Senate Commerce Committee approved a modest core package of reforms June 19, 1986, and voted 10-7 to pass a more extensive, controversial reform bill June 26. The bill, S 2760, was debated on the Senate floor in September, but was filibustered by Sen. Hollings (D-SC), a major reform opponent and key ally of the trial lawyers lobby. The Senate voted on September 25, by a margin of 84-13, to proceed with consideration of the bill. However, Majority Leader Dole (R-KS) reluctantly asked that the measure be pulled from the floor to permit the Senate to move on to pressing budget issues after it became clear that Sen. Hollings' parliamentary maneuvers would prevent rapid consideration of the bill.

100TH CONGRESS LEGISLATION

Determined grassroots efforts by industry in the 100th Congress helped break the House logjam blocking progress on product liability reform legislation. The House Energy and Commerce Committee on June 14, 1988, became the first House panel ever to approve a federal product liability reform bill by a 30-12 margin. The landmark measure--HR 1115, sponsored by Rep. Bill Richardson (D-NM-3)--would have established a federal liability standard, replacing state product liability laws. A majority of panel Democrats joined all Republicans in voting for the measure.

Full Energy and Commerce Committee consideration of HR 1115 began on May 10, 1988. In all, the committee debated more than 40 amendments during weeks of contentious debate and grueling markup. Chief among these was an amendment offered by Rep. Mike Synar (D-OK-2) to modify the standards of liability section of the bill by protecting the state-of-the-art defense and establishing clear, uniform guidelines for product warnings and instructions. Adoption of the Synar amendment was critical to attracting broad-based support for the bill from committee members.

The committee adopted several industry-backed amendments to the Synar proposal during subsequent markup sessions that significantly strengthened HR 1115. These included:

- o A "frivolous" lawsuit amendment, offered by Rep. Ralph Hall (D-TX-4), to give the courts authority to impose sanctions against both defendants and plaintiffs that pursue frivolous lawsuits;

- o A misuse and alteration amendment, offered by Reps. Joe Barton (R-TX-6) and Phil Sharp (D-IN-2), to reduce a claimant's damages if a product was misused or altered (included third party alteration); and

- o Another Hall amendment adopted on the final day of markup reversing a subcommittee action to allow the states to pass laws defending an environmental tort as a product liability action.

Committee markup was punctuated by attempts to water down the measure from consumer groups and their trial lawyer allies. However, a united business community helped defeat numerous weakening amendments.

Subsequent to the Energy and Commerce Committee's markup, HR 1115 was referred sequentially the Education and Labor, and Judiciary Committees for 45 days. The Educaton and Labor Subcommittee on Labor Standards held a hearing on worker compensation provisions in the measure on September 27. A major hearing was scheduled in the Judiciary Subcommittee on Monopolies, but was cancelled at the last minute due to the rush to adjourn the 100th Congress. These hearings marked the first time either of these panels had moved to exercise their jurisdiction over product liability reform legislation.

The Senate did not take definitive action on product liability reform measures in the 100th Congress. Sen. Hollings, chairman of the Senate Commerce Committee with jurisdiction over product liability legislation, chose to let the House to take the lead on the issue. Because the full House did not produce a product liability bill before adjournment, Hollings was able to avoid the issue for another year.

For information on the status of current legislation, see the NAMTRAK Status Report.

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NAMNET BILL SUMMARY

ISSUE Product Liability

BILL(S) S 1100

SEARCH TERM Product

DEPT Industrial Relations POL CMTE Risk Management
NAM STAFF CONTACT Phyllis Eisen PHONE (202) 637-3135

DATE REVISED 6/22/89

For additional information on this issue, see NAMTRAK status and Background Reports.

BILL	S 1100
TITLE	Lawsuit Reform Act of 1989
SPONSOR	McConnell (R-KY)
INTRODUCED	6/1/89
REFERRAL	S-Judiciary
COMPANION BILL	HR 2700
TITLE	The Uniform Product Safety Act of 1989
SPONSOR	Luken (D-OH-1)
INTRODUCED	6/19/89
REFERRAL	H-Energy & Commerce and Judiciary

EXECUTIVE SUMMARY
S 1100 would provide a significant reform of the nation's tort system and is aimed at reducing the overwhelming number of lawsuits that are clogging courts throughout the nation and costing consumers billions of dollars each year. The bill is supported by a coalition of over thirty major organizations, including business, volunteer groups, health care providers, local government organizations, and professional associations.

KEY PROVISIONS
The Lawsuit Reform Act would reduce lawsuits and put some limits on liability, through the following:

- Abolish the joint and several liability doctrine for all torts. Under this provision no party shall be held liable for the actions of others. Each party must pay only their proportional share of the total damages, based on their share of responsibility for causing the injury.
- Establish a "loser pays" provision. This provision would deter frivolous lawsuits and undue delay by requiring the losing party of any civil action covered by this bill to pay the attorneys' fees and costs of the prevailing party. One would be required to pay the

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prevailing party more than what the loser has paid or agreed to pay their own attorney. This would not apply if the loser had offered to submit the case to alternative dispute resolution, or if the loser would be considered indigent under the guidelines and regulations of the Legal Services Corporation.

- o Create an illegal drug and alcohol defense. If a person was under the influence of alcohol or an illegal drug at the time of the injury, and the intoxicated condition was at least 50 percent responsible for the injury, the bill will not allow the person to sue someone else for damages for this injury.
- o Promote an alternative dispute resolution. All defense and plaintiff attorneys are required to inform clients of alternatives to civil litigation, and certify to the court upon filing any action that such information was provided. If both parties voluntarily agree to submit to alternative dispute resolution, the decision of the alternative forum shall be binding, and there shall be no right of appeal.
- o Provide subrogation and Workers' Compensation. Awards for damages in product liability suits will be offset by payments from workers' compensation programs, and allows for a right of subrogation.
- o Provides for statutory liability of local government

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NAMNET BILL SUMMARY

ISSUE Product Liability Reform

BILL(S) HR 2700

SEARCH TERM Product

DEPT Industrial Relations POL CMTE Risk Management
NAM STAFF CONTACT Phyllis Eisen PHONE (202) 637-3135

DATE REVISED 6/22/89

For additional information on this issue, see NAMTRAK Status and Background Reports.

BILL	HR 2700
TITLE	The Uniform Product Safety Act of 1989
SPONSOR	Luken (D-OH-1)
INTRODUCED	6/19/89
REFERRAL	H-Energy & Commerce and Judiciary
COMPANION BILL	S 1100
TITLE	Lawsuit Reform Act of 1989
SPONSOR	McConnell (R-KY)
INTRODUCED	6/1/89
REFERRAL	S-Judiciary

EXECUTIVE SUMMARY
The Uniform Product Safety Act of 1989 establishes uniform federal standards for determining the liability of manufacturers and product sellers for products sold in interstate commerce. The purpose of the bill is to provide fair and balanced standards that will promote increased safety in the design, manufacture and use of products; encourage innovation and the development of new products by reducing manufacturers' uncertainty about product liability risks; and reduce the inordinately high transaction costs by encouraging the prompt and fair settlement of claims, by discouraging frivolous actions, and by providing greater stability and predictability in the system.

KEY PROVISIONS
The bill would:

o Establish standards of liability. The bill establishes three theories on which a manufacturer may be sued: negligence, strict liability, and intentional wrong doing. In a strict liability claim, a manufacturer may be liable if the product 1) contained a construction flaw, 2) did not conform to the manufacturer's express warranty, 3) failed to contain adequate warnings or instruction that a reasonably prudent person would have provided, or 4) was defective

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and unreasonably dangerous to the user or consumer in design.

- o Allow for inherent characteristics. A manufacturer will not be liable if the claimant's harm was caused by an "inherent characteristic" of the product (e.g. sugar causes tooth decay, glass breaks).
- o Permit states to determine unavoidably unsafe drugs and medical devices. State law will determine the liability of manufacturers of drugs and medical devices that are "unavoidably unsafe."
- o Provide state of the art defense. The bill provides a defense for manufacturers if, when the product left its control, the manufacturer could not have known of a product design defect, or in light of available scientific knowledge, could not have developed a feasible alternative safer design. There is an exception to this defense if the court determines that the product is so unsafe compared to its usefulness that it should not have been marketed.
- o Provide misuse defense. A claimant who misuses or alters a product will have any damages reduced proportionate to his or her degree of fault.
- o Include product sellers. Product sellers will be liable for harm caused by their own fault. They will be responsible for the manufacturer's errors where the manufacturer cannot be brought into court or lacks the funds to pay a judgment.
- o Establish alcohol and drug defense. A claimant whose use of alcohol or drugs is over 50 percent responsible for the accident causing his or her injury will be barred from any recovery.
- o Distinguish punitive damages. State law continues to determine if, and on what grounds, punitive damages are allowable. However, the bill establishes a "clear and convincing evidence" burden of proof for awarding punitive damages and allows the option of a separate proceeding -- called bifurcation -- to consider punitive damages, apart from the issues of liability and compensatory damages.
- o Provide time limitations. The bill provides a two-year statute of limitations which begins to run when the claimant discovers or should have discovered the harm and its cause. The bill establishes a 25-year statute of repose for capital goods, which applies if the claimant is eligible for workers' compensation benefits and the harm is not a chronic illness.
- o Reduce by workers' compensation offset. Damages are reduced by the amount of workers' compensation benefits the claimant may receive and employers are precluded from shifting the costs of workers' compensation onto manufacturers -- unless the employer was not at fault in causing the claimant's harm.
- o Impose sanctions on frivolous claims and defenses. The bill also directs the courts to impose sanctions on attorneys who needlessly increase the cost of litigation by filing frivolous pleadings.
- o Maintain availability of information. The bill establishes standards a court must apply in permitting the disclosure of material covered by a protective order.
- o Adopt mediation. The bill adopts a mediation procedure designed to expedite the settlement of claims.
- o Require reports. The bill requires the Secretary of Commerce to provide annual reports to Congress on the effects of the bill upon the cost and availability of product liability insurance. It also requires the Secretary of Commerce to report to Congress biennially

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on the effect of the bill on product liability litigation and costs, product innovation, competitiveness of U.S. manufacturers, and jobs.

COMPARISON WITH 100th Congress Bill HR 1115

The Uniform Product Safety Act of 1989 is based on HR 1115, which was reported out of the House Energy & Commerce Committee in the last Congress. Although closely tracking HR 1115, this legislation makes several changes in the interest of greater clarity and ease of implementation:

- o Technical changes in the language of the provisions governing alcohol and drug defenses and punitive damages clarify the intent of those sanctions.
- o Modifications to the section governing protective orders clarifying the standards a court must apply in permitting disclosure of material covered by a protective order and in issuing court orders and approving agreements between parties regarding confidential information.
- o To ensure uniform and fair procedures for handling product liability actions, the section mandating the development of special small claims procedures is eliminated.
- o To encourage settlements, the mediation provisions have been streamlined and the incentives on the parties to settle have been balanced.
- o The bill deletes a provision in last year's bill that was outside the scope of product liability concerns and that would have removed from coverage various products, including common birth control pills that may have a contraceptive effect subsequent to conception.
- o In the interest of completeness and uniformity of coverage, a provision that would allow one state to treat product liability claims as if they were environmental tort claims has been deleted. The bill makes clear, however, that it is applicable only to product liability claims and not to environmental torts.

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Briefing

To: Ed
From: Bobbie
FYI

Volume XV
Number 3
February 26, 1990

A Weekly Summary
of Legislative and
Regulatory Developments

National Association
of Manufacturers
Washington, D.C.

Mandated Leave Bill Headed for Possible House Showdown

The House is expected to vote soon—perhaps within the next month—on mandated leave legislation, H.R. 770. While the issue has received extensive press coverage for several years, this will be the first time a parental leave bill has actually reached the House floor. The vote is expected to be very close, and House leaders may postpone a vote—as they have in the past—if they are uncertain about the measure's level of support. NAM member communications will therefore play a significant role.

NAM is a founding member of the coalition working to defeat H.R. 770. The bill would initially apply to all firms with 50 or more workers, with the threshold dropping to 35 employees three years after enactment. Companies would be required to provide every employee upon request with 10 weeks of job-guaranteed family leave every two years for the birth or adoption of a child, or to care for an ill child or parent. The bill would also mandate 15 weeks of job-protected employee sick leave annually, with no interruption in health benefits. Provisions would be enforced via the Department of Labor or through jury trials, with damages allowed up to four times lost back pay. Proponents may make modifications in an effort to win more votes.

The floor battle against H.R. 770 will be led by Rep. Fred Grandy (R-IA-6). In a 2/8 letter to their House colleagues, Reps. Grandy and Tim Penny (D-MN-1) said H.R. 770 is "unworkable and fails to recognize the legitimate needs of an employer to orderly manage its workforce." They noted that "employers have limited resources and that only a certain finite amount can be set aside for employee benefits. A federal mandate dictating what type of benefits must be provided," the letter continued, "only reallocates portions of the benefit budget to a favored class of employees—those identified by the legislation—at the expense of the rest." Grandy and Penny concluded, "Employers should be allowed the flexibility to tailor their benefit plans to the needs of their employees."

Federal intervention is also unnecessary. Almost all working women today have some form of job-guaranteed maternity leave. A recent Harris poll shows that 73 percent of the working public believes their employers make adequate provisions for regular and emergency needs of working parents. And as the competition for qualified, productive workers increases in the 1990s, employers are redoubling their efforts to meet the diverse benefits needs of their workers.

Action Needed. *NAM members should contact their representatives as soon as possible to urge opposition to any form of mandated leave legislation. Anecdotal evidence about the impact the bill will have on your company will be particularly effective. About 45 representatives are still believed to be undecided. For additional information, contact Diane Generous of NAM at (202) 637-3133.*

Photo: Bruce Reedy

NAM Vice President for Resources and Environment Richard Seibert *(right)* discusses cost of Clean Air Act reauthorization bill permitting provision at NAM press conference.

NAM Member Support Needed as Senate Clean Air Vote Approaches

Manufacturers will suffocate under an avalanche of new paperwork if the permitting provisions in the Senate clean air bill, S. 1630, become law. Firms such as tool and die shops, chemical processors, users and makers of plastics, and even dry cleaners would be required for the first time to obtain *federally-approved*, state-issued permits to construct, modify or simply operate their businesses.

NAM member phone calls and telegrams to lawmakers are needed immediately, since a Senate vote on final passage of S. 1630 may occur this week. Senate Majority Leader George Mitchell (D-ME) hopes to end debate on the bill by invoking cloture—which requires 60 votes.

Manufacturers are already required to obtain construction permits in some states. S. 1630 would require firms to submit detailed emissions analyses and compliance schedules to receive U.S. Environmental Protection Agency-approved permits, which would need to be renewed every five years. A single permit could cost

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4 Pentagon Official Outlines Plans

thousands of dollars in legal fees and engineering analysis. This is in addition to the cost of 24-hour-per-day continuous emissions monitoring that would be required by S. 1630. Monitoring just four chemicals can have equipment costs exceeding $250,000.

NAM held a press conference during the congressional recess last December to publicize these points. More recently, association President Jerry Jasinowski noted in a letter to the Senate that the bill's technical requirements and costs—estimated at $54-$104 billion a year—could force many industrial sectors to face plant shutdowns and employee layoffs due to economic burdens.

Sen. Don Nickles (R-OK) has proposed an NAM-supported amendment to improve the permitting section. It would return flexibility to S. 1630 by allowing firms to make routine operational changes to their facility—in an uncomplicated and less expensive manner—so long as the plant continued to operate at or below a fixed emissions level.

Action Needed. *NAM members should contact their senators immediately by telephone, telegram or facsimile. All senators can be reached through the Capitol Hill switchboard at (202) 224-3121. Stress the following points in communications:*

Action Alert

- *Industry strongly supports reauthorizing the Clean Air Act to protect human health, but such legislation must also be cost-effective and protect the competitiveness of the American economy.*
- *The Nickles amendment is necessary to replace S. 1630's complicated and duplicative permitting requirements with a straight-forward, manageable system of state-issued operating permits.*
- *Congressionally-mandated exposure-based health standards should be removed from S. 1630, as they would unnecessarily force some firms to cease operations. Health-based standards should be established by EPA scientists, not mandated by Congress.*
- *S. 1630's global climate provisions should be removed, as knowledge about global climate change remains incomplete. NAM supports aggressive research, but opposes unilateral actions that are unlikely to have a positive impact on climate change and carry counterproductive long-run economic costs. NAM continues to support the Montreal ozone layer protection protocol.*

NAM Board Votes To Oppose Social Security Payroll Tax Scheme

NAM's Board of Directors voted unanimously 2/10 to oppose a proposal by Sen. Daniel Moynihan (D-NY) to cut the Social Security payroll tax. The 140-plus manufacturing leaders agreed that the "ill-advised" proposal would lead Congress to raise other taxes, "with the likliest result politically being income tax increases, especially on corporations."

Photo: Ray Dixon

Richard E. Heckert, chairman of the Finance Committee of the Du Pont Company, testified before the Senate Budget Committee on behalf of NAM 2/7 on the issue of health costs. Heckert, who was NAM's 1988-89 chairman, told the senators that health cost escalation is seriously affecting manufacturers' bottom line and raising questions about the future of employment-based benefits. He offered NAM's 10-point reform recommendations.

The NAM resolution stressed that the measure would "generate intense pressure for offsetting spending cuts and/or tax increases." The board emphasized, "While deficit reduction through spending restraint is always desirable, spending cuts of the size needed to offset a $55 billion tax cut simply are not politically achievable."

The Moynihan proposal, S. 2016, would nullify the increase in the Social Security payroll tax which took effect on 1/1/90. That increase—to 7.65 percent—was mandated by legislation enacted in 1983 to provide long-term financing for the program.

"Changing the 1983 financing structure so dramatically and so soon," the resolution continued, "will erode whatever confidence remains that any tax structure adopted by the Congress will actually remain in place for more than a few short years."

NAM's position "is not meant to imply there are no problems with the Social Security system," the NAM resolution continued. The NAM directors suggested that Congress reexamine the possibility of operating the system more as an insurance type of operation and less as a welfare program.

NAM will testify at a Senate Finance Committee hearing on the proposal 2/27. Finance Committee Chairman Lloyd Bentsen (D-TX), Senate Majority Leader George Mitchell (D-ME) and House Speaker Thomas Foley (D-WA-5) have all expressed concerns with the measure—weakening its prospects in Congress.

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NAM Calendar

Complete listing of NAM activities and Congressional Dialogues available on-line in NAM Bulletin Board section of NAMNET. To confirm meetings at NAM Headquarters, call the NAM Meeting Hotline toll-free at (800) 637-1193, or in the Washington area, (202) 637-3432.

March 6-7: **Government Regulation and Competition Spring Meeting.** NAM Headquarters, Washington, D.C. (202) 637-3049.

March 13-14: **Small Manufacturers Washington Legislative Conference.** Ramada Renaissance Techworld, Washington, D.C. (202) 637-3107.

March 15: **Strategies For Success: Tomorrow's Manufacturing Work Force.** NAM National Conference on Human Resources. Ramada Renaissance Techworld, Washington, D.C. (202) 637-3065.

March 25-28: **Public Affairs 2000.** The 1990 NAM Public Affairs Conference. The Wigwam Resort, Phoenix, Arizona. (202) 637-3120.

April 29-May 2: **NIC-IRG Spring 1990 Meeting.** The Cloister, Sea Island, Georgia. (202) 637-3053.

May 2-3: **NAM Taxation Committee Spring Meeting.** Marriott Marquis Hotel, New York City. (202) 637-3072.

Congressional Dialogues. *Dialogues provide an opportunity for NAM members to meet with members of Congress in their home states to discuss policy issues affecting manufacturers.*

Indiana: **Rep. Philip Sharp (D-2),** Indianapolis, 3/9. (708) 698-3838.

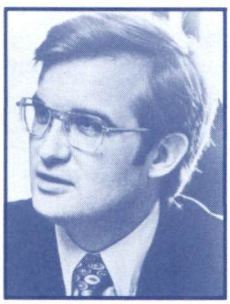
Maryland: **Rep. Tom McMillen (D-4),** Baltimore, 3/19. (215) 363-1955.

Ohio: **Rep. Tony Hall (D-3),** Dayton, 3/16. (708) 698-3838.

Oregon: **Rep. Denny Smith (R-5),** Portland, 3/23. (708) 698-3838.

Pennsylvania: **Rep. George Gekas (R-17),** Harrisburg, 3/9. (412) 869-2932; **Rep. Peter Kostmayer (D-8),** Warrington, 3/12. (215) 363-1955; **Rep. Austin Murphy (D-22),** Pittsburgh, 3/16. (412) 869-2932.

Texas: **Rep. Tom Delay (R-22),** Houston, 3/9. (713) 863-7575. **Rep. Greg Laughlin (D-14),** Houston, 3/23. (713) 863-7575.



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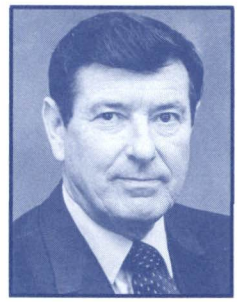
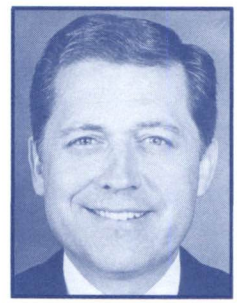


Rep. Murphy



Rep. Smith

Civil Rights Bills Go Much Further Than Proponents Acknowledge

The Civil Rights Act of 1990—introduced 2/7 by Sen. Edward Kennedy (D-MA) and Rep. Gus Hawkins (D-CA-29)—is characterized by proponents as a simple reversal of six key Supreme Court decisions from 1989. But if truth in advertising requirements applied to legislation, their inaccurate descriptions of the complex, highly technical provisions wouldn't pass muster. Unfortunately, the bills—S. 2104 and H.R. 4000—are already on a fast track.

The Civil Rights Act of 1990 actually goes far beyond the issues addressed by the Supreme Court last year. If enacted, it would vastly expand the application and remedies available under current civil rights statutes and would impact almost all existing employment practices. In the simplest terms, the legislation would amend Title VII of the Civil Rights Act of 1964 to permit persons to sue for punitive and compensatory damages in jury trials and effectively force employers to adopt quotas to avoid litigation. And that just scratches the surface of what the bills would mandate.

NAM is strongly opposed to all forms of discrimination. The association successfully challenged a proposal to relax affirmative action requirements for federal contractors in 1986. NAM's protests that such programs did not constitute quotas won NAM the annual award of the Leadership Conference on Civil Rights, a major proponent of this civil rights bill.

NAM is opposed, however, to the Civil Rights Act of 1990. S. 2104 and H.R. 4000 would discourage prompt settlement and reconciliation of alleged acts of discrimination—the original thrust of Title VII—and give rise to increased litigation for recovery of large awards. NAM expects to testify before House and Senate panels on 2/27. Association members are encouraged to call Pete Lunnie at (202) 637-3129 or Diane Generous at (202) 637-3133 for more information on this legislation.

Action Needed: *It is critical that members of Congress understand the depth of concern about the far-reaching changes proposed by the Civil Rights Act of 1990. NAM*

Pending Issues

Child Care: Key House Democrats do not appear to have reached a compromise yet on funding mechanism for child care legislation. Majorities of both chambers otherwise support legislation to subsidize some "professional" day care services and require states to impose about 180 new regulations on providers. President Bush and some lawmakers have offered alternative plans including tax credits and higher Head Start funding. NAM prefers this alternative approach, which provides more options for parents and retains flexibility for employers. Uncertain whether House will address this issue before or after parental leave.

Dealer Termination: NAM-opposed bills would limit manufacturers' ability to enforce standards of quality and performance by their dealers and distributors. Senate Judiciary Committee cleared S. 865 (Metzenbaum—D-OH) 2/22 by 7-6 vote. House companion H.R. 1236 (Brooks—D-TX-9) could come to House floor under suspension of the rules at any time. House suspension rules limit the time of debate and require a two-thirds majority vote.

Drug Testing: NAM-backed S. 1903 (Hatch—R-UT) would preempt 16 state drug testing statutes and assure accuracy and privacy of testing for employees. Also spells out employers' right to test employees who hold sensitive positions. Former Surgeon General C. Everett Koop supported bill at press conference on 1/16. Pending in Labor and Human Resources Committee, which is likely to hold a hearing. Alternative bill, H.R. 33, pending in Energy and Commerce Subcommittee on Health and the Environment. Many employers concerned about costs and roadblocks H.R. 33 would pose for firms wishing to test.

Employee Retirement Benefits: Senate Labor and Human Resources Committee may mark up S. 1511 (Pryor—D-AR) as early as 2/28. Bill could seriously undermine existing benefit plans by overturning Supreme Court's *Betts* decision, which had ruled that employee benefit plans are not subject to Age Discrimination in Employment Act as long as they are not a subterfuge to evade the law's purpose.

Environmental Taxes: House Ways and Means Committee Chairman Rostenkowski (D-IL-8) has scheduled hearings 3/6-7 to look at potential impacts on the environment from altering the nation's tax system. Committee will look at current and proposed excise taxes, tax credits and subsidies, and their effect on air emissions and energy conservation. NAM will testify at 3/6 hearing.

Groundwater Protection: House Science and Technology Committee 2/21 approved by voice vote H.R. 2734, the National Groundwater Research Act (Scheuer—D-NY-8). Would establish an interagency committee to coordinate federal groundwater activities and encourage development of cost-efficient technologies to assist state and local government groundwater efforts. The committee approved a Schneider (R-RI-2) amendment directing the Interior Department to appraise the nation's water resources.

Pensions: Hearings began 2/21 and will continue 2/28 on NAM-opposed H.R. 2664 (Visclosky—D-IN-1) in House Labor-Management Relations Subcommittee. H.R. 2664 would require joint management/labor trusteeship of single employer pension plans. NAM-opposed measure could seriously damage the management of pension funds, the voluntary employee benefit system and employer-employee relations.

Replacement of Strikers: Current U.S. law permits employers to hire permanent replacements for union workers who strike for economic reasons. H.R. 1383 (Brennan—D-ME-1) would bar employers from hiring permanent replacements during the first ten weeks of a strike. Pending in House Subcommittee on Labor-Management Relations with 91 cosponsors. S. 2112 (Metzenbaum—D-OH) introduced 2/8 and referred to Senate Labor Committee. Would prohibit hiring permanent replacements during any strike. Companion bill H.R. 3936 (Clay—D-MO-1) referred to House Education and Labor Committee.

South Africa: House Banking and House Foreign Affairs joint subcommittee hearings 2/21-22 on H.R. 3458 (Fauntroy—D-DC-AL), the South Africa Financial Sanctions Act of 1990. NAM-opposed bill would restrict activities between U.S. banks and South African banks and the South African government.

For more information about the issues covered in *Briefing*, contact the NAM Legislative Analysis Department, (202) 637-3187. Each week's *Briefing* is available prior to publication by 3:00 p.m. (ET) the previous Friday on NAMNET—NAM's public policy electronic network.

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"On paper, we are creating the basis for a market ...more open than you have in this country," Perissich said. NAM members questioned the EC experts on important issues. The European delegation repeatedly stated that the new policies would open—and not close—European markets.

NAM's EC-92 Task Force Chairman Glen Skovholt conveyed a similar message in testimony before the House Ways and Means Committee 1/30. Skovholt called on both industry and the U.S. government to make their views and interests known to the EC "in a timely and effective manner."

Senate Floor Action on Campaign Finance Reform Possible Next Month

Lawmakers in both parties are showing increased interest in overhauling the nation's campaign finance laws. Action may occur sooner than previously anticipated, as Senate Majority Leader George Mitchell (D-ME) recently indicated that campaign reform legislation may reach the Senate floor next month. It is unclear which bill—of the many that have been introduced—will be considered. Senate task forces established by both parties have been meeting and could serve as the springboard for the ultimate vehicle.

The Senate Rules and Administration Committee continued its hearings 2/22, looking at S. 2120, sponsored by Sen. Dennis DeConcini (D-AZ). The measure would establish partial taxpayer funding of Senate campaigns, voluntary spending limits and curbs on PAC contributions.

The committee will examine two other measures on 2/27. S. 1655, sponsored by Sen. Mitch McConnell (R-KY), would increase penalties for violators of campaign finance laws and strengthen restrictions on independent expenditures, bundling and personal loans that candidates make to their own campaigns. S. 1727, introduced by Senate Minority Leader Bob Dole (R-KS) on behalf of the Bush administration, would ban candidates from carrying campaign funds from one election cycle to the next; end unsolicited congressional mass mailings; and eliminate all corporate, union and trade association PACs—a provision NAM opposes.

The panel will continue hearings on 3/1 and 3/5, with markup scheduled for 3/8. NAM will testify on 3/1.

NAM Disputes Sentencing Guidelines

The U.S. Sentencing Commission's proposed guidelines "are extremely harsh, punitive, unwarranted and will place many businesses on the threshold of insolvency," Earlyn Church, secretary and treasurer of Superior Technical Ceramics Corporation, stated 2/14 on behalf of NAM at a commission hearing. Church urged the commission not to forward its recommendations to Congress. Instead, she said, the commission should reconsider its proposal in its entirety.

Church emphasized that the huge variation in proposed fines—$250 on up to $374 million—is "difficult to comprehend and very disturbing to small businesses whose total sales are often substantially less than the fines...at their mid-level ranges. Mandatory fines," she added, "should not be imposed on an organization that has done everything reasonably possible to prevent a crime."

Church also recommended eliminating the proposed guidelines' probationary requirements that would essentially allow courts to run those businesses unable to pay their fines on time. "The commission has not documented any past cases that would have called for this type of overreaching and strict supervision," she said.

The U.S. Sentencing Commission was established in 1984 to bring consistency to prison sentences handed down by federal judges, especially in cases where diverse sentences have been issued for the same offense. The commission developed guidelines for individuals in 1987 and is attempting to do the same for corporations this year. The commission is slated to issue a final report to Congress on May 1, and the guidelines will become law later this year unless Congress chooses to alter or overturn them.

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NAM's legislative information network, NAMNET, now includes a new and growing database called STATETRAK. State manufacturing/business associations from six states—Illinois, New Jersey, Missouri, Connecticut, Vermont and Maryland—now provide NAMNET with status reports on up to 10 major industry issues in their state legislatures. Other states will be added in the future.

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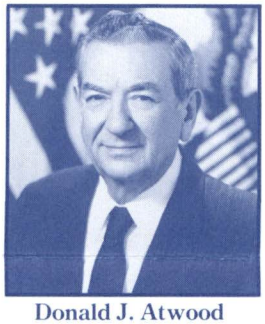
members are urged to contact their lawmakers immediately. The message is simple: "S. 2104 and H.R. 4000 are Trojan Horses. Don't support or cosponsor the bill before you fully understand its impact."

Pentagon Official Outlines Strategy

The Pentagon, responding to both the breakdown of the Warsaw Pact military alliance and domestic budget concerns, recently proposed reforms that by the mid-1990s may decrease defense spending—as a share of GNP—to the lowest level in 50 years. Similarly, although lawmakers have just begun work on the FY 1991 defense budget, it is already evident that U.S. defense spending—for the sixth consecutive year—will not keep pace with inflation in FY 1991.



Donald J. Atwood

Clearly, the squeeze is on the defense industry. On 2/14, Deputy Secretary of Defense Donald J. Atwood—the number two official at the Pentagon—met with NAM members to outline the administration's plans and respond to member questions.

"We're in this together," Atwood said, urging all companies involved in defense contracting to make a total commitment to product quality. He acknowledged that DOD will do business with fewer contractors in the years ahead, but predicted that the companies that remain in defense contracting will be "world class competitors" who produce highest quality products and earn a solid return.

Atwood said the FY 1991 administration budget proposal begins to implement a new national defense strategy. It will focus on maintaining the high quality of U.S. troops; bilateral troop withdrawals from Europe; continued emphasis on research and development of new technology; elimination of selected weapon systems; building better relations with suppliers; and streamlining the Pentagon's complex acquisition regulations. Pentagon regulations are so complex, Atwood said, that the specifications for purchasing a fruitcake run 17 pages.

While defense spending may drop to as little as 4 percent of GNP in the coming years, Atwood stressed, "We certainly cannot gamble with our national security." The positive events in Eastern Europe "are not yet fundamentally irreversible." The U.S., he reiterated, will not now abandon an approach which "contained communism and brought it to its knees."

Long-Awaited Action Begins On Product Liability Reform Bill

The waiting is finally over. Hearings on NAM-backed product liability reform bill S. 1400 commenced 2/22 in the Senate Commerce Consumer Subcommittee. NAM President Jerry Jasinowski applauded the efforts of subpanel Chairman Richard Bryan (D-NV) and S. 1400's sponsors, Sens. Bob Kasten (R-WI), John Danforth (R-MO), Dan Inouye (D-HI) and Jay Rockefeller (D-WV). "You have shown great foresight by committing yourselves to an issue which will mean greater choice for consumers, increased global competitiveness for U.S. business and a stronger economy for all," he said.

"Our present system of different product liability laws in each state has discouraged the development of newer, safer products and has created a tremendous advantage for foreign industry," Jasinowski declared. "If we are to be world leaders in the marketplace," he continued, "we need uniform federal standards which will promote an increase in U.S. innovation."

The bipartisan bill—endorsed by President Bush in his 1/31 State of the Union message—is expected to clear the subcommittee quickly. Panel Chairman Ernest Hollings (D-SC)—a longtime reform opponent—has indicated that he will not block full committee markup, which may be completed by the end of March. NAM and a unified industry coalition are calling for Senate floor action on S. 1400 by early summer.

EC-92 Will Open New Markets To American Manufacturers

"NAM has always believed that EC-92 is basically...positive for the European Community (EC) itself, for the U.S. companies doing business with Europe, and for the world economy," NAM President Jerry Jasinowski said at an NAM EC-92 Task Force meeting 2/6. EC-92 "moves in a direction that is deregulatory and anti-protectionist," he added. Jasinowski welcomed a delegation of high-level European Commission officials to the meeting, headed by Ricardo Perissich, director general for internal market and industrial affairs.

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FACT SHEET ON PRODUCT LIABILITY REFORM

"Product liability reform...it's time to act together."

President George Bush
State of the Union Address
January 31, 1990

"A legislative priority for our Administration will be the reform of our costly product liability laws. The burden of our present product liability system is excessive and adversely affects our ability to compete abroad. In fifteen years, product liability suits have increased over 1,000 percent -- representing unnecessary litigation and extreme costs to American business and consumers alike. This is unacceptable, and our Council on Competitiveness, chaired by Vice President Quayle, has made product liability reform a top competitiveness priority."

President George Bush
February 6, 1990

"Our current product liability system of 50 different State laws generates excessive litigation, inflates insurance costs, and creates uncertainties for American businesses. This is a self-imposed burden on our ability to compete. It also has a chilling effect on innovation and the development of new products. Ultimately, the costs of our inefficient product liability system are borne by American workers and consumers."

Vice President Dan Quayle
November 30, 1989

An Administration Priority.

Product liability reform is a top legislative priority for the Administration. It is essential to business innovation, U.S. international competitiveness, and consumer safety and welfare.

- In his State of the Union address President Bush called upon Congress to enact essential product liability reform legislation.

- On November 30, 1989 Vice President Quayle announced the Administration's product liability reform initiative developed by the Council on Competitiveness. The Administration strongly supports S.1400 -- a bipartisan reform bill co-sponsored by Senators Danforth, Inouye, Kasten and Rockefeller and similar legislation in the House of Representatives, and it will seek additional reform provisions to strengthen the bill.

- The Senate Commerce Sub-committee on the Consumer will hold hearings on S. 1400 on February 22, 1990.

Restore Basic Principles of Fairness.

The Administration's reform initiative will restore basic principles of fairness to America's product liability system:

- First, protection of an innocent person's legal right to fair compensation for medical expenses, lost wages, property damage and other actual losses.

- Second, payment for losses based on actual responsibility for the harm -- fault based liability -- not ability to pay -- "deep pocket" liability.

- Third, cooperation and the prompt and fair settlement of differences should be encouraged through alternatives to costly and time consuming litigation, which only reduces the compensation available to the injured party.

Strengthen U.S. Competitiveness.

Our product liability system --with its excessive litigation costs -- is a self-inflicted burden on America's ability to compete. U.S. product liability laws are more onerous than those of other major industrial countries, such as Japan and European nations.

- The estimated cost of product liability suits in the U.S. -- $80 billion per year -- equals the combined profits of the nation's 200 largest corporations.

- Total U.S. liability insurance costs are estimated to be 15 times higher than Japan's and on average 20 times higher than the European nations'. These costs are reflected in higher prices for U.S. goods and hamper our ability to compete with foreign manufacturers.

Enhance Product Innovation.

Equally devastating is the chilling effect of the liability system on product innovation. The fear of potential law suits deters businesses, especially small and start-up businesses, from introducing new and safer products.

- Many products are no longer being produced for American consumers -- single-engine aircraft, vaccines against deadly Japanese encephalitis, and gymnastic equipment are a few examples.

- Many companies decide against introducing new products. For example, Monsanto will not market an inexpensive, safe asbestos substitute and Genentech declined to go forward with a new hepatitis vaccine developed through biotechnology because of liability risks.

- 36% of American businessmen in a recent survey stated that they stopped some manufacturing as a result of product liability risks. 15% laid off workers and 8% closed plants.

Reform Advances Consumer Welfare and Safety.

Safety and health considerations, the principle rationale for continuing the current system, are undermined by the current product liability regime. Consumers are not always offered new, safer products (like vaccines and the Monsanto asbestos substitute). Also, the costs of excessive liability risks are reflected in higher prices for goods and services.

- A 1989 Rand Corporation study reveals that on average only 46% of total expenditures from tort law suits went to compensate injured parties. Legal fees and expenses consume on average of 37% of the amount spent -- in some product liability cases this figure reaches 70% of the total amount.

- The cost of DPT vaccines rose from $2.80 per dose to $11.40 per dose to cover liability insurance costs.

- In a February, 1990 Consumer News article, Bonnie Guiton, Special Advisor to the President for Consumer Affairs states "These are among the ways in which America's current product liability system works against consumers....Done properly, however, product liability reform can benefit consumers..."

The Administration will work with the bi-partisan sponsors of S.1400 and with groups from all sectors of the American public to support U.S. product liability reform that achieves improved U.S. international competitiveness for businesses and restoration of basic principles of fairness for consumers.

For more information contact:
David McIntosh 456-2816

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Business Perspective

Competition Outside Can Mean Cooperation Inside

An Interview with James Burge, Corporate Vice President at Motorola, Inc.

Motorola's line of electronic equipment puts it in direct competition with leading imports. Responding to that competition has meant new approaches to production and new demands on Motorola's workforce. In a recent interview, James Burge discussed the effects of these changes.

Burge: At Motorola we are moving toward higher levels of quality through employee participation in team problem-solving and through broader based jobs. We need to do this to compete in the international marketplace. There's no way that we can continue to function as a U.S. manufacturer if we don't. And we're finding that at least half of our direct-labor workforce — those who are dealing directly with the assembly of product — need some form of what we call manufacturing-literacy training.

We are trying to avoid the term remedial training because we don't want it to be demeaning — these people were good employees when we hired them. And they did the job that we had in existence at that time. But now we need to have more of the decision making occur at the assembly-line level. That means that communication skills, math skills and literacy skills are becoming more and more necessary to our workforce. So now we find that approximately one half of our direct-labor workforce will need some form of training to get up to seventh-grade reading skills and fifth-grade arithmetic skills. I don't even call it math really — it's what's necessary to understand statistical process control.

What we've done, essentially, is to eliminate quality control departments in our corporation. Instead, we're placing quality control at every work station, every step in the process of manufacture. The operator building a cellular radio or a mobile radio telephone must be able to do some basic calculations on failure rates of component parts coming across the work station. Or if they are doing a test on a circuit board, they've got to know the percentage of failures. If that percentage exceeds a certain level they have the authority to shut the entire assembly line down. What we are able to do with "cycle time" management is to identify a quality problem immediately, at each work station.

In the past, we would build a complete product, test it, and then discover something was wrong. Quality control would run an analysis, determine where the problem occurred, and go back and correct it. Now we correct a problem immediately. This places a new responsibility on each worker at each work station. We are finding that the only way we can solve our manufacturing problems — which are basically ensuring quality, productivity, and timely delivery — is by putting teams of workers together. In the old days we'd have a hierarchy and only people from the higher levels — engineers or managers, for example — would be allowed to solve problems. Now we delegate responsibility clear down to the lowest levels. For this system to work everyone's got to have good communication skills.

One of the concerns we have been expressing to the education community is that our education systems deal with individuals: individual homework, individual testing in the school, and individual advancement through classes. When they come into the work place we suddenly say you've got to work as a team. That involves social interaction, and it involves communication. It involves a dialogue on analysis of problems and potential solutions. We have to have good reading skills and math skills so the employee can understand the specific training that we want to give them in team problem-solving skills. The whole issue of troubleshooting is involved here. We use a lot of training in our factories on Pareto Analysis. Pareto Analysis is really the old "80/20 analysis" that says that 80 percent of your problems are going to be caused by 20 percent of the issues. If you focus on those 20 percent, you'll get rid of 80 percent of your problems. Once you do that you start fine-tuning the other issues.

What we taught our factory people is how to do the 80/20 analysis, so that they solve the major problems first. Then they start fine-tuning to continually ratchet up their quality and their productivity in our assembly operations. But you can see it requires basic skills in order to do that.

Suppose a worker at a work station has to enter a little bit of data into a keyboard so that we are able to capture quality data in a computer base. That keyboard doesn't read Polish, doesn't read Italian, it reads English. That's why the reading skills are important, that's why the math skills are important, and why language skills are important for team problem solving.

To us it is not a social issue, it's a competitive survival issue. Our operations were faced several years ago with the potential of moving many of our jobs off shore to chase low labor costs. If you do that you suffer from time delays, and the separation between your engineering and your manufacturing. For a number of reasons, we made a commitment to give the best possible effort to keeping those jobs in the United States. In order to do that we had to make the changes I've discussed. Right now we are producing mobile radios, paging systems, and cellular radio telephones all in the United States and competing worldwide on product quality and product cost.

We have to invest in our employees' skills to do this. I have an anecdote that suggests how important this is. I was in our chairman's office recently, and he had received a call from a young woman about her mother, who had worked at Motorola for 20 years. The mother's supervisor wanted her to go back to school for more training, and the daughter was saying "my mother is 60 years old. She's not interested in school. She's only going to be working for another five years." But our chairman explained that the investment would be worth it to her and worth it to Motorola. We can't afford not to do it.

***Work**America*: You are really talking about the impact of greater skill requirements on your current employees. Do you have a massive in-house retraining program?

Burge: We do a great deal of our training through liaisons with junior college systems. They just happen to be the local vehicle we've chosen to provide the upgrading and remedial education. Of course, these increased skill demands affect our new hires as well. We have an obligation to upgrade our existing workforce to understand the specific job they're performing. But we're testing our new hires to see if they have seventh-grade reading and fifth-grade arithmetic skills, so they can come in and do the job right away. But we're

See **Burge Interview** page 7

Diane J. Generous, Esq.
Associate Director
Employee Relations

National Association of Manufacturers
1331 Pennsylvania Ave., NW, Suite 1500 - North Lobby
Washington, DC 20004-1703 (202) 637-3133

Burge: Making Quality A Part Of Every Job, At Every Level

Continued from page 6

finding that about half our applicants don't meet these standards.

WorkAmerica: What about in the near future? Do you feel that they are going to improve, or get worse, or stay the same?

Burge: Our judgment is that this is going to get worse unless we achieve a significant upgrade in the quality of the education both primary and secondary. We see all the demographics that you folks at the National Alliance of Business have put together and that others have put together. Ultimately we are going to see a shortage of labor in this nation. Rather than lower our standards, which would place us at a competitive disadvantage in the global marketplace, we have got to upgrade the quality of our education. And there is a second issue — immigration. The immigration laws now focus on reunification of family. I suggest we need to couple that with some significant tests on literacy and education levels, so that we are bringing qualified workers into this nation, rather than placing the burden on the private sector again to train these people. Again, it has a tendency to place us at a competitive disadvantage in the global marketplace.

WorkAmerica: When you talk about problems with new entrants into the workforce, how seriously is that affecting Motorola?

Burge: We find that currently we have an adequate supply of workers. But you have to consider the fact that we are a premier employer. We can skim the labor market. There are a lot of companies that are vendors of the smaller companies in our chain of supply. These outfits that don't have all of the fringes and benefits that a large company like Motorola would have -they're in a more difficult position. I think it's a problem for the nation. It's not a problem for our specific company. In some ways we've adapted well to the changes in the workforce. For example, we've been able to attract a lot of women entering the workforce for the first time. They find the work in our factories attractive. Our work is extremely clean, we have good working conditions, good benefits and good pay. We provide all of the training and don't require previous experience. In fact, many of these women are excellent workers because they have made a decision that they have their household responsibilities taken care of and they can come in and become very productive and dependable workers.

WorkAmerica: You've mentioned your minimum standards of seventh-grade reading and fifth-grade arithmetic several times. Do you feel these standards are going to rise in the future?

Burge: I suspect that as we look to the future and see more and more advances in technology and electronics that these standards will increase. When it's going to happen I'm not sure, but I see a trend in that direction. Higher levels of reading, math and communication skills will be necessary to remain competitive in the global marketplace.

> "The schools are still perceiving our factory environment as the environment that existed two or three decades ago."

WorkAmerica: Do you see business playing a role in preparing people to keep pace with these changes?

Burge: One thing that we at Motorola are doing now is partnering with local schools. I don't know that ours is a special model to be followed, but we think we have to team up with local schools to develop training programs, educate the schools to help them understand the specialized job training we are offering in our companies. Schools need to know about this so they can prepare their students — give them the basic skills to be ready for modern training.

My personal judgment is that there has been a disconnection between business and the schools — a misperception in the school systems. They are still perceiving our factory environment as the environment that existed two or three decades ago. I suspect they haven't caught up with the dramatic changes that I've just described to you. We need the business sector to spend time talking about what we need in a modern factory — communication skills, flexibility and decision-making skills. We should work with the schools to discuss ways for them to adjust, to provide instruction that will help their students in these areas.

One idea I have been kicking around is a mentoring program that would use students rather than adults. We have tended to segregate the advanced student from the average student and the remedial student — what people call tracking. Why not challenge the advanced student to team up with the average or not so brilliant student? The challenge becomes one of sharing and of team work. They learn from their peers and they also learn team problem-solving skills that would be very helpful to them in the workplace. There have been some experiments in Europe that have focused on that. Early indications show success.

I think some of the techniques developed in the business sector could help the schools. We need to share good management practices with the school systems. At Motorola we are working with school administrators in districts where we have a lot of employees. We're discussing our approaches to strategic planning: how we gather data, how we analyze what changes are going to occur in the future and how we plan for the future. Too often we find that the schools are managing for the here and now and not projecting what the future marketplace will be for their students.

I believe the private sector needs to serve as a role model, to serve as an incentive for students to stay in there and get a quality education. Particularly with disadvantaged and minority youth, we need to find those who have broken out of the ghettoes and become successful by obtaining a quality education. We need to show disadvantaged kids that there is a light at the end of the tunnel, that a quality education can make you a success in life.

WorkAmerica: You talked quite a bit about what you are doing at Motorola, the team approach and communication. You feel that the schools aren't giving kids enough instruction in those areas. Do you have ideas that would help education move away from this individualist focus?

Burge: One other thing that we are involved in at Motorola is a summer jobs program for teachers. They can come in and experience how we go about team problem-solving, what the communication skills are. I think the more we can do to show teachers the real world of work, the one that their graduates will be entering, the better qualified they will be to teach kids how to succeed after school.

WorkAmerica: What kind of jobs are available for the summer jobs program?

Burge: We try to tailor the jobs to the individual. Frankly the programs we are involved in are fairly much in their infancy. We will see what skills and what interests individual teachers have; then we'll place them in one of our business operations in a job that can give them the best exposure and also matches their skills so that they can make a contribution to the business. It may be working in a factory area or a factory support area or even an inventory control area. If it's a math or science teacher they may be assigned to an engineering lab where they can do some calculations.

This is still a modest program. We have operations underway in Illinois, Florida, Texas and Arizona. It's a modest program but it ties into one of our major concerns — quality production. Recently Motorola received the Malcolm Baldridge National Quality Award. Getting this award symbolizes leadership in a variety of areas: quality, information and analysis, planning, human resource utilization, quality assurance, measuring quality assurance results, and ultimately customer satisfaction. Every employee has to be involved in that. Every employee has to be a quality employee.

In a competitive field like cellular telephones, constant feedback from workers on the assembly floor is necessary to keep costs down and quality high. Here a Motorola problem-solving team meets in an informal session.

ADULT EDUCATION NEEDS IN THE UNITED STATES' WORKPLACE

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FACTS:

- 75% of the American workforce in the year 2000 are in the workforce today. 20-30 million of these workers have serious problems with basic skills. They cannot read, write, speak English, calculate, solve problems, or communicate well enough to function effectively on the job or in their everyday lives.

- Some 23 to 27 million Americans cannot read above the 5th grade level and another 35 million cannot read above the 8th grade level. Seventy percent of the written material in the workplace is between 9th and 12th grade level of reading.

- This lack of basic skill at lower levels led American business to put in additional layers of managers who functioned as interpreters (of job tasks and requirements as well as language).

- Recently, the New York Telephone Company tested 22,880 applicants for operator and repair technician positions. Only 3,619 or 14% passed.

- The number of high school dropouts is estimated to be as high as one million a year and, in addition, another 700,000 cannot digest a newspaper or fill out a job application despite their completing twelve years of formal education.

- The average Japanese high schooler does better at math than the top 5% of Americans taking college prep courses.

- The literacy problem is so extensive that the overall cost to the nation ranges up to $200 billion annually.

- The median years of schooling required for current jobs is 12.8. By the year 2000, it will be 13.5.

- Twenty five million entrants to the labor force will be needed by the year 2000 to fill jobs requiring increased levels of skill. In those same years, 83% of the available new workers will be non-white, female or immigrants, populations that are traditionally less highly skilled.

- 600K-750K people immigrate to the United States each year. The majority know very little English. Many lack basic skills in their native tongue.

- Occupations in which a large proportion of workers have less than four years of high school are generally among the slowest growing.

- 11.5 million Americans lost their jobs between 1979 and 1984 through job shrinkage. 20-40% of them are functionally illiterate.

- Workers today can expect to change jobs five to six times during their normal work lives.

- Employers already spend an estimated $210 billion annually on training and education – an amount almost equal to the total America spends on formal education in schools.

- David T. Kearns, Chairman and CEO of the Xerox Corporation, has labeled public education as a failed monopoly producing workers for the nation at a 50% defect rate, and yet business people have typically not spent time talking to educators about the skills they need in their workplace.

- Workforce skill problems are not isolated at the low end of the spectrum. IBM notes that the life of their technology is down to 20 months. By conservative estimates, the half life of an engineer's knowledge is about 4 years. And The Chicago Tribune recently reported that engineering education in the U.S.A. is a flawed system. While American students drop out at alarming rates, foreign students seem to flourish. In industry, especially in very sophisticated applications like artificial intelligence, immigrant engineers support the whole system.

MOTOROLA'S EXPERIENCE

At Motorola, we have discovered that this is not just "everyone else's problem". It exists as a potentially dangerous flaw in every one of our operations.

Some examples:

- Of 180 workers given basic skills assessments as part of the staffing process for a new factory, only 15 were able to do basic math problems involving percentages, decimals and a simple bar chart.

- Half of the participants in a Motorola sponsored introduction to factory automation class taught by a local junior college at one of our plants had to drop out because they lacked the prerequisite math skills. All were technicians who had some prior technical training. One had a two year technical degree. All the minorities in the class dropped out.

- A toxic chemical spill on the receiving dock at one of our factories could have been a disaster. The dock attendant could not read the precautions on the labels. Fortunately, he called for help instead of trying to handle the situation alone.

- Performance problems led to the discovery that a European born long term factory supervisor whose spoken English was very good, could neither read nor write in English. Now reassigned to a less critical role, she is being tutored to gain those skills.

- At our Mesa, Arizona semiconductor plant, a group of 12 technicians responsible for machine maintenance and calibration were given a 5-question assessment of their ability to work with decimals. None passed! Some were 20 year veterans.

- Of 390 operators in that same factory, well over half scored below the 7.5 grade level on reading and math assessments.

QUANTIFYING THE PROBLEM:

Our assessment projects estimate that half of our factory workforce needs basic skills education in order to attain the current minimum requirement of seventh grade English and whole number mathematics. The long range skill goal for those workers is much higher and steadily rising as technologies demand more ability.

We are committed to improving the skills of these workers. Every Motorola domestic site is initiating a process of skills assessments and appropriate educational placement for all of our production workers. Most sites have already begun classes in English as a second language, math and reading. To date, we have had over 1000 students enroll. We estimate that we have 11,000 more to put through this basic educational process. The total bill for this most fundamental skill upgrade will be at least $30 million over five years.

You might ask, "Why would Motorola choose to invest that much in workers with clearly deficient skills? Why not replace them with workers who have better skills?" There are two major reasons.

1. Most of these people have been loyal employees for a number of years. In fact, they have performed their jobs competently, given what we were asking them to do. For years, American industry, Motorola included, has been modifying the structure of work to accommodate workers with diminishing levels of proficiency in the basic skills. Now, we are consciously changing the nature of that work and feel responsible to provide our workers with an opportunity to develop these skills.

2. The option of replacing these employees with ones who are more highly skilled is not viable. There simply are not enough skilled workers in the

labor pool to meet the need. Tests of 3,000 applicants in the rather affluent Northwest Suburbs of Chicago for jobs in our Cellular factory showed that 50% could not read English at the seventh grade level and do whole number mathematics. Similarly, staffing efforts at our Ft. Lauderdale, Florida, portable radio factory have ground to a halt because of our inability to find a sufficient number of applicants who possess this minimal skill level.

At Motorola, we have not quantified the cumulative costs of all the instances where a lack of basic skills led to defects in product, productivity loss, or other problems in Motorola's businesses.

We have, however, quantified the improvements in quality and productivity that result from having a workforce that has the basic skills.

BENEFITS OF BASIC SKILLS UPGRADES

CELLULAR, Arlington Heights, Illinois:

- Productivity is 500% of original estimates which included all gains expected from factory redesign and automation.
- Manufacturing Cycle Time has been reduced by 40:1.
- Workers do self inspection and defects are almost non-existent.
- Improvements keep coming. People are excited by their work. Breaking a record routinely brings a cheer from the factory floor.

AUTOMOTIVE ENGINE CONTROLS, Arcade, New York

- A five year program to upgrade basic skills, teach problem solving, and beginning SPC resulted in the reversal of a corporate decision to move the factory when our customer, Ford Motor Company, balked at the thought of our trying to replace that workforce.

SEMI-CONDUCTORS, Mesa, Arizona

- Workforce was downsized 8% via attrition over 9 months while the organization achieved record quality improvements and scrap reduction.

These programs also have a profound human impact. As workers see the impact of these skills in their lives, their self esteem grows, and so does their ability to contribute to the organization.

- A Hispanic worker who has been in ESL classes for 6 months reports that she is no longer afraid to talk about problems at quality meetings. She has been given responsibility for time card tracking for her whole department.

- An Asian worker, who has been in this country for 18 years, reports in her ESL class that she is trying to speak English at home to her children and grandchildren.

- A minority worker, who is in a reading class, is delighted that she can read a bedtime story to her two pre-school daughters.

- A Hispanic worker gets help from his 11 year old son with math homework and tells him he's determined to learn all he needs to know.

WHAT MOTOROLA IS DOING

Internally:

- Basic Skills assessments and classes have been established at all domestic sites.

- Study teams are determining the size and scope of our need for basic skills beyond literacy across all entry level populations. Those skills include problem solving, critical thinking, computer literacy, statistical process control, and the processes of continuous improvement, team building and creativity.

- Corporate policy requires 1.5% of payroll to be spent each year on training and education of the workforce.

- Job analyses are being performed on key populations: factory workers, technicians, supervisors, and engineers, to determine required skill levels. Curricula are being developed and matrices of required and optional coursework are being established.

- Beginning in 1990, we are proposing that each employee participate in 40 hours of training or education each year.

With Government:

- Discussions have begun with the Division of Adult Education at the U. S. Department of Education. We are focusing first on the basic skills needs of our workforce, but have a long term objective of finding ways to support continuous learning.

With the Education Systems:

- A number of local partnerships have been formed with junior colleges and school districts. In Florida, Motorola engineers worked with junior college instructors to develop a robotics curriculum that was used to prepare technicians for the Bandit factory.

  In Phoenix, junior college instructors are being taught to deliver many Motorola training programs. Motorola classes are taught on the college campus.

- The partnerships have had some profound business impacts.

  In Arcade, New York, that five year partnership with local schools to upgrade the factory workforce resulted in that factory not being moved to Illinois. That partnership was with all levels of the education system; elementary, secondary and college.

  In Illinois, junior college instructors teach basic skills courses at Motorola sites. The contributions of the newly upgraded workforce helped keep the Cellular factory from moving to the Far East in search of labor cost advantage.

- Regular meetings have been taking place between Motorola managers and some of our feeder public school systems. We have been clarifying our needed skills, offering Motorola training programs to teachers, and looking for ways in which we can establish collaborative partnerships.

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The Implications of the Growing Skills Gap

These skills deficiencies in the workforce are costing American business monetarily, through waste, lost productivity, increased remediation costs, reduced product quality, and ultimately a loss in competitiveness.

> **Item:** *An April 27, 1988 New York Times article, "Business Teaching 3 R's To Employees in Effort to Compete" reports: Many education researchers and economists say the lack of basic literacy and mathematical skills has caused costly mistakes, reduced productivity, increased the need for supervision and led to accidents. For example, the Metal Fab Corporation, a manufacturer of bellows based in Ormond Beach, Florida, estimates that it could save up to $1.2 million a year if its employees had stronger mathematical and reading skills. Because some employees have trouble measuring, the company's level of wasted material is higher than it should be. In addition, workers too often have trouble reading blueprints, forcing the plant to redo orders and pay overtime.*

If these gaps are not sufficiently addressed, this country can expect a severe shortage of qualified entry level workers. This scarcity of qualified workers can cause employers to: 1) employ under-qualified workers, which could result in inferior product quality, thus reducing our ability to compete in the global marketplace; 2) competitively

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seek out qualified workers already employed in other companies, thus driving up the wage scales, and reducing our price competitiveness; 3) expend massive resources to remediate workers to bring them up to a productive level; or 4) take the jobs elsewhere, thus reducing American job opportunities and eroding our economic base. None of these options is satisfactory.

Currently, one out of three American corporations provides some form of basic skills training for its employees. An American Society for Training and Development Study predicts that American industry will have to spend as much as $25 billion yearly on remedial education.

Motorola Inc. Vice President Carlton Braun testified before the Joint Economic Committee in April 1988 that the company spends about 60 percent of its employee training budget on remedial training in basic math and reading skills. Braun said employers like Motorola, a multi-national manufacturer of electronics products, are "fighting for survival" because of fierce international competition, and need a workforce that is literate in basic areas such as reading, writing, and mathematics. "We have found to our disappointment that many workers are not prepared to operate the factory of the present, much less of the future," said Braun.

As one economist puts it: If it takes America 80 man-hours to make a Ford, and it takes Japan 40 man-hours to make a comparable Toyota, economic logic does not say that we get to make half as many cars. It says that we make no cars.

own repair shops instead. Several decided to go back to school, said Torjesen.

No Liability?

Butterfield, however, maintained that the company should be free from liability, since it was only following the terms of the collective bargaining agreement.

"Our position is that the apprentice was laid off due to a downturn in business conditions. The actions were taken in accordance with the procedures in the collective bargaining agreement," said Butterfield. The company spokesman added that some of the apprenticeship training programs have been reinstated, but declined to provide details.

Steve Poor, an attorney with the Chicago law firm Seyfarth, Shaw, Fairweather, and Geraldson, and Caterpillar's attorney in the case, said that he could not comment on the case.

Jerry Brown, bargaining unit representative for the UAW in Peoria, Ill., concurred, "As far as my position is concerned, the contract between the United Auto Workers and the employer is binding. [The company and the union] followed the procedures of the agreement," he said.

Article 17 in the collective bargaining agreement stipulates that apprentices are to be covered by the collective bargaining agreement, Brown added, declining to make further comment. Phone calls to UAW's regional officers were not returned.

Valid At Caterpillar Only

Even if apprentices had received the company certification, the credential would not have been recognized elsewhere, according to the Department of Labor's Bureau of Apprenticeship and Training. The agency certifies apprenticeship training programs.

According to Dick Corwin, BAT representative in Peoria, Ill., the company did not register its apprenticeships with the federal government. The apprentices who go through the company's training cannot be certified as journeymen by BAT.

"The Caterpillar certificates are good at Caterpillar only," he said. Corwin said that nationally, 440,000 apprenticeship programs are registered. The latest statistics also show that there are 812 apprenticeable occupations certifiable by BAT.

BAT-approved programs must provide apprentices with a total of 2000 hours of on-the-job training and 144 hours of related book learning.

—Joanne Serpick Eglovitch

Adult Education

SITE-BASED PROGRAM IN KENTUCKY WORKS WITH BUSINESS TO DESIGN INTERVENTION

Workplace literacy programs need the active involvement of business leaders to be successful, a Kentucky educator told a Jan. 13 seminar at the North American Conference on Adult and Adolescent Literacy in Washington, D.C.

Barbara Nielsen, program specialist in adult and continuing education for the Jefferson County (Ky.) Public Schools, said that the county's program is working because it benefits from the participation of the companies involved, contrary to most previous workplace literacy programs. Jefferson County contains Louisville and surrounding towns.

In the past, educators determined the need, created a solution, and designed an intervention, Nielsen explained. "We told businesses what we were going to do," she said. Business leaders and educators now are equal partners, Nielsen said. "We insist on interaction."

The county's workplace literacy program does not turn a profit, but aims only to recover costs, Nielsen said. All of the companies contract with the school board to reimburse the county for teachers' salaries and learning materials. No county funds are used to support the program, she noted, which coordinates classes for some 1,000 employees at 18 local businesses.

Working Together

Today, Nielsen said, business officials describe the need at the site and work together with educators to provide a suitable intervention strategy. "And the student provides feedback to us on what works best," she stated.

Business leaders have a "strategic vision" for their firms that determines which techniques and technologies need to be infused into the production process to remain competitive, Nielsen explained. "[Business officials] analyze where they are now and where they want to be in the future," she said. "Our responsibility as educators," Nielsen told her audience of about 25 listeners, "is to react to their definitions."

"Our attitude is to respond to businesses' needs," Nielsen said. "I won't go in and tell them what they need." Teachers no longer bicker over which curriculum should be used in the classroom, she added. "The major focus is meeting the needs of the business and the learner."

Just One Request

When companies begin negotiations with the school board, their only request is to raise the education level of their employees, Nielsen said. "Not one wanted us to deliver job-specific training," she said. "The big companies already have programs dealing with occupation-related training," she added. Some of Louisville's biggest companies participate in the program: General Electric, Philip Morris, Ford, the University of Louisville, and Churchill Downs, site of the Kentucky Derby.

Many companies want to increase their employees' skill levels to the point where workers will be able to take advantage of the companies' own training programs. "The companies say, 'Raise their general level of education and we'll take it from there,' " Nielsen said.

The classes, Nielsen noted, do not aim to teach illiterates how to read, since most students have reading levels above even the fifth or sixth grade level needed to perform most tasks at a factory. Very few students enter classes because they risk losing their jobs unless they learn basic reading and math skills, Nielsen said.

A survey taken among 267 students at nine workplace sites bears out Nielsen's contention:

- 54 percent of the students scored between the ninth and 12th grade levels; 35 percent scored between the sixth and eighth grades; and 11 percent scored at or below the fifth grade level;
- math scores averaged one grade level lower than the reading scores; and
- almost 10 percent of the survey group had enrolled in college or university courses.

Most students enroll in the courses to earn their high school equivalency degrees or simply to improve their self-esteem, she said.

Site-To-Site Differences

Because each business has different needs and varying resources, the eventual "look" of each program also differs, Nielsen said. General Electric, for example, has state-of-the-art video equipment that are housed in separate classrooms, while other programs meet in cafeterias and use easels and flip charts, she explained. "One business spent $50,000 on its site, another spent $2,000," she said.

The structure of the classes, teaching material used, and students-to-teacher ratios all vary, Nielsen observed. "It depends on what the business decides," she said. "Never have we teachers been asked to be so flexible."

Nielsen suggested that the companies take responsibility for marketing the program and recruiting students. "They know the people," she noted.

Scheduling is negotiated between the county and the business, she said. While some businesses give employees time to study while still "on the clock," most arrange for students to attend on their own time, either before or after their shift, she explained.

Everyone Benefits

Nielsen said that both business and learner benefit from the program. For business, she said, the bottom line remains profits. "But [business leaders] feel that a more confident workforce will help them succeed," she added.

General Electric believes the program will help them because it will improve the quality of students' lives and "make them happier persons and better employees," she said.

For students, the classes may increase their chances for promotion or their ability to succeed in job-related training, Nielsen said. Still, she stressed, the main benefit of the classes is increased self-esteem. "The classes help them in ways we can't quantify," she said.

Nielsen told the story of one 58-year-old laborer who hugged her and cried openly during a ceremony held to award GEDs to several participants at one worksite. "We see from our own experiences that it matters to students to get their GEDs," she noted.

Benefits also accrue to educators, Nielsen added. "We establish positive working relationships" with business leaders in the community, she observed.

—Richard Sayre

ETA

OFFICIALS RELAY UPDATE ON SYEP WAGES, NEW LABOR OFFICE, REVISED STANDARDS

The new minimum wage, not the lower training rate, will most likely be the pay for youths hired for jobs funded by the JTPA Title II-B summer program, according to Dolores Battle, job training programs chief at the Employment and Training Administration.

Battle addressed a U.S. Conference of Mayors' Employment and Training Council meeting Jan. 24 along with other ETA officials who discussed the agency's new Office of Work-Based Learning, performance standards for program years 1990 and 1991, and Secretary of Labor Elizabeth Dole's "summer jobs initiative" campaign.

$3.85 Per Hour

When the president signed the minimum wage law Nov. 17, 1989, ETA requested that the Labor Department's Solicitor examine the potential impact of the new law on JTPA's Title II-B program, Battle said. The Solicitor's preliminary judgement, conveyed orally to Battle, is that program participants should be paid at least the minimum wage, which will increase from $3.35 to $3.85 in April.

The effect of the law on the Title II-B program was examined because it provides federally subsized employment, Battle said. The only other federal programs which may be affected by the law include employment programs under Title V of the Older Americans Act, work experience and on-the-job training programs. However, Battle noted, most OJT salaries, which are 50 percent subsidized, are usually well above the minimum wage.

With the wage increasing and the budget remaining roughly the same, Title II-B program operators may have to cut either the number of participants or the number of hours the participants work, Battle said. However, the numbers of youths served will probably not decrease because in recent years many slots have remained unfilled and money has been left unspent, Battle said. (For story, see ETR 7/12/89, p. 1172.)

The number enrolled may actually increase in some large cities because the wage increase may attract inner city youths who were reluctant to take jobs paying only $3.35 per hour last summer, Battle speculated.

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Mitchell told ETR that while she did not know if Scott had told the executive committee or not, she did know that Gonzales questioned Scott about the controller at a board meeting. She also alleged that the minutes of the meetings were not very accurately kept, and were never approved at subsequent meetings.

In addition, Mitchell said that there were communication problems between the three members of the executive committee and the rest of the board. Therefore, it is possible that the committee did not tell the board about the controller's resignation after Scott informed them.

Continuing Problems

Former PIC Executive Director Watson told ETR that the problems were not resolved after he hired a controller because "he wanted to try and do it on his own and did not hire any staff." In addition, because the PIC had missed many deadlines for cost reports, the controller tried to speed things up by taking the total contract amount for the year and dividing it by 12 months, which is how the July and August reports came out identical, Watson explained.

Larrea told ETR that Watson's controller left in September and since then "we have put together a qualified staff." Miller concurred.

Larrea told ETR that the PIC staff had also called in an auditor just a few weeks before the Department of Commerce came in because "we knew there were problems with the financial records," she said.

Despite the problems, contractors and PIC staff interviewed by ETR said that there was "very little," if any, interruption of program services to participants.

Power Struggle

Mitchell added that the PIC's problems will not go away until the political battles are resolved. "This is not a struggle between political parties or between Hispanics, blacks, and whites. It is more of a power struggle for control of the PIC and the JTPA money," she concluded.

—Anne Mytych-DelPonte

Basic Skills

FORD PLANT IN MICH. OFFERS READING, MATH AID IN 'COLLABORATIVE' SETTING

A skills enhancement program for hourly workers at the Ford Motor Co.'s plant in Ypsilanti, Mich., emphasizes a student-centered concept that engages adults in collaborative learning, according to the program's director.

Called "the Workplace Academy," the Ypsilanti site is one of 40 voluntary programs in Ford plants across the country that teach basic reading, writing, and math skills to hourly workers represented by the United Auto Workers.

About 12,500 workers nationally have enrolled in skills enhancement courses since the first classes opened in 1984 until the end of 1988, a spokesperson at the UAW-Ford National Education, Development, and Training Center in Dearborn, Mich., told ETR.

The courses are funded through Ford's contributions to the "nickel fund," which supports education and retraining efforts run jointly by the company and the UAW. The 1982 national agreement between Ford and the UAW set up the fund, into which the company pledged to contribute a nickel for each employee hour worked by UAW-represented workers.

Problem Was Apparent

Bob Bowen, an employee involvement coordinator at the Ypsilanti plant and former president of UAW Local 849, said that when the academy began operations in 1984, "we knew we had a need to fill." About 20 percent of the plant's hourly workers were functionally illiterate, he told ETR.

He said indications of literacy problems turned up in workers taking the wrong stock to assembly lines or being unable to read training manuals. "We were afraid many wouldn't be able to understand the company's new training needs, or couldn't read safety instructions," Bowen said.

Additionally, Ford's move in 1979 to encourage greater involvement by union workers in the production process made internal communications a more vital part of workers' jobs, but it also may have made them nervous, Bowen indicated. "Writing a report would have been uncomfortable for many people in the plant," he said.

Bowen contacted Rena Soifer, a workplace education specialist from the corporate service center at Eastern Michigan University in Ypsilanti, visited her at the university's federally funded literacy academy, and quickly realized that the project "was the type of thing we needed. She got through to adults and teens."

Soifer told ETR she then pitched the academy concept to union and company officials, who approved a six-month pilot project focusing on reading and writing skills at the Ypsilanti plant. "We planned a pilot for 30 people, but after three months we had 60 people attending classes," she said. Today, about 150 workers are enrolled annually in the reading and writing classes, she added. About 1,200 hourly employers are represented by the UAW at the Ypsilanti plant, according to Bowen.

Due to workers' interest in the initial classes, Dearborn center officials gave her the go-ahead for a full year of classes, Soifer explained. "They loved what we were doing," she said. Since then, Soifer and her staff — all of whom are EMU employees — have won yearly grants from the Dearborn center to continue and expand operations of the academy, she said.

Scope Of Courses Grows

The scope of basic skills classes offered at the academy has grown in recent years. Soifer said that the introduction by Ford of statistical product con-

trol analysis, a mathematical method used to determine production performance, made many "very capable workers very upset." Some workers using the SPC method "were undereducated in math," she explained.

That discovery led the academy to add classes in basic math skills and computer usage in the mid-1980s to supplement the reading and writing courses already being taught. Soifer said that annually about 200 workers enroll in the math classes and an additional 150 workers learn to use computers.

"Many of those workers have been here since the beginning, taking one course after another," Soifer said. "We set our own curriculum, so classes change regularly," she added.

Recently, classes in Japanese language and culture have been added to the list of classes offered by the academy, Soifer said. The growing infusion of Japanese technology in the automotive sector sparked an interest in that country that encouraged the academy to offer the classes, she indicated.

The academy's classes are scheduled either before or after work shifts. Most meet in 90-minute classes twice a week for eight weeks, Soifer said. Students are highly motivated, she contended, because workers receive no compensation for their studies. "It's all on their own time."

Small Class Size

Classes offered by the academy have no more than 10 students, Soifer explained. She said that the small size helps workers function in a group setting, "learning from and helping each other."

In the group, students "discuss, read, and write about situations and provocative issues related to their personal and work lives," Soifer wrote in an essay in *Participatory Literacy Education*, a book published this past summer. "Some topics, such as work shift changes, are covered in a single session; while other topics are explored over several sessions."

Soifer said the group becomes a "support structure" for the workers, helping to to diminish the tension students often feel at re-entering a classroom situation after long periods outside a school environment. "Each group member, including the teacher, is a resource and support for every other person," she said.

Participants in the group "learn to listen, to respect the opinions of others, and to see a different way to think through their problems," Soifer asserted. "It's important for them to know that others have shared their own experiences."

Soifer added that the small group size complements Ford's own Employee Involvement initiative, in which employees meet in small "quality circle" groups to discuss ways to improve production.

Facilitators, Not Authorities

Teachers at the academy are not authority figures who impart knowledge in the sequence and manner that they deem fit, but instead are "facilitators," according to Soifer. "The teacher serves as a model, listening and accepting contributions from everyone. Learners realize that others are interested in their ideas and that it is safe to make mistakes."

Teachers are heavily screened to prove their incentive to work in the plant environment, Soifer said. "Our teachers have at least master's degrees and are extremely qualified," she added. All new staffers receive 30 hours of training to acclimate them to the academy's teaching strategy and to the culture of the plant. "They must know they're not teaching in a vacuum."

Academy teachers are full-time staffers who are committed to their profession, Soifer explained, drawing a distinction between the academy and what she characterized as traditional adult education classes, where part-time teachers are beholden to a "stagnant" curriculum tied to the local public school system.

She said that one math teacher, one reading and writing instructor, and one secretarial staffer are at the academy whenever classes are being held.

The Nickel Fund

The UAW-Ford training center in Dearborn sponsors a variety of other education, training, and financial planning courses for Ford's hourly employees in plants across the country. These voluntary educational opportunities, which are administered by the center's Education, Development, and Training Program (EDTP), are funded through company contributions to the nickel fund.

The nickel fund concept was reaffirmed in 1984, according to Rick Martinez, a UAW international representative at the Dearborn center, and increased to 10 cents per employee hour worked in the 1987 agreement.

The EDTP courses are intended to promote personal development and are not related to the job-related technical training that is provided to workers at Ford plants, according to center spokespersons.

"We don't look at the results of the courses in terms of productivity," Martinez said. "What we do is deal with individuals to provide education and personal development opportunities for our workers."

—**Richard Sayre**

Dislocated Workers

PA. EXPANDS WORKPLACE PROJECT TO 24 LIBRARIES WITH TITLE III MONEY

The Pennsylvania Workplace Project has expanded to 24 new locations, up from its original six two years ago, through a JTPA Title III grant of $600,000, according to Steven Mallinger, state director. The project, which provides job search assistance in a library setting, was started with a three-year, $673,000 grant from the Kellogg Foundation, he added.

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Suggested Speech Inserts on Product Liability Reform

Reform of our costly product liability laws is a top legislative priority for our Administration. The burden of our present product liability system is excessive and adversely affects our ability to compete abroad. In 15 years, product liability suits have increased over 1,000 percent -- representing unnecessary litigation and extreme costs to American business and consumers alike. This is unacceptable, and our Council on Competitiveness, chaired by Vice President Quayle, has made product liability reform a top competitiveness priority.

We must restore basic fairness to our product liability system. A person who is injured by a product should be compensated for his or her actual losses. Liability should be based upon whether a person or company is at fault. Individuals and organizations with "deep pockets" must not be made to pay for losses that are not their fault.

You don't need a law degree to know that something is very wrong with a system in which over 50% of the money spent never gets to the injured person. Rather, it is used up in lawyers' fees, court costs, and other legal expenses. That's why I support product liability reform to encourage settlement out of court through arbitration and alternative dispute resolution.

Ultimately, the American consumer pays for the excessive cost of our inefficient litigation system. Companies abandon or severely limit the development and manufacture of important consumer products because of fear of protracted lawsuits and unfair judgments. Product liability reform is needed to preserve the health of Americans who will be worse off when they cannot obtain -- or cannot afford -- vaccines against hepatitis and other deadly diseases. Our kids will miss out on sports, if no one is willing to sell equipment like football helmets and masks. Mothers will not be able to buy car safety seats for their children, if all the manufacturers are forced out of business by skyrocketing insurance premiums. Our office buildings and schools will not be able to replace asbestos with safer products, if the fear of lawsuits prevents their introduction into our economy.

We must act together now. I call for Congress to act immediately to pass needed, bi-partisan product liability reform legislation. We must work together to restore justice, preserve our competitive edge, and promote consumer safety and welfare.

OFFICE OF THE VICE PRESIDENT

WASHINGTON

FACT SHEET ON PRODUCT LIABILITY REFORM

"Product liability reform...it's time to act together."

President George Bush
State of the Union Address
January 31, 1990

"A legislative priority for our Administration will be the reform of our costly product liability laws. The burden of our present product liability system is excessive and adversely affects our ability to compete abroad. In fifteen years, product liability suits have increased over 1,000 percent -- representing unnecessary litigation and extreme costs to American business and consumers alike. This is unacceptable, and our Council on Competitiveness, chaired by Vice President Quayle, has made product liability reform a top competitiveness priority."

President George Bush
February 6, 1990

"Our current product liability system of 50 different State laws generates excessive litigation, inflates insurance costs, and creates uncertainties for American businesses. This is a self-imposed burden on our ability to compete. It also has a chilling effect on innovation and the development of new products. Ultimately, the costs of our inefficient product liability system are borne by American workers and consumers."

Vice President Dan Quayle
November 30, 1989

An Administration Priority.

Product liability reform is a top legislative priority for the Administration. It is essential to business innovation, U.S. international competitiveness, and consumer safety and welfare.

- In his State of the Union address President Bush called upon Congress to enact essential product liability reform legislation.

- On November 30, 1989 Vice President Quayle announced the Administration's product liability reform initiative developed by the Council on Competitiveness. The Administration strongly supports S.1400 -- a bipartisan reform bill co-sponsored by Senators Danforth, Inouye, Kasten and Rockefeller and similar legislation in the House of Representatives, and it will seek additional reform provisions to strengthen the bill.

- The Senate Commerce Sub-committee on the Consumer will hold hearings on S. 1400 on February 22, 1990.

Restore Basic Principles of Fairness.

The Administration's reform initiative will restore basic principles of fairness to America's product liability system:

- First, protection of an innocent person's legal right to fair compensation for medical expenses, lost wages, property damage and other actual losses.

- Second, payment for losses based on actual responsibility for the harm -- fault based liability -- not ability to pay -- "deep pocket" liability.

- Third, cooperation and the prompt and fair settlement of differences should be encouraged through alternatives to costly and time consuming litigation, which only reduces the compensation available to the injured party.

Strengthen U.S. Competitiveness.

Our product liability system --with its excessive litigation costs -- is a self-inflicted burden on America's ability to compete. U.S. product liability laws are more onerous than those of other major industrial countries, such as Japan and European nations.

- The estimated cost of product liability suits in the U.S. -- $80 billion per year -- equals the combined profits of the nation's 200 largest corporations.

- Total U.S. liability insurance costs are estimated to be 15 times higher than Japan's and on average 20 times higher than the European nations'. These costs are reflected in higher prices for U.S. goods and hamper our ability to compete with foreign manufacturers.

Enhance Product Innovation.

Equally devastating is the chilling effect of the liability system on product innovation. The fear of potential law suits deters businesses, especially small and start-up businesses, from introducing new and safer products.

- Many products are no longer being produced for American consumers -- single-engine aircraft, vaccines against deadly Japanese encephalitis, and gymnastic equipment are a few examples.

- Many companies decide against introducing new products. For example, Monsanto will not market an inexpensive, safe asbestos substitute and Genentech declined to go forward with a new hepatitis vaccine developed through biotechnology because of liability risks.

- 36% of American businessmen in a recent survey stated that they stopped some manufacturing as a result of product liability risks. 15% laid off workers and 8% closed plants.

Reform Advances Consumer Welfare and Safety.

Safety and health considerations, the principle rationale for continuing the current system, are undermined by the current product liability regime. Consumers are not always offered new, safer products (like vaccines and the Monsanto asbestos substitute). Also, the costs of excessive liability risks are reflected in higher prices for goods and services.

- A 1989 Rand Corporation study reveals that on average only 46% of total expenditures from tort law suits went to compensate injured parties. Legal fees and expenses consume on average of 37% of the amount spent -- in some product liability cases this figure reaches 70% of the total amount.

- The cost of DPT vaccines rose from $2.80 per dose to $11.40 per dose to cover liability insurance costs.

- In a February, 1990 Consumer News article, Bonnie Guiton, Special Advisor to the President for Consumer Affairs states "These are among the ways in which America's current product liability system works against consumers....Done properly, however, product liability reform can benefit consumers..."

The Administration will work with the bi-partisan sponsors of S.1400 and with groups from all sectors of the American public to support U.S. product liability reform that achieves improved U.S. international competitiveness for businesses and restoration of basic principles of fairness for consumers.

For more information contact:
David McIntosh 456-2816

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Achieving Manufacturing and Economic Excellence In America

It was nearly two centuries ago that Alexander Hamilton, in his famous Report on Manufactures, pointed to the path whereby the United States was to attain wealth and power beyond the dreams of its founders:

> "Not only the wealth but the independence and safety of a country appear to be materially connected with the prosperity of manufactures."

These words are still true today. Manufacturing's recent comeback has made it clearer than ever that manufacturing is essential to the nation's international competitiveness, economic well-being, and national security:

— Manufacturing has driven the current economic expansion, accounting for almost three-quarters of GNP growth. Taking sales of services to manufacturers into account, nearly half of the U.S. economy depends on manufacturing.

— Manufacturing provides the technological innovations underlying increased productivity and a continued rise in our standard of living. Manufacturing accounts for more than 90% of private research and development expenditures and employs nearly three-fourths of all U.S. scientists and engineers. In the current decade, manufacturing productivity has grown almost 4% annually—compared to virtually no productivity growth in the service sector.

— Manufacturing is where we must look to improve our trade balance and decrease our dependence on international debt. About 80% of U.S. trade is in manufactured goods, where our net trade position has improved significantly in recent years.

While the U.S. manufacturing recovery has been heartening, much remains to be done. Our foreign competitors continue to improve product quality, develop better manufacturing processes, and aggressively expand markets. And, their governments treat domestic manufacturers as a national resource to be nurtured and encouraged.

U.S. companies can become and remain world class manufacturers by focusing relentlessly on all aspects of manufacturing excellence, from higher quality to increased capital investment in advanced manufacturing techniques; from better use of human resources to more rapid commercialization of technology. Fundamentally, excellence requires fostering values that make manufacturing a priority and developing a corporate culture committed to continuous learning and improvement.

But beyond what companies can do, meeting the global competitive challenges of the 1990's will require industry, government and society as a whole to join in a cooperative effort to achieve excellence. We must all work together as a team to beat the tough competition we face. In that context, the National Association of Manufacturers believes that we should place top priority on a long-term drive for excellence in the following areas:

Achieving Productivity Through People. Human capital is the indispensable cornerstone of manufacturing and economic excellence. An educated and motivated workforce is our most important competitive resource. Managers should inspire workers to be more involved in improving both manufacturing processes and product quality, by giving them opportunities to work in cooperative teams and rewarding them by relating pay to productivity. Our education system must be upgraded to give workers the fundamental skills they need to function in the modern workplace. At all educational levels, greater emphasis must be placed on science and engineering, as well as on the need to understand the diversity of cultures and other factors in the global economy. To keep pace with rapid changes in the workplace, both public and private sectors must collaborate in providing workers with adequate training, retraining and relocation assistance.

Regaining Our Technological Edge. Product and process innovations have always been essential to business success. To reclaim their competitive edge, U.S. manufacturers must invest more in research and development and learn to commercialize new technology more rapidly. To speed the transfer of knowledge from the laboratory to the marketplace, companies should consider cooperative generic research and development efforts focused on new manufacturing technologies. Government can help by maintaining a stable tax policy that promotes higher levels of research and development as well as increased investment in the facilities and equipment constituting the nation's technology infrastructure, and by reducing regulatory obstacles and delays in the marketing of technological breakthroughs. The Federal government should help coordinate and encourage the technology initiatives of businesses, universities and state governments.

Winning In The World Marketplace. In the battle for export markets, U.S. companies can win only by implementing strategies that deliver a quality product at a competitive price. But because the actions of other governments markedly affect international competition, the U.S. government must help create an environment that supports the competitiveness of American products. Through hard bargaining in the GATT negotiations and vigorous implementation of recently-enacted trade legislation, government trade policy must aggressively seek to open foreign markets to U.S. exports while protecting U.S. firms from unfair trade practices. Export disincentives of all types—ranging from unnecessary export controls to unworkable restraints on organizations such as the Eximbank—should be systematically eliminated. Exchange rates should reflect competitive fundamentals and avoid fluctuations that price U.S. goods out of foreign markets.

Investing For Excellence. Advanced technologies and systems must be put in place throughout the manufacturing sector. Governmental policies should encourage the adoption of advanced manufacturing techniques. Federal tax laws must be modified to reverse their strong bias in favor of consumption and against capital investment and personal savings. Desirable changes include more favorable depreciation allowances, restoration of some form of investment tax credit, increased incentives for savings, and elimination of the double taxation of corporate earnings paid as dividends.

Taking The Long View. Instability in the nation's financial markets makes manufacturing and economic excellence difficult if not impossible to achieve. Investors and managers alike must place less emphasis on quick trading gains and short-term operating profits, and focus more on long term performance and value. Government can encourage a longer term view through the judicious application of the securities, financial and antitrust laws. Lower capital gains tax rates are needed to restore incentive for entrepreneurial rather than speculative risk taking.

Living Within Our Means. The ongoing drive towards greater manufacturing and economic excellence will be short-lived unless both public and private sectors live within their means. Governmental, corporate and consumer debt are all alarmingly high, diverting capital from productivity-improving investment, keeping interest rates high and making us excessively dependent on foreign capital. The budget deficit must be reduced by holding the overall growth rate of federal spending below the rate of inflation, without raising taxes or shifting social costs to employers through the subterfuge of mandated employee benefits. No major economic or regulatory policy should be adopted until its impact on manufacturing competitiveness has been fully assessed and understood by policymakers. For their part, both managers and shareholders must reassess the wisdom of restructurings that result in massive corporate debt loads but add nothing to the stock of productive plant and equipment.

The quest for manufacturing and economic excellence in the decade ahead is a difficult but achievable goal. If we reach it, the U.S. will enter the 21st century with a robust economy and an improved standard of living. But this will require a commitment to standards of excellence, an investment of resources and efforts in the priorities outlined above, and the willingness and determination to work together as a team.

NATIONAL ASSOCIATION KNIGHTS OF THE KU KLUX KLAN. See Ku Klux Klan.

NATIONAL ASSOCIATION OF BROADCASTERS (NAB). Founded in 1922 at Washington, D.C., by Eugene F. McDonald, who served as president until 1925, and a group of radio broadcasters, for the purpose of promoting better broadcasting. Originally known as the National Association of Radio Broadcasters, it changed its name in 1951 to the National Association of Radio and Television Broadcasters. In 1957 it became the NAB.

One of the first pieces of federal legislation the NAB lobbied for was the passage of the Radio Act of 1927. It initiated the policy of assigned frequencies with private ownership of broadcasting stations. Over the years it has fought against federal censorship. It initiated voluntary regulation by first establishing the Radio Code Board and then the Television Code Review Board. Code authority offices are located in Washington, D.C., Hollywood, and New York City.

The NAB represents the radio and television industry before congressional committees, lobbies for or against legislation related to its interests, seeks to prevent limitations on television advertising, and opposes cable or pay television. The NAB established the Radio Advertising Bureau and the Television Advertising Bureau to promote the commercial use of its media. It also seeks to improve industry standards relative to the technical aspects of broadcasting and to broaden coverage of public events. It has proposed televising sessions of Congress and criminal trials. NAB attempts to force local and state governments and agencies to be open to radio or television coverage. To serve the general interest, the NAB encourages free public-service announcements on radio and television. It opposes groups such as Morality in Media* that try to impose censorship, control media content, or modify advertising.

National headquarters is located in Washington, D.C. The NAB has over five thousand members who represent radio and television stations of every network. Current president is Vincent T. Wasilewski. NAB publishes a weekly, *NAB Hotline*, and a monthly, *Code News*.

For more information, see Erik Barnow, *A History of Broadcasting in the United States*, 3 vols. (1970).

NATIONAL ASSOCIATION OF MANUFACTURERS (NAM). Founded in 1895 at Cincinnati, Ohio, by 583 small businessmen for the purpose of promoting domestic commerce and international trade. During its early existence the NAM almost became defunct. It began to expand when it took a stand against recognizing labor unions. Under the leadership of David Parry and T. W. Van Cleave, the NAM strongly opposed the concept of collective bargaining as undue interference with the private ownership of

business and industry. In lieu of recognizing labor unions as collective-bargaining agents for workers, it proposed the American plan, which advocated company unions and an open shop.

During the 1920s the membership in the NAM tended to reflect the views of big business rather than those of the small businessman, an orientation that has continued. For a long time the NAM championed high protective tariffs. Even after lessening its opposition to reciprocal trade, it has insisted on a peril point protective device for American producers (that point at which the volume of imports imperil domestic producers). The NAM supports research activities; monitors federal legislation; keeps members informed on relevant court decisions; represents business at congressional hearings; disseminates information to influence public opinion; and lobbies with members of Congress to persuade them to vote for or against legislation as determined from a pro-business viewpoint.

The NAM challenged the constitutionality of the Lobbying Act of 1946, which would have required it to register as a lobbying organization. It won in the lower court, but the decision was later reversed by the U.S. Supreme Court. It still did not register and in 1963 formed the Business-Industry Political Action Committee* to strengthen its activities related to congressional elections. The NAM was forced to comply with the Lobbying Act in 1975 following a court suit initiated by Common Cause.* It now has thirteen full-time lobbyists on its staff and a budget of over $8 million.

The NAM opposed most of the New Deal legislation during the presidency of Franklin D. Roosevelt. It also fought most of the Fair Deal programs proposed by President Harry S. Truman. It has consistently championed free enterprise with little or no regulation by government. It opposes federal involvement in business, such as public power or government ownership, and seeks to diminish the power of federal regulatory agencies. It fought unsuccessfully to defeat the Clean Air Act of 1970, as it did relative to the Clean Air Amendments Act of 1977. In 1971 the NAM successfully opposed the legislative activities disclosures bill proposed by the House Committee on Standards of Conduct. In 1977 the NAM was instrumental in engineering a defeat in Congress of the common-situs picketing bill.

In 1973 the NAM's national headquarters was moved from New York City to Washington, D.C. Membership currently totals a little over thirty-one thousand and primarily represents the economic and political outlook of those who own or operate larger business firms. It sponsors the Institute on Industrial Relations and has conducted negotiations with the Chamber of Commerce of the United States* about a possible merger. Current NAM president is W. P. Gullander. NAM publications include a weekly, *NAM Reports*, and a quarterly, *Action Report*.

For more information, see Albert K. Steigerwalt, *The National Association of Manufacturers* (1964).

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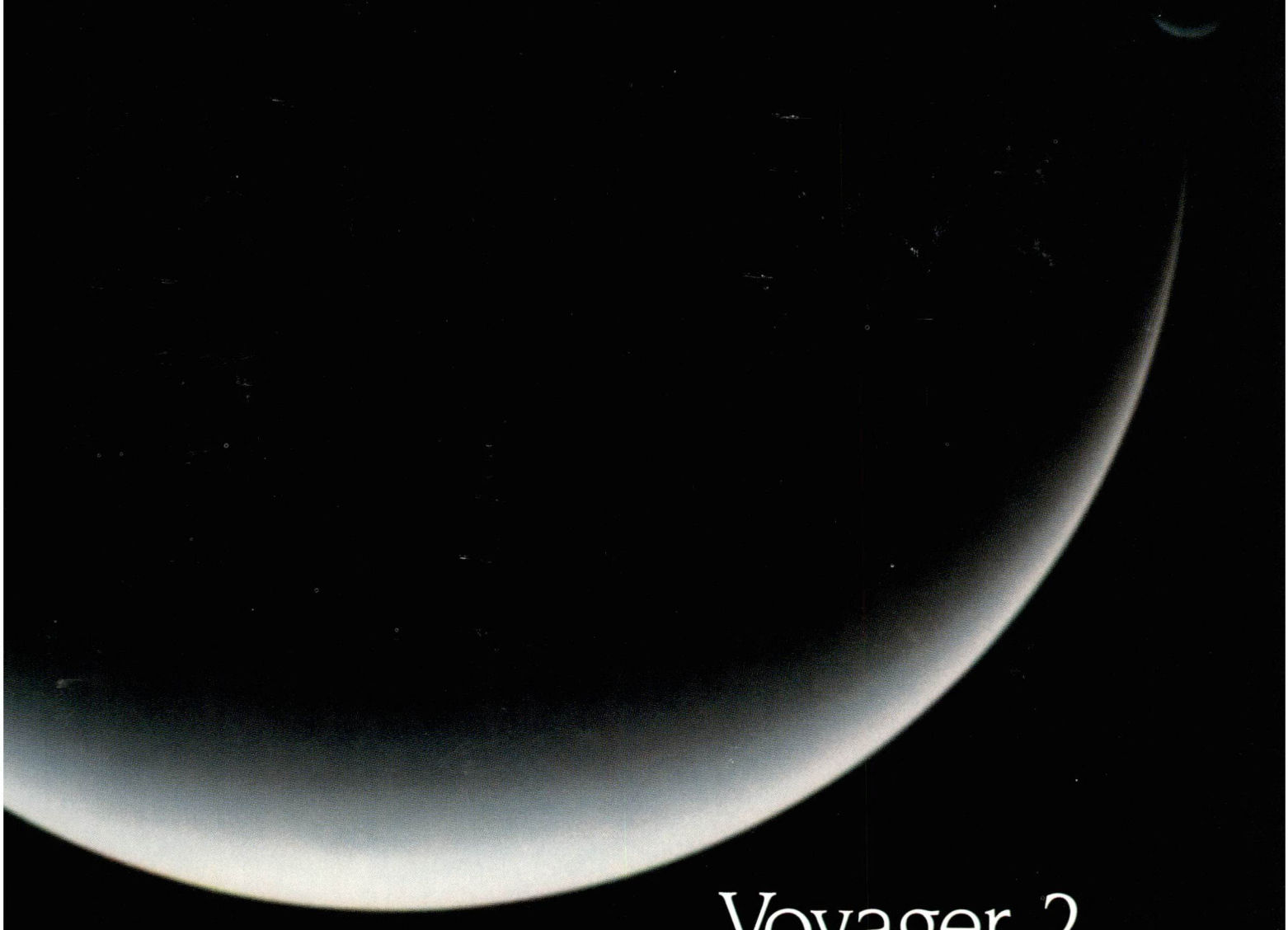

Voyager 2

Innovation on Trial: Punitive Damages Versus New Products

RICHARD J. MAHONEY AND STEPHEN E. LITTLEJOHN

Innovation, scientific discovery transformed into valuable products, is a powerful asset for the United States in today's global economy, but it is being put on trial by the U.S. product liability system. Strict liability and huge jury awards, bloated by the uncontrolled imposition of punitive damages, have led to a proliferation of lawsuits, which in turn has created immense legal uncertainty for innovators who want to create new products. Because a high level of legal uncertainty and scientific innovation cannot coexist, new, safe products may be kept off the market and the scope of research and development restricted. Punitive damages constitute the driving force behind this problem, and both judges and legislators should aim at bringing them under control with legal reforms.

ECONOMIC SUCCESS FOR THE UNITED STATES IN THE YEARS ahead will depend mainly on innovative thinking, especially from scientists. New knowledge, creative solutions, and innovative products—advantages in the past—are becoming the necessities of the future. "More so than in any other economy," said David J. Teece of the University of California at Berkeley, "the United States today depends critically on its ability to innovate, and to capture the benefits from innovation, for its economic prosperity" (*1*, p. 3).

Monsanto focused on this need for more innovation a decade ago and fundamentally shifted its strategy toward the creation of novel, higher-value products through scientific discovery. At the strategy's heart is a concentration on chemistry and biology and, importantly, their intersection in the use of biotechnology to create new pharmaceutical and agricultural products. Monsanto now spends more money annually on research and development than on capital investment—$650 million in 1988, about 7% of sales.

Still, research and development is an inherently unpredictable enterprise in which neither the pace of discovery nor the certainty of success can be guaranteed. Nevertheless, scientific uncertainty can be managed, whereas the legal uncertainty in the nation's courtrooms caused by product liability cannot. Monsanto's policy is to produce safe products based on sound science. Yet, no set of responsible actions by the company's scientists and development people can be identified which, if undertaken today, will ensure the legal acceptability of their innovations tomorrow.

Some products cannot be pursued. One such product was an asbestos substitute, a safe, biodegradable, and effective reinforcing phosphate fiber called calcium sodium metaphosphate. The unpredictable potential for further expansion or misapplication of product liability laws led Monsanto to cancel the product just before commercialization (*2*). A whole generation of lawyers has been schooled in asbestos liability theories that could possibly be turned against this or any similar substitute.

At the time of cancellation, the phosphate fiber program director, Joseph J. Narciso, observed that "seven-figure jury awards on claims without merit are enough to send shivers down anyone's spine" (*3*, p. 15). The costs of litigation are so high, the uncertainty of courtroom outcomes so great, and the possibility of multimillion dollar awards so real that winning every lawsuit would still have been a Pyrrhic victory.

Monsanto's experience is not unusual. Capable of managing the uncertainties of research but not the uncertainties of law, companies have no choice but to avoid the courtroom by withdrawing products, keeping others off the market, and restricting the scope of research and development at its earliest stages. As author Peter Huber concluded, "across the board, modern tort law weighs heavily on the spirit of innovation" (*4*, p. 14).

The chief executive officers of the nation's leading companies summed up the impact of product liability on innovation in a 1988 survey by the Conference Board. The study showed that uncertainty over potential liability had led almost 50% of the responding companies to discontinue product lines, nearly 40% to withhold new products, including beneficial drugs, and 25% to discontinue product research. Half the chief executives polled also reported that product liability had a major impact on our international competitiveness, and 75% expected product liability problems to grow in significance (*5*).

Strict Liability, Punitive Damages Halt 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 (*6*). Strict liability generates added lawsuits. It brings thousands of product manufacturers into court regardless of their attention to product safety. Then, potentially massive punitive damage jury awards create uncertainty that cannot be managed along with innovation.

"To expand liability and provide unrealistically high compensa-

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tion can only magnify our present predicament," said George L. Priest of Yale Law School (7, p. 234). As Huber explains, the negligence standard had focused on whether the "human actor on the scene was careful, prudently trained, and properly supervised" (4, p. 157). In this context, Huber contends, lay jurors can make reasonably sensitive intuitive judgments about people. The best scientists and researchers, from whom the greatest innovations come, can easily meet this test.

However, the change to strict liability in the 1960s shifted the issue from whether human conduct was negligent to whether a product was defective in design or manufacture (8). "Jurors," says Huber, "are not experts about technology itself, and intuition here is a terrible guide . . . (because) people everywhere underestimate the risks they know well and face every day and overestimate those that are new and foreign" (4, p. 157).

The result has been a vast expansion of legal liability for America's innovators. According to one study, "each year since 1974, the volume of product-related litigation has exceeded that of the previous year, sometimes to a substantial extent; nearly four times as many suits were filed in 1986 as in 1976" (9, p. ix). These lawsuits have grown substantially faster than have filings for any other kind of federal lawsuit, and filings at the state level are "almost certainly several times greater than federal filing levels" (9, p. v).

These data usually evoke rejoinders that the increase in litigation actually only involves a few industries, and then only a few products, with the large number of asbestos suits frequently cited. On the contrary, researchers have found thousands of federal product liability defendants and thousands of products leading to liability suits, with the cases widely dispersed across different sectors of the economy (9).

Arguments that the proliferation of liability suits are somehow related to an increase in unsafe products are also not supported by facts, as no relation can be found between the two. Priest concludes that "data on deaths and injuries cast great doubt on the proposition that the liability crisis derives from an increase in the underlying accident rate" (10, p. 203) and "provide no evidence that the expansion of litigation has affected the injury or death rate" (11, p. 194).

Product-related injuries have remained constant on an index basis before and during the escalation of product liability suits (7). In certain key areas, for example, the workplace, which accounted for 60% of product liability claims in 1985 in which large sums were paid, disabling injury rates remained relatively constant and death rates began dropping steadily in 1945, well before the increase in lawsuits (10). Similarly, the general aviation accident rate has shown consistent improvement since 1946, once again beginning before the lawsuit phenomenon (12).

When coupled with strict liability, huge punitive damage awards are the greatest cause of legal uncertainty for innovators (13) and the most attractive lure for lawyers filing lawsuits. Theoretically, punitive damages are meant to punish and deter, not to provide additional compensation (14). The law already ensures adequate compensation for nearly all conceivable harm, including noneconomic damages like pain and suffering, and usually does not account for additional payments from other sources.

The award of punitive damages is an anomaly peculiar to the United States, rare in Great Britain and Canada, and virtually unknown in the world's civil law countries (15). Before 1976, they were also virtually unknown in United States product liability cases (16). Legal scholars have been able to find only three earlier cases of appellate approval of punitive damages for defective products. Now, the same scholars say punitive damages are almost commonplace with multimillion-dollar awards occurring monthly (17).

In Cook County, Illinois, for example, the average punitive damage award between 1980 to 1984 in personal injury actions had risen to $1,934,000. Over six times as much money was awarded in punitive damages between 1980 and 1984 as was awarded during the previous 20 years combined (18).

A legal expert has found that, between 1922 and 1959, the highest punitive damage award affirmed by a California appellate court was $10,000. In the 1960s the record jumped to $250,000. In the 1970s, the highest was $740,000. By 1986, a $3 million punitive damage award had been approved, and in 1988 California appellate courts approved awards of $14 and $15 million in contract cases where the only actual damages were economic (19).

One case exemplifies the problem with punitive damages. Lederle Laboratories, a pharmaceutical company, followed Food and Drug Administration (FDA) instructions to the letter in producing and marketing a polio vaccine, only to have a Kansas jury hand down an $8 million punitive damage verdict against it. The reason: The lay jury decided that the firm should have used a less effective vaccine, essentially overruling FDA doctors, scientists, and policy-makers who had told the firm to do otherwise. The verdict was later set aside by a narrow, four-to-three decision of the Kansas Supreme Court, but the company still had to pay the legal costs of its appeal (20).

The punitive damages system makes it too easy for lawyers to mislead jurors, many of whom possess little scientific background but believe in the possibility of a risk-free society, to enrich plaintiffs and their attorneys with multimillion-dollar windfalls. Too often, witnesses that plaintiffs' lawyers bring before juries to explain complicated scientific details are, in fact, advocates of fringe theories not generally accepted by most scientific authorities (21).

Few of the traditional safeguards usually afforded defendants are available in punitive damages cases. Most states have only vague and uncertain standards of conduct, require only minimum proof, and impose few limits on huge dollar awards, thus giving juries little practical guidance. The result: Conduct for which punitive damages may be awarded is whatever a single jury says it is. Then, with few exceptions, nothing stops different juries from awarding punitive damages in huge amounts against the same defendant for the same alleged conduct.

Proponents of punitive damages argue that such awards are rare. They overlook the ripple effect just a few huge punitive damage verdicts can have in triggering a rush to the courthouse by plaintiffs' lawyers to file new claims. Thus, for one to count the number of punitive damage verdicts, declare it small, and dismiss the problem ignores the role of punitive damages in creating great uncertainty for innovators.

The U.S. Justice Department has observed that punitive damages have become a legal lottery where many plaintiffs regularly file claims (22). Even though their probability of success is small and only about 5% of all cases filed end with a verdict (23), plaintiffs' lawyers recognize that if enough such claims are filed, they may eventually hit the jackpot.

Even if plaintiffs' lawyers do not hit the jackpot, the mere possibility of doing so results in higher settlements (24). In one sample, a study reports that settlements in claims where plaintiffs sought punitive damages were nearly 150% higher than in those where plaintiffs did not seek punitive damages. In another sample, the settlements were 60% higher because of this punitive damages "shadow effect" (24).

People who favor punitive damages also argue that verdicts making such awards are usually reduced upon appeal. On the contrary, verdicts against business defendants were reported to be reduced less than were awards against individuals. Not only do business defendants have larger punitive damage awards assessed against them, but they are also likely to pay a greater portion of

those awards. In addition, among all types of actions, punitive damages in product liability cases are reduced the least (*25*).

Researchers have found that corporate defendants are, in fact, more likely than individuals or public agencies to be the target of punitive damages and that juries also award more money when the defendants are institutions or organizations rather than individuals—the "deep pocket" effect (*26*). Neatly summarizing what is happening, West Virginia Supreme Court of Appeals Justice Richard Neely, in an appeal for national standards, explains that "as a state court judge, much of my time is devoted to designing elaborate ways to make business pay for everyone else's bad luck" (*27*, p. 1).

Impact Greatest in Health Care, Aviation, and Basic Research

The result of this liability expansion has been a slowing of innovation in entire fields of inquiry, especially in those having to do with health care. The American Medical Association (AMA) has concluded that "product liability issues are having a profound negative impact on the development and utilization of potentially life-saving medical technologies" (*28*, p. 88).

Even when high litigation products like the Dalkon Shield and Bendectin are excluded from analysis, the product liability impact on pharmaceuticals has been severe. For 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. The former rate is greater than the total increase of federal product liability litigation, whereas the latter rate is only exceeded by that of asbestos litigation (*9*). In just the past 4 years, the number of punitive damage awards in all pharmaceutical product liability cases was fifteen times greater than in the entire decade of the 1970s (*29*).

Ironically, pharmaceuticals are among the most cost-effective elements in health care, which is already strained by liability-induced annual payments of $8 billion in medical malpractice insurance premiums and some $20 billion for unnecessary tests and procedures (*30*).

The inhibiting effect of expanded product liability may permeate a firm's entire decision-making process. For example, among groups of pharmaceutical industry representatives surveyed, some offered the example of the bench chemist "who simply chooses not to pursue his curiosity about pregnancy-related drugs because he knows that the firm's senior management is unlikely to fund later and more costly stages of the development process for such a high-hazard product" (*6*, p. 26).

Elizabeth B. Connell, chairman of the FDA Obstetrics and Gynecology Devices Panel, says that the United States is losing its leadership role in the area of contraceptive technology, "with potentially disastrous consequences for women and men in this country and elsewhere" (*31*, p. 46). Now, Johnson & Johnson and American Home Products are the only U.S. companies conducting contraceptive research, and the remaining researchers are three nonprofit, publicly funded organizations with a total annual budget of $16 million (*32*).

In 1983, Merrell Dow Pharmaceuticals withdrew the antinausea morning sickness drug Bendectin, also widely used by health care professionals and approved by the FDA. Legal bills and insurance premiums, plus other product costs, were far in excess of Bendectin's $12 to 13 million annual sales (*33*).

The outlook for future drugs is not auspicious. The AMA noted that basic biomedical research is deteriorating, and small companies involved in innovative research are delaying or foregoing product releases (*28*). The National Academy of Sciences has concluded 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 [acquired immunodeficiency syndrome]" (*28*, p. 86). For example, Huber estimates that the "tax" imposed by liability law on childhood vaccines for insurance accounts for 95% of the price (*4*).

Medical equipment has been affected too. Union Carbide has foregone developing a suitcase-sized kidney dialysis unit and offering intravenous equipment (*34*). The sole domestic manufacturer of anesthesia gas machines, Puritan-Bennett, stopped making the devices in 1984, leaving the market to two foreign competitors (*33*).

Other affected industries include general aviation, where the U.S. advantage in aircraft production is eroding because of liability costs. Between 1977 and 1985, paid claims for judgments, settlements and defense increased from $24 million to $210 million in the general aviation industry. In 1979, that industry produced nearly 18,000 planes, but by 1986 the number had decreased to less than 1,500 planes. Overall industry employment is down 70% (*12*).

Some companies, while not totally withholding a product from market, may severely restrict permitted applications and users. One chemical manufacturer refused to permit a product to be used in the manufacture of aircraft landing gear, although it believed that this application would have enhanced the safety of the gear (*6*).

A similar phenomenon has been observed when U.S. companies or consumers seek to purchase a needed product from abroad. In one case, a U.S. lawyer had to travel to Europe in order to convince the supplier that "the legal climate in North Carolina, where the product was to be used, was not as 'hostile' as in states more frequently discussed in the press" (*6*, p. 40). In another instance, the Japanese maker of a vaccine for Japanese encephalitis withdrew the product from the U.S. market in June 1987 because of liability concerns, leaving U.S. travelers to Asia unprotected (*35*).

Even centers of basic research like the Lawrence Livermore Laboratory in California and the University of Wisconsin at Madison are finding it difficult to transfer useful discoveries into the marketplace because of liability concerns. Stephen M. Matthews of the Livermore Laboratory has tried unsuccessfully to generate interest in his food irradiation invention for killing insects, larvae, and parasites that infest freshly harvested fruit and vegetables. At the University of Wisconsin, patent counsel Howard W. Bremer says universities are reluctant to license patents to small companies, fearing that plaintiffs may find colleges' deeper pockets more attractive targets for lawsuits (*36*).

Judges, Lawmakers Beginning to Reform Punitive Damages

State and federal courts, the Supreme Court, state legislatures, and Congress are just beginning to take action on the problems caused for innovation by the uncontrolled imposition of punitive damages. These early reforms, although encouraging, currently affect only a handful of the 50 states.

Last year, the Georgia Supreme Court ruled that a $5 million punitive damages award, more than 100 times the amount of the compensatory damages award, violated the excessive fines clause of the Georgia Constitution (*37*). The California Supreme Court also refused to extend strict liability to makers of prescription drugs and limited their "market share" liability, thereby restricting exposure to punitive damages (*38*). Recently, the Hawaii Supreme Court ruled that an award of punitive damages requires the higher proof burden of clear and convincing evidence (*39*).

This year, U.S. District Court Judge H. Lee Sarokin concluded that companies sued in mass tort product liability litigation should

be punished only once for the alleged wrongful conduct, although he acknowledged in a subsequent decision that he did not have the authority to limit what other courts might do. He observed that "astronomical punitive damage awards may run counter to the public interest by inhibiting research and development of new products, including those aimed at promoting good health and curing disease." Judge Sarokin called for a reexamination of the purpose and constitutionality of punitive damage awards in his first ruling and for uniform legislation in his subsequent decision (*40*).

The U.S. Supreme Court has also given punitive damages greater attention, especially in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.* Although in that case the Court refused to use the Excessive Fines Clause of the Eighth Amendment to restrict punitive damages, it noted that a different outcome might result if a portion of the punitive damages were paid directly to the government (*41*). The Court said an inquiry into possible due process limits awaits "another day" (*42*, p. 4990) because this question was improperly presented before the court, but suggested that the present system of awarding punitive damages may violate the Due Process Clause.

Justices William Brennan and Thurgood Marshall seized upon this suggestion and stated that "without statutory (or at least common law) standards for the determination of how large an award of punitive damages is appropriate in the given case, juries are left largely to themselves in making this important, and potentially devastating, decision" (*42*, p. 4992). Justices Sandra Day O'Connor and John Paul Stevens, noting that "awards of punitive damages are skyrocketing," said, "some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market" (*42*, p. 4992).

In an earlier case, *Bankers Life & Casualty v. Crenshaw*, Justice Antonin Scalia and Justice O'Connor, concurring, asserted that "there is no objective standard" that limits the amount of punitive damages so "the impact of these windfall recoveries is unpredictable and potentially substantial" (*43*, p. 78). They continued, saying that "this grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process" (*43*, p. 78).

Meanwhile, lawmakers at both the federal and state levels are beginning to deal with the punitive damages problem. Laws in Alabama, Colorado, Florida, Kansas, Oklahoma, Texas, and Virginia use a variety of means to set an outer limit on punitive damages awards (*44*). Enactments in New Jersey, Ohio, Oregon, Utah, and Arizona provide a defense against punitive damages for products in full compliance with FDA product approval regulations (*45*). Certainly, this should be the case in an era when government approval for the marketing of certain products is obtained only after years of data gathering, careful scientific review, and strict adherence to government directives (*46*).

Permitting the division of trials involving punitive damages into two or more phases are Missouri, Utah, Georgia, Connecticut, New Jersey, Maryland, Nevada, California, Montana, and Kansas (*47*). In the first phase, the jury determines whether the defendant injured the plaintiff, hearing evidence only on this question. Then, in a second or third phase, the jury decides on compensatory damages and later, if the case is still open, on whether to award punitive damages.

This bifurcation or trifurcation of trials into phases keeps the jury focused on the cause of the alleged harm without being confused by often inflammatory, unrelated testimony on alleged damages. According to a Louis Harris poll (*48*), 80% of judges using bifurcation believe it speeds up trials while improving fairness, but not enough states use it.

Last year, in Congress, a bipartisan products liability bill (H.R. 1115) containing punitive damages reform won approval in the House Energy and Commerce Committee. This year, similar bills have been introduced in the House (H.R. 2700) and the Senate (S. 1400). Each provide for bifurcation and a defense against punitive damages for FDA-approved products.

Support for product liability reform, especially of punitive damages, comes from a wide range of groups. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) Executive Council said in 1986 that punitive damages should be "more predictable and related to the degree of injury inflicted by, and the level of culpability of, the defendant" (*49*, p. 5). The American Bar Association advises that punitive damages should only be supported by at least clear and convincing evidence (*50*). The American College of Trial Lawyers has recommended limiting punitive damage awards to $250,000 or twice compensatory awards, whichever is greater (*51*).

Organizations supporting limits on punitive damages in briefs filed with the Supreme Court in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.* included the American Red Cross, the Council of Community Blood Centers, and the City of New York (*52*). Most important, 78% of the American people favor restricting punitive damages to flagrantly negligent and malicious behavior (*53*).

As this cross section of U.S. society recognizes, punitive damages reform will affirm that our nation's future depends on the continued pursuit of new and useful scientific knowledge. That pursuit will be greatly enhanced by reasonable punitive damages rules which no longer stifle the forward progress of innovation.

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9. T. Dungworth, *Product Liability and the Business Sector: Litigation Trends in Federal Courts* (The RAND Corporation, Santa Monica, 1988), pp. 20, 42.
10. G. L. Priest, in *New Directions in Liability Law*, W. Olson, Ed. (Academy of Political Science, New York, 1988), pp. 200–203.
11. ———, in *Liability Perspectives and Policy*, R. E. Litan and C. Winston, Eds. (Brookings Institution, Washington, DC, 1988).
12. *Product Liability (Part 1): Hearings before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 550 (1987) (statement by Frederick B. Sontag, President, Unison Industries and Chairman, Product Liability Committee, General Aviation Manufacturers Association).
13. More than 85% of respondents to a national survey of corporate insurance buyers ranked capping noneconomic and punitive damage awards as the single most important issue facing their companies. See *1989 Risk Management Survey* (A&A Government & Industry Affairs, Washington, DC, 1989). Some argue that unpredictably large punitive damage awards deter wrongful acts. See P. J. Corboy, *National Law J.* **12** (no. 9), p. 13 (6 November 1989). On the contrary, punitive damages uncertainty overdeters the conscientious, driving them away from socially beneficial activity. See D. D. Ellis, *Southern California Law Review* **56**, 1 (November 1982). When defendants overcomply, increasing the expected damage award only increases overcompliance. See J. E. Calfee and Richard Craswell, *Virginia Law Review* **70**, 965 (June 1984). In fact, serious questions have even been raised as to whether excessive damages are actually helpful in deterring unwanted conduct. See G. T. Schwartz, *Southern California Law Review* **56**, 133 (November 1982).
14. Exceptions include Connecticut, where punitive damages are used only to compensate plaintiffs for no more than litigation expenses, and Michigan, where exemplary

damages compensate the plaintiff for humiliation, sense of outrage, or injury, but are not permitted as punishment of a defendant or as a deterrent. See *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co., Inc.*, 193 Conn 208, 477 A2d 988 (1984); *Jackovich v. General Adjustment Bureau, Inc.*, 119 Mich App 221, 326 NW2d 458 (1982); and *Willett v. Ford Motor Co.*, 400 Mich 65, 253 NW2d 111 (1977).

15. For example, Australia has decided not to include punitive damages in a new product liability statute; see The Law Reform Commission, *Product Liability*, Report 51 (Australian Government Printing Service, Canberra, Australia, 1989), p. 106.
16. L. F. Bittle, *California Law Review* **75**, 1433 (July 1987). Punitive damages typically are not awarded in product liability cases in Connecticut and Michigan (*14*) where they serve a compensatory purpose; in New Hampshire, Louisiana, Massachusetts, and Washington where they are permitted only in a limited number of nonproduct-related cases authorized only by statute; and in Nebraska where the state constitution prohibits them. See NH REV. STAT. ANN. § 507:16, as added by Laws 1986, ch 227:3, effective July 1, 1986; *Philippe v. Browning Arms Co.*, 375 So.2d 151, 157 (La. App. 1979), *aff'd*, 395 So.2d 310; *Santana v. Registrars of Voters of Worcester*, 502 N.E.2d 132, 135 (Mass. 1986); *Barr v. Interbay Citizens Bank*, 96 Wash.2d 409, 635 P.2d 441 (1981); *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472, 474 (1975), *cited with approval Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103, 109 (1986).
17. The first appellate decision approving an award of punitive damages in a product liability case was not entered until 1967, and there were only two others by 1975. See *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal Rptr. 398 (1967); *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); and *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (107); see J. C. Jeffries, Jr., and G. C. Freeman, Jr., *For the Defense* **31**, 9 (1988).
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19. T. B. Olson, *Testimony on Behalf of the Minnesota Civil Justice Coalition*, Minnesota Injury Compensation Study Commission Hearing: Punitive Damages, Minneapolis (25 January 1989), p. 12.
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30. See *The Competitive Status of the U.S. Pharmaceutical Industry* (National Academy Press, Washington, DC, 1983), p. 15; see also "Billions Blown on Health," *The New York Times* 12 April 1989, p. 25.
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39. See *Masaki v. General Motors Corporation*, Sup. Ct. Haw., Docket No. 13023, 20 September 1989.
40. *Juzwin v. Amtorg Trading Corp.*, 705 F.Supp. 1053 (D.N.J. 1989); see also "Judge Limits Punitive Claims for Products," *The New York Times* 10 March 1989, pp. B1, B7. Subsequently, Judge Sarokin ruled in *Juzwin v. Amtorg Trading Corp.*, No. 87-3876 (D.N.J. 1989), that he lacked the power to implement his earlier ruling although he did not retreat from his belief that multiple imposition of punitive damages for harms involving one product could violate due process. Also, a number of the arguments regarding multiple punitive damage awards made in *Juzwin v. Amtorg Trading Corp.* were rejected by U.S. District Court Judge Clarkson Fisher in *Leonen v. Johns Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989), although he did not discount entirely the finding that due process requires some limit be placed on the amount of punitive damages which can be awarded against a manufacturer for the same culpable conduct. Missouri credits past punitive damage awards against the present punitive damage award, and Georgia allows recovery of only one award of punitive damages in a Georgia court from a defendant for any act or omission, regardless of the number of causes of action which may arise from such act or omission; see MO. REV. STAT. § 510.263(4) (Vernon Supp. 1989) and GA. CODE ANN. § 51-12-5.1(e)(1) (Michie Supp. 1988).
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42. *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 57 U.S.L.W. 4985 (U.S. 1989).
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45. See ARIZ. REV. STAT. § 12-701 (added by S.B. No. 1453, 1989); N.J. STAT. ANN. § 2A:58C-5(c) (West 1987); Ohio REV. CODE ANN. § 2307.80 (Page Supp. 1987); OR. REV. STAT. § 30.927 (1987); Utah CODE ANN. § 78-18-2 (added by S.B. No. 24, 1989).
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53. Louis Harris and Associates, "Majority of Americans Support Tort Reform," (May 1987).

COVER Six days after Voyager's historic encounter, Triton's orbit brought it around once again in line with Neptune. The crescent image of Triton is seen here just as it began to pass in front of the crescent of Neptune. Because scattering by high-altitude aerosols is enhanced at large phase angles, the characteristic blue color of Neptune's atmosphere is suppressed. This picture was taken by Voyager 2 on 31 August 1989. See page 1422. [Photo courtesy of Brad Smith, University of Arizona, Tucson, AZ 85721]