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Civil Justice Reform Roundtable [2]

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Civil Justice Reform

Implementation of Executive Order 12778



Briefing for Federal Litigators
November 25, 1991

Thank you for that very warm introduction, Ed. I should tell all of you, that Ed is responsible for bringing me here in more ways than you might think. Sure he invited me to speak tonight -- but I am talking about the role he played as a family friend in shaping my goals and aspirations over the last 31 years.

Those of you that know Ed Fowler would agree with me that he has about himself an air of nobility. He and a guy named Sam Pryor, who was a partner at the Davis Polk firm in New York, were the only lawyers I knew when I was a kid. I aspired to be a lawyer in part because of the example Ed Fowler set to his friends and neighbors in our home town. Ed Fowler's example, and, to be honest, my lusting after Sam Pryor's big house, have a lot to do with why I went to law school.

// [Describe what's in the Folder] [17.6% of physician services]

Sadly, Ed Fowler is not the typical lawyer. "Noble" is not the first word that leaps to mind for most people in this country when they think about a lawyer. The first word that leaps to mind for most is probably "Damn" -- as in Damn lawyer -- and that is a damn shame. As millions of people in Eastern Europe, Russia, Africa

and Central and South America would tell us, there is something noble about the rule of law.

But, we in this country have lost sight of the fact that law is only noble if it makes life better. The purpose of law is to ease the friction between individuals in society. There is nothing inherently noble about a lawsuit and there is no social benefit at all in a losing lawsuit. But there is this notion ingrained in pop culture that a lawsuit is the answer to any grievance. *Tolerance a lost concept.*

This past summer, Time Magazine called America "A Nation of Finger Pointers," with "a nasty intolerance and a desire to blame everyone else for everything." The numbers certainly bear this out. In 1989, more than 18 million civil lawsuits were filed in this country - one for every ten adults -- making us the most litigious culture in the world. We hate lawyers, but we love to sue.

This American love affair with the lawsuit grows out of a generation of cultural dominance by the political

left. The political lawsuit was the great innovation of liberals in the 1950's and, as you know, lawsuits were the engine for social change for the next 30 years. The rule of law was transmogrified into the rule by law suit. *In part facilitated by adoption of Fed. Rules Civ. Procedure*
[Statistics]

This explains the evil bitterness of the left toward our judicial appointments. I do not want to get side-tracked from my topic tonight, but I wish you all could have seen Senator Danforth's moving speech from ^{the Senate Floor} Tuesday night which was right out of Frank Capra's Mr. Smith Goes to Washington. If you want to see me get really wound up, let's talk more about the Thomas situation later.

We are living through a cultural identity crisis, caused in part by the growing disrepute of the law. People know there is a problem when the Boy Scouts of America experience a 1,000 percent increase in their liability insurance in the last 7 years, forcing them to charge a membership fee for the first time in their 76 year history. In Miami, one hospital closed its emergency room and at least seven others have cut back

their emergency services because doctors, protesting malpractice insurance rates that often exceed \$200,000 per year, are simply not available. *You've heard these anecdotes before*

Cultural crisis creates opportunities for political reform. The Vice President sensed this opportunity a little over a year ago when he -- to tell the truth -- stole the project away from the Domestic Policy Council. (Vice President's can do that sort of thing.) He got to lead the Legal Reform effort -- and in exchange I got a project that is still kicking around. Anyway, the Vice President knew after 18 months as Chairman of the President's Council on Competitiveness that legal reform is essential to improving the competitiveness our nation's workers and businesses.

It was reported this summer that the country's 1,000 largest public companies will spend \$20 billion this year on legal services. Estimates for the total cost of the litigation industry range from \$80 billion to \$300 billion. You know better than I the devastating impact this has on your ability to bring new products to market at prices lower than our overseas competition.

[Statistics]

The Council developed 50 recommendations for reform. Frankly, they are modest -- we did not come up with anything radical. But even if the steps are incremental, they do reflect a radically different concept of law than that which is ingrained today, particularly on the left side of the political spectrum.

One of the more ambitious reforms endorsed by the Council addresses the question of how litigation is financed. As you know, the general practice in our country is for each party to pay its own costs, regardless of the outcome of the case. A recent spate of legislation has modified the American rule to permit prevailing plaintiffs, but not successful defendants, to recover their costs. Needless to say, this creates enormous incentives for people to bring even frivolous law suits.

In virtually every western country, litigation is financed according to the "English Rule," under which the losing party --whether plaintiff or defendant -- pays the winner's costs. This cost-shifting is based on

the equitable principle that a party who suffers should be made whole. Clearly the English Rule forces parties to look more carefully at the merits of a case before it is brought.

The Council recognizes that to apply a cost-shifting rule too broadly could pose certain difficulties. Some plaintiffs might not be able to afford the risk of bringing lawsuits, especially against heavy weight defendants like all of you. Therefore, the Council recommends experimenting with the English Rule on the following limited basis: it would apply only in federal diversity cases where the plaintiff chooses to sue in federal court. If the plaintiff sues in state court and the defendant removes to federal court, the Rule would not be in effect.

Another item of great concern to the Council is punitive damages. What began as a sanction for only the most reprehensible conduct has now become commonplace. Plaintiffs in civil lawsuits routinely ask juries to award millions of dollars in punitive damages in addition to damages for their economic, or out-of-

pocket losses. And juries are responding with a fervor. A 1987 study of 24,000 jury trials in Cook County, Illinois, found that the average punitive damage award skyrocketed, in inflation-adjusted dollars, from \$43,000 in 1965-69 to \$729,000 in 1980-84 -- a jump of 1,500 percent.

Punitive damages are defended, quite properly, as an effective deterrent and legitimate punishment for villainous, quasi-criminal conduct. The problem is that no rational method exists for assessing punitive damages. In this regard the Council has proposed a comprehensive reform: first, punitive damages should be awarded in a separate proceeding only where there is evidence of outrageous misconduct or where there is clear and convincing evidence of the defendant's intent to cause injury; second, plaintiffs should not be able to assign a specific dollar amount to their requests for punitive damages; third, and most importantly, punitive damage awards should never exceed the amount of the plaintiff's actual damages.

The Council's fifty recommendations include specific proposals affecting every aspect of the civil justice

system. The Council supports increased use of judicial sanctions for attorney misconduct, market incentives to promote efficient discovery practice, a complete ban on contingency fees for expert witnesses, and greater emphasis on voluntary dispute resolution techniques, such as pre-lawsuit notifications, early settlement conferences and mediation.

Expand

Some of these proposals envision formal legislation, and the Administration intends to pursue such legislation in Congress. Other reforms can be implemented through revisions to the civil rules of procedure and evidence. Still others will require action at the state level, which we will facilitate by providing model state statutes. Finally, in the executive branch, we intend to take our own advice and set an example for the rest of the country. The President will soon be issuing an executive order that will apply some of these proposals to the federal government when it engages in litigation. If you would like, I can discuss the provisions that are currently in the draft being circulated among the Department's for approval.

Even these modest reforms, which are described in more detail in the booklets I have given you, face fierce political opposition from the forces of the liberal status quo. But, with your help, we can win. As someone pointed out to me the other day, did anyone think a few years ago that we would ever live to see a day when the Mayor of Moscow was far to the right of the Mayor of New York!

Let me take a few minutes to set out the ways you can help us start to replace the rule by lawsuit with the rule of law.

First, you can help us by providing us with more information about the real world costs of excessive litigation. We would like to be able to use this data to continue to build the case for reform. For example, we could use:

- o Information on the number and percent of cases pending against your firm in which punitive damages are being claimed.
- o Information on your rate of success in cases brought against your firm. For instance, if your firm settled only for lawyer's fees in 70%

of the cases, that would be powerful evidence that cases are being brought with little chance of success.

- o Examples of products not brought to market or killed in the development stage because of litigation risks. Examples of similar products developed by foreign firms would be particularly powerful.
- o Document the additional cost to your product caused by direct and indirect litigation expense. We would like to be able to document the size of the litigation tax for different products to bring home to the consumer the price they pay to subsidize the litigation industry.

We would find very helpful any other real world examples about how American firms are disadvantaged by our legal system. Is it easier for firms based outside the U.S. to develop products? Are more lawsuits being brought here for actions that have little nexus to this country? And so forth.

Each of you could also help by making your views known. For instance, the Standing Committee on the Federal Rules is holding public hearings on November 21, 1991. If you would like to see some of the reforms outlined in our proposal enacted, please testify to that Committee or otherwise submit your views. We need your help there.

You can express your views in other ways too. For instance, consider highlighting the problems with litigation in your annual report. Put this topic on the agenda for discussion in the chamber of commerce or economic club meetings where your firms are located - - I am sure that each of your firms have a lot of clout with any local organizations like that. Similarly, I know each of your firms are terribly important to politicians in your home state. Use that leverage wherever possible to take on the tort bar and enact reforms locally too.

INTERNATIONAL DATA

PROLIFERATION OF LAWYERS

	<u>LAWYER TO POPULATION RATIO</u>	<u>LAWYERS PER 100,000 POP.</u>
U.S.A.	1 / 355	281
England and Wales	1 / 898	111
Germany (F.D.R.)	1 / 1,215	82
Japan (est.)	1 / 9,231	11

CALCULATED FROM:

(Cambridge Law Journal, July 1990, Volume 49 (2))

(Intro To Research in Japan, 1991)

NUMBER OF LAWSUITS

	<u>NUMBER OF CIVIL ACTIONS</u>	<u>NUMBER OF TORT SUITS</u>
U.S.A. (1985)	14,800,000	911,000
Germany (1986)	2,047,500	205,000
England (1984)	2,982,904	60,030

CALCULATED FROM:

[Cambridge Law Journal, July 1990, Volume 49 (2)]

NUMBER OF LAWSUITS

TOTAL DISTRICT COURT FILINGS -

1950	-	92,342
1960	-	89,112
1970	-	127,280
1980	-	197,710
1989	-	279,288

(Federal Courts Study Committee - Working Papers and Subcommittee Reports; July 1, 1990, Vol. 2)

REPORTED CASELOAD FOR STATE TRIAL COURTS -

	<u>CIVIL</u>	<u>CRIMINAL</u>	<u>TOTAL</u>
1986	15,695,246	10,780,582	26,475,828
1987	16,027,139	11,271,768	27,298,907
1988	16,979,204	11,631,285	28,610,489
1989	17,321,125	12,533,207	29,854,332

DELAY IN THE COURTS

U.S. DISTRICT COURTS - NUMBER (AND %) OF CIVIL CASES OVER THREE YEARS OLD

	<u>NUMBER</u>	<u>PERCENT</u>
1985	16,726	6.6
1986	19,252	7.9
1987	19,782	8.1
1988	21,487	8.8
1989	22,391	9.2
1990	25,207	10.4

(1990 Federal Court Management Statistics)

U.S. DISTRICT COURTS - CIVIL CASES

Median time from issue to trial - 14 months

Median time from filing to disposition - 9 months

(1990 Federal Court Management Statistics)

NUMBER OF LAWYERS

1975	-	379,000
1980	-	532,000
1985	-	642,000
1990	-	729,000

(U.S. Bureau of Labor Statistics - Employed Persons by Occupation)

Projected - "Moderate" projections predict a 36 percent increase in the number of lawyers by 2000, or an estimated 191,000 new lawyers.

APPLICANTS TO ABA LAW SCHOOLS

1984-5	-	60,338
1985-6	-	65,168
1986-7	-	68,804
1987-8	-	78,930
1988-9	-	87,227
1989-90	-	92,958

(Law School Admission Services, National Statistical Report 1984-1985 through 1988-1989)

FACSIMILE TRANSMISSION SHEET

OFFICE OF THE DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

TO:

Richard Porter

Fax #:

() 456 - 2223 Voice #: () 456 - 6722

FROM:

J. MARK GIDLEY

Office of the Deputy Attorney General Room #
U.S. Department of Justice, Main Justice Building
Washington, D.C. 20530

Fax #:

(202) 514 - 4699 Voice #: (202) 514 - 2291THIS TRANSMISSION CONTAINS 4 SHEETS INCLUDING THIS SHEET

Special

Note (s):

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Talking Points with General Counsels

- * Executive Order is in the works (see separate sheet).
- * General Counsels can support reform efforts:
 1. Gather information on percentage of punitive damages suits pending
 2. Gather examples of products not brought to market
 3. Gather examples of additional costs to American goods added needlessly due to litigation
 4. Document the impact on competitiveness from the current litigation system
- * Make their views publicly known. The Standing Committee on the Federal Rules is holding public hearings on November 21, 1991.

Executive Order on Civil Justice Reform

Section-by-Section Analysis

Section 1. Efficient Litigation. This section directs lawyers on behalf of the United States to take steps to reduce unnecessary litigation costs in actions brought by or against the United States in federal court. Specifically, the order directs:

- * Pre-filing Notice of Complaint. Pre-filing notice of a complaint will be provided to parties whom the United States intends to sue so that settlement is explored before a lawsuit is filed.
- * Settlement. As soon as practicable, and throughout the litigation, the United States will make reasonable efforts to settle litigation and initiate settlement discussions.
- * Alternative Dispute Resolution (ADR). Counsel for the United States will be trained in ADR techniques and will use these as appropriate.
- * Discovery Reform. Lawyers for the United States will offer to exchange core information with the other parties to expedite discovery, will submit document requests to senior, independent review to ensure that these requests are not unreasonable or unduly burdensome, and will discuss and attempt to resolve all discovery disputes with the opposing parties before moving the court for resolution.
- * Expert Witnesses. The United States will not use experts who base their testimony on theories that are not widely accepted. The United States will use experts who are experts within their field of expertise, will offer to exchange core information with the opposing counsel and will not use contingent expert witness contracts.
- * Sanctions. The United States will bring motions for sanctions where appropriate and will have those motions approved by senior litigation counsel before filing to ensure appropriate and uniform sanctions are sought. Sanctions against the United States will also be reviewed.
- * Attorney's Fees. Subject to appropriate authority, the United States will offer a loser pay's contract to parties involved in contract disputes with the United States and in actions initiated by the United States.

Section 2. Reducing Litigation over Federal Legislation. All proposed new legislation will be reviewed and corrected to eliminate needless litigation.

- * **General Requirement.** Legislation will be reviewed to eliminate drafting errors, to minimize needless litigation, and clear and specific standards shall be used wherever practicable.
- * **Specific Issues.** All legislation will be reviewed against a list of 15 specific drafting issues (such as statutes of limitation, preemptive effect) that have historically led to needless litigation are listed. Proposed legislation will be compared to this list to ensure that bills clearly treat these subject matters.
- * **Preference for bright-line standards.** Bright-line legislative guidance will be preferred to more ambiguous general standards. Where general standards are chosen and justified, the factors to be considered will be spelled out.
- * **Agency certification.** Agencies proposing legislation will certify compliance with the factors listed in their legislative submissions to the Office of Management and Budget.
- * **One-way fee-shifting provisions.** One-sided fee shifting provisions are subject to cost-benefit analysis to be performed by the agency seeking the provision.

Section 3. Efficient Case Management in Administrative Adjudications. Agencies shall implement the recommendations of the Administrative Conference of the United States concerning efficient case management in administrative law proceedings.

Section 4. Coordination. The Department of Justice shall coordinate compliance with Sections 1 and 3.

Section 5. Definitions.

Section 6. No Private Rights Created. The order does not create private rights against the United States.

Section 7. Scope. The order applies to civil matters, not to criminal matters. Compliance with the pre-filing notice provision will not be given where such notice is impracticable or could lead to deleterious effects. The Attorney General is authorized to supply additional guidance as to the scope of the order.

Section 8. Conflicts with Other Rules. The order shall be construed consistently with existing law.

Section 9. Privileged Information. Privileged information shall not be compelled by virtue of the order.

Section 10. Effective Date. The order will affect all litigation commenced 90 days after it is signed.

Information Provided by the American Medical Association:
the Litigation Explosion's Impact on ACCESS TO HEALTH CARE AND ITS COSTS

- o Journal of the American Medical Association, Jan. 26, 1990.
v. 263, 584-6.

- o Dept. of HHS Task Force on Medical Liability and Malpractice

--Aug. 1987 report documented 150 examples of access
impairment related to professional liability premiums
in 26 states

- o 1987 Survey: American College of Obstetricians and
Gynecologists

--12.4% of U.S. Ob/Gyn nationally had given up obstetrics
owing to liability concerns

--27% had decreased the level of high-risk obstetric care
they provided

- o Center for Health Policy Research, AMA, Chicago, Ill.,
Sept. 1990

--the AMA estimates that defensive medicine practices
added \$11.7 B to the cost of physicians services in
1985

- o Medical Liability: It's Impact on Women's Health Care,
Wash., DC: American College of Obstetricians and
Gynecologists (1991).

- o with escalating premiums for Ob/Gyn's, approximate
increases to the consumer in "per delivery" costs
are:

--\$538 - \$1,261 in Florida

--\$272 - \$663 in New York

--\$476 - \$828 in Michigan

--\$155 - \$470 in West Virginia

- o As of 1990 Ob/Gyn's nationally had:

--12.2% had given up obstetrics due to liability
pressures

--24.2% had decreased the level of high-risk obstetric

care that they provided

o in some states the problem is worse than national figures show:

--in Idaho, 34% of Ob/Gyn's had stopped practicing obstetrics by 1986

--a Maryland survey shows that 28% of Ob/Gyn's intended to give up obstetrics in 1987

--by 1985, Arizona's rural counties experienced a decrease in obstetric providers of 21%

--a 1987 Oregon survey shows that the number of physicians delivering babies has declined by 25% since 1984

--a 1987 Iowa survey shows that of all physicians who had provided obstetric services since 1981, 31% had discontinued obstetrics

--half of them had practiced in rural areas

--according to a 1990 report on western frontier areas, 39.7% of physician providers of obstetric services indicated they had plans to stop delivering babies within the next year.

--in addition, 50% of North Dakota physicians and 39.1% of Wyoming physicians planned to quit obstetrics within the next year.

o Large numbers of family physicians are being forced to discontinue obstetrics as a result of the high cost of obstetric liability insurance.

--one-third of California's family physicians, almost 40% of Texas family physicians and approximately one-half of Nevada rural family physicians have also stopped practicing obstetrics.

--three-hundred of 441 family physicians responding to an Alabama survey have stopped delivering babies

--more than half of Utah's general and family physicians who were delivering babies in 1980 have stopped practicing obstetrics

--likewise, in Kansas, almost half of the family physicians reported having given up obstetrics by 1987

Hits Rural
Areas Hardest

- o Hospitals, "Tort Reform Legislation: Can it Help Hospitals?", May 20, 1990, 28-33.

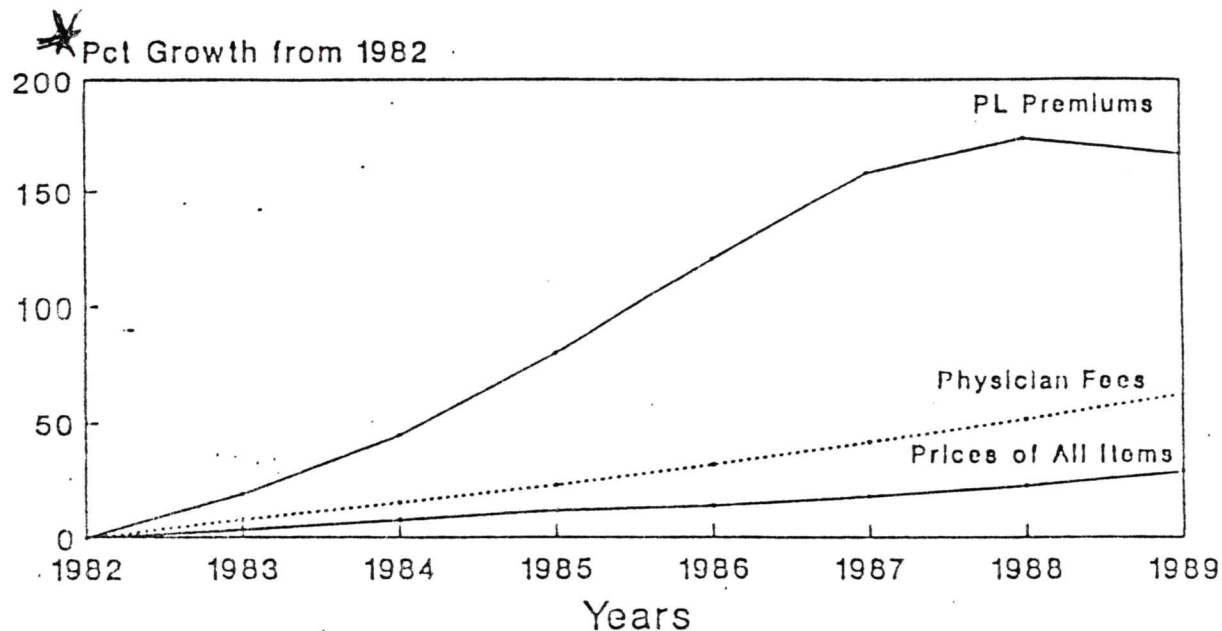
*-American College of Obstetricians and Gynecologists studies show that half the counties in some states, such as Alabama, Georgia, and Nevada, have **no obstetrical care.**

- o "The Cost of Medical Professional Liability in the 1980's," Center for Health Policy Research, AMA, Chicago, Ill., September 1990.

--the average amount of premiums paid by physicians for professional liability (PL) insurance increased from \$5,800 in 1982 to \$15,500 in 1989 for an annual rate increase of 15.1%

* [--PL costs accounted for 17.6% of spending on physician services in 1990. Most of these costs were due to defensive medicine practices.]

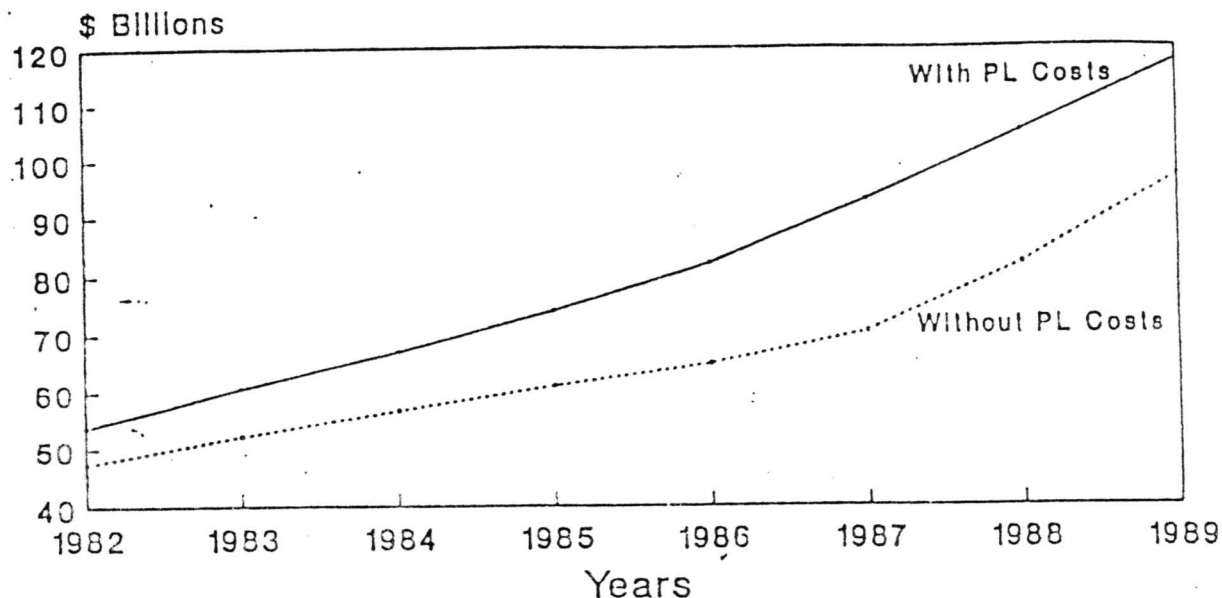
Table 2. Growth of Average Professional Liability Insurance Premiums, Physician Fees and Prices of all Items from 1982 to 1989.



	Percent Growth from 1982		
	PL Insurance Premiums	Physician Fees	Prices of All Items
1983	19.0	7.7	3.2
1984	44.8	15.2	7.6
1985	81.0	23.2	11.7
1986	120.7	32.1	13.9
1987	158.6	41.7	16.1
1988	174.1	51.9	22.9
1989	167.2	63.1	28.9

SOURCE: PL insurance premiums from American Medical Association Socioeconomic Monitoring System, 1983-1990 core surveys; physician fees and prices of all items, Consumer Price Index for Urban Consumers physician services and all items indexes, respectively.

Table 3. Professional Liability Costs and Expenditures on Physician Services (in billions of dollars), 1982-1989



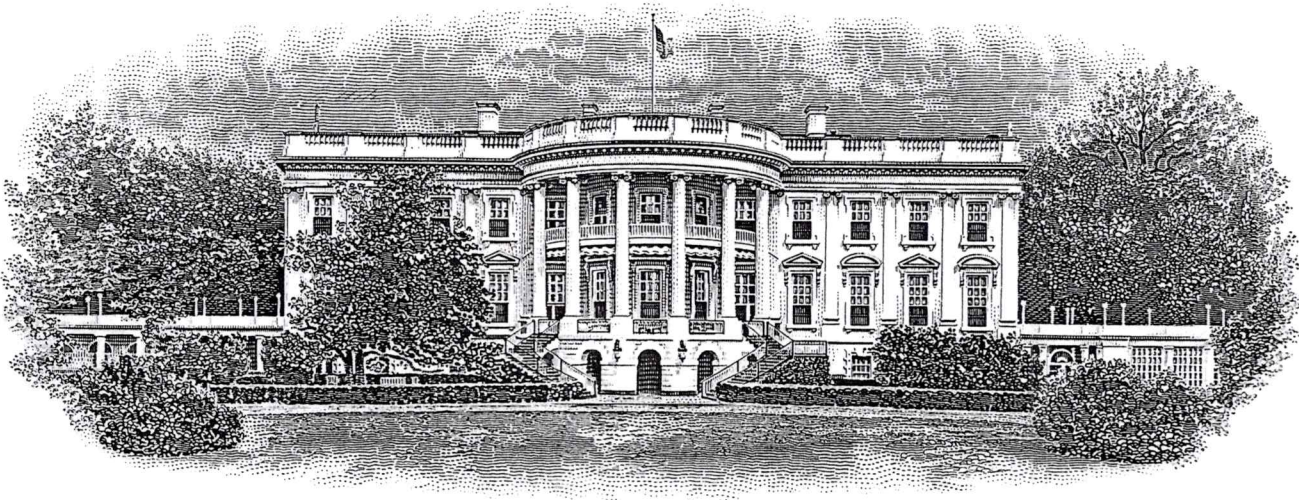
			Total Physician Service Expenditures		
	<u>Premiums</u>	<u>Other PL Costs¹</u>	<u>Total PL Costs</u>	<u>With PL Costs</u>	<u>Without PL Costs</u>
1982	1.7	4.8	6.5	53.8	47.3
1983	2.1	6.4	8.5	60.7	52.2
1984	2.7	7.6	10.3	67.1	56.8
1985	3.4	9.6	13.0	74.0	61.0
1986	4.2	13.0	17.2	82.1	64.9
1987	5.2	17.4	22.6	93.0	70.4
1988	5.6	17.5	23.1	105.1	82.0
1989	5.6	15.1	20.7	117.6	96.9

SOURCE: Expenditures including PL costs, U.S. Health Care Financing Administration; expenditures excluding PL costs, estimates based on American Medical Association Socioeconomic Monitoring System 1983-1990 core survey data and methodology reported in Reynolds, et al. "The Cost of Medical Professional Liability." Journal of the American Medical Association 257 (May 22, 1987) 2776-2781.

¹Other PL costs include costs of practice changes induced by PL risk and costs associated with PL claims that are not covered by insurance.



The White House



THE PRODUCT LIABILITY ALLIANCE

1725 K Street, N.W., Suite 710
Washington, D.C. 20006
(202) 872-0885

TO: The Product Liability Alliance

FROM: Victor E. Schwartz and Liberty Magarian
Crowell & Moring
Counsel to The Product Liability Alliance

DATE: October 4, 1991

RE: Senate Commerce Committee Votes to
Favorably Report S. 640

At an executive markup session of the Senate Committee on Commerce, Science and Transportation on Thursday, October 3, 1991, the Committee voted 13-7 to report favorably S. 640 to the full Senate. The vote, which is listed below, was identical to that which occurred on S. 1400 in the 101st Congress.

During the discussion which occurred before the vote, Chairman Hollings repeated his same arguments in opposition to the bill -- that it is a "bad bill"; the federal Government had no business taking product liability law away from the states; the proponents have put forth no data to show that a need for the bill exists; the bill creates uniformity only in favor of businesses.

Senator John B. Breaux (D-LA) called the bill the "Republican big government legislation." He opposed the bill because nothing in the record indicated that it would bring down insurance rates, because the proponents' competitiveness argument makes no sense at all, and because there is no compelling reason for the federal

Government to get involved in this area particularly because insurance laws are all handled by the states.

Senator Gore complained that the bill only creates one way uniformity in favor of defendants. He pointed out that the bill contains restrictions on punitive damages but does not create a right to punitive damages in states where they do not currently exist. He expressed his concern about the FDA defense against punitive damages. He noted a report that appeared in that morning's newspaper about jaw implants, which were approved by the FDA, and inserted in 26,000 people in the United States that break down and cause bone degeneration. Gore was concerned that if the manufacturer of these jaw implants were found "negligent," it would be protected against punitive damages under S. 640.

Senator Ford opposed the bill for a variety of reasons. He made a particular point of the fact that the bill creates federal product liability law without creating jurisdiction in federal courts. He also said that the National Federal of Independent Businesses opposes S. 640 because the workers' compensation offset provision increases workers' compensation costs on small businesses. Ford said that the bill hurts small businesses and only takes care of big businesses. In fact, NFIB supports S. 640, but has specific concerns about the workers' compensation provision which they have raised before.

Senator Hollings offered an amendment which would require reporting to the federal government on the legislation's effect on insurance rates. This same amendment was offered by Senator Rockefeller in the 99th Congress and was incorporated into that

bill without opposition. Hollings cited to the record during the 99th Congress, pointing out that Rockefeller and Ford worked out the amendment and that Stevens supported it. Rockefeller responded that Hollings' description of the amendment's history is correct. Rockefeller said that he would be willing to work with Hollings in passing such legislation in some other form, for example, as a stand alone bill, but opposed Hollings' amendment because he suspects that Hollings was not offering it in order to help pass S. 640. Rockefeller described it as a "death knell amendment." Senator Ford interjected that although he had worked with Rockefeller during the 99th Congress to resolve some of the his concerns with the amendment, he never supported the provision. In the vote on Hollings' insurance amendment, Ford initially "passed," and then after all votes were recorded, changed his vote to "yes" because he was upset that Kasten was pushing the bill through the Committee without accepting any amendments. Hollings' amendment was defeated by a tie vote of 10-10.

The votes on the insurance amendment and on S. 640's final passage were as follows:

<u>Senator</u>	<u>Insurance Amendment</u>	<u>Final Passage</u>
Ernest F. Hollings (D-SC)	Yes	No
Daniel K. Inouye (D-HI)	Yes	Yes
Wendell H. Ford (D-KY)	Yes	No
J. James Exon (D-NE)	No	Yes
Al Gore (D-TN)	Yes	No
John D. Rockefeller, IV (D-WV)	No	Yes
Lloyd Bentsen (D-TX)	No	Yes
John F. Kerry (D-MA)	Yes	No
John D. Breaux (D-LA)	Yes	No
Richard H. Bryan (D-NV)	Yes	No
Charles S. Robb (D-VA)	No	Yes
John C. Danforth (R-MO)	No	Yes
Bob Packwood (R-OR)	Yes	No

Larry Pressler (R-SD)	No	Yes
Ted Stevens (R-AK)	Yes	Yes
Robert W. Kasten, Jr. (R-WI)	No	Yes
John McCain (R-AZ)	No	Yes
Conrad Burns (R-MT)	No	Yes
Slade Gorton (R-WA)	Yes	Yes
Trent Lott (R-MS)	No	Yes

The 13-7 vote was a significant victory. It shows that support for the bill is solid. It was also significant that our opponents sent their "heavy hitters" to attend the markup. Ralph Nader and Joan Claybrook attended, as did Tommy Boggs who represents the Association of Trial Lawyers of America. After the markup, we had the opportunity to debate Ralph Nader on some of the issues with the press outside the committee room. We learned that Nader's principal arguments are these: (1) there is "no crisis" or compelling need for the legislation, (2) S. 640 is uniform only to the benefit of businesses, but not in creating rights for consumers (e.g., punitive damages), (3) proponents argue that the bill is "modest," but once it is passed, they will come back with proposals for anti-consumer amendments, (4) U.S. product liability laws have no effect on competitiveness because manufacturers from foreign countries such as Japan are increasingly bringing their businesses into the United States and opening up plants here. Nader indicated that they will propose amendments in the Judiciary Committee. He specifically mentioned the issue of "secrecy agreements" (i.e., an amendment to prohibit sealed settlements and protective orders).

S. 640 will receive a sequential referral to the Judiciary Committee. The length of that referral is being negotiated at this time. The Senate Small Business Committee, which does not

have jurisdiction over the bill, will hold hearings on the effect of product liability on small business during the week of November 11.

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

May 15, 1991

HEALTH CARE LIABILITY REFORM

FACT SHEET

As part of the Administration's continuing efforts to improve the delivery of health care services throughout our nation, the President today transmitted to Congress the **Health Care Liability Reform and Quality of Care Improvement Act of 1991**. This new initiative will reduce the costs and increase the availability of quality health care by addressing the problems of medical malpractice. In part because of liability risks, too few physicians -- especially obstetricians and gynecologists -- are available to serve rural and low-income communities. The Administration's medical professional liability reforms will enable more physicians to serve these communities.

The Administration's proposal is built on three principles:

1. Medical malpractice reform should seek both improved quality and lower legal costs.
2. Legal reforms should reduce the incentives for physicians to practice unnecessary defensive medicine or to abandon practice in certain inner city and rural areas.
3. Incentives for states to act are preferable to Federal preemption of state law.

Background

Malpractice costs -- the direct costs of insurance, litigation, and settlements, and the indirect costs of defensive medicine -- play a significant role in the rapid growth of health care spending. The costs associated with medical liability have increased more rapidly than any other component of physician practice costs. During the mid-1980's, medical liability insurance was the fastest growing component of a physician's practice expense, rising at an average annual rate of 21.9 percent.

Nationally, between 70 and 80 percent of obstetricians have been sued, and other medical specialties have also been

significantly affected. In Miami, Florida, for example, it was recently reported that neurosurgeons with good records paid \$220,000 per year for liability insurance.

The rise in insurance premiums has forced many physicians to close certain practices, leaving some areas of the country without adequate medical services. The American Academy of Family Physicians reported that, at the end of 1985, 23.3 percent of its members had stopped practicing obstetrics because of professional liability concerns.

The fear of lawsuits has also imposed enormous costs on patients. Some doctors have begun practicing defensive medicine, in which they order vast batteries of costly, and often unnecessary, tests in order to protect themselves from the possibility of lawsuits. Researchers shy away from potentially promising products and techniques for fear of lawsuits. Moreover, the specter of litigation weakens the doctor-patient relationship, one that should be built on trust.

Legislative Proposal

The Health Care Liability Reform and Quality of Care Improvement Act of 1991 is designed to create incentives for states to implement tort and quality reforms and also address claims arising under the Federal Tort Claims Act.

To encourage states to implement tort law and quality of care reforms, a bonus pool of funds will be distributed to states that have implemented these reforms. The incentive mechanism would take effect in three years to give states time to respond. Many states have already enacted tort reforms and are well on the way to being able to comply with these reforms. The tort reforms a state would be required to have in place to be eligible for the incentive funds are:

- A \$250,000 cap on non-economic damages -- those damages beyond economic expenses (e.g., for pain and suffering); a waiver may be granted for good cause, for example, to a state whose constitution does not permit a cap;
- The elimination of joint and several liability for non-economic damages (joint and several liability makes all parties responsible for the entire amount owed to the plaintiff);
- The elimination of the collateral source rule to prohibit double recovery by the plaintiff when compensation has been received from other sources such as health insurance;

- Allowing judgments for future costs, such as future medical bills, to be paid in periodic payments rather than as a lump sum; and
- An alternative dispute resolution mechanism such as mediation or pretrial screening panels.

In order to receive incentive payments, states would also be required to institute reforms to improve the quality of health care. These steps include:

- Cooperation with federal efforts to learn the comparative effectiveness of different medical treatments;
- Improved performance in the oversight of physicians through state medical boards; and
- A requirement that physicians sanctioned by the medical boards participate in continuing medical education in areas where the board has found deficiencies.

States could pursue alternatives to those activities involving medical boards if the alternatives were equally effective.

The incentive to implement tort law and quality of care reforms would be increased payments to states and hospitals in the qualifying states on a proportional basis. The incentive pools would be created by withholding two percent from the amount payable to states for Medicaid administrative costs and one percent from the annual increase payable to hospitals for operating costs through Medicare's prospective payment system. In Medicaid, the pool would be divided among states that have implemented the necessary tort reforms and quality assurance mechanisms. In Medicare, the pool would be directed to increased payments to hospitals in complying states.

Administrative Actions

The Administration will also take several administrative actions to reduce medical malpractice problems. These include:

- Gathering and disseminating scientific findings about the effectiveness of varying types of treatment, including clinical practice guidelines;
- Shifting the approach of Medicare's Peer Review Organizations (PROs) from after-the-fact review of hospital records toward providing statistical data which will enable hospitals to compare their performance;

- Providing the public with comparisons of the operation of state boards that license health care providers, along with technical assistance for improvement;
- Evaluating current risk management practices in health care settings and establishing an interagency study group to review malpractice cases against the federal government for lessons applicable across the health care system; and
- Expanding within the Federal Employees Health Benefits Program the number of plans that offer an alternative dispute resolution process instead of litigation.

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PRODUCT LIABILITY FAIRNESS ACT (S. 640)
FAIRNESS IN PRODUCT LIABILITY ACT OF 1991 (H.R. 3030)

- o The Senate product liability bill (S. 640) was introduced by Senator Kastan (R-WI) on March 13, 1991. In addition to Senator Kastan the bill has 35 co-sponsors (8 Democrats and 27 Republicans).
- o The House product liability bill (H.R. 3030) was introduced by Representative Rowland (D-GA) on July 25, 1991. The bill has 99 co-sponsors (19 Democrats and 80 Republicans).
- o The bills are very similar. S. 640 is virtually identical to the bill that was reported from the Senate Commerce Committee last year, but not considered on the Senate floor.
- o Following are the key features of S. 640, that will be followed by a listing of the main differences between S. 640 and H.R. 3030.
 - The elimination of joint and several liability for non-economic damages (pain and suffering), but not for economic damages (medical expenses, lost wages).
 - An expedited claims settlement procedure which will benefit both parties to an action.
 - Uniform rules that establish the liability of product sellers.
 - The improvement of the law governing punitive damage awards. The bill provides a uniform standard that punitive damages may be awarded only if there is "clear and convincing" evidence that the actions of the defendant show a "conscious, flagrant indifference to safety." Punitive damages cannot be awarded in actions involving drugs or medical devices that have been approved by the FDA, or aircraft certified by the FAA.
 - A two-year statute of limitations from the time a claimant discovers both his harm and its cause.
 - A 25-year statute of repose for capital goods. A statute of repose presumes that after a product has been in the marketplace for a certain length of time without causing harm the manufacturer should not be sued for an alleged defect in the product. A small percent of states now have such statutes.
 - A prohibition on double recovery. Damages will be reduced by the amount of worker's compensation benefits available to an injured person.

- Alcohol or drug use. A complete defense to liability if the claimant was under the influence of alcohol or non-prescribed drugs, and as a result was more than 50% responsible for the accident or event which resulted in the harm.
- o The main differences between S. 640 and H.R. 3030 are the following.
- Misuse or alteration. The House bill contains a provision that requires damages against a manufacturer or product seller to be reduced by the percentage of responsibility for the claimant's harm that is attributed to misuse or alteration of a product by any person.
 - Punitive damages involving aircraft. The House bill does not contain the provision of the Senate bill that prohibits punitive damages in cases involving aircraft certified by the FAA.
 - Expedited settlement. Unlike the Senate bill, the House bill does not contain a procedure for expedited settlement of claims.

THE VICE PRESIDENT'S OFFICE
Office of the Press Secretary

FOR IMMEDIATE RELEASE

JULY 24, 1991

Vice President Quayle, as chairman of the President's Council on Competitiveness, and Commerce Secretary Robert Mosbacher today reaffirmed the Administration's support for product liability reform.

"Product liability reform legislation is a top priority of this administration", the Vice President said in releasing a Competitiveness Council Fact sheet on product liability reform. "Our present system is unfair and is a burden on America's ability to compete. It puts a drag on innovation and reduces incentives to develop new, safer products for the consumer. The cost to business is 15 to 20 times higher in the U.S than in Europe and Japan, which means fewer jobs for Americans. The system is unfair to victims who receive less than 50% of the money spent on liability cases. Now is the time for Congress to act to reform our product liability system."

Secretary Mosbacher added: "By reducing legal uncertainty, the enactment of balanced federal product liability reform will enhance the international competitiveness of American businesses. The legislative proposals now before the House and Senate are an excellent step in that direction."

The Council on Competitiveness commended the efforts of Senators John Danforth, Robert Kasten, Jay Rockefeller, and Representatives Roy Rowland, Norman Lent, Hamilton Fish and John Dingell to further product liability legislation. The Vice President also noted the important role played by Secretary Mosbacher in advancing the cause of product liability reform.

For more information please contact: (202) 456-6614.



OFFICE OF THE VICE PRESIDENT
WASHINGTON

President's Council on Competitiveness
Fact Sheet on Product Liability Reform
July 24, 1991

"Product liability reform legislation is a top priority for this administration. Our present system is unfair and is a burden on America's ability to compete. It puts a drag on innovation and reduces incentives to develop new, safer products for the consumer. The cost to business is 15 to 20 times higher in the U.S than in Europe and Japan, which means fewer jobs for Americans. And, the system is unfair to victims who receive less than 50% of the money spent on liability cases. Now is the time for Congress to act to reform our product liability system."

Vice President Dan Quayle
July 24, 1991

"By reducing legal uncertainty, the enactment of balanced federal product liability reform will enhance the international competitiveness of American businesses. The legislative proposals now before the House and Senate are an excellent step in that direction."

Secretary of Commerce Robert Mosbacher
July 24, 1991

An Administration Priority.

The Administration is committed to the goal of restoring basic fairness and stability to the product liability laws in the United States. Such reform is essential to business innovation, U.S international competitiveness, and consumer safety and welfare.

- o President Bush, in his State of the Union address, called upon Congress to enact essential product liability reform legislation.
- o Secretary of Commerce Robert Mosbacher testified before the Senate Commerce Committee in 1990 in support of product liability reform legislation.
- o 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 the Fairness in Product Liability Act of 1991 (S 640) and efforts to pass similar legislation in the House of Representatives. The Vice President has commended the efforts of Senators John Danforth, Robert Kasten, Jay Rockefeller and Representatives Roy Rowland, Norman Lent, Hamilton Fish, and John Dingall on behalf of such legislation.

Restore Basic Principles of Fairness.

The administration's reform initiative will restore basic principles of fairness to America's product liability system:

- o First, protection of an innocent person's legal right to fair compensation for medical expenses, lost wages, property damage, and other actual losses.
- o Second, elimination of "deep pocket" liability by making each party responsible for non-economic damages attributable to his or her own percentage of fault, so that a person who creates harm to others will know that he or she will be held accountable.
- o 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 current 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. Product liability reform legislation can help strengthen U.S. competitiveness by requiring clear and convincing evidence before punitive damages can be awarded.

- o 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.
- o 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 lawsuits deters businesses, especially small and start-up businesses, from introducing new and safer products.

- o Many products are no longer being produced for American consumers -- single-engine aircraft, vaccines against deadly Japanese encephalitis, and gymnastic equipment are but a few examples.
- o 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.
- o 36% of American businessmen in a recent survey state that they stopped some manufacturing as a result of product liability risks. 15% laid off workers and 3% 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.

- o The cost of DPT vaccines rose from \$2.80 per dose to \$11.40 per dose to cover liability insurance costs.
- o 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 better consumers...."
- o A 1989 Rand Corporation study reveals that on average only 46% of total expenditures from tort lawsuits went to compensate injured parties. In some product liability cases, legal fees and expenses consume 70% of the total amount spent.

For more information please contact: 456-6614

THE VICE PRESIDENT'S OFFICE
Office of the Press Secretary

FOR IMMEDIATE RELEASE

November 30, 1989

STATEMENT BY THE VICE PRESIDENT
CHAIRMAN OF THE COUNCIL ON COMPETITIVENESS

Today I am announcing an Administration initiative to seek significant reform of our product liability system. The President has approved a proposal developed by the Council on Competitiveness designed to encourage U.S. business innovation and to improve U.S. international competitiveness, while continuing to ensure the safety of American consumers.

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.

The Administration will make product liability reform a top competitiveness priority. We will strongly support the bipartisan bill introduced by Senators Kasten, Danforth, Inouye, and Rockefeller, and we will seek additional reform provisions to strengthen the bill. I and the other members of the Competitiveness Council will work with groups from all sectors of our economy to marshal support for reforming our product liability laws in accord with basic principles of fairness and in order to remove a self-inflicted burden on U.S. competitiveness in the world.

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THE VICE PRESIDENT'S OFFICE
Office of the Press Secretary

FOR IMMEDIATE RELEASE

November 30, 1989

COUNCIL ON COMPETITIVENESS
FACT SHEET ON PRODUCT LIABILITY REFORM

Today the Vice President announced a major Administration initiative to seek product liability reform legislation. Recommendations on this subject were submitted by the Council on Competitiveness, and have been approved by the President. This initiative is designed to encourage U.S. business innovation and to improve U.S. international competitiveness, while continuing to ensure the safety of American consumers.

The Product Liability Problem

Our current product liability system of 50 different State laws generates unprecedented litigation. It inflates insurance costs and creates uncertainties for American businesses. Ultimately, these costs are borne by the American consumers.

Between 1973 and 1988, product liability suits in Federal courts increased 1000%; in state courts the increase was between 300% and 500%. One estimate of the total cost of these suits is \$80 billion per year -- a sum equal to the combined profits of the nation's 200 largest corporations. While individual states have instituted many tort reform measures over the last three years, there is still much more that can be done.

Self-inflicted Burden on U.S. Competitiveness

The U.S. product liability system -- with its excessive litigation cost and increasingly large damage awards -- is a self-imposed burden on our ability to compete abroad. Our product liability laws are more onerous than those of other major industrial countries. For example, Japan has uniform national rules, no punitive damages, and no complex, protracted, mandatory discovery (which make defending even frivolous suits very expensive). European nations also prohibit punitive damages and generally allow only very limited discovery; suits there also entail far lower attorneys' fees and other litigation costs.

The result is that total U.S. liability insurance costs are estimated to be some 15 times higher than Japan's and on average some twenty times higher than European nations. These costs are reflected in higher prices for U.S. goods, and this hampers our ability to compete with foreign manufacturers both in the U.S. and abroad.

The effect of product liability costs on our economy is substantial. In a 1988 Conference Board survey of chief executives, 40% said product liability has had a major impact on their business; 36% stopped some manufacturing as a result; 15% laid off workers; 8% closed plants. Ultimately, the public pays for product liability costs -- through increased prices, reduced consumer choice, lost products and jobs, and reduced options that may impede bringing safer products from reaching the market.

Chilling Effect on U.S. Innovation

Equally devastating, however, is the chilling effect of the current product liability system on innovation. The development of new products is essential to maintaining U.S. competitiveness. America's foreign competitors can develop a product abroad, discover its potential dangers, and work to make it safer -- all in an economically favorable environment with negligible product liability exposure. Then they can turn around and sell it in the United States, where potentially open-ended risk exposure will have discouraged domestic manufacturers from developing a new, cutting edge product. And, of course, American companies do not even get a chance in world markets, because they never develop the product. Small and start-up businesses particularly are deterred from introducing new products, for fear of potential law suits.

The effects of higher product liability costs can be seen, for example, in the pharmaceutical industry, where U.S. companies are discouraged by liability costs and risks from developing new products or marketing them in the U.S. -- the logical trial market for U.S. businesses. Genentech, for example, decided not to market a new hepatitis vaccine developed with biotechnology.

The High Cost of the Liability System

Ironically, the system also fails to do all that much to help most accident victims. It has been estimated that as much as 70% of the total of product liability awards is consumed in the litigation process itself. In part, this is because lawyers routinely negotiate contingency arrangements allowing them to command 1/3 to 1/2 of the award paid to their client victim. Defense against liability suits also involves substantial cost. There is much evidence that juries know this and take the large fees into account in deciding pain and suffering and punitive damages.

Basic Principles of Fairness

The question, then, is how should those who suffer from accidents be compensated without compromising American technological progress and without undermining U.S. competitiveness? Here are three basic principles of fairness that preserve U.S. competitive posture, while at the same time safeguarding consumer safety:

- ° First, there should be protection of an innocent person's legal right to fair compensation for the losses he or she has actually suffered. These include medical expenses, lost wages, and property damages.
- ° Second, a person or business should pay for the losses based on actual responsibility for the harm (this is known as fault-based liability) and not based on ability to pay (this is known as "deep pocket" liability).
- ° Third, cooperation and the prompt and fair settlement of differences should be encouraged through alternatives to costly and time consuming litigation.

Administration Reform Initiative

The President has approved the Competitiveness Council's recommendation to make product liability reform a top priority. Steps include:

- ° Strongly supporting S. 1400, the bipartisan bill introduced by Senators Kasten, Danforth, Inouye, and Rockefeller, as an important first step in restoring these basic principles.
- ° Developing additional reform provisions to strengthen the Kasten bill by adding: fault-based manufacturer defenses to liability, including a "state of the art" defense to encourage innovation; limits on punitive damages along the lines recommended by the American College of Trial Lawyers, including stricter standards for awarding punitive damages and a flexible cap on the amount of punitive damages; extension of the limit on joint and several "deep pocket" liability; broader definition of "capital goods" in the 25 year statute of repose -- to include vehicles and other goods in addition to workplace machinery, but not toxic chemicals; and offsets against awards payments from public sources.
- ° Working with groups from all sectors of our economy to reform our product liability laws to improve U.S. competitive posture and remove burdens on innovation, while assuring protection for injured parties.

This Administration initiative will remove a self-inflicted burden on U.S. competitiveness and help restore basic principles of fairness -- adequate compensation for accident victims, fault-based liability, and encouragement of dispute resolution rather than excessive litigation.

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The members of the Council on Competitiveness include the Vice President (Chairman), Attorney General, Secretary of Commerce,

Secretary of Treasury, Chairman of the Council of Economic Advisors, and Director of the Office of Management and Budget. In addition, the Secretary of Transportation, Secretary of Health and Human Services, Assistant to the President for Economic and Domestic Policy, Counsel to the President, and the Administrator of the Small Business Administration participated in the development of this recommendation.

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