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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Draft	H.R. 2341 - Class Action Fairness Act of 2002 [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	1	03/12/2002	
002	Draft	Civil Justice Reform Options [11 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	11	02/27/2002	
003	Memorandum	Status of Class Action Reform Legislation [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: POTUS - From: Nicholas Calio	2	03/19/2002	
004	Draft	Draft for Discussion Purposes Only [9 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	9	02/15/2002	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Civil Justice Reform

FRC ID:

9702

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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SUPERSEDED

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Draft	H.R. 2341 - Class Action Fairness Act of 2002	1	03/12/2002	P5;
002	Draft	Civil Justice Reform Options	11	02/27/2002	P5;
003	Memorandum	Status of Class Action Reform Legislation - To: POTUS - From: Nicholas Calio	2	03/19/2002	P5;
004	Draft	Draft for Discussion Purposes Only	9	02/15/2002	P5;

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DRAFT - NOT FOR RELEASE

March 12, 2002
(House Rules)

H.R. 2341 - Class Action Fairness Act of 2002

The Administration [strongly] supports the enactment of H.R. 2341 as an important step in reforming class action litigation. Class action abuses have taken a toll on our legal system through the interpretation and application of diversity requirements in the unique class action world. H.R. 2341 would provide the necessary reforms to establish long needed protections for participants in class actions whose rights are often being adjudicated by lawyers not of their choosing and in fora with which the class members have no connection, where settlements are, in effect, imposed on class members. H.R. 2341 would update diversity jurisdiction appropriately to permit, but not require, removal by any class member and any defendant in actions where minimal diversity existed and the total amount in controversy totaled at least \$2 million account, while permitting State court actions to proceed in cases where no party sought removal and in specified circumstances involving a relatively small class where the primary defendants were within the State. Opponents of class action reform incorrectly assert that the expansion of Federal diversity jurisdiction infringes on State courts and will result in a flood of class action litigation in Federal courts. Such criticism overlooks both the valid interest Federal courts have in cases that involve interstate commerce and defendants and plaintiffs from many States, as well as the inefficiency that duplication in State courts causes in the current system. The Constitution's provision for diversity jurisdiction was intended to prevent just the sort of local biases that have resulted from State court class actions that often award higher settlements to in-State class members and award unsupportable damages against out-of-State defendants.

* * * * *

Union Calendar No.

107TH CONGRESS
2D SESSION

H. R. 2341

[Report No. 107-]

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, to outlaw certain practices that provide inadequate settlements for class members, to assure that attorneys do not receive a disproportionate amount of settlements at the expense of class members, to provide for clearer and simpler information in class action settlement notices, to assure prompt consideration of interstate class actions, to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 27, 2001

Mr. GOODLATTE (for himself, Mr. BOUCHER, Mr. SENSENBRENNER, Mr. MORAN of Virginia, Mr. ARMEY, Mr. STENHOLM, Mr. HYDE, Mr. DOOLEY of California, Mr. BRYANT, Mr. HOLDEN, Mr. COX, Mr. CHABOT, Mr. CRAMER, Mr. OXLEY, Mr. SUNUNU, Mr. BACHUS, Mr. BARTLETT of Maryland, and Mr. GOSS) introduced the following bill; which was referred to the Committee on the Judiciary

MARCH , 2002

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on June 27, 2001]

A BILL

To amend the procedures that apply to consideration of

interstate class actions to assure fairer outcomes for class members and defendants, to outlaw certain practices that provide inadequate settlements for class members, to assure that attorneys do not receive a disproportionate amount of settlements at the expense of class members, to provide for clearer and simpler information in class action settlement notices, to assure prompt consideration of interstate class actions, to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CON-**
4 **TENTS.**

5 (a) *SHORT TITLE.*—*This Act may be cited as the*
6 *“Class Action Fairness Act of 2002”.*

7 (b) *REFERENCE.*—*Whenever in this Act reference is*
8 *made to an amendment to, or repeal of, a section or other*
9 *provision, the reference shall be considered to be made to*
10 *a section or other provision of title 28, United States Code.*

11 (c) *TABLE OF CONTENTS.*—*The table of contents for*
12 *this Act is as follows:*

Sec. 1. Short title; reference; table of contents.

Sec. 2. Findings and purposes.

Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.

Sec. 4. Federal district court jurisdiction of interstate class actions.

Sec. 5. Removal of interstate class actions to Federal district court.

Sec. 6. Appeals of class action certification orders.

Sec. 7. Effective date.



1 **SEC. 2. FINDINGS AND PURPOSES.**

2 (a) *FINDINGS.—The Congress finds as follows:*

3 (1) *Class action lawsuits are an important and*
4 *valuable part of our legal system when they permit*
5 *the fair and efficient resolution of legitimate claims*
6 *of numerous parties by allowing the claims to be ag-*
7 *gregated into a single action against a defendant that*
8 *has allegedly caused harm.*

9 (2) *Over the past decade, there have been abuses*
10 *of the class action device that have harmed class*
11 *members with legitimate claims and defendants that*
12 *have acted responsibly, and that have thereby under-*
13 *mined public respect for our judicial system.*

14 (3) *Class members have been harmed by a num-*
15 *ber of actions taken by plaintiffs' lawyers, which pro-*
16 *vide little or no benefit to class members as a whole,*
17 *including—*

18 (A) *plaintiffs' lawyers receiving large fees,*
19 *while class members are left with coupons or*
20 *other awards of little or no value;*

21 (B) *unjustified rewards being made to cer-*
22 *tain plaintiffs at the expense of other class mem-*
23 *bers; and*

24 (C) *the publication of confusing notices that*
25 *prevent class members from being able to fully*
26 *understand and effectively exercise their rights.*



1 (4) *Through the use of artful pleading, plaintiffs*
2 *are able to avoid litigating class actions in Federal*
3 *court, forcing businesses and other organizations to*
4 *defend interstate class action lawsuits in county and*
5 *State courts where—*

6 (A) *the lawyers, rather than the claimants,*
7 *are likely to receive the maximum benefit;*

8 (B) *less scrutiny may be given to the merits*
9 *of the case; and*

10 (C) *defendants are effectively forced into set-*
11 *tlements, in order to avoid the possibility of huge*
12 *judgments that could destabilize their companies.*

13 (5) *These abuses undermine our Federal system*
14 *and the intent of the framers of the Constitution in*
15 *creating diversity jurisdiction, in that county and*
16 *State courts are—*

17 (A) *handling interstate class actions that*
18 *affect parties from many States;*

19 (B) *sometimes acting in ways that dem-*
20 *onstrate bias against out-of-State defendants;*
21 *and*

22 (C) *making judgments that impose their*
23 *view of the law on other States and bind the*
24 *rights of the residents of those States.*



1 (6) *Abusive interstate class actions have harmed*
2 *society as a whole by forcing innocent parties to settle*
3 *cases rather than risk a huge judgment by a local*
4 *jury, thereby costing consumers billions of dollars in*
5 *increased costs to pay for forced settlements and exces-*
6 *sive judgments.*

7 (b) *PURPOSES.—The purposes of this Act are—*

8 (1) *to assure fair and prompt recoveries for class*
9 *members with legitimate claims;*

10 (2) *to protect responsible companies and other*
11 *institutions against interstate class actions in State*
12 *courts;*

13 (3) *to restore the intent of the framers of the*
14 *Constitution by providing for Federal court consider-*
15 *ation of interstate class actions; and*

16 (4) *to benefit society by encouraging innovation*
17 *and lowering consumer prices.*

18 **SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IM-**
19 **PROVED PROCEDURES FOR INTERSTATE**
20 **CLASS ACTIONS.**

21 (a) *IN GENERAL.—Part V is amended by inserting*
22 *after chapter 113 the following:*

23 **“CHAPTER 114—CLASS ACTIONS**

“Sec.

“1711. *Judicial scrutiny of coupon and other noncash settlements.*

“1712. *Protection against loss by class members.*

“1713. *Protection against discrimination based on geographic location.*

"1714. Prohibition on the payment of bounties.

"1715. Clearer and simpler settlement information.

"1716. Definitions.

1 **"§ 1711. Judicial scrutiny of coupon and other**
2 **noncash settlements**

3 *"The court may approve a proposed settlement under*
4 *which the class members would receive noncash benefits or*
5 *would otherwise be required to expend funds in order to*
6 *obtain part or all of the proposed benefits only after a hear-*
7 *ing to determine whether, and making a written finding*
8 *that, the settlement is fair, reasonable, and adequate for*
9 *class members.*

10 **"§ 1712. Protection against loss by class members**

11 *"The court may approve a proposed settlement under*
12 *which any class member is obligated to pay sums to class*
13 *counsel that would result in a net loss to the class member*
14 *only if the court makes a written finding that nonmonetary*
15 *benefits to the class member outweigh the monetary loss.*

16 **"§ 1713. Protection against discrimination based on**
17 **geographic location**

18 *"The court may not approve a proposed settlement*
19 *that provides for the payment of greater sums to some class*
20 *members than to others solely on the basis that the class*
21 *members to whom the greater sums are to be paid are lo-*
22 *cated in closer geographic proximity to the court.*



1 **“§ 1714. Prohibition on the payment of bounties**

2 “(a) *IN GENERAL.*—The court may not approve a pro-
3 posed settlement that provides for the payment of a greater
4 share of the award to a class representative serving on be-
5 half of a class, on the basis of the formula for distribution
6 to all other class members, than that awarded to the other
7 class members.

8 “(b) *RULE OF CONSTRUCTION.*—The limitation in
9 subsection (a) shall not be construed to prohibit any pay-
10 ment approved by the court for reasonable time or costs that
11 a person was required to expend in fulfilling his or her obli-
12 gations as a class representative.

13 **“§ 1715. Clearer and simpler settlement information**

14 “(a) *PLAIN ENGLISH REQUIREMENTS.*—Any court
15 with jurisdiction over a plaintiff class action shall require
16 that any written notice concerning a proposed settlement
17 of the class action provided to the class through the mail
18 or publication in printed media contain—

19 “(1) at the beginning of such notice, a statement
20 in 18-point Times New Roman type or other func-
21 tionally similar type, stating ‘LEGAL NOTICE:
22 YOU ARE A PLAINTIFF IN A CLASS ACTION
23 LAWSUIT AND YOUR LEGAL RIGHTS ARE AF-
24 FECTED BY THE SETTLEMENT DESCRIBED
25 IN THIS NOTICE.’;



1 “(2) a short summary written in plain, easily
2 understood language, describing—

3 “(A) the subject matter of the class action;

4 “(B) the members of the class;

5 “(C) the legal consequences of being a mem-
6 ber of the class;

7 “(D) if the notice is informing class mem-
8 bers of a proposed settlement agreement—

9 “(i) the benefits that will accrue to the
10 class due to the settlement;

11 “(ii) the rights that class members will
12 lose or waive through the settlement;

13 “(iii) obligations that will be imposed
14 on the defendants by the settlement;

15 “(iv) the dollar amount of any attor-
16 ney’s fee class counsel will be seeking, or if
17 not possible, a good faith estimate of the
18 dollar amount of any attorney’s fee class
19 counsel will be seeking; and

20 “(v) an explanation of how any attor-
21 ney’s fee will be calculated and funded; and

22 “(E) any other material matter.

23 “(b) *TABULAR FORMAT*.—Any court with jurisdiction
24 over a plaintiff class action shall require that the informa-
25 tion described in subsection (a)—



1 “(1) be placed in a conspicuous and prominent
2 location on the notice;

3 “(2) contain clear and concise headings for each
4 item of information; and

5 “(3) provide a clear and concise form for stating
6 each item of information required to be disclosed
7 under each heading.

8 “(c) *TELEVISION OR RADIO NOTICE.*—Any notice pro-
9 vided through television or radio (including transmissions
10 by cable or satellite) to inform the class members in a class
11 action of the right of each member to be excluded from the
12 class action or a proposed settlement of the class action,
13 if such right exists, shall, in plain, easily understood
14 language—

15 “(1) describe the persons who may potentially
16 become class members in the class action; and

17 “(2) explain that the failure of a class member
18 to exercise his or her right to be excluded from a class
19 action will result in the person’s inclusion in the class
20 action or settlement.

21 **“§ 1716. Definitions**

22 “In this chapter—

23 “(1) *CLASS ACTION.*—The term ‘class action’
24 means any civil action filed in a district court of the
25 United States pursuant to rule 23 of the Federal



1 *Rules of Civil Procedure or any civil action that is*
 2 *removed to a district court of the United States that*
 3 *was originally filed pursuant to a State statute or*
 4 *rule of judicial procedure authorizing an action to be*
 5 *brought by one or more representatives on behalf of a*
 6 *class.*

7 “(2) *CLASS COUNSEL.*—*The term ‘class counsel’*
 8 *means the persons who serve as the attorneys for the*
 9 *class members in a proposed or certified class action.*

10 “(3) *CLASS MEMBERS.*—*The term ‘class mem-*
 11 *bers’ means the persons who fall within the definition*
 12 *of the proposed or certified class in a class action.*

13 “(4) *PLAINTIFF CLASS ACTION.*—*The term*
 14 *‘plaintiff class action’ means a class action in which*
 15 *class members are plaintiffs.*

16 “(5) *PROPOSED SETTLEMENT.*—*The term ‘pro-*
 17 *posed settlement’ means an agreement that resolves*
 18 *claims in a class action, that is subject to court ap-*
 19 *proval and that, if approved, would be binding on the*
 20 *class members.”.*

21 “(b) *TECHNICAL AND CONFORMING AMENDMENT.*—*The*
 22 *table of chapters for part V is amended by inserting after*
 23 *the item relating to chapter 113 the following:*

“114. Class Actions 1711”.



1 **SEC. 4. FEDERAL DISTRICT COURT JURISDICTION OF**
2 **INTERSTATE CLASS ACTIONS.**

3 (a) *APPLICATION OF FEDERAL DIVERSITY JURISDIC-*
4 *TION.—Section 1332 is amended—*

5 (1) *by redesignating subsection (d) as subsection*
6 *(e); and*

7 (2) *by inserting after subsection (c) the fol-*
8 *lowing:*

9 “(d)(1) *In this subsection—*

10 “(A) *the term ‘class’ means all of the class mem-*
11 *bers in a class action;*

12 “(B) *the term ‘class action’ means any civil ac-*
13 *tion filed pursuant to rule 23 of the Federal Rules of*
14 *Civil Procedure or similar State statute or rule of ju-*
15 *dicial procedure authorizing an action to be brought*
16 *by one or more representative persons on behalf of a*
17 *class;*

18 “(C) *the term ‘class certification order’ means an*
19 *order issued by a court approving the treatment of a*
20 *civil action as a class action; and*

21 “(D) *the term ‘class members’ means the persons*
22 *who fall within the definition of the proposed or cer-*
23 *tified class in a class action.*

24 “(2) *The district courts shall have original jurisdiction*
25 *of any civil action in which the matter in controversy ex-*



1 *ceeds the sum or value of \$2,000,000, exclusive of interest*
2 *and costs, and is a class action in which—*

3 *“(A) any member of a class of plaintiffs is a cit-*
4 *izen of a State different from any defendant;*

5 *“(B) any member of a class of plaintiffs is a for-*
6 *foreign state or a citizen or subject of a foreign state and*
7 *any defendant is a citizen of a State; or*

8 *“(C) any member of a class of plaintiffs is a cit-*
9 *izen of a State and any defendant is a foreign state*
10 *or a citizen or subject of a foreign state.*

11 *“(3) Paragraph (2) shall not apply to any civil action*
12 *in which—*

13 *“(A)(i) the substantial majority of the members*
14 *of the proposed plaintiff class and the primary de-*
15 *fendants are citizens of the State in which the action*
16 *was originally filed; and*

17 *“(ii) the claims asserted therein will be governed*
18 *primarily by the laws of the State in which the action*
19 *was originally filed;*

20 *“(B) the primary defendants are States, State*
21 *officials, or other governmental entities against whom*
22 *the district court may be foreclosed from ordering re-*
23 *lief; or*

24 *“(C) the number of proposed plaintiff class mem-*
25 *bers is less than 100.*



1 “(4) In any class action, the claims of the individual
2 class members shall be aggregated to determine whether the
3 matter in controversy exceeds the sum or value of
4 \$2,000,000, exclusive of interest and costs.

5 “(5) This subsection shall apply to any class action
6 before or after the entry of a class certification order by
7 the court with respect to that action.

8 “(6)(A) A district court shall dismiss any civil action
9 that is subject to the jurisdiction of the court solely under
10 this subsection if the court determines the action may not
11 proceed as a class action based on a failure to satisfy the
12 requirements of rule 23 of the Federal Rules of Civil Proce-
13 dure.

14 “(B) Nothing in subparagraph (A) shall prohibit
15 plaintiffs from filing an amended class action in Federal
16 court or filing an action in State court, except that any
17 such action filed in State court may be removed to the ap-
18 propriate district court if it is an action of which the dis-
19 trict courts of the United States have original jurisdiction.

20 “(C) In any action that is dismissed under this para-
21 graph and is filed by any of the original named plaintiffs
22 therein in the same State court venue in which the dis-
23 missed action was originally filed, the limitations periods
24 on all reasserted claims shall be deemed tolled for the period
25 during which the dismissed class action was pending. The



1 *limitations periods on any claims that were asserted in a*
2 *class action dismissed under this paragraph that are subse-*
3 *quently asserted in an individual action shall be deemed*
4 *tolled for the period during which the dismissed action was*
5 *pending.*

6 “(7) *Paragraph (2) shall not apply to any class action*
7 *brought by shareholders that solely involves a claim that*
8 *relates to—*

9 “(A) *a claim concerning a covered security as*
10 *defined under section 16(f)(3) of the Securities Act of*
11 *1933 and section 28(f)(5)(E) of the Securities Ex-*
12 *change Act of 1934;*

13 “(B) *the internal affairs or governance of a cor-*
14 *poration or other form of business enterprise and*
15 *arises under or by virtue of the laws of the State in*
16 *which such corporation or business enterprise is in-*
17 *corporated or organized; or*

18 “(C) *the rights, duties (including fiduciary du-*
19 *ties), and obligations relating to or created by or pur-*
20 *suant to any security (as defined under section*
21 *2(a)(1) of the Securities Act of 1933 and the regula-*
22 *tions issued thereunder).*

23 “(8) *For purposes of this subsection and section 1453*
24 *of this title, an unincorporated association shall be deemed*



1 to be a citizen of the State where it has its principal place
2 of business and the State under whose laws it is organized.

3 “(9) For purposes of this section and section 1453 of
4 this title, a civil action that is not otherwise a class action
5 as defined in paragraph (1)(B) of this subsection shall nev-
6 ertheless be deemed a class action if—

7 “(A) the named plaintiff purports to act for the
8 interests of its members (who are not named parties
9 to the action) or for the interests of the general public,
10 seeks a remedy of damages, restitution, disgorgement,
11 or any other form of monetary relief, and is not a
12 State attorney general; or

13 “(B) monetary relief claims in the action are
14 proposed to be tried jointly in any respect with the
15 claims of 100 or more other persons on the ground
16 that the claims involve common questions of law or
17 fact.

18 In any such case, the persons who allegedly were injured
19 shall be treated as members of a proposed plaintiff class
20 and the monetary relief that is sought shall be treated as
21 the claims of individual class members. The provisions of
22 paragraphs (3) and (6) of this subsection and subsections
23 (b)(2) and (d) of section 1453 shall not apply to civil ac-
24 tions described under subparagraph (A). The provisions of
25 paragraph (6) of this subsection, and subsections (b)(2) and

1 *(d) of section 1453 shall not apply to civil actions described*
2 *under subparagraph (B).”.*

3 *(b) CONFORMING AMENDMENTS.—*

4 *(1) Section 1335(a)(1) is amended by inserting*
5 *“(a) or (d)” after “1332”.*

6 *(2) Section 1603(b)(3) is amended by striking*
7 *“(d)” and inserting “(e)”.*

8 **SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FED-**
9 **ERAL DISTRICT COURT.**

10 *(a) IN GENERAL.—Chapter 89 is amended by adding*
11 *after section 1452 the following:*

12 **“§ 1453. Removal of class actions**

13 *“(a) DEFINITIONS.—In this section, the terms ‘class’,*
14 *‘class action’, ‘class certification order’, and ‘class member’*
15 *have the meanings given these terms in section 1332(d)(1).*

16 *“(b) IN GENERAL.—A class action may be removed to*
17 *a district court of the United States in accordance with this*
18 *chapter, without regard to whether any defendant is a cit-*
19 *izen of the State in which the action is brought, except that*
20 *such action may be removed—*

21 *“(1) by any defendant without the consent of all*
22 *defendants; or*

23 *“(2) by any plaintiff class member who is not a*
24 *named or representative class member without the*
25 *consent of all members of such class.*



1 “(c) *WHEN REMOVABLE.*—This section shall apply to
2 any class action before or after the entry of a class certifi-
3 cation order in the action, except that a plaintiff class mem-
4 ber who is not a named or representative class member of
5 the action may not seek removal of the action before an
6 order certifying a class of which the plaintiff is a class
7 member has been entered.

8 “(d) *PROCEDURE FOR REMOVAL.*—The provisions of
9 section 1446 relating to a defendant removing a case shall
10 apply to a plaintiff removing a case under this section, ex-
11 cept that in the application of subsection (b) of such section
12 the requirement relating to the 30-day filing period shall
13 be met if a plaintiff class member files notice of removal
14 within 30 days after receipt by such class member, through
15 service or otherwise, of the initial written notice of the class
16 action.

17 “(e) *REVIEW OF ORDERS REMANDING CLASS ACTIONS*
18 *TO STATE COURTS.*—The provisions of section 1447 shall
19 apply to any removal of a case under this section, except
20 that, notwithstanding the provisions of section 1447(d), an
21 order remanding a class action to the State court from
22 which it was removed shall be reviewable by appeal or oth-
23 erwise.

24 “(f) *EXCEPTION.*—This section shall not apply to any
25 class action brought by shareholders that solely involves—



1 “(1) a claim concerning a covered security as de-
2 fined under section 16(f)(3) of the Securities Act of
3 1933 and section 28(f)(5)(E) of the Securities Ex-
4 change Act of 1934;

5 “(2) a claim that relates to the internal affairs
6 or governance of a corporation or other form of busi-
7 ness enterprise and arises under or by virtue of the
8 laws of the State in which such corporation or busi-
9 ness enterprise is incorporated or organized; or

10 “(3) a claim that relates to the rights, duties (in-
11 cluding fiduciary duties), and obligations relating to
12 or created by or pursuant to any security (as defined
13 under section 2(a)(1) of the Securities Act of 1933
14 and the regulations issued thereunder).”.

15 (b) *REMOVAL LIMITATION.*—Section 1446(b) is
16 amended in the second sentence by inserting “(a)” after
17 “section 1332”.

18 (c) *TECHNICAL AND CONFORMING AMENDMENTS.*—The
19 table of sections for chapter 89 is amended by adding after
20 the item relating to section 1452 the following:

 “1453. Removal of class actions.”.

21 **SEC. 6. APPEALS OF CLASS ACTION CERTIFICATION OR-**
22 **DERs.**

23 (a) *IN GENERAL.*—Section 1292(a) is amended by in-
24 serting after paragraph (3) the following:

1 “(4) Orders of the district courts of the United
2 States granting or denying class certification under
3 rule 23 of the Federal Rules of Civil Procedure, if no-
4 tice of appeal is filed within 10 days after entry of
5 the order.”.

6 (b) *DISCOVERY STAY*.—All discovery and other pro-
7 ceedings shall be stayed during the pendency of any appeal
8 taken pursuant to the amendment made by subsection (a),
9 unless the court finds upon the motion of any party that
10 specific discovery is necessary to preserve evidence or to pre-
11 vent undue prejudice to that party.

12 **SEC. 7. EFFECTIVE DATE.**

13 The amendments made by this Act shall apply to any
14 civil action commenced on or after the date of the enactment
15 of this Act.



THE WHITE HOUSE

WASHINGTON

February 27, 2002

TO: DAN BARTLETT
JOSH BOLTEN
NICOLAS CALIO
MITCH DANIELS
✓ALBERTO GONZALES
R. GLENN HUBBARD
KAREN HUGHES
LARRY LINDSEY
KARL ROVE

CC: CESAR CONDA
DIANA SCHACHT
KRISTEN SILVERBERG
AUSTIN SMYTHE
MARK SUMERLIN
KEVIN WARSH

FROM: MARGARET SPELLINGS
JAY LEFKOWITZ

RE: TORT REFORM MEETING

Attached is an options memorandum for discussion at the tort reform meeting tomorrow.
Please do not disseminate this document to people not directly involved in this meeting.

CIVIL JUSTICE REFORM OPTIONS

The first part of this memorandum outlines the foundation for the Administration's civil justice reform initiative. In order to reform our civil justice system, the American people must recognize the enormous costs that lawsuit abuse imposes on them as litigants, consumers, shareholders, and employees. They must also understand that the Administration's proposals will protect legitimate victims' rights to obtain just compensation for their injuries and will strengthen the rights of consumers in securing counsel.

The second part of this memorandum describes a number of potential civil justice reform initiatives the Administration could either initiate or support. The Administration should frame the debate around popular, commonsense reforms (e.g., the Client's Bill of Rights, limits on the liability of small businesses), setting up a favorable negotiating dynamic for more complex reforms involving federalism issues and forum-shopping. Moreover, the Administration's support of these larger, more sweeping reform initiatives will complement the push for reforms in specific legislative areas (e.g., the Patient's Bill of Rights, genetic anti-discrimination, terrorism insurance).

In promoting our reforms, we need to stress that our agenda is pro-growth, pro-job creation, pro-small business, and pro-productivity. The current system, in contrast, imposes an unnecessary, regressive, burdensome tax on workers, consumers, shareholders, and even victims of wrongdoing.

I. The Case for Civil Justice Reform -- Now More than Ever

The existing regime is characterized by excessive, lottery-style awards, and often an inequitable division of the spoils among claimants and counsel. It not only fails properly to deter unsafe conduct, but it also often fails to compensate victims fully for their losses.

Escalating lawsuit abuse imposes enormous and varied costs on our economy. Consumers pay higher prices for fewer products. Shareholders lose value when stock prices drop as a result of a spurious lawsuit. Management's focus is diverted from building shareholder value to developing litigation strategies. Research and development, a necessity for economic growth and prosperity, is sacrificed, and employees lose their jobs or receive reduced compensation as companies are forced to cover excess litigation expense. Jobs, income, and retirement savings are all ultimately tied to the performance of the companies that do business in America.

America's civil justice system is the most expensive in the industrialized world:

- The overall cost of our system is conservatively estimated at nearly \$180 billion annually, or about 2 percent of GDP.
- Costs have grown steadily over time, up from only 1.3% of GDP in 1970, and approximately 0.6% in 1950.
- By some estimates, 30% of the price of a stepladder, 55% of the price of a football helmet, and 95% of the price of a childhood vaccine is attributable to costs associated with litigation risk.

- Between 10 percent to 30 percent or more of medical diagnostic tests ordered in the United States are ordered as a precaution against possible charges of malpractice, not because the doctor needs the tests for a diagnosis.
- Less than one-half of the economic costs incurred in the course of litigation ultimately go to claimants.

The current system imposes a “litigation” or “tort” tax on all goods and services that flow through the economy – a tax that currently costs a family of four approximately \$4,800 per year. Businesses, large and small, pass this tax along to consumers, employees, and other stakeholders. Large enterprises with deep pockets are clearly susceptible to frivolous plaintiffs’ claims. Small businesses are also significantly affected. This litigation tax especially harms small businesses, which are the source of three out of every four new jobs.

Low-income Americans pay a disproportionate share of the tax, with larger shares of their disposable income going to higher insurance premiums, increased medical costs, reductions in employment compensation and benefits, and increases in the prices of goods and services.

Class action lawsuits are particularly ripe targets for reform. These large lawsuits often do not even benefit the plaintiffs in whose names claims are brought. The plaintiffs’ lawyers regularly reap a disproportionate share of the bounty. Using a token representative plaintiff to get into court, entrepreneurial lawyers sue a defendant, gain the court’s permission to represent a large class, and negotiate a settlement. Because litigating is risky and costly, companies often settle even cases that have no merit. Lawyers may walk off with millions in fees while class members individually receive pennies on the dollar – or nothing at all – for alleged harms.

- For example, lawyers in Florida settled a class-action lawsuit, filed by flight attendants, against tobacco companies over secondhand smoke. The attendants received no money at all. Some of the money went to a nonprofit foundation to research smoking-related diseases, while lawyers made out with \$46 million in fees.
- According to the *Wall Street Journal*, Bill Lerach, one of the most prominent plaintiffs’ lawyers, noted recently: “I have the greatest practice of law in the world. I have no clients.”

II. Reforms the Administration Might Support or Initiate

A. Legislative Measures

1. **Class Action Lawsuit Reform.** A handful of State courts, through their certification and settlement of large-scale class action lawsuits, are effectively making law and dictating corporate behavior for 49 other States. Currently, a class action lawsuit brought in State court may be removed to federal court only if there is *full* diversity among the defendants and the named plaintiffs – *i.e.*, no plaintiff is a citizen of the same State as any defendant. In addition, *each class member’s* claim alone must exceed \$75,000, even if the aggregate amount in controversy far exceeds this amount. These requirements make it easy for plaintiffs’ lawyers to bring large class actions in favorable State forums, even where these

lawsuits have significant interstate commerce implications and involve the residents and laws of multiple States.

The individual consumers on whose behalf these suits are brought often receive only a few dollars each from a class action settlement. Frequently, they do not even get cash, but instead receive a "coupon" for a noncash discount on one of the defendant's products. By contrast, the lawyers who bring the suits often negotiate very large fees.

Pending Legislation: The Class Action Fairness Bill. Two bills currently pending in Congress address these issues (H.R. 2341 (Sponsor: Goodlatte, 43 co-sponsors), S. 1712 (Sponsor: Grassley; co-sponsors: Carper, Hatch, Specter, Voinovich, Chafee, Kohl, Thurmond)). On February 6, 2002, the House Judiciary Committee held a hearing, and a mark-up of the bill is expected in early March. The Administration's support would help push these measures into the spotlight, although Senator Leahy and others can be expected to oppose any Senate action on these issues.

The bills' commonsense provisions include establishing a consumer class action bill of rights, requiring (1) notice of a lawsuit to class members in "plain English"; (2) judicial review of "coupon" settlements; and (3) prohibitions against court approval of proposed settlements providing for preferential payments to certain designated members of the class. In addition, the bills call for modification of diversity requirements for federal jurisdiction over class actions, such that cases would be removable if the aggregate amount in controversy exceeds \$2,000,000 and there is minimal diversity (at least one plaintiff representative and one defendant are from different States), unless a "substantial majority" of the plaintiffs and defendants are from the same State.

RECOMMENDATION: The Administration should support the class action reform measures, with particular focus on the protection of rights of potential victims.

PROS

- The bills' notice and judicial review provisions would provide some consumer protections against the plaintiffs' bar.
- The bills could be used very effectively to highlight abuses of the trial lawyers (e.g., class actions where the class members ended up paying lawyers' fees, or received cereal coupons when their lawyers received millions in fees), demonstrating that the Administration is strongly on the side of potential claimants.
- Diversity reform would give federal courts – which are accountable to the entire country, and whose members do not run for re-election – jurisdiction over interstate controversies that substantially impact the nation's economy.
- Without diversity reform, a few State courts will continue to make law and dictate corporate behavior nationwide, causing a 'race to the bottom' of standards and resulting behavior. This is inconsistent with federalism principles and the purpose of federal diversity jurisdiction itself (i.e., provision of a federal forum that is less susceptible to local political pressures).

CONS

- The Administration's support of the bills may be criticized as a favor to big business, which, it will be argued, will be the chief beneficiaries of the diversity reform measures. (Small businesses typically are not defendants in these lawsuits.)
- The bills' notice and judicial review provisions may be criticized as window dressing for a diversity reform bill that benefits big business.

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2. **Drafted Legislation: Client's Bill of Rights** Senator McConnell has drafted, but has not introduced, legislation that would create a "Client's Bill of Rights." Complementing the class action bill of rights legislation that is pending (above), such a law would require plaintiffs' lawyers to give injured consumers full information about their services, as well as ensure that consumers pay reasonable fees for lawyers' services. HALT, an organization of Americans for legal reform, also advocates such legislation.

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The proposal's reforms include the following elements: (1) a lawyer must provide a written agreement that informs the consumer of the likelihood of prevailing in a lawsuit; expected recovery; and all fee agreements; (2) injured consumers may not be contacted by lawyers or defendants' insurance companies for 45 days after an event resulting in personal injury or death; and (3) a class member has the right affirmatively to "opt into" a potential class action before being included in such a case, rather than having affirmatively to "opt out" in order to pursue an individual remedy.

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Currently, the bill contains a provision that would give a plaintiff the right to an objective review of a contingent fee by a court or bar association to assure "fairness and reasonableness." (Review of contingent fees for fairness may be administratively difficult and might interfere with free market negotiations between lawyers and clients.)

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RECOMMENDATION: The Administration should support the Client's Bill of Rights package, if the bill's language is modified to emphasize fee disclosure rather than fee regulation.

PROS

- Makes clear that the Administration is on the side of the consumer and potential victims.
- Provides a vehicle for demonstrating plaintiffs' bar abuses.

CONS

- Would be opposed by the plaintiffs' bar and many members of Congress as unjustified interference with State regulation of members of the bar.
 - May be legally vulnerable to challenge as exceeding Congress's Commerce Clause authority.
3. **Liability & Diversity Reform Package.** Current punitive damages and joint and several liability rules have the potential to impose unfair and excessive costs on defendants, which in turn affect consumers through higher prices and a burdened economy. In addition, federal

courts do not have jurisdiction over many cases that implicate substantial federal interests – *e.g.*, cases in which the amount in controversy is large (with a corresponding potential to affect the nation's economy), there is the possibility of numerous inconsistent State court judgments (*e.g.*, in mass tort cases), or citizens of numerous States seek to sue defendants in multiple States.

Pending Legislation: Two currently pending bills address liability and diversity reform issues.

Small Business Liability Reform Act. First, S. 865 (Sponsor: McConnell; co-sponsors: Lieberman, Fitzgerald, Hutchinson, Voinovich) and companion bill H.R. 1805 (Sponsor: Hutchinson, introduced with six original co-sponsors (3Ds, 2Rs, one I)) would address the particular liability concerns of small businesses with 25 or fewer employees.

Specifically, the measure would, for federal and State courts, (1) modify the “joint and several liability” rule so that a small business defendant would be held liable only for the damages directly attributable to that defendant; (2) require punitive damages to be established by clear and convincing evidence; and (3) limit punitive damages to the lesser of \$250,000 or three times compensatory damages. The bill also limits the liability of a product's resellers to certain circumstances, reducing the exposure of innocent product resellers that are simply a part of a product's chain of distribution.

The National Federation of Independent Businesses and the National Association of Wholesalers and Distributors have endorsed the bill. S. 865 could be expanded to cover larger businesses, which are more affected by excessive punitive damages awards and joint and several liability rules.¹ Indeed, a measure limited to very small businesses could be challenged as outside of Congress's Commerce Clause authority, since small businesses may have a relatively small effect on interstate commerce. That said, a law targeted at small businesses would likely be more popular.

The Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act. A pending diversity reform measure is H.R. 860 (Sponsor: Sensenbrenner, no co-sponsors), which, in part, proposes federal diversity reform provision that would give federal courts jurisdiction over mass disasters (*e.g.*, air crashes).

RECOMMENDATION AND ISSUE FOR DECISION: The Administration should initiate a liability package and diversity reform package. The diversity portion of the package should (1) create a single federal forum for mass tort cases (the measure that is part of H.R. 860); and (2) permit removal of cases where the amount in controversy exceeds \$500,000, even if only minimal diversity exists. The Administration must decide whether to take the more politically popular approach of proposing liability reform solely for small businesses (as in S. 865/H.R. 1805), or to expand coverage to larger businesses.

¹ Fourteen States permit unlimited joint and several liability; 11 States have abolished it completely; and 25 States have limited the scope of joint and several liability rules. 29 States do not limit punitive damages awards; 6 States have abolished punitive damages; and 15 States have limited punitive damages in some way.

PROS

- The measure could be heralded as part of the Administration's new job-creating, small business initiative. Economic evidence indicates that liability reform, if enacted, would greatly benefit the economy, ultimately resulting in lower costs to consumers and more jobs.
- The Administration could use the measure to educate the public about the costs imposed by the current system.
- Without diversity reform, a few State courts will continue to dictate the outcome of interstate controversies that have the potential substantially to affect the nation's economy.

CONS

- The plaintiffs' bar will argue that punitive damages and joint and several liability rules serve to protect the consumer.
 - States may object that limiting a plaintiff's State law remedy impermissibly interferes in State affairs.
 - It may be difficult to characterize diversity reform as benefiting consumers.
4. **Asbestos Litigation Reform.** Asbestos claims are not abating, even though virtually all of the traditional asbestos defendants – and some companies that at one time were considered peripheral defendants – are bankrupt. Almost 60,000 new claims were filed in 2000, and new filings have accelerated in 2001. The overwhelming majority of these claims have been filed on behalf of people who are not sick. If these trends continue, it is inevitable that many people who ultimately develop cancer and other serious diseases in the future will go uncompensated.
- Substantial additional burden of fed cts. -- do we know or have a projection of the # of addtl cases this will bring to fed ct?*

no

Class-action procedural mechanisms available under current law are inadequate to resolve the asbestos crisis. In *Amchem Products v. Windsor*, 521 U.S. 591 (1997) ("Georgine"), plaintiffs negotiated a global settlement with 20 former asbestos manufacturers. The Supreme Court overturned the settlement, however, based on its conclusion that the class could not legally be certified under Rule 23.

Drafted Legislation: Asbestos Claims Priorities and Compensation Act. The National Association of Manufacturers (which represents a large coalition of asbestos defendants) has drafted a bill that would make "physical impairment," defined under AMA guidelines, an essential element of an asbestos-related claim. It would also liberalize statutes of limitations to remove incentives for plaintiffs to file before they are ill, prohibit case consolidations (which can force defendants into settling large cases), and, to minimize forum-shopping, restrict plaintiffs to filing suit in the State in which they reside or where the exposure occurred. NAM believes that some members of the asbestos plaintiffs' bar will not oppose their bill. They have Republican support for the bill in the Senate, and if and when they get Democratic support, they will introduce it.

NAM's proposal is far more limited than legislation proposed by Congressman Hyde and Senator Ashcroft in 1999 and 2000, which established a defendant-supported fund from which victims' claims would be paid.

RECOMMENDATION: The Administration should consider supporting the asbestos litigation reform bill, particularly in the context of other reform measures.

PROS

- Will preserve funds for victims who ultimately do become ill.
- Will reduce filings against asbestos defendants by unjustified claimants and avoid unnecessary bankruptcies with their corresponding effects on claimants, employees, shareholders, communities, and the economy.

CONS

- Asbestos reform has fallen apart before, and the Administration risks entering into a losing battle in which it is criticized for supporting legislation that would limit recovery for asbestos victims and let asbestos defendants off the hook.
- Plaintiffs' attorneys will argue that postponing suit may prevent potential plaintiffs from having funds to pay for preventive or early stage treatment.

- no
5. **Expansion of the National Vaccine Injury Compensation Program.** The Vaccine Injury Compensation Program, 42 U.S.C. 300aa-10 et seq., is a no-fault alternative to the traditional tort system for resolving vaccine injury claims, whether the vaccine is administered in the public or private sector. The VICP is administered jointly by HHS, DOJ, and the U.S. Court of Federal Claims and covers all vaccines recommended by the Center for Disease Control for routine administration to children, such as diphtheria, tetanus, measles, mumps, and rubella. A tax (\$0.75 per antigen) is levied on vaccines and held in a fund. Compensation is determined either by settlement between plaintiffs' attorney and DOJ lawyers or by a special master appointed by the Court. Awards include economic costs, pain and suffering, estimated costs of future care and attorneys fees. Compensation for vaccine-related death and pain and suffering and emotional damages are capped at \$250,000. Punitive damages are unavailable.

RECOMMENDATION: The Administration should support legislation to expand the National Injury Compensation Program to cover vaccines that are in the "national interest," such as anthrax or smallpox.

PROS

- By reducing their liability risk, manufacturers will not be discouraged from developing vaccines that will be needed in the event of a bioterrorist attack.
 - An expansion of the program will encourage manufacturers to attempt to develop new and better vaccines.
- (standard is too loose; every effective vaccine - virtually by definition - will be in the national interest)*

CONS

- why?
- The Administration lobbied against inclusion of this measure in the bioterror legislation, and its support for the legislation in a different context could be viewed as a policy shift.
 - There is no track record for new vaccines from which to build the injury tables needed for compensation determinations.

6. **Modification of Federal Case Consolidation Requirements.** Under 28 U.S.C. § 1407, the multi-district panel assigns similar cases to a transferee court only for consolidated *pre-trial* proceedings. See *Lexecon Inc. v. Milberg Weiss*, 523 U.S. 26 (1998) (ruling that transferee courts may rule only on pre-trial issues such as motions to dismiss and summary judgment and they may not conduct trial). A more efficient approach would permit a transferee court to rule on the merits of consolidated cases, because a single court could uniformly handle many more aspects of similar cases.

Pending Legislation: The Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act H.R. 860 (Sponsor: Sensenbrenner, no co-sponsors) would amend section 1407 to permit transferee courts to retain jurisdiction over a case for trial purposes, with damages determined by the transferor court. (H.R. 860's amendment to section 1407 is coupled with a federal diversity reform provision (discussed earlier in this memo) that would give federal courts jurisdiction over mass disasters (e.g., air crashes). Senator Leahy opposes the diversity reform provision and has said he is only willing to schedule H.R. 860 if the House gives up the mass disaster provision.

RECOMMENDATION: The Administration should support passage of a measure that would amend section 1407.

PROS

- Amendment of section 1407 would enable federal courts to handle consolidated cases more efficiently, saving the litigants time and money.

CONS

- The public may view amendment of section 1407 as a modest reform measure that addresses a technical federal procedural issue.

B. Administrative Measures

1. **FDA Drug Labeling Safe Harbor.** The FDA reviews and approves every word on the label of any prescription drug product, and it requires manufacturers to obtain approval before modifying a drug label. Yet many courts permit lawsuits based on a claim that a drug manufacturer's label did not warn of a certain risk – even though the label fully complied with all federal safety requirements. Such lawsuits essentially allow a jury to second-guess the FDA's judgment regarding a product's label and develop labeling policy without considering all the consequences. Empirical evidence shows that these decisions actually jeopardize the public health, because labels that are too complicated or long lead to consumers' ignoring *all* warnings. In addition, defending these lawsuits adds enormously to the cost of drugs, because they are shifted to consumers by the manufacturers.

RECOMMENDATION: FDA should promulgate a regulation expressly preempting tort failure-to-warn and other claims based on alleged deficiencies in a drug's label, but not preempting tort claims based on fraud on the FDA or other tort law theories. FDA is currently drafting a final rule that will extensively revise drug-labeling requirements when it is promulgated next year. FDA could issue a notice this spring asking for comment on a

preemption regulation and could issue the preemption regulation as part of the final drug-labeling rule.

In addition, some pharmaceutical manufacturers have proposed that the Administration consider initiating or supporting legislation that would create a fund to compensate injured victims as part of this preemption approach. Manufacturers would pay into this fund, which would be distributed to consumers injured by a manufacturer's product.

PROS

- FDA's revised labeling requirements will result in simpler, more focused labels that will better protect the general public health. Preemption of failure-to-warn claims that essentially assert the FDA's labeling decisions are inadequate preserves the FDA's regulatory authority.
- Preemption of failure-to-warn claims will ensure that manufacturers are not asked to comply with inconsistent State and federal requirements.
- Giving manufacturers certainty regarding potential liability will lower drug costs.
- Seeking comment on the preemption regulation will ensure that the regulation is not overturned by a court for APA reasons.
- Making a fund part of this plan will ensure that injured consumers are fairly compensated for their injuries.

CONS

- The plaintiffs' bar will characterize the preemption as less protective of the public health, pointing out that, in the past, many courts and the FDA itself have called FDA labeling requirements a "floor," not a "ceiling."
- Issuing a public notice asking for comment on a preemption regulation may galvanize the plaintiffs' bar into seeking congressional action to block FDA from taking this action.
- States may object to FDA preemption of State claims as inconsistent with federalism principles and an encroachment on their ability to protect their citizens' health.

- Agency preemption is legally vulnerable; if not it challenged & we may lose it.
2. **FDA Policy Statement on Preemption of Fraud-on-the-FDA Claims.** In *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), the Supreme Court ruled that federal law preempted a plaintiff's State-law claim that a medical device manufacturer had committed fraud on the FDA (that is, had knowingly misled the agency by submitting false documents or withholding information). The FDA could issue a policy statement stating that it understands the Supreme Court's decision to extend to drugs and biologics, as well as to negligence per se claims.

RECOMMENDATION: FDA should issue a policy statement extending *Buckman*.

PROS

- Although a policy statement is not binding on courts, many courts will take an FDA policy statement seriously.
- Issuing a policy statement is administratively simple.

Med-nal. 17

CONS

- The public may view an FDA policy statement as a power grab that threatens the public health by limiting plaintiffs' access to the courts.
- Courts are beginning to extend *Buckman* on their own, and an FDA policy statement might be unnecessary and result in negative publicity. *See, e.g., Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199 (9th Cir. 2001). (extending *Buckman* to fraud on the EPA); *Brasher v. Sandoz Pharms. Corp.*, 2001 U.S. Dist. LEXIS 18364 (N.D. Ala. Sept. 21, 2001) (extending *Buckman* to fraud-on-the-FDA claim in a drug case).

C. Other Measures

1. **Adoption of Legislation Checklist.** In 1991, President George H.W. Bush's civil justice reform working group proposed the adoption of a "legislation checklist." *See* 1991 Agenda for Civil Justice Reform in America. A list of common errors to be avoided in legislation would be developed and applied in the review of all proposed laws.

RECOMMENDATION: The President should issue an Executive Order directing federal agencies to evaluate proposed legislation in view of a checklist. In addition, the Executive Order could be used to highlight the deficiencies in our current civil justice system. Legislation would be evaluated for drafting problems (*e.g.*, whether it adequately addresses statute of limitations or standards of proof issues). In addition, any legislation that addresses damages should be reviewed to ensure that punitive and non-economic damages are unavailable/limited and that exhaustion of administrative remedies is required.

2. **Modifications to the Federal Rules.** The Federal Rules of Civil Procedure could be strengthened to limit lawsuit abuse in federal courts. Modifications include:
 - Strengthening of Rule 11;
 - "Three strikes and you're out" law to punish lawyers who file frivolous claims,
 - Tightening of discovery rules to allow inquiry only into issues actually in dispute; and
 - Amendment of Rule 68 to clarify that if damages awarded after trial are less than a settlement offer, the plaintiff must pay the defendant's post-settlement offer attorneys' fees. Federal courts typically interpret Rule 68 to require the payment of costs to mean court costs (*e.g.*, filing, witness fees), but not attorneys' fees.

RECOMMENDATION: DOJ should initiate amendment of the Federal Rules by introducing amendments to the appropriate advisory committee of the Judicial Conference. Since this can be a lengthy process (it generally takes around three years to amend a rule from initial consideration by an advisory committee of the Judicial Conference through Congressional review), this action should be undertaken promptly. Particular care should be paid to defining the term "frivolous" as it is used in a "three strikes and you're out" approach.

3. **Auto Choice Reform.** A version of auto choice reform was endorsed by President George H.W. Bush in 1992. H.R. 1704 (Sponsor: Arme, 7 co-sponsors), the most recent version of this measure, would give consumers a choice between their State's current auto insurance system or less expensive personal protection insurance (PPI), which provides no-fault

coverage for economic damages only. Some economists estimate the scheme could reduce auto insurance costs by 24 percent. But some respected law-and-economics experts oppose it (George Priest).

RECOMMENDATION: A sub-working group that includes economists should be established to evaluate the issue.

State Punitive Damages Provisions

- **Twenty-nine states and the District of Columbia have no limits on punitive damage awards (except by constitutional standards):**

AZ, AR, CA, DE, DC, HI, ID, IL, IA, KY, ME, MD, MN, MS, MO, MT, NM, NY, OH, OR, PA, RI, SC, SD, TN, UT, VT, WV, WI and WY.

- **Six states have abolished punitive damages completely:**

LA, MA, MI, NE, NH and WA.

- **Fifteen states have limited punitive damage awards:**

AL: In nonphysical injury cases against large businesses, punitive damages are limited to the greater of three times compensatory damages or \$500,000; in nonphysical injury cases against small businesses with a net worth of less than \$2 million, limited to \$50,000 or 10% of net worth up to \$200,000; in personal injury cases, limited to the greater of three times compensatory damages or \$1.5 million. Limits to be adjusted Jan. 1, 2003, and at three year intervals thereafter in accordance with the Consumer Price Index.

AK: Punitive damages are limited to the greater of three times compensatory damages or \$500,000. In cases involving actual malice, punitive damages are limited to the greater of four times compensatory damages or four times aggregate amount of financial gain that the defendant received as a result of its conduct or \$7 million.

CO: Punitive damages may not exceed compensatory damages.

CT: Punitive damages in product liability actions are limited to two times compensatory damages.

FL: Punitive damages are limited to the greater of three times compensatory damages or \$500,000; if the trier of fact finds the defendant's conduct was "motivated solely by unreasonable financial gain" punitive damages may be awarded up to the greater of four times compensatory damages or \$2 million; no cap applies if the defendant had a "specific intent to harm the claimant." Punitive damages may not be awarded more than once for a single act or course of conduct unless the court finds by clear and convincing evidence that the prior award was insufficient to punish the defendant.

GA: Punitive damages are limited to \$250,000 unless the plaintiff demonstrated that the defendant acted with a specific intent to harm.

February 25, 2002

- IN: Punitive damages are limited to the greater of three times compensatory damages or \$50,000.
- KS: Punitive damages are limited to the lesser of \$5 million or the defendant's annual gross income. If the court finds that the profitability of the conduct exceeds the amount of the general limitation, the court may award an amount equal to 1½ times the amount of the profit which the defendant gained or is expected to gain as a result of the conduct.
- NV: Punitive damages are limited to three times compensatory damages if the amount of compensatory damages is \$100,000 or more; and \$300,000 if the amount of compensatory damages is less than \$100,000. Limits do not apply to an insurer who acts in bad faith regarding its obligations to provide insurance coverage or in product liability actions.
- NJ: Punitive damages are limited to greater of five times compensatory damages or \$350,000.
- NC: Punitive damages are limited to the greater of three times compensatory damages or \$250,000.
- ND: Punitive damages are limited to the greater of two times compensatory damages or \$250,000.
- OK: Punitive damages may not exceed the greater of \$100,000 or compensatory damages. Where the jury finds by clear and convincing evidence that the defendant acted with malice or an insurer intentionally acted in bad faith, punitive damages may not exceed the greater of \$500,000 or two times compensatory damages or the amount of the increased financial gain to the defendant.
- TX: Punitive damages limited to the greater of two times economic damages plus amount equal to non-economic damages up to \$750,000, or \$200,000.
- VA: Punitive damages may not exceed \$350,000.

State Joint and Several Liability Provisions

- **Fourteen states and the District of Columbia allow unlimited joint and several liability:**

AL, AR, DE, DC, HI, IL, ME, MD, NC, PA, RI, SC, VT and VA.

- **Eleven states have abolished joint and several liability completely:**

AK, AZ, CO, IN, KS, KY, LA, ND, OR, TN and WY.

- **Twenty-five states have limited joint and several liability:**

CA: Joint liability has been abolished for noneconomic damages only.

CT: Defendants are generally only liable in proportion to their share of responsibility. If a defendant is insolvent or its share is otherwise uncollectible, the remaining defendants may be required to pay that defendant's share of the damages according to their percentages of negligence.

FL: If plaintiff is at fault, joint liability is abolished for: (a) any defendant found 10% or less at fault; (b) economic damages in excess of \$200,000 for any defendant found to be more than 10% but less than 25% at fault; (c) economic damages in excess of \$500,000 for any defendant found at least 25% but no more than 50% at fault; (d) economic damages in excess of \$1 million for any defendant found more than 50% at fault. If plaintiff is not at fault, joint liability abolished for: (a) any defendant found to be less than 10% at fault; (b) economic damages for any defendant found at least 10% but less than 25% at fault; (c) economic damages in excess of \$500,000 for any defendant found at least 25% but not more than 50% at fault; (d) economic damages in excess of \$1 million for any defendant found at least 25% but not more than 50% at fault; and (e) economic damages in excess of \$2 million for any defendant found more than 50% at fault. Joint liability does not apply to any defendant who is found to be less at fault than the plaintiff.

GA: Joint liability applies, but can be disregarded in certain cases where the plaintiff is partially at fault.

ID: Joint liability has been abolished, except in cases arising out of a violation of any state or federal law or regulation related to hazardous or toxic waste or substances or solid waste disposal sites, or any cause of action arising from the manufacture of any medical devices or pharmaceutical products.

IA: Joint liability has been abolished for non-economic damages. Joint liability has been abolished for economic damages for defendants less than 50% at fault.

- MA: Each defendant is liable to the extent of that defendant's proportionate share of the entire common liability, without regard to his relative degree of fault. Thus, in a two-defendant case, a defendant found 1% negligent can be compelled to pay 50% of the judgment.
- MI: Joint liability has been abolished, except in medical malpractice cases or criminal conduct involving gross negligence or the use of drugs or alcohol.
- MN: A defendant whose fault is 15% or less is only liable up to four times that defendant's percentage of fault.
- MS: Joint liability has been abolished to the extent needed for the plaintiff to recover 50% of damages.
- MO: If the plaintiff was at fault, joint liability is limited to two times the defendant's percentage of fault.
- MT: Joint liability has been abolished except for defendants found to be more than 50% at fault, except that joint liability shall apply in actions arising from an act or omission that violates a state environmental law relating to hazardous or deleterious substances.
- NE: Joint liability has been abolished for non-economic damages.
- NV: Joint liability has been abolished for defendants less at fault than the plaintiff, except in products liability actions, strict liability actions, or actions involving the emission, disposal or spillage of a toxic or hazardous substance.
- NH: Joint liability has been abolished for defendants less than 50% at fault.
- NJ: Joint liability has been abolished for defendants less than 60% at fault.
- NM: Joint liability has been abolished, except in strict liability cases, cases involving vicarious liability, or "situations not covered by any of the foregoing and having a sound basis in public policy."
- NY: Joint liability has been abolished for non-economic damages for defendants less than 50% at fault, except when the defendant is found liable for: (1) use, operation, or ownership of a motor vehicle; (2) having acted with reckless disregard for the safety of others; (3) certain provisions of labor law; (4) unlawfully releasing hazardous substances; and (5) product liability actions where the manufacturer of the product is not a party to the action, jurisdiction over the manufacturer could not be obtained, and liability would have been imposed on the manufacturer through strict liability.

February 25, 2002

- OH: Joint liability has been abolished for non-economic damages, but only if the plaintiff was contributorily negligent or impliedly assumed the risk that caused the harm.
- OK: Joint liability is abolished if the plaintiff was at fault.
- SD: Joint liability is limited to two times the percentage of fault of any defendant found to be less than 50% at fault.
- TX: Joint liability has been abolished except for defendants found to be more than 50% at fault. In cases involving toxic torts, a defendant is jointly liable if that defendant's fault is 15% or greater.
- WA: Joint liability has been abolished if the plaintiff is found to be at fault.
- WV: In medical malpractice actions, joint liability has been abolished for defendants found to be less than 25% at fault.
- WI: Joint liability has been abolished for defendants found to be less than 51% at fault.

March 19, 2002

MEMORANDUM FOR THE PRESIDENT

FROM: NICHOLAS E. CALIO

SUBJECT: STATUS OF CLASS ACTION REFORM LEGISLATION

Background: Currently, it is very difficult to move class action lawsuits involving parties in multiple states to federal court. A handful of State courts, through their certification and settlement of large-scale class action lawsuits, are effectively making law and dictating corporate behavior for 49 other States. A class action lawsuit brought in State court may be removed to federal court only if there is *full* diversity among the defendants and the named plaintiffs, *i.e.*, no plaintiff is a citizen of the same State as any defendant. In addition, *each class member's* claim alone must exceed \$75,000, even if the aggregate amount in controversy far exceeds this amount. These requirements make it easy for plaintiffs' lawyers to bring large class actions in favorable state forums, even where these lawsuits have significant interstate commerce implications and involve the residents and laws of multiple states.

The individual consumers on whose behalf these suits are brought often receive only a few dollars each from a class action settlement. Frequently, they do not even get cash, but instead receive a "coupon" for a noncash discount on one of the defendant's products. By contrast, the lawyers who bring the suits often negotiate very large fees.

Pending Legislation: Two bills currently pending in Congress address these issues: H.R. 2341 (Sponsor: Goodlatte, 43 co-sponsors), and S. 1712 (Sponsor: Grassley; co-sponsors: Carper, Hatch, Specter, Voinovich, Chafee, Kohl, Thurmond). On March 14, the House of Representatives passed the Goodlatte bill 233-190. Seventeen Democrats voted in favor of the bill.

In the Senate, Chairman Leahy is opposed to S. 1712 and has ^{is} no plans to address this bill in hearings or a markup. A similar bill was voted on by the Republican-controlled Judiciary Committee in early 2000 and passed with a 10-8 vote; the only Democrat voting in favor being Sen. Kohl. Given Sen. Leahy's opposition to the bill, there ~~is~~ no chance of the bill moving under regular order. However, it might be a good bill for an amendment strategy. If the Democrats move hate crimes legislation, perhaps it might serve as an opportunity for an amendment.

^{as expected} The bills' provisions include establishing a consumer class action bill of rights, requiring (1) notice of a lawsuit to class members in "plain English"; (2) judicial review of "coupon" settlements; and (3) prohibitions against court approval of proposed settlements providing for preferential payments to certain designated members of the class. In addition, the bill calls for modification of diversity requirements for federal jurisdiction over class actions, such that cases would be removable if the aggregate amount in controversy exceeds \$2,000,000 and there is minimal diversity (at least one plaintiff representative and one defendant are from different

states), unless a "substantial majority" of the plaintiffs and defendants are from the same State.

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1991

WH

A Report from the
President's Council on Competitiveness

Agenda for Civil Justice Reform in America

Courtney



August 1991

KF8842

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1991

WH

A Report from the
President's Council on Competitiveness

Agenda for Civil Justice Reform in America

August 1991





THE VICE PRESIDENT
WASHINGTON

MEMORANDUM FOR THE PRESIDENT

FROM: THE VICE PRESIDENT

SUBJECT: PRESIDENT'S COUNCIL ON COMPETITIVENESS
AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA

On behalf of the President's Council on Competitiveness, I am pleased to transmit our report, "Agenda for Civil Justice Reform in America."

Throughout our history, the United States has cherished our system of civil justice as one of the cornerstones of our free and democratic society. It is our civil justice system that protects the individual's rights to life, liberty and property by providing all Americans an opportunity to be heard in an impartial court of law.

In the past 30 years, our legal system has become burdened with excessive costs and long delays. Many features of the current legal system no longer serve to expedite justice or to ensure fair results. Instead, overuse and abuse of the legal system impose tremendous costs upon American society. Each year the United States spends an estimated \$300 billion as an indirect cost of the civil justice system.

To address these problems, the Council established a special working group, chaired by Solicitor General Kenneth W. Starr. The working group's recommendations, which were unanimously accepted by the Council, provide concrete steps that can be taken to restore our civil justice system as an institution that is fair to all and serves the ends of justice.

To implement these changes, the Council has recommended fifty specific changes to our current civil litigation system. These changes can be implemented through legislation, by amendment to the rules of civil procedure and evidence, and through administrative actions including an executive order. The Justice Department is preparing the documents necessary for implementation and will coordinate the Administration's civil justice reform effort.

I am confident that these reforms will greatly reduce the burden of excessive, needless litigation, while at the same time protecting and enhancing every American's ability to vindicate legal rights through our judicial system.

Introduction

Litigation and the American Economy

America has become a litigious society. In 1989 nearly 18 million new civil cases were filed in the state and federal courts. This amounts to one lawsuit for every ten

adults. In the federal courts alone, the number of lawsuits filed each year has almost tripled in the last thirty years — from approximately 90,000 in 1960 to more than 250,000 in 1990.

This dramatic growth in litigation carries with it very high costs

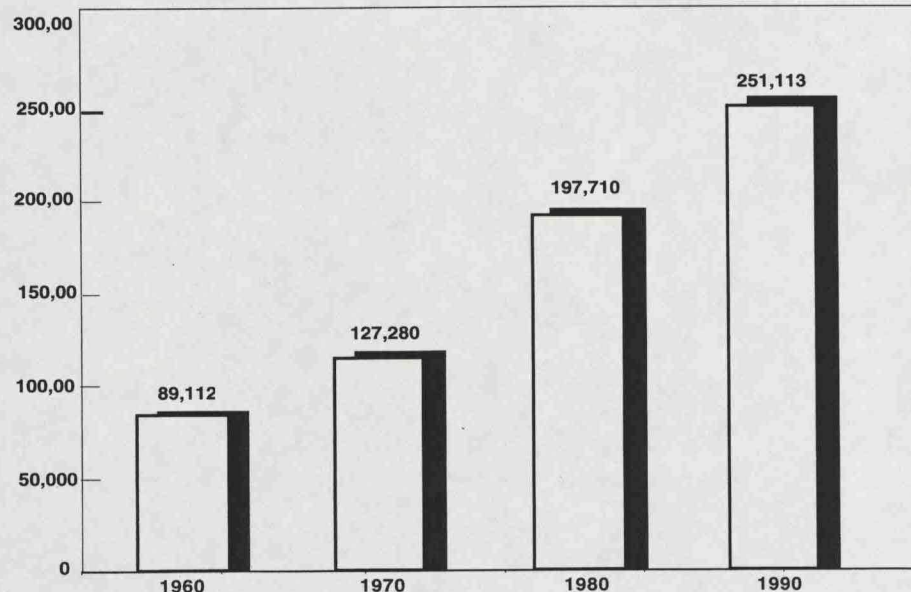
for the U.S. economy. A recent article in *Forbes* estimates that individuals, businesses and governments spend more than \$80 billion a year on direct litigation costs and higher insurance premiums, and a total of up to \$300 billion indirectly, including the cost of efforts to avoid liability.

Unrestrained litigation necessarily exacts a terrible toll on the U.S. economy. According to a recent report by a Professor of Finance at the University of Texas, it is esti-

mated that the average lawyer takes \$1 million a year from the country's output of goods and services. These baleful effects are

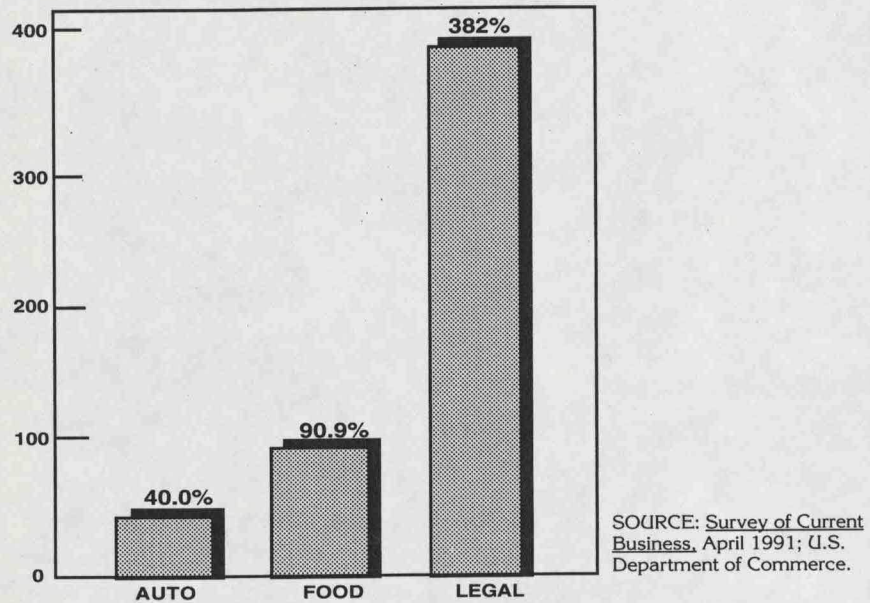
***Businesses and governments
spend more than
\$80 billion a year on direct
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Total Federal District Court Filings

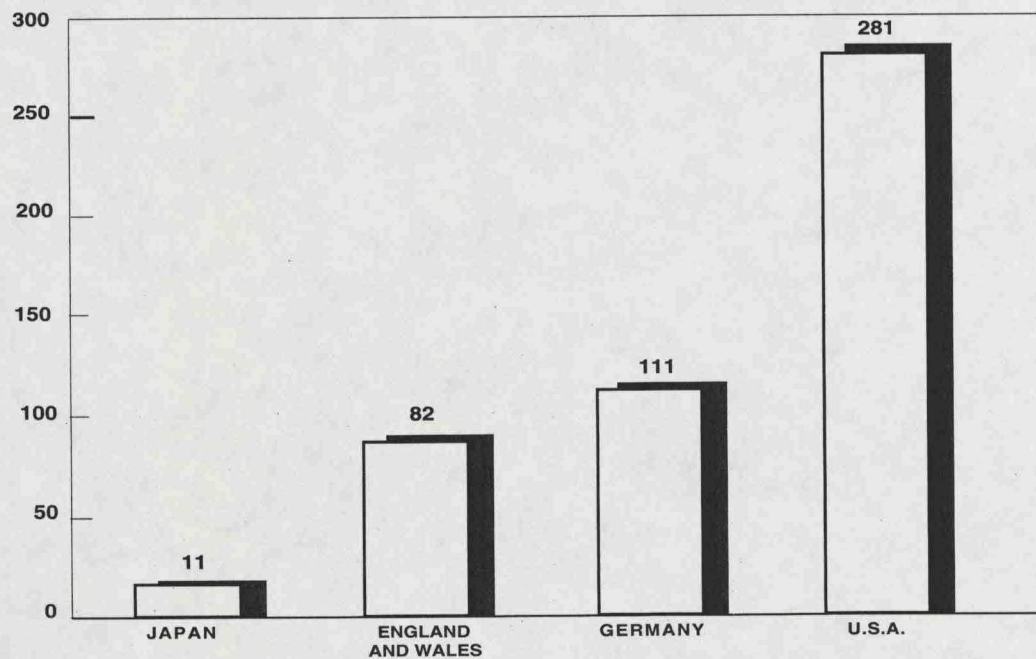


SOURCE: Federal Courts Study Committee - Working Papers and Subcommittee Reports; July 1990, Vol. 2; 1990 filings; 1990 Federal Court Management Statistics

Growth of the Legal Industry 1977-1989



Lawyers per 100,000 Population



SOURCE: Cambridge Law Journal, July 1990, Vol. 49 (2); Intro to Research in Japan, 1991.

not limited to the domestic economy. According to a 1984 study commissioned by the U.S. Department of Commerce, foreign competitors often have product liability insurance costs that are 20 to 50 times lower than U.S. companies. In a survey of over 250 American companies, more than three-quarters of the executives said they believe that the United States will be increasingly disadvantaged in world markets unless modifications are made in the liability system.

The adverse effects of unconstrained litigation are legion. A recent survey by the Conference Board, a group of 3,600 organizations in over 50 nations, reports that due to potential liability concerns:

- 47 percent of U.S. manufacturers have withdrawn products from the market;
- 25 percent of U.S. manufacturers have discontinued some forms of product research;
- Approximately 15 percent of U.S. companies have laid off workers as a direct result of product liability experience.

While some of these consequences result from meritorious lawsuits, the unnecessarily high cost of litigation is undoubtedly a major factor as well. The current *procedural* system adds costs by prolonging resolution of disputes and encouraging wasteful litigation.

Discovery

Over 80 percent of the time and cost of a typical lawsuit involves pretrial examination of facts through discovery. Discovery is the stage of the lawsuit where the parties are supposed to obtain and preserve information regarding the pending action, for later use as evidence in the trial. The current rules governing discovery

permit parties to roam unfettered through their opponent's most private documents.

An especially burdensome part of

discovery involves the taking of depositions — interviews of witnesses taken under oath, often lasting several days and occasionally even weeks. Another potentially intrusive and burdensome discovery practice is the use of interrogatories. The most onerous aspect of discovery, however, is the document demand, whereby litigants can force their opponents to open all of their file cabinets to inspection. Although discovery requests are relatively inexpensive to make, the responding party's costs can be staggering, involving the time of employees to produce materials, attorneys' fees for reviewing materials to be produced, and the physical copying or recording costs.

There are currently no limits to the number of requests that a party can make for discovery items, as long as the requests are at least tenuously related to the action. In one antitrust case, the discovery stage lasted almost

The life of the average civil lawsuit in federal court - - from filing to completion - - is fourteen months.

a decade; the plaintiff's final pretrial statement, which was over 10,000 pages long, cross-referenced approximately 250,000 pages of documents.

The life of the average civil lawsuit in federal court -- from filing to completion -- is fourteen months. Fully 77 percent of litigators in one large American city acknowledged in a 1988 survey that they had used discovery as an economic weapon against their opponents. One result of this lengthy process is that attorneys' fees account for a substantial portion of all recoveries. In fact, when all of the expenses of the litigation process are added up, the claimants in tort cases often end up with compensation that amounts to only a small percentage of the total money spent. Professor O'Connell of the University of Virginia Law School estimates this figure to be about 15 percent of total litigation costs. A study by the Rand Corporation's Institute for Civil Justice

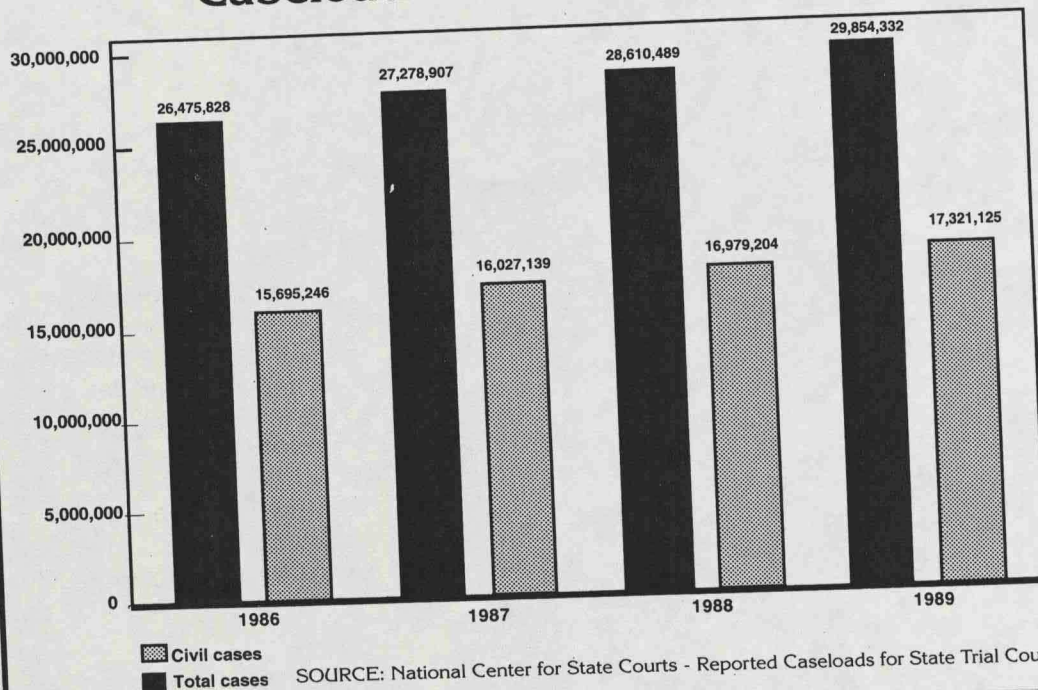
found that in 1985 the legal system incurred a total of \$16-\$19 billion in transaction costs to deliver \$14-\$16 billion to plaintiffs in net compensation.

Expert Witnesses and "Junk Science"

An area of the law particularly ripe for reform is expert witness practice. The Federal Rules of Evidence, which govern most expert testimony, eliminated many of the common law restrictions on the use of expert witnesses. The resulting uncontrolled use of expert witnesses has led to longer trials, more expensive litigation, and a reduction in the quality of expert testimony in many cases.

It has also allowed "junk science" to tarnish the legal process. Peter Huber,

Caseload for State Trial Courts



a leading observer of American courtrooms, has written recently that "scientific frauds . . . are attempted almost daily in our courts, and many succeed." Huber wrote that "the most fantastic verdict recorded so far was worthy of a tabloid:"

"With the backing of 'expert' testimony from a doctor and police department officials, a soothsayer who decided she had lost her psychic powers following a CAT scan persuaded a Philadelphia jury to award her \$1 million."

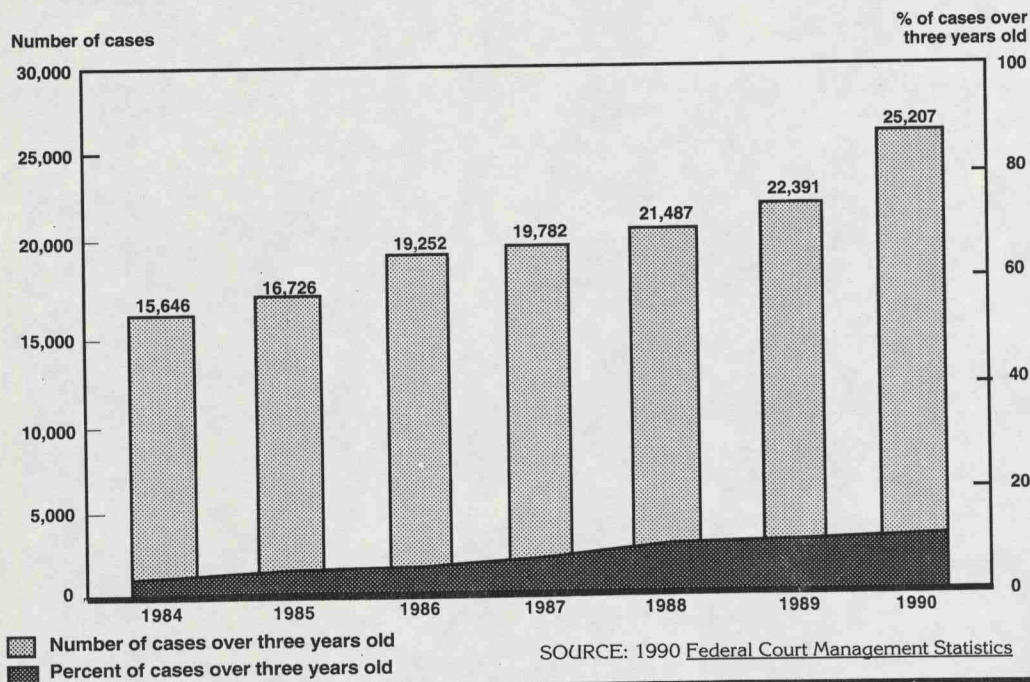
Stories such as this are becoming almost commonplace. "Expert" witnesses regularly offer their "scientific" opinions on the connections between automobile accidents and breast cancer or environmental pollutants and "chemically induced AIDS". As if the ability to fashion almost any opinion into expert testimony were not enough, there is considerable use of contin-

gency fees to pay expert witnesses. Although expert witnesses are supposed to give objective testimony based on scientific evidence in order to help judge and jury resolve complex matters, this practice easily turns too many expert witnesses into "hired guns."

Punitive Damages

In the past, punitive damages were assessed only in cases where the defendant was proved to have had a quasi-criminal intent to harm the plaintiff. Today, however, plaintiffs in civil lawsuits routinely ask juries to award not only compensatory damages (for their economic, or out-of-pocket losses) but also punitive damages. And juries are responding with enthusiasm. A 1987 study by the Institute for Civil Justice,

U.S. District Courts - Number (and %) of Civil Cases Over Three Years Old



which examined 24,000 jury trials in Cook County, Illinois, found that the average punitive damage award increased, in inflation-adjusted dollars, from \$43,000 in 1965-69 to \$729,000 in 1980-84 -- a jump of 1,500%. In personal injury cases, the rise has been even more dramatic.

A prominent insurance lawyer in Washington has said that punitive damages "have made civil litigation sort of like the lotteries you have in so many states." Justice O'Connor and Justice Scalia have observed that the "wholly standardless discretion" of punitive damages "appear[s] inconsistent with due process." And former Justices Brennan and Marshall noted that juries "are left largely to themselves in making this important and potentially devastating decision." Commenting on one particularly shocking case, federal appeals court Judge Alex Kozinski speculated: "I suppose next we will be seeing lawsuits seeking punitive damages for maliciously refusing to return phone calls or adopting a condescending tone in interoffice memos."

The Federal Civil Justice Working Group

In January 1991, a working group on Federal Civil Justice Reform was established under the aegis of the Council on Competitiveness, chaired by Vice President Dan Quayle. The working group, chaired by Solicitor General Kenneth W. Starr, was asked to examine the federal civil justice process and to recommend efficient and effective modifications to reduce unnecessary litigation and to decrease the costs and time required to resolve legal disputes.

The working group was composed of representatives from the White House Counsel's office, the Domestic Policy Council, the White House Office of Policy Development, the Office of the Vice President, the Office of Management and Budget, the Council of Economic Advisers, the Environmental Protection Agency, and the Departments of Justice, Commerce, Treasury and Energy. In June and July 1991, the Council acted on the working group's recommendations and formulated 50 proposals for the nation's civil justice system.

Implementing the reforms proposed by the Council will bring direct economic benefits to the United States. The reforms will allow lawsuits to be resolved quickly so that individuals and companies will be able to redirect assets that were formerly wasted on frivolous and often defensive litigation. Our economy and our country will benefit.

Council Recommendations: An Overview

Voluntary Dispute Resolution

Most potential litigants consider only two avenues for dispute resolution: informal negotiation and litigation. The Council on Competitiveness recommends providing greater access to alternative dispute resolution (ADR) techniques that would routinely be available as a substitute for traditional litigation. These techniques include (1) early neutral evaluation, (2) mediation, (3) arbitration, and (4) summary jury trials. The Council also encourages the private sector to employ contract provisions establishing non-judicial means of dispute resolution in order to introduce ADR into the corporate process.

Because more than 92 percent of all civil lawsuits are settled or otherwise disposed of prior to trial, the Council encourages mandatory settlement conferences soon after the commencement of any litigation. The Council suggests that litigants be required to notify the opposing parties of their intention to file suit before resorting to the courts. These actions will enhance the possibility that disputes may be resolved amicably without the courts.

Discovery

Pretrial discovery is frequently the source of needless delay and expense. Currently litigants have virtually unlimited ability to take sworn depositions of witnesses, request documents and submit written questions to parties.

The Council recommends several fundamental reforms to the discovery

process, including disclosure of basic information and an initial round of discovery that

would continue to be "free" to the requesting party. This would include an extensive document request, a limited set of depositions and written questions. Beyond this initial round, however, the requesting party would have to pay for additional discovery. The Council also recommends that greater sanctions be imposed if materials are wrongfully withheld.

***More than 92 percent of all
civil lawsuits are
settled . . . prior to trial . . .***

More Efficient Trials

Litigation is sometimes necessary when the parties are unable to resolve a dispute through less formal means. The Council recommends several reforms designed to make trial practice more efficient, including urging courts to set early trial dates and to employ summary judgment procedures more frequently to eliminate disputes that can be properly resolved by legal rulings alone.

Expert Evidence Reform

Reform of expert witness practice is also essential if trials are to remain fair and rational mechanisms for conflict resolution. One of the Council's principal recommendations in this regard is to require expert testimony to be based on "widely accepted" theories. This would eliminate testimony unsupported by professional practice or scientific knowledge. The Council also recommends banning contingency fees for expert witnesses. This should prevent expert witnesses from becoming mercenaries or advocates, instead of impartial and objective witnesses.

allowed to assign a specific dollar amount to their requests. Where there is clear and convincing evidence of the defendant's intent to cause injury, then punitive damages may be awarded in a separate phase of the proceeding. In any event, however, the amount of punitive damages should not exceed the plaintiff's actual damages.

Improved Use of Judicial Resources

The Council encourages courts to employ more efficient case management techniques, including flexible assignments of federal district judges. The Council also encourages greater emphasis on resolving intracircuit conflicts. The Council has

The Council recommends that greater sanctions be imposed if materials are wrongfully withheld.

proposed that circuit courts be maintained at a manageable number of judges, and that the Ninth Circuit, which

Punitive Damages

The current common law approach to punitive damages frequently distributes awards in a random and capricious manner. While some states have attempted limited reform, the Council recommends a comprehensive package designed to limit and restrict punitive damages.

The Council recommends that punitive damages be awarded in a rational and consistent manner as part of a coherent system. Plaintiffs seeking punitive damages should not be

has almost thirty sitting judges, be split into two circuits.

Enhanced Incentives for Reduced Litigation

In order to promote more disciplined and less wasteful litigation, the Council proposes to strengthen the current rules which authorize judges to sanction attorneys who file frivolous lawsuits.

The Council also recommends a test of a modified two-way fee-shifting

arrangement whereby the loser of a lawsuit pays the costs incurred by the winner. Although limitations would be built into this system to safeguard equal access to the courts, this reform would encourage pretrial settlements and impose market discipline on the litigation process.

The Council further proposes a moratorium on the more than 150 one-way fee shifting statutes under which victorious plaintiffs recover their fees from losing defendants, while victorious defendants get no such recovery.

Eliminating Litigation Caused by Poorly Drafted Legislation

The Council recognizes that the federal government bears a great deal of responsibility for the rise in litigation caused by poorly drafted federal statutes. The Council proposes that the Executive Branch closely review all legislative proposals against a "litigation hazards" checklist.

Reducing Unnecessary Burdens on Federal Courts

The federal district and appellate caseloads have skyrocketed in the past decade, creating endless delays and adding substantially to the cost of litigation. The Council has proposed several reforms designed to unclog the federal courts, including revising the threshold for federal diversity jurisdiction, restoring judicial immunity to state court judges for official actions, and reducing abuse of habeas corpus petitions.

Council Recommendations: Implementation

The civil justice reforms proposed by the Council may be implemented through one of several approaches. The five principal methods of implementation are (1) federal legislation, (2) revisions to the federal rules of civil procedure and evidence, (3) judicial action, (4) model state legislation and rules, and (5) executive action. Some of the proposed reforms can be implemented through more than one approach. Changes to the discovery process, for example, may be accomplished either by federal statute or through rule changes. Most reforms are also suited to model state statutes, particularly because they permit reforms suggested for the federal systems to be applied in the state courts.

The Administration will draft legislation to implement these recommendations and will work with Congress toward reform. Other changes will require amendment to the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the Federal Rules of Appellate Procedure. The

Administration will draft proposed rules changes and submit the proposals to the Supreme Court's Rules Advisory Committees.

Some reforms can also be accomplished locally by the efforts of individual judges. The Administration will make available innovative management procedures and provide technical assistance to support these suggestions.

Although the reforms contemplate Federal law and rules changes, many of the reforms may be equally applicable to state court systems. The Administration will draft model legislation and model rules changes so that these reforms may be implemented at the state level.

The Administration is committed to the fair, efficient, and early resolution of disputes. To underscore this commitment, the Administration will apply many of the suggested reforms to the conduct of litigation by federal agencies.

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Recommendations

VOLUNTARY DISPUTE RESOLUTION

1. Promote Voluntary Use of Alternative Dispute Resolution (ADR) Techniques

Provide a Choice for Resolving Disputes: Create "Multi-door Courthouses"

Recommendation: Create a "multi-door courthouse" to permit the parties to choose between several different methods for resolving their dispute. Before the contest would be set for trial, the parties would attend a mandatory conference to identify the areas in controversy. At this conference the parties would be given the opportunity to resolve their claims through a variety of alternative dispute resolution mechanisms, including early neutral evaluation, mediation, arbitration, minitrial, and summary jury trial. (1)

Alternative Dispute Resolution (ADR) seeks to resolve controversies with less cost and burden imposed upon the parties. Remedies fashioned through ADR may be more flexible than the restricted relief available through the courts. Because ADR frequently relies upon consensus, its use may foster continuing relationships.

Requiring the parties to explore ADR options at the initial stages of the proceedings will motivate attorneys to analyze the case and prepare basic investigative homework at a much earlier point than would be required by the traditional system. Because this approach can help promote settlement, there could also be a reduction in transaction costs.

Although the parties would be given opportunities to elect ADR, they would not be required to do so. This voluntary approach avoids the danger of creating an additional, and costly, obstruction through which litigants must first travel before they enter the litigation system.

Action Required: Encourage and facilitate judicial action.

Promote Greater Awareness of ADR

Recommendation: Members of the legal, business, and government communities should advocate dispute resolution techniques as an alternative to litigation. (2)

The primary advantage of alternative dispute resolution is that it allows parties to avoid the time and expense of formal court proceedings. Unfortunately, this benefit may not be adequately publicized. Lawyers, business leaders, and government officials should take the initiative in disseminating the important message that ADR achieves justice.

Action Required: Executive Branch applies recommendation to federal agencies. Encourage actions to increase public awareness.

2. Require Notice Prior to Filing a Lawsuit

Recommendation: In most cases, the right to sue should be conditioned on a showing that the parties have attempted, and failed, to resolve their dispute. The party alleging harm would be required to prove that it gave timely notice of the grievance prior to filing the suit, except where emergency or

other circumstances require immediate resort to the courts without prior notice to the opposing party. (3)

A pre-complaint notice requirement provides both parties with an opportunity to resolve the dispute at the earliest stages. The parties would have the opportunity to reach an agreement and fashion appropriate remedies at lower transaction costs and without the constraints of court. At the same time, the dispute would be resolved without burdening the court.

Action Required: Propose legislation to amend appropriate federal statutes.

3. Encourage Earlier Settlement of Contested Cases

Provide Incentives for Settlement Offers

Recommendation: Both parties should be encouraged to evaluate their claims closely and attempt to settle their dispute. Settlement offers advanced prior to trial should be reinforced with financial incentives such as requiring the party who rejected the compromise bear the additional costs of trial unless the outcome at trial exceeds the settlement offer. (4)

The party continuing to maintain an improperly evaluated claim would be forced to pay the expenses of continuing prosecution after receiving a reasonable settlement offer. This reform creates incentives to make settlement offers early and compensates parties who make good faith offers that are nonetheless rejected.

Action Required: Propose amendments to Federal Rule of Civil Procedure 68 and Title 28 of United States Code.

Expand Settlement Opportunities Through Settlement Conferences

Recommendation: Once a lawsuit has been filed, the parties should be required to attend regular conferences to discuss settlement. (5)

Mandatory settlement conferences would compel the parties to reevaluate their claims and litigation position. These required meetings are currently used with success in several judicial districts. They promote settlement earlier because there are more opportunities to focus issues. Mandatory conferences also overcome posturing by lawyers who perceive that initiating settlement discussions, even in the most appropriate cases, will be seen as a sign of weakness.

Action Required: Encourage judicial action.

DISCOVERY

4. Reforms to the Pre-Trial Discovery Process

Require Disclosure of "Core Information"

Recommendation: Parties should be required to disclose basic (or "core") information, such as the names and addresses of people having knowledge likely to bear on the claims and defenses and the location of documents most relevant to the case. This requirement would obligate the parties to make disclosure on their own initiative. Should the core information not be provided, the offending party would not be able to engage in any additional discovery. (6)

Mandatory early disclosure of core information recognizes that in the vast majority of cases there are basic facts that should be exchanged by the parties in order to reach a satisfactory resolution and that this exchange should be accomplished without gamesmanship or expense. This early exchange would increase the opportunity for effective discovery planning and early settlement discussions.

Providing early disclosure of core information eliminates unnecessary filings and delays in exchanging basic information. Disclosure would be accompanied by the attorney's certification that reasonable inquiry had been made and that the information will be supplemented if additional details become known.

Action Required: Propose amendments to Federal Rule of Civil Procedure 26.

Presumptive Numerical Limits on Discovery, with Additional Discovery Governed by Market Incentives

Recommendation: After the disclosure of core information, discovery should be conducted within presumptive quantitative limits and a market-based framework. The parties would be required to formulate a discovery plan within predetermined numerical limits. The parties would then be entitled to conduct any additional discovery, provided that each party would pay the opponent's "production" costs. Judges would be permitted to change the pre-set limits and review costs for good cause. (7-8)

Parties should have access to relevant information but should not be able to use discovery to impose needless costs upon an opponent.

After reviewing the core information exchanged, the parties would meet to formulate a plan that would limit and direct discovery efforts within preset limits. Presumptive quantitative limits on discovery, established in the rules, would set the outer boundaries of the plan unless good cause for additional inquiry is established. The parties would then submit a discovery plan to the court for approval. Either party would be able to pursue additional discovery by paying the costs its opponent would incur in producing the information.

This approach would require the litigants to evaluate carefully their additional discovery requests because paying production costs would discourage marginal or abusive discovery. It also allows the parties significant opportunities to conduct discovery without judicial intervention.

Action Required: Propose amendments to Federal Rule of Civil Procedure 26.

Penalize Abusive Discovery

Recommendation: Amend the Federal Rules of Civil Procedure to establish clear standards for imposing sanctions upon attorneys who abuse the system. The party whose conduct necessitated the discovery motion would bear the burden of establishing that its position was substantially justified. Sanctions would be automatic in instances where the court finds an unreasonable, vexatious, or abusive discovery practice. (9)

While the current rules allow the court to impose penalties upon attorneys, judges should be encouraged to make greater use of sanctions for discovery abuse. At present, judges have the

authority to impose costs (including attorney's fees) incurred in responding to an abusive discovery request, but most judges remain reluctant to levy sanctions for unreasonable or vexatious discovery. Making the imposition of sanctions mandatory provides a further disincentive to litigants who would abuse the discovery process.

Action Required: Propose amendments to Federal Rules of Civil Procedure 26, 37. Recommend judicial efforts to make discovery sanctions more uniform and predictable.

Encourage Parties to Admit Facts Not in Dispute.

Recommendation: *After a party has admitted factual information, further discovery should not automatically be allowed. The court should have authority, where appropriate, to prevent further inquiry regarding the area admitted. (10)*

Admissions sharpen the dispute by narrowing the contested issues. Parties should be encouraged to admit facts or authenticate documents. Only the most marginal purpose would be advanced by allowing further inquiry once reliable factual information has been admitted. Preventing discovery of admitted facts will eliminate the potential for repetitive and abusive inquiry.

Action Required: Propose amendments to Federal Rule of Civil Procedure 26(b).

Tie Discovery Requests to the Pleadings

Recommendation: *In making discovery requests, the parties should be compelled to supply the rationale for the discovery by referring to the*

portion of the complaint, answer or other relevant pleading to be addressed in the desired discovery. (11)

Requiring parties to explain the relevancy of materials being sought in discovery encourages them to assess whether the request is necessary. This also provides the responding party the ability to evaluate the request in light of the issues in the case. Additionally, this procedure would help focus areas in controversy should resort to court be necessary to decide the discovery dispute.

Action required: Propose amendments to Federal Rule of Civil Procedure Rule 26.

5. Resolving Discovery Disputes: Reform of Discovery Motions

Require Parties to Consult Before Seeking Court Intervention in Discovery Disputes.

Recommendation: *Before requesting that the court resolve a discovery dispute, counsel should be required to certify that they have conferred with their opponent and, despite good faith negotiations, are unable to agree upon a resolution. (12)*

This proposal, currently used in many federal and state courts, would require efforts by attorneys to avoid burdening the court with resolving unnecessary discovery disputes. It recognizes that discovery should be structured to minimize judicial intervention to resolve most pre-trial disputes. As the certification requirement places a

premium upon cooperation, acceptable compromises often result.

Action Required: Propose amendments to Federal Rule of Civil Procedure 26. While awaiting full rule amendment, encourage judicial action, through adoption of local rules or standing orders.

"Loser Pays" Rule for Discovery Motions

Recommendation: *When the court decides a discovery motion, the losing party would pay to the winner the costs and attorney fees to vindicate the prevailing position. As with the other "loser pays" provisions, this cost and fee shifting could be limited by judicial discretion where appropriate. (13)*

Requiring reimbursement to the prevailing party encourages both sides to evaluate carefully their claims and defenses. This is particularly true for discovery, which is intended to be self-enforcing. Under the previous recommendation, discovery motions could only be pursued after the parties certified their inability to resolve their dispute. Fee-shifting for discovery motions will be an added incentive for the parties to limit unnecessary discovery and should help discourage abusive discovery practices.

Action Required: Propose amendments to the Federal Rules of Civil Procedure.

6. Maintain Safeguards for Trade Secrets

Recommendation: *Courts should retain the ability to preserve confidential and trade secret information. These safeguards should not be eroded*

by legislative action or rules changes. (14)

Most courts have broad authority to grant "protective" orders that forbid the disclosure of confidential or trade secret information required to be divulged in preparation for trial. Protective orders enable the parties to learn confidential information necessary to their cases while prohibiting them from using the knowledge outside the lawsuit. Legislatures should resist efforts to limit the ability of courts to grant this relief because these orders allow parties to discover the facts necessary to prepare and evaluate a case for trial, but protect the legitimate confidentiality interest of the parties.

Action Required: Oppose repeal efforts. Propose amendments to state codes where authority has been restricted.

MORE EFFECTIVE TRIAL PROCEDURES

7. Early Trial Dates

Recommendation: *Judges should establish an early trial date immediately after the initial pleadings are completed. Once established, the trial date should be delayed only for compelling reason or the needs of the court. (15)*

One of the most effective remedies to the costs of the litigation system is establishment of rigid trial dates. Trial dates have a galvanizing effect on attorneys and parties alike; establishing the date promptly and firmly reduces the occasions for delay and

gamesmanship. A side-benefit of this cost-free reform is more efficient use of discovery and the potential reduction of other litigation expenses. This reform need not mean that a "rocket docket" with very small allowances for discovery would be utilized.

Action Required: Encourage judicial action.

8. Summary Judgment Reform

Mandatory Summary Judgment

Recommendation: *Courts must grant summary judgment when there is no genuine dispute as to any material fact and the party is entitled to prevail as a matter of law. The presiding judge must state reasons for denying or granting a motion for summary judgment. (16).*

Summary judgment is a method for resolving cases where the facts are not in dispute. Under Supreme Court precedent, federal courts are compelled to grant summary judgment when there is no genuine issue of material fact. Under the current rule, however, even when it is determined that there is no valid factual disagreement, the judge may refuse to dispose of the case. In addition to conforming the rule to Supreme Court precedents, it would eliminate unnecessary litigation expenses if judges were required to make explicit findings concerning the existence of a factual dispute and to grant summary judgment when no conflict exists. Because the judge would be required to make specific findings even when factual questions remain, the finding will help focus the factual issues for trial.

Action Required: Propose amendments to Federal Rule of Civil Procedure 56.

Provide Appropriate Deference to Trial Court Findings

Recommendation: *Courts of appeals should accord greater deference to the trial court findings whether a genuine issue of material fact exists. (17)*

The trial court's discretion in reviewing the factual record should be more extensively recognized by the appellate courts. This acknowledgment would not only demonstrate an appreciation that trial judges are more knowledgeable about the dispute than appellate judges, but, more importantly, would also assist the court system in disposing of nonmeritorious cases at an earlier stage in the proceedings.

Action Required: Propose amendments to Federal Rule of Civil Procedure 56.

9. Hands-On Docket Management

Recommendation: *Judges should take a hands-on approach to case management. Their active involvement in the discovery process and other pre-trial matters should be encouraged. (18)*

By adopting a "hands-on" policy towards case administration, including the management of discovery, trial judges can play a vital role in expediting litigation and reducing costs. Active involvement by judges early in the proceedings is one of the most effective ways to reduce the time required to resolve a dispute. When judges efficiently manage their cases,

they assist the parties in resolving their disputes. Hands-on management policies have resulted in increasing settlements within nine months of filing to nearly 85 percent in some courts.

At the same time, the Council's recommended system of discovery incentives should make the judge's job easier. The market-based approaches are designed to be largely self-enforcing.

Action: Encourage greater judicial involvement.

EXPERT EVIDENCE REFORM

10. Reform the Rules Regarding Expert Witnesses.

Require "Widely Accepted" Theories

Recommendation: *Require expert testimony to be based on "widely accepted" theories. A party would have to prove that its expert's opinion is based on an established theory that is supported by a significant portion of experts in the relevant field. (19)*

This revision is designed to eliminate testimony that is far afield from mainstream professional practice or current scientific knowledge. Currently, "expert" witnesses are permitted to offer testimony even if their theories are unproven and are not corroborated by other experts. The Council's recommendations would allow testimony based on respected minority or majority theories while excluding fringe theories.

Action Required: Propose amendments to Federal Rule of Evidence 702.

Bar Contingency Fees for Expert Witnesses

Recommendation: *Ban contingency fees (compensation in return for a "successful outcome") for expert witnesses. (20)*

An expert witness should have no financial interest in any outcome of a case in which he or she testifies. This reform is designed to keep expert witnesses from becoming mercenaries or advocates, instead of remaining impartial and objective.

Action Required: Propose amendments to Federal Rule of Evidence 702.

Require Additional Disclosure from Expert Witnesses

Recommendation: *Permit more comprehensive inquiries of proposed "expert" witnesses through interrogatories and disclosure of additional core data, including a list of the expert's publications and a description of the compensation arrangement. (21)*

Compared to the discovery of other witnesses, discovery of experts is very limited. Litigants should be able to scrutinize experts by obtaining more information about them automatically - - namely, a list of publications and a description of the expert's compensation arrangement, without cost to the opposing party.

Action Required: Propose amendments to Federal Rule of Civil Procedure 26.

Permit Depositions without Leave of Court

Recommendation: *Additional expert discovery such as depositions for expert discovery should be permitted, subject to the market incentives regime outlined above. (22)*

Currently, discovery of experts requires a court order if accomplished through deposition. The Federal Rules of Civil Procedure should provide for deposition of experts without need for motion of court. Depositions are particularly useful for civil expert witnesses.

Action Required: Propose amendments to Federal Rule of Civil Procedure 26.

Expressly Require Courts to Determine that the Expert is Qualified in the Field of Testimony Offered

Recommendation: *Require courts to determine that proposed expert witnesses are legitimate experts in their field before they are permitted to testify. (23)*

This revision would involve judges directly in protecting cases in their courtrooms from unqualified experts. It should have the effect of discouraging parties from retaining unqualified experts

Action Required: Propose amendments to Federal Rule of Evidence 702.

Resist Efforts to Make Use of Court-Appointed Experts Mandatory

Recommendations: *Resist attempts to take the review of expert testimony*

away from juries or force the use of court-appointed experts. (24)

Judges already have the ability to call on experts. Mandating their use could lead to concerns about judicial favoritism, particularly in jury trials.

Action Required: Oppose repeal efforts.

PUNITIVE DAMAGES

11. Reform of Unlimited Punitive Damages

Recommendations: *Punitive damages should be awarded in a rational and consistent manner as part of a coherent system. Plaintiffs seeking punitive damages should not be able to assign specific dollar amounts to their request. Rather, punitive damages should be awarded in a separate proceeding. A jury should determine whether punitive damages are warranted based only on "clear and convincing" evidence supporting an award; the trial judge should determine the amount of punitive damages. The amount of punitive damages should not exceed the full amount of the compensatory damages. (25-29)*

The common law method of assessing punitive damages has developed virtually without restriction. Lacking a unifying structure, the current approach to punitive damages will continue to generate disproportionately high awards in a random and capricious manner. Because punitive damages are "quasi criminal," an award should be predicated upon standards of proof requiring some element of intent. Other limitations are needed to restrict the measure of punit-

tive damages that can be levied in any single case.

These reforms reduce the threat of runaway jury verdicts, promote settlements, and promote certainty in commercial transactions by establishing reasonable boundaries for awards. This unified approach will insure that punitive damages are effective in deterring and punishing extreme or egregious conduct.

Action Required: Encourage state legislative action by means of a model state code.

IMPROVED USE OF FEDERAL JUDICIAL RESOURCES

12. Flexible Assignments for District Court Judges

Recommendation: *Encourage more efficient use of judicial resources through temporary judicial reassignments. Judges from less busy districts should be assigned to districts where there is a more crowded docket. (30)*

Many district courts experience a disproportionate influx of cases from time to time. The result has been significant backlogs in some areas and underutilization in others. The judiciary can address this problem by creating a flexible system that would temporarily transfer judges in response to high caseload demand.

Action Required: Propose legislation to amend Title 28 United States Code.

13. Enhance Case Management Techniques

Recommendation: *To ensure cost-effectiveness, federal judges should utilize procedures to speed management of cases after a lawsuit has been filed. (31)*

Many courts have adopted procedures for speeding the processing of cases and for resolving disputes earlier. Continued innovation should be encouraged within the judiciary to process cases efficiently and fairly. The Federal Rules of Civil Procedure should continue to retain the flexibility to permit tests of promising case management approaches.

Action Required: Encourage judicial action. Provide necessary technical support.

14. Encourage Use of En Banc Panels to Resolve Conflicting Decisions

Recommendations: *Eliminate restrictions that prevent en banc panels where all sitting judges on a federal appeals court jointly decide important legal issues. The use of "mini-panels" with less than a full compliment of judges as a substitute for en banc panels should be eliminated. (32-33)*

En banc hearings occur infrequently because they are discouraged by the current rules. As both the number of appellate judges and cases have increased, most cases are decided by 3-judge panels. All too frequently, separate 3-judge panels in the same circuit answer the same questions differently. The resulting uncertainty from these conflicting decisions

increases litigation. Eliminating the restrictions from the current rule to encourage more frequent use of the en banc process would help promote consistency in the law.

Action Required: Propose amendments to Federal Rule of Appellate Procedure 35.

15. United States Courts of Appeals Should be Maintained at Manageable Levels/ Reducing the Size of the Ninth Circuit

Recommendations: *To avoid the potential for inconsistent decisions within the same judicial circuit, the number of judges on each federal circuit court of appeals should be maintained at a manageable level. The Ninth Circuit should be divided into smaller circuits. (34-35)*

Beyond a certain number of judges, the ordinary operation of a circuit court of appeals becomes unwieldy. The ability to issue clear guidance is often diminished in relation to the number of different decisionmakers. A limit on the number of judges assigned to a single circuit would help ensure a more manageable — and more productive — court. For example, the Ninth Circuit Court of Appeals, currently stretching from Montana to Guam with twenty-eight judges, should be divided in smaller circuits. Previously, other circuit courts of appeals have been split when the number of judges became unmanageable.

Action Required: Propose legislation to amend Title 28 United States Code, Section 44.

ENHANCED INCENTIVES FOR ENCOURAGING MERITORIOUS LITIGATION

16. “Loser Pays” Rule for Attorney Fees in Diversity Cases

Recommendations: *Adopt a “loser pays” rule in cases involving state law brought under the federal courts’ diversity jurisdiction. The loser would pay the winner’s costs of vindicating its prevailing position, subject to two limitations: 1) fee shifting would be restricted to the amount of fees the loser incurred and 2) could be further limited by judicial discretion where appropriate. (36)*

Adopting a “loser pays” rule for payment of attorney’s fees will provide those bringing suit with a choice of methods to finance their litigation. The rule would help fund meritorious claims not currently initiated because the cost of pursuing the claim would have exceeded the expected recovery. The “loser pays” rule (sometimes called the English Rule) is grounded in fairness — in the equitable principle that a party who suffers should be made whole. Where the rule operates, it also prompts more realistic case evaluation. Because the losing party will be obligated to pay the winner’s fees, this approach will encourage litigants to evaluate carefully the merits of their cases before initiating a frivolous claim or adopting a spurious defense.

The “loser pays” rule approach recommended would limit the amount a losing party might have to pay to the sum it expended in litigating the suit.

This would prevent a party from incurring disproportionate expenses for the purposes of penalizing the loser. Limiting the application of the "loser pays" rule to federal diversity cases provides an option for those litigants desiring that each party pay its own attorney fees to pursue their cases in the state courts. Thus, this recommendation will not impact federal statutory rights such as civil rights and environmental protection statutes.

Action Required: Propose legislation to amend Title 28 United States Code.

17. Strengthen Sanctions Against False Court Filings: Rule 11 Reform

Recommendations: *The present attorney sanctions provision, Rule 11, should be retained. Courts should have the power to penalize those responsible for making unfounded assertions in filings with the court, not merely the attorney who signs the document. All parties and their counsel should be required to correct any unfounded assertion immediately upon learning of the inaccuracy. Courts should apply sanctions in a uniform manner. (37-40)*

Rule 11 is an important reminder to litigants to avoid filings with insufficient legal or factual support. The rule provides an important deterrent to frivolous conduct and should be retained and strengthened.

Some courts currently construe Rule 11 to apply only to knowledge at the time the document was filed, while other courts require parties to correct filings when they learn of error. Whenever an error or falsehood is discov-

ered, the parties should be obligated to supply correct information. Further, Rule 11 should apply not only to the lawyer who signs the pleading, but also to any other lawyers responsible for the falsehood.

Action Required: Propose amendments to Federal Rule of Civil Procedure 11

18. Towards More Efficient Attorney's Fees Statutes

Moratorium on One-Party Pay Statutes

Recommendation: *Impose a moratorium on statutes that award attorney fees only to the party who initiated the lawsuit and subsequently prevails. Pending a review of the current statutes, subsequent statutes with attorney fees provisions should be advanced only with substantial policy justification, including cost-benefit analysis. (41)*

Over 150 different federal statutes provide attorney's fees and costs if the party bringing the suit prevails, yet fail to compensate the party who has to defend itself from nonmeritorious allegations. The potential award of fees may well increase the likelihood of frivolous litigation. No additional "one-way" statutes should be enacted without a thorough examination of the benefits and burdens they may cause.

Action Required: Executive Branch imposes recommendation on all federal agencies; encourage Congressional restraint.

Reduce Time Spent Litigating Attorney's Fees

Recommendations: Amend the Equal Access to Justice Act (EAJA) to provide clear standards for the award of attorney's fees caused by vague and conflicting statutory guidance. The statute should specify that a uniform fee rate be applied absent exceptional circumstances. The uniform rate should be indexed to the rate of inflation. (42-43)

The Equal Access to Justice Act (EAJA) allows the award of attorney's fees to those who prevail in litigation against the government. Because the statute does not provide clear guidance, additional court hearings are required to set the proper amount of fees. This needless satellite litigation could be eliminated by amending EAJA to replace its vague and conflicting standards. The rate of attorney compensation should be consistent, clearly set forth in the statute, and altered only in limited instances for good cause. Adjusting the uniform fee awardable in relation to a national index would eliminate the need for annual revision.

Action Required: Propose legislation amending the Equal Access to Justice Act, Title 28, United States Codes, Section 2412.

REDUCING UNNECESSARY BURDENS ON FEDERAL COURTS

19. Reforming Diversity Jurisdiction

Recommendations: The amount in controversy required to invoke the

diversity jurisdiction of the federal courts should be based on the amount of economic damages alleged. This jurisdictional amount should be indexed to the rate of inflation. (44-45)

The jurisdiction of federal courts extends to cases involving state law only when the parties are citizens of different states. The statute establishing jurisdiction based on diversity of citizenship now requires that at least \$50,000 be in dispute to ensure that only the more significant cases are heard in federal court.

Resort to the federal court should be based on the possibility of demonstrable economic harm rather than speculative wrongs. In addition, indexing the monetary threshold to the rate of inflation would eliminate the need for repeated congressional action to revise the jurisdictional amount.

Action Required: Propose legislation to amend Title 28 United States Code, Section 1332.

20. Restore Full Judicial Immunity to State Court Judges for Judging Cases

Recommendation: Enact legislation to restore judicial immunity to state court judges for the fees and costs they incur in defending their official actions. (46)

The Supreme Court has held that state court judges may be held liable for attorney's fees and costs under the Civil Rights Attorney Fees Awards Act of 1976. The threat of this liability places an enormous and needless burden on state judges who fear personal liability for decision they make in their official capacity as judges.

Action Required: Propose legislation to amend Title 42 United States Code section 1983.

21. Reduce Frivolous and Protracted Prisoner Litigation

Recommendations: *States should be encouraged to use administrative procedures to resolve inmate grievances. Abusive prisoner litigation should be limited by restricting the number of habeas corpus petitions an inmate may file and by waiving court filing fees only when the petitioner demonstrates a substantial chance of prevailing. (47-49)*

In 1988 over 10 percent of the federal civil docket were prisoner civil rights cases. Many prisoners use the federal courts to harass prison officials or to delay their sentencing.

The vast majority of these cases challenge conditions of confinement in state institutions and can be resolved without resort to the federal court. States should be encouraged to adopt grievance dispute measures that adequately substitute for judicial hearings. The Civil Rights of Institutionalized Persons Act ("CRIPA") should be amended to remove unnecessary barriers to effective grievance procedures.

Inmates also abuse the writ of habeas corpus (which allows federal courts to review state court convictions) by repeatedly filing repeated almost identical actions. Reasonable standards, requiring the consolidation of all issues, are needed. As another method to discourage abusive filings by inmates, courts should also examine closely requests to waive filing fees.

Action Required: Propose legislation to amend Title 42 of the United States Code, section 1997e; Title 28 of the United States Codes, Sections 1915, 2244, 2254, and 2255.

ELIMINATE LITIGATION OVER POORLY DRAFTED LEGISLATION

22. Reduce Poor Draftsmanship in Legislation

Recommendations: *All proposed laws should undergo a "litigation hazards" review to insure that poor drafting of legislation does not create unnecessary litigation. (50)*

Each year thousands of laws are proposed. Too frequently, poor drafting leaves routine areas *e.g.*, statute of limitations or standards of proof, unaddressed. These ambiguities and omissions result in uncertainty and court challenges.

The federal government should develop a list of errors to be avoided in legislation and should apply the checklist to all proposed laws. Where appropriate, the government should make more consistent use of bright-line tests to reduce ambiguities which may lead to litigation. These steps will help promote certainty and will reduce the work of the courts.

Action Required: Executive Branch imposes recommendation on federal agencies and adds screening to current legislative review efforts; encourage Congressional restraint.

The Federal Civil Justice Reform Working Group

Chairman

Kenneth W. Starr

Solicitor General, Department of Justice

Members

Alden Abbott

Diana Culp Bork

Stephen Bransdorfer

Barbara Bruin

Jay Bybee

Robert Damus

E. Donald Elliott

Lisa Farringer

Dennis Foreman

J. Mark Gidley

John L. Howard

Charles E. M. Kolb

Peter Kostiuik

Jay Lefkowitz

Marianne McGettigan

David McIntosh

William G. Myers III

Richard Porter

Richard Schmalensee

Stephen Wakefield

Wendell L. Willkie II

Department of Commerce

Department of Justice

Department of Justice

Department of Justice

Office of White House Counsel

Office of Management and Budget

Environmental Protection Agency

Department of Justice

Department of the Treasury

Department of Justice

Counsel to the Vice President

White House Office of Policy Development

Council of Economic Advisers

Domestic Policy Council

White House Office of Policy Development

President's Council on Competitiveness

Department of Justice

Domestic Policy Council

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Department of Energy

Department of Commerce

President's Council on Competitiveness Staff

The Council is staffed by the Office of the Vice President with support from members.

Allan B. Hubbard serves as Executive Director.

Acknowledgement

Special thanks to the Department of Justice for making the publication of this report possible.

2/15/2002

The first part of this memorandum outlines the foundation for the Administration's civil justice reform initiative. In order for the Administration to make progress in reforming America's civil justice system, the American people must understand the enormous costs that lawsuit abuse imposes on them as consumers, shareholders, and employees. In addition, they must understand that the Administration's proposals will protect legitimate victims' rights to obtain just compensation for their injuries and will strengthen the rights of consumers in securing counsel.

The second part of this memorandum describes a number of civil justice reform initiatives that we recommend the Administration either support or initiate.

The Case for Civil Justice Reform, Now More than Ever

Escalating lawsuit abuse imposes enormous and varied costs on our economy. Consumers pay higher prices for fewer products. Shareholders lose value when stock prices drop as a result of a lawsuit. Management's focus is diverted from building shareholder value to developing litigation strategies. Employees lose their jobs or receive reduced compensation as the companies they work for are forced to cover excess litigation expense. Our jobs, income, and retirement savings are all ultimately tied to the performance of the companies that do business in America. Excessive litigation threatens our economy's welfare – and ultimately the welfare of the American consumer.

Civil justice reform is essential to spur the creation of new jobs. The current system essentially imposes a 'litigation tax' on all goods and services that flow through the economy. Small businesses are the most affected by this tax, which limits their ability to be the growth engines of new jobs and productivity. Similarly, the failures of our current system punish poorer individuals most greatly. Low-income Americans pay disproportionately larger shares of their disposable income in the form of higher insurance premiums, increased medical costs, reductions in employment compensation and benefits, and increases in the prices of goods and services.

America's civil justice system is the most expensive in the industrialized world, with an overall cost estimated at \$169 billion, or 2 percent of GDP. By some estimates, 30% of the price of a stepladder, 55% of the price of a football helmet, and 95% of the price of a childhood vaccine is attributable to costs associated with litigation risk. Between 10 percent to 30 percent *and* or more of medical diagnostic tests ordered in the United States are ordered as a precaution against possible charges of malpractice, not because the doctor needs the tests for a diagnosis.

There are certainly many legitimate victims of corporate negligence or malfeasance. These victims must be able to use the legal system to obtain justice and to receive fair and just compensation for their losses. But the large lawsuits that threaten our economy very often do not benefit the plaintiffs in whose names these cases are brought. Rather, it is plaintiffs' lawyers who too often reap a disproportionate share of the bounty.

Class action lawsuits are particular targets for reform. Using a token representative plaintiff to get into court, 'entrepreneurial' lawyers sue a defendant, gain the court's permission to represent a large class, and negotiate a settlement. Because litigating is risky and costly,

companies often settle even cases that have no merit. Lawyers may walk off with millions in fees while class members individually receive pennies on the dollar – or nothing at all – for alleged harms. For example, lawyers in Florida settled a class-action lawsuit, filed by flight attendants, against tobacco companies over secondhand smoke. The attendants received no money at all. Some of the money went to a nonprofit foundation to research smoking-related diseases, while lawyers made out with \$46 million in fees. According to the *Wall Street Journal*, Bill Lerach, one of the most prominent plaintiffs' lawyers, noted recently: "I have the greatest practice of law in the world. I have no clients."

A related area for reform concerns the relationship between client and counsel. A "Client's Bill of Rights" would protect consumers, who often must deal with unscrupulous lawyers at times in their lives when they are particularly vulnerable. A Client's Bill of Rights would require lawyers to give consumers information about what to expect from a lawsuit. In addition, it would give consumers the right to have fees reviewed for reasonableness and the right to be left alone for a period of time following an injury or death.

Reforms the Administration Should Support or Initiate

A. Legislative Measures

- 1. Class Action Lawsuit Reform.** A handful of state courts, through their certification and settlement of large-scale class action lawsuits, are effectively making law and dictating corporate behavior for 49 other states in addition to their own, or applying their own state law to citizens of other states. Currently, a class action lawsuit brought in state court may be removed to federal court only if there is *full* diversity among the defendants and the named plaintiffs – *i.e.*, no plaintiff is a citizen of the same State as any defendant. In addition, *each class member's* claim alone must exceed \$75,000, even if the aggregate amount in controversy far exceeds this amount. These requirements make it easy for plaintiffs' lawyers to bring large class actions in favorable state forums, even where these lawsuits have significant interstate commerce implications and involve the residents and laws of multiple states.

The individual consumers on whose behalf these suits are brought often receive only a few dollars each from a class action settlement. Frequently, they do not even get cash, but instead receive a "coupon" for a noncash discount on one of the defendant's products. By contrast, the lawyers who bring the suits often negotiate very large legal fees.

Pending Legislation. Two bills currently pending in Congress address these issues (H.R. 2341 (Sponsor: Goodlatte, 43 co-sponsors), S. 1712 (Sponsor: Grassley; co-sponsors: Carper, Hatch, Specter, Voinovich, Chafee, Kohl, Thurmond)). The Administration's support could help push these measures through, although Senator Leahy and others will likely oppose any Senate action on these issues.

The bills would (1) require notice of the lawsuit to class members in "plain English"; (2) require judicial review of "coupon" settlements; and (3) modify diversity requirements for federal jurisdiction over class actions, such that cases would be removable if the

aggregate amount in controversy exceeds \$2,000,000 and there is minimal diversity (at least one plaintiff representative and one defendant are from different states), unless a “substantial majority” of the plaintiffs and defendants are from the same State.

RECOMMENDATION: The Administration should support the class action reform measures.

PROS

- Diversity reform would give federal courts – which are accountable to the entire country – jurisdiction over what are essentially interstate controversies with a substantial impact on the nation’s economy.
- Without diversity reform, a few state courts will continue to make law and dictate corporate behavior nationwide, causing a ‘race to the bottom’ of standards and resulting behavior. This state of affairs is inconsistent with federalism principles and the purpose of federal diversity jurisdiction itself (*i.e.*, provision of a federal forum with more resources and less susceptibility to political pressures).
- The bills’ notice and judicial review provisions would provide modest consumer protections.
- The bills could be used as a vehicle to highlight abuses by the plaintiffs’ bar (*e.g.*, class actions where the class members ended up paying lawyers’ fees, or received cereal coupons when their lawyers received millions in fees).

CONS

- The Administration’s support of the bills could be criticized as a favor to big business, which will be the chief beneficiaries of the diversity reform measures. (Small businesses typically are not defendants in these lawsuits, since they are not the kind of deep pockets targeted by the plaintiffs’ bar.)
 - The bills’ notice and judicial review provisions could be criticized as window dressing for a diversity reform bill that really benefits big business.
2. **Modification of Federal Case Consolidation Requirements.** Under 28 U.S.C. § 1407, the multi-district panel assigns similar cases to a transferee court for consolidated *pre*-trial proceedings. *See Lexecon Inc. v. Milberg Weiss*, 523 U.S. 26 (1998) (ruling that transferee courts may rule only on pre-trial issues such as motions to dismiss and summary judgment and they may not conduct trial). A more efficient approach would permit a transferee court to rule on merits issues, because a single court could uniformly handle many more aspects of similar cases on a consolidated basis.

Pending Legislation. H.R. 860 (Sponsor: Sensenbrenner, no co-sponsors) would amend section 1407 to permit transferee courts to retain jurisdiction over a case for trial purposes, with compensatory damages determined by the transferor court. H.R. 860’s amendment to section 1407 is coupled with a federal diversity reform provision that would give federal courts jurisdiction over mass disasters (*e.g.*, air crashes). Senator Leahy opposes the diversity reform provision, and he has said he is unwilling to schedule H.R. 860 unless the House indicates that it would recede on the mass disaster provision.

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RECOMMENDATION: The Administration should urge the House to recede on the mass disaster provision and support passage of a measure that would amend section 1407.

PROS

- Amendment of section 1407 would enable federal courts to handle consolidated cases more efficiently.

CONS

- The public may view amendment of section 1407 as a modest reform measure that addresses a technical federal procedural issue.
3. **Client's Bill of Rights.** Senator McConnell has drafted, but has not introduced, legislation that would create a "Client's Bill of Rights." The law would require plaintiffs' lawyers to give injured consumers full information about their services, as well as to ensure that consumers pay reasonable fees for lawyers' services. HALT - An Organization of Americans for Legal Reform also advocates such legislation.

The proposal includes the following elements: (1) a lawyer must inform the consumer in writing about the likelihood of success, expected recovery, and all fee agreements; (2) lawyers or defendants' insurance companies could not contact injured individuals for 45 days after an event resulting personal injury or death; (3) a client has the right to an objective review of a contingent fee by a court or bar association to assure fairness and reasonableness; and (4) a class member has the right affirmatively to "opt into" a potential class action before being included in such a case, rather than having to affirmatively "opt out" in order to pursue an individual remedy.



RECOMMENDATION: The Administration should support a Client's Bill of Rights package.

PROS

- Makes clear that the Administration is on the side of the consumer and potential victims.
- Provides a vehicle for demonstrating plaintiffs' bar abuses.

CONS

- Will be vigorously opposed by the plaintiffs' bar and many members of Congress.
 - Public may not view this as an issue for concern, since dealing with a personal injury lawyer is an unusual event for most people.
 - Review of contingent fees for fairness may be prove administratively difficult and hamper lawyers and clients from negotiating freely.
4. **Asbestos Litigation Reform.** Asbestos claims are not abating, even though virtually all of the traditional asbestos defendants – and some companies that at one time were considered peripheral defendants – are bankrupt. Almost 60,000 new claims were filed in 2000, and new filings have accelerated in 2001. The overwhelming majority of these claims have been

filed on behalf of people who are not sick. If these trends continue, it is inevitable that many people who ultimately develop cancer and other serious diseases in the future will go uncompensated.

Proposed Legislation: The National Association of Manufacturers has drafted a bill that would (1) make “physical impairment” (as defined by AMA guidelines) an essential element of an asbestos-related claim; (2) specify that a statute of limitations does not begin to run until a plaintiff discovers physical impairment; (3) prohibit case consolidation (a practice that forces defendants into settling large cases) except where plaintiffs are family members; and (4) limit forum-shopping by restricting plaintiffs to suing where they reside or where the exposure occurred.

NAM’s proposal is far more limited than legislation proposed by Hyde and Ashcroft in 1999 and 2000, which would have established a defendant-supported fund from which victims’ claims would be paid.

NAM believes that some members of the asbestos plaintiffs’ bar will not oppose their bill. They have Republican support for the bill in the Senate. They hope to have it introduced when there is some Democratic support for the measure.

RECOMMENDATION: The Administration should support the NAM asbestos litigation reform bill.

PROS

- Will preserve funds for victims who ultimately do become ill.
- Will reduce filings against asbestos defendants and avoid unnecessary bankruptcies with their corresponding effects on claimants, employees, shareholders, communities, and the economy.

CONS

- Asbestos reform has fallen apart before, and the Administration risks entering into a losing battle in which it is accused of supporting legislation that would limit recovery for asbestos victims and let asbestos defendants off the hook.
- 5. Liability & Diversity Reform Package.** Current punitive damages and joint and several liability rules have the potential to impose unfair and excessive costs on defendants, which in turn affect consumers through higher prices and a burdened economy. In addition, federal courts do not have jurisdiction over many cases that implicate substantial federal interests – *e.g.*, cases in which the amount in controversy is large (with a corresponding potential to affect the nation’s economy), there is the possibility of numerous inconsistent state court judgments (*e.g.*, in mass tort cases), or citizens of numerous states seek to sue defendants in multiple states.

Pending Legislation. Two currently pending bills address liability and diversity reform issues. First, S. 865 (Sponsor: McConnell; co-sponsors: Lieberman, Fitzgerald, Hutchinson, Voinovich) would address the particular liability concerns of small businesses with 25 or

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fewer employees. The measure would, for federal and state courts, (1) modify the “joint and several liability” rule so that a small business defendant would be held liable only for the damages directly attributable to that defendant; (2) require punitive damages to be established by clear and convincing evidence; and (3) limit punitive damages to the lesser of \$250,000 or three times compensatory damages.

Whether S. 865 is a sensible approach to the needs of small businesses is questionable. Larger businesses are more affected by excessive punitive damages awards and joint and several liability rules. Small businesses would likely prefer a fee-shifting rule that would assist them in defending against frivolous lawsuits. In addition, a measure limited to very small businesses could be challenged as outside of Congress’s Commerce Clause authority, since small businesses may have a relatively small effect on interstate commerce.

Second, a pending diversity reform measure is H.R. 860 (Sponsor: Sensenbrenner, no co-sponsors) proposes federal diversity reform provision that would give federal courts jurisdiction over mass disasters (*e.g.*, air crashes). As discussed above, this bill also would amend section 1407.

RECOMMENDATION: The Administration should initiate a liability and diversity reform package. The liability portion of the bill should be patterned on S. 865, but apply to all or larger businesses (SBA definition is 500 or fewer). The diversity portion of the package should (1) create a single federal forum for mass tort cases (the measure that is part of H.R. 860); and (2) permit removal of cases where the amount in controversy exceeds \$500,000, even if only minimal diversity exists.

PROS

- Economic evidence indicates that liability reform, if enacted, would greatly benefit the economy, ultimately resulting in lower costs to consumers and more jobs.
- Even if the measure is not enacted, the Administration could use the measure to educate the public about the costs that the current system imposes on them.
- Without diversity reform, a few state courts will continue to decide what are essentially interstate controversies that have the potential substantially to affect the nation’s economy, a situation that is inconsistent with federalism principles and the purpose of diversity jurisdiction itself (*i.e.*, provision to citizens of different states of a federal forum with more resources and less susceptibility to political pressures).

CONS

- The plaintiffs’ bar will argue that punitive damages and joint and several liability rules serve to protect the consumer. Although we can show that consumers will ultimately benefit from liability reform because of lower costs and more jobs, the public may view liability reform as a measure that will primarily protect big business.
- States may object that limiting a plaintiff’s state law remedy impermissibly interferes in State affairs, and convincing Congress and the public that these measures are necessary will mean taking a position critical of some state courts.
- It may be difficult to characterize diversity reform as benefiting consumers, and the public may conclude that it more directly benefits big business.

B. Administrative Measures

1. **FDA Drug Labeling Safe Harbor.** The FDA reviews and approves every word on the label of any prescription drug product, and it requires manufacturers to obtain approval before modifying a drug label. Yet many courts permit lawsuits based on a claim that a drug manufacturer's label did not warn of a certain risk – even though the label fully complied with all federal safety requirements. Such lawsuits essentially allow a jury to second guess the FDA's judgment regarding a product's label. Empirical evidence shows that these decisions actually jeopardize the public health, since labels that are too complicated or long lead to consumers' ignoring *all* warnings.

RECOMMENDATION: FDA should promulgate a regulation expressly preempting tort failure-to-warn and other claims based on alleged deficiencies in a drug's label. FDA is currently drafting a final rule that will extensively revise drug-labeling requirements. It will promulgate the rule next year. To allow FDA to address preemption of all FDA-approved prescription drugs in this final rule, FDA should issue a notice this spring asking for comment on a preemption regulation, and it could issue the preemption regulation as part of the final drug-labeling rule.

In addition, some pharmaceutical manufacturers have proposed that the Administration consider initiating or supporting legislation that would create a fund to compensate injured victims as part of this preemption approach. Manufacturers would pay into this fund, which would be distributed to consumers injured by a manufacturer's product.

PROS

- FDA's revised labeling requirements will result in simpler, more focused labels that will better protect the general public health. Preemption of failure-to-warn claims that essentially assert the FDA's labeling decision was inadequate preserves the FDA's regulatory authority.
- Preemption of failure-to-warn claims will ensure that manufacturers are not asked to comply with inconsistent state and federal requirements.
- Giving manufacturers certainty regarding their potential liability will ultimately result in lower drug costs.
- Seeking comment on the preemption regulation will ensure that the regulation is not overturned by a court for APA reasons.
- Making a fund part of this plan will ensure that injured consumers are fairly compensated for their injuries.

CONS

- The plaintiffs' bar will characterize the preemption as less protective of the public health, pointing out that, in the past, many courts and the FDA itself have called FDA labeling requirements a "floor," not a "ceiling."
- Issuing a public notice asking for comment on a preemption regulation may galvanize the plaintiffs' bar into seeking congressional action to block FDA from taking this action.
- States may object to FDA preemption of state claims as inconsistent with federalism principles and an encroachment on their ability to protect their citizens' health.

- A fund could be difficult to administer (who will handle claims, how will it be funded, what will be the standard for injury).
 - If the public understands the FDA preemption rule and the fund as a package deal, and legislation creating the fund is not enacted, then there may be calls to rescind the FDA preemption rule.
2. **FDA Policy Statement on Preemption of Fraud-on-the-FDA Claims.** In *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), the Supreme Court ruled that federal law preempted a plaintiff's state-law claim that a medical device manufacturer had committed fraud on the FDA (that is, had knowingly misled the agency by submitting false documents or withholding information). The FDA could issue a policy statement stating that it understands the Supreme Court's decision to extend to drugs and biologics, as well as to negligence per se claims.

RECOMMENDATION: FDA should issue a policy statement extending *Buckman*.

PROS

- Although a policy statement is not binding on courts, many courts will take an FDA policy statement seriously.
- Issuing a policy statement is administratively simple.

CONS

- The public may view an FDA policy statement as a power grab that threatens the public health by limiting plaintiffs' access to the courts.
- Courts are beginning to extend *Buckman* on their own, and an FDA policy statement might be unnecessary and result chiefly in negative publicity. See, e.g., *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199 (9th Cir. 2001). (extending *Buckman* to fraud on the EPA); *Brasher v. Sandoz Pharms. Corp.*, 2001 U.S. Dist. LEXIS 18364 (N.D. Ala. Sept. 21, 2001) (extending *Buckman* to fraud-on-the-FDA claim in a drug case).

C. Other Measures

1. **Adoption of Legislation Checklist.** In 1991, President George H.W. Bush's civil justice reform working group proposed the adoption of a "legislation checklist." See 1991 Agenda for Civil Justice Reform in America. A list of common errors to be avoided in legislation would be developed and applied in the review of all proposed laws.

RECOMMENDATION: The President should issue an Executive Order directing federal agencies to evaluate proposed legislation in view of a checklist. In addition, the Executive Order could be used to highlight the deficiencies in our current civil justice system. Legislation would be evaluated for drafting problems (e.g., whether it adequately addresses statute of limitations or standards of proof issues). In addition, any legislation that addresses damages should be reviewed to ensure that punitive and non-economic damages are unavailable/limited and that exhaustion of administrative remedies is required.

2. **Modifications to the Federal Rules.** The Federal Rules of Civil Procedure could be strengthened to limit lawsuit abuse in federal courts. Modifications could include:
- Strengthening of Rule 11;
 - “Three strikes and you’re out” law to punish lawyers who file frivolous claims,
 - Tightening of discovery rules to allow inquiry only into issues actually in dispute; and
 - Amendment of Rule 68 to clarify that if damages awarded after trial are less than a settlement offer, the plaintiff must pay the defendant’s post-settlement offer attorneys’ fees. Federal courts typically interpret Rule 68 to require the payment of costs to mean court costs (*e.g.*, filing, witness fees), but not attorneys’ fees.

RECOMMENDATION: DOJ should initiate amendment of the Federal Rules by introducing amendments to the appropriate advisory committee of the Judicial Conference. Since this can be a lengthy process (it generally takes around three years to amend a rule from initial consideration by an advisory committee of the Judicial Conference through Congressional review), this action should be undertaken promptly.

3. **Auto Choice Reform.** A version of auto choice reform was endorsed by President George H.W. Bush in 1992. H.R. 1704 (Sponsor: Arme, 7 co-sponsors), the most recent version of this measure, would give consumers a choice between their state’s current auto insurance system or less expensive personal protection insurance (PPI), which provides no-fault coverage for economic damages only. Some economists estimate the scheme could reduce auto insurance costs by 24 percent. But some respected law-and-economics experts oppose it (George Priest).

RECOMMENDATION: A sub-working group that includes economists should be established to evaluate the issue.