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Common Sense Legal Reform Act

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MEMORANDUM

January 24, 1995

RE: Response to "Common Sense Legal Reform Act" (H.R. 10)

I. Recast the Terms of the Debate

As with many of the titles of the "Contract With America," the name "Common Sense Legal Reform Act" gives this section an immediate sense of legitimacy and popularity. After all, who could be against "common sense" or "legal reform?" In truth, H.R. 10 is neither. Our first task is to discard forever the use of this name, and replace it with a more correct description of the effect of the Act if it were to pass. Some ideas:

"Dollars and Cents Legal Deform Act" (shortened version: Legal Deform)

"Wrongdoers' Protection Act"

"Ford Pinto Bail-out Bill"

"Dalkon Shield Bail-Out Bill"

"American Eagle Bail-Out Bill"

Second, we need to show that efforts to weaken the civil justice system fly in the face of popular principles that the GOP claims to support: personal responsibility, smaller government and states' rights. Rather, the "Legal Deform Act" would create new federal laws that limit individual rights and relieve from responsibility big corporations and elite professionals whose negligence injures and kills innocent consumers.

Personal Responsibility

Our current civil justice system places responsibility for injuries from dangerous products on the people responsible for producing and marketing those products, rather than on innocent victims, their families, or taxpayers.

The GOP Contract would relieve the giant corporations who produce dangerous products of responsibility for harms they cause, placing the costs of injuries on injured people, their parents and families, and finally, on taxpayers, when the injured are unable to pay their bills.

Smaller Government

The civil justice system compensates injured people, punishes wrongdoers, and removes dangerous products from the market without turning to big government bureaucracies, raising taxes, or increasing the deficit.

The GOP Contract would require bigger government in a number of ways: First, by shifting the costs of injuries from corporate wrongdoers to injured people, legal deform would require taxpayer financing whenever the injured parties or their families were unable to pay their bills. Second, by relieving manufacturers of financial responsibility for selling dangerous products, the Republican platform would take incentives away for corporations to redesign or recall dangerous products from the market. Eventually, there would be a need for *more* government regulation to protect the public from unknown dangers in the market. (For example, it was lawsuits, not government regulation, that rid the market of the Dalkon Shield, asbestos and silicone breast implants.)

States' Rights

The legal rights of injured people have always been governed by state law. The GOP legal deform platform would create a brand new set of federal laws, superseding many individual rights granted under state laws, and clogging up state courts for decades while judges in 50 different states interpret the new national standards. By placing more costs on state courts, the new national tort system would operate as an "unfunded federal mandate." In addition, it would constitute a "lawyers' full employment" plan because of the years of litigation required to interpret the new federal standards.

II. The Facts About the Legal System

The effort to cut back on individuals' legal rights is based on myths about the costs and scope of tort litigation in the U.S. These myths have been perpetuated through a well-orchestrated and well-financed campaign by huge corporations and insurance companies with an interest in reducing their responsibility for their own actions. In fact:

There is no explosion in lawsuits by injured consumers against product manufacturers.

In 1992, product liability cases comprised less than .004% of total state civil court filings (less than 40,000 cases out of 10 million). This percentage has stayed relatively constant since 1986. In contrast, the fastest-growing category of lawsuits are *when businesses sue other businesses* in contract, bankruptcy or real property disputes.

Product liability lawsuits are not a big cost for most businesses.

In 1991, the total cost of product liability lawsuits was *less than four-tenths of one percent* of total product retail sales, or approximately 7 billion dollars. That is less than the U.S. spent on dog food that year.

Juries are increasingly ruling against consumers in most product liability cases.

In 1993, juries ruled for consumers in only 41% of product liability cases -- an 18% drop from the win rate of 59% in 1989. For all personal injury lawsuits, the injured person won 52% of the time in 1992, down from 63% in 1989.

Punitive damage awards in product liability suits are rare and are not excessive.

In the most comprehensive study of punitive damages in product liability lawsuits ever conducted, only *355* punitive verdicts could be found in the 25 year period from 1965-1991. With the exception of asbestos cases, the number of punitive verdict has been falling in the last seven years. In another study of 25,000 civil jury awards between 1981 and 1985, the median punitive damage award was $30,000.

Product liability lawsuits make the marketplace safer.

There is a long list of products that were made safer or were driven from the market following the publicity and damage payments brought on by product liability lawsuits before the government got involved (if it ever did). These include:

Ford Pinto, Dalkon Shield and Copper-7 IUDs, silicone-gel breast implants, Bjork-Shiley heart valve, GM pick-up trucks with side-saddle fuel tanks, all-terrain vehicles, Jeep C-J, super-absorbent tampons, flammable baby pajamas and unsafe product packaging.

III. Hot-button Issues in the Legal Deform Act

SEC. 101 (a) Loser pays in federal diversity cases.

In general, a "loser pays" provision favors the wealthier party in any lawsuit. The provision will be most harmful to the middle class and small businesses, who have assets to lose if they lose a case. The very poor usually have little to fear from loser pays because they will generally be judgment-proof in the event that they lose a case ; likewise, the rich or big corporations will generally be able to afford their opponents' attorneys' fees if they lose.

MESSAGE:

"Loser pays" benefits giant corporations at the expense of hard-working middle-class Americans. Adopted from the rule in England, which has a massive social welfare system that pays for half the population's legal expenses, "loser pays" would effectively cut off the right of middle class Americans to sue large corporations out of fear of losing all one's assets (home, car, wages) to pay the fees of major law firms if the case is lost.

SEC 103 (b) Limited liability for retailers

According to legal experts, this provision would immunize tavern owners and gun dealers from responsibility for negligently selling liquor to an underage or intoxicated individual, or negligently selling a firearm to a felon, fugitive, or intoxicated or underage individual, respectively. Because of this provision in last year's product liability bill, Mothers Against Drunk Driving and gun control groups came out against the legislation.

MESSAGE:

The Contract lets negligent tavern owners and gun dealers off the hook for deaths and injuries caused by drunk drivers and gun-toting criminals.

SEC 103 (c) $250,000 cap on punitive damages

This provision places a cap on punitive damages of $250,000 or 3 times economic loss, whichever is greater. While small businesses may be punished and deterred by an award of $250,000, this is pocket change for large corporations, who can simply factor this amount into the cost of doing business. By linking punitive damages to *economic* losses, this provision benefits corporations who, with "actual malice," kill children, retired people, or nonworking individuals (no economic loss), or who cause permanent harm that carries little economic loss (loss of fertility, permanent disfigurement, loss of a limb).

MESSAGE:

A $250,000 cap on punitive damages lets off the hook giant corporations that kill, maim and injure with actual malice. Examples of corporate behemoths that would be protected include Ford (Pinto), Exxon (Valdez), GM (side-saddle pickup trucks), Dow-Corning (silicone breast implants), A.H. Robins (Dalkon Shield), Johns-Manville (asbestos), Pfizer (Bjork-Shiley heart valve). Republicans seem to be tough on crime except when it comes to their corporate and big business cronies. Personal responsibility means *everyone* must be accountable for their actions, including the rich and powerful. By making punitive damages meaningless to multi-billion dollar companies, the Contract puts the entire country at risk by removing existing incentives to keep the marketplace safe.

SEC. 103 (d) Joint liability for non-economic damages

By limiting non-economic damages in some cases, this provision targets low-wage or nonworking people, children and the elderly -- people who will generally not have high out-of-pocket expenses in the event of death or serious injury. It benefits million-dollar-a-year corporate executives who may lose hundreds of thousands of dollars for missing work for even a few months.

The provision also targets women, who have often been the victims of drugs or medical devices that injure the reproductive system or cause permanent disfigurement (i.e., IUDs, tampons, breast implants). These types of injuries lead to little economic loss, but a great deal of pain and a lifetime of suffering.

MESSAGE:

By limiting non-economic damages, but leaving economic damages to be fully compensated, this provision protects the rich while harming women, children, the elderly and low-wage workers. For example, a corporate CEO with a million dollar a year salary who misses work for 6 months would be fully compensated for his or her $500,000 lost earnings. A woman who loses her ability to bear children, but suffers no economic loss, may recover little or nothing for her much more permanent and serious loss. The same is true for a family who loses a child, causing no economic loss (arguably, they save money), but immeasurable pain and suffering.

IV. Real legal reform

Real legal reform would change the legal system so that it works better for everyone by improving efficiency, lowering transaction costs, minimizing secrecy, and broadening access.

Suggested Reforms

1. Limit court-sanctioned secrecy agreements that keep information about public hazards hidden from the public and the government. In addition to placing the public at unnecessary risk, these gag orders make the legal system less efficient by forcing parties in lawsuits to reinvent the wheel every time they litigate a case over the same dangerous product or practice.

2. Establish alternative dispute resolution (ADR) systems for the following types of cases:

(a) Personal injury cases under $50,000.

In general, victims of corporate or professional negligence with less than $50,000 in damages are unable to sue to recover their losses because the potential award is too small to finance a lawsuit. In order to be affordable for people with small claims, ADR must be quicker and easier than traditional litigation. Ideas for streamlining the system include relaxing proof requirements, limiting or eliminating expert witness testimony, limiting discovery periods and methods, and limiting trial time. The system must be binding on the parties, or else defendants will appeal every decision against them, knowing that the plaintiff cannot afford a full-blown lawsuit.

(b) Business-to-business disputes.

The fastest-growing category of civil lawsuits are disputes among businesses. Ironically, the same corporate interests who seek to limit individual rights to bring lawsuits have offered no proposals to unclog the courts with lawsuits that *businesses* bring. ADR for business-to-business disputes would particularly help small businesses, who are at an extreme disadvantage if they are sued by a much wealthier company.

3. Eliminate barriers to nonlawyer practice.

There are many routine legal matters, such as wills, landlord-tenant problems, small claims and divorces, that become unaffordable for many people because of state laws that prohibit nonlawyers from providing these kinds of services. The federal government could offer financial incentives to states that eliminate these barriers, thus lowering costs and improving efficiency in the legal system by opening it up to competition. (The group that is the expert on these issues is HALT, William Fry Executive Director, (202) 347-9600.)

4. Criminal liability for corporate crime.

Some legal commentators claim that punitive damages do not belong in the *civil* justice system; they believe the *criminal* law should govern punishment for outrageous conduct. However, we have few federal laws that provide criminal penalties for corporate misconduct that results in death or serious injury. Some years ago, California passed (and Gov. Wilson signed) a law imposing criminal penalties on any business that *knowingly* produces a dangerous product or engages in a dangerous practice that results in death or serious injury to a consumer or a worker. Sen. Feinstein was going to offer this as an amendment to the product liability bill on the floor of the Senate last year.

V. Defensive legal reform

In addition to the above proposals, which would greatly improve the civil justice system so that it operates more efficiently and more fairly, there are a number of amendments that would make the GOP Contract proposals fairer and more balanced.

(a) Two-way preemption.

Every product liability and tort deform proposal supported by the business community contains one-way preemption. That is, the bills supersede state law only where that law is more favorable to consumers; where the law favors defendants, it is allowed to stand. This is patently unfair, and should be unacceptable to anyone who purports to support uniformity in tort law. If a federal law is to be enacted, it must operate fairly, and preempt all tort law that is affected.

For example, if a cap on punitive damages is enacted, the provision should also establish punitive damages in states where they do not already exist, and it should preempt all other caps on damages that have been enacted on the state level.

(b) Equal treatment for plaintiff attorneys and defense attorneys.

The GOP Contract contains a "sense of the Congress" provision that states should require disclosures by contingency-fee attorneys. Whatever kind of disclosure is required by plaintiffs' attorneys should also be required of defense attorneys. In addition, if a proposal is offered to cap contingency fees, in the interest of fairness, there must be a provision capping defense attorney fees.

(c) *Per se* liability for failure to meet standards.

Many tort deform proposals include defenses to liability if products meet federal safety standards. These proposals are unacceptable for many reasons: safety standards are often underprotective, out of date, or do not reflect the state of knowledge of experts. Government standards defenses are particularly inappropriate now, when federal agency budgets are being cut, and regulatory agency authority is being cut back.

However, if a government standards defense wins approval, it must be accompanied by a provision that provides for *per se* liability for failure to meet government standards.

(d) Insurance data disclosure.

Cutting costs is the most common rationale cited by proponents of weakening the civil justice system. However, the insurance industry, which absorbs most of the costs of the system, has repeatedly testified that federal product liability legislation will not reduce costs or premiums of product liability insurance. The insurance industry also argues that insurance regulation should remain the province of state governments.

However, if we choose to federalize the state civil justice system, it is appropriate to impose federal requirements on the insurance industry. This is particularly true where an ostensible benefit of tort deform is reducing costs. Sen. Hollings offered an amendment to the product liability bill last year that would require insurers to report to the federal government information about how much they receive in premiums and how much they pay out in liability claims. This data would enable the federal government to evaluate the effect that tort deform has had on rates and costs.