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Please make a file -- product liability

To: George Stephanopoulos
Mike Waldman
From: Tamera Stanton and
Peter Kinzler
Office of Senator Rockefeller
Re: Senate consideration of S. 640,
The Product Liability Fairness Act

Background

As you are only too aware, President Bush and Vice-President Quayle have stepped up their push for tort reform, focusing their attacks on the trial bar in general and Bill Clinton's relationship with the trial bar in particular. Clearly their lawyer bashing has struck a responsive chord. If nothing else, it has made Dan Quayle look good!

On September 8th, the day the Congress reconvenes, the Senate will start consideration of S. 640, the product liability bill. Senator Rockefeller is a cosponsor of this bill, along with eight other Democrats -- including Joe Lieberman and Chris Dodd -- and four other Democrats, including Lloyd Bentsen, have already declared their support for the bill. In the House, the chief sponsor of a similar bill is a Democrat and the bill's many supporters include Congressmen Gephardt and Dingell.

The Democratic supporters believe the bill is a balanced one that will make the system fairer for victims and manufacturers alike (**it includes provisions to encourage pre-trial settlements, with a strong emphasis on the use of state alternative dispute resolution mechanisms -- the concept strongly supported by Governor Clinton**). Given the Republican attacks on Governor Clinton's relationship with the trial bar, you can expect Senate consideration of S. 640 to produce more attacks and more stories. This memo outlines why Democratic supporters think this is a good bill and how they think Governor Clinton might turn the tables on President Bush and use the product liability debate to his advantage.

S. 640

The product liability debate started in 1979 and the early bills clearly were little more than a manufacturers' wish list of changes to the tort system that would benefit them -- and hurt victims. Early bills would have rolled back tort law to the 1960's -- most prominently, by applying a negligence standard in product cases (as opposed to strict liability). In addition, various bills would have imposed caps on noneconomic and punitive damages and limits on attorneys' fees. S. 640 contains none of these onerous provisions.

Senator Rockefeller opposed the early product liability bills -- voting against them in the Commerce Committee in 1985 and 1986 -- because he thought they were too favorable to businesses and too onerous for victims. It is because of Senator Rockefeller's efforts and those of other Democrats that the bill changed to what they believe is a balanced approach.

Overall, the tort system should not only discourage the manufacture of unsafe products; it should also encourage the manufacture of safe and useful products. One can be killed just as easily by the failure to introduce a new product as by a defect in an unsafe product. Sometimes the lines aren't even that clear. For example, the DTP vaccine has saved hundreds of thousands of lives over the years but every once in a while it injures someone severely. If we prohibited its use, we would eliminate the tragic effects on a few people -- but we would also cause the loss of far more lives by those not inoculated against diphtheria, typhoid and whooping cough.

In another compelling context today, two recent articles in Science magazine have indicated that two pharmaceutical companies have delayed or stopped promising tests on drugs to combat AIDS because of liability concerns.

The bill addresses 9 specific areas. Let's discuss them by their goals. First, it contains three provisions designed to increase incentives for safety. One would revise existing workers' compensation offset provisions to hold employers liable for their contributions to accidents, thereby creating an incentive for employers to maintain safer workplaces.

A second provision would protect manufacturers from punitive damages -- but not against suits for economic and noneconomic damages -- where the FDA or the FAA has approved a product, thereby giving manufacturers an incentive to fully disclose information to these regulatory agencies. While some have argued this would hurt consumers, to the contrary, it should have exactly the opposite effect. Remember, it only addresses whether a manufacturer that has complied with the long and rigorous regulatory requirements in this area has the requisite intent of "conscious, flagrant indifference to the safety of those who might be harmed by a product."

Third, the bill would deny recovery to people whose use of alcohol or illegal drugs is the predominant causes of their injuries.

A second goal of the bill is to eliminate some of the unfairness and arbitrariness in the law. In this area, it would establish a national statute of limitations of two years from the date a person discovers both the injury and its cause. This provision is a major step forward for victims, particularly for those injured by toxic substances which don't manifest themselves for years after a person is exposed to them.

It would also require plaintiffs to prove "by clear and convincing evidence" that the harm resulted from the manufacturer's "conscious, flagrant indifference to the safety of those who might be harmed by the product." The American Bar Association and the American College of Trial Lawyers support the higher standard of proof.

The bill contains other provisions that fit in the category of fairness. One would limit joint liability to economic damages while holding a manufacturer liable only for its proportionate share of **noneconomic** damages. This provision is designed to strike a balance between assuring compensation for a victim and not holding a minimally responsible manufacturer liable for huge damages caused by others.

Second, the bill contains expedited settlement and alternative dispute resolution provisions designed to reduce the long delays of the system. While some have attacked them for imposing too heavy penalties on victims, Senator Rockefeller believes most of those attacks misrepresent what are fair and balanced provisions. For example, if a manufacturer refuses a settlement offer, and fares worse in the subsequent lawsuit, it must pay the plaintiff's reasonable attorneys' fees. On the other hand, the penalty for a plaintiff is merely no double recovery -- loss of payments that would duplicate collateral sources.

Some have represented that a plaintiff would risk paying defendant's attorneys' fees if they sought to go to court instead of through a voluntary, nonbinding state ADR proceeding. The provision would potentially apply such a penalty only if the person "unreasonably" refused to go through an ADR proceeding and then lost in court. If the person goes through ADR, doesn't like the outcome, s/he can go to court without the threat of any penalty whatsoever.

Finally, in this area, there is a provision that restricts product sellers' liability to their negligence unless the manufacturer cannot be found or lacks the resources to pay a judgment. In those situations, the seller stands in the shoes of the manufacturer.

The product seller provision would also reduce unnecessary legal costs, another goal of the bill, as would the expedited settlement and ADR provisions.

A summary of the bill is attached (the bill is 29 pages long; we will fax it if you want to see it), as well as the first of three National Governors' Association endorsements of federal product liability reform, although not in favor of any specific bill.

Possible Courses of Action for Governor Clinton

We recognize that the consumer groups and the Association of Trial Lawyers of America have taken a hard line against the bill. Despite repeated efforts by Senator Rockefeller to negotiate, opponents of the bill have refused to do so. Frankly we think they are wrong and, if it would be helpful to you, we would be delighted to debate the bill provision by provision. However, we recognize the limits of your time and respectfully suggest the following possible courses of action for Governor Clinton.

1. Continue to bash Bush but counter the charge of being in the trial lawyers' pocket. Your statements in the Wall Street Journal attack Bush for siding with manufacturers and insurers. This is a good line of attack which can be buttressed by citing a Reagan Administration proposal to cap all noneconomic damages, including punitives, at $200,000. However, it doesn't answer the charge of being on the side of the lawyers. An expansion of your present approach might be doubly effective. Governor Clinton could come out for balanced tort reform -- reform that makes the system fairer for both manufacturers and victims. Then he could say he would sign any tort reform bill that helps both sides, without taking any position on this bill.

2. Say nothing more. If some version of option one is not followed, saying nothing would permit Senate Democrats who believe the bill is fair and are supporting it to point out the differences between the Bush-Quayle approach and the vastly different bill they are supporting.

Two final notes. Senator Gore will have to face this issue in his debate with Dan Quayle. Although Senator Gore is opposed to S. 640, he can attack Quayle by pointing to Gore's vote for no-fault auto insurance in the House Commerce Committee in 1978 and noting that the bill would have passed had not every single Republican on the Committee opposed the bill.

Finally, we would appreciate it if you would keep this memo confidential, given the differing views on the subject among Democratic supporters of Governor Clinton.