Blood Cloths — SW

Total Pages: 5

LRM ID: RJP188

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

URGENT

Friday, February 6, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference

OMB CONTACT: Robert J. Pellicci
PHONE: (202)395-4871 FAX: (202)395-6148

SUBJECT: **JUSTICE Report on HR1023 Ricky Ray Hemophilia Relief Fund Act of 1997**

DEADLINE: **Monday, February 9, 1998**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: The House Judiciary Subcommittee on Immigration and Claims is scheduled to markup HR 1023 on Wednesday, February 11th. ***YOUR PROMPT ATTENTION IS REQUESTED.***

DISTRIBUTION LIST

AGENCIES:
52-HHS - Sondra S. Wallace - (202) 690-7760
95-Office of Science and Technology Policy - Jeff Smith - (202) 456-6047
118-TREASURY - Richard S. Carro - (202) 622-0650
76-National Economic Council - Sonyia Matthews - (202) 456-6630

EOP:
Joshua Gotbaum
KAGAN_E
Todd A. Summers
JENNINGS_C
Thomas L. Freedman
Robert G. Damus
William P. Marshall
Donald R. Arbuckle
Barry T. Clendenin
Richard J. Turman
Wm G. White
Sarah A. Bianchi
Laura Oliven Silberfarb
Lisa M. Kountoupes
James C. Murr
Janet Forsgren

LRM ID: RJP188 **SUBJECT:** JUSTICE Report on HR1023 Ricky Ray Hemophilia Relief Fund Act of 1997

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter
Please include the LRM number shown above, and the subject shown below.

TO: **Robert J. Pellicci Phone: 395-4871 Fax: 395-6148**
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: _____ **(Date)**

_____ **(Name)**

_____ **(Agency)**

_____ **(Telephone)**

The following is the response of our agency to your request for views on the above-captioned subject:

_____ **Concur**

_____ **No Objection**

_____ **No Comment**

_____ **See proposed edits on pages** _____

_____ **Other:** _____

_____ **FAX RETURN of** _____ **pages, attached to this response sheet**

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

DRAFT

The Honorable Lamar Smith
Chairman, Subcommittee on
Immigration and Claims
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515-6216

Dear Mr. Chairman:

This provides the views of the Department of Justice on H.R. 1023, the "Ricky Ray Hemophilia Relief Fund Act of 1997." This bill would create a fund to pay $100,000 to each person (or heir) who has suffered any form of blood-clotting disorder, who contracted HIV after treatment with blood-clotting agents between July 1, 1982, and December 31, 1987.

General Comments

1. Policy. Manufacturers of anti-hemophilic factor concentrates utilize blood to create blood-clotting factors. During the period encompassed by the bill (1982 through 1987), anti-hemophilic fraction concentrates were used by hemophiliacs to prevent and control bleeding. Also, during the 1980's, the scientific community became aware of AIDS and HIV and sources of transmission, including blood, and means for reducing the risk of transmission.

The government agencies' response to the public health issues the occurrence of AIDS raised has been the subject of intense review, including the 1995 Institute of Medicine Report. The Department of Health and Human Services (HHS) has embraced the goals reflected in the report's recommendations. We understand that HHS has established a task force to assess all of the recommendations in light of current practices.

We are concerned about the precedent this bill would set. We do not believe that the federal government's regulatory responsibilities should expose it to liability as an insurer for the failures of private entities which the government regulates.

2. Litigation. The extent to which the federal government had, or did not have, the power to cause blood banks, the blood

DRAFT

industry and fractionators to adopt protective measures (including screening of high risk groups and surrogate testing) is a major aspect of the issues being debated. Moreover, litigation pending in the Northern District of Illinois raises these issues as well as additional related issues. MDL 986, In re Factor VIII or IX Concentrate Blood Products Liability Litigation. (This is the same litigation referenced in Title II of the bill.)

As part of a partial settlement of the litigation, blood product industry companies agreed to pay $12,188,100 to the United States to settle and obtain releases of claims for reimbursement for federally-funded health care provided to persons with hemophilia who became infected with HIV and who received blood products during 1978 to 1985. Individuals and their representatives who "opt-in" to the settlement are entitled to receive $100,000 and will be released from governmental health care reimbursement claims.

The four corporations and their affiliates that have agreed to settle on these terms are Alpha Therapeutic Corporation, Armour Pharmaceutical Company, Baxter Healthcare Corporation and Bayer Corporation. Each company is obligated to pay a specific percentage of the total amount to be paid. The federal government's health care has been provided under CHAMPUS, health benefit plans offered by the Department of Defense and the Department of Veterans Affairs, Medicare, Medicaid (a federally-subsidized, state-operated program), the Indian Health Service and the Federal Employees Health Benefits Program. In May, 1997, the District Court approved this settlement. However, "opt-out" plaintiffs continue to litigate the issues.

Statutory and Technical Issues

1. Section 101(e) authorizes the appropriation of $750 million. If the full sum authorized is not appropriated, or is inadequate to pay all claims, there needs to be a provision for payment of claims on the basis of available appropriations on a first come/first paid basis or some other statutory formula.

It is unlikely that reasonable persons would view the $100,000 per person payable under H.R. 1023 to be full compensation. Moreover, the infected individual will not at all be assisted by a payment to the individual's estate. Thus, the bill requires a payment that cannot be viewed as compensatory; the bill itself refers to the payments as "humanitarian." Section 103(e). The policy basis for selection of the figure of $100,000 is not self-evident. Obviously, the decision to authorize the appropriation of $750 million (Section 101(e)) raises very substantial fiscal issues as well.

2. Section 103(e) provides that payment under the legislation would "be in full satisfaction" of all the claims against the

United States that arise out of an individual's HIV infection and treatment, at any time during the period beginning July 1, 1982, and ending on December 31, 1987, with blood-clotting agents. The statutory eligibility period earlier is defined to be the same time period. Section 102(a). Moreover, if treatment commenced during 1982-1987 and continued thereafter, we construe Section 103(e) as barring any claim if payment is made under Section 102; we suggest that its intent be clarified if this provision is viewed as ambiguous.

The "full satisfaction" provision refers to "such claims." The claims referenced are listed in the first sentence of subsection (e), that is, "any claim of or on behalf of the individual against the United States or against any officer, employee, or agent thereof acting within the scope of employment or agency that relate to an HIV infection arising from treatment with antihemophilic factor, at any time during the period beginning on July 1, 1982, and ending on December 31, 1987." The reference to "on behalf of that individual" would, of course, encompass payments to spouses and former spouses and payments made in case of a deceased individual.

3. There is no judicial review provision. We assume that judicial review of the Secretary of Health and Human Services' determinations on petitions would be available in the Court of Federal Claims. See, 28 U.S.C. § 1491.

4. Title II of the bill would, in essence, bar any payments in the Illinois litigation from being considered in determination of any person's Medicaid or Supplemental Security Insurance (SSI) eligibility. We defer to the Department of Health and Human Services as to the desirability of this provision.

* * *

Thank you for the opportunity to comment on this matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

DRAFT

Andrew Fois
Assistant Attorney General

hr1023.204
2/4/98
4 PM