BOB DOLE
KANSAS

United States Senate

OFFICE OF THE MAJORITY LEADER
WASHINGTON, DC 20510

June 12, 1986

TO: Senator Dole

FROM: George Pieler

SUBJECT: Sunday Speech to Maine State Bar Association 6/15/86

The Maine Bar Association encourages you to speak about any topic you think is appopriate, but they did suggest that tax reform would be 'a natural' at this time. In addition, since these are lawyers, they are interested in tort reform: Maine recently passed a tort reform bill in a cooperative effort among lawyers and doctors. The concern many of them have is that, absent a national effort on this issue, insurers may fail to respond with lower premiums, etc.

Do you want a prepared speech, or just talking points?

June 13, 1986

Talking Points
Tort Liability Reform

- Last year, property-casualty insurance premiums rose 21%, industry economists predict another 20% jump in 1986. For many businesses and professions, liability insurance is becoming too costly to purchase, or simply not available at all. In Kansas, today's airplane purchaser is paying over $70,000 per airplane in insurance costs alone.

- Much of the blame for skyrocketing premiums lies with changing interest rates. During the late 1970's and early 1980's, many insurance companies lowered premiums, betting on (1) continued high interest rates on investments until claims had to be paid in the future, and (2) the ability to raise premiums in the future. Unfortunately for the industry, interest rates dropped rapidly over the last few years and they had no choice except to raise premiums substantially.

- Some claim the tort system is also responsible for the rise in premiums. They point out that more than 13 million civil lawsuits were filed last year, one for every 15 Americans, and there were 400 damage awards exceeding $1 million as compared to fewer than 30 such awards 10 years ago. One study commissioned by the American Insurance Association puts the total cost of the tort system at $68.2 billion, with only 25 cents of every dollar going to compensate the victim.

- Lawyers, however, point to their own studies showing that premiums are soaring even in states that have implemented tort reforms. They argue that the insurance companies have created a distorted perception of the tort system based on a few sensational cases.

- Some lawyers claim that part of the problem is with the insurance industry's exemption from federal antitrust laws under the McCarran-Ferguson Act. (Regulation of the industry was left completely to the states under that Act.) But, there is little evidence that the problems have been brought on by concerted company action. If anything, the industry has been very competitive, with companies lowering premiums below prudent levels in an effort to increase business.

- Since tort law and insurance regulation are both areas which fall outside the traditional province of the Federal government, if major legislative activity occurs this Congress, it will probably be on the products liability issue. There is a strong argument that since most manufactured goods cross state lines they should all be subject to the same product liability laws.

- Most states legislatures have reviewed omnibus tort reform packages and have tended to enact specific remedies by selecting one or two issues (medical malpractice in Kansas) seemingly linked to resolving the crisis. Some states have taken action to restore/clarify sovereign immunity, limit frivolous suits, issue grants of immunity, cap damages or awards, repeal/modify joint liability, and limit attorney fees

PENDING LEGISLATION

- The Senate Commerce Committee is currently in the process of marking-up a products liability bill that would develop uniform product liability standards among the states.

  The 3d day of mark-up is next Thursday, June 19 and the Committee hopes to complete action. Thus far the Committee has adopted a core amendment (16-1) in the nature of a substitute which reflects a compromise reached by Senators Kasten, Danforth and Gorton. They have restricted joint/several liability. This is identical to the reform bill just passed in California.

  Attorneys will be concerned about forced arbitration provisions - no such provisions have been adopted, as yet. The Committee hopes to bring the bill to the floor before the August recess.

- Senator McConnell has introduced two bills which would make certain procedural reforms to the Federal Civil Justice System, as follows:

  *Cap pain and suffering awards at $100,000, require punitives to be paid to the court, cap contingency fees at 35% for awards of less than $50,000 - down to 10% for awards in excess of $200,000.

  *Require attorneys to certify to the court that they have advised their clients of court-supervised arbitration alternatives.

- McConnell has also introduced 2 bills at the urging of the Administration. One deals with government contractors and another amends the Federal Tort Claims Act.

  Status: Senator McConnell intends to offer his legislation as an amendment to the Commerce Committee products liability bill once it reaches the Senate floor. 2 full days of hearings have been held.

- S. 2129, introduced by Senator Danforth, amends the 1981 Risk Retention Act and permits companies to join together and form risk retention pools for the purpose of purchasing product liability insurance. Only the chartering state used for creation of a risk retention group can regulate it for solvency. This bill is unpopular with both the insurance industry and state insurance regulators but is favored by groups like the nurse midwives. The bill was reported out of Committee, May 9 and is on the calendar.

ADMINISTRATION

- The Administration has sent to Congress their justice reform legislation addressing three areas of liability: product liability, government contractor liability and the liability of the United States.

- The "Product Liability Reform Act of 1986" places limitations on the liability of those who make and sell products in the national marketplace. (Kasten introduced)

- The "Government Contractor Liability Reform Act of 1986" and "Federal Tort Claims Reform Act of 1986" adopt similar limitations on the liability of federal contractors and of the U.S. (McConnell introduced)

HOUSE

- The House has done very little to date in the way of moving forward. No hearings have been held and will not be until the Senate completes action.

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Tax Reform in the Senate

- The U.S. Senate is about to do the country proud by producing the most far-reaching tax reform bill in history: the Finance Committee approved it by an overwhelming 20-0 vote. They said we couldn't beat the special interests--they were wrong.

- Tax reform in the Senate means the lowest income tax rates since 1931. The new rates are 15% up to $29,300 in income (joint returns), and 27% above that income level. On the corporate side, the rate is 33%.

- It also means significant tax reductions for working people in America, particularly the lowest-income wage-earners. 6 million low-income Americans will be taken off the tax rolls completely as a result of tax reform. The personal exemption will go up to $1,900 in 1987 and $2,000 in 1988. The standard deduction will go up to $5,000 for joint returns.

- Taxpayers with incomes of $10,000 or less get a 62% tax reduction; between $10,000 and $20,000, an 18% tax reduction; between $30,000 and $40,000, a 5% reduction; and between $40,000 and $50,000, a 6.5% reduction.

- These low, low tax rates are made possible by a major crackdown on unjustified tax shelters for the rich, and by eliminating many deductions, exemptions, credits, and the like. But mortgage interest, charitable contributions, and State and local income and property taxes remain fully deductible. The casualty loss deduction will remain subject to a 10 percent floor and the medical expenses deduction will be subject to a similar floor.

- A stiff new minimum tax ensures that no wealthy individual or corporation can avoid paying their fair share of tax.

- In addition, the Senate has voted to do everything possible in Conference to restore some deductions for all IRA contributions and for State sales taxes.

Productive for the economy

- This bill achieves, in a big way, the major economic goal of tax reform: establishing a 'level playing field' by taking the juice out of special tax breaks. If we can get this bill signed into law, people will be able to make their financial and economic decisions without worrying so much about tax consequences--and that's a very healthy thing for the economy.

- In addition, the Senate bill creates a much healthier climate for investment and productivity than the House-passed bill. Depreciation allowances are more realistic, and more neutral among various industries than under the House bill.

- Simply put, lower tax rates for all taxpayers are bound to take the premium out of planning your finances for the purpose of tax avoidance. And getting rid of some long-standing tax differentials--like capital gains rates, deductions for most interest payments, and dropping the investment credit--advances the same goal. From now on, straight marketplace judgment is what counts most--not creative tax accounting.

Last step in the process

- The new high-water mark on tax reform represented in the Finance Committee bill is the culmination of years of hard work in reducing and stabilizing tax rates and broadening the tax base. The groundwork for tax reform was laid in 1981 when, under my Chairmanship, the Finance Committee led the way for President Reagan's tax-rate cuts and initiated tax indexing to keep those lower rates in place, regardless of inflaion.

- The next step was to resort to closing loopholes, improving compliance, and removing special preferences as a way to raise revenue, rather than re-imposing high tax rates on working Americans. That was done in both 1982 and 1984 under the Dole Finance Committee.

- The net effect of this was to point the way to a lower-rate, broader-based, fairer and more productive tax system. Tax indexing and accelerated depreciation were sort of like the Gramm-Rudman of the tax code: they force us to make choices we ought to have been making all along, and to face the fact that our tax code had become a maze of special preferences and privileges that had outlived their usefulness.

- Now let's finish the job: and achieve true tax reform for all Americans.

Issues for Conference

- There are many good features in both the Senate and House bills. We can draw on both to achieve true tax reform, so long as we keep our eye on the goal of getting rates as low as possible.

- In addition to IRA's and State sales taxes, there will be interest in smoothing out the revenue impact of the bill over 5 years, the treatment of capital gains in 1987, and the distribution of benefits from tax reform.

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Tax Rates

- The individual tax rates in the Finance Committee bill are 15 and 27 percent. 80 percent of families will be in the 15 percent bracket.

- To take some of the juice out of the tax rate reduction for wealthier taxpayers, the tax breaks from the 15 percent bracket and of the increased personal exemption are phased out for high income taxpayers.

Recapture of Benefit of the 15% Bracket

- The benefit of the 15 percent rate bracket is cut back for taxpayers filing joint returns who have incomes over $75,000. This is done by a gradual phase-in, so the dollar benefit of the lower rate doesn't disappear completely until the taxpayer has more than $145,320 in income.

- The provision is drafted as a phase-out to avoid what we call a "cliff". We did not think it would be fair to tell taxpayers who have $75,001 of income to pay tax on all of it at the 27% rate, while taxpayers with $74,999 in income pay tax at the 15 percent rate.

- However, the way it is drafted gives commentators an opportunity to say that the "marginal" tax rate for families between $75,000 and $145,320 is 32 percent instead of 27 percent.

- The important thing to remember is that their effective tax rate never will exceed 27 percent and that, even at 32 percent, the rate is well below the 38 percent in the House bill and 35 percent in the President's proposals.

(N.B. The phaseout for single taxpayers begins at $45,000.)

Phaseout of Personal Exemption

- The Committee bill phases out the personal exemption for families between $145,320 and $185,320.

- I understand that the effect of this is to raise the marginal rate for these taxpayers to 28 percent, although, as I mentioned earlier, the effective rate never exceeds 27 percent.

- However, for taxpayers in this income range, the rate is significantly less than the 50 percent rate in current law, as well as the rates proposed by the President and passed by the House.

- Some will argue that the Finance Committee bill raises the tax rate on long-term capital gains too much. I can understand their concern, but over 70 percent of the benefit from the capital gains exclusion is taken by individuals making over $250,000 a year. These taxpayers will have a tax rate of 27 percent. That should be sufficient.

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Individual Retirement Accounts

- Senator Packwood's 25% proposal included repeal of IRA's for everyone. His 27% proposal as it was adopted by the Finance Committee includes my suggestion to retain fully deductible IRA's for people who are not covered by pension plans. This change meant that the proposal would raise $19 billion less over 5 years than full repeal.

- Senator Chafee's amendment which the Committee adopted broadened IRA's a little more by allowing individuals who are covered by pension plans to make nondeductible IRA contributions. The income earned on these investments would remain tax-deferred until it is withdrawn from the IRA.

- The Chafee amendment cost $1.6 billion over five years. Of course, since the "inside buildup" will grow over the years, the revenue cost in the future will be substantially greater.

- These changes, therefore, restored over $20 bilion of the $46 billion that would have been gained by repeal of IRA's altogether. In addition, the full Senate has pledged its conferees to work for further restoration of IRA deductions in conference with the House.

Misconceptions

- Individuals who now have IRA's will be able to keep the amounts they have already invested without any change in tax effect. They will also be able to contribute up to $2,000 each year ($2,250 for IRA's with a spousal feature) in the future. The only difference is that only individuals not covered by a pension plan will be able to take a deduction for the contribution. In every case, income earned on amounts invested in an IRA will remain tax-free until they are withdrawn from the IRA.

- There has been much discussion about the loss of the deduction for some individuals. Two things seem to have been ignored in the debate so far. First, 80 percent of all families will have their tax rate reduced to 15 percent. At this rate, the deduction on a maximum $2,000 contribution is worth only $300. With the low rate, double personal exemption and larger standard deduction, virtually all these taxpayers will have a substantial tax cut despite the loss of an IRA deduction. Of course, many people do not contribute

the maximum $2,000 and the deduction is even less important for them.

- Second, the value of the tax-deferral on the income earned in IRA's is the most significant feature from a tax-saving point of view. That feature is still retained in every case.

- In addition, I should point out that more and more employers are adding 401(k) plans as part of the pension package they offer to their employees.

- 401(k) plans are equivalent to IRA's in tax effect except that the maximum annual contribution is $7,000. I expect that, if the Finance Committee's IRA rules are included in the legislation sent to the President, the rate of new 401(k) plans will accelerate.

- If I am right on this, we basically have a fight not about the level of retirement savings, but about who holds these savings. Will it be the banks and insurance companies who administer pension plans or the banks, mutual funds, and other financial institutions who sell IRA's?

Who Takes the IRA Deduction
(Percentages Rounded)

Adjusted Gross Income (1983 figures)	Percent of All Tax Returns	Percent of All IRA Deductions
Below $10,000	36.0%	3.2%
$10,000-$19,999	25.6	11.2
$20,000-$29,999	16.8	18.7
$30,000-$39,999	10.8	21.1
$40,000-$49,999	5.3	17.4
$50,000-$74,999	3.7	18.0
$75,000-$99,999	.8	5.2
$100,000 and up	.8	5.1

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Sales Tax Deduction

- The total repeal of state and local taxes would have raised approximately $160 billion over 5 years against the rates in the Finance Committee bill. Repeal of the sales tax raises $17 billion over the same period. Therefore, it is fair to say that substantially all the state and local tax deduction has been retained.

- I strongly supported this historic tax reform bill despite reservations about the loss of the sales tax deduction. Obviously I care a lot about the people of Kansas: and Kansas gets over 23% of its tax revenue from general sales tax.

- But to look only at the sales tax issue would really be letting the tail wag the dog. This tax package provides dramatic relief for individuals, and the potential for a big boost to the economy as a whole. Leaving people with much lower marginal rates, more pocket money, and better job opportunities is bound to make the task of raising revenue at least somewhat easier for State and local governments.

- Also on the plus side for State and local governments, those States that copy the Federal income tax base can get a substantial revenue boost from the extensive base-broadening measures included in the tax reform bill.

- Nearly all individuals use the sales tax table: rather than actually keeping sales tax receipts throughout the year and counting them up when they are ready to prepare their returns. This means that States and localities should not expect any significant change in buying patterns and, therefore, no significant change in sales tax revenue.

- I supported retaining the full State and local tax deduction when we were talking about a maximum rate of 35%. However, with a maximum rate of 27% and 80% of individuals in the 15% bracket, the sales tax deduction is less important.

- The top rate of 27% is so important, Senators have to find other revenue-raisers to pay for restoring any deduction. No one in the Senate found a way to do that for the sales tax deduction--it's not easy. But we did pledge to work in conference for a better deal for State sales taxes.

May 29, 1986

Tax Reform and Real Estate

• There has been a lot of talk about the impact of tax reform on the real estate industry. The important thing to remember is that tax reform doesn't touch the most important tax breaks that benefit real estate: the mortgage interest deduction for first and second homes, and the capital gains rollover for sale of a principal residence (as well as the capital gains exclusion for those over 55).

• In the period 1986-1990, these tax benefits--together with deductibility of property taxes on owner-occuppied homes--total a revenue loss of $285 billion under current law. None of these benefits is taken away under the Finance Committee tax reform bill.

• Of course, it is true that lowering tax rates dramatically reduces the benefits from existing tax privileges. But that, after all, is the whole point of tax reform: to return to a tax system that is simpler, fairer, and protects the average taxpayer in preference to those who can exploit special tax breaks.

• The much lower rates in the Senate bill--15% and 27%--automatically take a lot of the juice out of tax shelters, by reducing the after-tax benefit of investing in a shelter. All we've done is go one step further, and explicitly limit those tax shelter activities we think lack economic justification.

• That's the new limit on passive losses: we don't let you use losses from inactive investments to offset income from other sources. Why? So we can discourage purely tax-motivated transactions, and ensure that investments are made based on their real economic merit. That's good for the economy as a whole, including the real estate sector.

• The real estate industry itself is divided on the issue of tax reform. A number of major developers--including Oliver Carr, one of the biggest developers in Washington D.C.--have endorsed the Senate tax reform bill, because they hope it will reduce wasteful overbuilding and help target construction to where the marketplace dictates.

• Whenever you make major changes like this tax reform, you are bound to upset a lot of people who have relied on the old rules. Real estate investors are not alone in this. But it was that concern which led me to press for a phase-in of the new passive loss limitations over a 4-year period. The door is not, of course, closed to further changes if an equitable case can be made--we're willing to talk, and everyone expects the conference committee to address many of these concerns.

• No doubt about it, tax reform will force a lot of people to rearrange their investments. Even the change in depreciation rules for real estate--moving up to 27 1/2 years for residential and 31 1/2 years for commercial--will have some impact. We will try to make the transition as smooth as possible, but remember that if we didn't have to upset some applecarts, we wouldn't be talking about tax reform in the first place.

• Finally, note that the Finance Committee bill keeps in place the credit for rehabilitating older properties (although at a reduced rate) and creates a new credit for low-income housing. No one is closing the door on tax-favored real estate investment.

TO: THE MAJORITY LEADER

SUBJECT: TORT LIABILITY REFORM

OVERVIEW OF THE PROBLEM

"Crisis" is the word most frequently used these days to describe the state of the tort liability insurance system in the United States. Last year, property-casualty insurance premiums went up 21%; industry economists predict another 20% jump in 1986. While historically, premium increases have had a pattern of large jumps in one or two years, followed by several years of moderation, these increases are extraordinary. For many businesses and professions, liability insurance is becoming too costly to purchase, or simply no longer available at all. Moreover, the problem is not confined to a few high-risk areas. Rather, it is reaching into a wide variety of commercial endeavors, be it manufacturing, hazardous waste disposal, practicing medicine, producing pharmaceuticals, running a nuclear power plant, or owning a tavern.

The Impact of Changing Interest Rates

Though there is widespread agreement that there is a crisis, there is widespread disagreement over its cause. Clearly, part of the blame for skyrocketing premiums lies with changing interest rates. During the late 1970's and early 1980's, many insurance companies lowered premiums, betting on (1) continued high interest rates on investments held until claims had to be paid in the future and (2) an ability to raise premiums somewhat in the future. This may have made sense at the time because the industry has traditionally been very cyclical.

Unfortunately for the industry, interest rates dropped rapidly over the last few years and competitive pressures prevented the companies from imposing gradual premium increases. Thus, they waited until they had no choice except to raise premiums substantially. CIGNA recently increased its estimate of future losses on pre-1985 business by $1.2 billion. Continental Insurance announced a similar "strengthening of reserves" in the amount of $220 million, and USF&G in the amount of $100 million. These actions reduced earnings for financial purposes; thus it's unlikely they would have been made unless absolutely necessary.

Is the Tort System Also Responsible?

While acknowledging the role of changing economic conditions, the insurance industry also argues that much of the blame lies with the nation's civil justice system, and in particular, escalating litigation, a gradual trend toward "no-fault" standards of liability, excessive, multi-million dollar damage awards, and lawyers' contingency fees which now typically range from 30% to 50%. They point out that more than 13 million civil lawsuits were filed last year, one for every 15 Americans, and there were 400 damage awards exceeding $1 million (as compared to fewer than 30 such awards 10 years ago.) One study commissioned by the American Insurance Association puts the total cost of the tort system at $68.2 billion, with only 25 cents of every dollar going to compensate victims for actual economic loss.

Another major problem is that tort claims frequently are not made or settled until many years after a policy was sold and the premium paid (e.g., medical malpractice, asbestosis). In the intervening years, inflation and changing standards of liability and damages may have significantly increased the insured's liability, making the premium insufficient in hindsight.

Lawyers and consumer groups on the other hand are skeptical of insurance industry claims that the tort system is responsible for the industry's problems and point to their own studies showing that premiums are soaring even in states that have implemented reforms of the kind insurance companies have sought. They argue that the industry, with help from the media, has created a distorted perception of the tort system based on a few sensational cases.

Lawyer and consumer groups have also suggested that the real problem may lie with the insurance industry's exemption from Federal antitrust laws under the McCarran-Ferguson Act, and the fact that regulation of the industry has been left completely to the states under that Act. There is no evidence, however, that the recent premium increases and coverage limitations have been the result of concerted insurance company action. If anything, recent experience suggests that the industry has been too competitive, with companies lowering premiums below prudent levels in an effort to increase their market share.

FEDERAL PROPOSALS FOR REFORM

Attached is a summary of selected legislative proposals related to tort liability issues. Also attached is a summary of

the recent Administration Task Force report which espouses a variety of tort reforms to help solve the liability crisis, though the Task Force has not yet specified how to implement these reforms -- whether at the state or federal level, and whether through judicial or legislative action.

If major legislative activity occurs this Congress, it will probably be on the products liability issue. Sen. Danforth has a bill which would establish uniform Federal products liability standards, preempting state law. It would also set up a system of Alternative Dispute Resolution whereby plaintiffs could have their claims resolved under special, expedited procedures if they were willing to forego seeking pain and suffering and punitive damages. Discussions are currently underway between Administration and Commerce Committee staff to incorporate parts of the Task Force's report into the Danforth bill. Committee staff have advised that they are moving away from establishing a substantive Federal products liability law and toward more procedural reforms designed to encourage early settlement of products liability cases.

State Activity

Since tort law and insurance regulation are both areas which fall outside the traditional province of the Federal government, the greatest activity in response to the liability insurance crisis occurring so far has been at the state level.

State legislative activity has included consideration or enactment of a wide variety of cross-cutting tort reforms, such as limits on pain and suffering awards, restriction or elimination of punitive damages, and curbs on contingency fees. Many state legislatures, have also focused on overall caps on a defendant's liability in specific problem areas such as medical malpractice. In Kansas, a proposal to cap total medical malpractice damages at $1 million has created a political firestorm, with the Republicans on the side of doctors, and the Democrats with the trial attorneys.

In addition, a great number of state legislatures and regulatory agencies have moved to impose or tighten restrictions on premium increases and midterm cancellations, and to facilitate self-insurance and risk pooling for those industries where liability insurance is unavailable. Finally, many states have established study groups to analyze the problem and assess the impact of proposed solutions.

POSSIBLE DOLE INITIATIVES

1) A National Commission on Tort Reform

One idea would be to set up a national commission to take a comprehensive look at the tort liability crisis and develop a coherent national policy and strategy to address the problem,

hopefully coordinating and balancing the various interests of Federal and state governments, as well as the private sector, including the insurance industry and practicing bar.

Though the current crisis has been developing for years, the intense public attention it is now receiving is of fairly recent vintage. As a consequence, responses to the problem have been somewhat piecemeal, if not haphazard, and focused on specific trouble spots, e.g., medical malpractice and products liability.

Moreover, it is an open question whether the issue is ripe in light of the deep divisions which exist among all the various affected interests. A national commission could help build the consensus needed for a coherent national policy and lay the ground work for passing comprehensive reforms next Congress, since even insurance industry spokesmen are now expressing doubts that any signficant legislation can pass the Congress during the remainder of the session.

2)Civil Justice Reforms

It would also be possible to develop a civil justice reform package, drawing on hearings we held in the Courts Subcommittee in the last Congress on civil case backlogs in the Federal courts. Such a bill could include a system of alternative dispute resolution (ADR), perhaps building upon the court-ordered mediation techniques being pioneered by Judge Kelly in Kansas which were mentioned by the Chief Justice in his 1985 year end report.

The ADR proposal could be combined with curbs on excessive damages and attorneys fees awards, as well as sanctions for parties who unreasonably refuse to settle a case or who bring frivolous lawsuits. You might also want to consider some type of overall cap on a defendant's tort liability which could be determined, for instance, as a percentage of the defendant's total financial worth.

Reforms of this type should be politically popular (though they would be vigorously opposed by trial lawyers) and could do much to reduce the Federal courts' congested civil dockets. It should be emphasized, however, any Federal civil justice reform will fall far short of a complete solution to the problem, since the vast majority of tort litigation is in state and local courts. For instance, of the 13 million civil lawsuits filed last year, only 250,000 were in Federal courts.

3) Limited Products Liability Reform

If the Commerce Committee is unable to develop consensus for comprehensive products liability reform, another option might be to test the waters on more limited reforms which address the major trouble spots. We might want to take a look at such areas as establishing a uniform Federal statute of limitations, statute of repose (how long a manufacturer remains liable for a defective product), and evidentiary rule on the question of whether measures taken by manufacturers to make their products safer after injuries or lawsuits have occurred should be treated as proof that the product was originally unsafe.

Reforms of this type should be particularly well received by key constituencies such as manufacturers of farm equipment and aircraft, though they could be vigorously opposed by consumer advocates and trial lawyers, even as a compromise alternative to more sweeping proposals.

Conclusion

In light of the lack of consensus on tort liability issues, it may be sufficient at this point for you to simply place greater emphasis on the problem in speeches and public appearances, instead of setting forth concrete proposals, providing more time to monitor the public debate and permit consensus to begin to gel on key issues.

ATTACHMENT

SUMMARY OF PENDING FEDERAL PROPOSALS

Product Liability/The Danforth Proposal

Manufacturers have long sought Federal standards to govern products liability suits, arguing that different and sometimes conflicting standards among the states generate excessive and burdensome legal costs. A bill to establish such standards, S. 100, which Sen. Kasten has pushed for years, died in the Commerce Committee early last year on an 8-8 tie. The Committee is now considering a Danforth proposal which, like the Kasten bill, would establish Federal product liability standards, but also create a system for "alternative dispute resolution" (ADR).

Specifically, under the bill, a plaintiff could sue in Federal court under the uniform standards established by the bill which are fault-based, and seek recovery for actual economic losses, as well as compensation for pain and suffering and punitive damages. But the plaintiff would also have the option, under "ADR", of filing a claim directly with the manufacturer of the product using special expedited procedures and less stringent standards of proof. If the plaintiff chose this easier route, however, he/she could only recover for actual economic loss, not for pain and suffering or punitive damages.

As again mentioned below, ADR is receiving increasing attention at both the state and national level as one way to expedite tort claims processing, while minimizing legal costs and excessive damage awards.

Civil Justice Procedural Reforms/The McConnell Bill

Sen. McConnell has introduced two bills which would make certain procedural reforms to the Federal civil justice system, as follows:

Damage Award and Fee Limitation: One of the bills is targeted at reducing litigation costs which topped $33 billion in 1983, the last year for which statistics are available. The bill would cap "pain and suffering" awards at $100,000; require that punitive damages be paid to the court, not the plaintiff; and cap contingency fees at 35% for damage awards of less that $50,000 ratcheting down to 10% for awards in excess of $200,000.

ADR: The other McConnell bill is designed to encourage the use of ADR by creating a new Federal Rule of Civil Procedure which would require attorneys to certify to a court that they

have advised their clients of available alternatives to litigation, such as court-supervised arbitration. The bill would also expressly permit a party to offer to settle or engage in ADR at any point in the litigation and includes sanctions if the other party unreasonably fails or refuses to accept such offers.

Insurance Availability: S. 2129, introduced by Sen. Danforth, would amend the 1981 Risk Retention Act (RRA) which permits companies to join together and form risk retention pools for the purpose of purchasing product liability insurance. S. 2129 would permit businesses and state/local governments to pool for the purpose of purchasing any kind of liability insurance. The bill is unpopular with both the insurance industry and state insurance regulators.

likely to be filed week of April 14

Miscellaneous Proposals: In addition to the above, a number of bills have been introduced which are targeted at specific problem areas, such as:

Vaccine Compensation: S. 827 (Hawkins) would provide government compensation for people injured by adverse reactions to some vaccines;

Medical Malpractice: S. 1804 (Hatch) would offer states up to $4 million as an incentive to enact specific medical malpractice reforms, including limits on attorneys fees and pain and suffering awards. There are a variety of other bills in this area, including a Gephardt proposal to encourage ADR in medical malpractice suits, as well as other proposals which would set up screening boards to review claims, and make self-insurance easier for doctors. On a related issue, bills have been introduced to permit military personnel to sue military hospitals for malpractice.

Nuclear: The Senate Energy Committee plans to soon markup S. 1225, Sen. McClure's bill to reauthorize the Price Anderson Act. Price-Anderson sets up a system of liability insurance for nuclear power plant accidents, providing $640 million total coverage per accident, with liability limited to the amount of insurance available. S. 1225 would raise the amount of insurance available to $2.4 billion, though retaining the liability limit.

Antitrust: Congressmen Florio and Rodino have both expressed interest in legislation to close the antiturst exemption granted the insurance industry under the McCarran-Ferguson Act. Sen. Simon has said he plans to introduce such legislation. These Members are also looking at proposals of consumer groups to provide for Federal regulation of the insurance industry.

The Administration's Package

Recently, a multi-agency tort policy working group, headed by Richard Willard, Assistant Attorney General for the Civil Division, issued a report which concluded that the tort system is a "major cause" of the liability insurance crisis and recommended a set of 8 reforms, as follows:

-Retain fault as the appropriate standard of liability. Recent cases have begun to extend the doctrine of "strict liability" used in products liability cases to other areas. The Report supports continuance of strict liability in products cases, but negligence in all other cases.
-Tighten standards applicable to evidence of causation so that only established and credible expert opinion/testimony is used.
-Eliminate joint and several liability. This doctrine permits each defendant in a case to be individually liable for the entire amount of damages, regardless of the extent of their responsibility.
-Limit noneconomic damages (pain and suffering, mental anguish, and punitive damages) to a cumulative amount of $100,000.
-Provide for "structured settlements" (permitting a defendant to pay off a damage award over an extended period of time, instead of requiring a lump sum payment).
-Abolish the collateral source doctrine (which bars collateral sources of compensation available to the plaintiff from being considered as evidence in determining damages.)
-Curb contingency fees (25% for the first $100,000 ratcheting down to 10% for awards exceeding $300,000).
-Encourage alternative dispute resolution.

As indicated in our memo, Danforth may incorporate some of these recommendations into a Commerce Committee package.

SUMMARY OF MAINE TORT REFORM LAWS

- Maine's newly passed tort reform package includes:
  - -- limits on contingency fees
    - -- 33% of the first $100,000 of recovery
    - -- 25% of the next $100,000 of recovery
    - -- 20% of any amount over $200,000
  - -- installment payments for awards and settlements
  - -- pretrial screening panels
  - -- changes in the laws on statutes of limitations and expert witnesses.

- Representatives of the Maine Medical Association who worked on preparing the Maine legislation claim they approached the subject very differently than most other states. They used "compromise and negotiation" rather than "lawyer bashing".

- The Maine tort reform legislation is argued to be modest relative to those passed or proposed in other states. The lawyers, physicians, insurers, and state agency all signed off on the package.

- Maine law also includes a study of whether there is a need for caps on awards. The issue of joint and several liability has not yet been addressed.

- The new Maine law also prohibits "wrongful birth and wrongful life" actions for babies born healthy.

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Maine passes tort reform package; society, lawyers worked together

As *AMN* went to press, the Maine legislature had agreed on a tort reform package to send to the state's governor, who was expected to sign the measure.

The package includes limits on contingency fees, installment payments for awards and settlements, pretrial screening panels, and changes in the laws on statutes of limitations and expert witnesses. At press time, the legislation awaited a final vote that lobbyists and legislators considered a formality.

Each of the provisions agreed to by the legislature, except those concerning limits on contingency fees, had been agreed to in advance by a coalition including the Maine Medical Assn.; the state's trial lawyers; and insurance, government, and business representatives.

After the coalition introduced its package, legislators proposed adding a provision limiting contingency fees. The measure was opposed by the trial lawyers.

The contingency fee provision will limit plaintiff's attorneys to collecting 33% of the first $100,000 of recovery; 25% of the next $100,000; and 20% of any amount over $200,000.

THE NEW PROVISION on the statute of limitations gives Maine one of the toughest standards in the nation. It requires that the statute of limitations begin running from the date the injury occurs, rather than the date the injury is discovered. The law contains an exception for "objects-left-in" cases — those situations in which a plaintiff alleges that a surgical team left sponges or equipment inside a body cavity. In such cases, the statute of limitations still begins running at the date of discovery.

The new statute of limitations also reduces from 20 years to six years the time allowed for children to bring suit for injuries allegedly suffered at birth.

The bill's provision for installment payment of awards and settlements applies to any recovery of more than $250,000. The provision that establishes pretrial screening panels would allow a judge, lawyer, and physician to rule on the merits of a medical liability action. If the decision is unanimous, their ruling would be admissible in court should the plaintiff decide to continue the suit through a trial.

A provision on expert witnesses, which requires the plaintiff to provide within 90 days of filing a case the names of their expert witnesses and the substance of their testimony, is designed to prevent plaintiffs from proceeding with a suit before securing an expert medical opinion.

The law also prohibits "wrongful

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Maine passes reforms... ...on statute of limitations; cap on damages dropped

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birth, wrongful life" actions for babies born healthy.

A wrongful life cause of action arises when a mother who has undergone medical treatment to prevent pregnancy, for instance, becomes pregnant and gives birth. Her child alleges that he never should have been born. No court has yet recognized such a cause of action.

A wrongful birth action arises when a mother, under the same circumstances, sues the treating physician for the alleged wrong she suffered by giving birth. A handful of courts have recognized this cause of action.

The new Maine bill would eliminate the child or mother's right to sue in cases in which the baby was born healthy. It is one of the first states to enact such a statute.

FRANK STRED, executive director of the Maine Medical Assn., said the association's lobbying forces approached tort reform in a very different way than most other states. The medical group sought and received compromise with the legal community before it introduced the legislation.

"We didn't go in lawyer-bashing," Stred said.

While an *AMN* survey shows that many state medical societies perceive the organized bar, and particularly the plaintiff's bar, as adversaries in the fight for tort reform, Maine's physicians took a very different tack. They engaged in 15 months of negotiations with the plaintiff's lawyers, as well as the state's major medical liability insurer, businesses, and the state department that oversees health care.

They hammered out a package that was modest in comparison to the kinds of tort reform other states have proposed. The lawyers, physicians, insurers, and state agency signed off on the package.

The *AMN* tort reform survey shows that, of 36 medical societies willing to say whether they saw the organized bar as an adversary in tort reform, only three states responded that they did not. Medical societies in 23 states said they perceived the bar as an adversary. Ten societies said that the bar was either neutral or helpful, but that the plaintiff's attorneys were adversaries.

STRED CREDITED Gordon Smith, the medical society general counsel who saw the bill through the legislature, with the success of the medical society's tort reform package. He said that the trust Smith had engendered among other lawyers had been crucial to the group's tort reform efforts.

Smith said that if he had it all to do over again, he would take the cooperative route.

"I think had we known how strong the climate was for reform, we might have asked for more from the outset," Smith said. "Unlike three years ago, when we proposed tort reform and had our head handed to us on a platter, this year the attitude of the legislature was completely different.

"But that climate didn't happen by accident," he added. By cooperating with the attorneys, there were no "lawyers up here claiming there was no problem with the tort system. Our strategy of non-confrontation allowed us to co-opt their issues.

"You wouldn't have believed how incredibly strong the anti-lawyer feeling was," Smith said. "When our compromise package with the lawyers got to the legislature, instead of looking at it as a compromise, [the legislators] saw it as a conspiracy. Then they went through it with a fine-tooth comb."

AFTER STUDYING the measure, Smith added, the legislators thought it was a very good bill. But they wanted to make it stronger.

> 'You wouldn't have believed how incredibly strong the anti-lawyer feeling was,' says Gordon Smith, Maine Medical Assn. general counsel.

The first thing they did was add a provision limiting contingency fees. Because the contingency fee proposal was not a part of the society's agreement with the bar, the physicians took a neutral stance while the lawyers actively opposed it.

It sailed through the House by a 100-14 margin.

When the House went further, proposing a cap on damages for pain and suffering, the medical society opposed it. Eventually, the proposal was dropped.

"We didn't want the cap in the bill because we knew that the Senate wouldn't buy it," Smith said. "But more importantly, we had agreed with the trial lawyers that we would not back a cap on damages, and we felt strongly that a deal is a deal. We felt that the long-term interests of physicians in the state would not be served by welshing on a deal in the legislature where you play by very strict rules, and your word is important."

As far as caps on damages and other reforms are concerned, Smith said, that legislation can wait for the next session in 1988.

"We've really never had a problem with the big awards in Maine, and this legislation authorizes a study commission to look into caps. After this session we'll be looking into those proposals as well as changes on joint and several liability."

—Mark Rust

Frank Stred (left), executive director of the Maine Medical Assn., said the association's lobbying forces approached tort reform in a very different way than most other states. The medical group sought and received compromise with the legal community before it introduced the legislation. 'We didn't go in lawyer-bashing,' Stred said.

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FROM THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Progress Made on Reform of Nation's Product Liability Laws

Senator Jack Danforth (R-MO), Chairman of the Commerce Committee, announced that today the Full Committee gave tentative approval by a vote of 16 to 1 to a proposal that would reform the Nation's product liability laws.

Senator Danforth said after the mark-up session, "The Committee made good progress toward a meaningful product liability reform bill. We adopted a basic core bill previously agreed to by Senators Gorton, Kasten, and myself. This core package includes new and expedited settlement procedures. It is my hope that we will be able to go further with measures to promote full settlement at an early stage, lowering the transaction costs assessed on all parties by the present system.

"The agreement also defines circumstances under which punitive damages can be assessed. Moreover, we adopted the recently enacted California approach to limiting joint and several liability, which is important to municipalities, as well as product manufacturers and sellers.

"I am encouraged by this important first step. Product liability reform remains one of the most important issues before this Committee."

The measure contains the "core package" of provisions crafted by a compromise among Senator Danforth, Consumer Subcommittee Chairman Bob Kasten (R-WI), and Senator Slade Gorton (R-WA).

Further, the Full Committee approved by a vote of 10 to 6, with one Member voting present, an amendment offered by Senator Larry Pressler (R-SD) to reform the doctrine of joint and several liability.

The Committee-approved core provisions address expedited settlement procedures, product seller liability, punitive damages, statute of limitations, record retention, and counsel's liability for excessive costs.