THE WHITE HOUSE

WASHINGTON

March 25, 1986

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Testimony re:
Litigation Abuse Reform

Counsel's Office has reviewed the above-referenced DOJ testimony and finds no objection to it from a legal perspective.

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Richard Willard

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Subject: DOJ testimony re: Litigation Abuse Reform

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5/91

DRAFT

STATEMENT

OF

RICHARD K. WILLARD
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

U.S. DEPARTMENT OF JUSTICE

BEFORE

THE

SENATE JUDICIARY COMMITTEE

CONCERNING

LITIGATION ABUSE REFORM

ON

MARCH 26, 1986

Mr. Chairman and members of the Committee:

The Department of Justice appreciates the opportunity to appear before the Senate Committee on the Judiciary to discuss the liability insurance crisis and the need for meaningful reforms of our tort civil justice system. Senator McConnell and others have proposed legislation that attempts to address these difficult issues. While the Administration is continuing to study S.2046, many of its provisions propose constructive answers to our current problems.

In my June 11, 1985 testimony before this Committee on S.1254, Senator Grassley's contractor indemnification bill, I identified two clear reasons why government contractors and other commercial manufacturers were alarmed about products liability and commercial risk exposure. Those reasons are the innovative theories of tort liability applied by many courts and the enormous growth in the size of awards being granted by many juries and courts. These troubling trends in the tort system are not confined to government contractors or to products liability cases, but have generated uncertainty and instability in almost every facet of the liability insurance marketplace and have contributed significantly to the current liability crisis.

As this Committee has already heard, and other members of Congress are undoubtedly becoming aware, liability insurance premium rates have increased by up to 1000 percent, if not

more. Often, coverage is unavailable at any price, with devastating results. The liability crisis affects virtually every segment of American society -- manufacturers, professionals, small businesses, municipalities and nonprofit organizations. Many believe that tort reform and insurance availability are the most important issues facing these groups today.

The Cause of the Problem

While everyone agrees that the high cost or unavailability of liability insurance is a major crisis facing American society, not everyone agrees on the cause of the problem.

Some groups have been before Congress -- most notably the National Insurance Consumer Organization and the trial lawyers -- to suggest that the current crisis stems from the insurance industry's own greed and shortsighted underwriting policies. They would assert that the current price increases are simply insurance industry efforts to recoup past losses suffered as a result of insurance industry mismanagement.

Others contend that the problem is cyclical and will disappear when low interest rates rise. Still others agree with Ralph Nader, who has testified before Senate and House committees that the entire crisis or problem is a hoax, a conspiracy by the insurance industry to use the legislatures to further defraud the insurance consumer.

Let me start by saying that the history of the insurance industry has been cyclical. And it is also true that some of the current increases in liability insurance costs are the result of past competition for premium income as well as the recent sharp decline in interest rates. However, while it seems likely that the insurance industry will be able to work its way out of its present economic straits, it is very unclear whether more favorable market conditions and more deliberative underwriting practices will significantly alleviate the long-term insurance availablity and affordability problem. Early indications are that insurers will continue to avoid areas that present a high risk of tort liability and, in those areas where insurance is offered, uncertainty about present and future liability will continue to dictate high premiums. It is becoming apparent that the insurance availability/affordability crisis is but one symptom of the dislocations and problems generated by a malfunctioning tort system. What is called for is a cure for the disease, not a treatment for the symptom.

The Administration strongly believes that the essence of the problem is a number of tort decisions of the last few years in which courts, driven by plaintiff lawyers, have brought about a vast expansion of civil liability and an enormous increase in the size of damage awards. Our civil justice system is no longer seeking to impose liability based upon traditional

doctrines of fault. Rather, the system seeks to compensate plaintiffs at the expense of those who have the resources to absorb the costs.

I would like to discuss four specific developments in tort law that deserve particular attention, and perhaps legislative redress, whether at the federal or state level.

1. The movement toward no-fault liability

As I have stated in earlier testimony before this Committee, fault has been the centerpiece of tort law since the days of the industrial revolution. It assigns liablity based on the reasonableness of the actor's conduct or activity, distinguishing socially beneficial, from socially harmful, conduct. Stated differently, without basing tort law on the concept of fault, we risk punishing those who do good -- whether by cleaning up asbestos or by manufacturing a childhood vaccine. In effect, without fault, tort liability becomes nothing more than a judicially imposed insurance scheme.

2. Undermining Causation

The gradual undermining of the requirement of causation through a variety of questionable doctrines and practices, has been used to shift liability to "deep pocket" defendants even

though their actions did not contribute to the underlying injury or had only a limited or tangential affect.

While the attack on the requirement of causation cannot be attributed to any single innovation, one principal vehicle has been the expanded use of joint and several liability. The doctrine of joint and several liability allows the plaintiff to recover the full judgment from any one of several defendants, rather than collect from each one individually according to his degree of fault. The practical effect is that "deep pocket" defendants guarantee the recovery of huge judgments rendered by sympathetic juries, even in situations where they have been found only slightly at fault.

This application of the doctrine of joint and several liability is a radical departure from its originally intended application in cases where multiple defendants were in "concert of action".1 Unfortunately, modern courts have shown an increasing willingness to apply joint and several liability as a viable means of securing a financially sound source from which to recover.

3. The explosive growth in noneconomic and punitive damages

Another identified problem area is the explosive growth in the damages awarded in tort lawsuits, particularly with regard

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1 See generally Prosser and Keeton on Torts (5th Ed., 1984) Chapter8.

to noneconomic awards, such as pain and suffering or punitive damages.

A recent report by Jury Verdict Research, Inc. indicates that the average medical malpractice jury verdict increased from $220,018 in 1975 to $1,017,716 in 1985 -- an increase of 363%. Average product liabilty jury verdicts during this same period increased from $393,580 to $1,850,452, an increase of 470%.

Interestingly, much of this increase can be attributed to a remarkable growth in verdicts above $1 million. The same study notes that in 1975, there were three million-dollar medical malpractice verdicts and nine million-dollar product liability verdicts; by 1984, the number of medical malpractice million-dollar verdicts had grown to 71 and the number of products liability million-dollar verdicts to 86. This is an increase of over 1200% in the number of such verdicts.

While it is not possible to quantify precisely how much of these awards are for nonecomonic damages, it appears that noneconomic damages, such as awards for pain and suffering and punitive damages, are a substantial factor. These types of damages are inherently unconstrained and subjective, and, therefore, are subject to dramatic inflation and wide variation. That is, in two cases involving similarly injured plaintiffs, because of the existence of these types of subjective damages, there is little chance that the two will receive comparable awards. The outcome and size of a particular

award or settlement is becoming based more on the defendant's perceived ability to pay rather than the extent of the injury to the plaintiff.

4. Excessive Transaction Costs

Finally, another serious problem of the tort system that should be noted is its extraordinarily high transaction costs.

It appears increasingly difficult to afford justice in this country. In fact, some would argue that the system, intended to benefit the injured and to do justice for all, only benefits the lawyers and is reserved for those who can afford it.

A study of liability cases from asbestos-related injuries by the Rand Corporation's Institute for Civil Justice indicates that out of every dollar paid out by the asbestos manufacturers and their insurers, an average of 62 cents is lost to attorneys' fees and litigation expenses.2 Rand found that a

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2 J. Kakalik, P. Ebener, W. Felstiner, G. Haggstrom & M. Shanley, Variations in Asbestos Litigation Compensation and Expenses xviii (1984). These costs, of course, include both plaintiffs' and defendants' litigation expenses. In comparing the costs attributable to plaintiffs' litigation expenses it is useful to remember that defendants incur such costs whether or not they prevail, and, indeed may incur substantial costs defeating even clearly frivolous claims.

typical asbestos court case results in a cost of $380,000. Of this, $125,000 is for legal defense fees, $114,000 is for legal fees paid by the plaintiff. It is difficult to justify such exorbitant costs, particularly when these costs are usually borne by the seriously injured or the innocent consumer through higher prices for goods and services.

These are four major areas in tort law where reform is necessary. Meaningful tort reform, however, will require the Federal Government to work closely with the states. In products liability law, for example, the Administration has for many years supported federal legislation which addresses the excesses of current law. In other areas, there are questions which must be carefully considered of how the Federal Government can appropriately promote sensible tort reform within the framework of federalism.

Senator McConnell and others in the Congress have demonstrated a willingness to address the problem. We, at the Justice Department, look forward to working with this Committee on appropriate legislation.

That concludes my testimony, I will be pleased to answer any questions you might have.

THE WHITE HOUSE
WASHINGTON

file

March 26, 1986

TO: John

FROM: **FRED F. FIELDING**
COUNSEL TO THE PRESIDENT

FOR YOUR INFORMATION:

This was received after
the testimony was given,
3/26/86 at 11:24 am.

Department of Justice DRAFT

STATEMENT

OF

RICHARD NORTON

ASSOCIATE COMMISSIONER

EXAMINATIONS

U.S. DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

CONCERNING

H.R. 23

ON

MARCH 25, 1986

9:00 AM

Mr. Chairman, Members of the Subcommittee:

Thank you for the opportunity to offer the views of the Department of Justice on H.R. 23.

The bill is designed to permit certain Cuban and Haitian nationals to adjust their immigration status to permanent resident aliens.

The Department of Justice concurs with the members of the subcommittee in the belief that there should be parity in the treatment of those designated Cuban/Haitian Entrants. The Department further believes that immigration reform and relief for specific nationality groups should not be accomplished piecemeal by nationality specific legislation. While we support the intent of H.R. 23, we again take the position that the preferable response rests with enactment of the immigration reform legislation. Until the outcome of the reform legislation is decided, we believe it is premature to take a position on H.R. 23.

We will continue in our support of a similar provision for legalization of this group contained in the reform legislation currently pending.

The Department does have some technical concerns with the language of H.R. 23. In part, the bill calls for the adjustment of status of Cuban nationals who have been designated "Cuban/Haitian Entrants (Status Pending)". These nationals, who entered during the Mariel time period, are eligible for the provisions of P.L. 89-732, the Cuban Refugee Adjustment Act of 1966. Since April 1, 1985, the Service has accepted applications for adjustment of status from over 53,000 Mariel Cubans, and has completed processing and adjusted the status of approximately 23,000 applicants. As H.R. 23 does not repeal the

Cuban Refugee Adjustment Act and specifically provides in section (f) that nothing shall preclude an alien from seeking permanent resident status under any other provision of law for which he or she may be eligible, we shall continue to enforce the provisions of the Cuban Adjustment Act. This will have the effect of treating nationals from Cuba differently from nationals of Haiti. We therefore recommend that repeal of PL 89-732 be included in this proposal.

We also continue to be concerned with section (b)(2) of HR 23. This section provides permanent residence for an alien who "is a national of Cuba or Haiti, who arrived in the United States before January 1, 1982, with respect to whom any record was established by the Immigration and Naturalization Service before January 1, 1982 ...." It is unclear what the subcommittee intends by the term "any record," as the term is not defined under the present law or in this legislation.

We are also concerned with the proposed cutoff date of January 1, 1982. It should be noted that the Executive Order and Presidential Proclamation authorizing the interdiction of illegal aliens on the high seas were both signed on September 29, 1981, and the first interdictions occurred some fifteen days later. We do not feel it appropriate to reward those individuals who successfully evaded this interdiction, which the present proposal would do. We therefore recommend that the cutoff date be established at October 1, 1981. Similarly, we would not oppose a roll-back date for adjustment of status to that same date.

This completes my prepared testimony. I would be glad to respond to any questions which you may have.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO John Roberts 106	Take necessary action	☐
	Approval or signature	☐
	Comment	☐
	Prepare reply	☐
	Discuss with me	☐
	For your information	☐
	See remarks below	☐
FROM Greg Jones X3454 4/9	**DATE**	

REMARKS

When I circulated this earlier this week, I neglected to include you. (You had signed off on Justice testimony on this bill some time ago.)

Do you have any objection?

There is a subcommittee markup of this bill tomorrow; I amtrying to clear this this afternoon.

Thanks.

JANET —
CALL GJ + ✓
TELL HIM NO
OBJECTION.

OMB FORM 4
Rev Aug 70

Kastenmeier DOJ report

DRAFT

Dear Mr. Chairman:

This letter is designed to augment the Department of Justice's March 5, 1986, testimony before the Subcommittee on Courts, Civil Liberties and the Administration of Justice with regard to H.R. 3378, the Electronic Communications Privacy Act. At that hearing, Congressman Moorhead asked the Department's representative, Deputy Assistant Attorney General James Knapp, to reconsider the position set forth in the Department's written Statement with respect to the private interception of cellular telephone communications. As you may recall, the Statement indicated that, although the Department was prepared to "accept legislation that ... would require Title III authorization for law enforcement officers to intercept either the wire or radio transmission portion of cellular communications", citizen scanning for recreational purposes should not incur liability for interception alone but rather -- by analogy to the Communications Act of 1934 -- only where the citizen "both intercepts and divulges the communication under circumstances in which the interception and divulgence are illegal, tortious, or for commercial gain." Mr. Knapp stated at the hearing that this aspect of the Department's written submission would be reconsidered and that the Department would make a final recommendation to the Subcommittee after meeting with various interested parties over the next few weeks.

This letter will serve to advise the Subcommittee of the results of our reconsideration of the cellular private

interception issue, as well as to suggest some additional ideas relating to the legislation before the Subcommittee.

As promised, the Department of Justice since March 5 has held a series of discussions with representatives of the cellular telephone industry as well as the manufacturers of scanners and other interested persons or groups. These meetings were frank and probing and contributed significantly to our understanding of the issues. The question at issue with regard to whether the unauthorized private interception of cellular telephone communications should be criminalized is a difficult one for the Department inasmuch as it involves problems both of assessing the extent of privacy intrusion inherent in such interception as well as problems of enforcement of any prohibition. In this latter regard, Congress should be under no illusion, if offenses in this area are created, that the Department, under present budgetary constraints, will be able to devote substantial resources to the investigation of such offenses, or, because of the inherent difficulty of such investigations, that a substantial number of successful prosecutions would be brought.

Nevertheless, with those caveats, the Department has concluded that its originally stated position with regard to the private interception of cellular telephone conversations should be modified. Because we believe that persons' conversations over cellular telephones should enjoy the protections of federal law, as they do today if carried in part over wire, we are prepared to support legislation that would amend Title III's definitional provisions as to specifically cover the radio component of

cellular communications. This would clearly bring communications over cellular telephones within the ambit of Title III.

However, our consideration of this issue has also led us to reevaluate the present penalty structure of Title III, which as you know in section 2511(1)(a) makes any willful interception of a wire or oral communication a five-year felony. In our judgment, this penalty, for a first and unaggravated offense of simple interception, is too severe. [1] We think fairness and enforcement would be enhanced if a first offense of simple interception were to be a misdemeanor or petty offense. The existing felony penalties would continue to apply for interception accompanied by divulgence or use for a tortious, illegal, or commercial purpose, as well as for a second or subsequent simple interception offense. In our view, criminalization of the private interception of cellular communications (which would require proof that the defendant was aware that the communication being intercepted was of a protected kind and not, for example, a conversation over a cordless telephone), coupled with the above- suggested refinements in the penalty structure for Title III interception violations, represents the most appropriate balancing of the competing interests in this complex field.

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[1] Our comment is confined to subsection (1)(a) and is not intended to suggest changing the applicable penalties for offenses under subsections (1)(b),(c), or (d).

We also recommend consideration by the Subcommittee of an injunction provision as an additional form of remedy for prospective or ongoing breaches of Title III. As part of the Comprehensive Crime Control Act of 1984, Congress enacted 18 U.S.C. 1345, which for the first time permits the United States to obtain an injunction against fraudulent practices under the wire, mail, and bank fraud statutes. In our view, a similar injunction provision in the context of Title III would be useful, either pending prosecution or in a suitable instance as an alternative thereto, as a mechanism for curtailing ongoing practices that threaten the privacy interests protected by that statute.

The Department appreciates the opportunity to provide you with our views on this important matter and we look forward to working with you and the Subcommittee staff in the development of appropriate legislation.

Sincerely,

Bolton

OMB has cd USA, etc... no objection, etc....