Department of Justice

ADDRESS

OF

THE HONORABLE EDWIN MEESE III
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

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NOTE: Because Mr. Meese often speaks from notes, the speech as delivered may vary from this text. However, he stands behind this text as printed.

I am pleased to be here today to address this general counsel briefing sponsored by the National Legal Center for the Public Interest.

I don't have to tell this group that we are in the midst of an explosion of litigation -- our tort system, in particular, seems virtually out of control. But rather than take an excursion in search of the ultimate causes of our litigiousness, I prefer today, knowing that you are, like me, practical men engaged in a practical business, to examine a few solutions within our reach.

There's a down-home saying now in vogue inside the beltway -- "If it ain't broke, don't fix it." Well, my message today is that the tort system is broken and a few repairs are in order. Today I would like to point out some of the symptoms of an ailing tort law system, diagnose its causes and then outline a number of possible remedies.

As anyone knows who has recently picked up Time magazine or the Wall Street Journal, or tuned in the evening news, the most acute symptom of an ailing tort law system is the current insurance crisis. I'm sure that in your capacity as corporate counsel you are no strangers to the problem of securing adequate affordable insurance coverage for your company. You may even have defended against the kind of tort claims that send premiums

sky-rocketing. Similar problems may face you in obtaining professional malpractice coverage. And, of course, insurance problems don't stop when you leave the office.

According to Time magazine, Americans last year paid $9.1 billion in liability premiums, an amount almost 60 percent higher than in 1983. Even worse, this steep climb of premiums shows no sign of leveling off. The result is that insurance is priced beyond the reach of many Americans -- and that's assuming that insurance coverage is even available. Faced with tremendous uncertainty about the likelihood and magnitude of damage awards in tort suits, insurers have discontinued whole lines of coverage. Try, for example, to get a policy to protect your company against a suit for environmental pollution.

Today more and more Americans -- consumers, businesses and governmental entities -- face the frightening prospect of "going bare." In insurance parlance, that means going without insurance coverage and paying any claims out of one's own pocket. Under such circumstances, a single sizeable claim may very well bankrupt a breadwinner, a company or a city.

The chilling effects on our economy and our way of life are obvious. Let me give you an example that strikes close to home: A company that manufactures auto exhaust systems was forced to cancel liability coverage for its ten-member board of directors and 28 corporate officers when it was notified that its premium for $10 million in liability coverage would increase from less than $50,000 to three-quarters of a million dollars annually. The result was that eight board members plus the chairman

resigned out of fear of exposure to litigation. The company could find only two replacements. No wonder, considering that the number of lawsuits filed against directors of corporations has climbed, according to some estimates, by more than 150 percent since 1974.

Many cities are having similar difficulties in keeping officers. Problems of availability and affordability may force two-thirds of California's towns and cities to operate without liability insurance by this summer. Municipalities in other parts of the country are finding themselves in the same boat.

I might just as easily have given you examples of sports equipment manufacturers or trucking firms that have shut down, obstetricians who have left their practice, and day care centers that have closed. Less visible, but more pervasive, are increases in the price of goods and services as the high cost of premiums is passed through to consumers.

Because this Administration is convinced that this is a question of great importance to the public, we have established an interagency Tort Policy Working Group under the Domestic Policy Council to study the problem. Two weeks ago the Working Group, chaired by Richard Willard, Assistant Attorney General for the Civil Division, published its findings and recommendations. The report is a sound one and I am pleased to be able to discuss it with you today.

I want to stress that as the Administration works in behalf of reform in this area, we invite the comments and suggestions of all concerned. We plan to be talking and working with

individuals and organizations representing a variety of viewpoints. The principles for reform presented in the report provide an excellent starting point and basis for legislation at the federal level and also serve as an example for use and adaptation by state legislatures.

Now let's look at some of the developments in tort law that have brought on our current troubles.

First, and perhaps most troubling, is the movement of our current tort system toward no-fault liability. Back in the mid-1960s, it became fashionable to reject two concepts which have always been central to our system of tort law -- fault and compensation. In their stead were placed supposedly more enlightened concepts such as societal insurance and risk spreading. As the tort system has moved away from fault, it has increasingly imposed liability upon persons and companies that have done nothing wrong. This has been accomplished in three principal ways:

-- by directly reducing or even eliminating the fault requirement;

-- by defining new so-called "duties" that effectively create fault where no fault existed previously; and

-- by engaging in after-the-fact analyses that "find" fault wherever there has been an injury without regard to realistic concepts of causation or culpability.

However the courts have called the tune, the result has ultimately been the same -- to shift liability for compensation to so-called "deep pocket" defendants who ostensibly have the

resources to compensate plaintiffs generously. The "deep pockets" are ultimately those of the consumer and the taxpayer, with those who can least afford it often most severely affected.

Perhaps the classic example of such compensation-oriented liability findings is the California Supreme Court's 1983 decision in Bigbee v. Pacific Tel. & Tel. Co. In that case, a man was injured when an allegedly intoxicated driver lost control of her car, veered off the street into a parking lot, and crashed into a telephone booth in which the man was standing. Suit was brought against the companies responsible for the design, location, installation, and maintenance of the telephone booth. The California court found that the risk someone might veer off the road and crash into the telephone booth was not unforeseeable as a matter of law. The Court also determined that it was of no consequence that the harm to the plaintiff came about through the negligent or reckless acts of an allegedly intoxicated driver. The court concluded that "there are no policy considerations which weigh against imposition of liability" against the defendants, and referred specifically to "the probable availability of insurance for these types of accidents."

Decisions, like this one, are all too common outside California, as well. And, of course, the harm done by such decisions extends far beyond the particular cases. First, insurance companies are unable to keep up with the expansion of this no-fault liability. Second, and more fundamentally, the

elimination of fault as a basis of liability cuts to the core of our tort system, which is predicated not only on compensation but also on the deterrence of wrongful conduct.

Today, tort law has become an off-budget program for the redistribution of wealth, administered by judges and juries without the constraints of the legislative process.

A second unfortunate development that has contributed to the current problem is the erosion of causation requirements. Traditionally, the concept of "proximate cause" assured a reasonable relationship between a given cause and effect. For some time now, however, proximate cause has been under systematic attack. In the name of "social justice," courts have deployed a variety of questionable practices and doctrinal innovations against it.

One such development has been the increasing use of joint liability to shift the cost of compensation to "deep pockets." Joint liability originated in the context of defendants acting in concert. Over the years, however, it has been used increasingly to make a defendant with only a limited role in causing an injury bear the full cost of compensating the plaintiff.

A third factor contributing to our tort predicament is damage awards that have grown beyond the bounds of all reason. Jury Verdict Research, Inc., reports that since 1962, the first year in which a $1 million damage award was granted by a jury in a personal injury case, the number of $1-million-plus awards has grown steadily, reaching 401 verdicts in 1984. Although there is some debate about the precise size of this phenomenon, a number

of studies show a substantial increase in the size of damage awards -- especially at the high end of the scale. Non-economic damage such as pain and suffering, mental anguish, and punitive damage appear to account for much of this increase.

Because such non-economic awards are not tied to objective measurements of value but call upon a jury or a judge to make a highly subjective judgment, they are inherently unconstrained. Moreover, the evidence indicates that the explosion in damages has occurred largely at the high end of the awards scale. The elimination of exorbitant awards of non-economic damage, would be an important step in restoring balance to the system.

Finally, we must be concerned about the extraordinarily high transaction costs of our tort system. For example, a study by the Institute for Civil Justice of the endless abestos-related law suits shows that out of every dollar paid by asbestos manufacturers and their insurers, 62 cents on the average is lost attorneys' fees and litigation expenses. This is exclusive of those costs borne by the court itself. The real beneficiaries of such a system are obviously not the victims or society, but those involved in the system of legal adjudication.

The time has come, I believe, to get control of a tort law system that is often at war with sound economic principles and sometimes hostile to fundamental American democratic institutions.

To that end, the Adminstration has suggested eight tort reforms that would bring a greater degree of rationality and predictability to specific areas of tort law. Let me emphasize that our proposals by no means exhaust the options available.

These reforms are modest and measured to the need. They are restorative in nature and should not dramatically alter the basic principles of tort law as those principles have existed for centuries. Time will not permit me to discuss each proposed reform in detail, but I would like to highlight a few of our recommendations.

* First, retain fault as the basis for liability. For non-product liability cases, negligence should remain the applicable standard of liability. Strict product liability should be interpreted in light of the fault-based standards contained in the Second Restatement of Torts.

* Second, eliminate joint and several liability, except in limited circumstances where the plaintiff can demonstrate that the defendants have actually acted in concert to cause the plaintiff's injury.

* Third, limit non-economic damages to a fair and reasonable amount. We believe that $100,000 would be a reasonable limitation. While there are many factors recommending an absolute ban on punitive damages, the Working Group has concluded that punitive damages might better be included within the $100,000 limitation on all non-economic damages.

* Fourth, reduce awards by certain collateral sources of compensation for the same injury.

* Fifth, limit contingency fees to a schedule that decreases as awards increase. Specifically, the Working Group recommends: 25 percent for the first $100,000, 20 percent for the second $100,000, 15 percent for the third, and 10 percent for the remainder.

* Sixth, develop alternative dispute resolution mechanisms such as arbitration and mediation. Procedural innovations such as mini-trials and expedited discovery techniques deserve serious consideration and can be tested appropriately in the states.

To sum up, any solution to the crisis in liability insurance must include reform of our tort law system. This administration has studied the problem and advanced a number of recommendations for reform that it considers sensible and appropriate. And, I should add that while developments in our tort law have given rise to a significant problem in insurance, our efforts will be consistent with principles of federalism. While some federal legislation may be required, particularly in the area of product liability, which is a problem essentially national in character, as well as in federal contracts and federal tort liability, we do not anticipate recommending wholesale federal regulation. We prefer to see state governments and state courts weigh some of the alternatives we have presented and any others they deem appropriate. The answer, we believe, lies largely with the implementation of remedies carefully and cooperatively selected by the legislators, judges and bar associations of the individual states.

Let me leave you with food for thought. On a recent "60 Minutes" segment, Harry Reasoner interviewed the manager of a ladder manufacturing company, Bernie Kline. Asked about product liability, Mr. Kline said, "Every time we manufacture a ladder we're manufacturing a potential lawsuit." Lynn Ladder Company currently has 23 lawsuits pending against them.

When Reasoner asked Mr. Kline what kind of suits he had lost, Mr. Kline answered, and I quote: "We lost a suit last year -- a fellow was shingling a barn, put up a ladder...in a manure pile. The temperature was 20 degrees. When he was working in that area two days later the temperature was 40 degrees. The ladder slipped and the poor fellow, unfortunately, hurt his ankle. And we were sued. Unfortunately, we didn't warn him about the viscosity of horse manure. So that's our classic -- 300,000 dollars."

I am sure the viscosity of both court decisions and legislative discussion on the subject of tort liability will be high in the future. The report of our working group will provide an excellent basis for informed consideration and ultimately for constructive action.

Thank you.