104TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPT. 104–64 Part 1

# COMMON SENSE LEGAL STANDARDS REFORM ACT OF 1995

MARCH 2, 1995.—Ordered to be printed

Mr. HYDE, from the Committee on the Judiciary, submitted the following

## R E P O R T

together with

## DISSENTING VIEWS

[To accompany H.R. 956]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 956) to establish legal standards and procedures for product liability litigation, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Common Sense Legal Standards Reform Act of 1995".

# TITLE I—PRODUCT LIABILITY REFORM

**SECTION 101. SHORT TITLE.**

This title may be cited as the "Common Sense Product Liability Reform Act of 1995".

**SEC. 102. FINDINGS AND PURPOSES.**

(a) FINDINGS.—The Congress finds that—

(1) the manufacture and distribution of goods in interstate commerce is to a large extent a national activity which affects national interests in a variety of important ways;

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(2) in recent years, the free flow of products in interstate commerce has been increasingly burdened by product liability law;

(3) as a result of this burden, consumers have been adversely affected through the withdrawal of products and producers from the national market, and from excessive liability costs passed on to them through higher prices;

(4) the rules of product liability law in recent years have evolved rapidly and inconsistently within and among the several States, such that the body of product liability law prevailing in this nation today is complex, contradictory, and uncertain;

(5) the unpredictability of product liability awards and doctrines are inequitable to both plaintiffs and defendants and have added considerably to the high cost of liability insurance, making it difficult for producers and insurers to protect their liability with any degree of confidence;

(6) the recent explosive growth in product liability actions and punitive damage awards jeopardizes the financial well-being of many industries, and is a particular threat to the viability of the nation's small businesses;

(7) the extraordinary costs of the product liability system undermine the ability of American industry to compete internationally, and is costing the loss of jobs and productive capital; and

(8) because of the national scope of the manufacture and distribution of most products, it is not possible for the individual states to enact laws that fully and effectively respond to these problems.

(b) PURPOSES.—Based upon the powers contained in Article I, clause 3 of the United States Constitution, the purposes of this title are to promote the free flow of goods in interstate commerce—

(1) by establishing certain uniform legal principles which provide a fair balance between the interests of product users, manufacturers, and product sellers,

(2) by placing reasonable limits on product liability law,

(3) by ensuring that product liability law operates to compensate persons injured by the wrongdoing of others,

(4) by reducing the unacceptable transactions costs and delays which harm both plaintiffs and defendants,

(5) by allocating responsibility for harm to those in the best position to prevent such harm, and

(6) by establishing greater predictability in product liability actions.

**SEC. 103. FEDERAL CAUSE OF ACTION PRECLUDED.**

The district courts of the United States shall not have jurisdiction pursuant to this title based on section 1331 or 1337 of title 28, United States Code.

**SEC. 104. APPLICABILITY AND PREEMPTION.**

(a) PREEMPTION.—This title governs any product liability action brought in any State or Federal court, on any theory for harm caused by a product. A civil action brought for commercial loss shall be governed only by applicable commercial or contract law.

(b) RELATIONSHIP TO STATE LAW.—This title supersedes State law only to the extent that State law applies to an issue covered by this title. Any issue that is not governed by this title shall be governed by otherwise applicable State or Federal law.

**SEC. 105. LIABILITY RULES APPLICABLE TO PRODUCT SELLERS.**

(a) GENERAL RULE.—Except as provided in subsection (b), in any product liability action, a product seller other than a manufacturer shall be liable to a claimant only if the claimant establishes that—

(1)(A) the product which allegedly caused the harm complained of was sold by the product seller; (B) the product seller failed to exercise reasonable care with respect to the product; and (C) such failure to exercise reasonable care was a proximate cause of the claimant's harm; or

(2)(A) the product seller made an express warranty applicable to the product which allegedly caused the harm complained of, independent of any express warranty made by a manufacturer as to the same product; (B) the product failed to conform to the warranty; and (C) the failure of the product to conform to the warranty caused the claimant's harm; or

(3) the product seller engaged in intentional wrongdoing as determined under applicable State law and such intentional wrongdoing was a proximate cause of the harm complained of by the claimant.

For purposes of paragraph (1)(B), a product seller shall not be considered to have failed to exercise reasonable care with respect to the product based upon an alleged failure to inspect a product where there was no reasonable opportunity to inspect

the product in a manner which would, in the exercise of reasonable care, have revealed the aspect of the product which allegedly caused the claimant's harm.

(b) EXCEPTION.—In a product liability action, a product seller shall be liable for harm to the claimant caused by such product as if the product seller were the manufacturer of such product if—

(1) the manufacturer is not subject to service of process under the laws of any State in which the action might have been brought; or

(2) at any point before or after entry of judgment, the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

**SEC. 106. DEFENSE BASED ON CLAIMANT'S USE OF INTOXICATING ALCOHOL OR DRUGS.**

(a) GENERAL RULE.—In any product liability action, it shall be a complete defense to such action if—

(1) the claimant was intoxicated or was under the influence of intoxicating alcohol or any drug when the accident or other event which resulted in such claimant's harm occurred; and

(2) the claimant, as a result of the influence of the alcohol or drug, was more than 50 percent responsible for such accident or other event.

(b) CONSTRUCTION.—For purposes of subsection (a)—

(1) the determination of whether a person was intoxicated or was under the influence of intoxicating alcohol or any drug shall be made pursuant to applicable State law; and

(2) the term "drug" means any controlled substance as defined in the Controlled Substances Act (21 U.S.C. 802(6)) that has been taken by the claimant other than in accordance with the terms of a lawfully issued prescription.

**SEC. 107. MISUSE OR ALTERATION.**

(a) GENERAL RULE.—Except as provided in subsection (c), in a product liability action, the damages for which a manufacturer or product seller is otherwise liable under State law shall be reduced by the percentage of responsibility for the claimant's harm attributable to misuse or alteration of a product by any person if the manufacturer or product seller establishes by a preponderance of the evidence that such percentage of the claimant's harm was proximately caused by—

(1) a use or alteration of a product in violation of, or contrary to, the manufacturer's or product seller's express warnings or instructions if the warnings or instructions are adequate as determined pursuant to applicable State law, or

(2) a use or alteration of a product involving a risk of harm which was known or should have been known by the ordinary person who uses or consumes the product with the knowledge common to the class of persons who used or would be reasonably anticipated to use the product.

(b) STATE LAW.—Notwithstanding section 104(b) of this Act, subsection (a) supersedes State law concerning misuse or alteration of a product only to the extent that State law is inconsistent.

(c) WORKPLACE INJURY.—Notwithstanding subsection (a), the damage for which a manufacturer or product seller is otherwise liable under State law shall not be reduced by the percentage of responsibility for the claimant's harm attributable to misuse or alteration of the product by the claimant's employer or any co-employee who is immune from suit by the claimant pursuant to the State law applicable to workplace injuries.

**SEC. 108. SEVERAL LIABILITY FOR NONECONOMIC LOSS.**

In any product liability action, the liability of each defendant for noneconomic loss shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic loss attributable to such defendant in direct proportion to such defendant's proportionate share of fault or responsibility for the claimant's harm, as determined by the trier of fact.

**SEC. 109. STATUTE OF REPOSE.**

A product liability action shall be barred unless the complaint is served and filed within 15 years after the time of delivery of the product. For the purposes of this section, the term "time of delivery" means the time when a product is delivered to its first purchaser or lessee who was not involved in the business of manufacturing or selling such product or using it as a component part of another product to be sold. This section applies only if the harm caused by a product did not include chronic illness. This section does not affect the limitations period established by the General Aviation Revitalization Act of 1994. This section does not bar a product liability action involving a manufacturer or product seller who made an express warranty in writing as to the safety of the specific product involved which was longer than 15 years.

**SEC. 110. FOREIGN-MADE PRODUCTS.**

This title shall not apply to a product liability action involving a product or component part of a product, manufactured outside the United States, unless the manufacturer of such product or component part has appointed an agent in the United States for service of process from anywhere in the United States.

**SEC. 111. DEFINITIONS.**

As used in this title:

(1) The term ''claimant'' means any person who brings a product liability action and any person on whose behalf such an action is brought. If such an action is brought through or on behalf of an estate, the term includes the claimant's decedent. If such action is brought through or on behalf of a minor or incompetent, the term includes the claimant's legal guardian.

(2) The term ''commercial loss'' means any loss of or damage to a product itself incurred in the course of the ongoing business enterprise consisting of providing goods or services for compensation.

(3) The term ''economic loss'' means any pecuniary loss resulting from harm (including the loss of earnings, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(4) The term ''harm'' means any physical injury, illness, disease, or death or damage to property caused by a product. The term does not include commercial loss, or loss or damage to a product itself.

(5) The term ''manufacturer'' means—

(A) any person who is engaged in a business to produce, create, make, or construct any product (or component part of a product) and who (i) designs or formulates the product (or component part of the product), (ii) has engaged another person to design or formulate the product (or component part of the product), or (iii) uses the design or formulation of the product developed by another person;

(B) a product seller, but only with respect to those aspects of a product (or component part of a product) which are created or affected when, before placing the product in the stream of commerce, the product seller produces, creates, makes, or constructs and designs or formulates, or has engaged another person to design or formulate, an aspect of a product (or component part of a product) made by another; or

(C) any product seller not described in subparagraph (B) which holds itself out as a manufacturer to the user of the product.

(6) The term ''noneconomic loss'' means subjective, nonmonetary loss resulting from harm, including pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation.

(7) The term ''person'' means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity).

(8)(A) The term ''product'' means any object, substance, mixture, or raw material in a gaseous, liquid, or solid state—

(i) which is capable of delivery itself or as an assembled whole, in a mixed or combined state, or as a component part or ingredient;

(ii) which is produced for introduction into trade or commerce;

(iii) which has intrinsic economic value; and

(iv) which is intended for sale or lease to persons for commercial or personal use.

(B) The term does not include—

(i) human tissue, human organs, human blood, and human blood products; or

(ii) electricity, water delivered by a utility, natural gas, or steam.

(9) The term ''product liability action'' means a civil action brought on any theory for harm caused by a product or product use.

(10) The term ''product seller'' means a person who, in the course of a business conducted for that purpose, sells, distributes, rents, leases, prepares, blends, packages, labels a product or is otherwise involved in placing a product in the stream of commerce, or who installs, repairs, or maintains the harm-causing aspect of a product. The term does not include—

(A) a seller or lessor of real property;

(B) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or

(C) any person who—

(i) acts in only a financial capacity with respect to the sale of a product; or

(ii) leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.

(11) The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States, or any political subdivision of any of the foregoing.

# TITLE II—PUNITIVE DAMAGES REFORM

**SEC. 201. PUNITIVE DAMAGES.**

(a) GENERAL RULE.—Punitive damages may, to the extent permitted by applicable State law, be awarded in any civil action for harm in any Federal or State court against a defendant if the claimant establishes by clear and convincing evidence that the harm suffered was result of conduct—

(1) specifically intended to cause harm, or

(2) conduct manifesting a conscious, flagrant indifference to the rights of others.

(b) PROPORTIONAL AWARDS.—The amount of punitive damages that may be awarded to a claimant in any civil action subject to this title shall not exceed 3 times the amount of damages awarded to the claimant for the economic loss on which the claimant's action is based, or $250,000, whichever is greater. The requirements of this subsection shall be applied by the court and shall not be disclosed to the jury.

(c) APPLICABILITY AND PREEMPTION.—Except as provided in section 301, this title shall apply to any civil action brought in any Federal or State court on any theory where punitive damages are sought. This title does not create a cause of action for punitive damages in any jurisdiction that does not authorize such actions.

(d) BIFURCATION AT EITHER PARTY'S REQUEST.—At the request of either party, the trier of fact shall consider in a separate proceeding whether punitive damages are to be awarded and the amount of such award. If a separate proceeding is requested, evidence relevant only to the claim of punitive damages, as determined by applicable State law, shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded.

**SEC. 202. DEFINITIONS.**

As used in this title:

(1) The term "claimant" means any person who brings a civil action and any person on whose behalf such an action is brought; if such action is brought through or on behalf of an estate, the term includes the claimant's decedent and if such action is brought through or on behalf of a minor or incompetent, the term includes the claimant's legal guardian.

(2) The term "clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. The level of proof required to satisfy such standard is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt.

(3) The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities), to the extent recovery for such loss is allowed under applicable State law.

(4) The term "harm" means any legally cognizable wrong or injury for which punitive damages may be imposed.

(5) The term "punitive damages" means damages awarded against any person or entity to punish or deter such person or entity, or others, from engaging in similar behavior in the future.

(6) The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States, or any political subdivision of any of the foregoing.

# TITLE III—EFFECT ON OTHER LAW; EFFECTIVE DATE

**SEC. 301. EFFECT ON OTHER LAW.**

Nothing in title I or II shall be construed to—

(1) waive or affect any defense of sovereign immunity asserted by any State under any law;

(2) supersede any Federal law;

(3) waive or affect any defense of sovereign immunity asserted by the United States;

(4) affect the applicability of any provision of chapter 97 of title 28, United States Code;

(5) preempt State choice-of-law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation;

(6) affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground of inconvenient forum; or

(7) supersede any Federal law that prescribes a specific regimen for punitive damages.

**SEC. 302. EFFECTIVE DATE.**

Titles I and II shall apply with respect to actions which are commenced after the date of the enactment of this Act.

## EXPLANATION OF AMENDMENT

Inasmuch as H.R. 956 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

## SUMMARY AND PURPOSE

H.R. 956, the "Common Sense Legal Standards Reform Act of 1995," is designed to promote fairness in product liability litigation and set appropriate parameters for judicial consideration of punitive damage claims. Our excessive reliance today on a patchwork of conflicting state statutes and common law relating to allegations of product defects excessively burdens interstate commerce, discourages innovation, exacerbates liability insurance costs, compromises American competitiveness, and forces Americans to pay higher price. The absence of federal standards and limitations also proves harmful to businesses and consumers in the range of cases involving punitive damages, not just in product related litigation. Both product liability reform and punitive damages reform implicate important Federal interests that necessitate action on the national level.

Title I on product liability reform includes four particularly important features. First, product sellers receive important, reasonable protections against liability for manufacturer error in situations where claimants can collect from manufacturers. Second, a claimant whose alcohol or drug use is the primary cause of an accident appropriately is barred from recovering from those with lesser degrees of responsibility. Third, a defendant's liability for noneconomic damages is limited, in the interest of fairness, to its own proportionate share of fault or responsibility. Fourth, most product liability actions are barred from being brought more than 15 years after the product's delivery.

Title II on punitive damages reform addresses burden of proof, proportionality of awards, and bifurcation of proceedings. Egregious

conduct must be linked to the harm suffered by clear and convincing evidence. Punitive damages, awarded to punish or deter rather than compensate, are limited to three times the economic loss or $250,000, whichever is greater. At either party's request, consideration of such damages occurs in a separate proceeding.

H.R. 956, in summary, addresses two major problematic areas in tort law that are not amenable to solutions at the local level. Businesses and consumers pay an unacceptably heavy price for congressional inaction.

## HEARING

The "Common Sense Legal Reforms Act of 1995" (H.R. 10), an important part of the Contract with America, was introduced by Judiciary Committee Chairman Henry Hyde on the opening day of the 104th Congress (January 4, 1995). Section 103 of that bill focused on product liability reform. On February 13, 1995, the full Committee on the Judiciary held a hearing on "Product Liability and Civil Justice Reform." The Committee received testimony on section 103 of H.R. 10 and on broader civil justice and tort reform issues. The Committee heard testimony from the following eight witnesses: Charles E. Gilbert, Jr., President, Cincinnati Gilbert Machine Tool Company; Larry S. Stewart, President, American Trial Lawyers Association of America; Richard K. Willard, Partner, Steptoe and Johnson; Robert B. Creamer, Executive Director, Illinois Citizen Action, representing Citizen Action; Peter A. Chevalier, Vice President, Medtronic Inc.; Thomas A. Eaton, Professor of Law, University of Georgia; Patrick J. Head, Vice President and General Counsel, FMC Corporation; and William T. Waren, Federal Affairs Counsel, National Conference of State Legislatures.

On February 15, Chairman Hyde (for himself and Mr. Hoke) introduced H.R. 956, the "Common Sense Legal Standards Reform Act of 1995." H.R. 956, modeled on section 103 of H.R. 10, also reflected insights from the Committee hearing.

## THE APPROPRIATENESS OF FEDERAL LEGISLATION

Article I, section 8 of the Constitution gives Congress the power to regulate interstate and foreign commerce. In an age when consumers generally do not reside in the states where products they purchase are manufactured, the power of Congress under Article I, section 8 to enact legislation on the subject of product liability cannot be subject to serious question. Even the sale of goods within the states that manufacture them have major effects on interstate commerce because of the pervasiveness of national markets. In addition, the current treatment of product liability claims in state and federal courts undermines the ability of the United States to compete with other countries. The Committee on the Judiciary, sensitive to the adverse effects of widely varying rules on product liability and the need for uniform protections, recommends action clearly authorized by the Constitution.

The adverse impacts of punitive damage awards on interstate and foreign commerce are not limited to product liability cases—and for that reason Congress' authority under the Commerce Clause clearly permits addressing punitive damages reform in its broader context. In that connection, Richard K. Willard, a former

Assistant Attorney General for the Civil Division, pointed out in testimony before our Committee.

> All manner of service providers—in areas such as telecommunications, banking, transportation, insurance, and professional services such as medical care, legal representation, and social services—are tied in to the national economy, and excessive awards collected against them increase the costs of purchasing those services nationwide, not just in the state of the judgment.

He goes on to explain: "What happens in one state affects the whole nation, and this 'punitive tax' hits average Americans and small businesses worst of all."

The fact that some cases involving punitive damages appear to relate to intrastate activity does not undercut Congress' Commerce Clause authority because the availability of virtually unlimited punitive damage awards in some American jurisdictions creates a hostile legal environment that discourages business activity. The opinion of the Supreme Court in *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.* is instructive:

> [T]his Court has made clear that the commerce power extends not only to "the use of channels of interstate or foreign commerce" and to "protection of the instrumentalities of interstate commerce * * * or persons or things in commerce," but also to "activities affecting commerce." *Perz* v. *United States,* 402 U.S. 146, 150 (1971). As we explained in *Fry* v. *United States,* 421 U.S. 542, 547 (1975), "[e]ven activity that is purely intrastate in character may be regulated by Congress, when the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." 452 U.S. 264 at 277 (1981).

Section 5 of the Fourteenth Amendment provides an independent constitutional ground for Congressional legislation limiting awards for punitive damages. Congress is given the authority, under section 5, "to enforce, by appropriate legislation" the provisions of the Fourteenth Amendment—which include a proscription on state deprivations of "life, liberty, or property, without due process of law." As Richard Willard points out in testimony presented to the Judiciary Committee: "Just as Congress has the authority under the Enforcement Clause of the Fifteenth Amendment to adopt voting rights laws that go beyond what the courts have required, so too the Enforcement Clause of the Fourteenth Amendment empowers Congress to adopt rules to ensure that proceedings in state courts do not infringe on the constitutional right to Due Process."

*Policy considerations*

The development of national and international markets necessitates a federal response to product liability issues—a response that may have been inappropriate at earlier times when Americans relied primarily on locally produced goods. There is a need for a significant measure of national uniformity in the law of product liability to free American businesses from the excessive costs and

uncertainties associated with the potential application of widely diverging state laws.

One of the problems with relying on individual states to develop product liability law us bias in favor of the in-state purchaser and against the out-of-state manufacturer. Such bias, unfortunately, proves harmful to consumers nationwide because manufacturers are forced to pass on their added costs. The efforts of states to protect their own residents, in other words, prove counterproductive in a national marketplace—a fact that underscores the need for substantial uniformity in product liability law. Justice Richard Neely of the West Virginia Supreme Court writes as follows in his book entitled "The Product Liability Mess":

> The fact of the matter is that as a state judge I can do nothing to make the overall law more sensitive to concerns of national economic policy. The best I can do, and I do it all the time, is make sure that my own state's residents get more money out of Michigan than Michigan residents get out of us. This I call the competitive race to the bottom and it is at the heart of the structural problems presented by uncoordinated local jurisdictions. [pages 71–72)

He goes on to observe: "Product liability law is, perhaps, the purest example of how lack of coordination among separate, independent state courts leads ineluctably to legal results that are unfavorable to business. * * *" [page 73] It is the consumer that ends up paying for the added costs.

In addressing reform of punitive damages, the Committee determined that the adverse impacts of excessive awards on interstate and foreign commerce extend to a wide range of cases that are not limited to situations involving products. As Richard Willard testified before our Committee, "[a]ll manner of service providers * * * are tied to the national economy." The fact that punitive damages are not provided for under the laws of many countries—punitive damages, for example, "are basically unknown in Continental Europe" [1]—underscores how the potential for virtually unlimited punitive damage awards in the United States, with the enormous risks involved, places our country at a significant competitive disadvantage.

The Committee acted to reform punitive damages not only to ameliorate adverse effects on interstate and foreign commerce but also to protect due process rights. Punitive damages are designed to punish an individual entity for wrongdoing or deter such conduct rather than to compensate an injured party. Allowing a jury to exercise virtually unlimited discretion to impose punishment or deterrence in the form of punitive damages is no more justifiable than allowing a criminal court to disregard the severity of an offense in its sentencing role. The issue of what limits to impose on punitive damage awards is a legislative policy decision that is within the competence of Congress.

The constitutional and policy justifications for this legislation are sound. H.R. 956 addresses problems that require national solutions. Although many Members of our Committee believe strongly

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[1] Unpublished paper on European Union prepared by Theresa Papademetriou, Senior Legal Specialist, Legal Research Directorate, Law Library of Congress, February, 1995.

in states' rights, we recognize that some problems are national in nature and cannot be solved by diverse state legislation, however well intended.

NEED FOR THIS LEGISLATION

Testimony at the February 13th hearing documented the need for this legislation. Richard Willard, who served as Assistant Attorney General in charge of the Civil Division of the Department of Justice from 1983 to 1988, described litigation reform as "a necessary part of any effort to make real changes in the way government works" and characterized "the increasing number of unpredictable and outrageous claims for punitive damages" as the "most urgent problem in civil litigation." Patrick J. Head, with his extensive experience as a corporate counsel and his wide knowledge of product liability, referred to the "widespread consensus that American businesses need to improve their competitiveness by reducing costs, by expanding the markets for their products, and by pursuing innovation." He noted that "[o]ur current product liability system undermines all of these efforts." Peter Chevalier, a researcher, innovator, and medical device industry executive, observed that "the current product liability system in the U.S. is having a severely detrimental effect on the ability of medical device manufacturers to innovate in this country." He pointed out that the "environment for innovation and research has become so harsh" that his company "recently moved the headquarters * * * the business unit responsible for managing the development of breakthrough technologies, from our Minneapolis Corporate Center to the Netherlands." Charles E. Gilbert, Jr., a former Chairman of the Board of the Association for Manufacturing Technology, commented that "[u]nder the current product liability system, everyone is hurt—the manufacturer; the injured claimants, who may be left uncompensated if all the manufacturers' resources are depleted due to the lack of available, affordable insurance; and the public, who is denied access to products." He went on to state: "Innovation and job creation are hampered by fear of the unknown. New designs and the new equipment to produce new, safer products represent too high a business risk for many American firms."

The present patchwork of fifty separate state product liability laws and the potential for virtually unlimited punitive damage awards in a wide range of cases are simply costing America too much. Today, we discourage capital investment, dampen job creation, and deny consumers new, safer, and less expensive products. We also misuse the civil justice system to impose disproportionate punishments without basic safeguards.

LIABILITY RULES APPLICABLE TO PRODUCT SELLERS

Section 105 is aimed at restoring legal fairness to product sellers and reducing costs to consumers. In a majority of the states, product sellers are liable for harms caused by a product as if they were the manufacturer, Ultimately, product sellers are held liable in less than five percent of product liability actions; nevertheless, they are drawn into the overwhelming majority of product liability cases. This is because thirty-one states treat product sellers as if they manufactured the product—they are made liable for a manufactur-

er's mistakes.[2] The seller, however, rarely pays the judgment because it is able to show in over ninety-five percent of the cases where any liability is present that the manufacturer is the party who actually caused, and is responsible for, the harm. Based on this showing, the seller gets contribution or indemnity from the manufacturer, and the manufacturer ultimately pays the damages.

The current state of the law generates substantial, unnecessary legal costs. Many product sellers are small wholesalers and retailers. This provision will prevent wasted time and effort for these small businesses and also, wasted expenses on attorneys. These costs are currently passed on to the consumer in the form of unnecessary higher prices for products and services. Thus, this provision also helps consumers by cutting the hidden "litigation tax." It would be much more efficient for the claimant to sue the manufacturer directly and to sue the product seller only if it has done something wrong.

The "Common Sense Legal Standards Reform Act of 1995" will logically remedy this situation. Under the bill, product sellers would no longer be subject to strict liability; they would be liable only for their own negligence or fault, breach of their own warranty, or intentional wrongdoing. Thus, the legislation would eliminate product sellers being needlessly brought into product liability lawsuits.

To protect consumers, there are two key exceptions to the general rule: (1) where a manufacturer cannot be brought into court in the state; or, (2) if a manufacturer lacks the funds to pay a judgment. In these circumstances, the product seller would have to bear responsibility for the manufacturer's conduct. There is a sound social policy behind this provision—it will encourage product sellers to deal with responsible (often domestic) manufacturers who do business in the state and have assets.

*Defense based on claimant's use of intoxicating alcohol or drugs*

In eleven states, people can recover in product liability actions even though a substantial cause of an accident was the fact that the plaintiff was inebriated or under the influence of illegal drugs.[3] The "Common Sense Legal Standards Reform Act of 1995" will put an end to this absurd situation; if the principal cause of an accident is the claimant's abuse of alcohol or illicit drugs, then he or she will no longer be able to recover. The provision is based on a

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[2] Approximately nineteen states have enacted reforms to limit product seller liability for harm caused by a manufacturer's defective product. See. e.g., Colo. Rev. Stat. § 13–21–402 (1991); Del. Code Ann. tit. 18 § 7001 (1989); Ga. Code Ann. § 51–1–11.1 (Michie 1990); Idaho Code § 6–1407 (1989); 735 ILCS 5/2–621 (1992) (formerly Ill. Rev. Stat. ch. 110, ¶ 2–621 (1989); Iowa Code § 613.18 (1993); Kan. Stat. Ann. § 60–3306 (1983), Supp. 1993); Ky. Rev. Stat. Ann. § 411.340 (Michie 1992); La. Rev. Stat. Ann. § 2800.53 (West 1992); Md. Cts. & Jud. Pro. Code Ann. § 5–311. (1982); Minn. Stat. § 544.41 (West 1988); Mo. Rev. Stat. § 537.762 (1988); Neb. Rev. Stat. § 25–21, 181 (1989); N.C. Gen. Stat. § 99B–2 (1989); Ohio Rev. Code Ann. § 2307.78 (Anderson 1991); Tenn. Code Ann. § 29–28–106 (Supp. 1992); Wash. Rev. Code § 7.72.040 (West 1992).

[3] The majority of states have laws which would not permit recovery in this situation. One state, Washington, has enacted a defense similar to the "Common Sense Legal Standards Reform Act of 1995" approach. Six jurisdictions continue to recognize contributory negligence as an absolute defense. Alabama, Maryland, North Carolina, South Carolina, Virginia and Washington, D.C. Thirty-two states have adopted some form of modified comparative fault standard: Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Tennessee, Utah, Vermont, West Virginia, Wisconsin and Wyoming. In eleven states, recovery is allowed even through a substantial cause of the accident was drug or alcohol use.

statute in the State of Washington. Wash. S.B. No. 4630, Sec. 902 (enacted March 10, 1986).

The alcohol/drug defense implements sound public policy. It tells persons that if they are drunk or on drugs and that is the principal cause of an accident, they will not be rewarded through the product liability system. This provision ensures that an individual who impairs his or her ability to act safely should not be able to shift the cost of this risk to a product manufacturer, seller or any other defendant in a product liability case.

The very strong public policy underlying this rule justifies preemption of conflicting state laws—it is a national policy of overriding importance to the American public. Thus, if a state has pure comparative fault as its general rule of tort law, this provision will prevail if a claimant was under the influence of alcohol or any drug and such condition was more than 50 percent responsible for the harm. On the other hand, if a state retains the contributory negligence defense and believes that a person's claim should be barred if the person's fault in any way contributed to his or her harm, this bill is not preemptive. It only addresses situations in which, currently, a person could bring a successful claim when such person was more than 50 percent responsible due to drugs or alcohol.

*Misuse and alteration*

Section 107 represents an important reform. It would assure manufacturers and sellers that they can develop and sell products without undue concern about unknowable and unpredictable liability—liability attributable to claims resulting from the misuse or alteration of their products. The language of the section provides incentives to the manufacturer of a product to provide express warnings or instructions which state law determines to be adequate. Thus, if reasonable care is taken to provide warnings or instructions adequate as a matter of state law, a manufacturer or product seller could reduce damages to the extent it establishes, by a preponderance of the evidence, the percentage of harm caused by failure to heed the express warnings or instructions.

*Several liability for noneconomic loss*

Section 108 introduces uniformity into the law of joint and several liability, as applied in product liability actions by adopting the California rule, which holds that defendants are liable only for their proportionate share of a plaintiff's noneconomic losses. We protect a defendant from being held liable for subjective nonmonetary losses that are attributable to the fault or responsibility of another individual or entity.

The concept of a defendant paying for its own proportionate share of fault or responsibility sounds self-evident to most people. Many states, however, give expression in their law to the principle of joint and several liability which, in its unrestrained form, means that a party with relatively nominal responsibility—perhaps one percent—can be held liable for the fault attributable to others—perhaps 99 percent.

The rule of joint and several liability originally entered the common law to deal with cases in which it was impossible to apportion responsibility for a plaintiff's harm among two or more tortfeasors.

The typical case was one in which several defendants had acted together, "in concert" courts usually said, to cause a single, indivisible injury. The courts held that, in these circumstances, each defendant must be responsible for the total amount of damages resulting from the injury.

Over time, the rule of joint and several liability became the norm in most states, applicable in all cases in which there were two or more defendants. Each defendant was to be severally liable for his or her share of plaintiff's damages and jointly liable, as was each other defendant, for the full amount. The rationale for this extension of the rule was that it increased the probability that a deserving plaintiff would be fully compensated even if one or more of the persons responsible for his or her harm was insolvent or beyond the reach of the court.

The argument that it is better to require a defendant who conduct contributed to the harm in any way to pay all of the damages rather then to deny full recompense to an injured party ignores the harshness of damage awards that are disproportionate to fault or responsibility. The result of the principle of joint and several liability is the litigation imposes severe risk for solvent businesses—often necessitating excessive settlement offers, increasing liability insurance costs, and making goods more expensive for consumers. All of these factors have negative implications for our competitiveness in international markets and our ability to keep enterprise—with all the jobs involved—in the United States.

I recent year, the rule of joint and several liability has been highly criticized. The rule routinely turns lawsuits into searches for peripherally involved persons whose pockets are deep enough to pay these very large awards.

As a result, 33 states have abolished or modified the rule of joint and several liability. They have done so, however, in a great variety of ways and, thereby, have contributed to the already serious problem of inconsistency among the tort laws of the 50 states. In fact, one of the unintended consequences of the state tort reform movement of the 1980s was to dramatically increase the need for uniform federal law governing the liability of manufacturers for harm caused by goods moving in interstate commerce. This is nowhere more true than with respect to joint and several liability.

Section 108 is based upon the reform of joint and several liability adopted by the State of California in 1986 through a popular referendum. (Proposition 51). The effect of this referendum was to abolish joint liability for noneconomic losses: pain and suffering, inconvenience, mental anguish, emotional distress, loss of society, loss of consortium, injury to reputation, humiliation and any similar losses which cannot be objectively quantified in dollar amounts. Defendants were made liable only for their share of these noneconomic losses, as determined by each one's proportionate responsibility for the plaintiff's harm. Section 108 makes this "California rule" the uniform rule in all product liability actions. In a civil action brought on any theory for harm caused by a product, the liability of each defendant for plaintiff's noneconomic damages is several only, and not joint.

In applying this section, the trier of fact will determine the proportion of responsibility of each person responsible for the claim-

ant's harm, without regard to whether or not such person is a party to the action. So, the trier of fact will measure a defendant's share of fault or responsibility for the claimant's loss by reference not simply to those who happen to be fellow defendants in the lawsuit, but to all responsible for plaintiff's harm, including defendants, third-party defendants, settled parties, non-parties and persons or entities that cannot be tried (e.g., bankrupt persons, employers and other immune entities).

In 1992, the California Supreme Court, in a unanimous decision, held that Proposition 51, on which Section 108 is based, could not achieve its purpose unless read this way. *DaFonte* v. *Up-right, Inc.*, 2 Cal. 4th 593, 828 P.2d 140 (1992).

> The statute plainly * * * shields every defendant from any share of noneconomic damages beyond that attributable to his or her own comparative fault. The statute contains no hint that a defendant escapes liability only for non-economic damages attributable to fellow defendants while remaining jointly liable for non-economic damages caused by others. *DaFonte*, 2 Cal. 4th at 602, 828 P. 2d at 145.

The Court went on to hold that the "only reasonable construction" of Proposition 51 is that a defendant's fault must be compared to "all fault responsible for the plaintiff's injuries, not merely that of 'defendant[s]' present in the lawsuit." *DaFonte*, 2 Cal. 4th at 603, 828 P. 2d at 146 (fault apportioned to negligent employer).

A Florida statute also, like Section 108, requires apportionment of fault to each defendant "on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability." Fla. Stat. § 768.81(d). Once again, the state Supreme Court, in *Fabre* v. *Marin*, 623 So. 2d 1182 (1993), concluded that, in the "unambiguous" language of the statute, "the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the [claimant's harm], regardless of whether they have been or could have been joined as defendants." *Fabre*, 623 So. 2d at 1885 (fault apportioned to immune spouse).

Section 108 essentially is a compromise between the principle of joint and several liability—with its disproportionate attendant costs—and the concept of liability limited to degree of fault or responsibility. As a result of section 108, a defendant can only be held liable for noneconomic losses in proportion to its share of the total fault or reponsibility—regardless of whether all who caused the harm are defendants in the case. Liability for economic losses is unaffected by this section, leaving in place, for example, the law of those states which have relieved minimally responsible defendants of joint liability for such losses.

A defendant, however, can continue to be held liable—to the extent authorized by state law—for economic losses that exceed its proportionate share. Thus, an injured party can obtain disproportionate recovery from one defendant for pecuniary losses the plaintiff sustains if state law allows it. This provides plaintiffs with a substantial measure of protection while recognizing—in the treat-

ment of noneconomic damages—the equities of those defendants with limited fault or responsibility.

The distinction this legislation draws between the treatment of economic and noneconomic damages is rooted in principle. We do not impinge on rights a plaintiff may have under state law to fully recoup pecuniary losses because such recompense may be necessary to avoid exacerbating the plaintiff's harm. An individual who cannot recover medical expenses, for example, may be denied access to essential treatment. If lost earnings are not replaced, individuals and families may not have the resources to pay for food and shelter. Bankruptcy is a prospect for many victims of serious injury if financial relief for out-of-pocket expenses is not available. Although there is an element of unfairness in requiring a defendant to pay disproportionately for economic damages—even if other responsible entities lack resources—humane considerations dictate that we not impinge on full recovery of such losses from any liable defendant if allowed in a particular state.

*Statute of repose*

The absence of a uniform statute of repose for product liability cases has resulted in enormous legal costs and staggering potential liability for manufacturers whose products are alleged to cause harm decades after their intended use. In such cases, where witnesses have disappeared or have died, memories have faded, and evidence has been lost, manufacturers are severely disadvantaged in their efforts to defend themselves. Many states have provided statutes of repose, but they vary in length and in their applicability to various products. A uniform statute of repose is needed, in order to provide certainty and finality in commercial transactions.

Section 109 serves the broad public policy goal of finality in commercial transactions by providing that, after 15 years, manufacturers will be protected from having to defend claims other than those for latent illness. There are important considerations favoring statutes of repose:

> After the passage of a reasonable length of time, manufacturers should be free from burdens of disruptive and protracted liability so that they may be able to plan their affairs with a degree of certainty. Statutes of repose promote the public goal of certainty and finality in the administration of commercial transactions by terminating liability at a set time;
>
> Difficulty exists in locating reliable evidence and defending claims many years after a product's manufacture;
>
> Statutes of repose prevent the unfairness that occurs when manufacturers are held liable for goods that have been beyond their control and subject to misuse or alteration for decades;
>
> Statutes of repose are necessary to avoid the possibility of juries unfairly imposing current legal and technological standards on product manufactured many years prior to suit;
>
> Statues of repose are an appropriate response to the current litigation explosion. The pendulum has swung too far towards penalizing defendants even when they have exercised all reasonable care;
>
> Statutes of repose help encourage the kind of innovation needed to make the U.S. strong at home and competitive

abroad. They are necessary to prevent certain manufacturers from being discouraged from producing beneficial goods due to the high cost or unavailability of product liability insurance;

A rational statute of repose provides consumers ample opportunity to discover manufacturing and design defects, while at the same time allowing manufacturers to quantify better their liability exposure;

Statutes of repose allow an injured party to pursue claims against those defendants whose more recent activities (e.g., failure to maintain, improper handling, etc.) more proximately caused the injuries;

Statutes of repose enable companies to make sound business decisions (acquisitions, e.g.) without having to be concerned about exposure for damages and harm incurred decades earlier.

Because of these arguments the Committee concluded there was a need for a uniform statute of repose for product liability actions. After this 15 year period of time, when evidence has been lost and witnesses have died or disappeared, it is disruptive, costly and unfair to burden manufacturers with protracted litigation related to products that have been out of their control for many years.

*Punitive damages*

Federal legislation limiting punitive damages is necessary because excessive punitive damage awards burden interstate and foreign commerce, unfairly penalize defendants out of proportion to injuries sustained, and add needless uncertainty to the litigation process—with the consequence that the settlement value of cases with tenuous liability can be inflated greatly. Businesses and consumers pay an unacceptably heavy price. Efforts to implement punitive damages reform at the state level have proved uneven—leading to widely varying rules across the country.

The United States Supreme Court has recognized that punitive damages awards have "run wild." *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 18 (1991). The problems are not merely anecdotal. A recent study by the Texas Public Policy Foundation found explosive increases in both the frequency of punitive damage awards and their size. From the early 1980s to the early 1990s, the total number of punitive awards in Dallas County, Texas, was 14 times greater and the average award, adjusted for inflation, was 19 times higher. In Harris County (Houston), total awards were up 26 fold and the average award was up eightfold.

Similarly, a 1987 study by the Institute for Civil Justice found that the average punitive damage award in Cook County, Illinois, between 1965 and 1969, was $43,000. Between 1980 and 1984, it was $729,000—an increase of about 1,500 percent or 17 times over 20 years.

In years past, when punitive damage awards were rare, the result in an individual case had little if any national impact. However, the increased frequency and size of these awards are now having a serious impact on all aspects of our society. The Texas Public Policy Foundation study found that punitive damages have a "splash effect," that high punitive awards penalize everyone as risk costs are shifted forward through higher prices to customers;

backward through lower payments to employees, vendors, and investors; and sideways through their insurance mechanisms to other policyholders.

As noted earlier, Richard K. Willard testified before the Committee on February 13, 1995, and emphasized the national implications of excessive punitive damage awards. Mr. Willard noted:

> * * * these awards are not just taxes on the company involved—they are taxes on all of us, in virtually all phases of our lives. What happens in one state affects the whole nation, and their "punitive tax" hits average Americans and small businesses worst of all.

The Supreme Court, in both the *Haslip* case and in *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 St. Ct. 2711 (1993) has indicated that punitive damages in an amount that is highly disproportionate to the level of compensatory damages may violate constitutional due process. In addition, both the American College of Trial Lawyers, in 1989, and the American Law Institute, in 1991, have recommended that the amount of punitive damages be limited to a specified ratio of compensatory damages. However, the Supreme Court has so far refused to establish "a mathematical bright line." H.R. 956 would establish that "bright line."

Limitations on punitive damages do not interfere in any way with the rights of victims to collect compensation in the form of both economic and noneconomic damages for the harm they suffer. The portion of a tort recovery for such pecuniary losses as wages and medical expenses and such intangible, nonmomentary losses as pain and suffering—to cite some examples—is unaffected by punitive damages reform. When Congress decides to limit punitive damages, we are setting parameters on punishment. The principle of proportionality which guides the formulation of punitive damages reform also guides our efforts in the criminal law area.

The "clear and convincing evidence" rule applicable to claims for punitive damages is an intermediate burden of proof that recognizes the quasi-criminal nature of a punitive damages award. The term "clear and convincing evidence" is defined in section 202 as "that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the truth of the allegations sought to be established." It is a higher standard than "preponderance of the evidence" applicable to most civil claims—but a lower standard that "proof beyond a reasonable doubt" applicable in criminal cases. The fact that something may be more probable than not, which generally is sufficient for purposes of establishing a right to compensation, cannot justify imposing punishment. It is offensive to our sense of basic fairness to punish individuals or entities based on a 51 percent likelihood.

The substantive standard for awarding punitive damages is that "the harm suffered was the result of conduct—(1) specifically intended to cause harm, or (2) conduct manifesting a conscious, flagrant indifference to the rights of others." Punitive damages are appropriate to punish or deter deliberate, egregious misconduct but are entirely inappropriate for negligence or carelessness. The potential for compensatory damage awards coupled with marketplace constraints on harmful conduct provide the appropriate incentives

for individuals and entities to adhere to reasonable standards of care and also avoid defects in the design of products.

The proportionality principle applicable to punitive damage awards is expressed in the ceiling of three times the economic loss or $250,000, whichever is greater, this formula, it must be emphasized again, does not detract from a claimant's ability to obtain noneconomic damages for intangible losses such as pain and suffering. A plaintiff who collects punitive damages essentially gets a windfall that Congress can limit without impinging on compensatory damages.

Three times the amount of economic loss can result in very sizeable penalties and operate as a powerful deterrent to misconduct. In cases where the economic loss is not substantial, punitive damages nevertheless can total a quarter of a million dollars—itself a sizeable sum. If a number of people are harmed by conduct meriting punitive damages, the potential awards—in the aggregate—may possibly exceed the individual ceiling substantially.

Section 201 also provides for a separate proceeding to determine punitive damages at the request of either party in a case. Bifurcation serves the important purpose of shielding a jury from the prejudice that may result if evidence relevant only to punitive damages is presented before liability is determined. A defendant's "deep pocket"—which may be relevant to deterring egregious misconduct—is irrelevant on the issue of liability. A jury, however, may confront difficulty in disregarding such information pursuant to judicial instructions. The prudent course is to authorize separating the compensatory and punitive damages phases of a case in the interest of enduring that decisions are based on relevant evidence. Bifurcation also prevents confusion relating to the burden of proof—since the general rule in civil cases is a preponderance of the evidence to assess liability, in contrast to the "clear and convincing" standard often favored—and incorporated in H.R. 956—for proof leading to a punitive damages award.

*Committee consideration*

On February 23, 1995 the Committee met in open session and ordered favorably reported the bill H.R. 956, as amended, by a rollcall vote of 21–11, a quorum being present.

*Vote of the committee*

The following rollcalls took place during Committee deliberations on H.R. 956 (February 22 and February 23, 1995).

1. A motion by Mr. Hyde to table the motion (offered by Mr. Conyers) to postpone Committee consideration of H.R. 956 until March 1. The motion to table the Conyers motion was approved by a rollcall vote of 20–15.

| AYES | NAYS |
|---|---|
| Mr. Hyde | Mr. Conyers |
| Mr. Moorhead | Mrs. Schroeder |
| Mr. Sensenbrenner | Mr. Frank |
| Mr. McCollum | Mr. Schumer |
| Mr. Gekas | Mr. Berman |
| Mr. Coble | Mr. Boucher |

Mr. Smith
Mr. Schiff
Mr. Gallegly
Mr. Canady
Mr. Inglis
Mr. Goodlatte
Mr. Buyer
Mr. Hoke
Mr. Bono
Mr. Heineman
Mr. Bryant of Tennessee
Mr. Chabot
Mr. Flanagan
Mr. Barr

Mr. Bryant of Texas
Mr. Reed
Mr. Nadler
Mr. Scott
Mr. Watt
Mr. Becerra
Mr. Serrano
Ms. Lofgren
Ms. Jackson-Lee

2. An amendment by Mrs. Schroeder to strike the section allowing several liability for non-economic losses and requiring that non-economic losses be included in the formula for calculating punitive damages. The Schroeder amendment was defeated by a rollcall vote of 14–18.[1]

[1] Both Ms. Jackson Lee and Mr. Schumer stated for the record that, had they been present, they would have voted "aye" on the Schroeder amendment.

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. Hyde |
| Mrs. Schroeder | Mr. Moorhead |
| Mr. Frank | Mr. Sensenbrenner |
| Mr. Berman | Mr. McCollum |
| Mr. Boucher | Mr. Gekas |
| Mr. Reed | Mr. Coble |
| Mr. Nadler | Mr. Smith |
| Mr. Scott | Mr. Gallegly |
| Mr. Watt | Mr. Canady |
| Mr. Becerra | Mr. Inglis |
| Mr. Serrano | Mr. Goodlatte |
| Ms. Lofgren | Mr. Hoke |
| Mr. Schiff | Mr. Bono |
| Mr. Buyer | Mr. Heineman |
| | Mr. Bryant of Tennessee |
| | Mr. Chabot |
| | Mr. Flanagan |
| | Mr. Barr |

3. An amendment by Mrs. Schroeder to the definition of "product" to exclude any product causing harm, injury, illness, or disease affecting reproductive organs or causing fetal malformation or demise. This amendment was defeated by a 13–20 rollcall vote.[1]

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. Hyde |
| Mrs. Schroeder | Mr. Moorhead |
| Mr. Frank | Mr. Sensenbrenner |
| Mr. Schumer | Mr. McCollum |
| Mr. Berman | Mr. Gekas |
| Mr. Boucher | Mr. Coble |
| Mr. Bryant of Texas | Mr. Smith |

Mr. Nadler
Mr. Scott
Mr. Watt
Mr. Serrano
Ms. Lofgren
Ms. Jackson-Lee

Mr. Schiff
Mr. Gallegly
Mr. Canady
Mr. Inglis
Mr. Goodlatte
Mr. Buyer
Mr. Hoke
Mr. Bono
Mr. Heineman
Mr. Bryant of Tennessee
Mr. Chabot
Mr. Flanagan
Mr. Barr

[1] Mr. Reed and Mr. Becerra stated for the record that, had they been present, they would have voted "aye" on the Schroeder amendment.

4. An amendment by Mr. Barr to add findings and purposes to title I. The Barr amendment was adopted by a rollcall vote of 19–13.

| AYES | NAYS |
|---|---|
| Mr. Hyde | Mr. Conyers |
| Mr. Moorhead | Mr. Frank |
| Mr. Sensenbrenner | Mr. Schumer |
| Mr. McCollum | Mr. Berman |
| Mr. Gekas | Mr. Bryant of Texas |
| Mr. Smith | Mr. Reed |
| Mr. Schiff | Mr. Nadler |
| Mr. Gallegly | Mr. Scott |
| Mr. Canady | Mr. Watt |
| Mr. Inglis | Mr. Becerra |
| Mr. Goodlatte | Mr. Serrano |
| Mr. Buyer | Ms. Lofgren |
| Mr. Hoke | Ms. Jackson-Lee |
| Mr. Bono | |
| Mr. Heineman | |
| Mr. Bryant of Tennessee | |
| Mr. Chabot | |
| Mr. Flanagan | |
| Mr. Barr | |

5. An amendment by Mr. McCollum to raise the cap on punitive damages to a maximum of one million dollars. The McCollum amendment was defeated by a 14–15 rollcall vote.

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. Hyde |
| Mr. Schumer | Mr. Moorhead |
| Mr. Berman | Mr. Sensenbrenner |
| Mr. Boucher | Mr. Gekas |
| Mr. Reed | Mr. Gallegly |
| Mr. Nadler | Mr. Canady |
| Mr. Scott | Mr. Inglis |
| Mr. Watt | Mr. Goodlatte |
| Ms. Lofgren | Mr. Hoke |
| Ms. Jackson-Lee | Mr. Bono |

| | |
|---|---|
| Mr. McCollum | Mr. Heineman |
| Mr. Coble | Mr. Bryant of Tennessee |
| Mr. Schiff | Mr. Chabot |
| Mr. Buyer | Mr. Flanagan |
| | Mr. Barr |

6. An amendment by Mr. McCollum providing a defense against punitive damages for a manufacturer or product seller of drugs, where a drug, devise or biologic was (1) subject to premarket approval by the FDA or (2) is generally recognized as safe and effective pursuant to FDA regulations. The McCollum amendment was defeated by a 10–21 rollcall vote.

| AYES | NAYS |
|---|---|
| Mr. McCollum | Mr. Hyde |
| Mr. Coble | Mr. Moorhead |
| Mr. Smith | Mr. Gekas |
| Mr. Schiff | Mr. Gallegly |
| Mr. Buyer | Mr. Canady |
| Mr. Heineman | Mr. Inglis |
| Mr. Bryant of Tennessee | Mr. Goodlatte |
| Mr. Chabot | Mr. Hoke |
| Mr. Schumer | Mr. Bono |
| Mr. Boucher | Mr. Flanagan |
| | Mr. Barr |
| | Mr. Conyers |
| | Mr. Berman |
| | Mr. Bryant of Texas |
| | Mr. Reed |
| | Mr. Nadler |
| | Mr. Scott |
| | Mr. Watt |
| | Mr. Becerra |
| | Ms. Lofgren |
| | Ms. Jackson-Lee |

7. An amendment by Mr. Schumer providing for a sunset of titles I and II, five years after the date of enactment, unless the Secretary of Commerce certifies not less than 90 days prior to that date, that liability insurance rates have declined not less than ten percent. The Schumer amendment was defeated by a 12–18 rollcall vote.

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. Hyde |
| Mrs. Schroeder | Mr. Moorhead |
| Mr. Schumer | Mr. Sensenbrenner |
| Mr. Berman | Mr. McCollum |
| Mr. Boucher | Mr. Gekas |
| Mr. Reed | Mr. Coble |
| Mr. Nadler | Mr. Smith |
| Mr. Scott | Mr. Schiff |
| Mr. Watt | Mr. Canady |
| Mr. Becerra | Mr. Inglis |

| | |
|---|---|
| Ms. Lofgren | Mr. Goodlatte |
| Ms. Jackson-Lee | Mr. Buyer |
| | Mr. Bono |
| | Mr. Heineman |
| | Mr. Bryant of Tennessee |
| | Mr. Chabot |
| | Mr. Flanagan |
| | Mr. Barr |

8. An amendment by Mr. Bryant of Tennessee to reduce the damages in a product liability action by the percentage of responsiblity for the harm to the claimant, that is attributable to a misuse or alteration of the product. The Bryant amendment was adopted by a 21–12 rollcall vote.

| AYES | NAYS |
|---|---|
| Mr. Hyde | Mr. Conyers |
| Mr. Moorhead | Mr. Berman |
| Mr. Sensenbrenner | Mr. Bryant of Texas |
| Mr. McCollum | Mr. Reed |
| Mr. Gekas | Mr. Nadler |
| Mr. Coble | Mr. Scott |
| Mr. Smith | Mr. Watt |
| Mr. Schiff | Mr. Becerra |
| Mr. Gallegly | Mr. Serrano |
| Mr. Canady | Ms. Lofgren |
| Mr. Inglis | Ms. Jackson-Lee |
| Mr. Buyer | Mr. Goodlatte |
| Mr. Hoke | |
| Mr. Bono | |
| Mr. Heineman | |
| Mr. Bryant of Tennessee | |
| Mr. Chabot | |
| Mr. Flanagan | |
| Mr. Barr | |
| Mr. Schumer | |
| Mr. Boucher | |

9. Amendment by Mr. Berman providing several liability only for defendants found less than 20% responsible for the claimant's harm. The Berman amendment was defeated by a 14–19 rollcall vote.

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. Hyde |
| Mr. Schumer | Mr. Moorhead |
| Mr. Berman | Mr. Sensenbrenner |
| Mr. Boucher | Mr. McCollum |
| Mr. Bryant of Texas | Mr. Gekas |
| Mr. Reed | Mr. Coble |
| Mr. Nadler | Mr. Smith |
| Mr. Scott | Mr. Gallegly |
| Mr. Watt | Mr. Canady |
| Mr. Becerra | Mr. Inglis |
| Mr. Serrano | Mr. Goodlatte |
| Ms. Lofgren | Mr. Buyer |

| | |
|---|---|
| Ms. Jackson-Lee | Mr. Hoke |
| Mr. Schiff | Mr. Bono |
| | Mr. Heineman |
| | Mr. Bryant of Tennessee |
| | Mr. Chabot |
| | Mr. Flanagan |
| | Mr. Barr |

10. An amendment by Mr. Schiff to amend the cap on punitive damages, so that it would be three times both economic and non-economic damages. The Schiff amendment was defeated by a 16–17 rollcall vote.

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. Hyde |
| Mr. Schumer | Mr. Moorhead |
| Mr. Berman | Mr. Sensenbrenner |
| Mr. Boucher | Mr. McCollum |
| Mr. Bryant | Mr. Gekas |
| Mr. Reed | Mr. Smith |
| Mr. Nadler | Mr. Gallegly |
| Mr. Scott | Mr. Canady |
| Mr. Watt | Mr. Inglis |
| Mr. Becerra | Mr. Goodlatte |
| Mr. Serrano | Mr. Hoke |
| Ms. Lofgren | Mr. Bono |
| Ms. Jackson-Lee | Mr. Heineman |
| Mr. Coble | Mr. Bryant of Tennessee |
| Mr. Schiff | Mr. Chabot |
| Mr. Buyer | Mr. Flanagan |
| | Mr. Barr |

11. An amendment by Mr. Nadler limiting the cap on punitive damages to actions in federal court. The Nadler amendment was defeated by a rollcall vote of 14–17.

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. Hyde |
| Mr. Schumer | Mr. Moorhead |
| Mr. Boucher | Mr. Sensenbrenner |
| Mr. Bryant of Texas | Mr. McCollum |
| Mr. Reed | Mr. Gekas |
| Mr. Nadler | Mr. Gallegly |
| Mr. Scott | Mr. Canady |
| Mr. Watt | Mr. Inglis |
| Mr. Becerra | Mr. Goodlatte |
| Mr. Serrano | Mr. Buyer |
| Ms. Lofgren | Mr. Hoke |
| Ms. Jackson-Lee | Mr. Bono |
| Mr. Coble | Mr. Heineman |
| Mr. Schiff | Mr. Bryant of Tennessee |
| | Mr. Chabot |
| | Mr. Flanagan |
| | Mr. Barr |

12. An amendment by Mr. Watt to remove the clear and convincing evidence standard from the bill. The Watt amendment was defeated by a rollcall vote of 10–19.

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. Hyde |
| Mr. Bryant of Texas | Mr. Moorhead |
| Mr. Reed | Mr. Sensenbrenner |
| Mr. Nadler | Mr. McCollum |
| Mr. Scott | Mr. Coble |
| Mr. Watt | Mr. Schiff |
| Mr. Becerra | Mr. Gallegly |
| Mr. Serrano | Mr. Canady |
| Ms. Lofgren | Mr. Inglis |
| Ms. Jackson-Lee | Mr. Goodlatte |
| | Mr. Buyer |
| | Mr. Hoke |
| | Mr. Bono |
| | Mr. Heineman |
| | Mr. Bryant of Tennessee |
| | Mr. Chabot |
| | Mr. Flanagan |
| | Mr. Barr |
| | Mr. Schumer |

13. An amendment by Mr. Watt to make a product seller liable for "reckless conduct". The Watt amendment was defeated by a rollcall vote of 13–16.

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. Hyde |
| Mr. Schumer | Mr. Moorhead |
| Mr. Bryant of Texas | Mr. Sensenbrenner |
| Mr. Reed | Mr. McCollum |
| Mr. Nadler | Mr. Gallegly |
| Mr. Scott | Mr. Canady |
| Mr. Watt | Mr. Inglis |
| Mr. Becerra | Mr. Goodlatte |
| Mr. Serrano | Mr. Buyer |
| Ms. Lofgren | Mr. Hoke |
| Ms. Jackson-Lee | Mr. Bono |
| Mr. Coble | Mr. Heineman |
| Mr. Schiff | Mr. Bryant of Tennessee |
| | Mr. Chabot |
| | Mr. Flanagan |
| | Mr. Barr |

14. An amendment by Mr. Nadler providing for an exception to the statute of repose where a manufacturer or seller is alleged to have known of a defect in a product but concealed, misrepresented or failed to warn of the defect. The Nadler amendment was defeated on a 10–19 rollcall vote.[1]

| AYES | NAYS |
|---|---|
| Mr. Conyers | Mr. Hyde |
| Mr. Schumer | Mr. Moorhead |

Mr. Bryant of Texas
Mr. Reed
Mr. Nadler
Mr. Scott
Mr. Watt
Mr. Serrano
Ms. Lofgren
Ms. Jackson-Lee

Mr. Sensenbrenner
Mr. McCollum
Mr. Gekas
Mr. Coble
Mr. Schiff
Mr. Gallegly
Mr. Canady
Mr. Inglis
Mr. Goodlatte
Mr. Buyer
Mr. Hoke
Mr. Bono
Mr. Heineman
Mr. Bryant of Tennessee
Mr. Chabot
Mr. Flanagan
Mr. Barr

[1] The original version of the transcript contained a number of errors in the vote count on this amendment. THe transcript did not correspond with the records of the Committee tally clerks, nor did it correspond with the notes of the official reporter. Subsequently, the Official Reporters to House Committees acknowledged in writing that errors did occur in the original version of the transcript and a corrected version was provided to the Committee. The Committee is satisfied that this is an accurate statement of the vote on this amendment.

15. The motion to favorably report H.R. 956, as amended, to the House. The motion was agreed to by a rollcall vote of 21–11.[1]

| AYES | NAYS |
|---|---|
| Mr. Hyde | Mr. Conyers |
| Mr. Moorhead | Mrs. Schroeder |
| Mr. Sensenbrenner | Mr. Schumer |
| Mr. McCollum | Mr. Berman |
| Mr. Gekas | Mr. Bryant of Texas |
| Mr. Coble | Mr. Nadler |
| Mr. Smith | Mr. Scott |
| Mr. Schiff | Mr. Watt |
| Mr. Gallegly | Mr. Serrano |
| Mr. Canady | Ms. Lofgren |
| Mr. Inglis | Ms. Jackson-Lee |
| Mr. Goodlatte | |
| Mr. Buyer | |
| Mr. Hoke | |
| Mr. Bono | |
| Mr. Heineman | |
| Mr. Bryant of Tennessee | |
| Mr. Chabot | |
| Mr. Flanagan | |
| Mr. Barr | |
| Mr. Boucher | |

[1] Had Mr. Reed been present he would have voted “aye”. Had Mr. Becerra been present he would have noted “nay”.

SECTION-BY-SECTION ANALYSIS

## TITLE I—PRODUCT LIABILITY REFORM

*Section 101—Short title*

This section states that title I may be cited as the "Common Sense Product Liability Reform Act of 1995."

*Section 102—Findings and purposes*

Section 102(a) consists of a detailed congressional statement of findings delineating how current law relating to product liability burdens interstate and foreign commerce. The statement points to consumers "adversely affected through the withdrawal of products and producers from the national market, and from excessive liability costs passed on to them through higher prices," industries put at risk by "the recent explosive growth in product liability actions and punitive damage awards," and the "ability of American industry to compete internationally" undermined by "extraordinary costs of the product liability system."

Section 102(b) states that the purposes of title I are to promote the free flow of goods in interstate commerce. The means of accomplishing this objective, emphasized in the statement, are (1) uniform legal principles, (2) reasonable limits, (3) compensation for injured persons, (4) reduction of transaction costs and delays, (5) better allocation of responsibility, and (6) greater predictability.

*Section 103—Federal cause of action precluded*

This section makes it clear that this title does not create a new basis for federal court jurisdiction, nor does the bill create a new federal cause of action for product liability claims. Specifically, title I does not establish federal question jurisdiction under 28 U.S.C. § 1331, nor does it create new jurisdiction based upon acts of Congress regulating commerce under 28 U.S.C. § 1337. The resolution of product liability claims is left to the state courts or federal courts that currently have jurisdiction over those claims. Thus, product liability actions will continue to be handled primarily in the state courts. Existing federal court jurisdiction based upon diversity of citizenship—28 U.S.C. § 1332—is retained.

*Section 104—Applicability and preemption*

Section 104(a) provides that this title governs any product liability action brought in any State or Federal court on any theory for harm caused by a product. Consistent with the definitions of "commercial loss" in section 111(2) and the definition of "harm" in section 111(4), section 104 states that a civil action for commercial loss is not a product liability action subject to title I, but rather is governed by applicable commercial or contract law.

Thus, insofar as a claim is for a "commercial loss" as defined in section 111(2), state or federal commercial or contract law will continue to control. Section 111(2) defines a "commercial loss" as the "loss of or damage to a product itself." Where the claim is solely for loss of or damage to the product itself, the modern trend of the law is to permit only the non-tort claims to proceed under commercial or contract law. The United States Supreme Court noted in

*East River S.S. Corp.* v. *Transamerica Delaval*, 476 U.S. 858, 871 (1986), that "[w]hen a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong." See also *Bocre Leasing Corp.* v. *General Motors*, _____ N.Y.2d _____ (Jan. 10, 1995).

Typically, state courts have interpreted the statute of limitations in such cases to run from the date of sale, regardless of when the plaintiff "discovered" the existence of a claim. See, e.g., Uniform Commercial Code § 2–725(1). Thus, the spectre of a long period of uncertainty about the possibility of the filing of future claims does not exist in this area of the law.

Consistent with *East River S.S. Corp.*, in using the terms "shall be governed only by applicable commercial or contract law" in section 104, the intention is that the Uniform Commercial Code, which has been adopted in nearly all states, or other state or federal contract law would apply. It is not intended that the term "commercial" be construed so broadly as to include tort concepts such as negligence or strict liability.

Section 104(b) states that this title supersedes state law only to the extent that it applies a new rule of law with respect to a particular subject (i.e., legal issue) covered by this title. For example, the bill does not include a defense based upon assumption of risk. So, if state law allows such a defense, it would remain the law of the state. An alternative example, however, would be the provision (section 105) contained in H.R. 956 dealing with product seller liability. Since the bill addresses that subject, it would preempt state law on that specific subject. When the bill covers a specific topic, however, preemption would occur only when the bill addresses a specific subject within that topic. For example, section 108 of H.R. 956 provides several liability (i.e. liability in proportion to fault) for noneconomic loss. Thus, it leaves the States free to make their own determinations about the apportionment of economic damages.

*Section 105—Liability rules applicable to product sellers*

Section 105 deals with the liability of product sellers and specifies when they are responsible for harm caused by a product. Generally, under subsection (a) product sellers are liable only for their own negligence, their failure to comply with their own express warranty, or their intentional wrongdoing. Under subsection (b), product sellers are liable for a manufacturer's errors only if that manufacturer cannot be made subject to the jurisdiction of the court or is unable to pay a judgment.

Specially, subsection (a) states that a product seller (other than a manufacturer) shall be liable to a claimant, only if the claimant establishes that (1) the product seller failed to exercise reasonable care with respect to the product that allegedly caused the harm and such failure was the proximate cause of the claimant's harm; (2) the product seller made an express warranty applicable to the product, independent of any express warranty made by the manufacturer with respect to the same product, and the product failed to conform to the seller's express warranty and that failure caused the claimant's harm; or (3) the product seller engaged in intentional wrongdoing (as determined under applicable state law) and

such intentional wrongdoing was the proximate cause of the claimant's harm.

Subsection (b) defines those narrow circumstances where a product seller remains liable as if it were a manufacturer. Specifically, those fact situations are when the manufacturer responsible is not subject to service of process under the laws of any state where the action might have been brought or if the court determines that the claimant would not be able to enforce a judgment against the manufacturer.

During Committee consideration of H.R. 956, an amendment was adopted to subsection (b)(2). That amendment ("if at any point before or after entry of judgment,") was added to the exception language which makes a product seller liable as if it were a manufacturer in instances where the claimant is unable to enforce a judgment against the manufacturer. This amendment does not override state laws regarding time limits for commencing an action against or conditionally dismissing a non-manufacturer, or on levying judgments, or other statutes related to the certifying and collection of judgments. The amendment was offered and accepted in an effort to ensure that reasonable time limits set by the states on these issues would not be cut off by the mere entry of judgment under this provision.

*Section 106—Defense based on claimant's use of intoxicating alcohol or drugs*

Section 106(a) establishes a complete defense in product liability actions if the claimant was under the influence of intoxicating alcohol or any drug when the accident or other event which resulted in the claimant's harm occurred, and such condition was more than 50 percent responsible for the accident or other event which resulted in the claimant's harm. Section 106(b) provides that state law will determine whether a person was intoxicated or under the influence of intoxicating alcohol or any drug.

*Section 107—Misuse or alteration*

Section 107(a) would reduce the damages otherwise recoverable against the manufacturer or seller of a product by the percentage of responsibility for the claimant's harm "attributable to misuse or alteration of a product by any person." The burden to establish the percentage of responsibility for the claimant's harm would lie with the manufacturer or product seller. Section 107(a)(1) provides incentives to the manufacturer of a product to provide express warnings or instructions which state law determines to be adequate. Section 107(a)(2) allows a manufacturer or product seller to reduce its damages if it can show by a preponderance of the evidence that the claimant's harm was proximately caused by a use or alteration which an ordinary person (one who uses or consumes the product) knew, or should have known, involved a risk of harm. Under section 107(c), no reduction would be permitted if the misuse or alteration were attributable to the claimant's employer or coemployees and they are immune from suit pursuant to the state law applicable to workplace injuries. This provision, however, does not affect the full application of section 108 as to several liability for noneconomic loss.

*Section 108—Several liability for non-economic loss*

This section would eliminate joint and several liability for noneconomic losses, but would retain it—to the extent available under the law of a particular state—for economic losses. Specifically, this provision states that each defendant in a product liability action shall be severally liable for the claimant's noneconomic losses (i.e., such as damages for pain and suffering, emotional distress, etc.). Thus, each defendant will be liable for noneconomic damages in proportion to its share of the fault for the claimant's harm. The proportionality provisions apply to all wrongdoers. Each defendant will remain jointly and severally liable for economic losses (i.e., lost wages, medical expenses, etc.), if applicable law so provides. Both "economic loss" and "noneconomic loss" are defined terms in section 111(3) and section 111(6) of the bill, respectively.

*Section 109—Statute of Repose*

Section 109 provides a uniform "statute of repose" for product liability actions—a time limit of fifteen years on litigation involving products. It states that a product liability action shall be barred unless the complaint is filed and served within fifteen years after the time of delivery of the product, meaning the time when a product is delivered to its first purchaser or lessee who was not involved in the business of manufacturing or selling the product or using it as a component part of another product to be sold. In providing that a product liability action shall be "barred" unless the complaint is filed and served within 15 years after the time of delivery, the term "barred" is intended to mean what it says. Thus, the section precludes the application of judge-made exceptions which have crept into the interpretation of statutes of limitations and repose, such as doctrines of tolling, estoppel and concealment. Were such doctrines to be applied to section 109, it would defeat the very purpose of having a single, easily understood period within which all product liability claims are to be brought.

This provision does not apply to claims involving "chronic illness", nor does it affect the eighteen year statute of repose ("limitation period") for general aviation aircraft established by the General Aviation Revitalization Act of 1994 (Public Law 103–298). The Committee intends the term "chronic illness" to mean a physical illness, the evidence of which does not ordinarily appear or manifest itself less than 15 years after exposure to the product. So, a person would not know for significant, extended period of time that they are ill—such as with asbestosis. Consequential effects of an acute harm caused by a product are not intended to be covered by the term "chronic illness."

During Committee consideration, an amendment was adopted to the statute of repose section providing that "(t)his section does not bar a product liability action involving a manufacturer or product seller who made an express warranty in writing as to the safety of the specific product involved which was longer than 15 years." So, where, prior to a sale, a manufacturer or product seller has expressly warranted in writing that a specific product will be safe for a period in excess of 15 years, the statute of repose will have no application during the life of the warranty. In such an instance the manufacturer or product seller has freely made a promise to the

customer in order to induce the sale and should be held accountable during the full life of the promise. For this exception to apply, however, the warranty must be (a) "express"; (b) "in writing"; (c) "as to the safety"; (d) "of the specific product"; and (e) address a period of time "longer than 15 years".

Thus, statements such as the product is a "good product", "works well" or is "problem-free" are not expressed warranties "as to the *safety*" of the specific product. Such statements speak only to general product attributes and, and therefore, are not warranties as to safety. Further, in order for an express warranty to speak to future performance for a period of time "longer than 15 years" there must be explicit language in the writing so stating. General, vague or imprecise terms such as "durable", "long lasting" or "permanent" will not qualify as a warranty "longer than 15 years".

*Section 110—Foreign-made products*

This section states that title I shall not apply to a product liability action involving a product or component part of a product, manufactured outside the United States, unless the foreign manufacturer has appointed an agent in the United States to receive service of process from anywhere in the United States.

*Section III—Definitions*

Section III defines various terms used in title I. They are summarized or discussed here out of alphabetical order to place them in a thematic context.

A "product liability action" [section 111(9)] is brought by or on behalf of a "claimant" [section 111(1)] on any theory for "harm" [section 111(4)] caused by a "product" [section 111(8)] or product use. H.R. 956's definitions of product liability action and other terms in section 111 are not intended to expand in any way the application of strict liability in tort. "Claimant" embraces "person[s]" [section 111(7)]—a broad range of individuals and entities. "Harm" is product caused physical injury, illness, disease, death, or property damage but excludes "commercial loss" [section 101(2)]—loss or damage to a product itself. "Commercial loss" is limited to "loss of or damage to a product itself incurred in the course of the ongoing business enterprise consisting of providing goods or services for compensation."

"Product" is broadly defined to include items "capable of delivery itself or as an assembled whole, in a mixed or combined state, or as a component part or ingredient" that are "produced for introduction into trade or commerce", possess "intrinsic economic value", and are "intended for sale or lease". Tissue, organs, blood, and blood products—that are human in origin—as well as electricity, utility delivered water, natural gas, and steam are explicitly excluded from the product definition.

"Economic loss" [section 101(3)] is measurable pecuniary loss in contrast to the subjective, nonmonetary nature of "noneconomic loss" [section 101(6)].

H.R. 956 provides a "product seller" [sec. 111(10)] with limited protection from liability for product defects if the seller does not also qualify as a manufacturer. A product seller is involved in plac-

ing a product in the stream of commerce or engages in installation, repair, or maintenance of the harm causing aspect of a product.

Individuals and entities with businesses involving leasing or renting products to others are considered product sellers under title I of H.R. 956. Consequently, civil actions against a product lessor or renter for harm caused by a permissive user of that product are deemed to be a product liability action as that term is defined in the bill. For example, any law of any state that permits a claimant, absent a showing of negligence on the part of the vehicle owner, to pursue a claim against the owner of a rented or leased motor vehicle for harm caused by a permissive user of that vehicle would be preempted by title I of the bill. Therefore, a civil action against the lessor or renter of a product for harm caused by the permissive use of that product would be considered a product liability action.

A "manufacturer" [section 111(5)] is "engaged in a business to produce, create, make, or construct any product (or component part of the product)." Under limited circumstances, a product seller can be considered a manufacturer and therefore rendered ineligible for seller related limitations on liability. These circumstances may arise when a seller (1) "produces, creates, makes, or constructs and designs or formulates, or has engaged another person to design or formulate, an aspect of a product (or component part of a product) made by another", or (2) "holds itself out as a manufacturer" to the product user.

The term "state" [section 111(11)] appears in the bill primarily in the context of references to State law. "State" is used in the broad sense to include not only 50 states but also the District of Columbia, U.S. territories and possessions, and political subdivisions of the foregoing.

## TITLE II—PUNITIVE DAMAGES REFORM

### *Section 201—Punitive damages*

Subsection (a) provides that punitive damages may be awarded in any civil action in any Federal or State court if the claimant establishes by "clear and convincing evidence" that the harm suffered was the result of conduct: (1) specifically intended to cause the harm; or (2) manifesting a conscious, flagrant indifference to the rights of others. There must be an awareness that the conduct was likely to result in the harm complained of—not merely an act of negligence or a good faith error. The clear and convincing evidence standard is now the law in twenty-four states. This language is modeled after a proposal by the American College of Trial Lawyers (ACTL).

Section 201(b) is intended to ensure that punitive damages will be awarded in proportion to the degree of harm caused by the product. Punitive damages may be awarded up to ("shall not exceed") three times the amount awarded to the claimant for economic loss, or $250,000, whichever is greater. The alternative monetary ceiling of $250,000 assures that, where there are comparatively modest economic losses but particularly egregious conduct, a quarter of a million dollars in punitive damages may be awarded. The "shall not exceed" language in subsection (b) makes it clear that juries are free to award less than three times economic loss.

Subsection (c) states that, except as provided in section 301, this title shall apply to any civil action brought in a federal or state court on any theory where punitive damages are sought. This title does not create a cause of action for punitive damages in any state that does not permit such actions.

Section 201(d) allows either party the option to obtain a separate proceeding on the issue of whether punitive damages should be awarded. Thus, a trial would be divided into segments. The first would address compensatory damages, including non-economic losses. The second would deal with punitive damages. Bifurcation allows the jury to more easily separate the burden of proof required for basic liability (i.e., proof by a preponderance of the evidence) from that required for an award of punitive damages (clear and convincing evidence). It also prevents evidence that is relevant only to the issue of punitive damages from prejudicing the determination of liability for compensatory damages.

Section 202 contains the definitions for title II of the bill. The definition of "claimant" is essentially identical to that contained in title I, except that it refers to "civil actions" rather than "product liability action".

The term "clear and convincing evidence" is defined as that "measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established." The definition makes it clear that this level of proof is more than a "preponderance of the evidence" but less than that required in a criminal case ("beyond a reasonable doubt").

The definitions of "economic loss" and "state" are identical to those contained in title I. "Harm" is defined to mean "any legally cognizable wrong or injury" for which punitive damages may be awarded.

## TITLE III—EFFECT ON OTHER LAW; EFFECTIVE DATE

### *Section 301—Effect on other law*

This section lists a number of laws and legal defenses that are not superseded or affected by the bill. The bill does not waive or affect the defense of sovereign immunity of any state or of the United States. Furthermore, nothing in the bill shall be construed to supersede any federal law. The legislation does not affect any provision of the Foreign Sovereign Immunities Act of 1976. The bill does not preempt state choice-of-law rules with respect to claims brought by a foreign nation or a foreign citizen. Nor does the bill supersede any Federal law that specifically allows punitive damage awards, such as the illegal wiretapping statute (18 U.S.C. § 2520) or title VII of the Civil Rights Act of 1964, as amended.

### *Section 302—Effective date*

This effective date section states that the provision of title I and title II apply to actions commenced after the date of enactment.

## COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings

and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 956, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, February 23, 1995.*

Hon. HENRY J. HYDE,
*Chairman, Committee on the Judiciary,*
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 956, the Common Sense Product Liability Reform Act of 1995, as ordered reported by the House Committee on the Judiciary on February 22, 1995. CBO estimates that enacting H.R. 956 would not result in any significant cost to the federal government. Because enactment of H.R. 956 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

This bill would set new standards for federal and state product liability cases and would limit the amount of punitive damages that may be awarded to a plaintiff to three times the plaintiff's economic award or $250,000, whichever would be larger. The new standards included in H.R. 956 would address when a product seller is liable for damages, when a defense based on a claimant's use of drugs or alcohol could be used, and how several liability for noneconomic loss would be determined. In addition, the bill would prohibit the filing of law suits unless the complaint is filed within 15 years after the injured party received the product.

Because product liability cases are handled primarily in state courts, CBO estimates that enacting this bill would have no significant budgetary impact on federal courts. State courts could initially incur additional costs if potential plaintiffs attempted to file their cases before the existing state laws are superseded. In the longer run, increasing savings could be realized to the extent that enacting this bill would discourage potential plaintiffs from filing product liability suits. Based on information from the National Center

for State Courts, CBO estimates that the amount of such costs or savings would be significant.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

JAMES L. BLUM
(For Robert D. Reischauer, Director).

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 956 will have no significant inflationary impact on prices and costs in the national economy.

## DISSENTING VIEWS

### INTRODUCTION

The undersigned reject the legislation on product liability adopted by the Committee. Not only has the Republican majority gone off-message from their "Contract with America" in totally preempting the States, but they have also dealt a vicious blow to the middle and working classes—supposedly the constituency most receptive to the Contract's provisions. Powerful forces, indeed, must have exerted great sway on the Contract's drafters to produce a bill that runs so counter to the themes and values supposedly embodied in their new charter of liberty.

For the same Members who have used the first 50 days of the 104th Congress to castigate the Federal government's unwanted entrance into so many areas of State and local life, H.R. 956 must be considered their equivalent of a "Great Society" piece of legislation to invade State prerogatives in the area of tort law. Since the earlier origins of the Republic, the States—and not the Federal government—have provided the means for victims of injury and tortious harm to sue to collect compensation for their economic damages as well as their non-economic damages. In particularly egregious—though highly limited—areas of harm where the victim suffered as a result of flagrant or intentional actions by the offender, punitive damages have also been awarded as a deterrent to future misconduct.

And while understandably, a small group in corporate America have always despised State law protections for citizens against defective products, they generally have fared well under the State system because of their resource advantage in the litigation. It was only in the past 15 years that powerful coalitions banded together to attack the tort system developed in State law by seeking a uniform set of so-called Federal "reforms" aimed at severely reducing their liability, and even the number of suits that could be brought against them. They were not successful. Because States themselves have been sensitive to striking the right litigation balance between their injured citizens and businesses who generate jobs and commerce within their borders, Congress in the past decade has properly deferred to the States and rejected well-funded assault after assault on the State system. In doing so, the Congress was aided by the empirical evidence, which bears out the fact that the balance struck by the States has indeed been evenhanded, and in no way an inducement to a tort litigation explosion alleged by the proponents of such legislation. Moreover, the state system of tort law has had an added benefit; for it has lead to self-regulation and self-discipline by manufacturers of products without the need for Federal bureaucracy to oversee every aspect of the production of every product.

Now, however, the coalition seeking radical surgery of the State laws have drafted their wish list, handed it off to the new majority, who, while swallowing hard in going against the sacred themes of their Contract, nevertheless have stepped forward to push this composite of radical change, captioned "civil justice reform". No one can dare accuse the majority of being half-hearted or incomplete in the effort. For, H.R. 956 eviscerates product liability on all conceptual fronts: it restricts the number of cases that can be filed; it eliminates many potential defendants from cases; it places a cap on punitive damages, but a cap with discriminates in favor of the very rich; and it causes great inconvenience to plaintiffs by often requiring them to go to another jurisdiction to file their case.

As will be explained below, the legislation is radical. It is not reform; it is a wholesale revolution brought solely in the name of corporate defendants. Victims of civil harm—unlike victims of crime—are not considered relevant to the debate. The new majority is thus embarked on a journey of taking an area of law that works well to protect all Americans, and substituting a new Federal system that will only work well for a class of businesses troubled by having to defend against suits for defective products brought by families on behalf of housewives and children. That is a disgrace, and will be recognized as such once the American people learn just what the abstract-sounding "civil justice reform" is all about. We intend to make sure that they do.

## I. THE STATE TORT LAW SYSTEM

As part of our civil justice system, tort law in general and product liability law in particular, have evolved over the centuries to reflect societal values and needs. Because it is "common law"—that is, judge-made law—state tort law has been "molded, refined, examined and changed in the crucible of actual decision, and handed down from generation to generation in the form of reported cases. In theory, the judges [draw] their decisions from existing principles of law; ultimately, these principles [reflect] the living values, attitudes and ethical ideas of the people."[1]

The tort system provides a number of benefits to society:

1. It compensates injured victims;
2. It deters misconduct that may cause injury and punishes wrongdoers who inflict injury;
3. It prevents injury by removing dangerous products and practices from the marketplace;
4. It forces public disclosure of information on dangerous products and practices otherwise kept secret;
5. It expands public health and safety rights in a world of increasingly complex technology.[3]

The product liability system accomplishes its purposes of effecting behavior through the forces of the private market. Since often time dangerous and reckless activity is not prohibited by any governmental regulation, the States have chosen to rely upon the "invisible hand" of the tort system to alter behavior so as to prevent such conduct.

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[1] Lawrence M. Friedman, A History of American Law 17 (1973).
[3] Joan Claybrook, Consumers and Tort Law, 34 Fed. B. News & J 127 (1987).

If the courts move too far and upset the liability rules which carefully balance the interests of injured citizens and wrongdoers, history indicates that they and the Sate legislatures are able to respond through the necessary adjustments. For example, during the 1980's, a majority of State elected to adopt a number of product liability reforms involving areas such as punitive damages, joint and several liability, and strict liability.[4] In the great tradition of being the "laboratories of democracy," each State has thus been able to calibrate its own tort system and consider and adopt reforms based on the particular needs of its citizens and its desire to attract commerce. Restatements of law issued by legal scholars can serve as a catalyst to nationwide uniformity when and if the States consider it to be in their own best interests.

## II. PROCEDURAL HISTORY OF H.R. 956

Although the Judiciary Committee has not previously elected to consider broadscale product liability reform, H.R. 956 has been rushed through the Committee on the most expedited possible basis. The Committee scheduled only a single day (February 13) of hearings on the issue of product liability reforms and on that occasion limited its review to only a single panel of witnesses and only a single round of questions.[5] Although the hearing's focus was on product liability reforms included in H.R. 10, on February 23, the Committee marked up H.R. 956, legislation far broader in scope than H.R. 10. The Committee markup was scheduled on a mere two days notice and occurred without the benefit of any subcommittee consideration.

## III. EMPIRICAL EVIDENCE

In recent years, a great wealth of empirical data has been produced relating to the causes of litigation in general, and product liability cases in particular. Surprisingly, none of this data in anyway supports the conclusion that Congress needs to take action to limit or minimize the impact of product liability cases or the size of punitive damages as H.R. 956 does. This lack of empirical foundation was acknowledged at the Judiciary Committee's recent hearing through the following colloquy between Rep. Bryant (D-TX) and proponents of product liability reforms:

> Mr. BRYANT. [When] you ask the question, is there any comprehensive objective study [or] body of evidence that indicates they have a [product liability] crisis? And they [proponents of product liability reform] always begin to disassemble and you can't get an answer to it.
>
> * * * * * * *
>
> [to the panel] If you have got an objective, comprehensive study to talk about, I want to hear about it.

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[4] See e.g., Thomas Koenig and Michael Rustad, "The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reforms on Punitive Damages in Products Liability," 16 The Justice System Journal 21 (1993); Henry Cohen and La Vonne Mangan, "Fifty-State surveys on Selected Products Liability Issues," CRS Reports for Congress 95–300A, February 24, 1995.

[5] Product Liability and Civil Justice Reform: Hearings before the House Comm. on the Judiciary, 104th Cong. 1st Sess (February 13, 1995) [hereinafter, "1995 Product Liability Hearings"].

> Mr. HEAD [Vice President and General Counsel of FMC Corporation]. There is no such thing. The State courts don't capture the data. Marc Galenter of Wisconsin said it right, pick a number, any number: So folks are picking numbers as it suits them. The States will eventually capture it, but today it isn't captured in any useful form.[6]

Review of the empirical evidence clearly supports a number of conclusions: first, that product liability cases have not "exploded" and that they constitute a very small portion of the civil justice system; second that where cases are brought they do not result in excessive awards and only infrequently result in punitive damages; third that product liability cases do not negatively impact American competitiveness; and fourth that the real crisis in the courts stems from the increasing number of commercial disputes between businesses.

*Product liability cases have not "exploded," rather, they constitute a very small portion of the civil justice system*

The most recent and exhaustive empirical studies demonstrate that product liability filings make up an extremely small percentage of all litigation, and that most types of product liability cases are on the decline. The most recent analysis of State court cases by the National Center for State Courts finds that product liability cases are only 4% of all Tort filings. Tort filings, in turn, are only 9% of all civil filings, and civil filings are only 27% of all filings. This means that product liability filings represent a mere 36 hundredths of a percentage point of the civil caseload and 97 thousandths of a percentage point of the total caseload in the state courts.[7] Moreover, in recent years the number of product liability filings has been steadily declining.[8] Indeed, the more salient problem is the failure of product liability victims to sufficiently utilize the tort compensation system. According to a recent Rand Corporation study, only ten percent of people who are injured ever use the tort system to seek compensation for their injuries.[9]

*Where cases are brought they do not result in excessive awards and only infrequently result in punitive damages*

When cases are brought, the evidence indicates that juries do not show any particular bias toward the victim. To the contrary, a 1994 study by Jury Verdicts Publications found that plaintiffs in product liability suits won only 41 percent of the cases, and the plaintiff re-

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[6] 1995 Product Liability Hearings, Transcript at 82 and 85.

[7] State Court Caseload Statistics: 1992 Annual Report 15–16, (March 1994), National Center for State Courts: Williamsburg, VA. This data is not an aberration. In 1991, the Center for State Courts found that product liability lawsuits also represented only 4 percent of all tort cases and that tort cases represent only 10 percent of all civil cases. See also, 1995 Product Liability Hearings, Statement of Professor Thomas A. Eaton (summarizing findings concerning tort litigation in selected Georgia counties).

[8] Since 1990, the national total of state tort filings has decreased by 2 percent. State Court Caseload Statistics: 1992 Annual Report, (March 1994), National Center for State Courts: Williamsburg, VA.

Excluding the unique case of asbestos, the number of product liability filings in federal court declined 36 percent from 1985 to 1991. See Marc Galanter, "Pick A Number, Any Number" Legal Times (February 17, 1992); See also Terrence Dungworth, Product Liability and Business Sector: Litigation Trends in Federal Courts, Institute for Civil Justice (1988).

[9] Hensler, et al., "Compensation for Accidental Injuries in the United States," Rand Corporation, Institute for Civil Justice (1991), Executive Summary at 18.

covery rate has been on the decline since 1989 when it peaked at 55 percent.[10] When verdicts are awarded, they are neither "erratic" nor "excessive" as proponents of H.R. 956 claim; rather awards for compensatory damages have been shown to be fair and rationale. For example, a recent General Accounting Office study of product liability verdicts concluded that the size of damage awards generally correlated to the severity of the injury suffered and the amount of the actual economic loss.[11] If anything, the evidence bears out that jurors are increasingly skeptical about the legitimacy of tort victims' claims and are hesitant to provide large damage awards.[12] And recent studies have found a national "pro-defendant" trend that has resulted in far fewer large tort awards.[13]

Punitive damage verdicts have also been found to be exceedingly rare. A 1992 study by Professor Michael Rustad of the Suffolk University Law School (termed by the Supreme Court as "the most exhaustive study" of product liability awards[14]) uncovered just 353 punitive awards in product liability cases between 1965 and 1990.[15] Excluding the 91 asbestos cases, there were an average of only 11 such awards reviewed each year in the entire country. Furthermore, over half of the punitive damage awards in the study were either reduced in settlement negotiations or reduced or reversed by an appellate court.[16]

And in the few cases where punitive damages are awarded, they have been found to play a vital role in deterring businesses from consciously developing and placing dangerous products into the marketplace.[17] For instance, more than 75 percent of the non-asbestos defendants subject to punitive awards between 1965 and 1990 took some sort of post-litigation step toward making their products safe, usually in the form of fortified warnings, product withdrawals or added safety features.[18] Similarly, a manufacturer of children's pajamas, the fabric of which was 100 percent untreated cotton flannelette, stopped making the highly flammable garment in 1980 only after a Minnesota jury ordered the company to pay $1 million in punitive damages to a 4-year old girl who had been badly burned when her pajama top caught fire.[19]

*Product liability cases do not negatively impact american competitiveness*

Proponents of H.R. 956 have further argued that federalizing State tort law is necessary to protect the competitive position of American manufacturers. This contention is also not supported by

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[10] "Current Trends in Products Liability," Jury Verdict Research Series at 26 (I.R.P. Publications 1994).

[11] U.S. General Accounting Office, "Product Liability: Verdicts and Case Resolution in Five States." GAO/HRD–89–99 (September 29, 1989).

[12] Valerie Hans and William Lofquist, "Jurors Judgments in Business Liability in Tort Cases," 26 Law & Society Review 85 (1992).

[13] Theodore Eisenberg & James Henderson, "Inside the Quiet Revolution in Products Liability," 39 UCLA L. Rev. 731 (1992).

[14] See *Honda Motor Co., Ltd.* v. *Oberg,* 114 S.Ct. 2331, 2341, n. 11 (1994).

[15] Michael Rustad, "In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data," 78 Iowa L. Rev. 1, 38 (1992).

[16] Id. at 55.

[17] See Michael Rustad, "Demystifying the Functions of Punitive Damages in Products Liability: An Empirical Study of a Quarter Century of Verdicts" (1991).

[18] See 1995 Products Liability Hearings, Statement of Larry Stewart, President of the Association of Trial Lawyers of America, at 7.

[19] Id. at 7–8.

any empirical data, as competitiveness studies and industry surveys indicate that liability costs represent less than one percent of the total costs for most industries.[20] And even this small cost should not be considered a unique "liability tax" on U.S. businesses, since all companies, both domestic and foreign, are subject to the same liability laws for harmful products sold in this country. In actuality, many countries with less "threatening" tort systems often impose substantially greater taxes and governmental safety regulation that result in compliance costs far greater than that imposed by the American system.[21] Moreover, the current product liability system can be seen as providing an innovation incentive for businesses to develop safe products, as American products have developed an international reputation for safety and reliability.[22]

*The real crisis in the courts stems from the increasing number of commercial disputes between businesses*

H.R. 956 makes no effort to address the true litigation explosion in America which is between businesses themselves. Contract cases, which make up only one type of all commercial litigation, have increased by 232 percent over the period 1960–1988 and are growing at a faster rate than tort filings.[23] Comprising 18.4 percent of all civil filings, such contractual disputes constitute the greatest percentage of all civil actions. Thus, businesses themselves should be seen as constituting the main source of any burden on the U.S. court system and the well being of the economy. It is therefore ironic that product liability cases where businesses are the harmed parties are completely excluded from the H.R. 956's purview.[24]

## IV. FEDERALISM CONCERNS

The federal government has traditionally deferred to the States regarding tort law in general, and product liability in particular. Unfortunately, H.R. 956 would decimate over two centuries of respect for federalism by superimposing a new set of federal standards on the States.

The Chief Justices have testified that the search for uniformity, which is purportedly at the heart of H.R. 956, will ultimately prove counterproductive.

> It follows that Federal standards, however well articulated, will be applied in many different contexts and inevitably will be interpreted and implemented differently, not only by the State courts but also by the Federal courts * * * Moreover, State Supreme Courts will no longer be, as they are today, the final arbiters of their tort law * * *

[20] Kenneth Jost, "Tampering with Evidence: The Liability and Competitiveness Myth," *ABA Journal* (April, 1992).

[21] See "Not Guilty," *The Economist* (February 13, 1993); Werner Pfennigstorf and Donald Gifford, "A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the United States," Industry Research Council (1991).

[22] See Joan Claybrook, "The Consumer Stake in Product Liability," *Toxics Law Reporter* (February 20, 1991); Nathan Weber, "Product Liability: The Corporate Response," The Conference Board (1987).

[23] Marc Galanter and Joel Rogers, "A transformation of American Business Disputing? Some Preliminary Observations," Dispute Processing Research Program, Working Paper DPRP 10–3 (Univ. of Wisconsin Institute for Legal Studies, 1991).

[24] See Section 103 of H.R. 956 ("A civil action brought against a manufacturer or product seller for commercial loss shall be governed only by applicable commercial or contract law.")

> a legal thicket is inevitable and the burden of untangling it, if it can be untangled at all, will lie only with the Supreme Court of the United States, a court which many experts feel is not only overburdened but also incapable of maintaining adequate uniformity in existing Federal law.[25]

The National Conference on State Legislatures also testified in opposition to the legislation. The Conference decried the "one-size-fits-all federal solution on the States," and noted that federalizing this area of law would lead to greater confusion rather than certainty:

> [m]ore likely than "predictability" is the prospect that this massive nationalization of civil law will cause years of uncertainty, unpredictability and an increasing flow [of] litigation to the Supreme Court. It is time to set aside old assumptions about the wisdom of Congress and the Supreme Court dictating domestic policy in the states. Federalism offers accountability, innovation and responsiveness in the formulation of public policy. The era of federal paternalism is over.[26]

This massive shift of responsibilities from the State to the federal level comes at the same time when legislative momentum appears to be shifting in the exact opposite direction. As Rep. McCollum (R–FL), argued during consideration of a bill which would provide local communities with the discretion to allocate funds previously earmarked to provide 100,000 new policeman:

> There are thousands of options that are out there, not just the ones Washington may dream up as to what is best for one city. It might be one thing that is good for Sacramento, CA and another good for New Brunswick, GA and another for Madison, WI. Who knows what is best for these communities? That has been the problem with the Democrats over the past 40 years controlling this Congress. They believe that Washington knows best. We believe the local communities know best * * *.[27]

The same logic articulated by Republicans should apply to the issue of product liability responsibilities—the States, not the Congress knows best.

H.R. 956 reaches far into State substantive civil law, forcing States to provide the necessary judicial structure to resolve product liability disputes without permitting them to decide the social and economic questions in the law that their courts administer. As a result, it constitutes a new unfunded mandate on the State civil justice systems, in contravention to the spirit and letter of unfunded mandate legislation recently adopted by the House.[28]

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[25] 1995 Product Liability Hearings, Statement of the Conference of Chief Justices at 6–7.
[26] Id. Statement of the National Conference of State Legislature at 5.
[27] 141 Cong. Rec. H1721 (daily ed. February 14, 1995) (statement of Rep. McCollum).
[28] H.R. 5, 104th Cong., 1st Sess. (1995).

## V. ADDITIONAL SUBSTANTIVE CONCERNS

In addition to the general problems raised above concerning the overall purpose and effect of H.R. 956, we have a number of more specific concerns relating to particular provisions of the legislation.

Although section 103 of H.R. 956 indicates that the bill is to generally supersede State law, the various limitations are drafted in a manner so that they only preempt State laws which are more favorable to plaintiffs and do not supersede State laws which are more favorable to corporate defendants.[29] It seems clear that rather than seeking uniformity, the bill's drafters prefer to preempt only those State laws which are perceived as being more favorable to victims than to corporate defendants.

*Limitation on product seller liability*

Section 104 of the legislation provides that notwithstanding State law, which traditionally allows sellers to be sued under a variety of legal theories for injuries caused by defective products, a seller may only be sued for breach of an express warranty, failure to exercise reasonable care, or intentional wrongdoing, unless the court determines the victim would be unable to enforce a judgment against the manufacturer. This could be construed as eliminating a seller's common law liability for (i) failure to warn a consumer about its unsafe characteristics and (ii) "negligent entrustment" (e.g., selling a firearm to an intoxicated person or liquor to a drunk driver). Section 104 would also eliminate the doctrine of implied product warranties by sellers, long accepted by the States pursuant to the widely respected Uniform Commercial Code.

The section would also severely limit a victim's ability to bring suit against a seller as a means of obtaining more appropriate redress from the manufacturer. Sellers have long been considered to be an integral link in the chain of commerce (for both information about a product and knowledge about possible defects), and are often in the best position to bring a manufacturer into a court proceeding so that liability can be fairly established (potentially eliminating the retail seller's ultimate financial responsibility. For example, since sellers, unlike consumers, have an ongoing relationship with manufacturers, they are in a far better position to be able to establish jurisdiction over a manufacturer. Product sellers are also more like to be privy to information concerning alleged design and manufacturing defects, which are integral to a victim's ability to establish liability.

*Limitation on liability where plaintiff has used alcohol or drugs*

Under the State common law doctrine of "contributory negligence," a victim's damages are limited to the extent that his or her own negligence contributed to the accident in question. Section 105 alters this rule by specifying that notwithstanding State law, it shall be a complete defense to a product liability action if the vic-

[29] Section 104 of H.R. 956 limits the types of claims which may result in liability, it does not establish any new claims; section 105 creates a new defense based on claimant's use of intoxicating alcohol or drugs, it does not supplant any other defense; section 106 limits joint liability for non-economic losses, it does not mandate joint liability for economic loss; Title II limits the criteria for and amount of punitive damages, it does not mandate its award or eliminate any lower caps which may have been established by the States.

tim was intoxicated and was more than 50% responsible for the accident. This constitutes a new federal substantive defense that would completely exculpate defendants from liability even where they are found to bear a significant responsibility for the harm in question. To this extent, it would significantly reduce the deterrent effect of State tort laws. Since Section 105 provides for no exceptions, it can result in a number of unfair results. For example, under the provision, manufacturers of devices designed to protect against using a product while intoxicated—such as breathalyzers now installed on some cars—would appear to be fully immunized from liability.

*Limitation on joint and several liability*

Section 106 would alter the State common law rule of joint and several liability between defendants. Under this traditional rule, where more than one defendant is found liable, each defendant is held to be liable for the full amount of the damages. The justification for the rule is that it is better that a wrongdoer who can afford to do so pay more than its share, rather than an innocent victim obtain less than full recovery. Also, a defendant who pays more than its share of damages can seek contribution from the other defendants. This section would supersede State law by eliminating joint and several liability for non-economic damages (such as pain and suffering) in product liability cases.

The effect of section 106 would be to shift costs from wrongdoers to victims. The provision discriminates against groups less likely to be able to establish significant economic damages, such as women, minorities, and the poor. Moreover, the elimination of joint and several liability would actually increase courts' caseloads and increase litigation costs, by discouraging settlements and requiring injured consumers to initiate multiple claims.

*Statute of repose*

Section 107 would create a new federal "statute of repose," barring any product liability action not brought within fifteen years of the date of delivery (except in cases of "chronic" illnesses).[30] The statute of repose provision would result in a number of occasions where a defective product leads to harm that is totally non-compensable, and as such, is perhaps the most egregious provision in the whole bill. For example, it would apply in cases where the product had an actual useful safe life in excess of 15 years or where the defect or harm is not discoverable within the fifteen year period (such as a seat belt which is not tested until the time of an accident). As such, it would shift a large share of the costs of defective products form manufacturers to victims and society as a whole.

*Limitations on punitive damages*

Title II of H.R. 956 would place a number of new restrictions on the extent to which defendants are subject to punitive damages in all civil cases. It would limit the award of punitive damages to only those cases where the victim had established by "clear and convinc-

[30] The fifteen year figure is entirely random. Oddly, the fifteen year period is three years less than the statute of repose adopted last Congress pertaining to general aviation aircraft. See The General Aviation Revitalization Act of 1994, Pub. L. 103–298, § 3(3), 108 Stat. 1552, 1553 (1994).

ing evidence" that the harm suffered was the result of conduct specifically intended to cause harm manifesting a "conscious, flagrant indifference to the safety of those persons who might be harmed by the product." Title II would also arbitrarily limit the amount of punitive damages to three times the amount awarded for economic injuries (e.g., lost wages and hospital bills) or $250,000, whichever is greater. Finally, Title II would permit a defendant to request a separate proceeding to determine whether punitive damages should be awarded and the extent of such damages.

These changes would in large part eliminate the role of punitive damages in the product liability system, thereby reducing the system's overall deterrent effect. For a civil case, these proposed evidentiary and substantive standards come very close to "criminalizing" tort law for purposes of punitive damages: in other words, an injured victim would almost have to show that a manufacturer acted with "criminal intent"—and not gross negligence. Permitting defendants to bifurcate proceedings concerning the award of punitive damages will lead to far more costly and time consuming proceedings, generally working to the disadvantage of harmed victims. Moreover, the proposed caps on punitive damages would have a disproportionately negative impact on women, minorities, and the poor; since they generally have less wages, a greater proportion of their damages are likely to be non-economic.

## VI. CONCLUSION

Collectively, the supposed "reforms" included in H.R. 956 would severely limit victims' ability to recover compensation for damages caused by defective products and other circumstances. In addition to raising core issues of fairness, the legislation would intrude into an area which has traditionally been the sole province of the States, many of which have enacted their own liability law changes in recent years. Moreover, the proposals would create a confusing overlay of federal and State laws, leading to increased costs and complexities in otherwise straightforward tort cases. These changes, which are designed to limit so-called "frivolous lawsuits" are not supported by a single objective empirical study; indeed they are being propounded at a time when the great wealth of data suggests there is no product liability explosion in our society. For these and the other reasons set forth above, we strongly believe H.R. 956 should be rejected.

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