Calendar No. 91

104TH CONGRESS, *1st Session* | SENATE | REPORT 104–69

PRODUCT LIABILITY FAIRNESS ACT

Mr. PRESSLER, from the Committee on Commerce, Science, and Transportation, submitted the following

R E P O R T

together with

MINORITY VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 565

APRIL 18, 1995.—Ordered to be printed

Filed under authority of the order of the Senate of April 6 (legislative day, April 5,), 1995

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

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Mr. PRESSLER, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

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MINORITY VIEWS

[To accompany S. 565]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 565) "A bill to regulate interstate commerce by providing for a uniform product liability law, and for other purposes", having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

PURPOSE OF BILL

The bill, S. 565, as reported, creates certain standards of product liability law that are to be applied uniformly throughout the United States.

The present system in the United States for resolving product liability disputes and compensating those injured by defective products is costly, slow, inequitable, and unpredictable. Such a system does not benefit manufacturers, product sellers, or injured persons. The system's high transaction costs exceed compensation paid to victims. Those transaction costs are passed on to consumers through higher product prices. The system's unpredictability and inefficiency have stifled innovation, kept beneficial products off the

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market, and have handicapped American firms as they compete in the global economy.

S. 565, as reported, addresses these problems through several changes to existing product liability law. This new law would apply to all product liability actions in state and federal courts. These changes are balanced and limited and are intended to reduce transaction costs, provide greater certainty as to the rights and responsibilities of all parties involved in product liability disputes, encourage innovation, and increase the competitiveness of U.S. firms.

The bill as reported also addresses specifically an emerging crisis concerning the supply of medical devices and thereby seeks to avoid a public health emergency. The supply of raw materials used in medical devices—commonly referred to as biomaterials—is jeopardized because raw material suppliers are thrust into product liability suits targeted primarily at the medical devices manufacturers. The costs of defending these suits are greater than the profits from supplying the raw materials for medical devices. To address this problem, S. 565 as reported, would allow the suppliers of biomaterials for medical implants to obtain dismissal from certain tort actions without extensive discovery or other legal costs.

BACKGROUND AND NEED

INTRODUCTION

Although product liability is a matter traditionally left to state law, the current morass of product liability laws is a problem of national concern that requires Congressional action. The current system of compensating people injured by defective products is costly, slow, inequitable, and unpredictable.

Many consumers who are injured by defective products and deserving of compensation are unable to recover damages or must wait years for recovery. They, like manufacturers and product sellers, are thrust into a product liability litigation system in which identical cases can produce startlingly different results. Moreover, severely injured victims tend to receive far less than their actual economic losses, while those with minor injuries often are overcompensated.

Inefficiency and unpredictability have many negative effects. Manufacturers of some products, such as machine tools, medical devices, and vaccines, find it difficult to buy adequate insurance coverage. The unpredictable patchwork of state laws has had a chilling effect on the introduction of new products to market. The current U.S. product liability system also damages our competitive position in world markets because the excessive costs of the system result in higher prices for American products.

The present system adversely affects manufacturers, product sellers, consumers, and individuals injured by products. Reform by the states cannot fully address the problems with the current product liability system. Reform at the federal level is urgently needed.

I. Problems with the present product liability system

The existing system does not provide an efficient and equitable means of resolving claims involving defective products.

A. Costs are high and continue to escalate

The costs of the product liability system have increased substantially in recent years. The editors of "The Liability Maze," a book published by the Brookings Institution in 1991, note that "[r]egardless of the trends in tort verdicts, most studies in this area have concluded that, after adjusting for inflation and population, liability costs have risen dramatically in the last thirty years, and most especially in the last decade."[1] Increases in awards in such cases have been much higher than corresponding increases in wages and inflation.[2] Increased product liability costs are reflected in dramatic increases in liability insurance costs. Over the last forty years, general liability insurance costs have increased at over four times the rate of growth of the national economy.[3]

The transaction costs associated with the present product liability system—the costs of litigation, court proceedings, and attorneys' fees—are enormous. Today, plaintiff and defense lawyers collect as much from the system as injured persons do and most of the money paid out by manufacturers never reaches the injured persons.[4] A study by the insurance Services Office (ISO) of closed claims in 1992 indicated that for every $10 paid to claimants by insurance companies in product liability cases, another $7 is paid for lawyers and other defense costs.[5] If the contingent fee of plaintiffs' attorneys are factored in, lawyers' fees account for 61 percent of the funds expended on product liability claims.

A 1986 Rand Institute for Civil Justice study showed the annual overall transaction costs of the U.S. tort system exceed compensation to plaintiffs. The Rand study found that in 1985, net compensation totaled $13 billion to $15 billion, but the transaction costs—including plaintiffs' attorneys' fees, defense legal fees, public expenditures, and the time of the litigants—were between $15 billion and $19 billion.[6] A study conducted by the insurance industry in 1989—the Tillinghast study—estimated the current overall cost of the U.S. tort system at a staggering $117 billion.[7]

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[1] P.W. Huber and R.E. Litan, eds., The Brookings Institution, "The Liability Maze" 3 (1991). [Hereinafter "The Liability Maze"].

[2] P. Weiler, K. Abraham, R. Rabin, D. Rosenberg, A. Schwartz, W.K. Viscusi, Enterprise Responsibility for Personal Injury, American Law Institute, Reporters' Study, Vol. I, at 270–71 [hereinafter ALI Reporters' Study].

[3] Id. at 60.

[4] Testimony of the Honorable Robert A. Mosbacher, Secretary, U.S. Department of Commerce, Before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, S. Hrg. 101–743 at 258, April 5, 1990 (hereinafter April 5, 1990 hearing).

[5] Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results (1992).

[6] Testimony of James S. Kakalik, Ph.D., The Institute for Civil Justice of the Rand Corporation, before the Subcommittee on Trade, Productivity, and Economic Growth of the Joint Economic Committee, July 29, 1986, S. Hrg. 99–1090. The same conclusion was reached in a study done by an actuarial consulting firm for members of the insurance industry. The study found that in 1984, 63 percent of the gross insured costs of the United States tort system consisted of payments to claimants. Robert W. Sturgis, "The Cost of the U.S. Tort System," Tillinghast, Nelson, and Warren, Inc. 16 (November 1985). If this is reduced by one-third to account for plaintiffs' attorneys' fees, only 42 percent of the costs remain to compensate the injured. Dr. Kakalik, author of the Rand study, explained in his testimony that Sturgis' estimate of transaction costs "is higher than ours because it includes the cost of insurance premiums that cover claims, lawsuits, and the operation of the insurance system. We only report on compensation and costs directly associated with tort lawsuits."

[7] Tillinghast, Perrins-Tower Group. Tort Cost Trends: An International Perspective 16 (December 1989).

The U.S. tort system is the world's most costly tort system.[8] Liability insurance costs reflect these transaction costs and insurance rates rise with them. Consumers pay higher prices as a result. Neither plaintiffs nor defendants benefit from the rapidly increasing and excessive costs of the present system for resolving product liability disputes.

B. Delay

Product liability suits take a very long time to process. This delay places at a disadvantage those injured by faulty products and adds to the expense of the system.

One survey, done by the insurance industry in 1977, found 36 percent of bodily injury losses in product liability cases are not paid until at least 4 years after the first report, and it takes 5 years to pay the claim with the average dollar amount of loss. Not surprisingly, this study also found "larger claims tend to take much longer to close than smaller ones."[9]

Another insurance industry study also found those with the most severe injuries are forced to wait the longest for compensation. This study found that, in cases where payment exceeded $100,000, 21.6 percent of claimants waited more than five years for payment. Only 2.1 percent were paid within a year of reporting their injury, and 62.6 percent took more than three years to be paid.[10]

A GAO report found that in the five states studied, on average product liability cases took two and one-half years to move from filing to trial court verdict.[11] One case studied by GAO took about nine and one-half years to move through the court system.[12]

Most product liability cases are settled before trial, but even these cases suffer from delay. One plaintiff's attorney explained that "most settlement negotiations get serious only a week or so before trial is scheduled to begin." This timing has become so ingrained in the system that "each week the [lawyer's] firm projects cash flow by estimating the settlement value of the cases set for trial the following week."[13]

Delay can result in undercompensation of victims. Many injury victims are forced to settle their claims for less than their full losses so they can obtain compensation more quickly. These individuals are often forced into this decision because they have inadequate resources to pay for their medical and rehabilitation expenses. This dynamic is most evident where severe injuries are involved.[14]

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[8] Id.

[9] Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results 79 (1977).

[10] Alliance of American Insurers Survey of Large-Loss Product Liability Claims 4 (1980).

[11] U.S. General Accounting Office, Report to the chairman, Subcommittee on Commerce, House Committee on Energy and Commerce, "Product Liability: Verdicts and Case Resolution in Five States" 49 (September 1989) [hereinafter GAO Report].

[12] *Id.*

[13] Wayne E. Green, "A Lawyer Faces Risks in Deciding to Take On Costly Damage Suits," Wall St. J., May 23, 1986 at 12.

[14] See O'Connell, "A 'Neo No-Fault' Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers," 73 Calif. L. Rev. 898, 901–902 (1985), citing Corstevet, "The Uncompensated Accident and Its Consequences," 3 Law & Contemp. Probs. 466, 468 (1936).

C. Inequitable compensation

The present product liability system also is unfair because it fails to compensate those injured in proportion to their losses. Numerous studies have found the tort system grossly overpays people with small losses, while underpaying people with the most serious losses.

An early ISO product liability study found injured plaintiffs with losses between $1 and $1,000 receive, on the average, 859 percent of their losses, while those with losses of over $1 million receive, on the average, 15 percent of their losses (before paying their attorneys' fees).[15] In general, the study found compensation exceeded economic loss when losses were below $100,000, but compensation dropped dramatically below actual economic loss when the claimant's loss exceeded $100,000.[16]

D. Unpredictability

Consumers, manufacturers, and product sellers are trapped in a product liability litigation system that is a lottery. Identical cases can produce startlingly different results.

In his testimony before the Committee in 1986, Professor Jeffrey O'Connell, of the University of Virginia School of Law, explained:

> [i]f you are badly injured in our society by a product and you go to the highly skilled lawyer * * * in all honesty [the lawyer] cannot tell you what you will be paid, when you will be paid, or indeed if you will be paid.[17]

A principle cause of excessive uncertainty is the diversity in legal standards applied in different jurisdictions.[18] Professor M. Stuart Madden, of Pace University School of Law, in his testimony before the Subcommittee on April 4, 1995 also identified the "cacophony of conflicting state liability and damage rules" as the primary cause of this confounding unpredictability.[19] Professor Madden explained:

> [w]hile the array of diverse state laws is festive for academics, it is costly to businesses and to the public. Studies show that insurance costs in the United States are twenty times greater than they are in Europe, and fifteen times greater than in Japan.[20]

Art Kroetch, Chairman of Scotchman Industries, a small business that manufactures machine tools in South Dakota, indicated in his testimony before the Subcommittee on April 4, 1995 that the uncertainty concerning both the applicable product liability rules and the resultant exposure business faces is reflected in erratic product liability insurance rates. Mr. Kroetch explained that insurers "are unable to accurately predict potential liability due to the disparity in state laws, unpredictability of where the product will

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[15] 1977 ISO study at 49.

[16] Id. at 383.

[17] Testimony of Professor Jeffrey O'Connell, hearing of the Consumer Subcommittee, Senate Committee on Commerce, Science, and Transportation, February 27, 1986.

[18] See, e.g., S. Rept. 98–476, pp. 3–4; Calabresi and Klevorick, "Four Tests for Liability in Torts," 14 J. Leg. Stud. 585, 585–6 (1985).

[19] Testimony of Professor M. Stuart Madden, hearing of the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, Senate Committee on Commerce, Science, and Transportation, April 4, 1995, at 2 [hereinafter April 4, 1995 hearing].

[20] Id. at 3.

be located initially, and later where it is sold and resold as used equipment." Mr. Kroetch indicated that when insurance companies set their rates, they must account for the worst case scenario and, as a result, insurance rates are sometimes so high that affordable coverage cannot be obtained.[21]

The system's unpredictability particularly affects settlements as negotiations are "sabotaged" by the lack of clear standards.[22] For example, uncertainty over the liability standards for punitive damages makes it difficult to negotiate sensibly where punitive damages are alleged.[23]

Greater predictability and uniformity will benefit all parties in product liability disputes. Warren W. Eginton, a federal judge and a product liability expert, testified at the Subcommittee's hearing on February 22, 1990 that:

> the more uniformity can be accomplished * * * the more quickly the litigation will flow and the lighter the economic burden on all parties involved. Certainly the task of the judge and juries in understanding the problems and the rules of law to be applied to those problems will be greatly simplified by uniformity.[24]

The uncertainty in the present system is a serious problem for both plaintiffs and defendants. Plaintiffs need faster, more certain recovery that fully compensates them for their real losses. Defendants need greater certainty as to the scope of their liability.

II. Burdens from a product liability system that has failed.

An inefficient and inequitable product liability system burdens consumers with higher prices and deprives them of needed products. It ladens businesses with unnecessary costs that injure their international competitiveness and sacrifices quality American jobs. An inefficient and inequitable product liability system does not foster safety.

A. Consumers pay higher prices and are confused about their rights

William Fry, Executive Director of HALT, indicated in his testimony before the Subcommittee on April 3, 1995 that average consumers would benefit from product liability reform. HALT is a "nonprofit organization of 70,000 individuals devoted to reforming the legal system so that it works better for the average citizen."[25]

Fry indicated the diversity of product liability laws applied by different states frustrates consumers because "they cannot know their basic rights and options, and * * * they must consult a law-

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[21] Testimony of Art Kroetch, April 4, 1995 hearing, at 3.

[22] Twerski, "A Moderate and Restrained Product Liability Bill: Targeting the Crisis Areas for Resolution," 18 U. Mich. J. of L. Ref. 575, 612 (1985).

[23] Testimony of Professor Aaron Twerski, Hearing of the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, September 19, 1991 (hereafter September 19, 1991 hearing), S. Hrg. 102–727 at 104 (1991). See Twerski, "A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution," supra, at 612.

[24] Testimony of the Honorable Warren W. Eginton, U.S. District Judge, District of Connecticut, S. Hrg. 101–743 at 180 (1990).

[25] Testimony of William Fry, hearing of the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, Senate Committee on Commerce, Science and Transportation, April 3, 1995, at 1 [hereinafter April 3, 1995 hearing].

yer to find them out."[26] HALT supports a uniform, federal product liability law to give consumers consistency and predictability, and to enable them to learn and understand their rights wherever they live.

Consumers must ultimately bear through higher prices the excessive costs of our product liability system. Mr. Fry testified, for example, that excessive punitive damages "penalties are harmful to business and to consumers of products when price reflects the risk of such penalties."[27]

B. Women's health research and products: A case study of a broken system

In its many hearings over the years, the Committee has often received testimony about how the existing product liability system stifles innovation and keeps beneficial products off the market. None of this testimony, however, is more direct or compelling than that received by the Subcommittee on April 4, 1995 from Ms. Phyllis Greenberger, the Executive Director of the Society for the Advancement of Women's Health Research. The Society is a "non-profit, non-partisan organization committed to improving the health of women through research."[28]

Ms. Greenberger testified that the Society believes "the current liability climate is preventing women from receiving the full benefits that science and medicine can provide." She noted "there is evidence that maintaining the current liability system harms the advancement of women's health research." This harm occurs because "[l]iability concerns are stifling research and development of products for women."

Ms. Greenberger stated "[c]ontraceptive development in the U.S. provides an excellent example of how the threat of litigation can devastate an entire industry." She noted it is litigation concerns, not a lack of demand, that has reduced the number of companies doing contraceptive research from 13 to 2. Ms. Greenberger stated a "recent report of the Institute of Medicine attributed this decline to the unpredictable nature of litigation combined with the enormous cost and limited availability of liability insurance."

It is not just research that is affected. "Liability concerns are keeping products, which have already been developed, off the market despite a known therapeutic need." Ms. Greenberger gave several examples of beneficial products which are not being marketed, including Bendectin, the only anti-nausea medication ever approved for use in pregnancy.

To understand these unfortunate developments, Ms. Greenberger advised that if one "[v]iews the legal landscape from the eyes of a manufacturer, one sees a foreboding terrain." She notes that "[i]t is important to remember that the very nature of drugs and medical devices means that they are not risk free." Consequently, "[a]ny drug taken over long periods of time by large populations will undoubtedly result in problems for a certain number of people." Ms.

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[26] Id. at 3.

[27] Id. at 6. Fry also noted that "our members are sensitive to the pass-through impact of punitive damages, or the fear of them, to consumers in the form of higher prices or products not getting to market." Id. at 7.

[28] Testimony of Phyllis Greenberger, April 4, 1995 hearing, at 1.

Greenberger stressed that "unintended adverse reactions in a few should not create a threat of liability so great as to disadvantage the many who benefit."

Ms. Greenberger identified the true risk to such beneficial products when she noted they "present an enticing arena for lawyers who have created an industry out of cultivating massive, sensationalized lawsuits often based on the experience of the few who experienced legitimate problems."

In addition, Ms. Greenberger commented that her organization "is concerned that opponents to reform are using women as their strategy to block change" in product liability.[29] Ms. Greenberger indicated the Society does not take a position on any bill but she called for an "FDA defense" to punitive damages and supported a special biomaterials access provision in the current bill.[30]

C. Innovation is stifled and beneficial products are kept off the market

The negative effect of our current product liability system on the economy was clearly demonstrated in a survey of over 2,000 CEOs conducted by the Conference Board in 1988. Participating businesses indicated their actions were affected in the following ways by our current product liability system.

Adverse impacts cited based on actual liability experience[31]

	Percent of firms reporting action
Type of Impact:	
Closed Production Plants	8
Laid Off Workers	15
Discontinued Product Lines	36
Decided Against Introducing New Products	30
Decided Against Acquiring/Merging	17
Discontinued Product Research	21
Moved Production Offshore	4
Lost Market Share	22

Adverse impacts cited based on anticipated liability problems[32]

	Percent of firms reporting action
Type of Impact:	
Closed Production Plants	1
Laid Off Workers	1
Discontinued Product Lines	11
Decided Against Introducing New Products	9
Decided Against Acquiring/Merging	5
Discontinued Product Research	4
Moved Production Offshore	1
Lost Market Share	.....

In his testimony before the Subcommittee in 1990, Secretary of Commerce Robert Mosbacher testified that the Conference Board results show the extent of the indirect costs of the current product

[29] All quotations in the preceding paragraphs are from Greenberger's testimony, April 4, 1995 hearing, at 2–3.
[30] Id. at 4.
[31] McQuire, The Conference Board, Research Report No. 908, "19 The Impact of Product Liability Table 28" (1988) [hereinafter Conference Board Report].
[32] Conference Board Report, Table 29, at 19.

liability system. These indirect costs include "useful products * * * being discontinued, decisions not to develop new product lines or not to continue product research, and a fear to innovate."[33] Many U.S. companies devote far more to product liability costs than to research and development efforts. For example, The National Machine Tool Builders Association stated its members spend seven times more on product liability costs than on research and development.[34]

Product development is hindered in many ways by our existing product liability system. Sometimes, due to fears about joint liability, raw material suppliers refuse to sell necessary materials to manufacturers for new product concepts. For example, Ms. Julie Nimmons, Chief Executive Officer of Schutt Sports Groups testified in 1993 that material suppliers are reluctant to sell to her company, a manufacturer of football helmets, for fear of liability. This reluctance sometimes kills new product development. For example, Ms. Nimmons' company designed a new baseball product that functioned well in prototype testing, but the company was unable to produce the product because it could not obtain needed materials.[35]

In his testimony before the Subcommittee in 1990, Secretary Mosbacher referenced reports that:

> Universities are shying away from licensing patents to small manufacturers because of their fear that, as the originators of the idea upon which a product was manufactured, they will become the "deep pocket" if there is litigation involving the product.[36]

This development is distressing because the crucial role of small companies in innovation is widely accepted.

A report by the American Medical Association indicates the current product liability system also is having a "profoundly negative impact on the development of new medical technologies."[37] The report concluded:

> Innovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance. Certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks.[38]

Not only is actual product development suppressed, even basic scientific research is squelched by our product liability system. Dr.

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[33] Testimony of the Honorable Robert A. Mosbacher, April 5, 1990 hearing, S. Hrg. 101–743 at 247 (1990).

[34] Testimony of Howard H. Fark, February 22, 1990 hearing, S. Hrg. 101-743 at 225-26.

[35] Testimony of Ms. Julie Nimmons, hearing of the Consumer Subcommittee, Senate Committee on Commerce, Science and Transportation, September 23, 1993, S. Hrg. 103–490 at 20.

[36] Testimony of the Honorable Robert A. Mosbacher, April 5, 1990 hearing, S. Hrg. 101–743 at 249 (1990).

[37] Testimony of Richard Kingham, April 5, 1990 hearing, citing, AMA Board of Trustees, "Impact of Product Liability on the Development of New Medical Technologies," at 12 (June 1988) in "Brief of Amici Curiae" Pharmaceutical Manufacturer Association and American Medical Association in *Browning Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989).

[38] Id. at 1.

Malcolm Skolnick testified before the Subcommittee during the 101st Congress that:

> Scientific inquiry is stifled. Ideas in areas where litigation has occurred will not receive support for exploration and development. Producers fearful of possible suit will discourage additional investigation which can be used against them in future claims.[39]

Even established, beneficial products sometimes fall prey to our broken product liability system. For example, in 1984 two of the three companies manufacturing the diphtheria-tetanus-pertussis (DTP) vaccine decided to stop producing it due to product liability costs. Later that year, the Centers for Disease Control recommended doctors stop vaccinating children over age one in order to conserve limited supplies of the DTP vaccine for the most vulnerable infants.[40]

D. U.S. competitiveness is hampered

American business faces a competitive disadvantage in both international and domestic markets due to our flawed product liability system. American manufacturers and product sellers generally pay product liability insurance rates that are 20 to 50 times higher than those of foreign competitors.[41] This disparity is attributable, in large part, to the uncertainties and costs of the American tort litigation system.[42] Insurers generally do not discount premiums when a manufacturer exports its goods, because there is a possibility that a product-related suit will be brought in the United States. Consequently, each U.S. product shipped abroad contains an insurance cost element greater than that of a foreign competitor.[43] In the ever more competitive international markets, the resultant price differences hamper American business.

American business is similarly disadvantaged in our domestic market when foreign companies enjoy a lower cost base due to their less expensive and more certain product liability systems. Often, the over-all cost base of foreign manufacturers is lower because they also benefit from a statue of repose in their home market. The Association of Manufacturing Technology has noted, for example, that the price of imported products can be lower due to the difference in liability insurance rates, if the importer does not sell all of its products in the United States.[44]

Changes in conflict of law theory also have added to the competitive disadvantage faced by American firms. An individual, injured in a foreign country by a U.S. product, now may be able to sue the manufacturer in the United States and have U.S. law applied in the case. In the past, the rule of lex loci would have required the

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[39] Testimony of Dr. Malcolm Skolnick, April 5, 1990 hearing, S. Hrg. 101–743 at 300 (1990).

[40] "The Liability Maze" at 343.

[41] The Conference Board Report at 4 (citing a 1984 study commissioned by the U.S. Department of Commerce).

[42] Id.

[43] See Orban, "Product Liability and International Trade and Policies," Product Liability and Tort Law Reform, National Legal Center for the Public Interest, 144 (April 21, 1982).

[44] Letter from James A. Gray, President, National Machine Tool Builders Association, to Jim J. Tozzi, Deputy Director of Information and Regulatory Affairs, Office of Management and Budget (June 14, 1982). The letter also points out the effect of the lack of a statute of repose on this industry. AMT indicates there are cases in which 50-year old products have been the subject of product liability lawsuits.

application the foreign country's law.[45] The diminished importance of lex loci means U.S. manufacturers may be held to higher and more costly product liability standards in both U.S. and foreign markets while foreign competitors only confront U.S. law in the United States.

Professor Aaron Twerski testified in 1991 that "uncontrolled damages have serious international implication(s)" because the United States has been unable to get foreign countries to enter into treaties to enforce American judgments abroad due to "unregulated judgments."[46] American businesses suffer as a result when they are unable to enforce overseas simple money judgments.[47]

E. Product liability and product safety

Those who oppose product liability reform believe the product liability system, as presently constructed, promotes safety. They argue alterations to the system will enable unsafe products to enter the market. Most often, those opposing reform argue that unbounded punitive damages are the threat that makes products safer.[48]

There is a notable lack of evidence for these assertions. William Fry, the Executive Director of HALT, testified at the April 3, 1995 hearing that some states and foreign countries such as Canada do not have punitive damages yet "there is no evidence that product liability suits there do not achieve changes in conduct."[49] Fry noted that "[f]or most defendants the stigma of punitive damages motivates reform" because excessive punitive damages are usually overturned on appeal.[50]

In his testimony on April 4, 1995, Professor M. Stewart Madden indicated that, in a punitive damage award, "the public finding of rogue conduct can be as great a punishment, and as much a deterrent to the defendant and to other marketplace participants, as the punitive monetary award."[51] Professor Madden explained "[t]here is overwhelming evidence * * * that manufacturers are alert to public opinion as to their behavior."[52] He also noted a punitive damage award will ensure that state and federal regulators descend on a defendant and thus assure they modify their conduct.[53]

The editors of "The Liability Maze" also concluded that factors other than the product liability system—such as safety regulations—are responsible for the promotion of safety.[54] For example, Professor John Graham of the Harvard University School of Public Health, conducted five case studies on whether there was a relationship between motor vehicle safety and product liability law. He concluded "[t]he case studies provide little evidence that expanded

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[45] Testimony of Professor Aaron Twerski, September 19, 1991 hearing, S. Hrg. 102–727 at 101–102 (1991); See *Pray* v. *Lockheed Aircraft Corp.* 644 F. Supp. 1289 (D.D.C. 1986) (Washington, D.C. law applied in lawsuit against U.S. manufacturer for damages arising outside Saigon, Vietnam).

[46] Testimony of Professor Aaron Twerski, September 19, 1991 hearing, S. Hrg. 102–727 at 105.

[47] Id.

[48] See e.g., Testimony of Larry Stewart, President of the Association of Trial Lawyers of America, April 3, 1995 hearing, at p. 8.

[49] Testimony of William Fry, April 3, 1995 hearing, at 6.

[50] Id.

[51] Testimony of M. Stuart Madden, April 4, 1995 hearing, at 4.

[52] Id.

[53] Id.

[54] See "The Liability Maze" at 12–13.

product liability risk was necessary to achieve the safety improvements that have been made."[55] Instead, Graham concludes vehicle safety regulation can provide a predictable and technically sound forum in which to resolve safety issues.[56]

One author contributing to "The Liability Maze" concluded, however, that in the chemical industry the liability system promotes safety.[57] The editors of the overall study note Professor Ashford's findings are contrary to those of all the other authors contributing to the study.[58] Moreover, the study's editors questioned the methodology on which Professor Ashford's conclusions are based.[59]

F. Biomaterials

There is an emerging crisis in the supply of biomaterials used in the production of implantable medical devices. Suppliers of raw materials and component parts are reluctant to sell to medical device manufacturers because, under current litigation practice, those suppliers are routinely sued with device manufacturers in actions alleging inadequate design and testing of the medical device and inadequate warnings related to the use of the medical device. Biomaterials suppliers, however, do not design, produce or test medical devices. Consequently, it is rare that biomaterials suppliers ultimately are held liable in these actions.

Nonetheless, suppliers of biomaterials are reluctant to sell to medical device manufacturers because the costs of successfully defending themselves exceed the expected return from supplying the biomaterials. The biomaterials suppliers provide raw materials and component parts that are not designed or manufactured specifically for use in medical devices: these materials also are used in a variety of nonmedical products. As a result, supplying materials for medical devices is a very small portion of their business and is easily foregone to avoid the cost of (successfully) defending liability suits.

Ms. Peggy Phillips, an attorney with a life-sustaining medical device, testified before the Subcommittee on April 4, 1995, that in the current climate it did not make sense for biomaterials suppliers to continue providing those materials for device manufacturers. Ms. Phillips related that one supplier spent $8 million annually defending itself in cases involving temporomandibular joint (TMJ) implants even though that supplier had no role in the design, manufacture or sale of the device. Ms. Phillips noted sales by all suppliers to all TMJ implant manufacturers "totaled $418,000 while sales of this same raw material to all other markets totalled $282 million."[60] In essence, biomaterials suppliers will not provide their product to medical device manufacturers because such transactions involve low returns and a high risk of substantial losses.

Millions of Americans, who rely on life-saving or life-enhancing medical devices, face a potentially devastating health crisis if reforms are not instituted.

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[55] "Product Liability and Motor Vehicle Safety" in "The Liability Maze" at 183–184.
[56] Id. at 184.
[57] Testimony of Professor Nicholas Ashford, September 12, 1991 hearing, S. Hrg. 102–727 at 71 (1991).
[58] Id. at 165 (testimony of Peter Huber).
[59] Id.
[60] Testimony of Peggy Phillips, April 4, 1995 hearing, at 5.

III. Federal reform is required as state reform is inherently limited

Those opposing product liability reform argue, that if reform is desirable, it is the domain of the states.[61] Reform is desirable, it is urgently needed, and given the nature and scope of the problem, only federal reform can be effective.

Reform by the states can do little to resolve the tort litigation problems facing those who deal in an interstate market. Products are manufactured, sold, used, and insured in a nationwide market. Data show the vast majority of products manufactured in a given state are consumed or used outside that state.[62] As a result, manufacturers and product sellers may be involved in product liability actions governed by the law of any state in which they do business. Thus, an attempt by any one state to reform the system cannot relieve the overall burden imposed on interstate commerce.[63]

The National Governor's Association (NGA) has long recognized both the need for product liability reform and the necessity of federal action to effectuate that reform. NGA's Director of State-Federal Relations, James Martin, testified before the Subcommittee on April 3, 1995 concerning the NGA's advocacy for federal product liability reform. Mr. Martin indicated that in 1982, the NGA opposed preemption of state law, but by 1986 this position was unanimously reversed to support uniform federal product liability laws. During the NGA's meeting on January 31, 1995 the NGA once again voted to support a uniform federal product liability law.[64] The resolution adopted, by the NGA provides an excellent summary of the need for reform executed on the federal level. That resolution reads, in part, as follows:

> The National Governors' Association recognizes that the current patchwork of U.S. product liability laws is too costly, time-consuming, unpredictable, and counter productive, resulting in severely adverse effects on American consumers, workers, competitiveness, innovation and commerce.
>
> The issue of product liability reform has increasingly pointed to federal action as a way to alleviate the problems faced by small and large businesses with regard to inconsistent state product liability laws. This lack of uniformity and predictability makes it impossible for product manufacturers to accurately assess their own risks, leading to the discontinuation of necessary product lines, reluctance to introduce product improvements, and a dampening of product research and development. American small busi-

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[61] See e.g. Testimony of Jeffrey Teitz, representing The National Conference of State Legislatures, April 3, 1995 hearing; Testimony of Larry Stewart, President of The Association of Trial Lawyers of America, April 3, 1995 hearing, at 12.

[62] Testimony of the Honorable Wendell L. Wilkie II, General Counsel, U.S. Department of Commerce, April 5, 1990 hearing, S. Hrg. 101–743 at 48 (1990). It has been estimated 30.5 percent of manufactured goods are consumed in the manufacturing state. See, 1977 Census of Transportation, Commodity Transportation Survey, Summary, U.S. Dept. of Commerce, Bureau of the Census, 1–77 (1981); American Bar Assoc. Section of Corporation, Banking and Business Law, Report to the House of Delegates, Attachment B. (1982). See generally Testimony of Randolph J. Stayin on behalf of the American Textile Machinery Association, Product Liability Act: Hearing before the Subcommittee on Consumer of the Senate Committee on Commerce, Science, and Transportation, 99th Cong., 1st Sess., Rept. No. 99–84, 170 (1985).

[63] Several state governors have recognized this in vetoing proposed product liability legislation. See, e.g., Schwartz and Bares, "Federal Reform of Product Liability Law: A Solution That Will Work," 13 Cap. U. L. Rev. 351, 355 (1984).

[64] Testimony of James Martin, April 3, 1995 hearing, at 1.

> nesses are particularly vulnerable to disparate product liability laws. For them, liability insurance coverage has become increasingly expensive, difficult to obtain, or simply unavailable. Further, the system causes inflated prices for consumer goods and adversely affects the international competitiveness of the United States.
>
> Clearly, a national product liability code would greatly enhance the effectiveness of interstate commerce. The Governors urge Congress to adopt a federal uniform product liability code.[65]

Mr. Martin testified the NGA "traditionally has opposed federal preemption unless there are highly compelling reasons to justify federal actions that require changes in policies adopted by state officials."[66] The Governors believe those conditions exist in the area of product liability.

Kirk Dillard, a State Senator from Illinois, testified that the American Legislative Exchange Council (ALEC) strongly advocates states' rights but nevertheless supports enactment of federal product liability legislation.[67] ALEC is a bipartisan organization of approximately 2,400 state legislators from all 50 states. Mr. Dillard indicated federal action is needed because "virtually all business transactions have an interstate commerce component, subjecting companies to suits in numerous different states."[68]

Professor Madden testified "products liability law cries out for uniformity."[69] Only federal legislation can create the uniformity necessary to relieve the enormous burdens imposed by the existing product liability system. Congress clearly has the power, under the interstate commerce clause of the United States Constitution, to enact reform.[70] In the past, Congress has preempted state tort law when diverse state laws burdened interstate commerce.[71]

LEGISLATIVE HISTORY

On March 15, 1995, Senators Jay Rockefeller and Slade Gorton introduced S. 565, the Product Liability Fairness Act. On April 3 and 4, 1995, the Senate Committee on Commerce, Science, and Transportation's Subcommittee on Consumer Affairs, Foreign, Commerce and Tourism held hearings on the bill. At the Committee executive session on April 6, 1995, the Chairman of the Commerce Committee, Senator Larry Pressler, offered an amendment in the nature of a substitute that maintained the original content of S. 565 but, among other things, incorporated as Title II, S. 303, The Biomaterials Access Assurance Act. S. 303 was introduced by

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[65] NGA policy EDC–22 (1995).
[66] Testimony of James Martin, April 3, 1995 hearing, at 3.
[67] Testimony of Kirk W. Dillard, April 3, 1995 hearing.
[68] Id. at 4.
[69] Testimony of M. Stuart Madden, April 4, 1995 hearing, at 14.
[70] U.S. Const., Art. I, Sec. 8, cl. 3.
[71] Congress preempted state tort reform to promote the nuclear power industry. See *Duke Power Co.* v. *Carolina Environmental Study Group,* 439 U.S. 59 (1978). See also Public Utility Holding Company Act of 1935, 15 U.S.C. sec. 79 et seq. (activities involved "not susceptible of effective control by any State"); United States Cotton Standards Act, 7 U.S.C. sec. 51 et seq. (uniform national classifications necessary to protect and promote commerce); Cigarette Labeling and Advertising Act, 15 U.S.C. sec. 1331 et seq. (national standards essential in order that "commerce and the national economy * * * not (be) impeded by diverse, nonuniform regulations"); Federal Employers' Liability Act, 45 U.S.C. 51 et seq.

Senators Lieberman and McCain on January 31, 1995, was referred to the Commerce Committee. On April 6, 1995, the Senate Committee on Commerce, Science, and Transportation favorably reported S. 565 as amended by the Chairman's mark by a rollcall vote of 13 to 6.

The Committee has a long history of involvement with product liability reform. In the Committee's early treatment of the subject, it reported three bills, each of which was introduced by Senator Kasten. S. 2631 was reported by the Committee in the 97th Congress (S. Rep. 97–670), and S. 44 was reported by the Committee in the 98th Congress (S. Rep. 98–476). Congress adjourned without Senate action on either of these measures.

At the beginning of the 99th Congress, on January 3, 1985, Senator Kasten introduced S. 100, the Product Liability Act. This bill preempted state law to impose uniform federal rules and standards of liability governing the recovery of damages for injuries caused by defective products. The legislation was substantially the same as S. 44, which had been reported by the Committee during the 98th Congress.

A Consumer Subcommittee hearing on S. 100 was held on March 21, 1985 (Serial No. 99–84) and the bill was reviewed by the Committee at an executive session on May 16, 1985. At that session, the motion to report the bill was defeated by an 8–8 vote.

Prior to the May 16, 1985, executive session, two amendments in the nature of a substitute to S. 100 had been introduced. One of these amendments (S. Amdt. No. 16) was introduced by Senator Christopher Dodd on March 19, 1985, and the other (S. Amdt. No. 100) was introduced by Senator Slade Gorton on May 14, 1985. These amendments were complete substitutes for S. 100 that preempted certain aspects of state law and also established alternative expedited claim systems for limited recovery of damages in product liability cases. Hearings on the Dodd and Gorton amendments were held by the Consumer Subcommittee on June 18 and June 25, 1985 (Serial No. 99–177).

After these hearings, the Committee staff was instructed by the Chairman of the Commerce Committee, Senator John C. Danforth, to draft a proposal that combined elements of all these measures. After review of extensive comments received from the public in connection with the Committee's first draft, a second draft was released on November 20, 1985. This draft was formally introduced by Senator Danforth on December 20, 1985, as S. 1999. This bill was the subject of two days of hearings before the Consumer Subcommittee on February 27 and March 11, 1986.

On April 30, 1986, Senator Kasten introduced an amendment in the nature of a substitute for S. 100 (S. Amdt. No. 1814).[72] This amendment embodied recommendations for product liability reform that had been made by the administration's Tort Policy Working Group.[73]

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[72] 132 Cong. Rec. S5106.

[73] Report of the Tort Policy Working Group on the Causes Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February 1986).

On May 12, 1986, Senator Danforth introduced an amendment in the nature of a substitute for S. 1999 (S. Amdt. No. 1951).[74] This amendment replaced the expedited claim system of S. 1999 with an expedited settlement system and made a number of other changes in S. 1999. On May 20, 1986, Senator Gorton introduced an amendment in the nature of a substitute to the Danforth amendment (S. Amdt. No. 1968).[75] On May 19 and 20, 1986, the Consumer Subcommittee held hearings on the Kasten amendment, the Danforth amendment, and the other product liability measures before the Committee.

On June 3, 1986, the Committee began its markup of product liability legislation. The markup draft bill was an original bill that embodied the provisions of the Danforth amendment to S. 1999. On June 12th, the Committee adopted an amendment in the nature of a substitute for the original markup draft bill. On June 12, 19, 24, 25 and 26, 1986, the Committee continued its consideration of the amendment and added a number of other amendments before reporting S. 2760 as an original bill. S. 2760 came before the full Senate on September 17, 1986. On September 25th, the Senate agreed to the motion to proceed to S. 2760 by a vote of 84 to 13. The bill was returned to the Senate Calendar, and no further action was taken.

The primary activity on federal product liability legislation in the 100th Congress occurred in the House of Representatives. On February 18, 1987, Congressman Bill Richardson and Thomas A. Luken introduced H.R. 1115, which was referral to the House Energy and Commerce Committee. The Subcommittee on Commerce, Consumer Protection and Competitiveness held extensive hearings on the need for federal product liability reform and on specific issues in the bill on May 5, May 20, June 18, July 21, August 6, October 7, and December 17, 1987. The Subcommittee met to mark up the bill on November 18, 19, and 20, and December 3 and 8, 1987. H.R. 1115 was reported by the Subcommittee, as amended, on December 8, 1987, by a vote of 11–3. On May 10, 12, 18, 19, and 24, June 1, 2, 8, 9, and 14, 1988, the Energy and Commerce Committee met to mark up H.R. 1115, voting on June 14 to report H.R. 1115, as amended, favorably by a recorded vote of 30–12. H.R. 1115 then received a sequential referral to the House Committees on the Judiciary and on Education and Labor. The Education and Labor Committee held a hearing on September 27, 1988, on provisions in H.R. 1115 that affected workplace safety. The House Judiciary Committee took no action on the bill in the 100th Congress. The sequential referral ran through the end of the session, so the 100th Congress adjourned without considering H.R. 1115 on the floor of the House.

During the 101st Congress, the Committee held three hearings on S. 1400, the Product Liability Reform Act, introduced by Senator Kasten (S. Hrg. 101–243). On May 22, 1990, the Commerce Committee reported an amendment in the nature of a substitute to S. 1400 by a roll call vote of 13 to 7 (S. Rep. 101–356). The full

[74] 132 Cong. Rec. S5874.
[75] 132 Cong. Rec. S6232.

Senate took no action before the adjournment of the 101st Congress.

In the 102nd Congress, Senator Kasten introduced S. 640 on March 13, 1991. There were 36 cosponsors of the bill, including seven members of the Committee. On September 12, 1991, the Consumer Subcommittee held a hearing on S. 640 and the full Commerce Committee held a second day of hearings on S. 640 and S. 645. The General Aviation Accident Standards Act of 1991, on September 19, 1991. On October 3rd, the Committee favorably reported S. 640 by a roll call vote of 13 to 7.

On May 7, 1992, the provisions of S. 640 were incorporated into an amendment offered by Senator Kasten to S. 250, the National Voter Registration Act. On May 14th, the amendment was tabled by a vote of 53 to 45. On June 26th, the bill was sequentially referred to the Committee on the Judiciary until August 12th. The Judiciary Committee held a hearing on August 5th but took no further action. Under the terms of a unanimous consent agreement, on September 8th, the Senate began consideration of a motion to proceed to consider S. 640. On September 10th, the Senate failed to invoke cloture on the motion to proceed by a vote of 57 to 39. A motion to reconsider that vote was agreed to by a vote of 57 to 39, and a subsequent cloture vote failed 58 to 38. No further action was taken.

In the 103rd Congress, Senators Jay Rockefeller and Slade Gorton introduced S. 687, The Product Liability Fairness Act, on March 31, 1993. The Consumer Subcommittee held a hearing on S. 687 on September 23, 1993 (Serial No. 103–490). On November 9, 1993 the Committee ordered S. 687 favorably reported by a roll call vote of 16 to 4. The bill was taken to the floor and on June 28, 1994 a motion to invoke cloture failed 54–44. On June 29, 1994 a second motion to invoke cloture failed 57–41.

SUMMARY OF MAJOR PROVISIONS

A. Applicability and preemption

The Act applies to any product liability action filed on or after the Act's date of enactment. The Act preempts State law only to the extent that State law applies to an issue covered in the Act. If an issue is not covered in the Act, state law is not preempted on that point.

B. Alternative dispute resolution

Either party may offer to participate in a voluntary, non-binding state-approved alternative dispute resolution (ADR) procedure. If a defendant unreasonably refuses to participate and a judgement is entered for the claimant, the defendant must pay the claimant's reasonable legal fees and costs. No penalty may be assessed against a defendant unless judgement is entered for the claimant and the defendant is found to have acted unreasonably or not in good faith in refusing to participate in ADR.

There is no penalty for claimants who refuse to participate in an ADR procedure. Consequently, claimants are in control of whether they choose to use ADR procedures as a quicker and cheaper mechanism of handling their claim. This provision particularly aids

claimants with relatively minor injuries (under $100,000) as those individuals often have difficulty finding a lawyer to take their case on a contingency basis due to the expense of preparing for trial. This provision should help such individuals receive compensation for their claims more quickly and bypass the need to retain costly legal representation.

C. Product sellers

Product sellers are held liable only for their own negligence or failure to comply with an express warranty. The product seller, however, remains liable as if it were the manufacturer if the manufacturer cannot be brought into court or is unable to pay a judgement. This provision assures injured persons will always have available an avenue for recovery.

D. Alcohol and drugs

The defendant has an absolute defense if the plaintiff was under the influence of intoxicating alcohol or illegal drugs and as a result of this influence was more than 50 percent responsible for his or her own injuries.

E. Misuse and alteration

A defendant's liability is reduced to the extent a claimant's harm is due to the misuse or alteration of a product.

F. Punitive damages

Punitive damages may be awarded if a plaintiff proves, by "clear and convincing evidence," that his or her harm was caused by the defendant's "conscious, flagrant indifference to the safety of others."

Punitive damages may be awarded up to the greater of $250,000 or three times economic damages. There is no limitation on compensatory damages (economic damages plus "non-economic damages" such as pain and suffering).

Either party can request the trial be conducted in two phases, one dealing with compensatory damages and the other dealing with punitive damages. The same jury is used in both phases. In the phase on punitive damages, evidence on the defendant's profits from the alleged wrongdoing is admissible, but evidence about the defendant's overall assets is not admissible.

G. Statute of limitations

The statute of limitations is established as two years from when the claimant discovered or should reasonably have discovered both the harm and its cause. A plaintiff may not file suit after this time.

H. Statute of repose

A statute of repose of 20 years is established for durable goods used in the workplace. After such goods have been in the workplace 20 years or longer, no suit may be filed for injuries related to their use unless the defendant made an express warranty in writing as to the safety of the specified product involved, and the warranty was longer than the period of repose (20 years). Then, the statute of repose does not apply until that warranty period is complete.

I. Joint and several liability

Joint liability is abolished for non-economic damages, such as pain and suffering. As to these damages, defendants are liable only in direct proportion to their responsibility for the claimant's harm.

J. Workers' compensation subrogation standards: Section 110

This provision preserves an employer's right to recover workers' compensation benefits from a manufacturer whose product harmed a worker unless the manufacturer can prove, by clear and convincing evidence, that the employer caused the injury.

K. Biomaterials access assurance

The Biomaterials Access Assurance Act would allow suppliers of the raw materials (biomaterials) used to make medical implants, to obtain dismissal, without extensive discovery or other legal costs, in certain tort suits in which plaintiffs allege harm from a finished medical implant.

The Act would not affect the ability of plaintiffs to sue manufacturers or sellers of medical implants. It would, however, allow raw materials suppliers to be dismissed from lawsuits if the generic raw material used in the medical device met contract specifications, and if the biomaterials supplier cannot be classified as either a manufacturer or seller of the medical implant.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 14, 1995.

Hon. LARRY PRESSLER,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 565, the Product Liability Fairness Act of 1995, as ordered reported by the Senate Committee on Commerce, Science, and Transportation on April 6, 1995. CBO estimates that enacting S. 565 would not result in any significant cost to the federal government. Because enactment of S. 565 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

Bill Purpose. This bill would set new standards for 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 S. 565 would establish when a product seller or biomaterials supplier 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 non-economic loss would be determined. S. 565 also would enable private parties to use alternative dispute

resolution procedures to settle product liability cases. In addition, the bill would prohibit the filing of law suits unless the complaint is filed within two years from when the injured party discovered, or should reasonably have discovered, the alleged harm and its cause. The bill also would preserve the right of employers to recover workers' compensation benefits in cases of work injury unless the manufacturer could prove that the employer or another employee was at fault.

Budgetary Impact. While some state product liability cases may be conducted in federal court, the majority of product liability cases are handled in state courts. Thus, 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, increased savings to the state court system could be realized to the extent that more uniformity in state product liability law results in fewer appeals and more efficient litigation. Based on information from the National Center for State Courts, CBO estimates that the amount of such costs or savings would be insignificant.

Previous CBO Estimate. On February 23, 1995, CBO prepared a cost estimate for H.R. 956, the Common Sense Product Liability Act of 1995, as ordered reported by the House Committee on the Judiciary on February 22, 1995. On March 1, 1995, CBO prepared a cost estimate for H.R. 917, the Common Sense Product Liability Reform Act of 1995, as ordered reported by the House Committee on Commerce on February 23, 1995. Both H.R. 956 and H.R. 917 are similar in substance and cost to S. 565.

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 June E. O'Neill, Director).

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of the rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of this legislation.

NUMBER OF PERSONS AFFECTED

The purpose of this product liability reform legislation, as reported, is to provide greater certainty as to the rights and responsibilities of all those involved in product liability disputes, to reduce transaction costs, to relieve the burden imposed on interstate commerce by the present product liability litigation system, and to ensure the continued availability of biomaterials for implantable medical devices. It is anticipated that it will affect the conduct of those involved in product liability disputes by making a number of significant changes in the laws that are applicable to all product liability actions. This legislation does not change the jurisdiction of state or federal courts. Thus, the number of persons affected should be consistent with current levels.

ECONOMIC IMPACT

It is anticipated this legislation will result in substantial cost and paperwork savings to all parties affected by product liability lawsuits. First, the legislation will bring greater predictability to this area of the law, and, thus, save time and money for manufacturers, product sellers and consumers alike, each of whom will be able to determine their rights more readily than under current law. The legislation should also foster product innovation and enhance the competitive position of U.S. product manufacturers in world markets.

PRIVACY

S. 565 will have no adverse impact on the personal privacy of the individuals or businesses affected.

PAPERWORK

S. 565 creates no new regulations and imposes no additional regulatory requirements at either state or the federal level. The legislation will not change the jurisdiction of state or federal courts.

SECTION-BY-SECTION ANALYSIS OF S. 565

SECTION 1—SHORT TITLE

As reported

Section 1 states the short title of the legislation, providing that the legislation may be cited as the "Product Liability Fairness Act of 1995."

Title I—Product Liability

SECTION 101—DEFINITIONS

In general

Section 101 defines terms or phrases used in the bill. Whenever a defined term or phrase is used, reference should be made to the definition in this section.

As reported

Section 101 defines the following terms:

(1) *Claimant.*[76]—As used in the Act, a "claimant" is any person who brings a product liability action and any person on whose behalf such as action is brought. If a product liability action is brought through or on behalf of an estate, the term includes the claimant's decedent. If a product liability action is brought through or on behalf of a minor, the term includes the minor's legal guardian.

(2) *Claimant's Benefits.*—This term includes all benefits paid to an employee as workers' compensation and the present value of all workers' compensation benefits to which the employee is or would

[76] The bill does not alter, modify, change, or preempt State law governing who may be a "claimant." For example, state statutes stating who may bring a wrongful death or survival action are not affected by the bill. Such persons, if authorized by State law to bring the action, are "claimants" under the bill.

be entitled at the time of the determination of the claimant's benefits, as determined by the appropriate workers' compensation authority for harm caused to an employee by a product.

(3) *Clear And Convincing Evidence.*—The Act adopts the generally accepted definition of "clear and convincing evidence."[77] This phrase means the degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth the allegations sought to be established. The "clear and convincing evidence" standard reflects the quasi-criminal nature of punitive damages; it requires proof greater than the "preponderance of the evidence" standard ordinarily used in civil cases, but less proof than the "beyond a reasonable doubt" standard found in the criminal law.

(4) *Commercial Loss.*—This term applies to any loss or damage to a product itself, loss relating to a dispute over its value, or consequential pecuniary loss the recovery of which is governed by the Uniform Commercial Code or analogous state law, not including "harm" as defined in the Act.

(5) *Durable Good.*—This term means any product, or any component of a product, which has a normal life expectancy of three or more years or is of a character subject to allowance for depreciation under the Internal Revenue Code of 1986, and which is used in a trade or business, held for the production of income, or sold or donated to a governmental or private entity for the production of goods, training, demonstration, or any other similar purpose.

(6) *Economic Loss.*—This term means any pecuniary loss resulting from harm, including any medical expense loss, work loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities, to the extent allowed under applicable state law. The essential distinction between economic and noneconomic loss is that economic loss is subject to empirical measurement and confirmation. In contrast, noneconomic loss, such as "pain and suffering," is not capable of measurement according to an objective standard.[78]

(7) *Harm.*—The Act defines this term to include any physical injury, illness, disease, or death, or damage to property caused by a product. For example, damage to a building caused by a boiler explosion would be a compensable loss under the Act. Whether the harm is suffered by an individual or a business is of no consequence; it is the nature of the loss that triggers application of the Act.

The definition of "harm" does not include loss or damage caused to a product itself, loss relating to a dispute over the value of a product, or consequential economic loss (*i.e.*, loss of profits due to an inability to use the damaged product). The Act leaves recovery for such losses to commercial law in accord with the traditional rule followed in the overwhelming majority of states.[79]

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[77] See *Hobson* v. *Eaton*, 399 F.2d 781 (6th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969). See also 30 Am.Jur.2d Evidence § 1167 (1967).

[78] See McCormick, "Handbook on the Law of Damages" 318 (1935).

[79] In cases in which a court determines that a commercial loss resulting from damage caused by a product is recoverable in tort, in contravention of the traditional rule, those losses would be included in the definition of "harm" and the provisions of this Act would apply.

(8) *Insurer*. This term means the employer of a claimant, if the employer is self-insured, or the workers' compensation insurer of the employer.

(9) *Manufacturer*.—The Act defines this term as any person[80] engaged in a business to produce, create, make, or construct any product[81] (or component part of a product), and who designs or formulates the product (or component part of the product), or has engaged another person to design or formulate the product (or component part of the product). The term does not include a person who only designs or formulates a product—such as an architect or engineer. These persons, although not liable under the bill, may be liable under traditional tort law for failure to exercise reasonable skill and care in rendering their design services.[82]

A product seller[83] may be a "manufacturer" of the product (or component part of a product) if the product seller sells or otherwise places a product or component into the stream of commerce in two situations. First, the product seller is a "manufacturer" of a product with respect to the those aspects of a product (or component part of a product) which are created or affected when, before placing in the stream of commerce, the product seller produces, creates, makes, constructs, 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 person. Where a product seller engaged in such conduct before placing the product in the stream of commerce, the product seller is responsible for the consequences of that conduct as if it were the manufacturer.

For example, a company may manufacture a truck and deliver it to a product seller. Prior to selling that vehicle, the product seller may design and create what becomes a new aspect of the truck by, for example, adding a larger engine or a cabin unit. The product seller is, then, the manufacturer of the end product with respect to all aspects of the product that are affected or created by the addition. Thus, the product seller is the manufacturer with respect to defects in the cabin unit itself and with respect to defects created by adding the unit to the original truck, such as lack of a warning back-up buzzer.[84] This rule fairly holds the product seller responsible for the consequences of the product seller's own actions in designing and creating a new product from the original product; it is not intended to impose the manufacturer's liability on a product seller who merely cleans, paints, or reconditions the truck with parts that are designed or manufactured by someone else.

Second, a product seller is deemed to be the "manufacturer" of a product where the product seller holds itself out as the manufacturer to the user of the product. Where a product seller attaches the product seller's own private label to a product made by another, the product seller's name and reputation become a representation of the product's quality in design and manufacture. The rule hold-

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[80] "Person" is defined in section 101(11).

[81] "Product" is defined in section 101(12).

[82] See, e.g., *Mechanical Rubber & Supply Co.* v. *Caterpillar Tractor Co.*, 399 N.E. 2d 722 (Ill. App. 1980). See also *State ex rel. Risk Management Div. of Finance & Admin.* v. *Gatham-Matotan Architects and Planners, Inc.*, 653 P.2d 166 (N.M. 1982).

[83] "Product seller" is defined in section 101(14).

[84] See e.g., *Green* v. *City of Los Angeles*, 115 Cal. Rptr. 685 (174) (seller of crane liable for harm caused by deficits in the crane created by the seller's modifications; given the modifications made by the seller, it was "tantamount to a manufacturer").

ing a product seller responsible for harms caused by products that the product seller "endorses" with the product seller's private label is uniformly by the states.[85]

(10) *Noneconomic Loss.*—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. The term does not include economic loss.

(11) *Person.*—The Act uses a broad definition of the term "person." The term is defined to include an individual, corporation, company, association, firm, partnership, society, joint stock company and any other entity (including governmental entities).

(12) *Product.*—The term is defined as any object, substance, mixture, or raw material in a gaseous, liquid, or solid state that, (i) is capable of delivery itself or as an assembled whole, in a mixed or combined state or as a component part or ingredient; (ii) is produced for introduction into trade or commerce; (iii) has intrinsic economic value; and (iv) is intended for sale or lease to persons for commercial or personal use. The term does not include tissue, organs, blood, and blood products used for therapeutic or medical purposes, except to the extent that such tissue, organs, blood and blood products (or the provision thereof) are subject, under applicable State law, to a standard of liability other than negligence.[86] The term also does not include electricity, water delivered by a utility, natural gas, or steam.

(13) *Product Liability Action.*—This term means a civil action brought on any theory for harm caused by a product.

(14) *Product Seller.*—A product seller is any person who, in the course of a business conducted for that purpose, sells, distributes, rents, leases, prepares, blends, packages, labels, or otherwise is involved in placing a product in the stream of commerce, or who installs, repairs, refurbishes, reconditions, or maintains the harm-causing aspect of the product. The definition includes anyone in the chain of distribution, such as a wholesaler, distributor, or retailer.

The term specifically excludes sellers or lessors of real property. Actions against such sellers or lessors will continue to be governed by state tort or real estate law.[87]

The term also excludes providers 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.[88] Where, for example, an engineer, phar-

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[85] See *Restatement (Second) of Torts* § 400 (1965). See also *Smith* v. *Regina Mfg. Corp.*, 396 F.2d 826 (4th Cir. 1968); *Carter* v. *Joseph Bancroft & Sons Co.*, 360 F. Supp. 1103 (E.D. Pa. 1973); *Moody* v. *Sears, Roebuck & Co.*, 324 F. Supp., 844., (S.D. Ga. 1971).

[86] Claims for harm caused by tissue, organs, blood and blood products used for therapeutic or medical purposes are, in the view of most courts, claims for negligently performed services and are not subject to strict product liability. The Act thus respects state law by providing that, in those states, the law with respect to harms caused by these substances will not be changed. In the past, however, a few states have held that claims for these substances are subject to a standard of liability other than negligence, and this Act does not prevent them from doing so. See, e.g., *Cunningham* v. *MacNeal Memorial Hosp.*, 266 N.E.2d 897 (Ill. 1970) (overturned by Ill. Ann. Stat. Ch. 111½, sections 2 and 3). Such actions would be governed by the Act. Actions involving claims for harm caused by electricity, water delivered by a utility, natural gas, or steam are treated in the same manner.

[87] See, e.g. *Restatement (Second) of Torts* §§ 353, 385 (1965) (providing standards of care for builders, contractors, and sellers of real estate).

[88] The approach taken by the Act is consistent with the law of the majority of states. See W. Prosser and W. Keeton, *Torts* 719–20 (5th ed. 1984).

macist, optician, or physician provides or uses a product in connection with that person's professional services, the person is not a product seller under the Act.[89] The majority rule is that a professional is required to exercise reasonable care, prudence, and skill in rendering services. Where failure to do so results in harm, injured persons have remedies under traditional state tort law theories and do not have a claim under this bill.

If, however, a professional engages in a commercial transaction where the essence of the transaction is not the furnishing of professional skill and judgment, the professional may be a product seller. For example, a pharmacist who sells perfume or photographic film may be a product seller within the scope of the Act. In such a case, the sale rather than the exercise of professional skill is the essence of the transaction; the action would therefore be governed by the Act.

The term "product seller" also excludes persons who act in only a financial capacity with respect to the sale of a product or lease a product under a lease arrangement in which the lessor does not initially select the leased product and does not during the lease term ordinarily control the daily operation and maintenance of the product. Such persons, called "finance lessors," generally have no contact with the product and do not provide advice about the product or its selection. These persons merely provide the money to transfer the product to the lessee. Courts that have considered the issue uniformly hold that finance lessors are not product sellers.

(15) *State.*—This definition is broad and is intended to include the District of Columbia, all the States, territories, and possessions of the united States, and any political subdivision thereof.

(16) *Time of Delivery.*—This term means the time when a product is delivered to the first purchaser or lessee of the product that was not involved in manufacturing or selling the product, or using the product as a component part of another product to be sold.

SECTION 102—APPLICABILITY; PREEMPTION

In general

This section provides that the Act governs any product liability action commenced on or after the date of its enactment, without regard to whether the harm that is the subject of the action or the conduct that caused the harm occurred before the date of enactment. The Act specifically excludes civil actions brought for loss or damage to a product itself or for commercial loss, leaving them subject to any applicable commercial or contract law. It also excludes civil actions for negligent entrustment or negligence in selling, leasing or renting to an inappropriate party, leaving these actions subject to applicable state law.[90]

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[89] See, e.g., *Carmichael* v. *Reitz*, 95 Cal. Rptr. 381 (1971); *Bichler* v. *Willing*, 397 N.Y.S.2d 57 (N.Y. 1977); *Barbee* v. *Rogers*, 425 S.W.2d 342 (Tex. 1968) *Migrine* v. *Krasnica*, 227 A.2d 539 (N.J. Super. 1967), aff'd, 250 A.2d 129 (N.J. 1969), aff'd, 250 A.2d 129 (N.J. 1969).

[90] For example, the provisions of the Act would not cover a seller of liquor in a bar who sold to a person who was intoxicated or a car rental agency that rents a car to a person who is obviously unfit to drive or a gun dealer that sells a firearm to a "straw man" fronting for children or felons. These actions would not be covered by the Act, because they involved a claim that the product seller was negligent with respect to the purchaser and not the product. Such actions would continue to be governed by state law.

The Act follows the traditional rule applied in the overwhelming majority of states by leaving claims for loss or damage caused to a product itself, loss relating to a dispute over the value of a product, or consequential pecuniary loss (i.e., loss of profits due to an inability to use the damaged product) to state commercial or contract law.[91] The leading case is *Seeley* v. *White Motor Co.*, 403 P.2d 145 (Cal. 1965), decided three decades ago, which takes the position that damage to the product itself and commercial losses are remedies that should be decided under the Uniform Commercial Code.[92] The United States Supreme Court strongly endorsed this principle in an admiralty case, *East River Steamship Co.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). The American Law Institute's *Restatement of Torts (Third)* project Draft No. 2 (May 19, 1994) also takes the position that "[w]hen a product defect results in harm from the product itself or an economic loss to a plaintiff * * * the law governing commercial transactions is the more appropriate source to resolve disputes between the parties," because such losses are, in essence, contract damages, not tort damages.[93]

The Act supersedes State law only to the extent that State law applies to an issue covered under the Act. Any issue that is not covered under the Act, including any standard of liability applicable to a manufacturer, is not subject to the Act, but is subject to applicable Federal or State law.

Present law

On average, over seventy percent of the products that are manufactured in a particular state are shipped out of the state and sold.[94] The current patchwork of over 51 state and District of Columbia and territorial product liability laws sends confusing and often conflicting signals to those who make, sell, or use products in the United States. Uncertainties in our Nation's product liability system create unnecessary legal costs, impede interstate commerce and stifle innovation, among other problems. Scholars have recognized that the current product liability system does not distinguish well between good and bad products. The Act seeks to simplify the law and reduce the costs and unpredictability of the current system.

Congress has the power under the Commerce Clause of the United States Constitution[95] to enact a federal product liability statute

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[91] See *Baltimore Football Club, Inc.* v. *Lockheed Corp.*, 525 F. Supp. 1206 (N.D. Ga. 1981); *Industrial Uniform Rental Co.* v. *International Harvester Co.*, 463 A.2d 1085 (Pa. Super 1983); *Moorman Mfg. Co.* v. *National Tank Co.*, 435 N.E.2d 443 (Ill. 1982); *Superwood Corp.* v. *Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981).

[92] The Committee strongly endorses the principle established in *Seeley*, that damages for commercial losses resulting from a defective product should be governed by the Uniform Commercial Code. In such cases, however, where a court determines that such losses are recoverable under a tort theory, the Committee intends that such losses be included within the definition of "harm" and this Act would apply.

[93] See also Note, "Economic Loss in Product Liability Jurisprudence," 66 Colum. L. Rev. 927 (1966). It is the Committee's intent that where recovery is not allowed because of a state statute of limitations defense or other defenses to contract liability, the Act will not create an independent cause of action. For example, a claim could not be brought under the Act if recovery under state contract or commercial law is barred because of the statute of limitations, contractual disclaimers or limitations of remedies.

[94] See Commodity Transportation Survey, U.S. Dept. of Commerce, Bureau of the Census, Table 1, pp. 1–7 (1977).

[95] See U.S. Const., art. I, § 8, cl. 3.

that preempts state law.[96] "Any such legislation would offend neither the Tenth Amendment's recognition of state sovereignty * * * nor the Fifth Amendment's traditional notions of due process and equal protection."[97] The Supremacy Clause of the United States Constitution also gives Congress the power to enact a federal law that replaces state law in the area of product liability.[98] The fact that tort law is traditionally a matter of state law does not alter this rule, and it is expected that state and federal courts with jurisdiction over product liability actions will interpret the Act in a manner consistent with the intent of Congress. Congress has long exercised its authority in matters of interstate commerce by enacting federal solutions to problems,[99] including the enactment of statutes that preempt state tort law.[100]

As reported

Section 102(a)(1) states that the Act governs any product liability action, as defined by section 101(13), commenced on or after the date of its enactment, without regard to whether the harm that is the subject of the action or the conduct that caused the harm occurred before the date of enactment. Commence means to initiate by performing the first act or step. Therefore, the Act does not apply to actions filed before the date of enactment but litigated after enactment. As the Act does not apply to such actions, the Act also does not apply to actions remanded or appealed after the date of enactment but commenced before that date. Applying the statute to all claims filed after the effective date, regardless of when the harm occurred, allows all parties and courts to know precisely what law applies in a product liability action. The rule furthers the goal of providing uniformity and predictability for all who make, sell, or use products in the United States.

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[96] The Commerce Clause power extends to interstate and intrastate activities which affect interstate commerce. See *e.g., Federal Energy Regulatory Comm'n* v. *Mississippi,* 456 U.S. 742 (1982) (discussion of scope of Commerce Clause); *Fry* v. *United States,* 421 U.S. 542 (1976); *Katzenbach* v. *McClung,* 379 U.S. 294 (1964); *Wickard* v. *Filburn,* 317 U.S. 111 (1942).

[97] See Schmidt & Derman, "The Constitutionality of Federal Products Liability/Toxic Tort Legislation," 6 J. Prod. Liab. 171, 184 (1983). See also *Duke Power Co.* v. *Carolina Environmental Study Group,* 438 U.S. 59, 93 (1978), where the Court held that preemption of state tort law in order to promote the nuclear power industry is permissible under the Commerce Clause and does not violate the Fifth Amendment. In reaching this decision, the Court also rejected a challenge under the Equal Protection Clause.

[98] See U.S. Const., art. VI, cl. 2. Under the Supremacy Clause, state courts are bound to apply federal law. See *Dice* v. *Akron, Canton & Youngstown R.R. Co.,* 342 U.S. 359 (1952) (Federal Employers' Liability Act). In addition, when there is a variance between State and Federal law, "incompatible doctrines of local law must give ways to principles of federal * * * law." *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of Am.* v. *Lucas Flour Co.,* 369 U.S. 95, 102 (1962) (National Labor Relations Act).

[99] For example, Congress enacted the United States Grain Standards Act in 1916, 7 U.S.C. §§ 71–87, 111, 113, 241–73, 2209 and 16 U.S.C. §§ 490, 683 (establishing uniform national standards for grain); the United States Cotton Standards Act in 1923, 7 U.S.C. §§ 51–65 (requiring uniform classifications for judging quality or value of cotton); the Tobacco Inspection Act in 1935, 7 U.S.C. §§ 511–511q (requiring compliance with uniform national classifications); the Food, Drug and Cosmetic Act in 1938, 21 U.S.C. §§ 21 U.S.C. §§ 30192 (safety and labeling of drugs); the Consumer Product Safety Act in 1972, 15 U.S.C. §§ 2051–2083 and 5 U.S.C. §§ 5314, 5315 (uniform safety standards for consumer products).

[100] See, e.g., Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901 et seq. (imposing liability without regard to fault); Price-Anderson Act, 42 U.S.C. § 2210 (limiting liability for nuclear power plant accidents); Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (governing the liability of interstate railway carriers to their employees and altering State tort law on available defenses). Most recently, in August 1994, President Clinton signed the General Aircraft Revitalization Act of 1994, establishing a uniform, national 18-year statute of repose for general aviation aircraft.

Consistent with the definition of "harm" set forth in section 101(7), section 102(a)(2)(A) states that a civil action for loss or damage to the product itself or for commercial loss (i.e., loss relating to a dispute over the value of a product or consequential pecuniary loss) is not governed by the Act, but is governed by applicable commercial or contract law.

Section 102(a)(2)(B) provides that a civil action for negligent entrustment (i.e., negligence in selling, leasing or renting to an inappropriate party) is not governed by the Act, but is governed by applicable state law.

Section 102(b) provides that the Act supersedes state law regarding recovery for harm caused by a product only to the extent that the Act establishes a rule of law applicable to an action for such recovery. Any issue arising in an action governed by this Act that is not governed by a rule of law established by the Act shall be governed by otherwise applicable state common and statutory law.

Recently, a number of state legislatures have considered the question of tort liability, including product liability, and some have adopted measures dealing with this matter. It is not the Committee's intention that this Act preempt such state legislation, or any other rule of state law, that provides for defenses, places limitations on the amount of damages that may be recovered, or covers other topics that are not addressed by a rule in this Act.

Section 102(c) lists a number of laws that are not superseded or affected by the Act. The Act does not waive or affect the defense of sovereign immunity of any State or of the United States; supersede any Federal law,[101] affect the applicability of any provision of chapter 97 of title 28 of the United States Code; preempt state choice-of-law rules with respect to claims brought by a foreign nation or foreign citizen; or 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. The Act also does not supersede or modify any statutory or common law, including an action to abate a nuisance, that authorizes a person to institute an action for civil damages or civil penalties, cleanup costs, injunctions, restitution, cost recovery, punitive damages, or any other form of relief for remediation of the environment (as defined in section 101(8) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601(8))[102] or the threat of such remediation. Such actions, which are brought against owners or operators of facilities as opposed to product manufacturers, involve separate policy considerations and relate to acts that are different from the acts for which this legislation provides rules of law. The exception for environmental cases in this section makes clear that this Act does not apply to actions for damage to the environment. The Act

[101] For example, the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq., the General Aviation Revitalization Act of 1994, the Oil Pollution Act of 1990 (P.L. 101–380), and the Trans Alaska Pipeline Authorization Act (P.L. 93–153), are not affected by the Act.

[102] This Act provides: "'[E]nvironment' means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States."

does apply to all product liability actions for harm, as defined in this Act.

Section 102(d) requires that this bill be construed and applied after consideration of its legislative history to promote uniformity of law in the various jurisdictions.

Section 102(e) provides that the decision of a U.S. Court of Appeals interpreting the provisions of this Act shall be controlling precedent to be followed by each and every federal and state court within that circuit unless overruled or modified by the Supreme Court of the United States.

SECTION 103—ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

In general

Because of its complexity and expense, the legal system is inaccessible to many product liability claimants. Section 103 establishes a scheme for expedited settlement of product liability claims in the initial stages of litigation. The alternative dispute resolution (ADR) procedures provision is based on incentives for settlement that will reduce the delays, excessive transaction costs, and uncertainties associated with such claims.

Specifically, section 103 allows either party to initiate settlement of a dispute pursuant to any voluntary and nonbinding ADR procedures established in the law of the state where the action is brought or under the rules of the court in which the action is maintained. If a defendant unreasonably refuses to participate in ADR procedures, and judgment is entered against that defendant, the court must assess reasonable attorney's fees against the defendant. Plaintiffs, on the other hand, are free to refuse to participate in ADR procedures without penalty. This "one-way" ADR is more favorable to plaintiffs than the law in any state.

Section 103 will increase access to the legal system, reduce the costs of litigation, and expedite resolution of legal disputes to the benefit of all plaintiffs. The provision is especially beneficial for plaintiffs with smaller claims. Plaintiffs with smaller claims are frequently unable to afford or obtain lawyers to represent them in expensive courtroom litigation. Such plaintiffs, however, can secure lawyers to represent them in ADR proceedings, which are free of cumbersome rules of procedure and evidence and do not require the use of expensive expert witnesses. Moreover, many plaintiffs desire to and are capable of representing themselves in ADR proceedings. These individuals need not pay expensive attorney costs.

William Fry, Executive Director of HALT, a nonprofit legal reform organization supported by 70,000 individual members nationwide, testified at an April 3, 1995 hearing on S. 565 before the Consumer Affairs, Foreign Commerce and Tourism Subcommittee of the Senate Committee on Commerce, Science, and Transportation that ADR mechanisms are "a way to lower costs, simplify procedures and achieve fairness through avoidance of technical rules of law." HALT supports the use of alternative dispute resolution mechanisms to permit consumers to handle their own legal affairs.

Section 103 does not violate an individual's right to a jury trial under the Seventh Amendment, because the decision in the ADR

procedure is nonbinding[103] and the penalty for unreasonable refusal to utilize ADR applies only against the defendant. Notwithstanding the fact that the bill imposes no penalties on claimants who refuse to use ADR, such incentives have proven to speed the resolution of disputes. At least twenty-four states have mandatory arbitration or mediation laws.[104] Under these programs, litigants are required to enter into arbitration or mediation and the decision reached in this procedure is subject to a trial de novo at the request of either party.[105] The proposal in this section refers only to voluntary and nonbinding ADR programs.

Eighteen states with mandatory arbitration or mediation laws have financial incentives to resolve cases before trial in order to conclude the litigation.[106] There is a similar incentive to settle cases before trial in the federal court system.[107] The use of reasonable attorneys fees as an incentive for parties to accept an arbitrator's decision in the Washington State ADR system has been upheld as consistent with the State's constitutional provision on jury trials, which is similar to the Seventh Amendment.[108]

As reported

Section 103(a) provides that either a claimant or a defendant may offer to proceed pursuant to a voluntary and nonbinding ADR procedure established in the law of the state where the action is brought or under the rules of the court in which the action is maintained. The offer to proceed to ADR must be made within 60 days after service of the initial complaint or the applicable deadline for a responsive pleading, whichever is later.

Section 103(b) provides that if the defendant refuses to proceed to ADR final judgement is entered against the defendant for harm caused by the product that is the subject of the action, and the court determines that such refusal was unreasonable or not in good faith, the court must assess reasonable attorney's fees and costs against the defendant. No sanctions would apply in the event of a settlement. There is no penalty for a claimant that refuses an offer to utilize ADR.

Section 103(c) provides that, in determining whether a refusal by a defendant to enter into ADR is unreasonable, the court shall consider (1) whether the case involves potentially complicated issues of fact; (2) whether the case involves potentially dispositive issues of law; (3) the potential expense faced by the offeree in retaining counsel for both the alternative dispute resolution procedure and to litigate the matter for trial; (4) the professional capacity of avail-

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[103] The Federal District Court for the Eastern District of Pennsylvania has held that ADR procedures that are not binding on the parties do not violate the Seventh Amendment. See *Kimbrough* v. *Holiday Inn*, 478 F. Supp. 566 (E.D. Pa. 1979). Compare *United Farm Workers Nat'l Union* v. *Babbitt*, 449 F. Supp. 449 (E.D. Ariz. 1978) (holding that a mandatory arbitration program that is binding violates the Seventh Amendment).

[104] See McIver and Kerlitz, "Court-Annexed Arbitration," The Justice System Journal, Volume 14, Number 2 at 123 (1991).

[105] See id.

[106] See McIver and Karlitz, supra, at 127, 130.

[107] See F.R.C.P. 68.

[108] See *Colarusso* v. *Peterson*, 812 P.2d 862 (Wash. App. 1991); *Christie-Lambert Van and Storage Co.* v. *McLeod*, 693 P.2d 161 (Wash. App. 1984). Article 1, section 21 of the Washington Constitution provides: "The right of a retrial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto."

able mediators within the applicable geographic area; and (5) such other factors as the court considers appropriate.

SECTION 104—LIABILITY RULES APPLICABLE TO PRODUCT SELLERS

In general

Section 104 is intended to bring legal fairness to product sellers and reduce costs to consumers. Currently, under the law in about thirty-one states, product sellers who do absolutely nothing but wholesale, sell, rent or lease a product are potentially liable for defects that they know nothing about and can know nothing about.[109] They are drawn into the overwhelming majority of product liability cases. The product 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 responsible for the harm. Based on this showing, the seller gets contribution or indemnity from the manufacturer, and the manufacturer ultimately pays the damages.[110]

This approach generates substantial, unnecessary legal costs, as well as unjustified loss of good will and reputation. The net result is wasted time and expense for business that is passed on to the consumer in the form of higher prices. 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. Furthermore, consumers would benefit from a reduction in the hidden "tort tax" now placed on products.

Section 104 follows the lead of approximately nineteen states that have changed their law and now hold product sellers, such as wholesalers and retailers, liable only if they have done something wrong with a product (e.g, misassembled it or failed to convey appropriate warnings to customers).[111] Section 104 holds product sellers liable only for their own fault, unless the manufacturer of the product is out of business or otherwise not available to respond in a lawsuit. The Act assures product sellers are not needlessly brought into product liability lawsuits. It also promotes sound public policy by encouraging product sellers to select the safest products for sale and to deal with responsible manufacturers who will be available and have assets in the United States in case a lawsuit arises because a product is defective. It will encourage product sellers to buy products "Made in the U.S.A." Finally, the Act assures an injured consumer will always have available an avenue to recover full compensation for product-related harms.[112]

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[109] See W. Prosser and W. Keeton, *Torts* 705 (5th ed. 1984).

[110] See, e.g., *Kelly* v. *Hanscom Bros., Inc.*, 331 A.2d 737, 740 (Pa. Super. 1974). ("It is not unusual for liability to move transactionally up the chain of distribution until the manufacturer ultimately pays * * *").

[111] 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).

[112] Two reasons have been advanced for holding product sellers liable as if they were manufacturers. First, it has been argued that the rule promotes safety and reduces the risk of harm,

Continued

As reported

Section 104 specifies when a product seller[113] other than a manufacturer is responsible for harm caused by a product. Section 104(a)(1) provides that a product seller is only liable for harm proximately caused (1) by its own failure to exercise reasonable care with respect to the product, (2) by a product that fails to conform to an express warranty made by the product seller or (3) by its intentional wrongdoing. All three situations follow the rule that a product seller is responsible for the consequences of its own conduct. This concept of individual responsibility, of placing responsibility on the party that actually caused and could have prevented the harm, encourages product safety.

Section 104(a)(2) provides that, except for breach of express warranty, a product seller will not be liable if there was not reasonable opportunity to inspect the product in a manner that would have, or in the exercise of reasonable care should have, revealed the product's danger. For example, a seller may not have had a reasonable opportunity to discover a product defect if the product was prepackaged[114] or if the product never passed through the seller's hands (e.g., a person may have held title to the product but may never have had possession of it).[115]

Section 104(b) provides that a product seller shall be treated as the product manufacturer and shall be liable for the claimant's harm as if the product seller were the manufacturer 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 by the claimant, or (2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer. For example, a judgment would be unenforceable if the court finds that the manufacturer is bankrupt, insolvent, or otherwise unable to pay. A claimant may recover from the product seller for harms that were caused by the manufacturer if one of the two provisions applies, and if the claimant proves that the manufacturer would have been liable under state law. Although section 104(b) departs from the notion of individual responsibility for harms, it ensures that a claimant can recover from the product seller if he or she is unable to recover from the manufacturer responsible for the harm.

Section 104(c) provides that parties engaged in the business of renting or leasing products shall be subject to liability in a product liability action in a manner similar to product sellers under section

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because product sellers will seek to avoid liability by pressuring manufacturers to make safe products. See, e.g., *Vandermark* v. *Ford Motor Co.*, 391 P.2d 168 (1964). This rationale, however, fails to recognize that manufacturers will feel the same, if not greater, pressure to make safe products if they are sued directly for harms caused by their own product defects. Second, it has been argued that the rule is fair because a product seller who is held liable for harm caused by a manufacturer's defect can seek indemnity, see, e.g., Ark. Stat. Ann. §16–116–107, and thereby shift the cost of liability to the manufacturer who actually caused the harm. See, e.g., *Hales* v. *Monroe*, 544 F.2d 331 (8th Cir. 1976); *Litton Systems Inc.* v. *Shaw's Sales & Serv., Ltd.*, 579 P.2d 48 (Ariz. App. 1978). Data show that, in fact, product sellers account for less than five percent of product liability payments, because generally they are either dismissed or indemnified.

[113] "Product seller" is defined in section 102(14).

[114] See Ky. Rev. Stat. §411.340 (Supp. 1984); Tenn. Code §29-28–106 (Supp. 1985). See also *Brady* v. *Steyr-Daimler-Puch, A.G.*, 429 So. 2d 1348 (Fla. App. 1983) (summary judgement for distributor who shipped product in sealed container to dealer).

[115] See, e.g., *Kirby* v. *Rouselle Corp.*, 437 N.Y.S. 2d 512 (1981); *Canifax* v. *Hercules Powder Co.*, 46 Cal. Rptr. 552 (Cal. App. 1965).

104(a).[116] This subsection also preempts state vicarious liability laws, which hold the owner of a product, such as a motor vehicle, liable for the negligence of a user of the product, regardless of whether the owner of the product was negligent in any way. The Committee finds that such unlimited vicarious liability laws impose an undue burden on interstate commerce.

The Committee does not intend that section 104(c) preempt state minimum financial responsibility laws for motor vehicles. This subsection does not relieve the owner of any motor vehicle of responsibility to insure the vehicle to the amounts required under appropriate state law. The Committee also does not intend to apply this section to parties who are excluded from the definition of product seller under section 101(14) of the Act. Financial lessors that are excluded from the definition of product seller under section 101(14) are not subject to the provisions of section 104(c).

SECTION 105—DEFENSES INVOLVING INTOXICATING ALCOHOL OR DRUGS

In general

In about 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.[117] The Act will put an end to that situation: if the principal cause of an accident is the claimant's abuse of alcohol or illicit drugs, he or she will no longer be able to recover. The provision is based on a statute in the State of Washington.[118]

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. The use of intoxicating alcohol and drugs for nonmedicinal purposes by a person creates serious risks to the safety of that person and to the safety of others. For example, drunk driving is a major cause of death on our highways.

The provision assures 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 liability defendant, and ultimately on to society itself. This rule will encourage persons to take responsibility for their own safety and the safety of others.

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[116] Companies that rent or lease products, such as car and truck rental firms, are subject in eleven states and the District of Columbia to liability for the tortious acts of their renters and lessees, even if the rental company is not negligent and there is no defect in the product. In these select states, a rental company will be held vicariously liable for the negligence of its customers simply because the company owns the product and has given permission for its use. Vicarious liability—liability without regard to fault—increases costs for all rental customers nationwide.

[117] The majority of states have laws which would not permit recovery in this situation. One state, Washington, has enacted a defense similar to the S. 565 approach. Six states 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.

[118] See Wash. S.B. No. 4630, Sec. 902 (enacted March 10, 1986). The Washington statute specifies that "If the amount of alcohol in a person's blood is shown by chemical analysis of his or her blood, breath, or other bodily substance to have been 0.10% or more by weight of alcohol in the blood, it is conclusive proof that person was under the influence of intoxicating liquor."

As reported

Section 105(a) establishes a complete defense for any defendant in a product liability action if the defendant can prove that the claimant was under the influence of intoxicating alcohol or any drug that may not lawfully be sold over-the-counter without a prescription, and was not prescribed by a physician for use by the claimant, and the claimant, as a result of such condition, was more than 50 percent responsible for the accident or event that resulted in the claimant's harm.[119]

Section 105(b) provides that the determination of whether a person is under the influence of intoxicating alcohol shall be made pursuant to applicable state law. For example, if applicable state law provides that a particular amount of alcohol in a person's blood is evidence that the person was under the influence of intoxicating alcohol, that standard shall apply.

SECTION 106—REDUCTION FOR MISUSE OR ALTERATION OF PRODUCT

In general

The current product liability system in many states requires defendants to pay for harms caused by no fault of their own. It allows claimants in some instances to grossly misuse products, injure themselves, and then turn to the "deep pocket" for compensation. This result is unjust to manufacturers and responsible consumers, reflects bad policy, and is a clear deviation from traditional notions of fairness and individual responsibility.

The Act offers a solution to this arbitrary situation. Following the law in the majority of states, the Act would allow for reduction of damages based on the misuse or alteration of a product. The provision just reduces damages, it would not cut-off a plaintiff's recovery even where the misuse or alteration substantially caused the injury.

The reduction for misuse or alteration is a good common sense provision, supported by two strong rationales: (1) liability law should be based on individual responsibility and should encourage safe use of products, and (2) consumers should not be forced to pay more for products due to the irresponsible misuse or alteration of products by others. Furthermore, the provision establishes an incentive to product manufacturers to provide express warnings or instructions which state law determines to be adequate.

As reported

Section 106(a)(1) provides that, in a product liability action that is subject to the Act, the damages for which a defendant is otherwise liable under applicable State law shall be reduced by the percentage of responsibility for the harm to the claimant attributable to misuse or alteration of a product by any person if the defendant establishes that such percentage of the harm was proximately

[119] If a state has pure comparative fault as its general rule of tort law, this provision will prevail if the 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, the Act is not preemptive. The Act 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.

caused by a use or alteration of a product either (A) in violation of, or contrary to, the express warnings or instructions of the defendant, if the warnings or instructions are determined to be adequate pursuant to applicable State law; or (B) 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.

Section 106(a)(2) makes clear that a use of a product that is intended by the manufacturer of the product does not constitute a misuse or alteration of the product.

Section 106(b) provides that the Act supersedes State law concerning misuse or alteration of a product only to the extent that State law is inconsistent with the Act.

Section 106(c) concerns workplace injury. It provides that, notwithstanding subsection (a), the amount of damages for which a defendant is otherwise liable under State law shall not be reduced by the application of section 106 with respect to the conduct of any employer or coemployee of the plaintiff who is, under applicable State law concerning workplace injuries, immune from being subject to an action by the claimant.

SECTION 107—UNIFORM STANDARDS FOR AWARD OF PUNITIVE DAMAGES

In general

The United States Supreme Court has said that punitive damages have "run wild" in the United States. *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 18 (1991). The Court has repeatedly recognized that the Due Process Clause of the United States Constitution places broad parameters on the size of punitive damages awards,[120] and has "invited" the legislative branch to enact punitive damages reforms along the lines of the provisions in this section.[121]

Punitive damages are quasi-criminal in nature; they are awarded to punish.[122] Nevertheless, unlike the criminal law system, there are virtually no standards for when punitive damages may be

[120] The Supreme Court has said in recent opinions that substantive and procedural due process protections apply to punitive damages. For example, in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989), a case involving predatory pricing and unfair compensation, the Court wrote: "[D]ue process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness." In that case, the Court did not squarely address the issue whether the Due Process Clause places outer limits on the size of punitive damages, because the issue had not been preserved for appeal. *See id.* at 277. In *Haslip*, the Court did address the issue and held that due process places substantive limits on the size of punitive damages awards. The Court nevertheless declined to "draw a mathematical bright line between the Constitutionally acceptable and the Constitutionally unacceptable." 499 U.S. at 15. Most recently, in *Honda Motor Corp., Ltd.* v. *Oberg*, 114 S. Ct. 2331, 2340 (1994), a case involving an all terrain vehicle that flipped over when an inebriated plaintiff tried to drive it up a hill, the Court stated that punitive damages "pose an acute danger of arbitrary deprivation of property," raising serious due process questions.

[121] See generally *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2727 (1993) (Scalia and Thomas, J.J., concurring in the judgment).

[122] Punitive damages have nothing to do with providing compensation to a person who has been harmed and are not in any way intended to "make the plaintiff whole." That purpose is served by compensatory damages, which provide compensation for both economic losses *e.g.*, lost wages, medical expenses, substitute domestic services) and noneconomic losses *e.g.*, "pain and suffering").

awarded and no clear guidelines as to their amount—good behavior is swept in with the bad. The result is uncertainty and instability and a chilling effect on innovation.[123]

Consider the situation of the drug Bendectin, an anti-nausea morning sickness drug once marketed by Merrell Dow Pharmaceuticals, Inc. Although the drug had been approved by the Food and Drug Administration and widely acclaimed by health care professionals, Merrell Dow withdrew Bendectin from the market in 1983 because of unwarranted product liability litigation. Merrell Dow has never lost a final judgment in any Bendectin case in the 18-year history of the litigation; trial courts often dismiss these cases prior to trial.[124] The lack of any meaningful standards, however, has resulted in some substantial punitive damages verdicts, which have been overturned by trial courts or on appeal.[125] The Committee heard compelling testimony from Congressman James H. Bilbray of California on April 4, 1995 of a personal family tragedy that possibly could have been avoided if Bendectin had not been improperly forced off the market.

Consider also the case where a Kansas jury imposed punishment against the manufacturer of the Sabin oral polio vaccine, because the company had not used a version of polio vaccine that had been abandoned for general use in the United States for over two decades.[126] There, the Kansas Supreme Court, by a slim, one vote margin, reversed an $8 million punitive damages verdict. One vote the other way and American children could have lost access to the Sabin polio vaccine because of the threat posed to its manufacturer by runaway punitive damages awards.

The sheer unpredictability of the current system has resulted in overdeterrence and has had a chilling effect on product innovation. A Conference Board Study of corporate executives found that fear of liability suits had prompted 36 percent of the firms to discontinue a product and 30 percent to decide against introducing a new product.

The problems are not merely anecdotal. A recent study by the Texas Public Policy Foundation found explosive increases in both the frequency of punitive damages awards and their size. From the early 1980s to the early 1990s, the total number of punitive damages awards in Dallas County 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.[127]

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[123] For example, a 1992 Science magazine article reported that at least two companies have delayed AIDS vaccine research and another company abandoned one promising approach as a result of liability concerns. See Jon Cohen, "*Is Liability Slowing AIDS Vaccines?*", Science, Apr. 10, 1992, at 168–69.

[124] See, e.g., *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995) (on remand from U.S. Supreme Court); *Turpin* v. *Merrell Dow Pharmaceuticals, Inc.*, 736 F. Supp. 737 (E.D. Ky. 1990), aff'd, 959 F.2d 1349 (6th Cir.), cert. denied, 113 S. Ct. 84 (1992).

[125] See, e.g., *Ealy* v. *Richardson-Merrell, Inc.*, 897 F.2d 1159 (D.C. Cir.) (overturning $75 million punitive damages award), cert. denied, 498 U.S. 950 (1990).

[126] See *Johnson* v. *American Cyanamid Co.*, 718 P.2d 1318 (Kan. 1986).

[127] Opponents of punitive damages reform frequently cite a 1992 study by Professor Michael Rustad of Suffolk University Law School in Boston, financed by the Roscoe Pound Foundation, to argue that punitive damages awards are rare. The Rustad Study found 355 punitive damages awards in product liability cases between 1965 and 1990. Opponents, however, generally fail to acknowledge what Professor Rustad said on page 2 of his report:

The actual number of punitive damages awards in product liability litigation *is unknown and possibly unknowable* because no comprehensive recording system exists. (Emphasis added).

Similarly, a 1987 study by the Institute for Civil Justice found that average punitive award in Cook County (Chicago), 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.[128]

Clear, rational rules are needed to promote innovation and responsible manufacturing practices, while at the same time providing assurances that wrongdoers will be justly punished and deterred from future misconduct.

The Act understands and accepts the basic premise that punitive damages are punishment. Section 107 provides the fundamentals that are part of any criminal punishment: a definition of the "crime," establishing a level of proof necessary for punishment, and making the sentence fit the crime.

Defining the crime

Section 107(a) defines the crime as "conduct that was carried out by the defendant with a conscious, flagrant indifference to the safety of others." This standard is fair and is similar to the standards of many states.[129] It conveys that punitive damages are to be awarded only in the most serious cases of outrageous conduct.

Level of proof

Section 107(a) also explains how a claimant must prove the crime and requires that the proof be "clear and convincing." This standard reflects the quasi-criminal nature of punitive damages and takes a middle ground between the burden of proof standard ordinarily used in civil cases (i.e., proof by a "preponderance of the evidence") and the criminal law standard (i.e., proof "beyond a reasonable doubt").[130] The Supreme Court has specifically endorsed the "clear and convincing evidence" burden of proof standard in punitive damages cases.[131]

This "clear and convincing evidence" standard is the accepted trend in the law of punitive damages. Each of the principal groups to analyze the law of punitive damages since 1979 has recommended this standard, including the American Bar Association and the American College of Trial Lawyers.[132] More recently, the

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[128] Another argument frequently heard from opponents of punitive damages reform is that the handful of headline-grabbing damage awards are often reduced on appeal. True, but only after huge legal costs, lost production time, and a business's basic credit or solvency and reputation are threatened. This argument also ignores the fact that 95 percent of product liability cases are settled out of court and not subject to appeal. In many of these cases, the threat of punitive damages is abused as a "wild card" to force extortionate settlements. In approximately 18 states, punitive damages are not insurable. Thus a business is subject to unwarranted pressure to settle a case for compensatory damages, which are insurable; a punitive damages award could end the business.

[129] See, e.g., Ky. Rev. Stat. Ann. § 411.184(2) (Baldwin 1991) ("flagrant indifference to the rights of plaintiff and with a subjective awareness * * *"); N.J. Rev. Stat. Ann. § 2A:58C–5a (West 1987) ("reckless indifference" to consequences); Ohio Rev. Code Ann. § 2307.80(A) (Page 1991) ("flagrant disregard"). See also *Owens-Illinois* v. *Zenobia*, 601 A.2d 633 (Md. 1992) (requiring proof that defendant acted with "actual malice" as a predicate to an award of punitive damages in a product liability action).

[130] See Malcolm Wheeler, "The Constitutional Case for Reforming Punitive Damage Procedures," 69 Va. L. Rev. 269, 298 (1983).

[131] See *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 23 n.11 (1991) (stating that "there is much to be said in favor of a state's requiring, as many do, * * * a standard of 'clear and convincing evidence' or, even 'beyond a reasonable doubt,' * * * as in the criminal context").

[132] See American Bar Association, Special Committee on Punitive Damages of the American Bar Association, Section on Litigation, "Punitive Damages: A Constructive Examination" 19

Continued

standard was endorsed in a report prepared by tort scholars of the prestigious American Law Institute.[133] "Clear and convincing evidence" is now law in 25 states.

Making the sentence fit the crime

Most importantly, this section puts reasonable parameters on sentencing to make it fit the crime. Even very serious crimes such as larceny, robbery, and arson have sentences defined with a maximum set in a statute.[134]

Section 107 sets forth the maximum "sentence" as three times a claimant's economic losses, or $250,000, whichever is greater. As in the criminal law, the provision will help assure that the punishment is proportional to the harm.[135]

The approach taken in the Act is based on a recommendation by the American College of Trial Lawyers, a group of experienced plaintiff and defense trial attorneys.[136] Other "mainstream" academic groups have likewise recommended that punitive damages be awarded in some ratio to damages.[137] A number of states have set forth guidelines.[138]

Permitting the award of punitive damages up to a certain multiple of a plaintiff's damages, coupled with an alternative monetary ceiling, is the fairest and most flexible of the various attempts to place parameters on the size of punitive damages awards. This flexible approach accomplishes punishment and deterrence in the unusual situation where there is serious misconduct and relatively minor economic damages—a fine as great as one-quarter of a million dollars may be imposed. Federal antitrust laws have worked well for decades with punitive damages set at three times economic losses. They are a solid model for appropriate punishment.

(1986) [hereinafter ABA Report]; American College of Trial Lawyers, "Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice" 15–16 (1989) [hereinafter ACTL Report].

[133] See American Law Institute, 2 "Enterprise Responsibility For Personal Injury—Reporters' Study" 248–49 (1991) [hereinafter ALI Reporters' Study].

[134] Some examples of federal criminal fines, even for particularly egregious crimes, do not exceed $250,000 and include: tampering with consumer products ($100,000, if death results); retaliation against a witness ($250,000); assault on the President ($10,000); bank robbery ($10,000, with the use of a deadly weapon); sexual exploitation of children ($100,000 for an individual, $200,000 for an organization); and treason ($10,000).

[135] Proportionality has been an important part of the Supreme Court consideration of the validity of criminal punishment. See, e.g., *Harmelin* v. *Michigan*, 501 U.S. 957 (1991); *Solem* v. *Helm*, 463 U.S. 277 (1983); *Hutto* v. *Davis*, 454 U.S. 370 (1982); *Rummel* v. *Estelle*, 445 U.S. 263 (1980).

[136] See ACTL Report at 15 (proposal that punitive damages be awarded up to twice compensatory damages or $250,000, whichever is greater).

[137] See ABA Report at 64–66 (recommending that punitive damages awards in excess of three-to-one ratio to compensatory damages be considered presumptively "excessive"); ALI Reporters' Study at 258–59 (endorsing concept of ratio coupled with alternative monetary ceiling).

[138] See Nev. Rev. Stat. § 42.005 (1991) (punitive damages awards permitted up to $300,000 in cases where compensatory damages are less than $100,000 and to 3 times the amount of compensatory damages in cases of $100,000 or more); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (West Supp. 1992) (punitive damages permitted up to 4 times actual damages, or $200,000, whichever is greater); N.D. Cent. Code § 32.03.2–11(4) (signed by governor Mar. 31, 1993) (permitting punitive damages up to twice compensatory damages, or $250,000, whichever is greater); Conn. Gen. Stat. § 52–204a (West Supp. 1992) (punitive award permitted up to twice the compensatory damages); Fla. Stat. Ann. § 768.73(1)(b) (West Supp. 1992) (punitive damages may be awarded up to 3 times compensatory damages unless "clear and convincing evidence" is presented by the plaintiff to show that a higher award is not excessive); Colo. Rev. Stat. § 13–21–102(1)(a)(1987) (punitive award may not exceed compensatory damages); Okla. Stat. tit. 23, § 9 (1987) (punitive damages generally permitted up to amount of compensatory damages awarded); Va. Code. Ann. § 8.01–38.1 (1994) (punitive damages permitted up to maximum of $350,000). Illinois adopted a limit of three times a claimant's economic damages in March 1995.

It has been argued that proportionality may result in inadequate deterrence. However, as Thomas Jefferson noted over two hundred years ago, "if the punishment were only proportional to the injury, men would feel that their inclination as well as their duty to see the laws observed."[139] Furthermore, it should be remembered there is no limit on the number of times a party can be punished and that when a person engages in wrongful conduct, he or she does not know how many people will be hurt and how much actual damages might occur. There is simply no way to predetermine the actual damages of all persons who might be injured by a defective product.

It has also been argued that unlimited punitive damages are necessary to police corporate wrongdoing. This assertion is not supported by facts. There is no credible evidence that products or intrastate services are any less safe in either those states that have set reasonable limits on punitive damages or in the six states (Louisiana, Nebraska, Washington, New Hampshire, Massachusetts, and Michigan)[140] that do not permit punitive damages at all. Furthermore, plaintiffs in these states have no more difficulty obtaining legal representation than in those states where the "sky is the limit."

Finally, it has been argued that the proportionality requirement in section 107(b) is unfair to women and other groups, who allegedly "rely more heavily on noneconomic damages to receive compensation for injuries." Opponents use Bureau of Labor Statistics data to support their view. First, this argument misapprehends the basic premise that punitive damages have absolutely nothing to do with compensating an individual for a loss—punitive damages are purely a "windfall" to the claimant. Second, women plaintiffs, children and the elderly have "economic losses" that do not show up in Bureau of Labor Statistics data.[141] This argument also ignores women in business, particularly small businesses, whose entire enterprise is threatened by out of control punitive damages.[142]

Bifurcation

The Act also allows a trial to be divided into segments, the first addressing compensatory damages, the second dealing with punitive damages. Judicial economy is achieved by having the same jury determine liability and amounts of both compensatory damages and punitive damages. This remedy has been given the shorthand name "bifurcation."

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[139] Thomas Jefferson, "A Bill for Proportioning Crimes and Punishment in Cases Heretofore Capital," 1779, in "Papers of Thomas Jefferson," 2:492, 493 (Julian P. Boyd ed. 1950).

[140] Michigan permits "exemplary" damages as compensation for pain and suffering, but does not permit punitive damages for purposes of punishment.

[141] In the case of children, economists are frequently used at trial to provide testimony based on income and work-life expectancy data generated by the federal government as to economic loss. The same is true of women and the elderly, where the focus is on the economic value of services these persons provide and the cost to employ substitute domestic services (which can be quite high).

[142] A U.S. Small Business Administration study has predicted that women will own 40% of all small businesses by the year 2000. In addition, Paul Huard, Senior Vice President of the National Association of Manufacturers (NAM), in testimony before the House Commerce Committee in February 1995, testified that smaller firms will benefit most from product liability reform, because they are least able to absorb the outrageous costs of the current product liability system.

Bifurcated trials are equitable, because they prevent evidence that is highly prejudicial and relevant only to the issue of punitive damages (e.g., the wealth of the defendant) from being heard by jurors and improperly considered when they are determining basic liability. Bifurcation also help jurors "compartmentalize" a trial, allowing them to easily separate the burden of proof that is required for compensatory damages awards (i.e., proof by a preponderance of the evidence) from a higher burden of proof (i.e., proof by clear and convincing evidence) for punitive damages.

Recognizing these benefits, some courts recently have required bifurcation as a matter of common law reform.[143] Other states have made similar changes through court rules or legislation.[144] This reform also meets the spirit of the *Haslip* case and is supported by the American Law Institute's Reporters' Study, the American Bar Association, and the American College of Trial Lawyers.[145]

The Act also provides that, in a bifurcated proceeding to determine punitive damages, evidence of defendant's profit from the alleged wrongdoing may be admissible, but evidence of the defendant's overall assets shall not be admissible. In *Pacific Mutual Life Insurance Co.* v. *Haslip*, supra, the Supreme Court, as a basis for sustaining Alabama's approach for awarding punitive damages, specifically noted Alabama law prohibits the jury from considering any evidence about the defendant's wealth.[146]

In general, many believe that a jury's consideration of the defendant's wealth distracts it from focusing on what is the essence of the punitive damage claim—the defendant's wrongdoing. Clearly, in the criminal context, most criminal laws base sentencing on a defendant's wrongdoing, not his or her wealth. Currently, the wealth of the defendant is allowed to be considered as a factor in the overwhelming majority of states that allow punitive damages. Recently, however, there has been increasing support among industry groups and some academics for excluding evidence of generic company revenue information, while permitting a plaintiff to introduce evidence of profits earned by the defendant from sales of the product or commodity specifically in question in the litigation.[147] The Act is consistent with this growing support.

As reported

Section 107(a) establishes a uniform standard of liability for punitive damages. It provides that punitive damages may be awarded, to the extent permitted by applicable state law, only if the claimant establishes by clear and convincing evidence "conduct that

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[143] See *Transportation Insurance Co.* v. *Moriel*, 879 S.W.2d 10 (Tex. 1994); *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992).

[144] See Cal. Civ. Code § 3295(d) (West Supp. 1993); Miss. H.B. 1270 § 2(1)(b) (signed by governor Feb. 18, 1993); Minn. Stat. Ann. § 549.20 (West Supp. 1993); Mont. Code Ann. § 27–1–221(7) (1991); Nev. Rev. Stat. § 42.005(3) (1991); N.J. Stat. Ann. § 2A:58C–5(b) (West 1987); N.D. Cent. Code § 32–03.2–11(2)–(3) (signed by governor Mar. 31, 1993); Utah Code Ann. § 78-18–1(2) (1992).

[145] See ABA Report at 19; ACTL Report at 18–19; ALI Reporters' Study at 255 n.41.

[146] 499 U.S. at 19–20. More recently, in *TXO Production Corp., supra*, the Court highlighted its concern about consideration of a defendant's wealth as a factor in determining a punitive damage award, but the defendant's counsel failed to preserve the issue for appeal. 113 S. Ct. at 2723–24.

[147] See ALI Reporters' Study at 254–55.

was carried out by the defendant with a conscious, flagrant indifference to the safety of others."[148]

Section 107(b) requires that the punitive damage award be proportional to the harm caused. The amount of punitive damages that may be awarded for a claim in any product liability action that is subject to the Act shall not exceed three times the amount awarded to the claimant for the economic injury on which the claim is based, or $250,000, whichever is greater. This subsection shall be applied by the court. Application of the subsection shall not be disclosed to the jury.

Section 107(c)(1) permits either party to request that the trier of fact conduct a separate proceeding to determine whether punitive damages are to be awarded for the harm that is the subject of the action and the amount of the award. Section 107(c)(2)(A) provides that, in such a proceeding, evidence relevant only to the claim of punitive damages, as determined by state law, shall be inadmissible in any proceeding to determine whether compensatory (i.e., economic and noneconomic) damages are to awarded. Section 107(c)(2)(B) provides that admissible evidence in the proceeding on punitive damages may include evidence of the profits of the defendant, if any, from the alleged wrongdoing and shall not include evidence of the overall assets of the defendant.

SECTION 108—UNIFORM TIME LIMITATIONS ON LIABILITY

In general

Statutes of limitations and repose set forth outer limitations on liability, after which a claim cannot be brought. Section 108 establishes uniform standards of limitation and repose. All civil actions governed by the Act are subject to a uniform, pro-plaintiff "discovery rule" statute of limitations that runs for two years from the time the claimant discovers, or in the exercise of reasonable care should have discovered, both the harm that is the subject of the action and the cause of the harm. The Act also contains a 20-year statute of repose, which establishes the time period during which a manufacturer or product seller may be held responsible for harm allegedly caused by a durable good used in the workplace. The statute of repose does not apply to limit liability in cases involving toxic harm.

Statute of Limitations

In General

All states have statutes of limitations that apply to product liability actions.[149] A statute of limitations specifies that time within

[148] To be "conscious" of its flagrant misconduct, a defendant must be aware that its product is legally defective and that its conduct in selling it in such a condition is therefore improper. Mere consciousness that its product is dangerous, that it can or indeed probably will cause substantial harm or even death, is insufficient by itself, since manufacturers, sellers, renters and lessors of many dangerous products—such as cars, power saws, and chemicals—surely are fully conscious of the inherent dangers in their products. It is only when a defendant consciously leaves in its product a danger that is unreasonable and known to be defective, that its conduct can be said to manifest a "conscious, flagrant indifference" to the safety of others.

[149] Under present law, different statutes of limitations apply in product liability actions depending upon the particular theory of the case. For example, a statute of limitations applicable in tort may be the rule in an action based on negligence, while a statute of limitations applicable

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which the claimant must file his or her action. Failure to file within the specified time bars the claim.

In some states, such as Virginia, the starting point for a person to bring a claim begins to run at the "time of injury."[150] When an injury caused by a product is immediate and traumatic, this date is easy to determine. The claimant generally knows of his or her harm and the cause of the harm at the time of the injury. However, where the harm has a latency period or becomes manifest only after repeated exposure to the product, the claimant may not know immediately that he or she has been harmed or the cause of that harm. In these situations, a "time of injury" statute of limitations may expire and bar a claim before the claimant is even aware of the injury and a potential claim.

In response to this problem, some courts and state legislatures have adopted a rule under which the limitations period begins to run when the claimant discovers the harm.[151] Even this rule may be unfair, however, because the claimant may not discover the actual cause of his or her harm until some time after he or she discovers the harm itself. The statute of limitations may expire before the claimant can reasonably discover both his or her harm and its cause.[152]

In contrast, the Act provides that the two-year period within which a plaintiff may bring a claim starts on the date that the claimant, or if the claimant has died the person entitled to bring the claim, knows, or in the exercise of reasonable diligence should know, both that a harm has occurred and the cause of that harm.[153] Thus, the Act will reduce the number of plaintiffs who, having otherwise meritorious claims, would be denied justice solely on the basis of their choice of the state in which they choose to file a claim. The Committee believes that this rule is the better reasoned approach and that it strikes a fair balance between the interests of all parties.

The Act will also alleviate the hardship caused by the statutes of limitations periods contained in state wrongful death statutes. Unlike the prevailing rule in most state wrongful death statutes, which bar claims a certain number of years following the date of the family member's death, the Act would preserve these claims for the "discovery" period, i.e., until two years after a surviving rel-

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in contract may be the rule in an action based on breach of warranty. The Act will establish one statute of limitations for all product liability actions. Moreover, the Act will provide a uniform rule, vastly improving the current patchwork state system to the benefit of all who make, sell and use products in the United States.

[150] See, e.g., *Hawhs* v. *DeHart,* 146 S.E. 2d 187 (Va. 1966); *Lange* v. *Bucyrus-Erie Co.,* 707 F.2d 94 (4th Cir. 1983) (applying Virginia law); See also *Wojcik* v. *Almase,* 451 N.E.2d 336 (Ind. App. 1983); *New Mexico Elec. Serv. Co.* v. *Montanez,* 551 P.2d 634 (N.M. 1976).

[151] See, e.g., Conn. Gen. Stat. 52–577(a) (1983); *Witherall* v. *Weimer,* 421 N.E.2d 869 (Ill. 1981); *Hansen* v. *A.H. Robins, Inc.,* 335 N.W.2d 578 (Wis. 1983); *Hines* v. *Tenneco Chemicals, Inc.,* 546 F. Supp. 1229 (S.D. Tex. 1982 aff'd, 728 F.2d 729 (5th Cir. 1984).

[152] See *Koepnick* v. *Aequitron Medical, Inc.,* No. 921–1975 (6th Cir. Aug. 3, 1993). As one judge said, this follows the logic of "topsy-turvy land" where one can "be divorced before [he] ever * * * marr[ies], or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad." *Dincher* v. *Marlin Firearms Co.,* 198 F.2d 821, 823 (2d Cir. 1952) (Frank J., dissenting).

[153] See, e.g., *Williams* v. *Borden, Inc.,* 637 F.2d 731, 734 (10th Cir. 1980); *Nelson* v. *A.H. Robins, Co.,* 515 F. Supp. 623 (N.D. Cal. 1981); *Lundy* v. *Union Carbide Corp.,* 695 F.2d 394 (9th Cir. 1982); *Fidler* v. *Eastman Kodak Co.,* 555 F. Supp. 87 (D. Mass. 1982), aff'd 714 F.2d 192 (1st Cir. 1983); *Mack* v. *A.H. Robins Co.,* 573 F. Supp. 149 (D. Ariz. 1983), aff'd, 759 F.2d 1482 (9th Cir. 1985); *Olsen* v. *Bell Telephone Laboratories, Inc.,* 445 N.E.2d 609 (Mass. 1983); *Elmore* v. *Owens-Illinois, Inc.,* 673 S.W.2d 434 (Mo. 1983); *Sahlie* v. *Johns-Manville Sales Corp.,* 663 P.2d 473 (Wash. 1983).

ative discovered or in the exercise of reasonable diligence should have discovered the cause of his or her loved one's death.

As reported

Section 108(a)(1) provides that in any civil action brought under the Act, the complaint must be filed within two years of the date the claimant discovers or, in the exercise of reasonable care, should have discovered, the harm and the cause of the harm. Actions filed more than two years after the harm that is the subject of the action and its cause were or should have been discovered are barred.

Section 108(a)(2)(A) provides that if a person with a product liability claim has a legal disability (e.g., the person is a minor or is insane) the person may file his or her complaint any time until two years after the legal disability ceases. Section 108(a)(2)(B) provides that if the filing of a product liability complaint is stayed or enjoined by court order, the running of the two-year period of limitations is suspended until the stay or injunction is lifted or ceases. This is a liberal provision which will benefit injured persons who file a lawsuit in a jurisdiction that does not have such a provision.

Statute of Repose

In general

Some of the oldest and most reliable companies in the United States are, by no fault of their own, falling behind competitively because they are disadvantaged by United States liability rules that create an artificial preference for newer, mostly foreign, industries. Many states have provided statutes of repose, but they vary in length and in their applicability to various products. A federal statute of repose is needed to level the playing field and allow these loyal corporate citizens to continue to compete in the global marketplace well into the next century.

The need for a federal statute of repose was very recently described by Art Kroetch, Chairman of Scotchman Industries, Inc., a small manufacturer of machine tools located in South Dakota, in April 4, 1995 testimony before the Consumer Affairs, Foreign Commerce and Tourism Subcommittee of the Senate Committee on Commerce, Science, and Transportation. Mr. Kroetch, representing the Association For Manufacturing Technology, emphasized that product liability reform is needed to allow United States manufacturers to compete effectively in the marketplace. He also illustrated to the Subcommittee the unnecessarily high transaction costs that are associated with the current product liability system, citing a 1992 Insurance Services Office (ISO) study that showed that "for every $10 paid out to claimants by insurance companies for product liability, another $7 is paid for lawyers and other defense costs." Mr. Kroetch concluded his testimony by noting that the Association For Manufacturing Technology recently conducted a product liability survey of its members which produced data consistent with the ISO study.

Similar testimony was received in February 1995 before the House Judiciary Committee. Charles E. Gilbert, Jr., President of Cincinnati Gilbert Machine Tool Company, testified that his company is subject to liability for machine tools manufactured over 100

years ago. He noted these older products usually pass through several owners, each making adjustments and changes to suit their own needs, until eventually the product causes harm, through no fault of Cincinnati Gilbert, and a lawsuit ensues. Cincinnati Gilbert, like most manufacturers of older products, almost always wins these lawsuits, yet it must invest time and resources into legal and transaction costs that could better be applied to create new jobs and to compete globally. Foreign competitors rarely have machines in this country that are 40 or more years old, so they pay less liability insurance than their American competitors and can offer their products at lower prices.

The Act provides a balanced solution to the problem of "long tail" liability, while protecting a claimant's right to bring suit for injuries incurred during the repose period. The Act would place a reasonable outer time limit on litigation involving older products used in the workplace. It would bar a claim twenty years after the time of delivery of the product. The provision would assist American manufacturers by reducing the high cost of defending stale claims. To be fair to plaintiffs, the provision does not apply to claims involving a toxic harm.

Support exists for this reform, particularly as a result of the enactment of the General Aircraft Revitalization Act of 1994, which created a federal eighteen year statute of repose for general aviation aircraft. Support also is found in the European Community Product Liability Directive, and in Japan's 1994 product liability law (which goes into effect this Summer), both of which contain a narrower ten year repose period. Several states have enacted legislation in this area as well.[154] The Act is substantially more liberal than every state statute of repose which currently exists.

As reported

Section 108(b)(1) provides that any product liability action alleging harm, which is not toxic harm, caused by a durable good[155] is barred unless the complaint is served and filed within 20 years of the date of delivery of the product to its first purchaser or lessee who has not engaged in a business of selling or leasing the product or using the product as a component part.

Section 108(b)(2) provides that if a state has a shorter statute of repose, that state law is specifically preserved, in lieu of application of the Act.

Section 108(b)(3)(A) excludes motor vehicles, vessels, aircraft, or trains used primarily to transport passengers for hire from the statute of repose provision.

Section 108(b)(3)(B) extends the repose period in situations where a defendant has made an express warranty in writing as to

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[154] Statutes of repose for products currently exist in some form in at least 16 states. In all but one state, these statutes of repose apply to all products, and are not limited to capital goods: Arkansas ("anticipated life" of product); Colorado (10 years); Connecticut (10 years); Georgia (10 years); Idaho ("useful safe life" of product); Illinois (12 years from date of first sale, or 10 years from date of sale to first user, whichever is shorter); Indiana (10 years); Kansas ("useful safe life" of product); Kentucky (presumption that product is not defective if harm occurred 5 years after sale to first consumer or 8 years after manufacture); Michigan (if product in use for 10 years, plaintiff must prove prima facie case without benefit of any presumption); Minnesota ("useful life" of product); Nebraska (10 years); New Jersey (10 years); Oregon (8 years); Tennessee (10 years); Texas (15 years); and Washington ("useful safe life" of product).

[155] Durable good" is defined in section 101(5).

the safety of the specific product involved which was longer than 20 years. The repose limitation goes into effect at the expiration of that warranty.

Transitional provision

Section 108(c) provides that if any provision of sections 108(a) or 108(b) of the Act would shorten the period during which a product liability action could otherwise be brought pursuant to another provision of law, the claimant may, notwithstanding sections 108(a) or 108(b), bring an action within one year after the effective date of the Act. This exception is intended to prevent unfair situations from arising as a result of the application of the time limitations set forth in the Act.

SECTION 109—SEVERAL LIABILITY FOR NONECONOMIC LOSS

In general

Section 109 introduces fairness and uniformity to the law concerning joint and several liability in product liability actions by adopting the "California rule," which holds that defendants are responsible only for their "fair share" of a claimant's subjective, nonmonetary losses, including pain and suffering awards.

The concept of "fair share," or several, liability sounds self-evident to most people. Most states, however, give expression in their law to the principle of joint liability which, in its unrestrained form, means that a defendant who is found only one percent at fault can be burdened with an entire damages award.[156] This system is unfair and blunts incentives for safety, because it allows negligent actors to under-insure and puts full responsibility on those who may have been only marginally at fault. Thus a jury's finding that a defendant is minimally at fault gets magically overridden and the minor player in the lawsuit pays a large price.

The rule of joint liability originally developed in the common law to deal with cases in which it was impossible to apportion responsibility for a plaintiff's harm among two tortfeasors.[157] The typical case was one in which several defendants had acted together, or "in concert," to cause harm to a plaintiff. The courts held that in these circumstances, each defendant would be held responsible for the total amount of damages resulting from the harm.[158]

Over time, the rule of joint 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 its share of the plaintiff's damages and jointly liable, as was each other defendant, for the full amount.[159] The rationale for making a defendant who is only one percent at fault pay 100 percent of damages is due to something called, "risk distribution." The theory is that a

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[156] For example, in *Walt Disney World Co.* v. *Wood*, 515 So. 2d 198 (Fla. 1987), Disney was required to pay 86 percent of a $75,000 jury award, even though it was only one percent at fault for the claimant's harm.

[157] See, *Summers* v. *Tice*, 199 P. 2d 1 (Cal. 1948).

[158] See *Bierczynski* v. *Rogers*, 239 A.2d 218 (Del. 1968). The classic discussion is Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413 (1937). See also Jackson, *Joint Torts and Several Liability*, 17 Tex. L. Rev. 399 (1939).

[159] See *Coney* v. *J.L.G. Indus., Inc.*, 454 N.E.2d 197 (Ill. 1983). But see *Bartlett* v. *New Mexico Welding Supply, Inc.*, 646 P.2d 579, *cert. denied*, 648 P.2d 794 (N.M. 1982) (rejecting doctrine of joint liability as "obsolete").

wealthy defendant is better able to distribute the cost of a risk of injury than an injured plaintiff is able to absorb it.[160]

Joint liability has produced extreme and unwanted consequences. It has caused suppliers of raw materials, often "deep pockets," to refuse to supply critical raw materials to manufacturers of medical devices and other manufacturers of needed products, such as protective sporting goods equipment.

For example, in May 1994, Mark Reilly, the father of a young boy from Houston, Texas, testified before the Senate Subcommittee on Regulation and Government Information that his nine year old son, Thomas, who is alive because of a brain shunt (a small plastic tube), may not be able to have this medical device renewed because companies that supplied basic ingredients for the medical device would no longer do so. The single reason for this unfortunate and life-threatening development is our Nation's over-reaching laws on joint liability. No doubt, if there were a lawsuit, people who supplied basic materials would be dragged into the suit. Even if they were found only one or two percent at fault, they would have to bear the entire risk.

Julie Nimmons, President and Chief Executive Officer of Schutt Sports Group, one of two remaining U.S. manufacturers of football helmets,[161] testified in September 1994 before the Senate Committee on Commerce, Science, and Transportation about a baseball safety product her company did not make because no raw material supplier would accept the potential liability of supplying components of the new product. This Committee and others in both the Senate and the House of Representatives have received numerous testimonies about similar experiences by other individuals during the decade and a half Congress has considered the issue of product liability legislation.[162]

Recognizing the urgent need for reform of this unfair doctrine, thirty-three states have abolished or modified the principle of joint liability.[163] They have done so, however, in a great variety of ways and, thereby, have contributed to the already serious problem of inconsistency among our Nation's tort laws.

The Act takes a fair and balanced approach. It follows joint liability reform enacted in California through a ballot initiative ("Proposition 51") approved by an overwhelming majority of voters

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[160] The "risk distribution" rationale supports the idea of allowing joint liability for economic losses, loss of wages, medical costs, or many other economic costs that an injured person may sustain. It does not, directly or indirectly, support a law that would require someone who is only one percent at fault to pay 100 percent damages for pain and suffering or other such non-economic compensatory losses. The law of workers' compensation is an excellent example. That is a "risk distribution" mechanism. The losses that are paid under that mechanism, however, are economic losses, not damages for pain and suffering.

[161] In 1988, Rawlings Sporting Goods decided to stop manufacturing or selling football helmets. Rawlings was the 18th manufacturer to discontinue the manufacture of this product, joining Hutch, Spaulding, Wilson and MacGregor. According to Riddell, Inc., one of two remaining U.S. helmet manufacturers, half of the cost of a football helmet goes to liability-related expenses.

[162] For example, Mary Kaynor, counsel for the Risk Management Foundation at Harvard Medical Institutions, testified before the Senate Small Business Committee in November 1991 that her foundation, which sponsors medical research products, is discouraged from dealing with small businesses because they fear that the foundation will become the "deep pocket" in the event of a lawsuit.

[163] The ALI Reporters' study also recommends reforming the doctrine of joint and several liability. See ALI Reporters' Study at 147. The ALI Study proposes an "allocation" theory. This would require multiple defendants to pay damages in proportion to their fault. The portion of damages attributable to an insolvent defendant would be allocated to the plaintiff and all solvents defendants in proportion to their fault.

in 1986. The Act permits the States to apply the rule of joint liability for economic damages (e.g., medical expenses and lost wages and the cost of substitute domestic services in the case of injury to a homemaker), so that claimants can recover full compensation for these losses.[164] On the other hand, it eliminates joint liability for "noneconomic damages" (e.g., damages for pain and suffering or emotional distress). This means that each defendant will be liable for damages for pain and suffering in an amount proportional to its share of fault. The provision does not set any "caps" or "limits" on noneconomic losses. Furthermore, in the overwhelming majority of cases (i.e., those cases involving solvent defendants) the provision will have absolutely no adverse effect on claimants. The Nebraska legislature adopted this approach as the law of that State in 1991 after carefully studying the issue.

The Act makes the "California rule" the uniform law 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 a claimant's noneconomic damages is several only, and not joint.

In applying this section, the trier of fact apportions responsibility for a claimant's harm in reference to all persons responsible for the plaintiff's injury, whether or not such person is a party to the product liability action.[165] This position is sound public policy and reflects the trend in the tort law of the states.[166] In 1992, the California Supreme Court, in a unanimous decision, held the California law on which section 109 is based could not achieve its purpose unless read this way. See *DaFonte* v. *Up-Right, Inc.*, 2 Cal. 4th 593, 602, 828 P.2d 140, 145 (1992).

Most recently, the Supreme Court of Florida, in *Fabre* v. *Marin*, 623 So. 2d 1182, 1185 (Fla. 1993), interpreting a similar statute, held: "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 accident, regardless of whether they have been or could have been joined as defendants." In reaching its holding, the court approvingly cited a lower court opinion which stated: "The obvious purpose of the statute was to partially abrogate the doctrine of joint and several liability by barring its application to noneconomic damage. To exclude from the computation the fault of an entity that happens not to be a party to the proceeding would thwart this intent." Id. at 1184. The Act is consistent with the laws in these states.

It has been argued by the Association of Trial Lawyers of America (ATLA) and other plaintiff advocacy groups that the California

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[164] Section 109 limits the doctrine of joint liability as applied to noneconomic damages in product liability actions. This section, however, does not preempt other limitations on joint liability with respect to economic damages, which have been imposed by individual jurisdictions. Indeed, a number of jurisdictions have enacted more sweeping reform with respect to joint liability. These reforms are not affected by the Act.

[165] Thus, the trier of fact will measure a defendant's share of fault or responsibility for the claimant's loss by references to all responsible for the claimant's loss, 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).

[166] Of the thirty-three states which have eliminated or limited joint liability, seventeen calculate the damages for which a defendant is severally liable by apportioning responsibility among all wrongdoers, not just the parties to the lawsuit. (The issue has not been addressed in all of the other sixteen states). The two states, California and Florida, which took the lead in abolishing joint liability for noneconomic damages have taken this position by judicial decision.

approach discriminates, because women or other groups may have less economic losses than others. The California approach does not discriminate. There has been no constitutional challenge to the California law in its nine year history. To the contrary, the California approach helps assure that risk distribution works where it was intended to be placed—for economic harms.

Suzelle Smith, a highly respected attorney from California who practices both for plaintiffs and defendants, testified before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation in September 1993 and before the Senate Judiciary Committee in March 1994 that the California approach works and is fair to all groups. She testified that the California approach is pro-consumer. She testified that prior to the California initiative, her experience was that juries often rendered defense verdicts in cases in which a finding to the contrary could mean that a minimally at-fault defendant would be saddled with the entire damage award.

The Act, like the California initiative, ends the overreach and overkill of joint liability in the area that it never should have ventured into—noneconomic damages.[167] The distinction the Act draws between economic and noneconomic loss is consistent with the underlying policy of joint liability to make the injured party whole. It does not preclude the claimant from being made whole for actual losses, while limiting a defendant's liability for noneconomic losses to that portion for which the defendant is responsible.

As reported

Section 109(a) limits each defendant's liability for noneconomic damages to that defendant's percentage of responsibility as determined by the trier of fact. In most cases the percentage determination required by this section will not be subject to an exact mathematical computation. Rather, it will be based on the common sense approximation assigned to it by the jury or by the court. In determining the percentage of each defendant's liability, the trier of fact should take into consideration the proportionate share of each party's responsibility for the total harm caused, including that portion attributable to the claimant. The focus of the inquiry should be on the defendant's "responsibility." For example, if a defendant's share of responsibility for the harm is found to be 25 percent, that defendant is liable for 25 percent of the noneconomic damages.

Section 109(b) provides that, for purposes of determining the amount of noneconomic loss allocated to a defendant under section 109(a), the trier of fact shall apportion responsibility for a claimant's harm in reference to all persons responsible for the plaintiff's injury, whether or not such person is a party to the product liability action.

SECTION 110—WORKERS' COMPENSATION SUBROGATION STANDARDS

In general

According to noted law Professor Aaron Twerski, a reporter for the American Law Institute's Restatement (Third) of Torts project

[167] Again, there is no accident insurance system in the world that provides damages for pain and suffering.

on product liability, a federal product liability law must address the unjust results that arise from the conflict between tort and workers' compensation systems. The solution proposed in the Act addresses this problem in a rational way.[168]

Section 110 clarifies the relationship between the workers' compensation system and the product liability system with rules that keep these systems separate to reduce unfair cost-shifting between the workers' compensation system and the product liability system, minimize legal costs, and promote workplace safety—without reducing the amount an employee can recover in a product liability action. Reforms similar to those in this section of the Act have been supported for many years by leading experts on workers' compensation law.[169]

Workers' compensation statutes are designed to ensure that an employee injured in the course of his or her employment has a fast and inexpensive way to recover for his or her injury, while maximizing the incentive for employers to maintain a safe workplace.[170] In most states, however, the incentive for employers to ensure worker safety has been substantially undermined. In these states, if an employee has a successful product liability claim against a manufacturer or product seller, his or her employer can recover the full amount of workers' compensation benefits paid to the employee from the product liability damage award, even if the employer is responsible for the injury.[171]

Allowing employers to recover workers' compensation benefits paid out of a product liability damage award, irrespective of fault, has been highly criticized by workers' compensation experts, because it places no incentive on employers to keep their workplaces safe and to train their employees in safe workplace practices.[172] Section 110 would reverse this effect by placing an incentive on employers to keep their workplaces safe. In sum, if an employer was at fault in causing a workplace injury, it will have to bear the costs of workers' compensation.

As reported

Section 110(a)(1)(A) preserves the right of an employer or the employer's workers' compensation insurer to recover amounts paid to an employee as workers' compensation through subrogation. Section 110(a)(1)(B) provides that an employer or the employer's workers' compensation insurer must provide the court with written no-

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[168] See statement of Professor Aaron Twerski, September 12, 1991 hearing, S. Hrg. 102-727 at 105.

[169] For example, Arthur Larson, a leading expert on workers' compensation law, has advocated the reforms contained in this section for many years. See testimony of Professor Arthur Larson, Hearings on S. 44 before the Subcommittee on Consumer of the Senate Committee on Commerce, Science, and Transportation, 98th Cong., 1st Sess., pp. 269–270 (1983) (Serial No. 98–302). See also ALI Reporters' Study at 191 (supporting reforms similar to those contained in section 110).

[170] Under workers' compensation law, the employer automatically pays workers' compensation benefits to an employee injured in the course of employment, without regard to fault. As originally conceived, workers' compensation is a tradeoff: While the employer is liable regardless of fault, the employer is immune from tort liability for the injury. Workers' compensation was, thus, intended to be the employee's exclusive remedy against the employer for work-related injuries. See *Kofron* v. *Amoco Chem. Corp.*, 441 A.2d 226 (Del. 1982).

[171] The employer does this by assuming the employee's rights against the manufacturer (i.e., is "subrogated" to the employee's rights against the manufacturer).

[172] See A. Larson, Workers' Compensation for Occupational Injuries and Death, ¶76 (desk ed. 1991).

tice that is its asserting a right of subrogation. Section 110(a)(1)(C) states that the employer or the employer's workers' compensation insurer need not be a necessary party to the underlying product liability lawsuit. Thus, an employee can pursue a product liability action against a manufacturer without regard to his or her employer's participation in the action.

Section 110(a)(2)(A) preserves the right of an employer or an employer's workers' compensation insurer to assert a right of subrogation against payment made by a product liability defendant as a settlement, to satisfy a judgment of for any other reason. To prevent collusion between the employee and the product liability defendant, section 110(a)(2)(B) provides that an employee may not accept a payment from the product liability defendant in settlement or in satisfaction of a judgment or for any other reason without the employer's written consent. Section 110(a)(2)(C) states the rule that no such release to or agreement with a product liability defendant shall be valid or enforceable unless the employer or the worker's compensation insurer of the employer is made whole for workers' compensation benefits paid.

Section 110(a)(3) provides the mechanism for increased workplace safety. Under section 110(a)(3)(A), a product liability defendant may attempt to prove to the trier of fact that the claimant's injuries were caused by the fault of the employer or the claimant's coemployees. The product liability defendant is required to provide written notice to the employer that it will raise employer fault as a defense at trial. To allow the employer or its insurer to attempt to preserve its lien, section 110(a)(3)(B) permits the employer to appear at trial, be represented by counsel, introduce evidence, cross-examine adverse witnesses, and make arguments to the trier of fact as if it were a party to the proceedings. If the trier of fact finds by clear and convincing evidence that the claimant's injury was caused by the fault of the claimant's employer or coemployees, section 110(a)(3)(C) reduces the damages award against the product liability defendant and, correspondingly, the employer's subrogation lien, by the percentage of responsibility for the harm attributed to the employer. Thus, the amount the injured employee would recover remains totally unaffected. The Act merely provides that the employer will not be able to fully recover workers' compensation benefits it paid to the employee if it is responsible in full or in part for the harm.[173]

Section 110(a)(3)(D) preserves the right of an employer to obtain subrogation in two situations where employee harm may occur beyond its control: (1) where the claimant is harmed by a coemployee's intentional tort, and (2) where the claimant is harmed

[173] An example is instructive. Consider the case where an employee is injured due to an allegedly defective machine tool. Assume that the employee receives $30,000 in workers' compensation benefits from his or her employer. To obtain additional compensation (e.g., "pain and suffering," which is not compensated at all under workers' compensation law), the employee brings a product liability action against the machine tool builder. At trial, the machine tool builder presents evidence that the employer had removed a safety guard from the machine. The jury finds that the employer's action was fifty percent responsible for the employee's injury and awards $100,000 in damages. Under current law, the employer, through subrogation, would recover all $30,000 that it paid in workers' compensation benefits. The employee would receive what is left, or $70,000. Under section 110, the employee still recovers $70,000, but the employer is not rewarded for its negligence. The employer's lien would be reduced by its percentage of fault (e.g., fifty percent) for the harm. The employer thus would recover only fifty percent of the amount it paid in workers' compensation ($30,000), or $15,000. A "fair share" allocation is the result.

by the act of a coemployee that is outside the scope of the offending employee's normal work practices.

Section 110(b) provides a mechanism to discourage product liability defendants from raising employer fault as a defense where such a defense is not merited. The subsection states that if, in a product liability action, the court finds that harm to a claimant was not caused by the fault of the employer or a coemployee, the product liability defendant shall reimburse the employer (or its workers' compensation insurer) for reasonable attorney's fees and court costs incurred by the insurer in the action, as determined by the court.

SECTION 111—FEDERAL CAUSE OF ACTION PRECLUDED

Section 111 provides that the bill does not provide any new basis for federal court jurisdiction. The resolution of product liability claims is left to state courts or to federal courts that currently have jurisdiction over those claims.

Specifically, section 111 states: "The district courts of the United States shall not have jurisdiction under section 1331 or 1337 of title 28, United States Code, over any product liability action covered under this title." These sections of the United States Code establish district court jurisdiction with respect to federal questions and Acts of Congress regulating commerce. It is the intent of the Committee that these sections shall not be a basis for bringing a product liability action governed by this bill in federal court.

Civil actions governed by this bill will continue to be handled by state courts currently open to litigants and only by federal district courts where there is currently a basis for federal jurisdiction. The bill does not affect these bases for jurisdiction and, therefore, does not expand the caseload of the federal courts.

Title II—Biomaterials Access Assurance

In general

Each year millions of citizens depend on the availability of implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, angioplasty catheters, left ventricular assist devices, and hip and knee joints. The availability of these devices is critically threatened because suppliers have ceased supplying raw materials and component parts to medical implant manufacturers. A 1994 study by Aranoff and Associates concluded that there are significant numbers of raw materials that are "at risk" of shortages in the next 12-18 months. Suppliers have found that the risks and costs of responding to litigation related to medical implants far exceeds potential sales revenues, even though courts are not finding suppliers liable.

Three major suppliers of raw materials used in the manufacture of implantable medical devices recently announced they will limit, or cease altogether, their shipments of these crucial raw materials to device manufacturers. All three companies have indicated these were rational and necessary business decisions.

Consumers suffer the most from the biomaterials availability crisis. This Committee learned firsthand the problems facing consumers through testimony by Peggy Phillips, Esq., on April 4, 1995. Ms. Phillips is a Virginia resident who has survived two episodes

of Sudden Cardiac Death Syndrome and is the recipient of an Automatic Implantable Cardioverter Defibrillator device. She told the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism that, as a patient with a lifesaving medical implant, her worry is that such devices "may not be available to those who need them," because the "threat of liability suits" is causing suppliers of raw materials to pull out of the medical device market.

Ms. Phillips shared with the Subcommittee her experience on a recent panel discussion sponsored by the American Institute for Medical and Biological Engineering in which representatives of medical science and the device industry put "tort law on trial." A woman in the audience wanted to know if the threatened shortage of biomaterials was serious. "A chill ran up my spine," Ms. Phillips testified, "when the panelists could not guarantee that the battery used to power my Automatic Implantable Cardioverter Defibrillator device would be available in the United States because of the threatening shortage of raw materials used in the devices resulting from product liability concerns." Ms. Phillips specifically endorsed this title of the Act.

Phyllis Greenberger, Executive Director for the Society for the Advancement of Women's Health Research, testified at the same hearing that ensuring the availability of implantable medical devices is especially important to women. "Women," she testified, are disproportionately impacted by a shortage of biomaterials "because they live longer than men, and as a result, suffer more from chronic disease, increasing their chances of needing a medical device, such as hip or joint replacements."

Title II of the Act will safeguard the availability of a wide variety of lifesaving and life-enhancing medical devices. The title addresses the liability of biomaterials suppliers to persons who claim to have been injured as a result of an implant that incorporates raw materials sold by those suppliers. It is not intended to restrict any rights other persons may have to sue biomaterials suppliers under a variety of state law theories. The title also would not affect the scope of a biomaterials supplier's liability to such persons under existing state common law doctrines. As a result, an implant manufacturer may sue a supplier for breach of warranty or contract violations, if such claims exist under state law, without regard to the provisions of this title.

Title II of the Act is identical to S. 303, the "Biomaterials Access Assurance Act of 1995," introduced by Senators Lieberman and McCain. The title was added to S. 565 as part of an amendment offered by Chairman Pressler during executive session held for S. 565. The issue has been the subject of hearings and Title II of the Act will help prevent a public health crisis by fairly limiting the liability of biomaterials suppliers to instances of genuine fault and establishing a procedure to ensure suppliers can avoid litigation without incurring heavy legal costs. Title II of the Act would not diminish in any way the existing liability of medical device manufacturers.

As reported

SECTION 201—SHORT TITLE

Section 201 states this title may be cited as the "Biomaterials Access Assurance Act of 1995."

SECTION 202—FINDINGS

Section 202 contains the findings upon which this title is based.

SECTION 203—DEFINITIONS

Section 203 defines terms or phrases used in this title. Whenever a defined term or phrase is used, reference should be made to the definitions in this section.

SECTION 204—GENERAL REQUIREMENTS; APPLICABILITY; PREEMPTION

Section 204(a) specifies that, in any civil action covered by the bill, a biomaterials supplier may raise any defense set forth in section 205, and the court must use the procedures set forth in section 206 in connection with that defense.

Section 204(b) states that the bill applies to any civil action brought by a claimant in Federal or State court against a manufacturer, seller, or biomaterials supplier, on the basis of any legal theory, for harm allegedly caused by an implant.

Section 204(c) states that the bill preempts State law to the extent the bill establishes a rule of law.

Section 204(d) also states that the bill may not be construed to affect any defense available under other provisions of law to a defendant in an action alleging harm caused by an implant, or to create any new Federal cause of action.

SECTION 205—LIABILITY OF BIOMATERIALS SUPPLIERS

Section 205 restricts the possible liability of biomaterials suppliers in lawsuits covered by the bill to three situations, where the supplier: (i) was itself the manufacturer of the implant; (ii) was itself the seller of the implant; or (iii) furnished raw materials that failed to meet applicable contractual requirements or specifications.

A supplier may be deemed to be a manufacturer only if the supplier registered as such with the FDA pursuant to medical device requirements or if the Secretary of HHS issues a declaration that the supplier should have registered as a manufacturer. Section 205 also establishes a procedure for the Secretary to issue such a declaration.

A supplier may be deemed to be a seller and thus liable in situations in which the supplier itself resold the implant after it had been manufactured and had entered the stream of commerce.

With respect to contractual requirements, a supplier may be liable for harm only if the claimant shows that the biomaterials were not the actual product for which the parties contracted or the biomaterials failed to meet certain specifications and that failure was the cause of the injury. The relevant specifications are those: (i) provided to the supplier by the manufacturer; (ii) provided by the manufacturer (either published, given to the manufacturer, or

included in an FDA master file); or (iii) included in manufacturer submissions that had received clearance from the FDA.

SECTION 206—PROCEDURES FOR DISMISSAL OF CIVIL ACTIONS AGAINST BIOMATERIALS SUPPLIERS

Section 206(a) establishes a new procedure for dismissal of lawsuits against suppliers. A supplier named as a defendant or joined as a co-defendant may file a motion for dismissal based on the defenses set forth in Section 205.

Section 206(b) specifies additional procedural requirements for the lawsuits against suppliers. A plaintiff must sue a manufacturer directly whenever jurisdiction over the manufacturer is available. A plaintiff must submit an expert's affidavit certifying that the biomaterials were actually used and were the cause of the alleged harm and that the case has merit.

Section 206(c) establishes procedural requirements for the proceeding on a motion to dismiss. Pretrial discovery is limited to certain issues and to the scope permitted against third parties. A motion on the ground that the supplier is not a manufacturer would be automatically granted if the supplier had not filed with the FDA as a manufacturer of the implant unless the plaintiff obtained a ruling from the FDA that the supplier should have registered as a manufacturer. A ruling on the supplier's pretrial motion for dismissal is based solely on the pleadings and any affidavits.

Under section 206(d) the court may treat the motion for dismissal as a motion for summary judgment if the pleadings and affidavits raise genuine issues of material facts with respect to a motion concerning compliance with contractual requirements and specifications. Discovery is limited to establishing whether an issue of material fact exists. The court would grant the summary judgment motion unless the plaintiff has submitted evidence sufficient to allow a jury to reach a verdict for the plaintiff.

Section 206 (f) and (g) change other procedural aspects to reduce litigation burdens. The manufacturer, not the supplier, may conduct the proceeding on the motion if an appropriate contractual indemnification agreement exists. The possibility of frivolous claims against a supplier is reduced by permitting the court to require the plaintiff to pay attorney fees if the plaintiff succeeds in making the supplier a defendant, but ultimately is found to have a meritless claim.

SECTION 207—APPLICABILITY

Section 207 indicates this title will apply to civil actions commenced on or after the date of enactment.

ROLLCALL VOTE IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 565:

At the close of debate on S. 565, the Chairman announced a rollcall vote on the bill. On a rollcall vote of 13 yeas and 6 nays as follows, the bill was ordered reported:

YEAS	NAYS
Mr. Pressler	Mr. Hollings
Mr. Burns	Mr. Inouye [1]
Mr. Gorton	Mr. Ford
Mr. Lott	Mr. Kerry [1]
Mrs. Hutchison	Mr. Breaux
Ms. Snowe	Mr. Bryan
Mr. Exon	
Mr. Rockefeller	
Mr. McCain [1]	
Mr. Stevens [1]	
Mr. Packwood [1]	
Mr. Dorgan	
Mr. Ashcroft	

[1] By proxy

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

MINORITY VIEWS OF MR. HOLLINGS

INTRODUCTION

Once again, this Committee has reported legislation to federalize our nation's product liability system. However, this year's version of the legislation is unwise, unnecessary, and without any factual basis.

This measure would federalize an area of law that for over 200 years has been the province of the states. Such action should not be undertaken lightly or carelessly. Those who propose such dramatic change should, at a minimum, bear the burden of proving that such change is both warranted and likely to be effective. Unfortunately, however, the Committee has, once again, ordered this bill to be reported without requiring anything close to a demonstration that either factor is present. The factual record clearly shows that each stated basis for this legislation cannot withstand even minimal scrutiny.

Over the years the bill's supporters have asserted that the legislation is needed to curb the litigation explosion, improve the efficiency of the American jury system, remedy the liability insurance crisis, and to bolster American businesses' competitiveness. However, the Committee's work on this issue has clearly demonstrated that (1) there is no litigation explosion; (2) the current system generally works properly to fairly compensate injured victims; (3) the insurance crisis (which has now ended) was not due to product liability, but the underwriting practices of insurance companies; (4) the product liability system is not stifling American businesses' competitiveness; and (5) products kept off the market because of product liability concerns are not necessarily safe or innovative, but rather are examples of the system working properly to deter potentially dangerous products.

Thus, despite the supporters' claims, this bill will not make American business more competitive, will not create uniformity in the law, will not reduce insurance rates, and will not ensure more compensation for plaintiffs. Quite to the contrary, the bill will create considerable confusion within the courts, will precipitate more litigation, will have no effect on insurance rates, and will reduce the ability of injured victims to be compensated for their injuries.

The proponents claim that they want an efficient, fair, and predictable judicial system. However, they obviously are not aware that the American civil justice system, one of the most cherished institutions in the world, is rooted in a democratic jury system, where cases are decided on the facts and circumstances, not on profit motives.

If fairness and consistency are truly the proponents' goal, it is certainly not evident in the legislation. For example, one of the purported purposes of the legislation is uniformity, yet, the bill, for

the most part, preempts state law only to the extent that the law favors consumers. Of course, state laws that are pro-defendant are left intact. Where is the uniformity in that?

The bill raises the standard of proof for punitive damages to clear and convincing evidence of conscious, flagrant misconduct, but also protects companies that engage in such conduct through arbitrary damage caps. Not only are the damage caps arbitrary, they are applied in a manner that discriminates against non-wealthy citizens. The bill provides that punitive damages are limited to three times economic damages, or $250,000, whichever is greater. So, the greater a plaintiff's wealth, the more a company will be punished. Or to put it simply, injuries to wealthy citizens are more punishable than injuries to working-class citizens. This is completely contrary to the purpose behind punitive damages—namely, to punish outrageous conduct.

I am concerned about the supporters' representations that this bill is not as severe as the legislation (S. 687) considered in the last Congress. The truth of the matter is that the current bill has re-incorporated many of the onerous provisions that were contained in the earlier product liability bills.

Proponents claim that the legislation is a pro-consumer bill, that it will benefit women, the elderly, and children, and that it will make more medicines and medical devices available. However, the bill is opposed by every major consumer organization throughout the nation. Over 100 women's, children's, health, and public interest organizations, as well as the American Association of Retired Persons, oppose this bill. Additionally, the proponents contend that the bill will make the state tort system more predictable and productive; yet the bill is opposed by the Conference of State Chief Justices, the National Conference of State Legislatures, and over 100 law professors nationwide. These are the experts in consumer protection, administration of law, and legal jurisprudence. They are concerned not with fees, but with justice, and the proper functioning of our legal system. Does the Congress know more about health and safety and what's good for our nation's legal system than these groups?

As I have stated in the past, we should not misunderstand the purpose of this bill. This bill is written clearly for the benefit of the business community, not for consumers or to make the system more uniform. Indeed, if there are issues that need to be examined in the tort system, they already are being addressed by the states, where this issue belongs. Since 1983, 46 States have enacted measures involving tort reform. The states—through their work with members of the bar, the chamber of commerce, the insurance industry, and consumer groups—have addressed concerns about the tort system, and have crafted legislation they believe is in the best interest of their citizens. The proponents of this bill, however, would override the enormous and commendable efforts and time the states have devoted to this issue, and force their own brand of reform on the states.

Once again the Congress is being asked to enact legislation when there has been no credible demonstration that there is a problem, or an issue that necessitates any involvement by the Congress. Enactment of such a law would alter, in one stroke, the fundamental

federalism inherent in this country's tort law, and would add to the difficulties already faced by the victims of defective products. It is ironic that, at the very moment so many of our colleagues are insisting that control over major issues be surrendered by the Federal Government and returned to the states, these same members would usurp this area of state responsibility.

I yield to no one in my desire to assist American business in every way, and to insure its viability in ever-changing world markets. However, I urge my colleagues to insist, at a minimum, on some objective demonstration that federal product liability law is a reasonable means to address the problems of the business community. I have not yet seen such a demonstration, and in my view the legislative process is ill-served by taking such action in these circumstances.

In the discussion below, I have set out in more detail the facts that have been developed on this issue, and why I believe we should not move forward on this bill.

THERE IS NO FACTUAL BASIS FOR THIS LEGISLATION

I. The current system achieves fair results, and there is no "explosion" of litigation

Before we make dramatic changes in product liability law, we should, at the least, have information to demonstrate that the current system needs fixing—that it is not achieving its purpose of fairly and properly compensating victims of defective products, and of deterring the marketing of unsafe products. As each additional piece of objective data becomes available, it becomes more clear that the system is working. The number of non-asbestos product liability cases is actually declining, punitive damages are a rare occurrence, and compensatory awards are reasonably related to the cost of the injuries involved.

In 1991, the Rand Corporation released a report on civil claims and compensation, which found that only 10% of persons that are injured by defective products seek some form of compensation through the tort system, and a mere 2% actually goes forward with filing a lawsuit.[1] The report further found that only 7 percent of all compensation for accident victims is paid through the tort system.[2] This low level of compensation is obviously due to the reluctance of injured persons to file claims or lawsuits. The report concluded that "most Americans who are injured in accidents do not turn to the liability system for compensation. * * * In this respect, Americans' behavior does not accord with the more extreme characterizations of litigiousness that have been put forward by some."[3]

The most recent statistics from the National Center for State Courts on state civil filings show that product liability cases constitute only 4% of all state tort filings, and a mere 36 hundredths of one percent (.0036) of all civil cases.[4]

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[1] Hensler, et al., "Compensation for Accidental Injuries in the United States," Rand Corporation, Institute for Civil Justice (1991), Executive Summary at 18. See also testimony of Dr. Deborah Hensler, Consumer Subcommittee Hearing on S. 640, September 12, 1991, statement at 6.

[2] Id.

[3] Id., Executive Summary at 18, 20.

[4] National Center for State Courts, "State Court Caseload Statistics: Annual Report 1992," (February 1994) at 16.

Jury Verdicts, Inc., reported last year that juries nationwide have become much tougher on plaintiffs.[5] The report revealed that a plaintiff's chances of winning in tort cases decreased from 65% to 42% between 1987 and 1992, and among product liability cases specifically, the percentage of favorable verdicts for plaintiffs fell from 59% to 41% between 1989 and 1993.[6] The report also indicated that there have been major declines in the size of awards.[7]

In 1992, Professors James Henderson—a supporter of tort reform—and Theodore Eisenberg of Cornell University released a study, "Inside The Quiet Revolution In Products Liability," which found notable declines in the number of product liability cases filed, as well as significant decreases in the size of awards.[8] The study confirmed Professors Henderson's and Eisenberg's findings in an earlier study, which found a "quiet revolution * * * away from extending the boundaries of products liability and toward placing significant limitations on plaintiffs' rights to recover in tort for product-related injuries."[9] Specifically, they found that in 1976 and continuing to 1983, defendants benefitted in roughly 51 percent of product liability cases. By 1988, defendants prevailed in 63.4 percent of product liability cases. The study concluded that, even if product liability cases could be characterized as unfairly favoring plaintiffs in the past, the current trend is clearly favoring defendants.

The General Accounting Office (GAO) in 1989 completed one of the first extensive reviews of data related to state court product liability cases.[10] Since most product liability cases are litigated in the state court, and most of the past data has been only from the federal courts, this report is very significant. GAO found that the size of compensatory awards varied by type and severity of injury in a manner consistent with underlying economic loss, so that compensatory awards were neither erratic nor excessive.[11] It further found that plaintiffs won fewer than 50 percent of the cases litigated, that awards were based on negligence in almost three-quarters of the cases (even in the states that permit recovery based on strict liability without a demonstration of negligence), and that the amount of punitive damages awarded was highly correlated with the size of compensatory damages.[12]

Additionally, in testimony submitted to the Committee in September of 1991, Professor Marc Galanter of the University of Wisconsin Law School stated that, if asbestos cases are excluded, the number of product liability cases in the federal courts has declined in the last 5 years—from 8,268 cases in 1985 to 4,992 in 1991, a 40 percent decrease.[13] He indicated that asbestos filings accounted

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[5] New York Times, Friday, June 17, 1994.

[6] Id.

[7] Id.

[8] Henderson and Eisenberg, "Inside the Quiet Revolution In Products Liability," 39 U.C.L.A. Law Review 731, 743 (1992).

[9] Henderson and Eisenberg, "The Quiet Revolution in Products Liability: An Empirical Study of Legal Change," 37 U.C.L.A. Law Review 479, 480 (1990).

[10] U.S. General Accounting Office, "Product Liability: Verdicts and Case Resolution in Five States," GAO/HRD–89–99 (September 1989). Hereafter referred to as "1989 GAO Report."

[11] Id. at 27.

[12] Id. at 29–31.

[13] Testimony of Professor Marc Galanter, Director, Institute of Legal Studies, University of Wisconsin Law School, before the Consumer Subcommittee September 19, 1991, transcript at

Continued

for all the increases in product liability filings in the 1980s, and that asbestos cases are quite distinct in that they involve a product of "unparalleled deadliness to which there was massive exposure that continued long after the dangers of its use were suspected and suppressed." [14]

Professor Galanter's findings are similar to reports of federal civil filings by the GAO[15] and the Rand Corporation,[16] which have shown that one product, asbestos, accounted for approximately 60 percent of the growth in filings between 1976 and 1986.[17] GAO further found that, since 1981, product liability cases have grown at about the same rate as other civil filings and at the same rate as personal expenditures on goods, with growth of product liability cases at 4 percent, personal expenditures on goods at 4 percent, and civil filings at 6 percent.[18] The author of the Rand study has stated that "[m]y feeling is that the available evidence doesn't support the notion that products liability is crippling American business."[19]

Professor Lawrence Mann from Wayne State University Law School performed a similar study for the Governor of Michigan in 1988–89. He began by noting that "* * * much of the debate surrounding products liability litigation has been based upon anecdote and intuition. Hard data describing the products liability litigation landscape are scarce." He conducted his research by surveying over 2,000 businesses as well as attorneys of record in closed cases for the year 1987. His general conclusion was that "[v]erdicts and settlements in products liability cases are not erratic and appear reasonably related to economic losses sustained and injury severity." [20]

His research found a "phenomenal concentration of litigation among a handful of defendants who are 'repeat players' in civil litigation." In 1987, four companies accounted for 92 percent of the cases filed. In 1982, four companies accounted for 91 percent of the cases filed, and in 1979, four companies accounted for 83 percent.[21]

Professor Mann concluded that "* * * fewer and fewer litigants are accounting for an increasing share of the litigation pie." He further found that "* * * the distribution of cases filed for the years covered in the * * * survey yield a picture of products litigation that is inconsistent with the conclusion that the business community in general is the victim of a products liability explosion." [22]

II Business litigation

According to Professor Galanter, the real increase in litigation in recent years has been in businesses suing businesses, not consum-

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86–87. See also Galanter and Rogers, "A Transformation of American Business Disputing? Some Preliminary Observations," working paper #DPRP 10–3, Institute for Legal Studies, University of Wisconsin (April 1991).

[14] Galanter testimony, supra, transcript at 88.

[15] U.S. General Accounting Office, "Product Liability: Extent of 'Litigation Explosion' in Federal Courts Questioned," GAO/HRD–88–36BR (January 1988).

[16] Dugworth, "Product Liability and the Business Sector: Litigation Trends in Federal Courts," Rand Corporation, The Institute for Civil Justice, R–3668–ICJ (1988).

[17] GAO Report, supra, note 12, at 32, 43.

[18] Id. at 32, 43.

[19] Wall Street Journal, "Survey Questions Liability Crisis at U.S. Companies," January 18, 1989.

[20] Testimony of Professor Lawrence C. Mann, Wayne State University School of Law, Consumer Subcommittee Hearing on S. 1400, February 22, 1990, statement at 1–2.

[21] Id., at Report to the Governor of Michigan 2.

[22] Id. at Report to Governor 1, 2.

ers seeking compensation through the product liability system.[23] For example, contract filings in federal courts increased by 232 percent between 1960–1988, and by 1988 were the largest category of civil cases in the federal courts.[24] Statistics compiled from the National Law Journal's annual reports on major civil verdicts show that, since 1989, of the 83 largest damage awards nationwide, 73% have involved business litigation.[25] Between 1987 and 1994, just 76 of the largest verdicts alone accounted for more than $10 billion.[26] Statistics from the National Center for State Courts show that at least several hundred thousand business and contract cases were pending during this period.[27]

Last year, the Harvard Business Review featured a report on corporate litigation and Alternative Dispute Resolutions (ADR) which provided an insightful view on the litigious behavior of businesses. Although ADRs are designed to avoid litigation and save costs, such hopes have faded for businesses as a result of legal billings, high damage awards, and the propensity of businesses to litigate.[28] The report indicated that ADRs have become for businesses a disguise for litigation, sometimes costing more than a normal court proceeding.[29] In addition, businesses often prefer litigation to ADR. A survey found that fewer senior corporate managers are willing to forgo a chance to win a courtroom triumph. A top lawyer of a major company stated that "CEOs want to be able to take the other guy to the cleaners if they believe that they're in the right, and are going to bet the ranch if they have to."[30]

III. Jury system/punitive damages

Much has been made of the unpredictability of results in product liability trials. However, it has been recognized, as it must be, that most of this is due to our jury system.[31] I cannot believe any of my colleagues want to tamper with that system. When a product liability case goes to trial, the jury is not impaneled for the purpose of giving away someone else's money. Rather it is charged with the administration of justice. These juries are composed of our friends and neighbors, who conclude, some of the time, that the defective products involved and the injuries sustained require compensation. And it is our friends and neighbors—who work for a living and know the value of a dollar—who occasionally conclude that punitive damages are justified when the defendant has engaged in outrageous behavior.

If there is an issue that has been terribly exaggerated in this debate, it is the issue of punitive damages. Much new data is available on punitive damages, which show, among other things, that very few punitive damage awards have been made in all state and

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[23] Supra at 13.
[24] Id.
[25] See National Law Journal Annual Reports on Largest Civil Verdicts (1990–1994).
[26] See National Law Journal Annual Reports on Largest Civil Verdicts for years 1990–1994, and "Inside Litigation" published reports on Civil verdicts for 1987–1989.
[27] Supra at 4.
[28] Harvard Business Review (May–June 1994) at 120.
[29] Id.
[30] Id. at 123.
[31] Testimony of Peter Huber, Consumer Subcommittee Hearing on S. 1400, April 5, 1990, transcript at 119, 141; testimony of Professor Mark Hager, Consumer Subcommittee Hearing on S. 1400, April 5, 1990 transcript at 137–8.

federal product liability cases over the last 25 years. Punitive damages simply are not a factor in any but the rare product liability case, and have little effect on the business community. Dr. Stephen Daniels of the American Bar Foundation conducted a nationwide study of over 25,000 civil jury awards between 1981 and 1985. The study found that punitive damages were awarded in only 4.9% of the cases reviewed.[32] He stated that the debate over punitive damages "changed in the 1980s as a part of an intense, well-organized, and well-financed political campaign by interest groups seeking fundamental reforms in the civil justice system benefiting themselves." He went on to state that this "politicization of the punitive damages debate * * * makes the debate more emotional and manipulative, and less reasoned. The reformers appeal to emotions, fear, and anxiety in this political effort while avoiding reason and rational discourse."[33]

He concluded that punitive damages were not routinely awarded, were awarded typically in modest amounts, and were awarded more often in financial and property harm cases [business v. business] than in product liability cases.[34] His research also pointed up the errors in the data from Cook County, IL, and San Francisco, CA, which in the past have been cited by supporters of bills like S. 565 as indicative of the nationwide pattern on punitive damages. He found that there were flaws in the method of data analysis used, and that it was inappropriate in any event to generalize from data in two counties to a nationwide trends.[35]

On April 4, 1995, Dr. Daniels, testifying before the Committee, submitted data on a study he conducted to review his initial findings. Using the same database in a review of the same sites for years 1988–1990, he found that punitive damages were again awarded at an extremely low rate—4.8%.[36] The study confirmed his earlier findings that such awards are more of an aberration than the norm.

Dr. Daniels' findings are similar to those by Professor Michael Rustad of Suffolk University Law School and Professor Thomas Koening of Northeastern University. The Supreme Court recently referred to this report as "the most exhaustive study of punitive damages." Professors Rustad and Koening reviewed all product liability awards from 1965–1990 in both state and federal courts. During that time, punitive damages were awarded in only 355 cases—only 355 total punitive damages in 25 years! One quarter of all those awards involved on product—asbestos. Another one quarter of those cases was reversed or remanded upon appeal. They further found that the amount of punitive damage awards was not skyrocketing, and in 35 percent of the cases in which punitive damages were awarded they were less than the amount of compensatory damages. They concluded that "[t]here is a widespread

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[32] Daniels and Martin, "Myth and Reality in Punitive Damages," 75 Minn. Law Review 1, 10–12 (Oct. 1990).

[33] Dr. Stephen Daniels, Consumer Subcommittee Hearing on S. 640, September 12, 1991, transcript at 122.

[34] 74 Minn. L. Rev., supra., at 43.

[35] Id. at 22–27.

[36] See testimony of Dr. Stephen Daniels, Consumer Affairs, Foreign Commerce and Tourism Subcommittee Hearing on S. 565, April 4, 1995.

misperception that punitive damage awards are skyrocketing because of frivolous lawsuits. * * *"[37]

As witnesses testified at the Committee's September 23, 1993 hearing, if a manufacturer is not engaged in flagrant disregard of safety, pursuant to the standard set under section 107 of the bill, then that manufacturer does not have to be concerned about punitive damages.[38] The possibility of punitive damages provides an important deterrent which helps to insure that manufacturers police themselves. We must require continued maximum vigilance from the manufacturers themselves. In its recent decision in *TXO Production* v. *Alliance Resources* (June 25, 1993, No. 92–479), the Supreme Court soundly rejected attempts to limit or abolish punitive damages.

IV. The current system promotes product safety

One of the primary effects of the current system is to promote product safety—to make manufacturers more careful in the design and production of their products. I know this because manufacturers themselves have told me. The 1987 Conference Board survey of risk managers of corporations found that "[w]here product liability has had a notable impact—where it has most significantly affected management decision making—has been in the quality of the products themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit."[39]

Indeed, according to the Consumer Federation of America (CFA), only a small minority of companies had a product safety management position in the early 1970s. By the end of the 1970s, virtually all companies had a very strong product safety presence in their management structure. CFA further stated that there has been a dramatic change in the rate of accidental injuries and deaths in the United States, so that "approximately 6,000 deaths and millions of injuries have been prevented on an annual basis now because of product liability and other forces towards greater safety in our society."[40]

Moreover, Professor Rustad in his survey of punitive damage awards found that 190 of the 252 non-asbestos defendants who were subject to punitive damage awards between 1969 and 1990 "have taken some safety step in the wake of punitive damages litigation. In eighty percent of these cases, there were steps such as fortified warnings, product withdrawals, and safety features added to products which followed shortly after the [litigation]."[41]

A similar finding was made by Professors Nicholas Ashford and Robert Stone of MIT, in work done for inclusion in "The Liability Maze," a collection of articles on product liability, innovation and

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[37] Rustad and Koening, "Demystifying the Functions of Punitive Damages in Products Liability: An Empirical Study of a Quarter Century of Verdicts," Executive Summary at 11–15, 1. See also testimony of Professor Michael Rustad, Consumer Subcommittee Hearing on S. 640, September 19, 1991, transcript at 74–78.

[38] See testimony of Lucinda Finley, Consumer Affairs, Foreign Commerce and Tourism Subcommittee Hearing, April 4, 1995.

[39] "Product Liability: The Corporate Response," The Conference Board Report No. 893 (1987) at 2.

[40] Testimony of Gene Kimmelman, Legislative Director, Consumer Federation of America, at Consumer Subcommittee Hearing on S. 1400, April 5, 1990, transcript at 77–78.

[41] *Rustad, supra,* executive summary at 28.

safety. This book is often mischaracterized by proponents of S. 565 as a monolithic study reaching results supportive of their position. Rather, it is a collection of research articles reaching various conclusions on the issue of innovation and safety in assorted industries.

Professors Ashford and Stone researched the effect of product liability on the chemical industry. They found that manufacturers pay "no more than 5 percent, and often less than 0.1 percent, of the corresponding social costs" of the chronic injuries caused by chemicals.[42] They concluded that, although the system is not stringent enough on the manufacturers to provide appropriate deterrence to prevent all unsafe products, it still has helped in the development of safer products. They recommend, however, that if the liability system were more, not less, stringent with respect to manufacturers it would be even more effective in promoting safety and innovation.[43]

The editor of "The Liability Maze," Peter Huber, has suggested that the work by Professors Ashford and Stone is somehow unique. However, Professor Ashford has responded that he and other authors of the book found it impossible to separate innovation and safety, and found that "the liability system can both promote safety and innovation of desirable products and discourage unsafe products though they may be innovative." Professor Ashford goes on to state that "we believe most scholars would subscribe to our methodology * * *"[44]

The effect of product liability in promoting product safety relates not only to consumer protection, but to competitiveness. As Professor Mark Hager of American University testified:

> * * * our products, because of their superior reputation for safety, due in part to the effects of product liability over the last 20 years, have a superior reputation in the international marketplace. * * * [W]e cannot compete at this time with the low labor costs of newly industrializing countries, but we can compete very effectively * * * in safety, and it would be a grave risk to our international competitiveness to toy with the tort system that helps bring about that competitive advantage.[45]

V. The current system promotes important principles of federalism

The value of the principles of federalism embodied in our current system of tort law should not be overlooked. As Congressman Mike Box, of the Alabama House of Representatives, has testified:

> [t]he issues of proper compensation for injured persons and suitable protections for businesses are matters of social values and public policy that should be addressed at the state level, in the absence of a national economic crisis.

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[42] Ashford and Stone, "Liability, Innovation, and Safety in the Chemical Industry," in "The Liability Maze" (Brookings 1991) at 414.

[43] Id. at 415–417.

[44] Letter from Professor Nicholas Ashford to Senator Ernest Hollings, October 1, 1991, submitted for the record of the Consumer Subcommittee hearing on S. 640, September 19, 1991.

[45] Testimony of Professor Mark Hager, Assistant Professor of Law, Washington College of Law, American University, at Consumer Subcommittee Hearing on S. 1400, April 5, 1990, transcript at 126.

> * * * Arguments for uniform laws as a means of promoting competitiveness ignore the advantages of a decentralized and federal system of civil justice. * * * Remember why we developed as a federal nation. * * * Our founding fathers recognized the importance of having governments responsive to the electorate. Broad powers were reserved to the states so they would serve as bulwarks of freedom, an antidote to an overpowerful national government. * * * S. 1400 [a similar bill introduced in the 101st Congress] is radical because it opens the door to substantially greater federal intrusions.[46]

These concerns were reiterated during the Subcommittee's September 12, 1991 hearing by Delegate Bernard Cohen on behalf of the National Conference of State Legislatures. Delegate Cohen pointed out that federal "preemption should not occur unless it could be proved that the variation in State laws is significantly impeding commerce among the States and unless the specific legislative response is the only way to resolve the conflict. * * * [T]his burden has not been met with respect to product liability laws." Delegate Cohen went on to note that, not only had the burden of proof not been met, but "the basic rationale for this bill, the underlying rationale for it, is fallacious."[47]

Professor Eisenberg from Cornell Law School also has raised these concerns, and pointed out the practical problem with federal tort law that I believe should provoke serious concern:

> The changing nature of products liability law makes me cautious about wishing for Congress to implement a single rule. For the rule Congress adopts had better be a good one, since it may preempt further experimentation and change by the states. I see no basis for believing that the rules embodied in S. 1400 [a similar bill introduced in the 101st Congress] are superior to the collection of rules embodied in various state laws and to the ability of the states to adopt the best rules of their sister states, as those rules evolve over time. The one thing we do know is that state product law does change. I worry that Congress may freeze the law with the wrong set of rules at a time when there is no clear reason to do so.[48]

Testifying on behalf of the National Conference of State Legislatures at the Committee's April 4, 1995 hearing. Representative Jeffrey Teitz of the State of Rhode Island stated:

> This is a unique moment in our national history. For the first time in decades, we have begun a serious re-examination of the relationships between Washington and the fifty state capitals. Members of Congress on both sides of the aisle are publicly acknowledging that the federal government needs to return significant governmental authority

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[46] Testimony of Rep. Mike Box, Alabama House of Representatives, at Consumer Subcommittee Hearing on S. 1400, April 5, 1990, Statement at 1–3.

[47] Testimony of Delegate Bernard Cohen, Virginia House of Delegates, Consumer Subcommittee Hearing on S. 640, September 12, 1991, transcript at 85–86; 87.

[48] Testimony of Professor Theodore Eisenberg, Professor of Law, Cornell University, in response to post hearing questions of Senator Rockefeller, from Consumer Subcommittee Hearing on S. 1400, April 5, 1990, at 2.

> on a broad range of issues to the states. There is a widely-shared recognition that dictates from Washington have in many instances made government neither more efficient nor more equitable. Against this great historic trend comes the dubious idea of product liability preemption. The proponents of this legislation want Washington to dictate the legal standards and evidentiary rules which the fifty state court systems use to adjudicate disputes over allegedly defective products. There is no precedent for such a congressional imposition of federal rules by which state courts will be forced to decide civil disputes * * * The issues of proper compensation for injured persons and suitable protections for businesses are matters of social values and public policy that should be addressed at the state level. Only with clear proof of the need and the effectiveness of national rather than state solutions should we consider the sweeping preemption of state laws and constitutions contemplated by this legislation. In our view, proof of need and effectiveness is lacking.[49]

Indeed, I have this same concern. I am constantly surprised that some are willing to take their chances with Congress setting the rules over the long haul. Such an effort would limit flexibility, and could eventually result in rules more oriented toward plaintiffs than those the states would craft. In any event, we only should tinker with the fundamental principles of federalism in the most extreme circumstances—a record such as we have on this issue is insufficient to take such action.

VI. The current system did not cause the Insurance "Crisis"

In past years, the cry of product liability has been based on a "crisis" in the availability and price of insurance. However, the primary allegations concerning the existence and magnitude of this crisis have proved vastly exaggerated. In 1976, the Federal Government created a Federal Interagency Task Force on Product Liability (hereinafter the Task Force) to examine the problem. The Insurance Study commissioned by the Task Force found that, while insurance costs did increase in the mid-1970s, insurance premiums exceeded 1 percent of the total sales for only three industries.[50]

By 1983, evidence indicated that product liability insurance costs had stabilized or decreased, and that the insurance crisis had disappeared. A 1983 Institute for Civil Justice study concluded not only that reports of a product liability crisis in the mid–1970s were greatly exaggerated, but that even the perception of a crisis had receded because it had become evident that product liability claims had not imposed unreasonable costs on most manufacturers.[51] Costs increased and availability decreased again in the mid-1980s. In an April 25, 1980 letter to Senator Adlai Stevenson, Victor Schwartz, in his capacity as Chairman of the Commerce Depart-

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[49] See testimony of Jeffrey Teitz, Consumer Affairs, Foreign Commerce and Tourism Subcommittee Hearing on S. 565, (April 4, 1995).

[50] U.S. Department of Commerce, Interagency Task Force on Product Liability, Final Report VI–20 (1977) [hereinafter cited as Task Force Final Report].

[51] Rand Corporation, The Institute for Civil Justice, "Designing Safer Products: Corporate Responses to Product Liability Law and Regulation 121" (1983) [hereinafter cited as Designing Safer Products].

ment's Task Force on Product Liability and now one of the leading advocates to S. 565, stated that "no one has ever demonstrated that the huge increases in product liability premiums in recent years were related to the number and/or size of product liability claims."[52]

Professors Henderson and Eisenberg noted, in their 1992 study on civil filings, that their data showed little linkage between tort reform and declining insurance rates, and that one has to be skeptical of such linkage.[53] According to Professors Henderson and Eisenberg, at the advent of the so-called tort reform movement, reformers were concerned more about convincing the American public that there was a crisis and linking the alleged crisis to product liability, than about the reality of the crisis itself.[54] The idea was to tie the product liability system to the crisis in a way that reshaped public opinion.[55] Efforts were forcefully made to link the so-called crisis to basic American activities, such as little league baseball and the Boy Scouts.[56] To quote Professors Henderson and Eisenberg, "using every technique of modern media-shaping, tort reform groups sought to insure that the public believed that products liability law was the cause of this threat to their way of life." [57]

During the mid–1980s, the Director of Government Affairs for the Risk and Insurance Management Society—an association of corporate risk managers which generally supports tort reform—himself expressed concern about linking tort reform and the insurance availability crisis.[58]

There is ample evidence that the increases in product liability insurance costs were actually the result of the cyclical nature of the insurance industry and insurance companies' underwriting practices, not product liability. The Congressional Research Service (CRS) has described the repeating cycles of high and low premiums as an historical alteration between soft and hard insurance markets, and has discussed the management practices of the companies which contribute to this cycle. In a soft market, rates are adequate, and risk selection careful, and the industry generally performs well. New capital is attracted from a number of sources and capacity increases. Price cutting of premiums results when new sources of capacity begin to generate increased competition for available premium volume. Underwriting standards (the standards for deciding whether to insure a particular manufacturer) for risk selection diminish with increased competition, and insurers take on riskier business endeavors. According to CRS, this practice results in rising claims losses.

At the point that competition is severe and that losses are too high, insurers withdraw from the market and the capacity shrinks, resulting in hard market. Availability and affordability problems ensue as the remaining insurers raise prices and tighten the un-

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[52] Testimony of Victor Schwartz, Commerce Committee Hearing on S. 1789, 96th Congress, (April 22, 1980).
[53] Supra at 8, 792.
[54] Id. at 792–793.
[55] Id.
[56] Id.
[57] Id.
[58] Id.

derwriting standards. Eventually the market stabilizes, a soft market emerges, and the cycle begins again.[59]

Interest rates, which reached historic heights in the late 1970s, aggravated the cycle, Companies engaged in price wars in order to obtain a larger volume of premium income for investment.[60] Basically, companies were willing to accept lower premiums for certain insurance lines in order to encourage sales and obtain funds for investments.[61]

On February 19 and March 4, 1986, the Committee held hearings to conduct a more comprehensive examination of the availability and cost of liability insurance. Testimony was presented at hearings on the reasons for the insurance crisis. Witnesses noted that the insurance crisis had arisen during a period of falling interest rates, prior to which competing insurance companies had been underpricing their product in order to maximize cash flow and enhance investment income. When interest rates began to fall, companies were forced to increase premiums because investment income was no longer compensating for underwriting losses. The Committee Report accompanying S. 2129, the Risk Retention Amendments of 1986, states that "[t]his practice of cash flow underwriting was linked directly to the current crisis."[62]

GAO testified in May 1986 before the Consumer Subcommittee that the underwriting cycle turned again and "is now moving in a positive direction." The property/casualty industry will enjoy "an expected net gain before taxes of more than $90 billion over the years 1986–1990."[63] According to the Insurance Information Institute, the insurance industry has been a very profitable industry over the past decade, even during the 1980s' insurance crisis. A compilation of the Institute's annual statistics shows that, between 1984–1994, property/casualty companies had a net after-tax income of approximately $100 billion, and an increase in surplus of $63 billion to $190 billion.[64]

The irony of the continuing debate over a federal product liability bill is that insurance costs were emphasized by the proponents as the reason for passage of a federal product liability bill in the 96th and 97th Congresses when premiums were high, and were deemphasized as a reason for passage of product liability legislation during the 98th Congress when insurance premiums were reduced. In the 99th Congress, the proponents again pointed to the high premiums as a justification for a Federal bill, but these arguments disappeared in the 101st and 102nd Congresses.

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[59] See Congressional Research Service, "Property-Casualty Insurance market Operation", CRS Report No. 85–629E (March 20, 1985).

[60] See "A Rate War Rips Casualty Insurers," Business Week, December 8, 1980.

[61] Hearing on Product Liability before the consumer Subcommittee, 99th Cong. 2d. Sess. (1986) (hereafter cited as 1986 Product Liability Hearing). (Statement of Johnny C. Finch, Senior Associate Director, General Government Division General Account office) (Testimony on file at Senate Committee on Commerce, Science, and Transportation).

[62] S. Rep. No. 294, 99th Cong., 2nd Sess. 4 (1986).

[63] 1986 Hearing on Product Liability, supra note 25 (Statement of Johnny C. Finch, Senior Associate Director, General Government Division General Accounting Office) (Testimony on file at Senate Committee on Commerce, Science and Transportation). U.S. Congress, Office of Technology Assessment, "Making Things Better: Competing in Manufacturing," OTA–ITE–443 (Washington, D.C.: U.S. Government Printing Office, February 1990).

[64] Insurance Information Institute Annual Statistics on Property/Casualty Companies.

VII. Product liability is not a major factor in the competitiveness of U.S. business

The proponents also claim that produce liability is inhibiting the ability of U.S. business to compete in world markets and to market innovative products. However, there is absolutely no evidence that product liability hinders the competitiveness of American businesses.

In its study of competitiveness, the Office of Technology Assessment (OTA) concluded that American manufacturing clearly is being challenged by competitors, particularly from Japan. However, the recommended policy options for government activity to address this challenge did not include federal product liability law. Rather, OTA listed the four most important steps that the United States could take to improve competitiveness: (1) lower the cost of capital; (2) improve the quality of human resources through education and quality of workforce; (3) improve the diffusion of manufacturing technology to small and medium-sized business; and (4) provide government funding of risky but promising long-term research and development.[65]

In 1987, the Conference Board surveyed risk managers of 232 major U.S. manufacturing, trade, and service corporations about the effect of product liability on their companies.[66] Risk managers are the corporate employees that have the greatest corporate responsibility for addressing product liability issues—40 percent, as compared to a 6 percent responsibility by the Chief Executive Officers (CEOs).[67] Two-thirds of the risk managers said that product liability contributed 1 percent or less to the final prices of their products. For another 11 percent of the companies, the liability cost was only 2–3 percent of the final price.[68] Additionally, most of the companies surveyed said that the area in which product liability had most significantly altered management decision making was in the quality of the products themselves.[69]

The GAO made similar findings in a 1988 report on the issue. GAO found that insurance costs represented a relatively small proportion of businesses' annual gross receipts—0.6 percent for large businesses, and about 1 percent for small businesses.[70]

Additionally, the Institute for Civil Justice of the Rand Corporation concluded in 1983 that product liability costs in most cases were only a minute percentage of costs to business:

> It appears safe to conclude that for most large manufacturing firms, product liability costs—including the cost of defending litigation and certain product liability prevention activities—probably amount to much less than 1 percent of total sales revenue.[71]

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[65] Testimony of Dr. Julie Fox Gorte, Office of Technology Assessment, Consumer Subcommittee Hearing on S. 1400, April 5, 1990 at transcript pp. 61–2.

[66] Weber, "Product Liability: The Corporate Response," The Conference Board, Report No. 893 (1987).

[67] Id. at v.

[68] Id. at 13.

[69] Id. at 2.

[70] U.S. General Accounting Office, "Liability Insurance: Effects of Recent 'Crisis' on Businesses and Other Organizations," GAO/HRD–88–64 (July 1988).

[71] Designing Safer Products, supra, note 31 at 121.

Also, the Rand Corporation has found that only a small percentage of U.S. manufacturers are even involved in product liability litigation. In 1986, only 0.9 percent of all manufacturing concerns in the United States were defendants in product liability litigation.[72]

A recent study by Robert Hunter, former Texas Insurance Commissioner, and currently Director of the Insurance Division of the Consumer Federation of America, found that product liability accounts for only 26 cents of each $100 of retail sales in the country.[73]

Claims to the contrary regarding the competitiveness of business are based on self-serving anecdote or unsupported claims. Such rhetoric was greatly espoused by the Council on Competitiveness, under the auspices of former Vice President Quayle. The Council claimed that the cost of the tort system was crippling U.S. business, using questionable factors to derive the total cost of the system. Upon scrutiny, these dollar amounts were completely without factual basis.

Mr. Quayle asserted that the "direct" costs of the tort system are $80 billion per year, and that indirect costs were considerably higher. The "Authority" cited for that figure was Forbes magazine, which in turn cited no authority. The figure can be located in only one other place I have been able to uncover—Peter Huber's book, "Liability: The Legal Revolution and Its Consequences." However, as an analysis of this book for the Stanford Law Review points out, this number was simply lifted from a comment made by Robert Malott, Chairman of the Business Roundtable's product liability task force and CEO of the FMC Corporation, in the 1986 issue of Chief Executive magazine. Mr. Malott was quoted as saying, "insurance liability costs industry about $80 billion per year" with no documentation for that remark.[74] These "authorities" speak for themselves about the extent to which we should rely on these estimates in deciding to overhaul the civil justice system.

The only other discordant note in the general agreement that product liability has a very small impact on business comes from a 1988 Conference Board survey of 500 chief executive officers of corporations, 42 percent of whom stated that product liability had a major impact on them.[75] Some components of the Conference Board apparently were dissatisfied with the results of their 1987 survey, cited above, which did not support their theory of product liability. So they decided to ask different people, in hopes of a different result. This is virtually the only piece of information cited by the supporters of this legislation for the proposition that product liability affects competitiveness.[76]

However, as Professor Theodore Eisenberg of Cornell Law School has stated with respect to this survey, "* * * the case for reducing defendant liability seemed rather weak. It depended in large part

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[72] Dugworth, "Product Liability and the Business Sector: Litigation Trends in Federal Courts," supra at 53–56.

[73] See testimony of Robert Hunter, Consumer Affairs, Foreign Commerce and Tourism Subcommittee Hearing on S. 565 (April 3, 1995).

[74] Hager, "Civil Compensation and Its Discontents: A Response to Huber," 42 Stanford L. Rev. 539, 547–550 (January 1990).

[75] McGuire, "The Impact of Product Liability," The Conference Board, Report No. 908 (1988).

[76] See, e.g., Testimony of Wendell Wilkie, General Counsel, Department of Commerce, Consumer Subcommittee Hearing on S. 1400, February 22, 1990.

on a survey of CEOs in which they were asked whether products liability was a problem for their companies. The flaws in such a survey are so substantial and obvious that no self-respecting legislature should act on the basis of the results."[77] I could not have said it better myself. We cannot responsibly move forward on this legislation based on a self-serving survey of corporate executives, particularly when it is contrary to all other data. The date demonstrate that the actual impact of product liability on businesses' bottom line is very small.

What is truly troubling about this debate over competitiveness is not the effect of the tort system on business, but the total lack of reliable information on which this competitiveness claim is based. As Dr. Deborah Hensler of the Rand Corporation testified, "[p]roduct liability litigation has been a source of controversy and public policy debate for almost a decade in this institution. I think it is remarkable that we still lack very basic information about the extent and nature of that litigation and the costs of resolving claims."[78]

In 1991, the GAO released a study of the effects of product liability on competitiveness, and stated that it could find no acceptable methodology for relating product liability to competitiveness, and that businesses refuse to make available the information necessary to conduct such analysis."[79]

During debate on this topic in the 101st Congress, the supporters declared that the product liability system must be altered because of the changes taking place in the European Economic Community (EEC). It was argued that the EEC was moving toward a uniform product liability system, and the United States must do the same. It also was argued that other countries in the world had lower product liability costs than the United States, implying that this country should somehow emulate those other systems. However, like so many arguments on this issue, when the facts were examined, the argument disappeared.

The Council of the European Communities issued a directive in 1985 "concerning liability for defective products."[80] Despite the August 1, 1988 compliance deadline in the directive, only five member states—the United Kingdom, Italy, Greece, Luxembourg, and Denmark—had adopted the Directive as of March 15, 1990.[81] More significantly, the Directive by its terms does not preempt existing law in the various countries, but merely provides an additional cause of action in those countries in which remedies for harm already exist, and therefore is not likely to establish a more uniform system. As Professor Lawrence Mann of Wayne State University School of Law testified, "[the Directive] is not in derogation of each member state's substantive tort law. And so, side by side, they will

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[77] Responses of Professor Theodore Eisenberg, Professor of Law, Cornell University, to post-hearing questions of Senator Rockefeller, April 10, 1990, response to question 1.

[78] Testimony of Dr. Deborah Hensler, Consumer Subcommittee, September 12, 1991, hearing, transcript at 106.

[79] GAO, "Product Liability Rates and Claims, HRD 91–108 (1991).

[80] 28 O.J. Eur. Comm. (No. L 210) 29 (1985) (hereafter cited as "Directive").

[81] Letter of Robert C. Holland, Committee for Economic Development, to Senator Richard Bryan, Chairman, Consumer Subcommittee, dated March 15, 1990, in response to post-hearing questions at 1.

have a dual system operating.[82] Additionally, while the Directive establishes certain rules of law, it leaves many issues optional with the member states.[83]

Equally interesting, it is apparent that the EEC is moving toward a system of substantive product liability that is more consumer-oriented than that which is currently in place, and more like that in the United States. For example, its directive introduces the concept of strict liability for defective products,[84] expands the scope of potential defendants,[85] and institutes joint and several liability.[86] Since product liability is being expanded, insurance premiums are likely to go up, with an accompanying significant additional cost for producers in the EEC.[87]

Thus, the EEC Directive does not provide an incentive for changing U.S. product liability law. Rather, it is a recognition of the value of current U.S. law in protecting consumers and promoting safe products. As Wendell Wilkie, former General Counsel of the Department of Commerce, has testified, "* * * the protection [other countries] afford their consumers is so radically smaller than is the case in this country [that] the disparity in the costs associated between our system and theirs is inordinately great. * * *"[88] I do not believe we should sacrifice the greater degree of consumer protection we enjoy for some unsubstantiated hope of greater competitiveness.

It also has been argued that product liability costs are much higher in the United States than in the countries of some of our foreign competitors. However, a direct comparison of the costs of the tort systems in various countries, without more, is not valid because it ignores other types of compensation systems available in other countries. For example, in the Netherlands several social insurance programs are available which may preempt the need for compensation through the litigation process—the ZW/Sick Statute; the ZFW/Sick Fund Law; the WAO/Workers Disability Act of 1967; the AAW/General Act on Disability of Work; and the AWBZ/General Act on Special Medical Costs. The ZW is funded by collecting 5 percent of employers' gross income and 1 percent of employees' gross income. An injured employee may receive up to 70 percent of earned wages for 1 year. AAW and WAO continue finding if further assistance is needed.[89]

Moreover, the tax burden on business in the various countries must be included in any calculus of the relative competitive status of business. Taxes on business are higher in virtually every advanced country than they are in the United States.[90]

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[82] See Directive, Article 13; Testimony of Professor Lawrence D. Mann, Wayne State College of Law, Consumer Subcommittee Hearing on S. 1400, February 22, 1990, transcript p. 167.

[83] See, e.g. Dielmann, "The European Economic Community's Council Directive on Product Liability," The International Lawyer, Vol. 20, No. 4, 1391 at 1400 (1986).

[84] Directive, Article 1.

[85] Directive, Article 3. See also Theiffry, Doorn, and Lowe, "The Single European Market: A Practitioner's Guide to 1992," 7 B.C. Int'l & Comp. L. Rev. 357 at 383.

[86] Directive, Article 5. See also, Thieffry, Doorn and Low, supra, at 383.

[87] Dielmann, supra, at 1399.

[88] Testimony of Wendell Wilkie, General Counsel, Department of Commerce, at Consumer Subcommittee Hearing on S. 1400, February 22, 1990, transcript p. 30.

[89] Mann and Rodrigues, "The European Directive on Products Liability: The Promise of Progress?" 18 Ga. J. Int'l & Comp. L. 391, 416.

[90] Testimony of John G. Wilkins, Director of Tax Policy for Economic Analysis, Coopers and Lybrand, before the House Committee on Ways and Means, hearing on factors affecting U.S. international competitiveness, July 18, 1991.

Thus, while business' costs related directly to the tort system may be lower in other countries, the relevant comparison is between the overall cost of compensation, which is likely to be similar to that in the United States. The proof of the fact that U.S. laws do not unduly burden companies doing business here is that foreign businesses are increasingly trying to locate here. In fact, foreign direct investment in the United States increased from $83 billion in 1980 to $530 billion in 1990.[91] Foreign businesses would not seek to locate here if the tort system were the crippling burden that has been suggested by the proponents of S. 565.

It is clear that the facts do not support this contention that the current product liability system puts American businesses at a competitive disadvantage. Very recently, the National Association of Manufacturers issued a report boasting about the global competitiveness of U.S. manufacturers. The report showed that U.S. exports increased from over $150 billion in 1986 to over $300 billion in 1991.[92] If we are going to legislate to assist American business, we should do it in a way that will be effective, and S. 565 will not be.

VIII. S. 565 will not reduce product liability costs for business

Even if we assume that product liability is a significant barrier to the ability of U.S. firms to compete in world markets, that barrier cannot be reduced by any legislation unless the legislation somehow reduces businesses' costs. As J. Robert Hunter, then President of the National Insurance Consumer Organization, testified, "[m]ake no mistake about it, if insurance costs and availability are not improved, competitiveness is not affected."[93]

The Committee, in hearings over the last several years, has received virtually unequivocal testimony that enactment of bills such as S. 565 will not affect costs or insurance rates. The insurance industry testified before the Committee regarding a bill similar to S. 565 in no uncertain terms that "* * * the bill is likely to have little or no beneficial impact on the frequency and severity of product liability claims. * * * [I]t is not likely to reduce insurance claim costs or improve the insurance market."[94]

Indeed, that the bill will not have its purported effects becomes clear when its actual impact is reviewed. For example, it is claimed that the bill will provide additional uniformity in product liability law nationwide. However, the bill only selectively preempts state law, waving much of state law in place to be interpreted with the new federal law. Additionally, it provides a federal rule of law to be interpreted by both the state and the federal courts, but it is questionable whether state courts can be bound by the decisions of federal courts other than the Supreme Court.

As professor Eisenberg testified:

> * * * for a period of time, at least, predictability may be reduced rather than increased. Each state will have to de-

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[91] Bureau of Economic Analysis, Department of Commerce (1991).

[92] "The Facts about Modern Manufacturing," the Manufacturing Institute, July 1992 at 3.

[93] Testimony of J. Robert Hunter, President, National Insurance Consumer Organization, Consumer Subcommittee hearings on S. 1400, April 5, 1990, at 132.

[94] Testimony of Deborah T. Ballen, Vice President for Policy Development and Research, American Insurance Association, at Consumer Subcommittee Hearing on S. 1400, April 5, 1990, transcript p. 110.

> cide the scope of S. 1400's [a similar bill introduced in the 101st Congress] preemption and its relation to state tort law, The interaction between state and federal law in tort will be made more rather than less complex. * * * [U]niformity will not be quickly, if ever, achieved. * * * [We] are at risk of having not just 55 jurisdictions but an additional dozen federal courts of appeals making products law. At least before enactment of S. 1400 the [federal] courts of appeals should have felt bound by state law. Until the Supreme Court speaks, it is not clear that state supreme courts would or should be bound by federal interpretations of S. 1400 as it interacts with the relevant state law.[95]

With respect to punitive damages, S. 565 provides a standard of proof for punitive damages that is more restrictive than that in may states. However, punitive damages are not a significant factor in product liability cases. As Professor Eisenberg has stated, "[t]here is a widespread perception that punitive damages are awarded frequently and in great amounts. Yet every serious study of the area finds that punitive damage awards are relatively infrequent, that they usually are commensurate with the defendant's wrongdoing, and that they bear a substantial relationship to the size of the compensatory awards. * * * [P]unitive damages are awarded in not more than one percent of filed cases. * * *"[96] The 1989 GAO Report also looked at punitive damages, and found that, on the few occasions when they were awarded, their amount had a high correlation with the amount of compensatory damages.[97]

In fact, regardless of the scope of the product liability legislation enacted, the record indicates that it will be ineffective in reducing product liability insurance costs. For example, Florida passed very strong changes in its tort law in 1986, and also required the insurance industry to make rate filings indicating the effect of the changes on its rates. The Florida law eliminated joint and several liability, limited non-economic damages to $450,000, and limited punitive damages. Nevertheless, when Aetna's rate filing came in, it listed the effect of each change on its rates as "zero."[98] There was no change in insurance costs, despite the dramatic changes in tort law, and we could expect none with enactment of S. 565.

No explanation has been offered, and none could logically be offered, for any way in which a bill could improve competitiveness if it does not reduce product liability claims or costs. When this is pointed out, the supporters of the bill often suggest that the bill may not reduce damages paid but will reduce "transaction costs", or the costs of litigation such as attorneys' fees. But it is obvious, that if transaction costs were reduced, they should be reflected in reduced insurance costs. However, experts have testified that insurance costs will not be reduced by this bill. The available evi-

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[95] Testimony of Professor Theodore Eisenberg, Cornell Law School, Responses to post-hearing questions of Senator Rockefeller at 3. See also Note, "Authority in State Court of Lower Federal Court Decisions on National Law," 48 Columbia L.Rev. 943, 954 (1948); Stern and Grossman, Supreme Court Practice (5th ed. 1978) at 280; *Testa* v. *Katt*, 330 U.S. 386 (1947).

[96] Testimony of Professor Theodore Eisenberg, Responses to Post-hearing questions of Senator Rockefeller supra, at 4–6 and authorities cited therein.

[97] 1989 GAO Report, supra, at 27.

[98] Testimony of J. Robert Hunter, supra. transcript at 135.

dence demonstrates that the bill will not reduce transaction costs, either.

GAO has stated unequivocally:

> [w]e believe that S. 1400 [a similar bill introduced in the 101st Congress] is unlikely to reduce transaction costs in product liability suits. For cases that are litigated, the procedural features of the tort system would not be changed by the bill. It is also not clear that the bill provides strong incentives for alternative dispute resolution, which could cut litigation costs. Moreover, the alternative dispute resolution mechanisms that may be used are left to the discretion of the states. If these mechanisms are not binding, then they may add to rather than substitute for litigation. If this happened, costs could actually increase.

GAO went on to note that transaction costs are largely a function of the length of litigation, and that delays caused by defendants are common. However, if a complete and accurate record is necessary to insure a fair outcome of the case, "lengthy litigation and its attendant costs might be justified."[99]

Another justification offered for federal product liability legislation in that legal fees paid to plaintiffs' attorneys are too high. However, this bill would not have any effect on attorneys' fees. In any event, it is important to understand the value of the current system of compensation for plaintiffs' attorneys. Plaintiffs' lawyers who accept product liability cases work on a contingency fee basis. If they win the case they get a percentage of the case (which is usually about 30 percent); if they lose, they get nothing. This system allows injured plaintiffs who are not wealthy to obtain a lawyer. At the same time, the system acts as a deterrent to frivolous cases because attorneys are spending their own time and money in the case.

Figures from the Institute for Civil Justice state that plaintiffs receive approximately one-half of the cost of litigation.[100] Any problem with the cost of the system is not with the cost of the attorney who is "investing" his or her own time and money to win a case. The problem is with the defense attorney who has an incentive to delay the case with dilatory motions, and thereby encourage severely injured plaintiffs to settle for less in order to get an expedited payment of the plaintiff's medical and other costs. Meanwhile, the company is making interest on money that would otherwise be in the hands of the prevailing plaintiff.

The evidence also shows that defendants' attorneys are apparently better paid, on average, than plaintiffs' attorneys. According to a recent report by the Consumer Federation of America, for every $1 paid to plaintiff's attorneys, at least $1.31 is paid to defense attorneys.[100] Of course, defendants' attorneys are paid regardless of the outcome of the case, while plaintiffs' attorneys are paid only if they win their cases. Otherwise, they suffer a loss for the time and expenses they have incurred. Thus, existing trans-

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[99] Testimony of Joseph F. Delfico, Director, Income Security Issues, General Accounting Office, Consumer Subcommittee Hearing on S. 1400, February 22, 1990 in response to post-hearing questions of Senator Bryan at 2.

[100] See Testimony of Robert Hunter, Consumer Affairs, Foreign Commerce and Tourism Subcommittee Hearing on S. 565, April 3, 1995.

action costs are not inappropriate, and in any event would not be reduced by this bill.

IX. The product liability system does not stifle innovation, but can encourage innovations in safety

Another popular argument made in support of the bill is that the current system deters innovation, and discourages new products from being brought to market. Of course, this effect is, by its nature, somewhat subjective and very difficult to examine. However, witnesses at the Committee's hearings that examined the effects of the tort system on the chemical industry noted that desirable innovation must mean safe innovation, and that if the tort system discourages unsafe innovation, that is valuable. They also found that, even in the chemical industry in which manufacturers pay a minuscule percentage of the costs of the injuries caused by their products, the tort system works to encourage the innovation of safer products.[101]

Business can, and often does, say it is discouraged from bringing innovative products to market, but it does not say what those products were, so the claim cannot be analyzed. However, those actual products that have been cited by witnesses in support of this claim subsequently had legitimate questions raised about their safety. In such cases, until such questions are resolved, I do not think we should presume that the product liability system has not worked properly to keep those products from the market.

Some examples of products cited as unfairly kept from the market by the system are set out below, together with the facts as they developed through the Committee's hearing process.

Monsanto Asbestos Substitute.—Calcium sodium metaphosphate was cited by several supporters of S. 640 [a bill considered in the 102nd Congress] as a primary example of a safe product kept from the market by the product liability system. However, an Environmental Protection Agency (EPA) Status Report dated August 19, 1986, reviewed studies of this product submitted by Monsanto, and stated that "EPA believes that the evidence obtained from Monsanto's * * * study in rats offers reasonable support for the conclusion that calcium sodium metaphosphate fibers can cause cancer." (Report p. 9). Dr. Philip Landrigan, Chairman, Department of Community Medicine, Mt. Sinai Medical Center, reviewed the EPA and Monsanto documents, and stated: "I am extremely concerned about the potential carcinogenicity of sodium calcium metaphosphate."[102] Monsanto's CEO, Richard Mahoney, subsequently wrote to the Committee stating that later tests of the fiber showed no evidence of health problems, that the first test was not done to determine the health risk to humans, and that the product was kept off the market solely because of concerns about "unwarranted litigation".[103] However, this letter does not explain why the first test would have been done if not to examine risks to human health.

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[101] Ashford and Stone, supra., at 415, 417.

[102] Report of Dr. Phillip Landrigan.

[103] Letter from Richard Mahoney to Senator Richard H. Bryan dated May 17, 1990, reprinted in record of Consumer Subcommittee Hearing on S. 1400, May 10, 1990.

Copper 7 IUD.—Supporters of S. 687 [a bill considered in the 103rd Congress] claimed that this product, although safe, was taken off the market because of unwarranted product liability suits. The Court in *Kociemba* v. *Searle,* 707 F. Supp. 1517 (D. Minn. 1989), (settled w/out appeal), a Copper 7 case, stated that the plaintiff "Presented evidence which would have allowed a reasonable jury to conclude that defendant knowingly placed millions of American women, especially [women who have not had children], at risk of serious infection, loss of fertility, and surgery for removal of internal organs" and that "responsibility for this conduct was shared throughout defendant's corporate hierarchy, and that the conduct continued for over ten years." Michael Ciresi, the lawyer who litigated many Copper 7 cases for plaintiffs, has written to the Committee stating that his firm spent millions of dollars on discovery of documents that Searle resisted through litigation to the Supreme Court. Cases litigated before completion of that discovery were not successful because of the lack of documentation. According to Mr. Ciresi, the documents ultimately obtained demonstrated that the company knew the product was dangerous to women who have never had children, but continued to market the product to those women. That action was the basis for punitive damages against the company.[104]

Sturm Ruger "Old Model" Single Action Revolver.—This product was cited as one which was the victim of unreasonable verdicts based on injuries that were really due to plaintiff negligence. However, documents submitted at the Committee's May 10, 1990 hearing demonstrated that since 1962 Ruger has received reports of serious injuries and deaths resulting from accidental discharges of this gun. In 1968, the gun failed a test for accidental discharge performed by the Bureau of Alcohol, Tobacco and Firearms, and it subsequently failed Ruger's own tests. Ruger did not redesign the gun to add a transfer bar safety device until 1973, and estimated that between 1968 and 1973 more than 150,000 "old models" were sold. Bill Ruger, CEO of the company, testified during product liability litigation that no safety device was put on the gun because a revolver "is supposed to be designed in the traditional way." The Court in *Sturm Ruger* v. *Day*, 594 P.2d 38 (Alaska 1979) found Ruger liable for punitive damages for failure to add a safety device. According to testimony before the Committee, by 1989 about 230 product liability claims had been filed against Ruger for this defect, but the gun has never been recalled.[105]

Puritan-Bennett Anesthesia Gas Machines.—This was cited by some hearing witnesses as a product unjustly removed from the market by the product liability system. The machines were implicated in four deaths in 1983–4. Hearings in the House Subcommittee on Oversight and Investigations, September 24, 1984, found that the company failed to notify the Food and Drug Administration (FDA) of deaths that were caused by an overdose of anesthesia due to swelling of "O" rings and resultant sticking of a valve. This

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[104] Statement of Michael Ciresi, submitted for record of Consumer Subcommittee hearing on S. 1400, April 5, 1990.

[105] Supplemental Statement of Linda Lipsen, submitted for record of Consumer Subcommittee Hearing on S. 1400, May 10, 1990. Supplemental statement of Linda Lipsen, supra, reprinted in record of Consumer Subcommittee Hearing on S. 1400, May 10, 1990.

problem was known in the 1970s, and reflected in an appendix to the 1979 voluntary standard for anesthesia machines. The FDA, testifying before the subcommittee in 1984, stated that the company "appears * * * [to have] failed to conduct adequate design review of certain critical components" including use of certain rubber-like materials in the presence of high concentrations of anesthetic gas. The company instituted a limited recall, and the FDA required the recall extended to all valves distributed through July 1984.[106]

Ortho Contraceptives.—Witnesses at the Committee's hearings claimed these products were unfairly subjected to product liability actions, citing *Wooderson* v. *Ortho*, 681 P.2d 1038, cert. denied 105 S.Ct. 365 (1984). It was claimed that, in that case, the company was held liable for failure to warn even though the FDA had determined that the warning was not necessary. However, an examination of the Court's decision reveals that the Court held that there was no clear determination by the FDA as to whether such a warning was necessary, so that the defense was not valid. Ortho was held liable by the Court for punitive damages because it ignored substantial evidence that its product caused renal failure.

Taking all the evidence presented on both sides of these issues, I am not prepared to conclude that the current product liability system is not working properly to insure the safety of new products.

S. 565 IS SUBSTANTIVELY FLAWED

As I stated in previous reports, this legislation dramatically revises our current legal system without any serious factual predicate for such a change. The purported intent of S. 565 is to create uniformity through federal preemption of state law. In reality, however, the bill provides for only selective, and in many instances, only one-way preemption. Moreover, the bill, for the most part, only preempts state law to the extent the law favors consumers. Laws that are considered favorable to defendants are preserved by the bill. The legislation also contains many inconsistencies and substantive legal problems. A few examples are set out below.

Section 107—Punitive damages

Section 107 of the bill is cited as "Uniform Standards For Award of Punitive Damages." By including such standards, the bill's supporters are acknowledging that such damages are important in deterring outrageous and unacceptable behavior by manufacturers. However, by its terms, it applies to punitive damages only "if otherwise permitted by applicable law. * * *" Thus, in states which have, through state law, eliminated or limited punitive damages, this bill would not restore the availability of such damages. In some states, there would be no right to punitive damages; in some states they would be capped at a stated amount; and they would be available only if the burden of proof in this legislation is met. This clearly does not, and is not intended to, create uniformity in the law of punitive damages. If proponents truly wanted uniformity, and were serious about deterring egregious conduct, they, at a

[106] Supplemental Lipsen statement, supra, reprinted in record of Consumer Subcommittee Hearing on S. 1400, May 10, 1990.

minimum, would restore punitive damages in the states that have limited them so that the law would be consistent nationwide. As Professor Lucinda Finley of the Buffalo School of Law, stated in testimony before the Committee on April 4, 1995, "to advance the goal of uniformity, punitive damages ought to be equally available to injured people without regard to what state they reside in."[107]

Section 107 also caps punitive damages at three times economic damages or $250,000, whichever is greater. This standard will have the effect of permitting persons with higher economic losses (e.g., wages, business opportunities), to collect more in punitive damages than persons with lower economic losses. The implied message, of course, is that injuries to persons with higher incomes and salaries (i.e., wealthy citizens) should be punished more than harm caused to lower-wage earners (i.e., working-class citizens or women who are homemakers).

Section 108—Statute of repose

Section 108 purports to establish a statute of repose for durable goods of 20 years. However, the law would only apply to the extent a state has a more extended statute of repose. If a state has a shorter limitations period of less than 20 years, that state law will not be preempted by the bill. The previous bills of the past three Congresses (S. 687, S. 640, and S. 1400) provided for a 25-year limitations period.

Additionally, the provision will have the effect of shielding from liability a significant number of products in use. Howard Fark, a member of the Board of Directors of the National Machine Tool Builders Association, testified at a hearing on S. 1400 [legislation considered in the 101st Congress] that over 50 percent of the claims filed against machine tool builders involve machines at least 25 years old.[108] It is argued that, if machines are defective, the defects will show up before the expiration of a 20-year period, so that manufacturers typically should not be liable for such products after that time. I have no reason to dispute that, but, by the same token, there has been no demonstration that there could never be a defective 21-year-old product or 26-year-old product for that matter. As long as that possibility exists, it is appropriate to leave the responsibility to decide who should be liable for harm from a product where it now exists in most states—with the jury and the court.

Section 110—Elimination of joint liability for non-economic damages

Section 110 states that "the liability of each defendant for non-economic damages shall be several only and shall not be joint." However, it does not restore the availability of full non-economic damages in states in which such damages have been capped at a certain amount. It does not restore joint and several liability for economic damages in states where such liability has been limited by state law. So, again, we will not have uniform nationwide law

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[107] See testimony of Lucinda Finley, Consumer Affairs, Foreign Commerce and Tourism Subcommittee Hearing on S. 565, April 4, 1995.

[108] Testimony of Howard Fark, Vice President, Minster Machine Company, Response to Post-Hearing Questions of Senator Rockefeller at question 2, Consumer Subcommittee Hearing on S. 1400, February 22, 1990.

on joint and several liability. We have some states that have no joint and several liability, some that have joint and several liability only in certain circumstances, and some that follow the rule of S. 565. As Professor Finley has noted, the elimination of joint and several liability will make it harder for injured persons to collect their full damages, particularly women, who tend to suffer higher pain and suffering losses than men. She also questioned the basic theory of proportioned fault and placing such burden on the plaintiff. As she indicated in her testimony:

> Joint liability does not mean that part of the injury was caused by the independent actions of one defendant, while another part of the indivisible injury was caused by another defendant's actions. In many product cases, the injuries are an indivisible whole, and cannot meaningfully be parceled out in this way. * * * when a defective IUD causes an infection that renders a woman permanently infertile, one cannot meaningfully ascertain that the manufacturer's failure to test the string caused half of the infertility, while the failure of the manufacturer of the copper string filament to test its effects when introduced in the uterus caused the other half of the infection.[109]

However, as a result of this legislation, there will be endless litigation over these issues.

CONCLUSION

I regret that the Committee has once again proceeded to report legislation to federalize product liability tort law without any comprehensive data to demonstrate (1) that the legislation is necessary, and (2) that the legislation will work. The evidence is clear that this legislation will not have its purported effect of making the civil justice system more efficient or enhancing the competitiveness of American businesses. Our nation's civil justice system is one of the most admired systems of justice in the world. It should be cherished and preserved, not tinkered with, or modified in the interest of singularly self-interested groups.

I believe that, before the Congress delves into this area, it should seek the guidance of the majority of state legislatures and judges, who have handled such matters for over 200 years, as well as legal experts. I did so, and they all gave a resounding "no" to this legislation. We would do well to listen to them.

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[109] Supra at 102.