106TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPT. 106–410 Part 1

WORKPLACE GOODS JOB GROWTH AND COMPETITIVENESS ACT OF 1999

OCTOBER 21, 1999.—Ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2005]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2005) to establish a statute of repose for durable goods used in a trade or business, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Workplace Goods Job Growth and Competitiveness Act of 1999".

SEC. 2. STATUTE OF REPOSE FOR DURABLE GOODS USED IN A TRADE OR BUSINESS.

(a) IN GENERAL.—Except as otherwise provided in this Act—

(1) no civil action for damage to property arising out of an accident involving a durable good may be filed against the manufacturer or seller of the durable good more than 18 years after the durable good was delivered to its first purchaser or lessee; and

(2) no civil action for damages for death or personal injury arising out of an accident involving a durable good may be filed against the manufacturer or seller of the durable good more than 18 years after the durable good was delivered to its first purchaser or lessee if—

(A) the claimant has received or is eligible to receive worker compensation; and

(B) the injury does not involve a toxic harm (including, but not limited to, all asbestos-related harm).

(b) EXCEPTIONS.—

(1) IN GENERAL.—A motor vehicle, vessel, aircraft, or train, that is used primarily to transport passengers for hire shall not be subject to this Act.

(2) CERTAIN EXPRESS WARRANTIES.—This Act does not bar a civil action against a defendant who made an express warranty in writing as to the safety or life expectancy of a specific product which was longer than 18 years, except that this Act shall apply at the expiration of that warranty.

(3) AVIATION LIMITATIONS PERIOD.—This Act does not affect the limitations period established by the General Aviation Revitalization Act of 1994 (49 U.S.C. 40101 note).

(c) EFFECT ON STATE LAW; PREEMPTION.—This Act preempts and supersedes any State law that establishes a statute of repose to the extent such law applies to actions covered by this Act. Any action not specifically covered by this Act shall be governed by applicable State law.

(d) TRANSITIONAL PROVISION RELATING TO EXTENSION OF REPOSE PERIOD.—To the extent that this Act shortens the period during which a civil action could be otherwise brought pursuant to another provision of law, the claimant may, notwithstanding this Act, bring the action not later than 1 year after the date of the enactment of this Act.

SEC. 3. DEFINITIONS.

In this Act:

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

(2) DURABLE GOOD.—The term "durable good" means any product, or any component of any such product, which—

(A)(i) has a normal life expectancy of 3 or more years; or

(ii) is of a character subject to allowance for depreciation under the Internal Revenue Code of 1986; and

(B) is—

(i) used in a trade or business;

(ii) held for the production of income; or

(iii) sold or donated to a governmental or private entity for the production of goods, training, demonstration, or any other similar purpose.

(3) STATE.—The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or

possession of the United States or any political subdivision of any of the foregoing.

SEC. 4. EFFECTIVE DATE; APPLICATION OF ACT.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act without regard to whether the damage to property or death or personal injury at issue occurred before such date of enactment.

(b) APPLICATION OF ACT.—This Act shall not apply with respect to civil actions commenced before the date of the enactment of this Act.

PURPOSE AND SUMMARY

The "Workplace Goods Job Growth and Competitiveness Act of 1999" is premised on the notion that a product which is used safely for a substantial period of time is not likely to be defective at the time of manufacture, sale, or delivery. Thus any injury it causes after some reasonably long period of time is likely to have been due to either misuse or improper maintenance by someone other than the manufacturer. However, the passage of time increases a manufacturer's difficulty in disproving the existence of a defect at the time of manufacture. Although manufacturers often win cases based on injuries from old products, the litigation costs of defending these cases—where witnesses have died or disappeared, memories have faded, and evidence has been lost—may be enormous and can divert resources from job creation, research and development.

H.R. 2005 addresses this problem by creating a uniform federal statute of repose for cases involving injuries caused by durable goods. This statute of repose would bar a cause of action against the manufacturer of such a product after 18 years from the date the product was placed in the stream of commerce, regardless of when the injury occurred.

BACKGROUND AND NEED FOR THE LEGISLATION

H.R. 2005 is intended to eliminate the economic inefficiency of litigation that seeks to hold manufacturers of durable goods [1] liable for harms caused by machinery they have not controlled for almost two decades. Manufacturers almost always prevail in such litigation when they go to trial, but the costs of defending the design of a machine that was produced decades ago are unusually large. Knowledgeable personnel have often retired or died; design and production records have often been lost. Without careful explanation, old machinery may appear poorly designed when measured against modern counterparts, even if it was state-of-the-art at the time it sold. Misuse or alteration of the machine, disabling or removal of safety devices, or failure to train workers often does not provide a defense at trial.[2] The result is a great incentive for man-

[1] Durable goods are defined as those which (1) have a normal life expectancy of at least 3 years or are of a character subject to allowance for depreciation under the Internal Revenue Code, and (b) are used in a trade or business, held for the production of income, or sold or donated to a governmental or private entity for production of goods, training, demonstration, or any similar purpose.

[2] The employer's contributory fault in altering a machine—after it has left the factory and is thus beyond the manufacturer's control—in such a way as to become the sole or proximate cause of an employee's injury is not a defense upon which the machine tool manufacturer can rely in many States. See, e.g., *Alm* v. *Aluminum Co. of America*, 687 S.W. 2nd 374,381 (Tx. Ct. App., 1985)(the fact that the bottler-employer was solely responsible for creating risk by its failure to properly maintain capping machines did not preclude holding the designer of these machines

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ufacturers to settle even the flimsiest cases, so long as the settlement is less than or approximately equivalent to the defense costs.[3]

A recent survey of machine tool manufacturers reveals the magnitude of transaction costs involving litigation over these older products. Thirty three percent of respondents in an Association for Manufacturing Technology (AMT) survey reported having claims filed against them in 1998.[4] Of 121 claims that were closed in that year, only 5% actually reached trial, and manufacturers won 83% of those cases. Plaintiffs won only 1% of these cases, with an average award of $215,000. Another 60% of these cases were settled, with an average settlement of $104,700. However, little of the overall costs incurred by defendants in these cases went to compensate the injured claimant. For every 100 claims, about $11 million was spent by the manufacturer. Of this, $4.5 million went for defense costs, and another $2.4 million went as subrogation to employers or their insurance companies to reimburse them for money already paid to employees under worker compensation laws (even if the employer was primarily at fault). Only about $4.1 million actually went to claimants, out of which they paid their attorneys, usually 33% or more. According to the survey, an 18-year statute of repose would have barred 42% of AMT members' closed and pending cases. Significantly, that change would have reduced defense and subrogation payments by an amount 10 times greater than the amount of reduction in the payments claimants actually receive.

These statistics demonstrate three crucial facts:

- The magnitude of the transaction and subrogation costs imposed on the durable goods manufacturing industry is substantial in absolute terms and in relation to the overall revenues and profits of the machine tool industry.
- The amount of money that ends up with lawyers, employers, and insurance companies in these cases far outweighs the amount that goes to claimants themselves.
- Barring cases involving durable goods over 18 years after initial sale or lease would eliminate 42% of the cases and save millions of dollars in transaction costs. These cases are clearly the least productive for claimants and the most costly to defend. Their value to society and the economy is minimal at best.

This committee has long recognized the need for a national statute of repose for workplace durable goods. Bills containing a national statute of repose have been considered by every Congress for almost two decades, and several have been approved by this com-

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liable in negligence); *Thompson* v. *Package Machinery Co.*, 22 Cal. App.3rd 188, 195; 99 Cal. Rptr. 281, 285 (Cal. Ct. App.,1971)(jury instruction that the defendant-manufacturer of a plastic machine could not be found liable if the accident was caused by a modification made after the machine had left the factory held erroneous); *Bullen* v. *Roto Finishing Sys.*, 435 So.2nd 1256 (Ala. 1983)(reversing summary judgment and holding that manufacturer's liability should have been submitted to the jury, even though employer made substantial modifications to printing machine).

[3] The incidence of suits of this type against the manufacturers of older products is even higher where an injury occurs in the workplace, and the claimant is covered by the worker compensation system. In those situations, the injured employee cannot sue the parties typically most responsible for the injuries—the employer and co-workers—so the only available defendant in a civil suit will often be the manufacturer.

[4] See Prepared testimony of James H. Mack before the Committee on the Judiciary, July 21, 1999, at 6.

mittee, the House of Representatives, and the Senate. With the exception of the General Aviation Revitalization Act[5] ("GARA"), the repose provisions were part of larger product liability bills that met with filibusters in the Senate or in one case, a Presidential veto. The repose provisions in these bills were often broader than H.R. 2005, involving shorter repose periods or reaching beyond claimants eligible for worker compensation. Negotiations in 1998 among interested House and Senate Members and the White House led to an informal agreement on an acceptable statute of repose, as noted in the National Association of Manufacturers letter of September 20, 1999, endorsing this bill.[6] Although the product liability bill failed in the Senate in 1998 for reasons unrelated to its content, the repose provisions in that bill are embodied in H.R. 2005.

The General Aviation Revitalization Act, which contains only a statute of repose, establishes an 18-year repose period for general aviation aircraft. The immediate effect of that Act was the initiation of production of new general aviation aircraft. The General Aviation Manufacturers Association, a national trade association of over 50 manufacturers of fixed-wing aircraft, engines, avionics, and components, submitted its Five-Year Report to the President and Congress on GARA this year.[7] It describes the industry's progress in creating 25,000 new jobs, doubling general aviation aircraft production, doubling export revenues, increasing general aviation research and development by 150%, and establishing new pilot training programs. The Report describes GARA as an "unqualified success."

Both the European Union and Japan have adopted 10-year statutes of repose for all products. These laws reinforce a significant competitive disadvantage for American durable goods manufacturers. Manufacturers in those jurisdictions do not face liability claims based on older goods in their home markets, where most of their sales occur, and they do not yet face such claims in the United States because they have not participated in the American market until fairly recently. With a lower-cost market as their base and fewer transaction costs here in the United States, foreign manufacturers have more cash (or investment capital) on hand to pursue new technology and are able to offer goods in the U.S. market for less than their U.S. competitors. While the passage of decades may eventually even out the situation in the United States, foreign manufacturers will always have the advantage that comes from more favorable treatment in their home markets.

At the State level in the United States, 19 States currently have statutes of repose.[8] Twelve of those States adopted fixed time peri-

[5] Pub. L. No. 103–298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101 note (West 1997)).

[6] See Letter from Michael Baroody, Senior Vice Presidernt, National Association of Manufacturers (September 20, 1999) (on file with the Committee on the Judiciary).

[7] General Aviation Manufacturer's Association, *A Report to the President and Congress on The General Aviation Revitalization Act*, September 1999.

[8] Ark. Code Ann. § 16–116–105(c) (Michie 1997) (stating that use of a product beyond its "anticipated life" where the consumer "knew or should have known the anticipated life of the product" may be considered as evidence of fault on the part of the consumer); Colo. Rev. Stat. § 13–21–403(3) (1998) (creating a rebuttable presumption that a product is not defective after ten years); Colo. Rev. Stat. § 13–80–107(1)(b) (1998) (imposing a seven year statute of repose for new manufacturing equipment but excluding claims arising from injury due to hidden defects or prolonged exposure to hazardous material); Conn. Gen. Stat. § 52–577a (1999) (placing a ten year statute of repose on product liability claims if the harm is covered by workers compensation,

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ods, which unequivocally bar actions brought more than a certain period after the initial sale of the product. Many of these State statutes cover all products, not just durable goods, and their repose periods range from 6 years to 15 years. Because durable goods manufacturers sell their products nationally, across State lines, out-of-State manufacturers often bear the brunt of litigation initiated by local claimants. Faced with these circumstances, State legislatures have difficulty effectively balancing the interests of manufacturers and claimants. The resulting disparity in State laws encourages forum-shopping, with unpredictable and inequitable results for claimants and defendants alike.

Moreover, some State statutes of repose have been struck down under State constitutional provisions that guarantee a "right to a remedy," a provision that has no counterpart in the United States Constitution. In Wisconsin, where a State statute of repose is unconstitutional, the courts refused even to apply the statute of repose of another State when standard choice-of-law rules would apply the law of the place of the injury.[9]

Finally, piecemeal, State-by-State enactment of statutes of repose does not reduce durable good product liability insurance rates in the way a uniform national statute of repose would. Durable goods manufacturers typically ship the vast majority of their products out of State. Insurance carriers are unable to predict potential liability accurately, due to uncertainty about where the durable good will be sold initially and where it will eventually end up when resold. When insurers set rates, they must account for the worst case scenario, which drives up rates even for durable goods manufacturers in States that have enacted statutes of repose.

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otherwise barring a claim if the "useful safe life of the product" has expired; excluding asbestos); Ga. Code Ann. § 51–1–11(b)–(c) (1999) (prescribing a ten year statute of repose but excluding claims alleging that a product caused a disease or birth defect or those arising out of egregious conduct); Idaho Code § 6–1403(2) (1999) (creating a rebuttable presumption that the "useful safe life" of a product is ten years, but stating that this presumption may be rebutted by "clear and convincing evidence;" excluding claims alleging fraud or misrepresentation and claims alleging harm caused by prolonged exposure to a defective product or if the injury-causing aspect of the product was not discoverable until more than ten years after the time of delivery of the product); 735 Ill. Comp. Stat. 5/13–213(b) (West 1997) (imposing a twelve year statute of repose measured from the date of the first sale or ten years from the date of sale to the first user, whichever is shorter, but applying only to strict liability actions); Ind. Code § 34–20–3–1(b) (1999) (setting a ten year statute of repose); Iowa Code § 614.1(2A) (1997) (prescribing a fifteen year statute of repose that excludes claims alleging latent disease caused by "harmful material" which is defined by the statute as silicone gel breast implants, asbestos, dioxins, tobacco, PCBs, and risks regulated by the EPA); Kan. Stat. Ann. § 60–3303 (1997) (creating a rebuttable presumption that the "useful safe life" of a product is ten years, but stating that this presumption may be rebutted by "clear and convincing evidence;" excluding claims alleging fraud or misrepresentation and claims alleging harm caused by prolonged exposure to a defective product if the injury-causing aspect of the product was not discoverable until more than ten years after the time of delivery of the product); Ky. Rev. Stat. Ann. § 411.310(1) (Banks-Baldwin 1998) (establishing a rebuttable presumption that a product is not defective if the harm occurred more than five years after the sale of the product to the first consumer or more than eight years after the date of manufacture); Mich. Comp. Laws § 27A.5805(9) (1999) (requiring a plaintiff to prove a prima facie case, without the benefit of any presumption, if the product has been in use for ten years); Minn Stat. § 604.03 (1998) (describing the "useful life" of a product); Neb. Rev. Stat. § 25–224 (1998) (imposing a ten year statute of repose); N.C. Gen. Stat. § 1–50(a)(6) (1999) (prescribing a six year statute of repose); N.D. Cent. Code § 28–01.3–08(1) (1999) (placing a ten year statute of repose measured from the date of the first sale or eleven years from the date of manufacture); Or. Rev. Stat. § 30.905(1) (1997) (imposing an eight year statute of repose); Tenn. Code Ann. § 29–28–103(a) (1999) (fixing a ten year statute of repose but excluding claims alleging harms caused by silicone gel breast implants or asbestos); Tex. Civ. Prac. & Rem. Code Ann. § 16.012 (West 1999) (setting a fifteen year statute of repose for non-agricultural manufacturing equipment); Wash. Rev. Code § 7.72.060(1) (1999) (creating a rebuttable presumption that the "useful safe life" of a product is twelve years but excluding claims alleging fraud or latent harms).

[9] *Steven Sharp* v. *Case Corporation*, 216 Wis.2d 113; 573 N.W.2d 899 (Ct. of Appeals, Dist. 2, 1997), aff'd on other grounds, 227 Wis.2d 1; 595 N.W.2d 380 (1999).

H.R. 2005 represents a particularly narrowly formulated statute of repose. Because the death and personal injury section of the bill is limited to cases where the claimant is eligible for worker compensation, H.R. 2005 ensures that no claimant will ever go empty-handed. Contrary to the assertions by some opponents, worker compensation is not a stingy remedy. In most States, worker compensation benefits include not only all medical and rehabilitation expenses and wage replacement (for life in the case of permanent injuries), but also "scheduled payments" for designated injuries, such as loss of use of limbs, hands, or serious disfigurement. These scheduled payments are designed to be a functional substitute for "pain and suffering" awards in court litigation.

The Act respects warranty periods on durable goods, ensuring that purchasers will continue to obtain the benefit of their negotiated bargains with durable good manufacturers or sellers. In the event that the product's warranty period is longer than 18 years, the Act will allow suit to be filed until the conclusion of the warranty period. It also takes into consideration the fact that some injuries may be caused by a durable good within the 18 year repose period, but because of their nature, will not manifest themselves for many years after the exposure to the product. In recognition of the unfairness that a statute of repose might work on a claimant harmed by such "latent" injury, H.R. 2005 does not apply to personal injury or wrongful death claims where the injury involves a toxic harm.

As a practical matter, the design and construction of a machine to function smoothly for 18 years is effectively an effort to design and construct a machine to last as long as technically possible. Competitive market pressures further encourage manufacturers to design and build the best possible durable goods. Imposing a statute of repose for these products will not give manufacturers any incentive to design or build shoddy products, because they would be fully subject to suit for those products for the first 18 years of its life. Moreover, under H.R. 2005 if a manufacturer rebuilds and significantly modifies a machine so that it is effectively a new durable good, the repose period will restart for that product.

In sum, H.R. 2005 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. It places a reasonable outer time limit on litigation involving older products used in the workplace, where injured claimants will have recourse to benefits from the worker compensation system.

HEARINGS

The full committee on July 21, 1999 held one day of hearings on H.R. 2005. Testimony was received from Eleanor D. Acheson, Assistant Attorney General, U.S. Department of Justice; James H. Mack, Vice-President for Government Relations of the Association for Manufacturing Technology ("AMT"), and Samuel A. Bleicher, Esq., on behalf of the Committee for Uniform Product Liability Law, in support of the bill; and Thomas L. Bantle, Legislative Counsel, Public Citizen's Congress Watch, in opposition to the bill.

COMMITTEE CONSIDERATION

On September 22, 1999, the committee met in open session and ordered favorably reported the bill H.R. 2005 with amendment by a recorded vote of 16 ayes to 14 noes, a quorum being present.

VOTE OF THE COMMITTEE

The committee voted to order H.R. 2005 favorably reported by a recorded vote of 16 ayes and 14 noes. The vote was as follows:

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Sensenbrenner	X		
Mr. McCollum	X		
Mr. Gekas	X		
Mr. Coble	X		
Mr. Smith (TX)	X		
Mr. Gallegly	X		
Mr. Canady	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Barr	X		
Mr. Jenkins		X	
Mr. Hutchinson	X		
Mr. Pease	X		
Mr. Cannon	X		
Mr. Rogan	X		
Mr. Graham			
Ms. Bono	X		
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter			
Mr. Conyers		X	
Mr. Frank	X		
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler		X	
Mr. Rothman		X	
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Hyde, Chairman	X		
Total	16	14	

During consideration of the bill two amendments were adopted by voice vote:

An amendment by Mr. Chabot to clarify that the bill entirely preempts State statutes of repose, whatever their provisions, to the extent such laws apply to actions covered by this Act.

An amendment by Ms. Jackson Lee, as amended by an amendment offered by Mr. Sensenbrenner, to clarify that the term toxic harm as used in section 2(a)(2)(B) includes asbestos-related harm.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R.2005, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 8, 1999.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2005, the Workplace Goods Job Growth and Competitiveness Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette Keith (for federal costs), who can be reached at 226–2860, Lisa Cash Driskill (for the State and local impact), who can be reached at 225–3220, and John Harris (for the private-sector impact), who can be reached at 226–2618.

Sincerely,

DAN L. CRIPPEN, *Director.*

H.R. 2005—Workplace Goods Job Growth and Competitiveness Act of 1999.

SUMMARY

CBO estimates that enacting this bill would have no significant impact on the federal budget. The bill would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. H.R. 2005 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA). CBO esti-

mates that the bill would result in small costs to State, local, or tribal governments—well below the threshold established in UMRA ($50 million in 1996, adjusted annually for inflation). The bill also contains a private-sector mandate, but CBO estimates that the costs to firms and individuals would likely fall below UMRA's private-sector threshold ($100 million in 1996, adjusted annually for inflation).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

H.R. 2005 would limit the length of time manufacturers and sellers of durable goods would be liable for injury and damages resulting from the use of their products. The bill defines a durable good as a product used in trade or business with an expected life of three years or more, and is subject to depreciation under the Internal Revenue Code. The bill would set the statue of repose (the length of time after which a manufacturer is no longer liable) at 18 years from the date the product first entered commerce, but would not apply in cases involving certain durable goods, or where the claimant is not covered by workers' compensation insurance. Under current law, there is not a uniform statue of repose for determining the liability of manufacturers of durable goods.

While some product liability cases are tried in federal court, the majority of the cases that would be covered under H.R. 2005 are tried in State courts and we estimate that enacting this bill would result in no significant increase in the number of cases that would be referred to federal courts. In addition, most cases that would be covered under H.R. 2005 are settled out of court and never go to trial. Therefore, CBO estimates that implementing H.R. 2005 would have no significant budgetary impact.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

H.R. 2005 would establish that, in certain circumstances, a civil action may not be filed in any court against the manufacturer or seller of durable goods after 18 years. This provision would constitute a mandate as defined by UMRA because it would preempt State laws that have established different time periods for filing these types of civil suits and because this preemption would apply to State, local, and tribal governments as plaintiffs.

CBO estimates that imposing the federal standard of liability in these cases would impose no costs on States because they would not be required to take any action to comply. State, local, and tribal governments as potential plaintiffs, however, could face costs. For example, in those States where no time frame on filing these types of suits currently applies, government plaintiffs could lose court-awarded judgments or out-of-court settlements. In States where the time frame for filing these types of suits is extended by the bill, they would have a greater opportunity to collect damages. (At least 20 States now have statutes that range from six to 15 years.) Last year roughly 70 such cases were settled, averaging around $100,000 per case. Because suits brought by State, local, or tribal governments are likely to make up a very small number of the total cases filed and because the damages awarded are generally small, CBO estimates that, overall, the bill would have a small effect on the budgets of State, local, and tribal governments.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

H.R. 2005 would create a new private-sector mandate by prohibiting certain property damage and personal injury suits against manufacturers and sellers of durable goods or capital equipment. Generally, the bill would prevent firms and individuals from recovering damages in cases where the equipment is more than 18 years old. The mandate would not affect existing claims or claims filed within one year of enactment. The bill also provides exceptions to the prohibition for claims involving passenger vehicles and general aviation aircraft and claims involving manufacturer warranties.

CBO estimates that the costs of the mandate would most likely fall below the threshold established by UMRA ($100 million in 1996, adjusted annually for inflation). The cost of the mandate for an affected firm or individual would be the amount of the court-awarded judgment or out-of-court settlement they would otherwise receive under current law. Because the mandate would not affect suits filed within a year of enactment, the first costs would not occur until 2001. Based on information collected by the Association for Manufacturing Technology, CBO estimates that the cost to firms and individuals would be less than $4 million in 2001. Costs in the first few years following enactment would be lower than in subsequent years because of a lag between when the suits are filed and when they are resolved. For example, an individual filing a personal injury claim in 2001 might have to wait until 2002 or later for the suit to be settled. The costs of the mandate would be somewhat offset by plaintiffs' savings on legal fees.

ESTIMATE PREPARED BY:

Federal Costs: Lanette Keith (226–2860)
Impact for the State, Local, and Tribal Governments: Lisa Cash Driskill (225–3220)
Impact on the Private Sector: John Harris (226–2618)

ESTIMATE APPROVED BY:

Peter H. Fontaine
Deputy Assistant Director for Budget Analysis

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article I, clause 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short Title: This section states that this Act may be cited as the "Workplace Goods Job Growth and Competitiveness Act of 1999".

Section 2. Statute of Repose for Durable Goods Used in a Trade or Business: Subsection (a) sets out the basic rule of the statute of repose that no civil action arising out of an accident involving a durable good may be filed against a manufacturer or seller of a durable good more than 18 years after it was delivered to its first purchaser or lessee. In the case of death or personal injury claims, the

scope of the bar is limited to circumstances where (A) the claimant has received or is eligible to receive worker compensation, and (B) the injury does not involve a toxic harm.

The bill specifies that "toxic harm" includes, but is not limited to, all asbestos-related harm. The "toxic harm" exclusion is intended to cover all claims involving asbestos and other latent diseases; that is, diseases that do not manifest themselves for many years after the ingestion, inhalation, or absorption of the toxic substance.

Subsection (b) sets out three exceptions where the Act does not apply: (1) where the injury involves a motor vehicle, vessel, aircraft, or train, that is used primarily to transport passengers for hire; (2) where the durable good has been warranted by the manufacturer as to safety or life expectancy for a period longer than 18 years (in which case suit may be brought until the expiration of the warranty period); and (3) where the case is governed by the limitations period in GARA.

Subsection (c) specifies that the Act preempts and supersedes any State law that establishes a statute of repose for actions covered by the Act. This subsection clearly establishes a uniform national repose period, longer than that of all existing State laws with fixed-time statutes of repose. Thus, all the current statutes of repose governing durable goods will be superceded by the Act, giving claimants in those States an additional number of years in which to bring claims against the manufacturers and sellers of durable goods used in the workplace. Existing and future State statutes of repose will continue to apply to actions that are not covered by this Act, such as injuries or deaths involving durable goods where the claimant is not eligible for worker compensation or involving consumer goods.

Subsection (d) provides that if any provision of this 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 this Act, bring an action within one year after the effective date of this Act. This transitional period is intended to protect a claimant who upon the date of enactment of the Act has already been injured by a workplace durable good, but has not yet filed suit on that claim. If the statute of limitation on that claim has not expired prior to the enactment date, the claimant would be granted the shorter of the limitation period or one year after enactment to file the claim, regardless of the age of the durable good which allegedly caused the injury.

Section 3. Section 3 provides definitions for various terms.

(1) "Claimant" is any person who brings an action covered by this Act or on whose behalf such an action is brought, including an injured person's employer, insurance carrier or other subrogated party, the estate of a decedent, and the guardian of a minor or incompetent person.

(2) "Durable good" is a product or component that meets two criteria: (a) it must have a normal life expectancy of at least 3 years or be of a character subject to allowance for depreciation under the Internal Revenue Code, and (b) it must actually be used in a trade or business, held for the production of income, or sold or donated

to a governmental or private entity for production of goods, training, demonstration, or any similar purpose.

Complex workplace machinery typically comprises a multitude of components, many of which will be routinely replaced by the owner or its maintenance contractor at frequent intervals. Such maintenance, repair, and replacement of components is not intended to "restart" the repose period, depriving the manufacturer of the durable good or its old or new components of the benefit of the statute of repose. So long as the functional safety of the original design remains unchanged by the manufacturers of the durable good or the original or replacement component, the statute of repose should not toll for those manufacturers. This principle applies whether or not the replacement component is made by the same manufacturer as the replaced component. This approach avoids discouraging manufacturers of products and components from providing replacement parts for overage machinery. If the manufacturer of the product or component so alters the durable good that it is a "new" machine, the repose period would run from the date of first sale or lease of the "new" machine by the party that performed the alterations.

(3) "State" is defined as any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States or any of their political subdivisions.

Section 4. Effective Date; Application of Act: The Act takes effect immediately upon enactment, regardless of whether the damage, death, or injury occurred before that date, except that it does not affect pending litigation.

DISSENTING VIEWS

We strongly oppose H.R. 2005, the "Workplace Goods Job Growth Competitiveness Act of 1999," which would preempt State law to establish a nationwide 18-year statute of repose for "durable goods,"[1] thereby barring any recovery by employees for death or personal injury stemming from an accident to such goods.[2] H.R. 2005 is opposed by organized labor groups, such as the AFL–CIO[3] the UAW,[4] and the Teamsters Union,[5] and public interest groups, such as Public Citizen.[6] In addition, it is opposed by the Justice Department,[7] and a veto is expected should the legislation reach the President's desk.

Like many tort "reforms" being sought by the majority, H.R. 2005 would discourage corporate responsibility by cutting off the rights of injured victims to obtain full recovery. A statute of repose is perhaps the most perilous type of such tort "reform" because it operates to totally cut off any right of action against the manufacturer after an 18-year period has elapsed, regardless of whether or not the potential injured party has suffered an injury yet and regardless of how long the product was built to last.[8] The legislation also raises a host of serious federalism and constitutional issues. For these and the reasons set forth herein, we dissent from H.R. 2005.

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[1] "Durable goods" are defined as products that are expected to last more than three years and that are used in a trade or business, or by the Government.

[2] The legislation does not apply to workers if they are ineligible to receive workers' compensation, or if the injury involves a "toxic harm." The legislation also provides exceptions for (1) motor vehicles, vessels, aircraft or trains used primarily to transport passengers for hire, (2) actions based on an express warranty in writing for longer than 18 years, and (3) the limitation period established by the General Aviation Revitalization Act of 1994. The statute of repose, which applies 18 years after the first purchase or lease of the durable good, also applies to employer actions with regard to "property damage," but not other types of harm to employers, such as business interruption.

[3] See Letter from Peggy Taylor, Director, Department of Legislation, American Federation of Labor and Congress of Industrial Organizations ("AFL–CIO"), to Members of Congress (September 30, 1999) (on file with the minority staff of the House Judiciary Committee) [hereinafter AFL–CIO Letter].

[4] See Letter from Alan Reuther, Legislative Director, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America ("UAW"), to Members of Congress (October 5, 1999) (on file with the minority staff of the House Judiciary Committee) [hereinafter UAW Letter].

[5] See Letter from Michael E. Mathis, Director, Government Affairs Department, International Brotherhood of Teamsters, to Members of Congress (October 8, 1999) (on file with the minority staff of the House Judiciary Committee) [hereinafter Teamsters Letter].

[6] See *Hearing on H.R. 1875 and H.R. 2005 Before the Comm. on the Judiciary*, 106th Cong. (1999) (Statement of Tom Bantle, Legislative Attorney, Public Citizen) [hereinafter Public Citizen Testimony].

[7] See *Hearing on H.R. 1875 and H.R. 2005 Before the Comm. on the Judiciary*, 106th Cong. (1999) (Statement of U.S. Department of Justice Assistant Attorney General Eleanor D. Acheson) [hereinafter DOJ Testimony].

[8] See generally, 63A Am. Jur. 2d, Products Liability §§ 921–924; Am. Law. Prod. Liab. 3d, Limitation of Actions: Statutes of Repose §§ 47:55–47:76.

I. H.R. 2005 HARMS AMERICAN WORKERS BY DENYING THEM ADEQUATE COMPENSATION FOR THEIR INJURIES AND TREATING THEM DIFFERENTLY THAN OTHER HARMED PARTIES

H.R. 2005 denies workers adequate compensation for their injuries. As the AFL–CIO has written, the bill "is purely and simply an effort to discriminate against workers injured or killed on the job by preventing them or their survivors from recovering damages from a manufacturer or seller of durable goods more than 18 years after the durable good was delivered to its first purchaser or lessee." [9]

While H.R. 2005 applies only to injured workers who are covered by workers' compensation, for those workers, recovery for harm suffered can be drastically limited. This is because State workers' compensation laws usually only provide for medical costs and limited disability payments—they do not provide for compensation for non-economic damages, such as loss of fertility, loss of a limb, permanent disfigurement and other forms of pain and suffering.[10] As the United Auto Workers explained:

> Workers' compensation laws only allow partial recovery for workplace injuries—usually only medical costs and payments to cover lost wages. No compensation is allowed for so-called non-monetary damages. Because the employer cannot be sued for additional amounts, workers are allowed to sue responsible third parties. But H.R. 2005 would effectively cut off this recourse for many injured workers.[11]

Even in the area of economic damages, workers' compensation laws can be lacking. For example, a 1998 study of California's workers' compensation laws by the RAND Institute for Civil Justice concluded that because wage losses persist and benefit payments run out, workers' compensation benefits compensated less than 40% of workers' full economic losses over a five-year period after the accident.

H.R. 2005 also unfairly singles out American workers, treating them differently from other injured persons. Thus, for example, if a 25-year old elevator malfunctions and crashes, killing a custodian and a visitor, the bill would allow the visitor's family to sue, but would bar the custodian's family from seeking compensation in court. This is illogical and inequitable and provides an unjustified economic windfall to the elevator manufacturer.

Moreover, it is inherently unfair in that the statute of repose only applies to workers injured on the job—while business owners would still have their full rights under State law to recover for business interruptions due to defective machinery.[12] As the International Brotherhood of Teamsters wrote:

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[9] See AFL–CIO Letter.

[10] See, e.g., *Heath* v. *Sears, Roebuck & Co.*, 464 A.2d 288 (N.H. 1983).

[11] UAW Letter.

[12] Although, as noted, businesses would be entitled to bring business interruption lawsuits, they would be barred from recovery for property damage when older equipment fails and damages the workplace, and they would no longer be able to recover the funds paid to an injured employee through workers' compensation. Currently, employers may recover these workers' compensation payments from any damages awarded the employee in court, ensuring that employers and workers' compensation systems do not subsidize manufacturers of defective products.

> This bill unfairly discriminates against workers. They are totally shut out, while employers would still be able to sue a manufacturer of a defective product covered by the statute of repose to recover commercial losses, such as loss of sales.[13]

Our concerns are not theoretical, they are very real. The following are just two examples of actual cases that would have been completely barred under this legislation:[14]

- In California in 1995, Reginaldo Gonzalez, 47, was operating a printing press designed and manufactured in 1973 by Heidelberg, Inc., when his hand became caught in the rollers, resulting in the traumatic amputation of his arm at the shoulder. The company added safeguards to this printing press model in 1974 and again in 1980, but never took steps to notify prior owners of the machine's dangerous defect. As a result, by 1995, at least eight pressmen had their arms amputated or crushed while operating pre-1974 presses. A jury found the early design defective and the company's conduct negligent, and awarded Gonzalez $4.1 million. *Under H.R. 2005, this case would have been barred, and the manufacturer of the rollers would have no legal responsibility to minimize the dangers inherent in their product.*
- In Massachusetts, on April 13, 1984, John Jones was bending material in a press brake designed and manufactured by Cincinnati, Inc., in 1966 when the unguarded press suddenly closed, crushing his hands. The court awarded Jones $500,000, finding that Cincinnati was aware that press operators would have their hands in vulnerable positions while operating this machine, and that the manufacturer was reckless for not incorporating safeguards (available to the manufacturer in 1966) into the press's design that could have prevented the accident. *Again, under H.R. 2005, Mr. Jones would have been awarded no compensation for the loss of his hands, other than the minimal recovery available under workers' compensation.*

In addition to harming workers, the bill transfers legal responsibility from the manufacturer of the machine tool to the employer, providing a legal disincentive for such manufacturers to publicize and fix defective older products that are still in use. Moreover, under the legislation a fix that requires a new component might set a new 18-year clock running, providing further disincentives for a manufacturer to cure product defects late in the statutory period.

II. H.R. 2005 RAISES SERIOUS FEDERALISM AS WELL AS POSSIBLE CONSTITUTIONAL CONCERNS

We are also concerned by the majority's failure to consider or take into account the very serious federalism and constitutional concerns raised by this legislation. Since Congress has traditionally deferred to the States regarding tort law in general and product liability law in particular, preempting State law regarding statutes

[13] Teamsters Letter.
[14] See also Public Citizen Testimony at 6–7 and other cases cited therein.

of repose would constitute a dramatic shift in this balance.[15] Noting this federalism concern, Assistant Attorney General Eleanor D. Acheson testified:

> This proposed national statute of repose would extinguish valid lawsuits that would otherwise be permitted to proceed under State law. This sort of intrusion into the availability of State tort remedies is inappropriate absent compelling and well-documented evidence that the defendants' need for civil immunity outweighs the strong policy that individuals and businesses be able to seek relief for their injuries. We do not think that H.R. 2005 passes this test.[16]

It should therefore come as no surprise that a whole host of constitutional concerns are also raised by the legislation. First, the bill—which contains no interstate commerce jurisdictional requirement—may run afoul of the constitutional requirement under Article I, clause 8,[17] limiting congressional authority to the regulation of interstate commerce and under the Tenth Amendment, reserving all of the unenumerated powers to the States.[18] This is a particular concern in light of the recent Supreme Court decisions such as *Lopez* v. *United States* (striking down a Federal gun-free school zone law which had no interstate commerce requirement),[19] and *New York* v. *United States*[20] and *Printz* v. *United States*[21] in which the Court showed extreme scepticism regarding Congress' ability to dictate State legal policies.

There is also the potential that H.R. 2005 may implicate Fifth Amendment due process[22] and Seventh Amendment right to trial[23] issues. The due process concern stems from the fact that the

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[15] Supporters may argue that the General Aviation Revitalization Act of 1994 should serve as a precedent for a Federal 18 year statute of repose, however, that law was specifically crafted to react to the specific circumstances in the general aviation industry, such as ubiquitous Federal regulation and the fact that private planes are fully rebuilt on a periodic basis.

[16] DOJ Testimony at 8–9.

[17] Article I, Section 8 of the Constitution provides, *inter alia*, "Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States. . . ." U.S. CONST. art I, § 8, cl. 3.

[18] The Tenth Amendment provides "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X.

[19] 514 U.S. 549 (1995). In *Lopez*, one of the problems with the school gun ban was that it contained "no express jurisdictional element which might limit its reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce." When Congress acted in 1996 to remedy the constitutional infirmity in the school gun ban invalidated by *Lopez*, it limited the law to firearms that have "moved in or that otherwise [affect] interstate or foreign commerce." 18 U.S.C.A. § 922(q)(2)(A) (1994) (amended 1996). See also, Employers' Liability Cases, 207 U.S. 463 (1907) (striking down Federal tort law concerning common carriers which preempted State tort law on interstate commerce grounds); T.R. Goldman, *Lopez Gives Tort Reform a New Weapon*, LEGAL TIMES, May 8, 1995, Tort Reform Notebook, at 2 (quoting Harvard Law School Professor Laurence Tribe for the proposition that "*Lopez* is a reminder that the Commerce Clause is not a blank check. As such, it will operate to at least raise significant questions about some of the elements of proposed tort reforms pending in Congress").

[20] 505 U.S. 144 (1992) (invalidating a Federal law requiring States to assume ownership of radioactive waste or accept legal liability for damages caused by the waste because it was found to "commandeer the legislative processes of the States").

[21] 521 U.S. 898; 117 S.Ct. 2365; 138 L.Ed. 2d 914; 65 U.S.L.W. 4731 (U.S. June 27, 1997) (invalidating portions of the Brady Act requiring local law enforcement officials to conduct background checks on prospective gun purchasers).

[22] The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property without due process of law," a proscription which has been held to include an equal protection component. U.S CONST. amend. V.

[23] The Seventh Amendment provides, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact

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leading Supreme Court case, *Duke Power Co.* v. *Carolina Envtl. Study Group*,[24] left open the question as to whether it is necessary for Federal tort laws to provide an offsetting legal benefit or *quid pro quo* to justify the deprivation of tort rights (which the legislation does not appear to do). As for the Seventh Amendment, although the right to jury trial has been found not to apply to Federal limitations imposed on State courts, the Seventh Amendment could apply to diversity cases brought in Federal court, particularly if a statute of repose is seen as extinguishing a "common law" right.[25] In this regard, it is telling that in nearly half of the States that have enacted product liability statutes of repose, the State supreme courts have overturned them because they were found to violate State constitutional requirements relating to due process, equal protection and open access to courts.[26]

Conclusion

H.R. 2005 creates a statute of repose that unfairly singles out American workers and denies them full recovery for their injuries. Under the legislation, American workers maimed and killed by defective products would find themselves limited to workers' compensation remedies and totally barred from obtaining damages for their pain and suffering, unlike every other category of injured persons.

This legislation is being propounded by the majority in the absence of any credible evidence that a systemic problem exists with regard to lawsuits concerning durable goods[27] and with no corresponding understanding of the bill's impact on workers, their families, and their employers. In our view, we do not believe a threshold has been met which would justify such a significant intrusion into the State product liability system.

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tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend VII.

[24] 439 U.S. 59, 87–88 (1978) (upholding Price-Anderson Act which, *inter alia*, capped liability at federally supervised nuclear power plants and mandated waiver of defenses in event of nuclear accident).

[25] See *Tull* v. *United States* where the Seventh Amendment was found not apply to the statutory civil penalty caps in the Clean Water Act, 481 U.S. 412 (1987), since the assessment of civil penalties involved neither the "'substance of a common-law right to a trial by jury' nor a 'fundamental element of a jury trial.'" On the other hand, in the 1935 case *Dimick* v. *Schiedt*, 293 U.S. 474 (1935), the Court found unconstitutional the Federal practice of additur, because increasing the amount of a jury award was a question of "fact" protected by the Seventh Amendment.

[26] See e.g., *Lankford* v. *Sullivan, Long & Hagarty*, 416 So.2d 996 (Ala. 1982), *Hazine* v. *Montgomery Elevator Co.* 861 P.2d 625 (Ariz. 1993), *Heath* v. *Sears, Roebuck & Co.*, 464 A.2d 288 (N.H. 1983). Other States throwing out statute of repose laws include Kentucky, North Dakota, Rhode Island, South Dakota, and Utah.

[27] The Association for Manufacturing Technology's own 1998 Product Liability Survey confirms that there is no liability crisis threatening American manufacturers. Their members' survey indicates that only six products liability cases were tried in 1998 and the plaintiff won in only one case, receiving an award of $215,000, a substantial, but not overwhelming sum. Sixty percent of the claims were settled and 35 percent were dropped without any payment. The survey noted that the average liability insurance premium for its machine tool building firms was down 31 percent from 1997, continuing the downward trend that began in 1987.

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