

103^D CONGRESS
2^D SESSION

S. 687

[Report No. 103–203]

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 31 (legislative day, MARCH 3), 1993

Mr. ROCKEFELLER (for himself, Mr. GORTON, Mr. LIEBERMAN, Mr. DANFORTH, Mr. DODD, Mr. COATS, Mr. CHAFEE, Mr. WALLOP, Mr. PRESSLER, Mr. LOTT, Mr. BURNS, Mrs. KASSEBAUM, Mr. BOREN, Mr. EXON, Mr. NICKLES, Mr. THURMOND, Mr. PELL, Mr. GRASSLEY, Mr. HELMS, Mr. HATCH, Mr. MCCONNELL, Mr. LUGAR, Mr. JEFFORDS, Mr. FAIRCLOTH, Mr. GLENN, Mr. CRAIG, Mr. DOLE, Mr. BOND, Mr. BROWN, Mr. DOMENICI, Mr. MACK, Mr. MCCAIN, Mr. MURKOWSKI, Mr. SMITH, Mr. BENNETT, Mr. COVERDELL, Mr. GREGG, Mr. KEMPTHORNE, Mr. HATFIELD, Mrs. HUTCHISON, Mr. WARNER, Mr. DURENBERGER, Mr. MATHEWS, Mr. PRYOR, and Mr. GRAMM) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

NOVEMBER 20 (legislative day, NOVEMBER 2), 1993

Reported by Mr. HOLLINGS, without amendment

MARCH 1 (legislative day, FEBRUARY 22), 1994

Ordered referred to the Committee on the Judiciary for a period not to extend beyond April 11, 1994

A BILL

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Product Liability Fair-
 5 ness Act”.

6 **SEC. 2. TABLE OF CONTENTS.**

7 The table of contents of this Act is as follows:

TABLE OF CONTENTS

Sec. 1. Short title.
 Sec. 2. Table of contents.
 Sec. 3. Definitions.
 Sec. 4. Applicability; preemption.
 Sec. 5. Jurisdiction of Federal courts.
 Sec. 6. Effective date.

TITLE I—EXPEDITED JUDGMENTS AND ALTERNATIVE DISPUTE
 RESOLUTION PROCEDURES

Sec. 101. Expedited product liability judgments.
 Sec. 102. Alternative dispute resolution procedures.

TITLE II—STANDARDS FOR CIVIL ACTIONS

Sec. 201. Civil actions.
 Sec. 202. Uniform standards of product seller liability.
 Sec. 203. Uniform standards for award of punitive damages.
 Sec. 204. Uniform time limitations on liability.
 Sec. 205. Workers’ compensation subrogation standards.
 Sec. 206. Several liability for noneconomic loss.
 Sec. 207. Defenses involving intoxicating alcohol or drugs.

8 **SEC. 3. DEFINITIONS.**

9 As used in this Act, the term—

10 (1) “claimant” means any person who brings a
 11 civil action pursuant to this Act, and any person on
 12 whose behalf such an action is brought; if such an
 13 action is brought through or on behalf of an estate,
 14 the term includes the claimant’s decedent, or if it is
 15 brought through or on behalf of a minor or incom-

1 petent, the term includes the claimant's parent or
2 guardian;

3 (2) "clear and convincing evidence" is that
4 measure or degree of proof that will produce in the
5 mind of the trier of fact a firm belief or conviction
6 as to the truth of the allegations sought to be estab-
7 lished; the level of proof required to satisfy such
8 standard is more than that required under prepon-
9 derance of the evidence, but less than that required
10 for proof beyond a reasonable doubt;

11 (3) "collateral benefits" means all benefits and
12 advantages received or entitled to be received (ex-
13 cluding any benefits any other person has or is enti-
14 tled to assert for recoupment through subrogation,
15 trust agreement, lien, or otherwise) by any claimant
16 harmed by a product or by any other person as re-
17 imbursement of loss because of harm to person or
18 property payable or required to be paid to the claim-
19 ant, under—

20 (A) any Federal law or the laws of any
21 State (other than through a claim for breach of
22 an obligation or duty); or

23 (B) any life, health, or accident insurance
24 or plan, wage or salary continuation plan, or
25 disability income or replacement service insur-

1 ance, result of participation in any pre-paid
2 medical plan or health maintenance organiza-
3 tion;

4 (4) “commerce” means trade, traffic, com-
5 merce, or transportation—

6 (A) between a place in a State and any
7 place outside of that State; or

8 (B) which affects trade, traffic, commerce,
9 or transportation described in subparagraph
10 (A);

11 (5) “commercial loss” means any loss incurred
12 in the course of an ongoing business enterprise con-
13 sisting of providing goods or services for compensa-
14 tion;

15 (6) “economic loss” means any pecuniary loss
16 resulting from harm (including but not limited to
17 medical expense loss, work loss, replacement services
18 loss, loss due to death, burial costs, and loss of busi-
19 ness or employment opportunities), to the extent re-
20 covery for such loss is allowed under applicable State
21 law;

22 (7) “exercise of reasonable care” means conduct
23 of a person of ordinary prudence and intelligence
24 using the attention, precaution, and judgment that

1 society expects of its members for the protection of
2 their own interests and the interests of others;

3 (8) “harm” means any bodily injury to an indi-
4 vidual sustained in an accident and any illness, dis-
5 ease, or death of that individual resulting from that
6 injury; the term does not include commercial loss or
7 loss or damage to a product itself;

8 (9) “manufacturer” means—

9 (A) any person who is engaged in a busi-
10 ness to produce, create, make, or construct any
11 product (or component part of a product) and
12 who designs or formulates the product (or com-
13 ponent part of the product) or has engaged an-
14 other person to design or formulate the product
15 (or component part of the product);

16 (B) a product seller, but only with respect
17 to those aspects of a product (or component
18 part of a product) which are created or affected
19 when, before placing the product in the stream
20 of commerce, the product seller produces, cre-
21 ates, makes, or constructs and designs or for-
22 mulates, or has engaged another person to de-
23 sign or formulate, an aspect of a product (or
24 component part of a product) made by another;
25 or

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

4 (10) “noneconomic loss” means subjective,
5 nonmonetary loss resulting from harm, including but
6 not limited to pain, suffering, inconvenience, mental
7 suffering, emotional distress, loss of society and
8 companionship, loss of consortium, injury to reputa-
9 tion, and humiliation; the term does not include eco-
10 nomic loss;

11 (11) “person” means any individual, corpora-
12 tion, company, association, firm, partnership, soci-
13 ety, joint stock company, or any other entity (includ-
14 ing any governmental entity);

15 (12) “preponderance of the evidence” is that
16 measure or degree of proof which, by the weight,
17 credit, and value of the aggregate evidence on either
18 side, establishes that it is more probable than not
19 that a fact occurred or did not occur;

20 (13) “product” means any object, substance,
21 mixture, or raw material in a gaseous, liquid, or
22 solid state—

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

1 (B) which is produced for introduction into
2 trade or commerce;

3 (C) which has intrinsic economic value;
4 and

5 (D) which is intended for sale or lease to
6 persons for commercial or personal use;

7 the term does not include human tissue, blood and
8 blood products, or organs unless specifically recog-
9 nized as a product pursuant to State law;

10 (14) “product seller” means a person who, in
11 the course of a business conducted for that purpose,
12 sells, distributes, leases, prepares, blends, packages,
13 labels, or otherwise is involved in placing a product
14 in the stream of commerce, or who installs, repairs,
15 or maintains the harm-causing aspect of a product;
16 the term does not include—

17 (A) a seller or lessor of real property;

18 (B) a provider of professional services in
19 any case in which the sale or use of a product
20 is incidental to the transaction and the essence
21 of the transaction is the furnishing of judg-
22 ment, skill, or services; or

23 (C) any person who—

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

1 (ii) leases a product under a lease ar-
2 rangement in which the selection, posses-
3 sion, maintenance, and operation of the
4 product are controlled by a person other
5 than the lessor; and

6 (15) “State” means any State of the United
7 States, the District of Columbia, Puerto Rico, the
8 Northern Mariana Islands, the Virgin Islands,
9 Guam, American Samoa, and any other territory or
10 possession of the United States, or any political sub-
11 division thereof.

12 **SEC. 4. APPLICABILITY; PREEMPTION.**

13 (a) **APPLICABILITY TO PRODUCT LIABILITY AC-**
14 **TIONS.**—This Act applies to any civil action brought
15 against a manufacturer or product seller, on any theory,
16 for harm caused by a product. A civil action brought
17 against a manufacturer or product seller for loss or dam-
18 age to a product itself or for commercial loss is not subject
19 to this Act and shall be governed by applicable commercial
20 or contract law.

21 (b) **SCOPE OF PREEMPTION.**—(1) Except as provided
22 in paragraph (2), this Act supersedes any State law re-
23 garding recovery for harm caused by a product only to
24 the extent that this Act establishes a rule of law applicable
25 to any such recovery. Any issue arising under this Act that

1 is not governed by any such rule of law shall be governed
2 by applicable State or Federal law.

3 (2) The provisions of title I shall not supersede or
4 otherwise preempt any provision of applicable State or
5 Federal law.

6 (c) EFFECT ON OTHER LAW.—Nothing in this Act
7 shall be construed to—

8 (1) waive or affect any defense of sovereign im-
9 munity asserted by any State under any provision of
10 law;

11 (2) supersede any Federal law, except chapter
12 81 of title 5, United States Code (relating to Fed-
13 eral employees' compensation for work injuries) and
14 the Longshore and Harbor Workers' Compensation
15 Act (33 U.S.C. 901 et seq.);

16 (3) waive or affect any defense of sovereign im-
17 munity asserted by the United States;

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

20 (5) preempt State choice-of-law rules with re-
21 spect to claims brought by a foreign nation or a citi-
22 zen of a foreign nation;

23 (6) affect the right of any court to transfer
24 venue or to apply the law of a foreign nation or to
25 dismiss a claim of a foreign nation or of a citizen

1 of a foreign nation on the ground of inconvenient
2 forum; or

3 (7) supersede any statutory or common law, in-
4 cluding an action to abate a nuisance, that author-
5 izes a State or person to institute an action for civil
6 damages or civil penalties, cleanup costs, injunc-
7 tions, restitution, cost recovery, punitive damages, or
8 any other form of relief resulting from contamina-
9 tion or pollution of the environment (as defined in
10 section 101(8) of the Comprehensive Environmental
11 Response, Compensation, and Liability Act of 1980;
12 42 U.S.C. 9601(8)), or the threat of such contami-
13 nation or pollution.

14 (d) CONSTRUCTION.—This Act shall be construed
15 and applied after consideration of its legislative history to
16 promote uniformity of law in the various jurisdictions.

17 (e) EFFECT OF COURT OF APPEALS DECISIONS.—
18 Any decision of a United States court of appeals interpret-
19 ing the provisions of this Act shall be considered a control-
20 ling precedent and followed by each Federal and State
21 court within the geographical boundaries of the circuit in
22 which such court of appeals sits, except to the extent that
23 the decision is overruled or otherwise modified by the
24 United States Supreme Court.

1 **SEC. 5. JURISDICTION OF FEDERAL COURTS.**

2 The district courts of the United States shall not
3 have jurisdiction over any civil action pursuant to this Act,
4 based on section 1331 or 1337 of title 28, United States
5 Code.

6 **SEC. 6. EFFECTIVE DATE.**

7 This Act shall take effect on the date of its enactment
8 and shall apply to all civil actions pursuant to this Act
9 commenced on or after such date, including any action in
10 which the harm or the conduct which caused the harm
11 occurred before the effective date of this Act.

12 **TITLE I—EXPEDITED JUDGMENTS AND ALTER-**
13 **NATIVE DISPUTE RESOLUTION PROCE-**
14 **DURES**

15 **SEC. 101. EXPEDITED PRODUCT LIABILITY JUDGMENTS.**

16 (a) **CLAIMANT’S OFFER OF JUDGMENT.**—Any claim-
17 ant may, in addition to any claim for relief made in ac-
18 cordance with State law, include in the complaint an offer
19 of judgment to be entered against a defendant for a spe-
20 cific dollar amount as complete satisfaction of the claim.

21 (b) **DEFENDANT’S OFFER.**—A defendant may serve
22 an offer to allow judgment to be entered against that de-
23 fendant for a specific dollar amount as complete satisfac-
24 tion of the claim, within sixty days after service of the
25 claimant’s complaint or within the time permitted pursu-
26 ant to State law for a responsive pleading, whichever is

1 longer, except that if such pleading includes a motion to
2 dismiss in accordance with applicable law, the defendant
3 may serve such offer within 10 days after the court's de-
4 termination regarding such motion.

5 (c) EXTENSION OF RESPONSE PERIOD.—In any case
6 in which an offer of judgment is served pursuant to sub-
7 section (a) or (b), the court may, upon motion by the
8 offeree made prior to the expiration of the applicable pe-
9 riod for response, enter an order extending such period.
10 Any such order shall contain a schedule for discovery of
11 evidence material to the issue of the appropriate amount
12 of relief, and shall not extend such period for more than
13 sixty days. Any such motion shall be accompanied by a
14 supporting affidavit of the moving party setting forth the
15 reasons why such extension is necessary to promote the
16 interests of justice and stating that the information likely
17 to be discovered is material and is not, after reasonable
18 inquiry, otherwise available to the moving party.

19 (d) DEFENDANT'S PENALTY FOR REJECTION OF
20 OFFER.—If a defendant, as offeree, does not serve on a
21 claimant a written notification of acceptance of an offer
22 of judgment served by a claimant in accordance with sub-
23 section (a) within the time permitted pursuant to State
24 law for a responsive pleading or, if such pleading includes
25 a motion to dismiss in accordance with applicable law,

1 within thirty days after the court's determination regard-
2 ing such motion, and a final judgment is entered in such
3 action in an amount greater than the specific dollar
4 amount of such offer of judgment, the court shall modify
5 the judgment against that defendant by including in the
6 judgment an amount for the claimant's reasonable attor-
7 ney's fees and costs, not to exceed \$50,000. Such fees
8 shall be offset against any fees owed by the claimant to
9 the claimant's attorney by reason of the final judgment.

10 (e) CLAIMANT'S PENALTY FOR REJECTION OF
11 OFFER.—If the claimant, as offeree, does not serve on the
12 defendant a written notice of acceptance of an offer of
13 judgment served by a defendant in accordance with sub-
14 section (b) within thirty days after such service and a final
15 judgment is entered in such action in an amount less than
16 the specific dollar amount of such offer of judgment, the
17 court shall reduce the amount of the final judgment in
18 such action by that portion of the judgment which is allo-
19 cable to economic loss for which the claimant has received
20 or is entitled to receive collateral benefits. If the claimant
21 is not the prevailing party in such action, the claimant's
22 refusal to accept an offer of judgment shall not result in
23 the payment of any penalty under this subsection.

24 (f) REASONABLE ATTORNEY'S FEE.—For purposes
25 of this section, a reasonable attorney's fee shall be cal-

1 culated on the basis of an hourly rate which shall not ex-
2 ceed that which is considered acceptable in the community
3 in which the attorney practices, considering the attorney's
4 qualifications and experience and the complexity of the
5 case.

6 (g) EVIDENCE OF OFFER.—An offer not accepted
7 shall be deemed withdrawn and evidence thereof is not ad-
8 missible except in a proceeding to determine attorney's
9 fees and costs.

10 **SEC. 102. ALTERNATIVE DISPUTE RESOLUTION PROCE-**
11 **DURES.**

12 (a) IN GENERAL.—A claimant or defendant in a civil
13 action subject to this Act may, within the time permitted
14 for making an offer of judgment under section 101, serve
15 upon an adverse party an offer to proceed pursuant to
16 any voluntary, nonbinding alternative dispute resolution
17 procedure established or recognized under the law of the
18 State in which the civil action is brought or under the
19 rules of the court in which such action is maintained. An
20 offeree shall, within ten days of such service, file a written
21 notice of acceptance or rejection of the offer; except that
22 the court may, upon motion by the offeree make prior to
23 the expiration of such ten-day period, extend the period
24 for response for up to sixty days, during which discovery
25 may be permitted.

1 (b) DEFENDANT'S PENALTY FOR UNREASONABLE
2 REFUSAL.—The court shall assess reasonable attorney's
3 fees (calculated in the manner described in section 101(f))
4 and costs against the offeree, if—

5 (1) a defendant as offeree refuses to proceed
6 pursuant to such alternative dispute resolution pro-
7 cedure;

8 (2) final judgment is entered against the de-
9 fendant for harm caused by a product; and

10 (3) the defendant's refusal to proceed pursuant
11 to such alternative dispute resolution procedure was
12 unreasonable or not in good faith.

13 (c) GOOD FAITH REFUSAL.—In determining whether
14 an offeree's refusal to proceed pursuant to such alter-
15 native dispute resolution procedure was unreasonable or
16 not in good faith, the court shall consider such factors as
17 the court deems appropriate.

18 TITLE II—STANDARDS FOR CIVIL ACTIONS

19 SEC. 201. CIVIL ACTIONS.

20 A person seeking to recover for harm caused by a
21 product may bring a civil action against the product's
22 manufacturer or product seller pursuant to applicable
23 State or Federal law, except to the extent such law is in-
24 consistent with any provision of this Act.

1 **SEC. 202. UNIFORM STANDARDS OF PRODUCT SELLER LI-**
2 **ABILITY.**

3 (a) STANDARDS OF LIABILITY.—In any civil action
4 for harm caused by a product, a product seller other than
5 a manufacturer is liable to a claimant, only if the claimant
6 establishes by a preponderance of the evidence that—

7 (1)(A) the individual product unit which alleg-
8 edly caused the harm complained of was sold by the
9 defendant; (B) the product seller failed to exercise
10 reasonable care with respect to the product; and (C)
11 such failure to exercise reasonable care was a proxi-
12 mate cause of the claimant's harm; or

13 (2)(A) the product seller made an express war-
14 ranty, independent of any express warranty made by
15 a manufacturer as to the same product; (B) the
16 product failed to conform to the product seller's war-
17 ranty; and (C) the failure of the product to conform
18 to the product seller's warranty caused the claim-
19 ant's harm.

20 (b) CONDUCT OF PRODUCT SELLER.—(1) In deter-
21 mining whether a product seller is subject to liability
22 under subsection (a)(1), the trier of fact may consider the
23 effect of the conduct of the product seller with respect to
24 the construction, inspection, or condition of the product,
25 and any failure of the product seller to pass on adequate

1 warnings or instructions from the product's manufacturer
2 about the dangers and proper use of the product.

3 (2) A product seller shall not be liable in a civil action
4 subject to this Act based upon an alleged failure to provide
5 warnings or instructions unless the claimant establishes
6 that, when the product left the possession and control of
7 the product seller, the product seller failed—

8 (A) to provide to the person to whom the prod-
9 uct seller relinquished possession and control of the
10 product any pamphlets, booklets, labels, inserts, or
11 other written warnings or instructions received while
12 the product was in the product seller's possession
13 and control; or

14 (B) to make reasonable efforts to provide users
15 with the warnings and instructions with it received
16 after the product left its possession and control.

17 (3) A product seller shall not be liable in a civil action
18 subject to this Act except for breach of express warranty
19 where there was no reasonable opportunity to inspect the
20 product in a manner which would or should, in the exercise
21 of reasonable care, have revealed the aspect of the product
22 which allegedly caused the claimant's harm.

23 (c) TREATMENT AS MANUFACTURER.—A product
24 seller shall be deemed to be the manufacturer of a product
25 and shall be liable for harm to the claimant caused by

1 a product as if it were the manufacturer of the product
2 if—

3 (1) the manufacturer is not subject to service of
4 process under the laws of any State in which the ac-
5 tion might have been brought; or

6 (2) the court determines that the claimant
7 would be unable to enforce a judgment against the
8 manufacturer.

9 **SEC. 203. UNIFORM STANDARDS FOR AWARD OF PUNITIVE**
10 **DAMAGES.**

11 (a) IN GENERAL.—Punitive damages may, if other-
12 wise permitted by applicable law, be awarded in any civil
13 action subject to this Act to any claimant who establishes
14 by clear and convincing evidence that the harm suffered
15 by the claimant was the result of conduct manifesting a
16 manufacturer's or product seller's conscious, flagrant in-
17 difference to the safety of those persons who might be
18 harmed by the product. A failure to exercise reasonable
19 care in choosing among alternative product designs, for-
20 mulations, instructions, or warnings is not of itself such
21 conduct. Punitive damages may not be awarded in the ab-
22 sence of an award of compensatory damages.

23 (b) LIMITATION CONCERNING CERTAIN DRUGS AND
24 MEDICAL DEVICES.—(1) Punitive damages shall not be
25 awarded pursuant to this section against a manufacturer

1 or product seller of a drug (as defined in section 201(g)(1)
2 of the Federal Food, Drug, and Cosmetic Act; 21 U.S.C.
3 321(g)(1)) or medical device (as defined under section
4 201(h) of the Federal Food, Drug, and Cosmetic Act; 21
5 U.S.C. 321(h)) which caused the claimant's harm where—

6 (A) such drug or device was subject to pre-mar-
7 ket approval by the Food and Drug Administration
8 with respect to the safety of the formulation or per-
9 formance of the aspect of such drug or device which
10 caused the claimant's harm or the adequacy of the
11 packaging or labeling of such drug or device, and
12 such drug or device was approved by the Food and
13 Drug Administration; or

14 (B) the drug or device is generally recognized
15 as safe and effective pursuant to conditions estab-
16 lished by the Food and Drug Administration and ap-
17 plicable regulations, including packaging and label-
18 ing regulations.

19 (2) The provisions of paragraph (1) shall not apply
20 in any case in which—

21 (A) the defendant, before or after pre-market
22 approval of a drug or device, withheld from or mis-
23 represented to the Food and Drug Administration or
24 any other agency or official of the Federal Govern-
25 ment required information that is material and rel-

1 evant to the performance of such drug or device and
2 is causally related to the harm which the claimant
3 allegedly suffered; or

4 (B) the defendant made an illegal payment to
5 an official of the Food and Drug Administration for
6 the purpose of either securing or maintaining ap-
7 proval of such drug or device.

8 (c) LIMITATION CONCERNING CERTAIN AIRCRAFT
9 AND COMPONENTS.—(1) Punitive damages shall not be
10 awarded pursuant to this section against a manufacturer
11 of an aircraft or aircraft component which caused the
12 claimant's harm where—

13 (A) such aircraft or component was subject to
14 pre-market certification by the Federal Aviation Ad-
15 ministration with respect to the safety of the design
16 or performance of the aspect of such aircraft or
17 component which caused the claimant's harm or the
18 adequacy of the warnings regarding the operation or
19 maintenance of such aircraft or component;

20 (B) the aircraft or component was certified by
21 the Federal Aviation Administration under the Fed-
22 eral Aviation Act of 1958 (49 App. U.S.C. 1301 et
23 seq.); and

24 (C) the manufacturer of the aircraft or compo-
25 nent complied, after delivery of the aircraft or com-

1 ponent to a user, with Federal Aviation Administra-
2 tion requirements and obligations with respect to
3 continuing airworthiness, including the requirement
4 to provide maintenance and service information re-
5 lated to airworthiness whether or not such informa-
6 tion is used by the Federal Aviation Administration
7 in the preparation of mandatory maintenance, in-
8 spection, or repair directives.

9 (2) The provisions of paragraph (1) shall not apply
10 in any case in which—

11 (A) the defendant, before or after pre-market
12 certification of an aircraft or aircraft component,
13 withheld from or misrepresented to the Federal
14 Aviation Administration required information that is
15 material and relevant to the performance or the
16 maintenance or operation of such aircraft or compo-
17 nent or is causally related to the harm which the
18 claimant allegedly suffered; or

19 (B) the defendant made an illegal payment to
20 an official of the Federal Aviation Administration
21 for the purpose of either securing or maintaining
22 certification of such aircraft or component.

23 (d) SEPARATE PROCEEDING.—At the request of the
24 manufacturer or product seller, the trier of fact shall con-
25 sider in a separate proceeding (1) whether punitive dam-

1 ages are to be awarded and the amount of such award,
2 or (2) the amount of punitive damages following a deter-
3 mination of punitive liability. If a separate proceeding is
4 requested, evidence relevant only to the claim of punitive
5 damages, as determined by applicable State law, shall be
6 inadmissible in any proceeding to determine whether com-
7 pensatory damages are to be awarded.

8 (e) DETERMINING AMOUNT OF PUNITIVE DAM-
9 AGES.—In determining the amount of punitive damages,
10 the trier of fact shall consider all relevant evidence, includ-
11 ing—

12 (1) the financial condition of the manufacturer
13 or product seller;

14 (2) the severity of the harm caused by the con-
15 duct of the manufacturer or product seller;

16 (3) the duration of the conduct or any conceal-
17 ment of it by the manufacturer or product seller;

18 (4) the profitability of the conduct to the manu-
19 facturer or product seller;

20 (5) the number of products sold by the manu-
21 facturer or product seller of the kind causing the
22 harm complained of by the claimant;

23 (6) awards of punitive or exemplary damages to
24 persons similarly situated to the claimant;

1 (7) prospective awards of compensatory dam-
2 ages to persons similarly situated to the claimant;

3 (8) any criminal penalties imposed on the man-
4 ufacturer or product seller as a result of the conduct
5 complained of by the claimant; and

6 (9) the amount of any civil fines assessed
7 against the defendant as a result of the conduct
8 complained of by the claimant.

9 **SEC. 204. UNIFORM TIME LIMITATIONS ON LIABILITY.**

10 (a) **STATUTE OF LIMITATIONS.**—Any civil action sub-
11 ject to this Act shall be barred unless the complaint is
12 filed within two years of the time the claimant discovered
13 or, in the exercise of reasonable care, should have discov-
14 ered the harm and its cause, except that any such action
15 of a person under legal disability may be filed within two
16 years after the disability ceases. If the commencement of
17 such an action is stayed or enjoined, the running of the
18 statute of limitations under this section shall be suspended
19 for the period of the stay or injunction.

20 (b) **STATUTE OF REPOSE FOR CAPITAL GOODS.**—(1)
21 Any civil action subject to this Act shall be barred if a
22 product which is a capital good is alleged to have caused
23 harm which is not a toxic harm unless the complaint is
24 served and filed within twenty-five years after the time
25 of delivery of the product. This subsection shall apply only

1 if the court determines that the claimant has received or
 2 would be eligible to receive compensation under any State
 3 or Federal workers' compensation law for harm caused by
 4 the product.

5 (2) A motor vehicle, vessel, aircraft, or train, used
 6 primarily to transport passengers for hire, shall not be
 7 subject to this subsection.

8 (3) As used in this subsection, the term—

9 (A) “capital good” means any product, or any
 10 component of any such product, which is of a char-
 11 acter subject to allowance for depreciation under the
 12 Internal Revenue Code of 1986, and which was—

13 (i) used in a trade or business;

14 (ii) held for the production of income; or

15 (iii) sold or donated to a governmental or
 16 private entity for the production of goods, for
 17 training, for demonstration, or for other similar
 18 purposes; and

19 (B) “time of delivery” means the time when a
 20 product is delivered to its first purchaser or lessee
 21 who was not involved in the business of manufactur-
 22 ing or selling such product or using it as a compo-
 23 nent part of another product to be sold.

24 (C) EXTENSION OF PERIOD FOR BRINGING CERTAIN
 25 ACTIONS.—If any provision of this section would shorten

1 the period during which a civil action could be brought
2 under otherwise applicable law, the claimant may, notwith-
3 standing such provision of this section, bring the civil ac-
4 tion pursuant to this Act within one year after the effec-
5 tive date of this Act.

6 (d) EFFECT ON RIGHT TO CONTRIBUTION OR IN-
7 DEMNITY.—Nothing in this section shall affect the right
8 of any person who is subject to liability for harm under
9 this Act to seek and obtain contribution or indemnity from
10 any other person who is responsible for such harm.

11 **SEC. 205. WORKERS' COMPENSATION SUBROGATION**
12 **STANDARDS.**

13 (a) IN GENERAL.—(1) An employer or workers' com-
14 pensation insurer of an employer shall have a right of sub-
15 rogation against a manufacturer or product seller to re-
16 cover the sum of the amount paid as workers' compensa-
17 tion benefits and the present value of all workers' com-
18 pensation benefits to which the employee is or would be
19 entitled as determined by the appropriate workers' com-
20 pensation authority for harm caused to an employee by
21 a product if the harm is one for which a civil action has
22 been brought pursuant to this Act. To assert a right of
23 subrogation an employer or workers' compensation insurer
24 of an employer shall provide written notice that it is as-
25 serting a right of subrogation to the court in which the

1 claimant has filed a complaint. The employer or workers'
2 compensation insurer of the employer shall not be required
3 to be a necessary and proper party to the proceeding insti-
4 tuted by the employee.

5 (2) In any proceeding against or settlement with the
6 manufacturer or product seller, the employer or the work-
7 ers' compensation insurer of the employer shall have an
8 opportunity to participate and to assert a right of subroga-
9 tion upon any payment and to assert a right of subroga-
10 tion upon any payment made by the manufacturer or
11 product seller by reason of such harm, whether paid in
12 settlement, in satisfaction of judgment, as consideration
13 for covenant not to sue, or otherwise. The employee shall
14 not make any settlement with or accept any payment from
15 the manufacturer or product seller without the written
16 consent of the employer and no release to or agreement
17 with the manufacturer or product seller shall be valid or
18 enforceable for any purpose without such consent. How-
19 ever, the preceding sentence shall not apply if the em-
20 ployer or workers' compensation insurer of the employer
21 is made whole for all benefits paid in workers' compensa-
22 tion benefits.

23 (3) If the manufacturer or product seller attempts
24 to persuade the trier of fact that the claimant's harm was
25 caused by the fault of the claimant's employer or

1 coemployees, then the issue whether the claimant's harm
2 was caused by the claimant's employer or coemployees
3 shall be submitted to the trier of fact. If the manufacturer
4 or product seller so attempts to persuade the trier of fact,
5 it shall provide written notice to the employer. The em-
6 ployer shall have the right to appear, to be represented,
7 to introduce evidence, to cross-examine adverse witnesses,
8 and to argue to the trier of fact as to this issue as fully
9 as though the employer were a party although not named
10 or joined as a party to the proceeding. Such issue shall
11 be the last issue submitted to the trier of fact. If the trier
12 of fact finds by clear and convincing evidence that the
13 claimant's harm was caused by the fault of the claimant's
14 employer or coemployees, then the court shall reduce the
15 damages awarded by the trier of fact against the manufac-
16 turer or product seller (and correspondingly the subroga-
17 tion lien of the employer) by the sum of the amount paid
18 as workers' compensation benefits and the present value
19 of all workers' compensation benefits to which the em-
20 ployee is or would be entitled for such harm as determined
21 by the appropriate workers' compensation authority. The
22 manufacturer or product seller shall have no further right
23 by way of contribution or otherwise against the employer.
24 However, the employer shall not lose its right of subroga-
25 tion because of an intentional tort committee against the

1 claimant by the claimant's coemployees or for acts com-
2 mitted by coemployees outside the scope of normal work
3 practices.

4 (4) If the verdict shall be that the claimant's harm
5 was not caused by the fault of the claimant's employer
6 or coemployees, then the manufacturer or product seller
7 shall reimburse the employer or workers' compensation in-
8 surer of the employer for reasonable attorney's fees and
9 court costs incurred in the resolution of the subrogation
10 claim, as determined by the court.

11 (b) EFFECT ON CERTAIN CIVIL ACTIONS.—(1) In
12 any civil action subject to this Act in which damages are
13 sought for harm for which the person injured is or would
14 have been entitled to receive compensation under any
15 State or Federal workers' compensation law, no third
16 party tortfeasor may maintain any action for implied in-
17 demnity or contribution against the employer, any
18 coemployee, or the exclusive representative of the person
19 who was injured.

20 (2) Nothing in this Act shall be construed to affect
21 any provision of a State or Federal workers' compensation
22 law which prohibits a person who is or would have been
23 entitled to receive compensation under any such law, or
24 any other person whose claim is or would have been deriv-
25 ative from such a claim, from recovering for harm caused

1 by a product in any action other than a workers' com-
2 pensation claim against a present or former employer or
3 workers' compensation insurer of the employer, any
4 coemployee, or the exclusive representative of the person
5 who was injured.

6 (3) Nothing in this Act shall be construed to affect
7 any State or Federal workers' compensation law which
8 permits recovery based on a claim of an intentional tort
9 by the employer or coemployee, where the claimant's harm
10 was caused by such an intentional tort.

11 (c) STAY PENDING COMPENSATION DETERMINA-
12 TION.—In any civil action subject to this Act in which
13 damages are sought for harm for which the person injured
14 is entitled to receive compensation under any State or
15 Federal workers' compensation law, the action shall, on
16 application of the claimant made at the claimant's sole
17 election, be stayed until such time as the full amount pay-
18 able as workers' compensation benefits has been finally de-
19 termined under such workers' compensation law. Should
20 the claimant elect to bring a civil action under this Act
21 and not stay his or her action until the full amount pay-
22 able as workers' compensation benefits has been finally de-
23 termined by the appropriate workers' compensation au-
24 thority, then the court shall determine the amount of
25 worker's compensation that has been or would be payable

1 if the issue had been determined by the appropriate work-
2 er's compensation authority. The verdict as determined by
3 the trier of fact pursuant to this title shall have no binding
4 effect on and shall not be used as evidence in any other
5 proceeding.

6 (d) WRITTEN NOTICE.—A claimant in a civil action
7 subject to this Act who is or may be eligible to receive
8 compensation under any State or Federal workers' com-
9 pensation law must provide written notice of the filing of
10 the civil action to the claimant's employer within thirty
11 days of the filing. The written notice shall include infor-
12 mation regarding the date and court in which the civil ac-
13 tion was filed, the names and addresses of all plaintiffs
14 and defendants appearing on the complaint, the court
15 docket number if available, and a copy of the complaint
16 which was filed in the civil action.

17 **SEC. 206. SEVERAL LIABILITY FOR NONECONOMIC LOSS.**

18 (a) IN GENERAL.—In any civil action subject to this
19 Act, the liability of each defendant for noneconomic loss
20 shall be several only and shall not be joint. Each defendant
21 shall be liable only for the amount of noneconomic loss
22 allocated to such defendant in direct proportion to such
23 defendant's percentage of responsibility as determined
24 under subsection (b). A separate judgment shall be ren-
25 dered against such defendant for that amount.

1 (b) PROPORTION OF RESPONSIBILITY.—For pur-
2 poses of this section, the trier of fact shall determine the
3 proportion of responsibility of each party for the claim-
4 ant's harm.

5 **SEC. 207. DEFENSES INVOLVING INTOXICATING ALCOHOL**
6 **OR DRUGS.**

7 (a) CIVIL ACTIONS IN WHICH ALL DEFENDANTS
8 ARE MANUFACTURERS OR PRODUCT SELLERS.—In any
9 civil action subject to this Act in which all defendants are
10 manufacturers or product sellers, it shall be a complete
11 defense to such action that the claimant was intoxicated
12 or was under the influence of intoxicating alcohol or any
13 drug and that as a result of such intoxication or the influ-
14 ence of the alcohol or drug the claimant was more than
15 50 percent responsible for the accident or event which re-
16 sulted in such claimant's harm.

17 (b) OTHER CIVIL ACTIONS.—In any civil action sub-
18 ject to this Act in which not all defendants are manufac-
19 turers or product sellers and the trier of fact determines
20 that no liability exists against those defendants who are
21 not manufacturers or product sellers, the court shall enter
22 a judgment notwithstanding the verdict in favor of any
23 defendant which is a manufacturer or product seller if it
24 is proved that the claimant was intoxicated or was under
25 the influence of intoxicating alcohol or any drug and that

1 as a result of such intoxication or the influence of the alco-
2 hol or drug the claimant was more than 50 percent re-
3 sponsible for the accident or event which resulted in such
4 claimant's harm.

5 (c) INTOXICATION DETERMINATION TO BE MADE
6 UNDER STATE LAW.—For purposes of this section, the
7 determination of whether a person was intoxicated or was
8 under the influence of intoxicating alcohol or any drug
9 shall be made pursuant to applicable State law.

10 (d) DEFINITION.—As used in this section, the term
11 “drug” means any non-over-the-counter drug which has
12 not been prescribed by a physician for use by the claimant.

S 687 RS—2

S 687 RS—3