

105TH CONGRESS
1ST SESSION

S. 1135

To provide certain immunities from civil liability for trade and professional associations, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 31, 1997

Mr. McCONNELL introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide certain immunities from civil liability for trade and professional associations, 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 “Trade and Professional
5 Association Free Flow of Information Act of 1997”.

6 **SEC. 2. FINDINGS; PURPOSES.**

7 (a) FINDINGS.—Congress finds that—

8 (1) trade and professional associations serve the
9 public interest by conducting research, collecting and
10 distributing information, and otherwise providing

1 services to their members with regard to products
2 and materials purchased and used by those mem-
3 bers;

4 (2) in the decade preceding the date of enact-
5 ment of this Act, many large class action lawsuits
6 have been filed against manufacturers for allegedly
7 defective products;

8 (3) as a result of the lawsuits referred to in
9 paragraph (2), many members of trade and profes-
10 sional associations who are consumers of those prod-
11 ucts have relied increasingly on trade and profes-
12 sional associations for information concerning those
13 products, including information concerning—

14 (A) the conditions under which such a
15 product may be used effectively;

16 (B) whether it is necessary to repair or re-
17 place such a product, and if such a repair or re-
18 placement is necessary, the appropriate means
19 of accomplishing that repair or replacement;
20 and

21 (C) any litigation concerning such a prod-
22 uct;

23 (4) trade and professional associations have,
24 with an increasing frequency, been served broad and
25 burdensome third-party subpoenas from litigants in

1 product defect lawsuits, including class action law-
2 suits;

3 (5) members of trade and professional associa-
4 tions are seeking potentially beneficial information
5 relating to product defects, quality, or performance
6 from the trade and professional associations;

7 (6) trade and professional associations have
8 been subject to lawsuits concerning methods of col-
9 lection and dissemination of that information;

10 (7) the burden of responding to third-party sub-
11 poenas in product defect lawsuits and the threat of
12 litigation have had a substantial chilling effect on
13 the ability and willingness of trade and professional
14 associations to disseminate information described in
15 paragraph (5) to members, and the threat that in-
16 formation provided on a confidential basis to mem-
17 bers could be subject to discovery in a civil action
18 also has a chilling effect;

19 (8) because of the national scope of the prob-
20 lems described in paragraphs (1) through (7), it is
21 not possible for States to fully address the problems
22 by enacting State laws; and

23 (9) the Federal Government has the authority
24 under the United States Constitution (including arti-
25 cle I, section 8, clause 3 of the Constitution and the

1 14th amendment to the Constitution) to remove bar-
2 riers to interstate commerce and protect due process
3 rights.

4 (b) PURPOSES.—The purposes of this Act are to pro-
5 mote the free flow of goods and services and lessen bur-
6 dens on interstate commerce in accordance with the au-
7 thorities referred to in subsection (a)(9) by ensuring the
8 free flow of information concerning product defects, qual-
9 ity, or performance among trade and professional associa-
10 tions and their members.

11 **SEC. 2. DEFINITIONS.**

12 In this Act:

13 (1) PRODUCT.—

14 (A) IN GENERAL.—The term “product”
15 means any object, substance, mixture, or raw
16 material in a gaseous, liquid, or solid state
17 that—

18 (i) is capable of delivery itself or as an
19 assembled whole, in a mixed or combined
20 state, or as a component part or ingredi-
21 ent;

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

24 (iii) has intrinsic economic value; and

1 (iv) is intended for sale or lease to
2 persons for commercial or personal use, in-
3 cluding improvements to real property and
4 fixtures that are affixed or incorporated
5 into those improvements.

6 (B) EXCLUSIONS.—The term does not in-
7 clude—

8 (i) tissue, organs, blood, and blood
9 products used for therapeutic or medical
10 purposes, except to the extent that such
11 tissue, organs, blood, and blood products
12 (or the provision thereof) are subject,
13 under applicable State law, to a standard
14 of liability other than negligence; or

15 (ii) electricity, natural gas, or steam.

16 (2) STATE.—The term “State” means each of
17 the several States of the United States, the District
18 of Columbia, and any commonwealth, territory, or
19 possession of the United States.

20 (3) TRADE OR PROFESSIONAL ASSOCIATION.—
21 The term “trade or professional association” means
22 an organization described in paragraph (3), (4), (5),
23 or (6) of section 501(c) of the Internal Revenue
24 Code of 1986 that is exempt from taxation under
25 section 501(a) of such Code.

1 **SEC. 3. QUALIFIED EXEMPTION FROM CIVIL LIABILITY.**

2 (a) IN GENERAL.—

3 (1) IN GENERAL.—Except as provided in sub-
4 section (b), a trade or professional association shall
5 not be subject to civil liability relating to harm
6 caused by the provision of information described in
7 paragraph (2) by the trade or professional associa-
8 tion to a member of the trade or professional asso-
9 ciation.

10 (2) INFORMATION.—The information described
11 in this paragraph is information relating to a prod-
12 uct concerning—

13 (A) the quality of the product;

14 (B) the performance of the product; or

15 (C) any defect of the product.

16 (3) APPLICABILITY.—This subsection applies
17 with respect to civil liability under Federal or State
18 law.

19 (b) EXCEPTION FOR LIABILITY.—Subsection (a)
20 shall not apply with respect to harm caused by an act of
21 a trade or professional association that a court deter-
22 mines, on the basis of clear and convincing evidence, to
23 have been caused by the trade or professional association
24 by the provision of information described in subsection
25 (a)(2) that the trade or professional association—

26 (1) knew to be false; or

1 (2) provided a reckless indifference to the truth
2 or falsity of that information.

3 **SEC. 4. SPECIAL MOTION TO STRIKE.**

4 A trade or professional association may file a special
5 motion to strike any claim in any judicial proceeding
6 against the trade or professional association on the ground
7 that the claim is based on an act with respect to which
8 the association is exempt from liability under section 3.

9 **SEC. 5. REQUIRED PROCEDURES REGARDING SPECIAL MO-**
10 **TION TO STRIKE.**

11 (a) TREATMENT OF MOTION.—Upon the filing of any
12 motion under section 4—

13 (1) to the extent consistent with this section,
14 the motion shall be treated as a motion for summary
15 judgment under Rule 56 of the Federal Rules of
16 Civil Procedure (or an equivalent motion under ap-
17 plicable State law); and

18 (2) the trial court shall hear the motion within
19 a period of time that is appropriate for preferred or
20 expedited motions.

21 (b) SUSPENSION OF DISCOVERY.—Upon the filing of
22 a motion under section 4, discovery requests to or from
23 the moving party shall be suspended pending a decision
24 on—

25 (1) the motion; and

1 (2) any appeal on the ruling on the motion.

2 (c) BURDEN OF PROOF.—The responding party shall
3 have the burden of proof in presenting evidence that a mo-
4 tion filed under section 4 should be denied.

5 (d) BASIS OF DETERMINATION.—A court shall make
6 a determination on a motion filed under section 4 on the
7 basis of the facts contained in the pleadings and affidavits
8 filed in accordance with this section.

9 (e) DISMISSAL.—With respect to a claim that is the
10 subject of a motion filed under section 4, the court shall
11 grant the motion and dismiss the claim, unless the re-
12 sponding party has produced evidence that would be suffi-
13 cient for a reasonable finder of fact to conclude, on the
14 basis of clear and convincing evidence, that the moving
15 party is not exempt from liability for that claim under sec-
16 tion 3.

17 (f) COSTS.—If a moving party prevails in procuring
18 the dismissal of a claim as a result of a motion made
19 under section 4, the court shall award that party the costs
20 incurred by the party in connection with making the mo-
21 tion, including reasonable attorney and expert witness
22 fees.

1 **SEC. 6. QUALIFIED EXEMPTION FROM THIRD-PARTY DIS-**
 2 **COVERY.**

3 (a) IN GENERAL.—Notwithstanding any other provi-
 4 sion of law, a trade or professional association may only
 5 be served with a subpoena in a civil action described in
 6 subsection (b) if the party that serves the subpoena first
 7 establishes to the court, by clear and convincing evidence
 8 that—

9 (1) the materials or information sought by the
 10 subpoena are directly relevant to the civil action; and

11 (2) the party serving the subpoena has a com-
 12 pelling need for the materials or information because
 13 the materials or information are not otherwise avail-
 14 able.

15 (b) CIVIL ACTIONS DESCRIBED.—A civil action de-
 16 scribed in this subsection is a civil action—

17 (1) relating to the quality, performance, or de-
 18 fect of a product; and

19 (2) to which the trade or professional associa-
 20 tion involved is not a party.

21 **SEC. 7. SPECIAL MOTION TO QUASH A SUBPOENA.**

22 A trade or professional association may file a special
 23 motion to quash a subpoena on the grounds that the trade
 24 or professional association is exempt from any third-party
 25 discovery request under section 6.

1 **SEC. 8. REQUIRED PROCEDURES REGARDING SPECIAL MO-**
2 **TION TO QUASH.**

3 (a) IN GENERAL.—Upon the filing of any motion
4 under section 7, the trial court shall hear the motion with-
5 in the period of time that is appropriate for preferred or
6 expedited motions.

7 (b) SUSPENSION OF COMPLIANCE.—Upon the filing
8 of a motion under section 7, the court shall not compel
9 compliance with the subpoena during the period during
10 which—

11 (1) the motion is under consideration; or

12 (2) an appeal on the determination by the court
13 to deny the motion has not resulted in a final ruling
14 by the court on the appeal.

15 (c) BURDEN OF PROOF.—The responding party shall
16 have the burden of proof in presenting evidence that a mo-
17 tion filed under section 7 should be denied.

18 (d) BASIS OF DETERMINATION.—A court shall make
19 a determination on a motion filed under section 7 on the
20 basis of the facts contained in the pleadings and affidavits
21 filed in accordance with this section.

22 (e) QUASHING A SUBPOENA.—The court shall grant
23 a motion filed under section 7 and quash the subpoena
24 that is the subject of the motion, unless the responding
25 party proves, by clear and convincing evidence, that the
26 trade or professional association that received the sub-

1 poena is not exempt from responding to the subpoena
2 under section 6.

3 (f) COSTS.—If a trade or professional association
4 prevails in procuring the quashing of a subpoena as a re-
5 sult of a motion made under section 7, the court shall
6 award the trade or professional association the costs in-
7 curred by that trade or professional association in connec-
8 tion with making the motion, including reasonable attor-
9 ney and expert witness fees.

10 **SEC. 9. RIGHT TO OBJECT UNDER RULE 45 OF THE FED-**
11 **ERAL RULES OF CIVIL PROCEDURE.**

12 Nothing in this Act may be construed to impair the
13 right of a trade or professional association to serve written
14 objections under rule 45(c)(2)(B) of the Federal Rules of
15 Civil Procedure, or any similar rule or procedure under
16 applicable State law.

17 **SEC. 10. QUALIFIED ASSOCIATION-MEMBER PRIVILEGE.**

18 (a) IN GENERAL.—Except as provided in subsection
19 (b), a member of a trade or professional association shall
20 not be required to disclose any information described in
21 section 3(a)(2), including any materials containing that
22 information, that—

23 (1) relates to actual or anticipated litigation in-
24 volving the quality, performance, or defect of a prod-
25 uct;

1 (2) is considered to be confidential by the trade
2 or professional association and that member; and

3 (3) is communicated by the trade or profes-
4 sional association with the reasonable expectation
5 that the information will—

6 (A) be used in connection with actual or
7 anticipated litigation; and

8 (B) be maintained in confidence.

9 (b) EXCEPTION.—Subsection (a) does not apply in
10 any action in which a party seeking information described
11 in that subsection has established to a court, by clear and
12 convincing evidence, that—

13 (1) the materials or information sought are di-
14 rectly relevant to an action filed by that party; and

15 (2) the party has a compelling need for the in-
16 formation because the information is not otherwise
17 obtainable.

18 **SEC. 11. ELECTION OF STATE REGARDING NONAPPLICABIL-**
19 **ITY.**

20 This Act shall not apply to any civil action in a State
21 court with respect to which all of the parties are citizens
22 of that State, if that State enacts, pursuant to applicable
23 State law, a State statute that—

24 (1) cites the authority of this section;

1 (2) specifies that the State elects to be exempt
2 from the requirements of this Act pursuant to this
3 section; and

4 (3) contains no other provisions.

5 **SEC. 12. PREEMPTION; APPLICABILITY.**

6 (a) **PREEMPTION.**—This Act supersedes the laws of
7 any State to the extent such State laws apply to matters
8 to which this Act applies.

9 (b) **APPLICABILITY.**—Except as provided in section
10 11, and subject to subsection (a), this Act applies to any
11 civil action commenced in a Federal or State court, on
12 or after the date of enactment of this Act.

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