

subjective noneconomic loss, each defendant would be responsible only for his or her proportionate share of harm caused.

This amendment is fair and consistent with principles of individual responsibility. It will put an end to the gamble taken by the trial bar when they join everyone in sight of an injury.

Let me just say in conclusion, Mr. President, having chaired a number of hearings years ago as chairman of the Courts Subcommittee of the Judiciary Committee, I had a hard time ever getting any plaintiff's lawyer to make a good argument in support of joint and several liability, because it is obviously not just. It violates any standard of American justice to require that someone who contributed little or nothing, just a little bit of what may have caused the harm, to end up getting assessed 100 percent of the damages simply because they are able to pay. That is not just. That does not have anything to do with civil justice.

It is astonishing to me, Mr. President, that our tort system in this country has evolved to the point where essentially innocent parties can end up being assessed all of the damages for a harm that they did not cause.

That is what the Abraham-McConnell amendment will be about when it is subsequently offered. I hope that I will be able to come back to the floor and speak again on this amendment at the appropriate time.

I wish to commend the occupant of the chair, the Senator from Michigan, for his great leadership in this tort reform field. He has been in the Senate now about 4 months, and I cannot remember anybody who has taken a subject and made a difference on it any more quickly than he has. I have enjoyed working with him.

We have another issue that we may be talking about later in the debate, something called an early offer mechanism, which I do not have the time to address at this point.

I just want to say how much I have enjoyed working with him. We are greatly in hope that the Senate will decide that changing the way we handle joint and several liability will be in the best interest of the American people.

Mr. President, I believe no one is about so speak. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mrs. MURRAY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. KYL). Without objection, it is so ordered.

Mrs. MURRAY. Mr. President, I ask unanimous consent that I be allowed to speak as in morning business for approximately 2 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

NOMINATION OF DR. HENRY FOSTER, TO BE SURGEON GENERAL

Mrs. MURRAY. Mr. President, I say to Members of the Senate, the Senate Labor and Human Resources Committee has just a few minutes ago concluded its testimony from Dr. Foster, who is the nominee for Surgeon General. I wanted to take this opportunity to personally thank Senator KASSEBAUM, chair of that committee, for doing an outstanding job of giving Dr. Foster the opportunity to present himself to the Senate and to the United States of America. I felt that the hearing was very fair and very well conducted by both Senator KASSEBAUM and all the members of the committee.

I also wanted to take this opportunity to commend Dr. Foster who, for the last several months, has been a person we have only known as a cardboard cutout; who, in the last day and a half has, I believe, really presented a very strong image to this country of a man who is caring, who is compassionate, and who can be a very forthright Surgeon General, to speak to the issues of the day that are of concern to so many of us; who will be a person, I believe, who will speak to women's health care issues in a way that needs to be done in this country today; who will speak to the issue of teen pregnancy and provide leadership; and a man who I think is a person who we can all look up to in terms of being a model public servant; who understands that we cannot just sit in our houses and close our blinds and shut our doors, but we need to personally get out and work with young kids today and be a personal role model for all of them.

I think he has done an outstanding job of answering all the questions that have been brought to him, and I believe that both Dr. Foster and the committee deserve a debt of gratitude from the Senate.

I look forward to having an expeditious vote on his nomination and to being allowed, as a U.S. Senator, to vote up or down on his nomination very soon on the floor of the Senate.

I thank the Chair and yield the floor. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. ABRAHAM. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMONSENSE PRODUCT LIABILITY AND LEGAL REFORM ACT

The Senate continued with the consideration of the bill.

AMENDMENT NO. 600 TO AMENDMENT NO. 596
(Purpose: To provide for proportionate liability for noneconomic damages in all civil actions whose subject matter affects commerce)

Mr. ABRAHAM. Mr. President, I ask unanimous consent to lay aside the

pending Thompson amendment so I may offer an amendment.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows: The Senator from Michigan [Mr. ABRAHAM], for himself, Mr. MCCONNELL and Mr. KYL, proposes an amendment numbered 600.

Mr. ABRAHAM. I ask unanimous consent further reading be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Strike out section 109 and insert in lieu thereof the following new section:

SEC. 109. SEVERAL LIABILITY FOR NONECONOMIC DAMAGES.

(a) FINDINGS.—The Congress finds that—
(1) because of the joint and several liability doctrine, municipalities, volunteer groups, nonprofit entities, property owners, and large and small businesses are often brought into litigation despite the fact that their conduct often had little or nothing to do with the harm suffered by the claimant;

(2) the imposition of joint and several liability for noneconomic damages frequently results in the assessment of unfair and disproportionate damages against defendants that bear no relationship to their fault or responsibility;

(3) producers of products and services who are only marginally responsible for an injury risk bearing the entire cost of a judgment for noneconomic damages even if the products or services originate in States that have replaced joint liability for noneconomic damages with proportionate liability, because claimants have an incentive to bring suit in States that have retained joint liability; and

(4) the unfair allocation of noneconomic damages under the joint and several liability doctrine disrupts, impairs and burdens commerce, imposing unreasonable and unjustified costs on consumers, taxpayers governmental entities, large and small businesses, volunteer organizations, and non-profit entities.

(b) GENERAL RULE.—Notwithstanding any other section of this Act, in any civil action whose subject matter affects commerce brought in Federal or State court on any theory, the liability of each defendant for noneconomic damages shall be several only and shall not be joint.

(c) AMOUNT OF LIABILITY.—

(1) IN GENERAL.—Each defendant shall be liable only for the amount of noneconomic damages allocated to the defendant in direct proportion to the percentage of responsibility of the defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which the defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

(2) PERCENTAGE OF RESPONSIBILITY.—For purposes of determining the amount of noneconomic damages allocated to a defendant under this section, the trier of fact shall determine the percentage of responsibility of each person, including the claimant, responsible for the claimant's harm, whether or not such person is a party to the action.

(d) APPLICABILITY.—Nothing in this section shall be construed to—

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

(2) give rise to any claim for joint liability;

(3) supersede or alter any Federal law;

(4) preempt, supersede, or alter any State law to the extent that such law would further limit the applicability of joint liability to any kind of damages;

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

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

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

(e) FEDERAL COURT JURISDICTION NOT ESTABLISHED.—Nothing in this section shall be construed to establish any jurisdiction in the district courts of the United States on the basis of section 1331 or 1337 of title 28, United States Code.

(f) DEFINITIONS.—For purposes of this section:

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

(2) The term "commerce" means commerce between or among the several States, or with foreign nations.

(3)(A) The term "economic damages" means any objectively verifiable monetary losses resulting from the harm suffered, including past and future medical expenses, loss of past and future earnings, burial costs, costs of repair or replacement, costs of obtaining replacement services in the home (including, without limitation, child care, transportation, food preparation, and household care), costs of making reasonable accommodations to a personal residence, loss of employment, and loss of business or employment opportunities, to the extent recovery for such losses is allowed under applicable State law.

(B) The term "economic damages" shall not include noneconomic damages.

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

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

(B) The term "noneconomic damages" shall not include economic damages or punitive damages.

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

(7) 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.

Mr. ABRAHAM. Mr. President, the amendment I have proposed with my esteemed colleague from Kentucky would extend the joint liability reforms of S. 565 to all cases whose subject matter affects interstate commerce. This extension is necessary, in our view, to realize the basic goals of the bill.

In its traditional form, the doctrine of joint liability allows the plaintiff to collect the entire amount of a judgment from any defendant found to be at least partially responsible for the plaintiff's damages.

Thus, for example, a defendant found to be 1 percent responsible for the plaintiff's damages could be forced to pay 100 percent of the plaintiff's judgment.

This example is not merely theoretical. In the case of *Walt Disney World versus Wood*, the plaintiff sought recovery of damages resulting from a collision between her go-kart and another driven by her fiancée. The jury found the plaintiff 14 percent responsible, and her fiancée 85 percent responsible, for the plaintiff's damages. Thus, between them, the plaintiff and her fiancée were 99 percent responsible for her damages.

Unfortunately for Disney, however, the jury found it 1 percent responsible for the plaintiff's damages and, under the doctrine of joint liability, Disney was forced to pay 86 percent of the plaintiff's judgment.

The Disney case underscores the fact that unreformed joint liability forces defendants to pay judgments on the basis of their resources, not their responsibility. Thus, a largely blameless defendant can be punished for the actions of a truly culpable defendant simply because the former defendant has greater assets than the latter.

This unfairness is aggravated when noneconomic damages are awarded.

Noneconomic damages are awarded to compensate plaintiffs for subjective harm, like pain and suffering, emotional distress, and humiliation. Since noneconomic damages are not based on tangible losses, however, there are no objective criteria for calculating their amount. As a result, the size of these awards often depends more on the luck of the draw, in terms of the jury, than on the rule of law.

Thus, when defendants are held jointly liable for noneconomic damages—as they are under the unreformed version of joint liability—they can be forced to pay enormous sums for unverifiable damages they did not cause.

Apparently forgotten amid all this is the old idea that the law is supposed to yield predictable, fair, and equitable results.

In cases where the doctrine of joint liability is applied, then, we depart from the fundamental concept, rooted in simple justice, that tort law liability should be based on fault. This departure yields a number of undesirable consequences.

First, determining liability on a basis other than fault often leaves people with an overwhelming sense of helplessness. No matter how careful they might be, actors are no longer masters of their own fate with regard to the extent of their exposure to liability.

For example, one of my cousins operates a baseball batting cage. Patrons of the cage pay money to swing at pitches

hurled by a pitching machine. Obviously, a fast-pitched baseball can cause injury, so the small business posted warnings that the cage should only be used by experienced batters, and that only one person should be in the batter's box at a time. On one occasion, however, two patrons squeezed into the batter's box, including one who had never hit a fast-pitched baseball before. The inexperienced batter was struck by the ball and injured. The business was sued for this injury, although the plaintiff and her accomplice were largely responsible for it.

Thus, because of joint liability, and despite their best efforts to act responsibly, my cousin's business faced the prospect of paying for all the plaintiff's damages.

A second and related point is that basing liability on criteria other than fault erodes incentives for responsible behavior.

As Karyn Hicks has explained in a leading law review article,

[u]nder joint and several liability, whether the actor is 1 percent responsible or 100 percent responsible for an injury, his actual cost potential for involvement in the activity will always be the same. He will, therefore, have little incentive to expend his resources in accident avoidance behavior, such as equipment maintenance or taking the time to act carefully, if * * * he will still have to pay the same as he would if he had made no expenditure to avoid the accident in the first place.

Thus, by reducing or eliminating an actor's reward for acting carefully, we likewise reduce or eliminate the incentive for shouldering the extra costs associated with careful conduct. The result, of course, is more accidents and injuries.

In truth, Mr. President, to the extent that joint liability requires parties to provide compensation for harms they did not cause, it acts like an accident insurance system. But this system is remarkably inefficient. Less than half of every dollar paid out in damage awards goes to the injured party—the remainder goes to court costs and attorney fees.

Of course, the costs imposed on defendants by unreformed joint liability are not limited to damage awards. In case after case, deep pockets organizations and individuals are made defendants for no reason other than their financial resources. For example, George McGovern operated a country inn that was sued by a man who got into a fistfight in its parking lot.

Mr. McGovern had a security man on duty at the time, and he managed to win the case. But he only did so after, in his words, "the expenditure of a great deal of time, effort and money."

In another case, a McDonald's restaurant was sued by a driver whose car was struck by a car driven by a drive-in patron of the restaurant.

The plaintiff argued that McDonald's had been negligent by failing to warn its patron of the dangers of eating while driving. The case was a patent

attempt to extort a settlement from McDonald's by means of the threat of joint liability, but McDonald's prevailed only after 3 years of costly litigation.

Although not reflected in any damage award, the costs of these two cases should be attributed to the lure of joint liability because, absent that doctrine, the cases almost certainly would not have been brought.

Now, some may ask why we should reform a doctrine that has been around as long as joint liability. That is a fair question, but it has a ready answer.

Joint liability was designed for a fundamentally different body of law than that in place today. As Ms. Hicks explains, "the evolution of joint liability took place at a time when the contributory negligence of the plaintiff was a complete defense to any negligence action." But the vast majority of States have now abolished contributory negligence as a complete defense.

By failing to reform joint liability as well, we have moved, as Ms. Hicks explains, "from a situation where a wrongdoer compensated an innocent victim to one in which an actor responsible to a degree as minute as one percent * * * may, in fact, be confronted with paying the entire damage costs to a plaintiff who may have been considerably more responsible and in a far better position of cost avoidance than was he." Thus, Mr. President, joint liability reform is necessary to bring the doctrine into alignment with the reforms made to related, background principles of law.

S. 565 would reform joint liability in the product liability context by allowing it to be imposed for economic damages only, so that a defendant could be forced to pay for only his proportionate share of noneconomic damages. As a result, plaintiffs would be fully compensated for their out-of-pocket losses, while defendants would be better able to predict and verify the amount of damages they would be forced to pay. This reform thus would address the most pressing concerns of plaintiffs and defendants alike.

But this reform needs to be extended beyond the product liability context, because entities other than manufacturers and sellers are among those hardest hit by unreformed joint liability.

The impact of our current system on nonprofits and local governments, for example, is well-documented: Individual Little League Baseball leagues have seen their liability insurance premiums soar 1,000 percent over the past 5 years alone; the city of New York now pays out almost \$270 million in tort awards each year, which is double the amount of funding for city libraries; and well-grounded fears of liability thwart the recruitment efforts of volunteer organizations.

Extending this bill's joint liability reforms beyond the product liability context is also critical to the bill's

goals of enhancing economic growth and competitiveness.

Small businesses are the engine of that growth, generating 2 of every 3 new net jobs in our economy since the early 1970's. To a significant extent, however, small businesses are forced to direct their resources not to job creation, but to costs associated with lawsuits.

Liability insurance premiums paid by American businesses, for example, are now 20 to 50 times higher than those paid by foreign firms.

But the bill as currently written fails to pare these costs adequately because many if not most of the lawsuits involving small businesses do not concern product liability.

Instead, small businesses are routinely ensnared in suits for slip and fall, misconduct by employees, patrons, and the like. Since a majority of small business owners take home less than \$50,000 per year a determination of joint liability in even one such lawsuit can cripple a small business or force it to close its doors. To be serious about enhancing economic growth, we have to address that threat.

Mr. President, it is clear that the American people, men and women alike, demand joint liability reform. According to a recent poll conducted by the Luntz Research Co., 71 percent of Americans believe that joint liability reforms should be extended to all lawsuits, not just product liability cases.

In summary, Mr. President, we can no longer afford to overlook the heavy burden that unreformed joint liability imposes on our society. I say our society, rather than simply "defendants," because we all know that the costs of our current system are passed on to all of society, rich and poor alike, in the form of lost jobs, higher taxes, reduced community services, and rising prices. Without our amendment, we can address only a small fraction of those costs. With it, we can make a difference in the lives of all Americans.

Mr. President, I yield the floor.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. GORTON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GORTON. Mr. President, this is merely in the nature of an announcement to confirm what I had said earlier. At approximately 5:45 I will ask for regular order at the direction of the majority leader and move to table the Thompson amendment. And I am certain there will be a rollcall on that motion.

So I would urge Members who wish to speak to the Thompson amendment, or for that matter the Abraham and McConnell amendment, to do so. The

majority leader is working with the Democratic leader with respect to what will happen after that time and for tomorrow. But for the attention of all Members, at approximately 5:45 there will be a vote on the Thompson amendment.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. HEFLIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HEFLIN. Mr. President, I have just read a copy of the Abraham-McConnell-Kyl amendment. I would like to discuss some of the language that I find in here.

Basically it says: Notwithstanding any other section of this act, in any civil action whose subject matter affects commerce brought in a Federal or a State court on any theory that liability of each defendant for economic damages shall be several only and shall not be joined.

So this is a much broadening of the issue than what was in the underlying product liability bill. It says in any civil action whose subject matter affects commerce—it does not say "interstate commerce," it says "commerce"—brought under any theory. I want to include that in my discussions with Senator THOMPSON on what is a civil action. We concluded that any action which is not a criminal action is a civil action.

This in effect preempts State law. State laws have many aspects that affect noneconomic damages. Noneconomic damages are defined herein as meaning subjective nonmonetary damages resulting from harm, including pain, suffering, inconvenience, mental suffering, emotional distress, loss of society companionship, loss of consortium, injury to reputation, and humiliation. That would mean, for example, that all suits that we might be talking about that are nonmonetary, including libel, defamation, slander, etc.

If there is one or more publication by a writer or contributing writer, all of those, then under this amendment you would have to pick the percentage of harm or the percentage of fault on each defendant. It would also mean that in the punitive damages in calculating the Snowe amendment, which is now a part of the underlying bill, you would have to consider this. And you would have to pick out each defendant. There is also the provision that does not allow for you to introduce any evidence of punitive damage or wrongdoing in a case at chief.

So I gave the illustration this morning of the truck company that knows that the driver has had four drunk driving charges, two reckless driving charges, and, therefore, you could not

prove that evidence because that would be punitive as to the driver and as to the owner of the trucking company, and all that might be the owner of the trucking company, in calculating the damages. You would not be able to do it. It might well be that they say, "Well, the truck owner has just 5 percent of the damage," because the jury did not know anything about the fact that he had knowledge of those four convictions, and, therefore, it can affect it in a lot of different ways.

But I want to get also into what this includes. I just read it. I have not had time to do adequate research. But I do have questions, and I think they ought to be answered. Does this include noneconomic damages such as pain and suffering, or the emotional distress that could occur to an American with a disability or a State law that has certain disability acts? Does this apply to those States that have laws against sexual harassment? Sexual harassment is not a type of injury that you show in economic terms. It is a subjective damage that you have to evaluate. The discrimination cases that come up in employment, sometimes you may be able to prove monetary damages on that. But there are other elements of emotional distress, pain and suffering, and humiliation.

Then I also wonder what about anti-trust litigation under a State law? There are so many unanswered questions about how this would apply. You wonder to what extent it would go. This amendment particularly seems to be, as it was under the product liability underlying bill, directed toward the non-wage earner, the retired person, the elderly who are going to spend, hopefully, their days in their retirement, their sunset years in life with emotional peace and enjoyment. And yet they are deprived of that, and you have someone over here that you cannot even prove the gross negligence or the recklessness or the wanton conduct in a trial in chief in trying to calculate whatever the noneconomic damages might be.

The woman who is deprived of the right to bear children comes under noneconomic damages—whether or not it occurs from a product or whether it would occur from the automobile accident or any type of cause of action that might arise pertaining to this amendment.

This is a very broad, sweeping amendment that covers so many aspects of the tort laws of the States, and we have had, I suppose, no hearings on this, as far as I know. I do not know whether this amendment was ever the subject of a hearing beyond the scope of the underlying product liability bill. I would like to ask the distinguished chairman of the Commerce Committee, were there any hearings ever held outside of product liability as to the effect of eliminating joint and several liability for noneconomic damages for all civil actions?

Mr. HOLLINGS. On behalf of the distinguished chairman of the Commerce Committee, Senator PRESSLER, the answer is no.

Mr. HEFLIN. I still refer to the Senator as my chairman, but I realize that all of a sudden we have had change.

So no hearings have been held in regards to the sweep of this. I would like to also ask the ranking member, have any hearings been held as to the broad sweep and the encompassing aspects of all civil actions pertaining to punitive damages outside of the field of product liability?

Mr. HOLLINGS. No. What is particularly disturbing, in the accelerated hearings—I say accelerated—actual markup took place, when and even before, unbeknownst, I would say, to most members of the committee they added on the matter of rental cars, they added on the matter of component parts, and a lot of other things. And it has been like a sheep dog with the taste of blood, gobble up anything. Anything you can think of, put it on. We have had no hearings on any of this.

Mr. HEFLIN. In other words, we have an expansion to all civil actions on any theory as to changes in the area of punitive damages and the elimination of joint and several liability. And the amendment does not limit its application to interstate commerce. We as a deliberate body, the U.S. Senate, are going to attach our stamp of approval to language that has such a far-reaching, encompassing aspect without having a single witness or law professor or defense lawyer, or anybody to advise us as to its potential effect.

I do not know where and how it affects Americans under the Disabilities Act or a State law that has a disability act. I do not know how it affects—and from this one cannot tell—what it does pertaining to all of the various State laws dealing with the environment. There are some States that have had Superfund-type cleanup laws. What happens where there are numerous parties which might have contaminated the environment?

It certainly seems to me that these things ought to be subject to some hearings and some investigations rather than coming here without having really any great knowledge as to its ultimate impact.

Now, it seems to me that this matter of rendering a separate judgment against each defendant as to the amount to be determined, pursuant to the preceding sentence, which is that they be in direct proportion to the percentage of responsibility of the defendant.

Now, in a trial of a case where you might have 10, 15, or more defendants, there are really no standards, no real directions that are given as to how you, in effect, will determine the placing of damages, no real instructions or standards, or various criteria to be used.

There are just so many unanswered questions, it seems to me that the Senate ought to give certainly a lot of careful thought to this amendment before we move forward.

The overall concept in the past has been that the wrongdoers, if a judgment is obtained, do the apportionment of the damages amongst themselves. Some States have what they call contribution among joint tortfeasors. This has not been a real problem that I have heard of any great consequence—and I practiced law for 25 years—where there were those who really suffered as a result of joint tortfeasor action. There may be some illustrations and there may be some instances to be pointed out, but I think they would be rare, indeed. Of course, if a person does not have any money, and the person who is injured only has a judgment against somebody that does not have any money, he cannot collect. The injured party is left holding the bag. He is the one who is really suffering. In other words, what you are doing with this amendment is benefiting the wrongdoer.

Now, under the underlying bill, you also have this matter of determining the percentage of fault. You have the situation of the employer's responsibility, co-employee's responsibility, and in the underlying bill, which is designed and it seems to be for such an advantage, that the harm can be placed against a nonparty. He does not have to be a defendant. You come up with somebody. And there are a lot of people you cannot sue. They are in bankruptcy, and so therefore, if they are in bankruptcy they have no money. Everybody wants to put all the fault off on him, on the person that might be in bankruptcy. Sometimes you cannot get service on someone in order to file a suit. So there are all sorts of considerations that should given to the impact of this far reaching amendment.

This underlying bill, seemingly, in determining the fault of the employer and the co-employee, is designed to give a particular emphasis to that. And it has language in the bill which says the last issue that shall be presented to the jury is the issue of the amount of fault that falls on the co-employee or the employer.

So you, therefore, try to have that fresh in the minds of the jury rather than somebody being able to present the case in a manner which they consider to be the proper way to do it. It ends up that you are required to try to emphasize and put the emphasis on the employer's fault, the coemployee's fault. And in most States you cannot sue the coemployee, who cannot be a party to the lawsuit because the employer is protected by workmen's compensation and the coemployee is protected by workmen's compensation.

So, all of these things are involved in this amendment which to me raises many questions. It just seems to me that it is already faulted with the fact that we have got that in the underlying

bill. But to add it to all civil actions under any theory is grossly, in my judgment, unfair.

I yield the floor.

Mr. ABRAHAM addressed the Chair.

The PRESIDING OFFICER (Ms. SNOWE). The Senator from Michigan.

Mr. ABRAHAM. Thank you, Madam President.

I would like to try to answer several of the questions that were raised by the distinguished Senator from Alabama in his comments a moment ago. I was out of the Chamber for a minute, so I am trying to recapitulate all of his remarks. But I will go to the ones I think I understand.

One question that has been raised is the issue of whether the Senate has had an opportunity to consider some of the arguments that are involved in this effort to expand the underlying bill, the substitute bill, through such things as hearings and so on.

I would just say that I think there have been several efforts to do that. It is my understanding that in the Commerce Committee the notion of broadening legislation in that regard was discussed at least by one of the witnesses. A Mr. Ted Olson discussed the notion of broadening.

Also, obviously the principles of changing from the joint and several system that has preexisted were discussed in the context of the underlying bill itself. We discussed to some degree the same issues in a hearing that was held in the Judiciary Committee on punitive damages as well as in a subcommittee hearing that was conducted yesterday by Senator GRASSLEY on the cost of the legal system. To my knowledge, those are at least several venues in which these discussions have been the subject of hearings.

In addition, I guess I would just point out to the Chair that these are certainly not new issues. I believe the notion of reforming the legal system has been, as I understand it, at least before the Senate on previous occasions in various committees. So I think that we have had previous discussions as well.

Another point I want to address is the question that was raised as to whether the amendment we are proposing would apply to such things as the Civil Rights Act and so on. This amendment expressly does not alter or supersede Federal law. So in the case of any Federal law, whether it is the Civil Rights Act or others, I guess, that were referenced, I was out of the Chamber at that time, where provision for joint and several liability is provided, this amendment would not supersede. Those provisions would remain in place.

Let me just comment a little more broadly on some of the other points that were touched on by the Senator from Alabama in his remarks.

As far as noneconomic damages go, he, I think, did a very good job of outlining the broad definition of what constitutes noneconomic damages. And there is no intent on the part of our amendment to change that definition

or to confine in any way the types of noneconomic damages which people might be able to recover.

The purpose of our amendment is to say that, while you may recover noneconomic damages, you should only recover them from a defendant to the extent the defendant is responsible for those noneconomic damages. And in the sense that so many of the noneconomic damages that were referenced tend to be in areas that are very subjective in terms of calculation, very hard to discern, it strikes me at least to be a fundamental principle of fairness that we not hold defendants who are not responsible for the negligence involved for damages over which it is very difficult, if not impossible, to calculate. As a sense of fairness, I think the type of amendment we are offering is responsive.

I would close with one final thought. We heard, I thought, a good point made with respect to some of the people who could conceivably be plaintiffs in actions of this sort; references to the elderly who might be injured and be seeking a form of recovery and not be somehow able to because we assign damages on the basis of responsibility.

But it seems to me that it is equally possible that the type of elderly individual referenced by the Senator from Alabama could be a defendant—an elderly individual who has saved his or her entire life for his or her retirement, who has a certain amount of fixed assets unlikely to get greater because of the fact that they have stopped working, who, because of joint and several liability, finds themselves, unhappily, the deep pocket in some type of multiple defendant situation and, consequently, even though they have only participated in a small degree in terms of the responsibility for an injury, end up holding the bag for the entire amount of the injury because the other defendants, even though more blameworthy, are judgment proof.

In short, I think you can see it from both perspectives.

The notion of our amendment is to try to place responsibility for resolving noneconomic damages on the shoulders of those who are most responsible for the damages in the first place, on the basis of their apportioned share of negligence.

So, for those reasons, I think our amendment is a sensible expansion of the underlying legislation. As I said earlier, I strongly hope that Members of the Senate will support it.

Madam President, I yield the floor.

Mr. HEFLIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. HEFLIN. Madam President, I was interested in what the distinguished Senator from Michigan had to say, particularly with regard to the reversal of where he made the elderly individual the defendant.

Most elderly persons in our country over the years, at least, I think the biggest majority of them, believed in

having a home and buying a home and paying for their home by the time they reach retirement age. Most of them have what the insurance industry calls a homeowner's policy.

Now, how does that affect the illustration that he gave of the elderly defendant?

Practically every homeowner's policy has a provision known as the comprehensive liability provision. And those comprehensive liability provisions which insurance companies have sold over the years are indeed very comprehensive. I commend the insurance industry for the way they have sold these policies and their breadth. They cover pretty well any type of action that might be brought, unless it is specifically excluded.

The elderly individual probably in almost every case will have insurance to protect them from any liability that they might incur. Certainly, if they are driving an automobile, they carry insurance.

So I think the opportunity of saying the reversal—if you leave out the element of insurance—most of them are insured relative to this matter.

I just wanted to point that out in regard to this.

I have talked a lot about the Snowe amendment and severability and provisions on punitive damages in the underlying bill. Since Senator SNOWE is in the chair, it might be of interest to her, and I will recite it again.

Under the provisions of the underlying bill, if a person brings a suit and demands punitive damages, there is a provision that says if you demand it, either party can demand a separate hearing for punitive damages. I think that increases transaction costs, but that is not the point I want to bring here.

In that separate hearing, there is other language in the underlying bill which says that a party cannot introduce evidence of the conduct which would be admissible under a punitive damage trial, but in the suit for compensatory damages. So, therefore, a person who might be really, under several liability involved in this, 85 percent at fault but could not present the evidence of conduct which would constitute conduct recoverable under punitive damages in the trial in chief, you might have a situation where that person is 85 percent at fault really but because of this protection ends up with only about 5 percent in the noneconomic damage aspect of it.

So when you attempt to double that, you have a problem. That language pertaining to the fact that you cannot introduce in the compensatory damages part of a trial, the conduct of a defendant who is willful or conscious and flagrantly indifferent, but who could come under the punitive damage portion of a trial, prohibits such evidence from being introduced in the trial in chief. Therefore, the severability aspect of this comes into play, and it can well be that the defendant who is the

greatest at fault and, therefore, you would have the severability as it would apply to the noneconomic damages, would be, in effect, able to escape relative to these matters.

So it is something she might want to look into as this bill goes forward. I feel like there is a major problem that might be there. I just mention that again.

I think I will yield the floor at this time.

Mr. ABRAHAM addressed the Chair.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. ABRAHAM. Madam President, I just wanted to add a couple more points to my opening remarks on this amendment, because I think they elaborate a little more fully on some of the concerns I raised at that time.

As I mentioned in my comments, the need, in my judgment, for expanding the underlying substitute is based on my belief that there is a need to provide the same sort of protections to nonprofit organizations and civic organizations, and so on, that we are trying to provide to product manufacturers. I just wanted to enter into the RECORD a couple of examples that have been brought to my attention in recent days in the context of this debate.

The first is a case of a battered woman's shelter in Evanston, IL. A few years ago, the Junior League of Evanston sought to establish such a shelter. An exhaustive search of liability insurance coverage revealed that no insurance company would provide coverage until the shelter operated for 3 years without being sued. No one was willing to serve on the shelter board unless it had liability insurance. So the shelter was never established.

That is the kind of, I think, unhappy outcome which the current system with respect to joint and several liability has created.

A similar incident involving the Cincinnati Symphony Orchestra illuminates the problem as well. A situation occurred recently where traffic was backed up on the exit ramp leading to the Cincinnati Symphony Orchestra's facility prior to a recent performance. A drunk driver, speeding above posted limits, rear ended a car in the traffic jam injuring the driver of that car. The injured driver filed a lawsuit and made the orchestra a defendant only after learning that the drunk driver was uninsured. The owner of the land on which the facility was situated was also made a defendant.

The plaintiff argued that the orchestra and the landowner were negligent in allowing the traffic jam to occur. After litigating the case all the way through trial, the orchestra and landowner were found to be 20 percent at fault between them. However, through the application of joint liability, the orchestra and the landowner were made responsible for all the plaintiff's damages, even though, by any commonsense measure, they had done little or nothing to cause them.

This is really the principle that caused me to bring this amendment in to expand the underlying substitute, because I think we have instance after instance where these types of outcomes are produced and, as I said in my opening statement, they happen regardless of the extent to which the defendant may have tried to protect against injury. We know that no situation is without its risks. Nobody who operates a business can operate it risk free. They can and should have as much incentive as possible to minimize the risks that they create.

Under a joint/several liability approach, however, there is not as much incentive to limit risk because, as I stated in my earlier comments, no matter how successfully one insulates themselves, even to exclude certain risks and possibilities of liability from happening, they still may be found responsible and pay the entire damages involved in an injury simply because of joint and several liability.

I do not think that is the kind of incentive system we want, and I think that set of incentives ought to apply across the board. Therefore, I believe the expansion of the legislation through my amendment from the product area exclusively to other areas, as indicated in the amendment, is a sensible and wise addition to this bill.

Madam President, I yield the floor.

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. Madam President, once again, we are back now to the joint and several question with the Abraham amendment. I remember a few years ago this issue of competitiveness in Europe, for example, that they did not have this and we pointed out at that particular time, and I read again article V of the Directive of the Official Journal of the European Community:

Where, as a result of the provisions of this directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.

So if they get on to the matter of competitiveness, I wanted to answer that in the first question, because the trend for joint and several without competitors is just that. The United States gives overwhelmingly predominant treatment—and in fact they call it fair treatment with respect to economic loss. Let us not misunderstand here. They characterize in the majority report what is fair. They use that word—and you can use—in the majority language of the report of the committee.

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

Well, is that fair? It was on an initiative, Madam President—proposition 51. That State of California is as goofy as it can come. They had, I remember, proposition 13 on property tax and wrecked the State. They can sell anything out there, mostly. They get a lot of money and a lot of advertising and a lot of TV and get a temper up and everything else like that. So they are ruining a magnificent school system. You could not get a license to build down in the capital, in Pasadena and Sacramento. I remember many instances, from friends out there, that it never has been the same since. They removed property tax support for general government and rolled it back, and now they have gone to an 8 percent sales tax and they have gone to a special gas tax for highways and everything else, and they have been struggling ever since with multibillion dollar deficits. They call it fair, the California rule. It is not the usual rule in the several States of America. It is the unusual rule, in this Senator's opinion, the unfair one.

Why did we say that it is unfair? We go right to the idea as to economic loss. It should be joint and several. Now, that is a hypothesis; that is the premise of the amendment of the distinguished Senator from Michigan. He agrees that is sound. In fact, the majority of the committee agrees that is sound. In fact, the major sponsors, the Senators from West Virginia and Washington, the principal sponsors here of product liability, all agree that joint and several is sound and fair. But only for economic damages.

What they are really doing is savaging the women and family population, savaging the women and family population of our country. That crowd that came to town with the family bill got a contract, and they are going to build a family. The majority of women, thank heavens, are the builders of the family, producing the family, caring for the family, and all without a salary—noneconomic loss, all with no compensation, so no compensatory situation. The family. Everybody I know down in my backyard, they have the big movement, the religious right and everything else. But they all say, "I am for the family, the family, the family." But I can tell you here and now that they are gutting the family.

Let us see what Professor Finley said with respect to the distinctions between economic loss and noneconomic loss damages harming women:

Provisions that make distinctions between economic loss and noneconomic loss, favoring the former and disfavoring the latter, disadvantage women for several reasons. Noneconomic loss damages, which include compensation for loss of reproductive capacity, impairment of sexual function, harm to dignity and self-esteem, and emotional or psychic harm, are crucial category of damages for women, because many injuries that primarily or especially affect women are compensated largely, if at all, through noneconomic loss damages. For example, reproductive harm, including pregnancy loss, or

infertility, is compensated primarily through noneconomic loss damages, because the greatest impact of these sorts of injuries is not on the ability to earn a paycheck, but rather on the ability to be a whole, fully functional female. Sexual harassment, sexual assault, sexual improprieties by health care providers are also examples of injuries that have profound impacts but are compensated primarily through noneconomic loss damages.

Noneconomic loss damages are especially crucial to women in the area of drugs and medical devices. Unfortunately, far too many of the modern health and product liability disasters in the drug and device area involve products designed to be used in women's bodies, usually in connection with reproduction or sexuality: The anti-nausea drug thalidomide, which produced horrifying birth defects; the ineffective anti-miscarriage drug DES, which causes cervical cancer and infertility; the Dalkon Shield and Copper-7 IUDs, which caused sometimes fatal or sterilizing pelvic inflammatory disease and uterine perforations; silicone breast implants, which can cause debilitating autoimmune diseases and permanent disfigurement; the acne treatment drug Accutane, which if taken during the early stages of pregnancy causes serious birth defects; the drug Ritodine, which is prescribed to prevent premature labor, but has proven fatal to some women; the contraceptive Norplant, which is turning out to have serious side effects and to require expensive and dangerous invasive surgery to remove. The greatest extent of injuries caused by these products is to reproductive capacity, to the ability to bear a whole and healthy child, to intimacy and normal sexual functioning, to self esteem and dignity—all aspects of injury which are compensated by noneconomic loss damages. Studies also demonstrate that the prospect of liability can be a factor to encourage drug companies to more adequately include women in clinical trials of drugs and to perform more extensive testing of drugs and devices to be used in women's bodies.

If you go with this Abraham amendment, I can tell you here and now, you have cut off clinical trials of women in this drug field, because there is no loss there. They have written that off now as a care in this society—the family crowd that has come to town wanting a family bill, a family tax cut, and a family this and that, and they want to savage the family here with this joint and several prohibition, or noneconomic damages.

Going further with Professor Finley—and to make it absolutely clear, she is an outstanding professor. Lucinda M. Finley is her complete name. She says:

Noneconomic loss damages are also of particular importance to women because a growing body of empirical research demonstrates that women recover far less than men for economic loss damages, and it is primarily thanks to the noneconomic loss category that women's tort recoveries move closer to the average for men. Women recover less under the economic loss category because on the whole they earn less than men; because their household labor, while recognized, is valued very low; because economic loss damages are often calculated using tables that presume that women earn less and will stop work earlier; and because so many injuries that happen to women have low economic loss value and injure primarily in noneconomic ways.

These inequities in economic loss damages are also true for other social groups that earn little or less on average than white men: The elderly and retired, blacks, and Hispanics. Noneconomic loss damages can also make the tort recoveries of these economically less well off social groups more commensurate with what white men receive for similar injuries.

Indeed, the nonpecuniary loss aspects of damages may be even more crucial for the elderly person or for the poorly paid minority clerical or domestic worker, because they are less likely than high wage earners to have disability and health insurance, a pension plan, or investments that can provide a security net in the event of catastrophic injury.

For all these reasons, full recognition of noneconomic loss damages is of fundamental importance to ensuring that the tort system provides adequate compensation to women for reproductive and sexual harm, and to the elderly and lower paid or impoverished members of society.

Madam President, I think it is clear cut. I could go on. There is no question in my mind what the intent here is. Again, the manufacturers bill is not for consumers. We have to have Senators on the floor saying, "Oh, I am worried about the consumers." The manufacturers bill, again, limits their liability and limits their cost so they can make more money and safety can decline in the United States.

What do we do when we provide for that several proof in noneconomic loss and the degree thereof? I read again from Professor Finley:

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

Now, here is an initiative to simplify the uniformity for less bureaucracy, causing what? If they want to know why there are so many lawyers, I can say now, having tried cases, that is going to put another 2 days of trial on my case, and we will spend more time and there will be more dispute and there will be more bureaucracy and there will be more cost.

That is all in the name of, really, punishing the poor, the minority, the women in our society, particularly family members. I think it ought to be rejected out of hand. They do not reject it. They adopt it with the word "fair" for economic loss.

It is not 1 percent in economic loss who has only 1 percent contributing, we will say, to the wrongful act or in-

jury and the other 99 percent having gone bankrupt, and I only had 1 percent contribution to the particular verdict and finding of that jury. Yes, if it is only 1 percent for economic, then let the 1 percent pay the 100 percent. Let the 1 percent pay the 100 percent. They adopt that with the word "fair." They think that is fair, joint and several, for that. That is fair.

When it comes to the injuries for the women in our society, the aged in our society, the minorities in our society, the nonbreadwinners in our society, if they cannot prove economic loss, then what do they do? They list it out.

They want to make absolutely sure in that particular amendment—if I could find my copy of that Abraham amendment, they talk and they decide exactly what they do not want to pay for. They find, yes, joint and several for everything else, but the term "noneconomic damages" means "subjective, nonmonetary loss resulting from harm, including pain, including suffering, including inconvenience, including mental suffering, emotional distress, loss to society and companionship, loss of consortium, injury to reputation, and humiliation."

Throw all of that out under this amendment. Forget it. We will not be able to prove the several. And we have to start proving that while, at the same time, there has been proof by the greater weight of the preponderance of evidence that there has been wrongdoing and that there has been injury and the burden now is the injured party is to be injured further with the Abraham amendment. They are really putting the burden on here, and they come in the same breath and say, "We are interested in the injured parties—namely, consumers."

Now, if anybody believes that, well, I see we are getting around the time when we can vote and others want to speak, but I hope that Members will study this amendment very, very carefully and understand that it is not the California rule, like something is wonderful. I run in the other direction when I hear about the California rule.

If a person wants some liberal things happening and everything else of that kind, go to the State of California. I have many, many friends out there and they have a big time, but to bring this into rule of the United States of America and to reverse the majority State laws in our Nation and not to reverse it on joint and several for economic loss, which they term "fair" and sound but only for noneconomic loss, these particular people in our society, particularly families and those who produce and build the families and say that they are for families, they are caught off base on this. I hope they vote against their own amendment.

AMENDMENT NO. 681 TO AMENDMENT NO. 596
(Purpose: To make improvements concerning alternative dispute resolution)

Mr. KYL. Madam President, I am simply going to make a unanimous-

consent request. I ask unanimous consent to lay aside the pending amendment and offer an amendment, which I send to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Arizona [Mr. KYL] proposes an amendment numbered 681 to amendment No. 596.

The amendment is as follows:

In section 103, strike all after subsection (a) through the end of the section.

Mr. KYL. Madam President, just a moment to explain what this amendment is. I know we are getting close to the time to vote, and the Senator from Connecticut wishes to speak, as well.

This section 103 is titled "Alternative Dispute Resolution Procedures." It establishes that in a jurisdiction where an alternative dispute resolution procedure is provided for, that either the claimants or the defendant may utilize such procedure. That is point one. Of course, that does not change anything or add anything to existing law.

The second part of this provides how the procedure shall be utilized. Again, that adds nothing to the existing law.

The third part of section 103 establishes that if the defendant refuses to go along with or to accept the plaintiff's request and certain other conditions are satisfied, then the defendant shall be found liable for attorney's fees and costs. That is, in effect, the British rule, the loser pays. But there is no such provision for plaintiffs.

I thought this was merely an oversight. Obviously both parties to a litigation should be accorded the same rights under the rules of procedure. But it is not an oversight. I am told that certain Members of the body require this dichotomy in the rules in order to vote in favor of the bill.

Madam President, if that is what it takes we should not be doing it. This is grossly unfair. It would be an absolute and total departure from everything that our legal system stands for. All parties to litigation plead their cases, defend their cases, prosecute their cases under the same set of rules. We do not have rules that apply to one side but that do not apply to another; particularly where we are trying to avoid litigation in the first place by providing for alternative dispute resolution.

So, where a State has such a procedure we ought to be encouraging both parties to go through such a procedure. If there is to be a penalty attached, then that penalty should be the same for either party. If there is not, that is the business of the State jurisdiction. But the Federal Government should not be interceding and saying if a State has such a procedure it only applies to the defendant; plaintiff is under no obligation to go through with it if requested by the defendant.

So, Madam President, we will talk more about this tomorrow but I wanted

my colleagues to know that this gross unfairness does need to be corrected in the bill. It is a very simple amendment, but I will be asking my colleagues to support this amendment tomorrow.

I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. Madam President, I wanted to send an amendment to desk to get in line here. I ask unanimous consent to temporarily lay aside the pending amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 682 TO AMENDMENT NO. 596

(Purpose: To provide for product liability insurance reporting)

Mr. HOLLINGS. Madam President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from South Carolina [Mr. HOLLINGS] proposes an amendment numbered 682 to amendment No. 596.

Mr. HOLLINGS. Madam President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

SEC. . PRODUCT LIABILITY INSURANCE REPORTING.

(a) REPORT TO CONGRESS.—The Secretary of Commerce (hereafter in this section referred to as the "Secretary") shall provide to the Congress before June 30 of each year after the date of enactment of this Act a report analyzing the impact of this Act on insurers which issue product liability insurance either separately or in conjunction with other insurance; and on self-insurers, captive insurers, and risk retention groups.

(b) COLLECTION OF DATA.—To carry out the purposes of this section, the Secretary shall collect from each insurer all data considered necessary by the Secretary to present and analyze fully the impact of this Act on such insurers.

(c) REGULATIONS.—Within 120 days after the date of enactment of this Act, the Secretary shall issue such regulations as may be necessary to implement the purposes, and carry out the provisions, of this section. Such regulations shall be promulgated in accordance with section 553 of title 5, United States Code. Such regulations shall—

(1) require the reporting of information sufficiently comprehensive to make possible a full evaluation of the impact of this Act on such insurers;

(2) specify the information to be provided by such insurers and the format of such information, taking into account methods to minimize the paperwork and cost burdens on such insurers and the Federal Government; and

(3) provide, to the maximum extent practicable, that such information is obtained from existing sources, including, but not limited to, State insurance commissioners, recognized insurance statistical agencies, the Administrative Office of the United States Courts, and the National Center for State Courts.

(d) SUBPOENA.—The Secretary may subpoena witnesses and records related to the report required under this section from any place in the United States. If a witness disobeys such a subpoena, the Secretary may

petition any district court of the United States to enforce such subpoena. The court may punish a refusal to obey an order of the court to comply with such a subpoena as a contempt of court.

Mr. HOLLINGS. Madam President, this is simply the amendment we had on previous product liability bills. It was actually proposed by the distinguished colleague, Senator ROCKEFELLER from West Virginia. It has to do with product liability insurance reporting.

Not to delay the Senator from Washington or the Senator from Connecticut, both of whom I thank very much for yielding, I will debate it later on.

I yield the floor.

The PRESIDING OFFICER. The Senator from Washington.

AMENDMENT NO. 618 TO AMENDMENT NO. 596

Mr. GORTON. Madam President, I had earlier announced I would move to table the Thompson amendment at 5:45. I do see on the floor my distinguished colleague and cosponsor, the Senator from Connecticut, who has not spoken on any of these issues today.

I ask him if he would like to do so? I am going to certainly defer my motion to table.

Mr. LIEBERMAN. Madam President, replying to my friend and colleague from Washington, I would appreciate the opportunity to speak for just 4 or 5 minutes, if I may at this time, on the Thompson amendment.

Madam President, we have proceeded, now, for several days on the topic of product liability reform. Those of us who have sponsored the underlying bill, a bipartisan group, have argued that the current system of product liability litigation is costly, it is unfair, too much of the money put into the system goes to those who are operating it instead of the victims of actual negligence.

We have proceeded and brought several important issues to votes, not only on product liability but on the general topic of medical malpractice, punitive damages—a creative approach offered and accepted by more than 60 of our colleagues, by the occupant of the chair, the distinguished Senator from Maine.

I think we have a consistent pattern in which a majority of Members of the Chamber, of this Senate, have spoken in favor of reform, acknowledging that the status quo in the civil justice system, when it comes to tort law, is just not working as it should. It is not working in the interests of the American people. It is not working in the interests of the American consumer who is paying too much and getting too little. It is certainly not working in the interests of American business and American workers because it is denying us products. It is making us less competitive. It is denying employment opportunities. I say all of that as a preface to saying just a few brief words about the amendment offered by the

Senator from Tennessee, Mr. THOMPSON, joined also by Senators SIMON and COCHRAN.

With all respect to my three colleagues, the record will note that they have not been, generally speaking, among those who have voted for the reform effort, the tort reform effort. I would say, respectfully again, that a vote for this amendment will have the effect of making hollow the effort to achieve genuine product liability reform—genuine tort reform. It would make it hollow in taking unto itself the banner of federalism and States rights, as it were—but it does so in a way that is not true to the actual content of the bill before us and is not really true to federalism either.

The fact is, the underlying bill leaves almost all of the fundamental questions of liability still with the States but it acknowledges that this area of our law has national implications. It is a national problem and it requires a national solution. By restricting the impact of these reforms to the Federal courts, this amendment essentially eviscerates—it guts the bill. It will not any longer be true reform.

There are some who have described the underlying bill as too weak. We like to say it is moderate. It is balanced—I believe it is. It is the way it ought to go forward. But if this amendment is agreed to, there will be very little left and it will be much less than moderate.

Madam President, let me just say specifically that the impact of this amendment would be to enable attorneys, plaintiff's attorneys, to shop for appropriate jurisdictions in which to, even more than under the current law, file their suits in State courts. But more significant and perhaps a point that has not been mentioned enough, plaintiff's attorneys here will be motivated to immediately add resident defendants to the complaint so as to avoid removal to Federal court. Under current legal practice, under current law, any time there is a defendant in a suit from the same State as plaintiff, diversity of jurisdiction, which is a prerequisite to obtaining Federal court jurisdiction, is defeated. Thus, plaintiffs can easily control here whether Federal law will apply and can frustrate the attempt to finally, after 18 years of attempts in this Senate, in this Congress, to reform. They can frustrate that attempt. It also means that more people will be sued, more small businesses will be sued, that lawsuits will cost even more.

So we are trying to achieve a modest level of uniformity in the underlying amendment in an effort to reform the inequitable, costly, slow system we now have. The amendment offered by the Senator from Tennessee will doom any effort to achieve those moderate results, and, therefore, I strongly urge my colleagues, again a majority of whom have expressed their clear desire for reform, to be consistent with that expressed desire for reform and to vote

against the amendment offered by the Senator from Tennessee.

I thank the Chair and I yield the floor.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Madam President, almost 6 years ago the U.S. Supreme Court decision named *Erie Railroad versus Tompkins* did all it possibly could to consolidate and rationalize the law relating to actions brought or removed to Federal courts under diversity of jurisdiction by ruling that Federal courts were required to follow State law in such cases. So that it would cut back on forum shopping by lawyers who were looking for a more favorable law than within their own State by choosing between State or Federal courts.

For almost 60 years that has been the law and it has worked well. This bill is designed to reduce further the lack of uniformity, shopping among the various States.

The Thompson amendment instead of having 50 different jurisdictions and rules with respect to product liability litigation would result in 100 because the rule of the Federal court in Connecticut would be different from the rule in the State court in Connecticut. The rule in the Federal court in West Virginia would be different than the rule in the State court in West Virginia or Washington or Maine. So we would have more confusion, more forum shopping, and less uniformity.

That is why primarily the Thompson amendment should be defeated ending this debate.

Madam President, I ask for the regular order.

The PRESIDING OFFICER. The regular order is the amendment offered by the Senator from Tennessee.

Mr. GORTON. I move to table the Thompson amendment and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Washington to lay on the table the amendment of the Senator from Tennessee. On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. FORD. I announce that the Senator from Rhode Island [Mr. PELL] is necessarily absent.

The PRESIDING OFFICER (Mr. BENNETT). Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 58, nays 41, as follows:

[Rollcall Vote No. 147 Leg.]

YEAS—58

Abraham	Burns	Coverdell
Ashcroft	Campbell	Craig
Bennett	Chafee	DeWine
Bond	Coats	Dodd
Brown	Conrad	Dole

Domenici	Hutchison	Nickles
Dorgan	Inhofe	Nunn
Exon	Jeffords	Pressler
Faircloth	Kassebaum	Pryor
Feinstein	Kempthorne	Robb
Frist	Kohl	Rockefeller
Glenn	Kyl	Santorum
Gorton	Lieberman	Smith
Gramm	Lott	Snowe
Grams	Lugar	Stevens
Grassley	Mack	Thomas
Gregg	McCain	Thurmond
Hatch	McConnell	Warner
Hatfield	Mikulski	
Helms	Murkowski	

NAYS—41

Akaka	Feingold	Moseley-Braun
Baucus	Ford	Moynihan
Biden	Graham	Murray
Bingaman	Harkin	Packwood
Boxer	Hefflin	Reid
Bradley	Hollings	Roth
Breaux	Inouye	Sarbanes
Bryan	Johnston	Shelby
Bumpers	Kennedy	Simon
Byrd	Kerrey	Simpson
Cochran	Kerry	Specter
Cohen	Lautenberg	Thompson
D'Amato	Leahy	Wellstone
Daschle	Levin	

NOT VOTING—1

Pell

So the motion to lay on the table was agreed to.

Mr. GORTON. Mr. President, I move to reconsider the vote by which the motion was agreed to.

Mr. ROCKEFELLER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. GORTON. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. HEFLIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HEFLIN. Mr. President, I would like to address some of the underlying provisions in the product liability bill which I feel are unfair.

No. 1 is that in the definition of claimant and person, the language brings within the purview of this bill a Government entity. This means cities, counties, State Government, the Federal Government. The statute of repose could be very important as we look at the United States Army relative to damages it might suffer.

I think most of the vehicles in the Army we know are designed to last a long time—helicopters, NASA vehicles, and so forth. Why the proponents want to include a Government entity within the provisions of this statute raises a lot of questions to me.

Now they pretty well exempt rental cars, lease property from product liability. I gave an illustration earlier that you might have a situation in which a recall is sent by the manufacturer, but the rental car agency decides to continue to lease the car with knowledge that there are dangers that might be in the car. I just mention that.

Also, in the calculation of several damages in the bill itself and in the Abraham amendment, there is language to the effect that in the several liability and the percentage of harm, that it does not have to be a party to the lawsuit. Therefore, you have situations where there could be companies in bankruptcy where you could not get jurisdiction. And then you could have a situation where, in the absence of service, you could not bring it; or it could be that the statute of limitations has run before someone recognizes that part of it is not to the lawsuit, to get service on, relative to that matter. Under most workman's compensation laws, it not only means that you cannot bring a lawsuit against your employer, but also against coemployees. Yet, you have the right under this, whether party to a lawsuit or not—the jury would be obligated to set a percentage of the fault against that party. And that party would not be there to defend themselves. They would not want to become involved in a lawsuit. They are the only ones who really know their defenses and the amount of their responsibility pertaining to the fault that might occur. So, in effect, therefore, they would gang up against a party who was not a defendant in the lawsuit.

Then there is language in regard to misuse or alteration, which is a defense that reduces the damage. But, again, it is carefully worded for an advantage. It says, ". . . misuse or alteration by any person, regardless of whether they are a defendant in the lawsuit."

And then you have, in this bill, to show you how it is worded, in the lawsuit if you have several defendants and they are not parties—the employer and the employee cannot be made—in most instances, the coemployee cannot be made a party to a lawsuit and is protected because of workman's compensation. Then it says that the last issue to be tried in the lawsuit is the percentage of the fault that falls on the employer or the coemployee.

So they want it to be fresh in the minds of the jury as being the last issue that is tried. That is another slight advantage that they are always working in regard to this. The draftsmen of this are keen people who have represented defendants, and they are knowledgeable about defending lawsuits and are trying to get an advantage rather than trying to be fair to the injured party. And then it has the provision that you cannot settle without the insurance company or the workman's compensation agreement. If you want to settle for 75 cents on the dollar, the workman's compensation insurer will not let you do that because they want 100 percent. That is another example of the bill's unfairness.

Now, there are a lot of lawsuits on asbestos injury. It would apply to asbestos, except there is some provision pertaining to the statute of repose relative to asbestos, calling it a "toxic" matter.

The bill has a provision for businesses coming under the provisions of the Uniform Commercial Code regarding commercial loss, where businesses are therefore given an advantage. Well, under the uniform commercial code, it has generally, under warranties, a 4-year statute of limitations; whereas, under this bill, the injured worker has only 2 years in a statute of limitations. That is another advantage that is put in there for the benefit of the manufacturer.

Another aspect relates to implied warranty. The bill abolishes the concept of implied warranty as a cause of action. Implied warranty basically is a concept that says that the product is fit for the purpose for which it is sold. But under the language of the bill, there are several implied warranties. There is an implied warranty of merchantability, and other implied warranties are involved. Under this language, it allows the only warranty that you can, have a cause of action for or sue on is an express warranty.

So, therefore, all a seller of goods has to do, if he has knowledge of defects, is to keep his mouth shut. He just does not say anything. Under the normal law, if he says nothing, but he has knowledge, then the implied warranty could be found. But unless a seller expressly warrants a product, he is exempt from liability. Then there could be an instance in regard to the Uniform Commercial Code relative to privity of contract. You have to have privity of contract, actual contractual relations; it would be a limited effect where it would come into play, but it is still an advantage the bill's proponents are seeking.

I wanted to mention those. Of course, as the bill presently stands, the drug companies are almost completely immune from any lawsuit. Regarding pharmaceutical companies—drugs—there is just about an impossibility the way it is presently framed to recover against them. The biomaterial section is still one where they have written it in such a manner that it has language that is most unusual. They say that if a material comes in contact with bodily fluids or with tissue and remains for less than 30 days, less than 30 days could be 1 minute. It could be 5 minutes. When it talks about less than 30 days, it says that that comes in contact through a surgical opening.

What is a surgical opening? A surgical opening could be a needle that is stuck into you, a needle, a hypodermic device that goes in the body to draw blood or administer a drug or medicine. That is, in effect, a surgical opening. If it stays there 30 seconds, then it comes under the classification, the way this is written, of being an implant. And, therefore, if you are a component part of the implant under the biomaterials section that we have here, you have just about a complete immunity. The only way you could do it would be that you have to prove that the component part was not made by a different party

but was made by the manufacturer, or that the component part was made by the seller—component parts, many times, are made by many and different people—or that it was according to specifications. A lot of times, there are defects relative to specifications on these.

I point out that there are a lot more snakes, as I call them, involved in this. Every time you read it, you discover another one of these snakes wiggling in the grass. Each of them are big issues.

I think we have concentrated too much relative to punitive damages, because there are so many other issues involved in this that are just as big in taking away the rights of injured persons. I wanted to point those out. I thought some others would be on the floor but, as usual, some will leave before too long. Maybe I made a point in that regard.

I yield the floor.

Mr. HOLLINGS. Mr. President, I am afraid the distinguished Senator and myself are probably running them off the floor.

Mr. President, I have submitted an amendment which is presently at the desk. I understand from the managers of the bill that the intent now is to hear about these amendments this evening, and then in the morning, and it is up to the majority and minority leaders.

As they have told me about it thus far, perhaps around 12:15, we would start voting on three amendments: The amendment of the distinguished Senator from Michigan, Senator ABRAHAM; I think it is a second-degree amendment by the distinguished Senator from Arizona, Senator KYL; and my amendment.

With respect to my amendment, entitled Product Liability Insurance Reporting, it struck me at the time of the hearing, the official on behalf of the Government appeared, said that the National Governors' Association policies makes three major points about product liability. The first urges Congress to adopt a uniform product liability code; second, the Congress to assess and if necessary enhancing Federal consumer protection and product safety standards; third, calls for more effective oversight of the insurance industry. There is absolutely none.

In fact, the attempts over the years to try to determine anything at all about casualty carriers, their costs, their rates, their losses, the availability of insurance and otherwise, has been a tremendous problem at the Federal level because we have left it generally to the States.

Back 9 years ago in the hearings we were having at that time—because we only had cursory hearings on the bill this time—when we were having hearings in depth, it was a matter of unanimity out of our committee when Senators from Kentucky and West Virginia got together reaching a significant agreement.

I quote the Senator from West Virginia, Senator ROCKEFELLER, the primary cosponsor with Senator GORTON of Washington of this particular bill that we now have before the Senate:

The Senator from Kentucky and I have reached a significant agreement which I think achieves a significant goal in an eminently sensible manner. The amendment is before you and ensures for the first time that the Secretary of Commerce will collect—not “may collect” but “will collect”—comprehensive product liability insurance data which will be useful to us as policy makers at the Federal and State levels.

The amendment in effect makes it possible that should this issue be revisited, Congress will in fact have the facts before us. Okay. So what is in the amendment?

The amendment would require the Secretary of Commerce to report comprehensive information annually to the Congress on the effect of this product liability tort reform bill, should it pass, on those insurers, noninsurers, reinsurers, self-insurers, risk retention folks, who issue product liability insurance.

Now the Secretary of Commerce will collect data from these folks, and he can collect data from existing insurance statistical agencies. In other words, the bureaucracy factor is minimized. Mr. Chairman, because he can collect it from those who already produce it.

However, a key component of my agreement with the distinguished Senator from Kentucky provides that the committee report—and we crafted our language carefully here—will spell out for the Secretary what information is needed for comprehensive understanding of the issue. For example, insurers premiums and investment income, outlays, overhead, legal expenses, reserves, as well as claims paid as a result of settlement as opposed to claims paid as a result of adjudication.

Included in the report language will be a provision that the National Association of Insurance Commissioners has a set amount of time to work out an agreement with the Secretary of Commerce to require that insurers report data on claims paid out as a result of economic, noneconomic, and punitive damages. That has been an elusive factor, and that information in fact is not now available or at least it is not broken out. As a result of this amendment, it will be, and will be available to us.

I believe, Mr. Chairman, it is a good amendment. I believe it is a fair amendment. It is not the amendment which I had originally suggested, but I believe that it is a reasonable compromise that gets us the same information and in a reasonable manner.

Now, that was presented in the bill and accepted. Thereafter, year before last, when we had on the last occasion before the Senate product liability, that amendment, word for word, was presented and accepted. Presented by this Senator at that particular time as the chairman of the Commerce Committee and accepted by none other than the two distinguished leaders that we have, the cosponsors and managers of the bill, the distinguished Senator from West Virginia and the distinguished Senator from Washington.

My hope, of course, that the amendment was accepted, it would be accepted again. Perhaps we will have to vote on it. However, it would nonplus this particular Senator that here we have what the managers themselves have not only promulgated but what they

have accepted heretofore as a reasonable, proper, and necessary add on to the consideration of product liability and now rejected at this particular time. With that in mind, I yield the floor.

AMENDMENT NO. 599, AS MODIFIED, TO
AMENDMENT NO. 596

Mr. HATCH. Mr. President, I ask unanimous consent that the pending amendment be set aside to call up this amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HATCH. Mr. President, I ask unanimous consent that amendment numbered 599, as previously agreed to, be modified with the language which I now send to the desk.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment (No. 599), as modified, is as follows:

At the appropriate place, insert the following new section:

SEC. . REPRESENTATIONS AND SANCTIONS UNDER RULE 11 FEDERAL RULES OF CIVIL PROCEDURE.

(a) IN GENERAL.—Rule 11 of the Federal Rules of Civil Procedure is amended—

(1) in subsection (b)(3) by striking out “or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery” and inserting in lieu thereof “or are well grounded in fact”; and

(2) in subsection (c)—
(A) in the first sentence by striking out “may, subject to the conditions stated below,” and inserting in lieu thereof “may”;
(B) in paragraph (2) by striking out the first and second sentences and inserting in lieu thereof the following: “A sanction imposed for violation of this rule may consist of reasonable attorneys’ fees and other expenses incurred as a result of the violation, directives of a nonmonetary nature, or an order to pay penalty into court or to a party.”; and

(C) in paragraph (2)(A) by inserting before the period “, although such sanctions may be awarded against a party’s attorneys”.

(b) EFFECTIVE DATE.—The provisions of this section shall take effect 30 days after the date of the enactment of this Act.

Mr. HATCH. Mr. President, this amendment was offered by Senator BROWN and adopted by the Senate earlier this week. We have consulted with Senator BROWN and he has agreed to our modification.

Section (2)(A) of Senator BROWN’s amendment would make the imposition of sanctions for a violation of Federal Rule of Civil Procedure 11 mandatory. The current Federal rule gives Federal judges discretion to award sanctions if a violation has occurred. This amendment simply restores discretion to our Federal judges to award sanctions in the appropriate cases.

AMENDMENT NO. 683 TO AMENDMENT NO. 596

(Purpose: To revise the rules regarding claimants who are employees)

Mr. GORTON. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The pending amendments will be set aside and the clerk will report.

The legislative clerk read as follows:

The Senator from Washington [Mr. GORTON] proposes an amendment numbered 683 to amendment No. 596.

Mr. GORTON. I ask unanimous consent further reading be dispensed.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 2, strike lines 4 through 14 and insert the following:

(2) CLAIMANT’S BENEFITS.—The term “claimant’s benefits” means the amount paid to an employee as workers’ compensation benefits.

On page 25, line 15, strike “CONSENT” and insert “NOTIFICATION”.

On page 25, beginning with “subparagraph” on line 16 strike through line 25 and insert “subparagraph (C), an employee shall not make any settlement with or accept any payment from the manufacturer or product seller without written notification to the employer.”.

Mr. GORTON. Mr. President, this is a corrective amendment with respect to the subrogation provisions of the workmen’s compensation section. I have checked this out with the distinguished Senator from South Carolina. It is not controversial.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 683) was agreed to.

AMENDMENT NO. 684 TO AMENDMENT NO. 596

(Purpose: To modify the rented or leased products provision)

Mr. GORTON. Mr. President, I send another amendment to the desk for immediate consideration, and I ask the pending amendment be set aside.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Washington [Mr. GORTON], proposes an amendment numbered 684 to amendment No. 596.

Mr. GORTON. I ask unanimous consent further reading be dispensed.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 16, line 21, after “but” insert “any person engaged in the business of renting or leasing a product”.

Mr. GORTON. Mr. President, this falls under the same category, dealing with the definition of a rental.

I have checked it out with Senator HOLLINGS and it is acceptable and agreed to and not controversial.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 684) was agreed to.

ORDERS FOR THURSDAY, MAY 4,
1995

Mr. DOLE. Mr. President, I ask unanimous consent that the vote on or in relation to the Abraham amendment No. 600, occur at 12:15 on Thursday, May 4, followed by a vote on or in relation to the Kyl amendment No. 681, to