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1ST SESSION

H. R. 1910

To establish uniform product liability standards.

IN THE HOUSE OF REPRESENTATIVES

APRIL 28, 1993

Mr. ROWLAND (for himself, Mr. HASTERT, Mr. DINGELL, Mr. FISH, Mr. CARR, Mr. MOORHEAD, Mr. MURTHA, Mr. MICHEL, Mr. SHARP, Mr. GINGRICH, Mr. ROGERS, Mr. SWIFT, Mr. MCMILLAN, Mr. SLATTERY, Mr. STEARNS, Mr. MAZZOLI, Mr. HYDE, Mr. MOLLOHAN, Mr. PAXON, Mr. GLICKMAN, Mr. FRANK of Massachusetts, Mr. BLILEY, Mr. DURBIN, Mr. STENHOLM, Mr. UPTON, Mr. HEFNER, Mr. SISISKY, Mr. HUNTER, Mr. LEHMAN, Mr. GALLO, Mr. JACOBS, Mr. SUNDQUIST, Mr. MCKEON, Mr. PORTER, Mr. SOLOMON, and Mrs. MEYERS of Kansas) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Energy and Commerce

SEPTEMBER 7, 1993

Additional sponsors: Mr. MONTGOMERY, Mr. KOLBE, Mr. GREENWOOD, Ms. KAPTUR, Mr. MCCURDY, Mr. LINDER, Mr. MCNULTY, Mr. MACHTLEY, Mr. HOLDEN, Mr. BURTON of Indiana, Mrs. JOHNSON of Connecticut, Mr. BOEHLERT, Mr. HUTTO, Mr. GALLEGLY, Mr. MCHUGH, Mr. KLUG, Mr. EVERETT, Mr. WALSH, Mr. SHAYS, Mr. BEREUTER, Mr. SAXTON, Mr. HEFLEY, Mr. PENNY, Mr. HALL of Ohio, Mr. FRANKS of Connecticut, Mr. CRANE, Mr. FAWELL, Mr. ARCHER, Mr. HOEKSTRA, Mr. NEAL of Massachusetts, Mr. BARTON of Texas, Mr. OXLEY, Mr. EWING, Mr. BALLENGER, Mr. MCCRERY, Mr. STUMP, Mr. PETRI, Mr. KYL, Mr. GILLMOR, Mr. DOOLEY, Mr. BARLOW, Mr. BARCIA of Michigan, Mrs. ROUKEMA, Mr. PETERSON of Florida, Mr. GOODLING, Mr. PETERSON of Minnesota, Mr. GUNDERSON, Mr. DOOLITTLE, Mr. CAMP, Mr. BOEHNER, Mr. MILLER of Florida, Mr. TRAFICANT, Mr. HOUGHTON, Mr. HOKE, Mr. MCCOLLUM, Mr. INHOFE, Mr. ROHRABACHER, Mr. SPENCE, Mrs. VUCANOVICH, Mr. COLLINS of Georgia, Mr. LEWIS of Florida, Mr. MEEHAN, Mr. PORTMAN, Mr. EMERSON, Mrs. FOWLER, Mr. PARKER, Mr. ZIMMER, and Mr. BISHOP

A BILL

To establish uniform product liability standards.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Fairness in Product Liability Act of 1993''.

SEC. 2. PREEMPTION.

(a) GENERAL RULE.—This Act governs any product liability action brought in any State or Federal court against a manufacturer or product seller, on any theory, for harm caused by a product. A civil action brought against a manufacturer or product seller for commercial loss shall be governed only by applicable commercial or contract law.

(b) STATE LAW.—This Act supersedes State law only to the extent that State law applies to an issue covered by this Act. Any issue that is not covered by this Act shall be governed by otherwise applicable State or Federal law.

(c) CONSTRUCTION.—Nothing in this Act shall be construed to—

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

(2) supersede or affect any Federal law, except the Federal Employees Compensation Act and the

Longshoremen's and Harborworker's Compensation Act,

(3) waive or affect any defense of sovereign immunity asserted by the United States,

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

(5) 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, or

(6) supersede any statute or common law which creates a cause of action for civil damages or civil penalties, cleanup costs, injunctions, restitution, cost recovery, punitive damages, or any other form of relief for contamination or pollution of the environment or the threat of such contamination or pollution.

For purposes of paragraph (6), the term ''environment'' has the meaning given to such term in section 101(8) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(8)).

(d) VACCINE INJURY.—

(1) To the extent that title XXI of the Public Health Service Act establishes a Federal rule of law applicable to a civil action brought for a vaccine-related injury or death—

(A) this Act does not affect the application of the rule of law to such an action, and

(B) any rule of law prescribed by this Act in conflict with a rule of law of such title XXI shall not apply to such an action.

(2) If there is an aspect of a civil action brought for a vaccine-related injury or death to which a Federal rule of law under title XXI of the Public Health Service Act does not apply, then this Act or otherwise applicable law (as determined under this section) will apply to such aspect of such action.

SEC. 3. STANDARD OF PRODUCT SELLER LIABILITY.

(a) GENERAL RULE.—Except as provided in subsection (b), in a product liability action, a product seller shall be liable to a claimant for harm only if the claimant establishes that—

(1)(A) the product which allegedly caused the harm complained of was sold by the product seller, (B) the product seller failed to exercise reasonable care with respect to the product, and (C) such fail-

ure to exercise reasonable care was a proximate cause of the claimant's harm,

(2)(A) the product seller made an express warranty applicable to the product which allegedly caused the harm complained of, independent of any express warranty made by the manufacturer as to the same product, (B) the product failed to conform to the warranty, (C) the failure of the product to conform to the warranty caused the claimants harm, or

(3) the product seller engaged in international wrongdoing as determined under applicable State law and such intentional wrongdoing was a proximate cause of the harm complained of by the claimant.

For purposes of paragraph (1)(B), a product seller shall not be considered to have failed to exercise reasonable care with respect to a product based upon an alleged failure to inspect a product where there was no reasonable opportunity to inspect the product in a manner which would, in the exercise of reasonable care, have revealed the aspect of the product which allegedly caused the claimant's harm.

(b) SPECIAL RULE.—In a product liability action, a product seller shall be liable for harm to the claimant

caused by such product as if the product seller were the manufacturer of such product if—

(1) the manufacturer is not subject to service of process under the laws of the State in which the claimant brings the action, or

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

SEC. 4. ALCOHOL AND DRUG DEFENSE.

(a) GENERAL RULE.—In any product liability action, it shall be a complete defense to such action that—

(1) the claimant was intoxicated or was under the influence of intoxicating alcohol or any drug, and

(2) the claimant as a result of such intoxication or the influence of the alcohol or drug was more than 50 percent responsible for causing the accident or event which resulted in such claimant's harm.

(b) CONSTRUCTION.—For purposes of subsection (a)—

(1) the determination of whether a person was intoxicated or was under the influence of intoxicating alcohol or any drug shall be made pursuant to applicable State law, and

(2) the term ''drug'' means any controlled substance as defined in the Controlled Substances Act

(21 U.S.C. 802(6)) that has been taken by the claimant other than in accordance with the terms of a lawfully issued prescription.

SEC. 5. MISUSE OR ALTERATION.

(a) GENERAL RULE.—Except as provided in subsection (c), in a product liability action, the damages for which a manufacturer or product seller is otherwise liable under State law shall be reduced by the percentage of responsibility for the claimant's harm attributable to misuse or alteration of a product by any person if the manufacturer or product seller established by a preponderance of the evidence that such percentage of the claimant's harm was proximately caused by—

(1) a use or alteration of a product in violation of, or contrary to, the manufacturer's or product seller's express warnings or instructions if the warnings or instructions are adequate as determined pursuant to applicable State law, or

(2) a use or alteration of a product involving a risk of harm which was known or should have been known by the ordinary person who uses or consumes the product with the knowledge common to the class of persons who used or would be reasonably anticipated to use the product.

(b) STATE LAW.—Notwithstanding section 2(b) of this Act, subsection (a) supersedes State law concerning misuse of alteration of a product only to the extent that State law is inconsistent.

(c) WORKPLACE INJURY.—Notwithstanding subsection (a), the damage for which a manufacturer or product seller is otherwise liable under State law shall not be reduced by the percentage of responsibility for the claimant's harm attributable to misuse or alteration of the product by the claimant's employer or coemployees who is immune from suit by the claimant pursuant to the State law applicable to workplace injuries.

SEC. 6. PUNITIVE DAMAGES.

(a) GENERAL RULE.—

(1) STANDARD FOR AWARD OF DAMAGES.—Except as provided in paragraph (2) or subsection (d), punitive damages may, to the extent permitted by applicable State law, be awarded against a manufacturer or product seller in a product liability action if the claimant establishes by clear and convincing evidence that the harm suffered was the result of conduct manifesting a manufacturer's or product seller's conscious, flagrant indifference to the safety of those persons who might be harmed by a product.

(2) EXCEPTION.—

(A) REASONABLE CARE.—A failure to exercise reasonable care in selecting among alternative product designs, formulations, instructions, or warnings shall not, by itself, constitute conduct that may give rise to punitive damages.

(B) AWARD OF OTHER DAMAGES.—Punitive damages may not be awarded in a product liability action unless compensatory damages have been awarded in such action. For purposes of this subparagraph, nominal damages do not constitute compensatory damages.

(b) SEPARATE PROCEEDING.—At the request of the manufacturer or product seller, the trier of fact shall consider in a separate proceeding (1) whether punitive damages are to be awarded and the amount of such award, or (2) the amount of punitive damages following a determination of liability for such damages. If a separate proceeding is requested, evidence relevant only to the claim of punitive damages, as determined by applicable State law, shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded.

(c) CONSIDERATION.—In determining the amount of punitive damages, the trier of fact shall consider all relevant evidence, including—

(1) the severity of the harm caused by the conduct of the manufacturer or product seller,

(2) the duration of the conduct or any concealment of it by the manufacturer or product seller,

(3) the profitability of the conduct to the manufacturer or product seller,

(4) the number of products sold by the manufacturer or product seller of the kind causing the harm complained of by the claimant,

(5) awards of punitive or exemplary damages to persons similarly situated to the claimant,

(6) prospective awards of compensatory damages to persons similarly situated to the claimant,

(7) any criminal penalties imposed on the manufacturer or product seller as a result of the conduct complained of by the claimant,

(8) the amount of any civil and administrative fines and penalties assessed against the defendant as a result of the conduct complained of by the claimant, and

(9) whether the foregoing considerations have been presented in any prior proceeding involving that manufacturer or product seller.

(d) DRUGS AND DEVICES.—

(1)(A) Punitive damages shall not be awarded against a manufacturer or product seller of a drug (as defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)) or medical device (as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. (h)) which caused the claimant's harm where—

(i) such drug or device was subject to premarket approval by the Food and Drug Administration with respect to the safety of the formulation or performance of the aspect of such drug or device which caused the claimant's harm or the adequacy of the packaging or labeling of such drug or device, and such drug was approved by the Food and Drug Administration; or

(ii) the drug is generally recognized as safe and effective pursuant to conditions established by the Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

(B) Subparagraphs (A) shall not apply in any case in which the defendant, before or after premarket approval of a drug or device—

(i) intentionally and wrongfully withheld from or misrepresented to the Food and Drug Administration information concerning such drug or device required to be submitted under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) or section 351 of the Public Health Service Act (42 U.S.C. 262) that is material and relevant to the harm suffered by the claimant, or

(ii) made an illegal payment to an official or employee of the Food and Drug Administration for the purpose of securing or maintaining approval of such drug or device.

(2) PACKAGING.—In a product liability action for harm which is alleged to relate to the adequacy of the packaging (or labeling relating to such packaging) of a drug which is required to have tamper-resistant packaging under regulations of the Secretary of Health and Human Services (including labeling regulations related to such packaging), the manufacturer of the drug shall not be held liable for punitive damages unless the drug is found by the court by clear and convincing evidence to be substantially out of compliance with such regulations.

SEC. 7. SEVERAL LIABILITY FOR NONECONOMIC DAMAGES.

(a) GENERAL RULE.—If a manufacturer or product seller is found liable in a product liability action, the liability of each defendant in the lawsuit shall be several only and shall not be joint for noneconomic damages. Each defendant shall be liable only for the amount of noneconomic damages allocated to such defendant in direct proportion to such defendant's percentage of responsibility as determined under subsection (b) of this section. A separate judgment shall be rendered against such defendant for that amount.

(b) TRIER OF FACT.—For purposes of this section, the trier of fact shall determine the proportion of responsibility of each party for the claimant's harm.

(c) NONECONOMIC DAMAGES.—As used in this section, the term ''noneconomic damages'' means subjective, nonmonetary losses including pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, but does not include objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, rehabilitation and training expenses, loss of employment, or loss of business or employment opportunities.

SEC. 8. TIME LIMITATIONS ON LIABILITY.

(a) STATUTE OF LIMITATIONS.—A product liability action shall be brought within 2 years after the time the individual who would be the claimant in such action discovered, or in the exercise of reasonable diligence should have discovered, the harm and its cause, except that any such action of a person under legal disability may be filed within 2 years after the disability ceases. If the commencement of such an action is stayed or enjoined, the running of the statute of limitations under this section shall be suspended for the period of the stay or injunction.

(b) STATUTE OF REPOSE FOR CAPITAL GOODS.—A product liability action for harm caused by a product which is a capital good shall be barred unless the complaint is served and filed within 25 years of the date of delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product. This subsection shall apply only if—

(1) the court determines that the claimant has received or would be eligible to receive compensation under any State or Federal worker's compensation law for harm caused by the product, and

(2) the harm caused by the product did not include chronic illness.

SEC. 9. WORKERS' COMPENSATION OFFSET.

(a) GENERAL RULE.—

(1) SUBROGATION.—If a product liability action has been brought pursuant to this Act for harm caused to an employee by a product, the employer of such employee or the workers' compensation insurer of such employer shall have a right of subrogation against the manufacturer of such product or the product seller to recover the sum of the amount of workers' compensation benefits to which such employee is or would be entitled as determined by the appropriate workers' compensation authority. To assert such a right of subrogation, an employer or workers' compensation insurer of an employer shall provide written notice that it is asserting a right of subrogation to the court in which such product liability action has been brought. The employer or workers' compensation insurer of such employer shall not be required to be a necessary and proper party to such product liability action.

(2) RIGHT OF SUBROGATION AGAINST A PAYMENT.—In any product liability action brought by an employee against a manufacturer of a product or a product seller or in any settlement of such an action, the employer of such employee or the workers' compensation insurer of such employer shall have an

opportunity to participate in such action and to assert a right of subrogation upon any payment made by such manufacturer or product seller in satisfaction of a judgment in such action, in connection with a settlement of such action, as consideration for a covenant not to sue, or otherwise. Such employee shall not make any settlement of such an action with, or accept any payment from, such manufacturer or product seller without the written consent of such employee's employer. No release to or agreement with such manufacturer or product seller made by such employee shall be valid or enforceable for any purpose without such consent unless such employer or workers' compensation insurer of such employer is made whole for all workers' compensation benefits paid to such employee.

(3) CLAIMANT'S HARM.—In a product liability action brought for harm from a product by an employee, the manufacturer of such product or a product seller may allege to the trier of fact that the claimant's harm was caused by the fault of the claimant's employer or a coemployee of the claimant. If the manufacturer of a product or a product seller makes such an allegation, the manufacturer or product seller shall provide written notice to the em-

ployer involved in such allegation. Such employer shall have the right to appear in such product liability action, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the trier of fact on such allegation as though such employer were a party to such product liability action. The issue of the cause of the claimant's harm shall be the last issue submitted to the trier of fact in such product liability action. If the trier of fact finds by clear and convincing evidence that the claimant's harm was caused by the fault of the claimant's employer or a coemployee of such claimant, the court shall reduce the damages awarded against such manufacturer or product seller and, except as provided in the last sentence, correspondingly the subrogation lien of such employer by the sum of the amount paid as workers' compensation benefits to such employee and the present value of all workers' compensation benefits to which such employee is or would be entitled for such harm as determined by the appropriate workers' compensation authority. Such manufacturer or product seller shall have no further right, by way of contribution or otherwise, against such employer with respect to such harm. Such employer shall not lose its right of sub-

rogation if the employee's harm was the result of an intentional tort committed against the claimant by a coemployee of the claimant or for acts committed by such coemployee outside the scope of normal work practices.

(4) REIMBURSEMENT.—If in a product liability action brought by an employee for harm from a product the judgment is that the claimant's harm was not caused by the fault of the claimant's employer or a coemployee of the claimant, the manufacturer of such product or product seller shall reimburse such employer or workers' compensation insurer of such employer for reasonable attorney's fees and court costs, as determined by the court, incurred in the resolution of the subrogation claim.

(b) THIRD PARTY TORTFEASOR.—In any product liability action brought by an employee in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, no third party tortfeasor may maintain any action for implied indemnity or contribution against such employee's employer, any coemployee of such employee, or the exclusive representative of such employee.

(c) CONSTRUCTION.—Nothing in this Act shall be construed to affect any provision of a State or Federal workers' compensation law—

(1) which prohibits—

(A) a person who is or would have been entitled to receive compensation under such law, or

(B) any other person whose claim for benefits under such law would have been derivative from the claim of the person described in subparagraph (A),

from recovering for harm caused by a product in any product liability action other than a workers' compensation claim against a present or former employer or workers' compensation insurer of such an employer, any coemployee, or the exclusive representative of the person who is injured, or

(2) which permits recovery based on a claim of an intentional tort by an employer or any coemployee if the claimant's harm was caused by such a tort.

(d) STAY PENDING COMPENSATION DETERMINATION.—In any product liability action brought by an employee in which damages are sought for harm for which the person injured is or would have been entitled to receive

compensation under any State or Federal workers' compensation law, such action shall, on application of the claimant made at the claimant's sole election, be stayed until such time as the full amount payable as workers' compensation benefits has been finally determined under such workers' compensation law. If the claimant elects to bring a product liability action and not stay the claimant's action until the full amount of such benefits has been finally determined by the appropriate workers' compensation authority, the court shall determine the amount of workers' compensation benefits that has been or would be payable if the amount had been determined by such an authority.

(e) EFFECT OF VERDICT.—The verdict of any court in a product liability action shall not be used as evidence in any proceeding relating to workers' compensation.

(f) WRITTEN NOTICE.—A claimant in a product liability action who is or may be eligible to receive compensation under any State or Federal workers' compensation law shall provide written notice of the filing of the product liability action to the claimant's employer within 30 days of such filing. The written notice shall include information regarding the date and court in which the product liability action was filed, the names and addresses of all plaintiffs and defendants appearing on the com-

plaint, the court docket number if available, and a copy of the complaint which was filed in the product liability action.

SEC. 10. FEDERAL CAUSE OF ACTION PRECLUDED.

The district courts of the United States shall not have jurisdiction under section 1331 or 1337 of title 28, United States Code, over any civil action arising under this Act.

SEC. 11. DEFINITIONS.

As used in this Act—

(1) the term ''capital good''—

(A) means any product, or any component of such product, which is of a character subject to allowance for depreciation under the Internal Revenue Code of 1986 and is—

(i) used in a trade or business,

(ii) held for the production of income, or

(iii) sold, leased, or donated to a governmental or private entity for the production of goods for training, for demonstration, or other similar purposes, and

(B) does not mean a motor vehicle, vessel, aircraft, or railroad car used primarily to transport passengers for hire,

(2) the term ''claimant'' means any person who brings a product liability action and any person on whose behalf such an action is brought, including such person's decedent if such an action is brought through or on behalf of an estate or such person's legal representative if it is brought through or on behalf of a minor or incompetent,

(3) with respect to a civil action brought against a manufacturer or product seller of a product the term ''commercial loss'' means loss, including damage to the product itself, which is not harm described in clause (i) or (ii) or paragraph (4)(A) and is of a kind for which there is a remedy under applicable contract or commercial law,

(4) the term ''harm''—

(A) means—

(i) personal physical illness, injury, or death of the claimant,

(ii) mental anguish or emotional harm of the claimant caused by or causing the claimant personal physical illness or injury, or

(iii) physical damage to property other than the product itself,

caused by a product, and

(B) does not include commercial loss,

(5) with respect to a product, the term ''manufacturer'' means—

(A) any person who is engaged in a business to produce, create, make, or construct the product and who designs or formulates the product or has engaged another person to design or formulate the product,

(B) a product seller of the product who, before placing the product in the stream of commerce—

(i) designs or formulates or has engaged another person to design or formulate an aspect of the product after the product was initially made by another, and

(ii) produces, creates, makes, or constructs such aspect of the product, or

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

(6) the term ''product''—

(A) means any object, substance, mixture, or raw material in a gaseous, liquid, or solid state—

(i) which is capable of delivery itself, in a mixed or combined state, or as a component part or ingredient,

(ii) which is produced for introduction into trade or commerce,

(iii) which has intrinsic economic value, and

(iv) which is intended for sale or lease to persons for commercial or personal use, and

(B) does not include—

(i) human tissue, human organs, human blood, and human blood products, or

(ii) electricity, water delivered by a utility, natural gas, or steam,

(7) the term ''product liability action'' means a civil action brought against a manufacturer or product seller, on any theory, for harm caused by a product,

(8) with respect to a product, the term ''product seller''—

(A) means a person—

(i) who sells, distributes, leases, prepares, blends, packages, or labels a product

or is otherwise involved in placing a product in the stream of commerce, or

(ii) who installs, repairs, or maintains the harm-causing aspect of a product, and

(B) does not include—

(i) a manufacturer as defined in paragraph (5) of this section,

(ii) a seller or lessor of real property,

(iii) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services,

(iv) any person who acts only in a financial capacity with respect to the sale of a product, or

(v) any person who leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor, and

(9) the term ''State'' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Is-

lands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States, or any political subdivision thereof.

SEC. 12. EFFECTIVE DATE.

This Act shall apply with respect to product liability actions which are commenced after the date of the enactment of this Act.

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