

104TH CONGRESS
1ST SESSION

S. 565

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

IN THE SENATE OF THE UNITED STATES

MARCH 15, 1995

Mr. ROCKEFELLER (for himself, Mr. GORTON, Mr. McCONNELL, Mr. LIEBERMAN, Mr. DODD, Mr. PRESSLER, Mr. HATCH, Mr. EXON, Mr. INHOFE, Mrs. HUTCHISON, and Mr. CHAFEE) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

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

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Product Liability Fair-
5 ness Act of 1995”.

6 **SEC. 2. DEFINITIONS.**

7 For purposes of this Act, the following definitions
8 shall apply:

1 (1) CLAIMANT.—The term “claimant” means
2 any person who brings a product liability action and
3 any person on whose behalf such an action is
4 brought. If an action is brought through or on be-
5 half of—

6 (A) an estate, the term includes the dece-
7 dent; or

8 (B) a minor or incompetent, the term in-
9 cludes the legal guardian of the minor or in-
10 competent.

11 (2) CLAIMANT’S BENEFITS.—The term “claim-
12 ant’s benefits” means an amount equal to the sum
13 of—

14 (A) the amount paid to an employee as
15 workers’ compensation benefits; and

16 (B) the present value of all workers’ com-
17 pensation benefits to which the employee is or
18 would be entitled at the time of the determina-
19 tion of the claimant’s benefits, as determined by
20 the appropriate workers’ compensation author-
21 ity for harm caused to an employee by a prod-
22 uct.

23 (3) CLEAR AND CONVINCING EVIDENCE.—

24 (A) IN GENERAL.—Subject to subpara-
25 graph (A), the term “clear and convincing evi-

1 dence” is that measure of degree of proof that
2 will produce in the mind of the trier of fact a
3 firm belief or conviction as to the truth of the
4 allegations sought to be established.

5 (B) DEGREE OF PROOF.—The degree of
6 proof required to satisfy the standard of clear
7 and convincing evidence shall be—

8 (i) greater than the degree of proof
9 required to meet the standard of prepon-
10 derance of the evidence; and

11 (ii) less than the degree of proof re-
12 quired to meet the standard of proof be-
13 yond a reasonable doubt.

14 (4) COMMERCIAL LOSS.—The term “commercial
15 loss” means any loss incurred in the course of an
16 ongoing business enterprise consisting of providing
17 goods or services for compensation.

18 (5) DURABLE GOOD.—The term “durable good”
19 means any product, or any component of any such
20 product, which has a normal life expectancy of 3 or
21 more years or is of a character subject to allowance
22 for depreciation under the Internal Revenue Code of
23 1986, and which is—

24 (A) used in a trade or business;

25 (B) held for the production of income; or

1 (C) sold or donated to a governmental or
2 private entity for the production of goods, train-
3 ing, demonstration, or any other similar pur-
4 pose.

5 (6) ECONOMIC LOSS.—The term “economic
6 loss” means any pecuniary loss resulting from harm
7 (including any medical expense loss, work loss, re-
8 placement services loss, loss due to death, burial
9 costs, and loss of business or employment opportuni-
10 ties), to the extent that recovery for the loss is per-
11 mitted under applicable State law.

12 (7) HARM.—The term “harm” means any phys-
13 ical injury, illness, disease, or death caused by a
14 product. The term does not include commercial loss
15 or loss or damage to a product itself.

16 (8) INSURER.—The term “insurer” means the
17 employer of a claimant, if the employer is self-in-
18 sured, or the workers’ compensation insurer of an
19 employer.

20 (9) MANUFACTURER.—The term “manufac-
21 turer” means—

22 (A) any person who is engaged in a busi-
23 ness to produce, create, make, or construct any
24 product (or component part of a product), and
25 who designs or formulates the product (or com-

1 ponent part of the product), or has engaged an-
2 other person to design or formulate the product
3 (or component part of the product);

4 (B) a product seller, but only with respect
5 to those aspects of a product (or component
6 part of a product) which are created or affected
7 when, before placing the product in the stream
8 of commerce, the product seller produces, cre-
9 ates, makes, constructs, designs, or formulates,
10 or has engaged another person to design or for-
11 mulate, an aspect of a product (or component
12 part of a product) made by another person; or

13 (C) any product seller that is not described
14 in subparagraph (B) that holds itself out as a
15 manufacturer to the user of the product.

16 (10) NONECONOMIC LOSS.—The term “non-
17 economic loss”—

18 (A) means subjective, nonmonetary loss re-
19 sulting from harm, including pain, suffering, in-
20 convenience, mental suffering, emotional dis-
21 tress, loss of society and companionship, loss of
22 consortium, injury to reputation, and humilia-
23 tion; and

24 (B) does not include economic loss.

1 (11) PERSON.—The term “person” means any
2 individual, corporation, company, association, firm,
3 partnership, society, joint stock company, or any
4 other entity (including any governmental entity).

5 (12) PRODUCT.—

6 (A) IN GENERAL.—The term “product”
7 means any object, substance, mixture, or raw
8 material in a gaseous, liquid, or solid state
9 that—

10 (i) is capable of delivery itself or as an
11 assembled whole, in a mixed or combined
12 state, or as a component part or ingredi-
13 ent;

14 (ii) is produced for introduction into
15 trade or commerce;

16 (iii) has intrinsic economic value; and

17 (iv) is intended for sale or lease to
18 persons for commercial or personal use.

19 (B) EXCLUSION.—The term “product”
20 does not include—

21 (i) tissue, organs, blood, and blood
22 products used for therapeutic or medical
23 purposes, except to the extent that such
24 tissue, organs, blood, and blood products
25 (or the provision thereof) are subject,

1 under applicable State law, to a standard
2 of liability other than negligence; and

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

5 (13) PRODUCT LIABILITY ACTION.—The term
6 “product liability action” means a civil action
7 brought on any theory for harm caused by a prod-
8 uct.

9 (14) PRODUCT SELLER.—

10 (A) IN GENERAL.—The term “product sell-
11 er” means a person who—

12 (i) in the course of a business con-
13 ducted for that purpose, sells, distributes,
14 leases, prepares, blends, packages, labels,
15 or otherwise is involved in placing a prod-
16 uct in the stream of commerce; or

17 (ii) installs, repairs, or maintains the
18 harm-causing aspect of the product.

19 (B) EXCLUSION.—The term “product sell-
20 er” does not include—

21 (i) a seller or lessor of real property;

22 (ii) a provider of professional services
23 in any case in which the sale or use of a
24 product is incidental to the transaction and

1 the essence of the transaction is the fur-
2 nishing of judgment, skill, or services; or

3 (iii) any person who—

4 (I) acts in only a financial capac-
5 ity with respect to the sale of a prod-
6 uct; and

7 (II) leases a product under a
8 lease arrangement in which the selec-
9 tion, possession, maintenance, and op-
10 eration of the product are controlled
11 by a person other than the lessor.

12 (15) STATE.—The term “State” means each of
13 the several States of the United States, the District
14 of Columbia, the Commonwealth of Puerto Rico, the
15 Virgin Islands, Guam, American Samoa, and the
16 Commonwealth of the Northern Mariana Islands,
17 and any other territory or possession of the United
18 States, or any political subdivision thereof.

19 (16) TIME OF DELIVERY.—The term “time of
20 delivery” means the time when a product is delivered
21 to the first purchaser or lessee of the product that
22 was not involved in manufacturing or selling the
23 product, or using the product as a component part
24 of another product to be sold.

1 **SEC. 3. APPLICABILITY; PREEMPTION.**

2 (a) APPLICABILITY.—

3 (1) ACTIONS COVERED.—Subject to paragraph
4 (2), this Act applies to any product liability action
5 commenced on or after the date of enactment of this
6 Act, without regard to whether the harm that is the
7 subject of the action or the conduct that caused the
8 harm occurred before such date of enactment.

9 (2) ACTIONS EXCLUDED.—

10 (A) ACTIONS FOR DAMAGE TO PRODUCT
11 OR COMMERCIAL LOSS.—A civil action brought
12 for loss or damage to a product itself or for
13 commercial loss, shall not be subject to the pro-
14 visions of this Act governing product liability
15 actions, but shall be subject to any applicable
16 commercial or contract law.

17 (B) ACTIONS FOR NEGLIGENT ENTRUST-
18 MENT.—A civil action for negligent entrustment
19 shall not be subject to the provisions of this Act
20 governing product liability actions, but shall be
21 subject to any applicable State law.

22 (b) SCOPE OF PREEMPTION.—

23 (1) IN GENERAL.—This Act supersedes a State
24 law only to the extent that State law applies to an
25 issue covered under this Act.

1 (2) ISSUES NOT COVERED UNDER THIS ACT.—

2 Any issue that is not covered under this Act, includ-
3 ing any standard of liability applicable to a manu-
4 facturer, shall not be subject to this Act, but shall
5 be subject to applicable Federal or State law.

6 (c) STATUTORY CONSTRUCTION.—Nothing in this
7 Act may be construed to—

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

10 (2) supersede any Federal law, except the Act
11 of April 22, 1908 (35 Stat. 65 et seq., chapter 149;
12 45 U.S.C. 51 et seq.) (commonly known as the
13 “Federal Employers’ Liability Act”) and the
14 Longshore and Harbor Workers’ Compensation Act
15 (33 U.S.C. 901 et seq.);

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

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

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

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

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

3 (7) supersede any statutory or common law, in-
4 cluding any law providing for an action to abate a
5 nuisance, that authorizes a State or person to insti-
6 tute an action for civil damages or civil penalties,
7 cleanup costs, injunctions, restitution, cost recovery,
8 punitive damages, or any other form of relief relat-
9 ing to contamination or pollution of the environment
10 (as defined in section 101(8) of the Comprehensive
11 Environmental Response, Compensation, and Liabil-
12 ity Act of 1980, 42 U.S.C. 9601(8)) or the threat
13 of such contamination or pollution.

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

17 (e) EFFECT OF COURT OF APPEALS DECISIONS.—
18 Notwithstanding any other provision of law, any decision
19 of a circuit court of appeals interpreting a provision of
20 this Act (except to the extent that the decision is overruled
21 or otherwise modified by the Supreme Court) shall be con-
22 sidered a controlling precedent with respect to any subse-
23 quent decision made concerning the interpretation of such
24 provision by any Federal or State court within the geo-

1 graphical boundaries of the area under the jurisdiction of
2 the circuit court of appeals.

3 **SEC. 4. ALTERNATIVE DISPUTE RESOLUTION PROCE-**
4 **DURES.**

5 (a) IN GENERAL.—

6 (1) SERVICE OF OFFER.—A claimant or a de-
7 fendant in a product liability action that is subject
8 to this Act may, not later than 60 days after the
9 service of the initial complaint of the claimant or the
10 applicable deadline for a responsive pleading (which-
11 ever is later), serve upon an adverse party an offer
12 to proceed pursuant to any voluntary, nonbinding al-
13 ternative dispute resolution procedure established or
14 recognized under the law of the State in which the
15 product liability action is brought or under the rules
16 of the court in which such action is maintained.

17 (2) WRITTEN NOTICE OF ACCEPTANCE OR RE-
18 JECTION.—Except as provided in paragraph (3), not
19 later than 10 days after the service of an offer to
20 proceed under paragraph (1), an offeree shall file a
21 written notice of acceptance or rejection of the offer.

22 (3) EXTENSION.—The court may, upon motion
23 by an offeree made prior to the expiration of the 10-
24 day period specified in paragraph (2), extend the pe-
25 riod for filing a written notice under such paragraph

1 for a period of not more than 60 days after the date
2 of expiration of the period specified in paragraph
3 (2). Discovery may be permitted during such period.

4 (b) DEFENDANT'S PENALTY FOR UNREASONABLE
5 REFUSAL.—

6 (1) IN GENERAL.—The court shall assess rea-
7 sonable attorney's fees (calculated in accordance
8 with paragraph (2)) and costs against the offeree,
9 if—

10 (A) a defendant as an offeree refuses to
11 proceed pursuant to the alternative dispute res-
12 olution procedure referred to subsection (a)(1);

13 (B) final judgment is entered against the
14 defendant for harm caused by the product that
15 is the subject of the action; and

16 (C) the refusal by the defendant to proceed
17 pursuant to such alternative dispute resolution
18 was unreasonable or not made in good faith.

19 (2) REASONABLE ATTORNEY'S FEES.—For pur-
20 poses of this subsection, a reasonable attorney's fee
21 shall be calculated on the basis of an hourly rate,
22 which shall not exceed the hourly rate that is consid-
23 ered acceptable in the community in which the attor-
24 ney practices law, taking into consideration the

1 qualifications and experience of the attorney and the
2 complexity of the case.

3 (c) GOOD FAITH REFUSAL.—In determining whether
4 the refusal of an offeree to proceed pursuant to the alter-
5 native dispute procedure referred to in subsection (a)(1)
6 was unreasonable or not made in good faith, the court
7 shall consider such factors as the court considers appro-
8 priate.

9 **SEC. 5. LIABILITY RULES APPLICABLE TO PRODUCT SELL-**
10 **ERS.**

11 (a) GENERAL RULE.—

12 (1) IN GENERAL.—In any product liability ac-
13 tion that is subject to this Act filed by a claimant
14 for harm caused by a product, a product seller other
15 than a manufacturer shall be liable to a claimant,
16 only if the claimant establishes—

17 (A) that—

18 (i) the product that allegedly caused
19 the harm that is the subject of the com-
20 plaint was sold by the product seller;

21 (ii) the product seller failed to exer-
22 cise reasonable care with respect to the
23 product; and

1 (iii) the failure to exercise reasonable
2 care was a proximate cause of harm to the
3 claimant;

4 (B) that—

5 (i) the product seller made an express
6 warranty applicable to the product that al-
7 legedly caused the harm that is the subject
8 of the complaint, independent of any ex-
9 press warranty made by a manufacturer as
10 to the same product;

11 (ii) the product failed to conform to
12 the warranty; and

13 (iii) the failure of the product to con-
14 form to the warranty caused harm to the
15 claimant; or

16 (C) that—

17 (i) the product seller engaged in in-
18 tentional wrongdoing, as determined under
19 applicable State law; and

20 (ii) such intentional wrongdoing was a
21 proximate cause of the harm that is the
22 subject of the complaint.

23 (2) REASONABLE OPPORTUNITY FOR INSPEC-
24 TION.—For purposes of paragraph (1)(A)(ii), a
25 product seller shall not be considered to have failed

1 to exercise reasonable care with respect to a product
2 based upon an alleged failure to inspect a product
3 if the product seller had no reasonable opportunity
4 to inspect the product that allegedly caused harm to
5 the claimant.

6 (b) SPECIAL RULE.—A product seller shall be
7 deemed to be liable as a manufacturer of a product for
8 harm caused by the product if—

9 (1) the manufacturer is not subject to service of
10 process under the laws of any State in which the ac-
11 tion may be brought; or

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

15 **SEC. 6. DEFENSES INVOLVING INTOXICATING ALCOHOL OR**
16 **DRUGS.**

17 (a) GENERAL RULE.—Notwithstanding any other
18 provision of law, a defendant in a product liability action
19 that is subject to this Act shall have a complete defense
20 in the action if the defendant proves that—

21 (1) the claimant was under the influence of in-
22 toxicating alcohol or any drug that may not lawfully
23 be sold over-the-counter without a prescription, and
24 was not prescribed by a physician for use by the
25 claimant; and

1 (2) the claimant, as a result of the influence of
2 the alcohol or drug, was more than 50 percent re-
3 sponsible for the accident or event which resulted in
4 the harm to the claimant.

5 (b) CONSTRUCTION.—For purposes of this section,
6 the determination of whether a person was intoxicated or
7 was under the influence of intoxicating alcohol or any drug
8 shall be made pursuant to applicable State law.

9 **SEC. 7. REDUCTION FOR MISUSE OR ALTERATION OF**
10 **PRODUCT.**

11 (a) GENERAL RULE.—

12 (1) IN GENERAL.—Except as provided in sub-
13 section (c), in a product liability action that is sub-
14 ject to this Act, the damages for which a defendant
15 is otherwise liable under applicable State law shall
16 be reduced by the percentage of responsibility for
17 the harm to the claimant attributable to misuse or
18 alteration of a product by any person if the defend-
19 ant establishes that such percentage of the harm
20 was proximately caused by a use or alteration of a
21 product—

22 (A) in violation of, or contrary to, the ex-
23 press warnings or instructions of the defendant
24 if the warnings or instructions are determined

1 to be adequate pursuant to applicable State
2 law; or

3 (B) involving a risk of harm which was
4 known or should have been known by the ordi-
5 nary person who uses or consumes the product
6 with the knowledge common to the class of per-
7 sons who used or would be reasonably antici-
8 pated to use the product.

9 (2) USE INTENDED BY A MANUFACTURER IS
10 NOT MISUSE OR ALTERATION.—For the purposes of
11 this Act, a use of a product that is intended by the
12 manufacturer of the product does not constitute a
13 misuse or alteration of the product.

14 (b) STATE LAW.—Notwithstanding section 3(b), sub-
15 section (a) of this section shall supersede State law con-
16 cerning misuse or alteration of a product only to the ex-
17 tent that State law is inconsistent with such subsection.

18 (c) WORKPLACE INJURY.—Notwithstanding sub-
19 section (a), the amount of damages for which a defendant
20 is otherwise liable under State law shall not be reduced
21 by the application of this section with respect to the con-
22 duct of any employer or coemployee of the plaintiff who
23 is, under applicable State law concerning workplace inju-
24 ries, immune from being subject to an action by the claim-
25 ant.

1 **SEC. 8. UNIFORM STANDARDS FOR AWARD OF PUNITIVE**
2 **DAMAGES.**

3 (a) GENERAL RULE.—Punitive damages may, to the
4 extent permitted by applicable State law, be awarded
5 against a defendant in a product liability action that is
6 subject to this Act if the claimant establishes by clear and
7 convincing evidence that the harm that is the subject of
8 the action was the result of conduct that was carried out
9 by the defendant with a conscious, flagrant indifference
10 to the safety of others.

11 (b) LIMITATION ON AMOUNT.—The amount of puni-
12 tive damages that may be awarded for a claim in any prod-
13 uct liability action that is subject to this Act shall not ex-
14 ceed 3 times the amount awarded to the claimant for the
15 economic injury on which the claim is based, or \$250,000,
16 whichever is greater. This subsection shall be applied by
17 the court and the application of this subsection shall not
18 be disclosed to the jury.

19 (c) BIFURCATION AT REQUEST OF EITHER PARTY.—

20 (1) IN GENERAL.—At the request of either
21 party, the trier of fact in a product liability action
22 that is subject to this Act shall consider in a sepa-
23 rate proceeding whether punitive damages are to be
24 awarded for the harm that is the subject of the ac-
25 tion and the amount of the award.

26 (2) ADMISSIBLE EVIDENCE.—

1 (A) INADMISSIBILITY OF EVIDENCE REL-
2 ATIVE ONLY TO A CLAIM OF PUNITIVE DAM-
3 AGES IN A PROCEEDING CONCERNING COMPEN-
4 SATORY DAMAGES.—If either party requests a
5 separate proceeding under paragraph (1), in
6 any proceeding to determine whether the claim-
7 ant may be awarded compensatory damages,
8 any evidence that is relevant only to the claim
9 of punitive damages, as determined by applica-
10 ble State law, shall be inadmissible.

11 (B) PROCEEDING WITH RESPECT TO PUNI-
12 TIVE DAMAGES.—Evidence that is admissible in
13 the separate proceeding under paragraph (1)—

14 (i) may include evidence of the profits
15 of the defendant, if any, from the alleged
16 wrongdoing; and

17 (ii) shall not include evidence of the
18 overall assets of the defendant.

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

20 (a) STATUTE OF LIMITATIONS.—

21 (1) IN GENERAL.—Except as provided in para-
22 graph (2) and subsection (b), a product liability ac-
23 tion that is subject to this Act may be filed not later
24 than 2 years after the date on which the claimant
25 discovered or, in the exercise of reasonable care,

1 should have discovered, the harm that is the subject
2 of the action and the cause of the harm.

3 (2) EXCEPTIONS.—

4 (A) PERSON WITH A LEGAL DISABILITY.—

5 A person with a legal disability (as determined
6 under applicable law) may file a product liability
7 action that is subject to this Act not later
8 than 2 years after the date on which the person
9 ceases to have the legal disability.

10 (B) EFFECT OF STAY OR INJUNCTION.—If

11 the commencement of a civil action that is sub-
12 ject to this Act is stayed or enjoined, the run-
13 ning of the statute of limitations under this sec-
14 tion shall be suspended until the end of the pe-
15 riod that the stay or injunction is in effect.

16 (b) STATUTE OF REPOSE.—

17 (1) IN GENERAL.—Subject to paragraphs (2)
18 and (3), no product liability action that is subject to
19 this Act concerning a product that is a durable good
20 alleged to have caused harm (other than toxic harm)
21 may be filed after the 20-year period beginning at
22 the time of delivery of the product.

23 (2) STATE LAW.—Notwithstanding paragraph
24 (1), if pursuant to an applicable State law, an action
25 described in such paragraph is required to be filed

1 during a period that is shorter than the 20-year pe-
2 riod specified in such paragraph, the State law shall
3 apply with respect to such period.

4 (3) EXCEPTION.—A motor vehicle, vessel, air-
5 craft, or train that is used primarily to transport
6 passengers for hire shall not be subject to this sub-
7 section.

8 (c) TRANSITIONAL PROVISION RELATING TO EXTEN-
9 SION OF PERIOD FOR BRINGING CERTAIN ACTIONS.—If
10 any provision of subsection (a) or (b) shortens the period
11 during which a product liability action that could be other-
12 wise brought pursuant to another provision of law, the
13 claimant may, notwithstanding subsections (a) and (b),
14 bring the product liability action pursuant to this Act not
15 later than 1 year after the date of enactment of this Act.

16 **SEC. 10. SEVERAL LIABILITY FOR NONECONOMIC LOSS.**

17 (a) GENERAL RULE.—In a product liability action
18 that is subject to this Act, the liability of each defendant
19 for noneconomic loss shall be several only and shall not
20 be joint.

21 (b) AMOUNT OF LIABILITY.—

22 (1) IN GENERAL.—Each defendant shall be lia-
23 ble only for the amount of noneconomic loss allo-
24 cated to the defendant in direct proportion to the
25 percentage of responsibility of the defendant (deter-

1 mined in accordance with paragraph (2)) for the
2 harm to the claimant with respect to which the de-
3 fendant is liable. The court shall render a separate
4 judgment against each defendant in an amount de-
5 termined pursuant to the preceding sentence.

6 (2) PERCENTAGE OF RESPONSIBILITY.—For
7 purposes of determining the amount of noneconomic
8 loss allocated to a defendant under this section, the
9 trier of fact shall determine the percentage of re-
10 sponsibility of each person responsible for the
11 amount of noneconomic loss caused to the claimant,
12 whether or not such person is a party to the action.

13 **SEC. 11. WORKERS' COMPENSATION SUBROGATION STAND-**
14 **ARDS.**

15 (a) GENERAL RULE.—

16 (1) RIGHT OF SUBROGATION.—

17 (A) IN GENERAL.—An insurer shall have a
18 right of subrogation against a manufacturer or
19 product seller to recover any claimant's benefits
20 relating to harm that is the subject of a product
21 liability action that is subject to this Act.

22 (B) WRITTEN NOTIFICATION.—To assert a
23 right of subrogation under subparagraph (A),
24 the insurer shall provide written notice to the

1 court in which the product liability action is
2 brought.

3 (C) INSURER NOT REQUIRED TO BE A
4 PARTY.—An insurer shall not be required to be
5 a necessary and proper party in a product li-
6 ability action covered under subparagraph (A).

7 (2) SETTLEMENTS AND OTHER LEGAL PRO-
8 CEEDINGS.—

9 (A) IN GENERAL.—In any proceeding re-
10 lating to harm or settlement with the manufac-
11 turer or product seller by a claimant who files
12 a product liability action that is subject to this
13 Act, an insurer may participate to assert a
14 right of subrogation for claimant's benefits with
15 respect to any payment made by the manufac-
16 turer or product seller by reason of such harm,
17 without regard to whether the payment is
18 made—

19 (i) as part of a settlement;

20 (ii) in satisfaction of judgment;

21 (iii) as consideration for a covenant

22 not to sue; or

23 (iv) in another manner.

24 (B) WRITTEN CONSENT.—Except as pro-
25 vided in subparagraph (C)—

1 (i) an employee shall not make any
2 settlement with or accept any payment
3 from the manufacturer or product seller
4 without the written consent of the insurer;
5 and

6 (ii) no release to or agreement with
7 the manufacturer or product seller de-
8 scribed in clauses (i) through (iv) of sub-
9 paragraph (A) shall be valid or enforceable
10 for any purpose without the consent of the
11 insurer.

12 (C) EXEMPTION.—Subparagraph (B) shall
13 not apply in any case in which the insurer has
14 been compensated for the full amount of the
15 claimant's benefits.

16 (3) HARM RESULTING FROM ACTION OF EM-
17 PLOYER OR COEMPLOYEE.—

18 (A) IN GENERAL.—If, with respect to a
19 product liability action that is subject to this
20 Act, the manufacturer or product seller at-
21 tempts to persuade the trier of fact that the
22 harm to the claimant was caused by the fault
23 of the employer of the claimant or any
24 coemployee of the claimant, the issue of that
25 fault shall be submitted to the trier of fact, but

1 only after the manufacturer or product seller
2 has provided timely written notice to the em-
3 ployer.

4 (B) RIGHTS OF EMPLOYER.—

5 (i) IN GENERAL.—Notwithstanding
6 any other provision of law, with respect to
7 an issue of fault submitted to a trier of
8 fact pursuant to subparagraph (A), an em-
9 ployer shall, in the same manner as any
10 party in the action (even if the employer is
11 not a named party in the action), have the
12 right to—

13 (I) appear;

14 (II) be represented;

15 (III) introduce evidence;

16 (IV) cross-examine adverse wit-
17 nesses; and

18 (V) present arguments to the
19 trier of fact.

20 (ii) LAST ISSUE.—The issue of harm
21 resulting from an action of an employer or
22 coemployee shall be the last issue that is
23 presented to the trier of fact.

24 (C) REDUCTION OF DAMAGES.—If the trier
25 of fact finds by clear and convincing evidence

1 that the harm to the claimant that is the sub-
2 ject of the product liability action was caused
3 by the fault of the employer or a coemployee of
4 the claimant—

5 (i) the court shall reduce by the
6 amount of the claimant's benefits—

7 (I) the damages awarded against
8 the manufacturer or product seller;
9 and

10 (II) any corresponding insurer's
11 subrogation lien; and

12 (ii) the manufacturer or product seller
13 shall have no further right by way of con-
14 tribution or otherwise against the em-
15 ployer.

16 (D) CERTAIN RIGHTS OF SUBROGATION
17 NOT AFFECTED.—Notwithstanding a finding by
18 the trier of fact described in subparagraph (C),
19 the insurer shall not lose any right of subroga-
20 tion related to any—

21 (i) intentional tort committed against
22 the claimant by a coemployee; or

23 (ii) act committed by a coemployee
24 outside the scope of normal work practices.

1 (b) ATTORNEY'S FEES.—If, in a product liability ac-
2 tion that is subject to this section, the court finds that
3 harm to a claimant was not caused by the fault of the
4 employer or a coemployee of the claimant, the manufac-
5 turer or product seller shall reimburse the insurer for rea-
6 sonable attorney's fees and court costs incurred by the in-
7 surer in the action, as determined by the court.

8 **SEC. 12. FEDERAL CAUSE OF ACTION PRECLUDED.**

9 The district courts of the United States shall not
10 have jurisdiction under section 1331 or 1337 of title 28,
11 United States Code, over any product liability action cov-
12 ered under this Act.

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S 565 IS—3