

105TH CONGRESS  
1ST SESSION

# S. 1135

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

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IN THE SENATE OF THE UNITED STATES

JULY 31, 1997

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

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## A BILL

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

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

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Trade and Professional  
5       Association Free Flow of Information Act of 1997”.

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

7       (a) FINDINGS.—Congress finds that—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 **SEC. 2. DEFINITIONS.**

12 In this Act:

13 (1) PRODUCT.—

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

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

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

24 (iii) has intrinsic economic value; and

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

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

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

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

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

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

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

2 (a) IN GENERAL.—

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

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

13 (A) the quality of the product;

14 (B) the performance of the product; or

15 (C) any defect of the product.

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

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

26 (1) knew to be false; or

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

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

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

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

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

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

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

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

25           (1) the motion; and

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

11 (1) the motion is under consideration; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8                   (B) be maintained in confidence.

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

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

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

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

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

24                   (1) cites the authority of this section;

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

4           (3) contains no other provisions.

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

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

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

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