### Calendar No. 476

106TH CONGRESS 2D SESSION

# H. R. 2366

#### IN THE SENATE OF THE UNITED STATES

February 22, 2000 Received

March 27, 2000 Read the first time

March 28, 2000
Read the second time and placed on the calendar

## AN ACT

To provide small businesses certain protections from litigation excesses and to limit the product liability of nonmanufacturer product sellers.

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

#### 1 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

- 2 (a) SHORT TITLE.—This Act may be cited as the
- 3 "Small Business Liability Reform Act of 2000".
- 4 (b) Table of Contents for
- 5 this Act is as follows:
  - Sec. 1. Short title; table of contents.

#### TITLE I—SMALL BUSINESS LAWSUIT ABUSE PROTECTION

- Sec. 101. Findings.
- Sec. 102. Definitions.
- Sec. 103. Limitation on punitive damages for small businesses.
- Sec. 104. Limitation on joint and several liability for noneconomic loss for small businesses.
- Sec. 105. Exceptions to limitations on liability.
- Sec. 106. Preemption and election of State nonapplicability.

#### TITLE II—PRODUCT SELLER FAIR TREATMENT

- Sec. 201. Findings; purposes.
- Sec. 202. Definitions.
- Sec. 203. Applicability; preemption.
- Sec. 204. Liability rules applicable to product sellers, renters, and lessors.
- Sec. 205. Federal cause of action precluded.

#### TITLE III—EFFECTIVE DATE

Sec. 301. Effective date.

### 6 TITLE I—SMALL BUSINESS

### 7 LAWSUIT ABUSE PROTECTION

- 8 SEC. 101. FINDINGS.
- 9 Congress finds that—
- 10 (1) the defects in the United States civil justice
- system have a direct and undesirable effect on inter-
- state commerce by decreasing the availability of
- goods and services in commerce;
- 14 (2) there is a need to restore rationality, cer-
- tainty, and fairness to the legal system;

- (3) the spiralling costs of litigation and the magnitude and unpredictability of punitive damage awards and noneconomic damage awards have continued unabated for at least the past 30 years;
  - (4) the Supreme Court of the United States has recognized that a punitive damage award can be unconstitutional if the award is grossly excessive in relation to the legitimate interest of the government in the punishment and deterrence of unlawful conduct;
  - (5) just as punitive damage awards can be grossly excessive, so can it be grossly excessive in some circumstances for a party to be held responsible under the doctrine of joint and several liability for damages that party did not cause;
  - (6) as a result of joint and several liability, entities including small businesses are often brought into litigation despite the fact that their conduct may have little or nothing to do with the accident or transaction giving rise to the lawsuit, and may therefore face increased and unjust costs due to the possibility or result of unfair and disproportionate damage awards;
  - (7) the costs imposed by the civil justice system on small businesses are particularly acute, since

- 1 small businesses often lack the resources to bear 2 those costs and to challenge unwarranted lawsuits;
- 3 (8) due to high liability costs and unwarranted 4 litigation costs, small businesses face higher costs in 5 purchasing insurance through interstate insurance 6 markets to cover their activities;
  - (9) liability reform for small businesses will promote the free flow of goods and services, lessen burdens on interstate commerce, and decrease litigiousness; and
- 11 (10) legislation to address these concerns is an 12 appropriate exercise of the powers of Congress under 13 clauses 3, 9, and 18 of section 8 of article I of the 14 Constitution of the United States, and the 14th 15 amendment to the Constitution of the United States.

#### 16 SEC. 102. DEFINITIONS.

17 In this title:

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- 18 (1) CRIME OF VIOLENCE.—The term "crime of violence" has the same meaning as in section 16 of title 18, United States Code.
- 21 (2) DRUG.—The term "drug" means any con-22 trolled substance (as defined in section 102 of the 23 Controlled Substances Act (21 U.S.C. 802)) that 24 was not legally prescribed for use by the defendant 25 or that was taken by the defendant other than in

- accordance with the terms of a lawfully issued prescription.
- 3 (3) Economic loss.—The term "economic loss" means any pecuniary loss resulting from harm 5 (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.
  - (4) HARM.—The term "harm" means any physical injury, illness, disease, or death or damage to property.
  - (5) HATE CRIME.—The term "hate crime" means a crime described in section 1(b) of the Hate Crime Statistics Act (28 U.S.C. 534 note).
  - (6) International terrorism" has the same meaning as in section 2331 of title 18, United States Code.
  - (7) Noneconomic loss.—The term "non-economic loss" means loss for physical or emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), injury

- to reputation, or any other nonpecuniary loss of any
  kind or nature.
  - (8) Person.—The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity).
  - (9) Punitive damages.—The term "punitive damages" means damages awarded against any person or entity to punish or deter such person, entity, or others from engaging in similar behavior in the future. Such term does not include any civil penalties, fines, or treble damages that are assessed or enforced by an agency of State or Federal government pursuant to a State or Federal statute.

#### (10) Small business.—

- (A) IN GENERAL.—The term "small business" means any unincorporated business, or any partnership, corporation, association, unit of local government, or organization that has fewer than 25 full-time employees as determined on the date the civil action involving the small business is filed.
- (B) CALCULATION OF NUMBER OF EMPLOYEES.—For purposes of subparagraph (A), the number of employees of a subsidiary of a

1	wholly owned corporation includes the employ-
2	ees of—
3	(i) a parent corporation; and
4	(ii) any other subsidiary corporation
5	of that parent corporation.
6	(11) STATE.—The term "State" means each of
7	the several States, the District of Columbia, the
8	Commonwealth of Puerto Rico, the Virgin Islands,
9	Guam, American Samoa, the Northern Mariana Is-
10	lands, any other territory or possession of the
11	United States, or any political subdivision of any
12	such State, commonwealth, territory, or possession.
13	SEC. 103. LIMITATION ON PUNITIVE DAMAGES FOR SMALL
14	BUSINESSES.
15	(a) General Rule.—Except as provided in section
16	105, in any civil action against a small business, punitive
17	damages may, to the extent permitted by applicable Fed-
18	eral or State law, be awarded against the small business
19	only if the claimant establishes by clear and convincing
20	evidence that conduct carried out by that defendant with
21	a conscious, flagrant indifference to the rights or safety
22	of others was the proximate cause of the harm that is the

1	(b) Limitation on Amount.—In any civil action
2	against a small business, punitive damages awarded
3	against a small business shall not exceed the lesser of—
4	(1) three times the total amount awarded to the
5	claimant for economic and noneconomic losses; or
6	(2) \$250,000,
7	except that the court may make this subsection inappli-
8	cable if the court finds that the plaintiff established by
9	clear and convincing evidence that the defendant acted
10	with specific intent to cause the type of harm for which
11	the action was brought.
12	(c) Application by the Court.—The limitation
13	prescribed by this section shall be applied by the court
14	and shall not be disclosed to the jury.
15	SEC. 104. LIMITATION ON JOINT AND SEVERAL LIABILITY
16	FOR NONECONOMIC LOSS FOR SMALL BUSI
17	NESSES.
18	(a) General Rule.—Except as provided in section
19	105, in any civil action against a small business, the liabil-
20	ity of each defendant that is a small business, or the agent
21	of a small business, for noneconomic loss shall be deter-
22	mined in accordance with subsection (b).
23	(b) Amount of Liability.—
24	(1) In general.—In any civil action described
25	in subsection (a)—

1	(A) each defendant described in that sub-
2	section shall be liable only for the amount of
3	noneconomic loss allocated to that defendant in
4	direct proportion to the percentage of responsi-
5	bility of that defendant (determined in accord-
6	ance with paragraph (2)) for the harm to the
7	claimant with respect to which that defendant
8	is liable; and
9	(B) the court shall render a separate judg-
10	ment against each defendant described in that
11	subsection in an amount determined under sub-
12	paragraph (A).
13	(2) Percentage of responsibility.—For
14	purposes of determining the amount of noneconomic
15	loss allocated to a defendant under this section, the
16	trier of fact shall determine the percentage of re-
17	sponsibility of each person responsible for the harm
18	to the claimant, regardless of whether or not the
19	person is a party to the action.
20	SEC. 105. EXCEPTIONS TO LIMITATIONS ON LIABILITY.
21	The limitations on liability under sections 103 and
22	104 do not apply—
23	(1) to any defendant whose misconduct—
24	(A) constitutes—
25	(i) a crime of violence;

1	(ii) an act of international terrorism;
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3	(iii) a hate crime;
4	(B) results in liability for damages relating
5	to the injury to, destruction of, loss of, or loss
6	of use of, natural resources described in—
7	(i) section $1002(b)(2)(A)$ of the Oil
8	Pollution Act of 1990 (33 U.S.C.
9	2702(b)(2)(A)); or
10	(ii) section 107(a)(4)(C) of the Com-
11	prehensive Environmental Response, Com-
12	pensation, and Liability Act of 1980 (42
13	U.S.C. 9607(a)(4)(C));
14	(C) involves—
15	(i) a sexual offense, as defined by ap-
16	plicable State law; or
17	(ii) a violation of a Federal or State
18	civil rights law;
19	(D) occurred at the time the defendant
20	was under the influence (as determined under
21	applicable State law) of intoxicating alcohol or
22	a drug, and the fact that the defendant was
23	under the influence was the cause of any harm
24	alleged by the plaintiff in the subject action; or

1	(2) to any cause of action which is brought
2	under the provisions of title 31, United States Code,
3	relating to false claims (31 U.S.C. 3729–3733) or to
4	any other cause of action brought by the United
5	States relating to fraud or false statements.
6	SEC. 106. PREEMPTION AND ELECTION OF STATE NON-
7	APPLICABILITY.
8	(a) Preemption.—Subject to subsection (b), this
9	title preempts the laws of any State to the extent that
10	State laws are inconsistent with this title.
11	(b) Election of State Regarding Nonapplica-
12	BILITY.—This title does not apply to any action in a State
13	court against a small business in which all parties are citi-
14	zens of the State, if the State enacts a statute—
15	(1) citing the authority of this subsection;
16	(2) declaring the election of such State that this
17	title does not apply as of a date certain to such ac-
18	tions in the State; and
19	(3) containing no other provision.
20	TITLE II—PRODUCT SELLER
21	FAIR TREATMENT
22	SEC. 201. FINDINGS; PURPOSES.
23	(a) FINDINGS.—Congress finds that—
24	(1) although damage awards in product liability
25	actions may encourage the production of safer prod-

- ucts, they may also have a direct effect on interstate commerce and consumers of the United States by increasing the cost of, and decreasing the availability of, products;
  - (2) some of the rules of law governing product liability actions are inconsistent within and among the States, resulting in differences in State laws that may be inequitable with respect to plaintiffs and defendants and may impose burdens on interstate commerce;
  - (3) product liability awards may jeopardize the financial well-being of individuals and industries, particularly the small businesses of the United States;
  - (4) because the product liability laws of a State may have adverse effects on consumers and businesses in many other States, it is appropriate for the Federal Government to enact national, uniform product liability laws that preempt State laws; and
  - (5) under clause 3 of section 8 of article I of the United States Constitution, it is the constitutional role of the Federal Government to remove barriers to interstate commerce.
- (b) Purposes.—The purposes of this title, based onthe powers of the United States under clause 3 of section

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- 8 of article I of the United States Constitution, are to
- promote the free flow of goods and services and lessen the
- 3 burdens on interstate commerce, by—
- 4 (1) establishing certain uniform legal principles 5 of product liability that provide a fair balance among 6 the interests of all parties in the chain of production,
- 7 distribution, and use of products; and
- 8 (2) reducing the unacceptable costs and delays 9 in product liability actions caused by excessive litiga-10 tion that harms both plaintiffs and defendants.

#### 11 SEC. 202. DEFINITIONS.

- 12 In this title:
- 13 (1) ALCOHOL PRODUCT.—The term "alcohol 14 product" includes any product that contains not less 15 than ½ of 1 percent of alcohol by volume and is in-16 tended for human consumption.
- 17 (2) CLAIMANT.—The term "claimant" means 18 any person who brings an action covered by this title 19 and any person on whose behalf such an action is 20 brought. If such an action is brought through or on behalf of an estate, the term includes the claimant's 22 decedent. If such an action is brought through or on 23 behalf of a minor or incompetent, the term includes 24 the claimant's legal guardian.

1	(3) Commercial Loss.—The term "commercial
2	loss" means—
3	(A) any loss or damage solely to a product
4	itself;
5	(B) loss relating to a dispute over the
6	value of a product; or
7	(C) consequential economic loss, the recov-
8	ery of which is governed by applicable State
9	commercial or contract laws that are similar to
10	the Uniform Commercial Code.
11	(4) Compensatory damages.—The term
12	"compensatory damages" means damages awarded
13	for economic and noneconomic losses.
14	(5) Dram-shop.—The term "dram-shop"
15	means a drinking establishment where alcoholic bev-
16	erages are sold to be consumed on the premises.
17	(6) Economic Loss.—The term "economic
18	loss" means any pecuniary loss resulting from harm
19	(including the loss of earnings or other benefits re-
20	lated to employment, medical expense loss, replace-
21	ment services loss, loss due to death, burial costs,
22	and loss of business or employment opportunities)
23	to the extent recovery for that loss is allowed under
24	applicable State law.

1	(7) HARM.—The term "harm" means any phys-
2	ical injury, illness, disease, or death or damage to
3	property caused by a product. The term does not in-
4	clude commercial loss.
5	(8) Manufacturer.—The term "manufac-
6	turer" means—
7	(A) any person who—
8	(i) is engaged in a business to
9	produce, create, make, or construct any
10	product (or component part of a product);
11	and
12	(ii)(I) designs or formulates the prod-
13	uct (or component part of the product); or
14	(II) has engaged another person to
15	design or formulate the product (or compo-
16	nent part of the product);
17	(B) a product seller, but only with respect
18	to those aspects of a product (or component
19	part of a product) that are created or affected
20	when, before placing the product in the stream
21	of commerce, the product seller—
22	(i) produces, creates, makes, con-
23	structs and designs, or formulates an as-
24	pect of the product (or component part of
25	the product) made by another person; or

1	(ii) has engaged another person to de-
2	sign or formulate an aspect of the product
3	(or component part of the product) made
4	by another person; or
5	(C) any product seller not described in
6	subparagraph (B) that holds itself out as a
7	manufacturer to the user of the product.
8	(9) Noneconomic loss.—The term "non-
9	economic loss" means loss for physical or emotional
10	pain, suffering, inconvenience, physical impairment,
11	mental anguish, disfigurement, loss of enjoyment of
12	life, loss of society and companionship, loss of con-
13	sortium (other than loss of domestic service), injury
14	to reputation, or any other nonpecuniary loss of any
15	kind or nature.
16	(10) Person.—The term "person" means any
17	individual, corporation, company, association, firm,
18	partnership, society, joint stock company, or any
19	other entity (including any governmental entity).
20	(11) Product.—
21	(A) IN GENERAL.—The term "product"
22	means any object, substance, mixture, or raw
23	material in a gaseous, liquid, or solid state
24	that—

1	(i) is capable of delivery itself or as an
2	assembled whole, in a mixed or combined
3	state, or as a component part or ingre-
4	dient;
5	(ii) is produced for introduction into
6	trade or commerce;
7	(iii) has intrinsic economic value; and
8	(iv) is intended for sale or lease to
9	persons for commercial or personal use.
10	(B) Exclusion.—The term "product"
11	does not include—
12	(i) tissue, organs, blood, and blood
13	products used for therapeutic or medical
14	purposes, except to the extent that such
15	tissue, organs, blood, and blood products
16	(or the provision thereof) are subject,
17	under applicable State law, to a standard
18	of liability other than negligence; or
19	(ii) electricity, water delivered by a
20	utility, natural gas, or steam.
21	(12) Product Liability action.—
22	(A) General Rule.—Except as provided
23	in subparagraph (B), the term "product liabil-
24	ity action" means a civil action brought on any
25	theory for a claim for any physical injury, ill-

1	ness, disease, death, or damage to property that
2	is caused by a product.
3	(B) The following claims are not included
4	in the term "product liability action":
5	(i) Negligent entrustment.—A
6	claim for negligent entrustment.
7	(ii) Negligence per se.—A claim
8	brought under a theory of negligence per
9	se.
10	(iii) Dram-shop.—A claim brought
11	under a theory of dram-shop or third-party
12	liability arising out of the sale or providing
13	of an alcoholic product to an intoxicated
14	person or minor.
15	(13) Product seller.—
16	(A) IN GENERAL.—The term "product sell-
17	er" means a person who in the course of a busi-
18	ness conducted for that purpose—
19	(i) sells, distributes, rents, leases, pre-
20	pares, blends, packages, labels, or other-
21	wise is involved in placing a product in the
22	stream of commerce; or
23	(ii) installs, repairs, refurbishes, re-
24	conditions, or maintains the harm-causing
25	aspect of the product.

1	(B) Exclusion.—The term "product sell-
2	er" does not include—
3	(i) a seller or lessor of real property;
4	(ii) a provider of professional services
5	in any case in which the sale or use of a
6	product is incidental to the transaction and
7	the essence of the transaction is the fur-
8	nishing of judgment, skill, or services; or
9	(iii) any person who—
10	(I) acts in only a financial capac-
11	ity with respect to the sale of a prod-
12	uct; or
13	(II) leases a product under a
14	lease arrangement in which the lessor
15	does not initially select the leased
16	product and does not during the lease
17	term ordinarily control the daily oper-
18	ations and maintenance of the prod-
19	uct.
20	(14) State.—The term "State" means each of
21	the several States, the District of Columbia, the
22	Commonwealth of Puerto Rico, the Virgin Islands,
23	Guam, American Samoa, the Northern Mariana Is-
24	lands, any other territory or possession of the

1	United States, or any political subdivision of any
2	such State, commonwealth, territory, or possession
3	SEC. 203. APPLICABILITY; PREEMPTION.
4	(a) Applicability.—
5	(1) In general.—Except as provided in para-
6	graph (2), this title governs any product liability ac-
7	tion brought in any Federal or State court.
8	(2) ACTIONS FOR COMMERCIAL LOSS.—A civil
9	action brought for commercial loss shall be governed
10	only by applicable State commercial or contract laws
11	that are similar to the Uniform Commercial Code.
12	(b) Relationship to State Law.—This title su-
13	persedes a State law only to the extent that the State law
14	applies to an issue covered by this title. Any issue that
15	is not governed by this title, including any standard of
16	liability applicable to a manufacturer, shall be governed
17	by any applicable Federal or State law.
18	(c) Effect on Other Law.—Nothing in this title
19	shall be construed to—
20	(1) waive or affect any defense of sovereign im-
21	munity asserted by any State under any State law
22	(2) supersede or alter any Federal law;
23	(3) waive or affect any defense of sovereign im-
24	munity asserted by the United States;

1	(4) affect the applicability of any provision of
2	chapter 97 of title 28, United States Code;
3	(5) preempt State choice-of-law rules with re-
4	spect to claims brought by a foreign nation or a cit-
5	izen of a foreign nation;
6	(6) affect the right of any court to transfer
7	venue or to apply the law of a foreign nation or to
8	dismiss a claim of a foreign nation or of a citizen
9	of a foreign nation on the ground of inconvenient
10	forum; or
11	(7) supersede or modify any statutory or com-
12	mon law, including any law providing for an action
13	to abate a nuisance, that authorizes a person to in-
14	stitute an action for civil damages or civil penalties
15	cleanup costs, injunctions, restitution, cost recovery
16	punitive damages, or any other form of relief, for re-
17	mediation of the environment (as defined in section
18	101(8) of the Comprehensive Environmental Re-
19	sponse, Compensation, and Liability Act of 1980 (42
20	U.S.C. 9601(8))).
21	SEC. 204. LIABILITY RULES APPLICABLE TO PRODUCT
22	SELLERS, RENTERS, AND LESSORS.
23	(a) General Rule.—
24	(1) IN GENERAL.—In any product liability ac-

tion covered under this title, a product seller other

1	than a manufacturer shall be liable to a claimant
2	only if the claimant establishes that—
3	(A)(i) the product that allegedly caused the
4	harm that is the subject of the complaint was
5	sold, rented, or leased by the product seller;
6	(ii) the product seller failed to exercise rea-
7	sonable care with respect to the product; and
8	(iii) the failure to exercise reasonable care
9	was a proximate cause of the harm to the
10	claimant;
11	(B)(i) the product seller made an express
12	warranty applicable to the product that alleg-
13	edly caused the harm that is the subject of the
14	complaint, independent of any express warranty
15	made by a manufacturer as to the same prod-
16	$\operatorname{uct};$
17	(ii) the product failed to conform to the
18	warranty; and
19	(iii) the failure of the product to conform
20	to the warranty caused the harm to the claim-
21	ant; or
22	(C)(i) the product seller engaged in inten-
23	tional wrongdoing, as determined under applica-
24	ble State law; and

1	(ii) the intentional wrongdoing caused the
2	harm that is the subject of the complaint.
3	(2) Reasonable opportunity for inspec-
4	TION.—For purposes of paragraph (1)(A)(ii), a
5	product seller shall not be considered to have failed
6	to exercise reasonable care with respect to a product
7	based upon an alleged failure to inspect the product,
8	if—
9	(A) the failure occurred because there was
10	no reasonable opportunity to inspect the prod-
11	uct; or
12	(B) the inspection, in the exercise of rea-
13	sonable care, would not have revealed the as-
14	pect of the product that allegedly caused the
15	claimant's harm.
16	(b) Special Rule.—
17	(1) In general.—A product seller shall be
18	deemed to be liable as a manufacturer of a product
19	for harm caused by the product, if—
20	(A) the manufacturer is not subject to
21	service of process under the laws of any State
22	in which the action may be brought; or
23	(B) the court determines that the claimant
24	is or would be unable to enforce a judgment
25	against the manufacturer.

1 (2) STATUTE OF LIMITATIONS.—For purposes
2 of this subsection only, the statute of limitations ap3 plicable to claims asserting liability of a product sell4 er as a manufacturer shall be tolled from the date
5 of the filing of a complaint against the manufacturer
6 to the date that judgment is entered against the
7 manufacturer.

#### (c) Rented or Leased Products.—

- (1) DEFINITION.—For purposes of paragraph (2), and for determining the applicability of this title to any person subject to that paragraph, the term "product liability action" means a civil action brought on any theory for harm caused by a product or product use.
- (2) LIABILITY.—Notwithstanding any other provision of law, any person engaged in the business of renting or leasing a product (other than a person excluded from the definition of product seller under section 202(13)(B)) shall be subject to liability in a product liability action under subsection (a), but any person engaged in the business of renting or leasing a product shall not be liable to a claimant for the tortious act of another solely by reason of ownership of that product.

#### 1 SEC. 205. FEDERAL CAUSE OF ACTION PRECLUDED.

- 2 The district courts of the United States shall not
- 3 have jurisdiction under this title based on section 1331
- 4 of title 28, United States Code.

### 5 TITLE III—EFFECTIVE DATE

- 6 SEC. 301. EFFECTIVE DATE.
- 7 This Act shall take effect with respect to any civil
- 8 action commenced after the date of the enactment of this
- 9 Act without regard to whether the harm that is the subject
- 10 of the action occurred before such date.

Passed the House of Representatives February 16, 2000.

Attest: JEFF TRANDAHL,

Clerk.

#### Calendar No. 476

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