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Senate

The Senate met at 9 a.m. and was called to order by the President pro tempore [Mr. THURMOND].

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Gracious Lord, You know what is ahead today for the women and men of this Senate. Crucial issues confront them. Votes will be cast and aspects of the future of our Nation will be shaped by what is decided. And so, we say with the Psalmist:

Show me Your ways, O Lord; teach me Your paths. Lead me in Your truth and teach me, for You are the God of my salvation; on You I wait all the day.—Psalm 25:4–5.

'I delight to do Your will, O my God, and Your law is within my heart.—Psalm 40:8.

We prepare for the decisions of today by opening our minds to the inflow of Your spirit. We confess that we need Your divine intelligence to invade our thinking brains and flood us with Your light in the dimness of our limited understanding.

We praise You, Lord, that when this day comes to an end we will have the deep inner peace of knowing that You heard and answered this prayer for guidance. In the name of Him who is the Truth. Amen.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The able Senator from Washington State is recognized.

SCHEDULE

Mr. GORTON. Mr. President, for the information of our colleagues, the Senate today will immediately resume consideration of the conference report to accompany the product liability bill for a period of 3 hours of debate, equally divided.

At 12 noon there will be two consecutive rollcall votes. The first will be on the adoption of the product liability conference report, and that vote will be immediately followed by a vote on the motion to invoke cloture on the motion to proceed to Senate Resolution 227, a resolution concerning the Special Committee To Investigate Whitewater and Related Matters.

Following those votes, the Senate will resume consideration of the grazing bill, and there will be 75 minutes for debate remaining on the Bumpers amendment, amendment No. 3556, as modified. A rollcall vote will occur on or in relation to that amendment immediately upon the expiration or yielding of debate time. Other votes are expected, and a late night session is possible in order to complete action on that grazing bill.

COMMONSENSE PRODUCT LIABILITY LEGAL REFORM ACT OF 1996—CONFERENCE REPORT

The PRESIDING OFFICER (Mr. DEWINE). Under the previous order, the Senate will now proceed to the conference report to accompany H.R. 956. The time between now and 12 noon is equally divided.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 956), a bill to establish legal standards and procedures for product liability litigation, and for other purposes, having met, after full and fair conference, have agreed to recommend and do recommend to their respective Houses this report, signed by a majority of the conferees.

The Senate resumed consideration of the conference report.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Mr. President, as we proceed toward the climax of the debate on product liability and a vote on the bill at noon, I believe it appropriate to state what I think the issues in this debate truly are. The question involved in whether or not we wish to reform the product liability litigation system of this country has, I think, primarily to do with the products that are available to the American people, the rapidity with which new products are researched, developed, introduced, and marketed, and the cost of those products to the people of the United States.

In each of these cases, the closely related question, of course, is the system of justice by which people who believe that they have been wronged get a determination as to whether or not such a wrong has been committed and how much compensation should be granted when a wrong is determined.

Our present legal system serves well neither of these goals. We have, in many areas, a frequent reduction in the number of companies that are willing to engage in vitally important businesses: a reduction from something like a dozen to one, in the producers of serum for whooping cough; a reduction from 20 to 2, in the number of companies willing to produce helmets, football helmets, for players, whether professional or college or high school or otherwise.

There is a constant fear on the part of product developers that the unpredictable costs of product liability litigation, whether or not it is successful, are simply greater than any potential profits that can be gained from the development and marketing of a product. For example, Science magazine has identified three U.S. laboratories that suspended or canceled research on promising AIDS vaccines. Union Carbide funded and developed a suitcase-size kidney dialysis unit for home use. It was sold to a foreign corporation

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

after the company determined that potential liability risks under the present system of law made the product uneconomical.

Another company developed a phosphate fiber substitute for asbestos, the subject, obviously, of a tremendous amount of litigation. Not only was the product safe, it was biodegradable and environmentally sound. Although the product could have generated an estimated $100 million a year in revenues, the company concluded that plaintiffs' attorneys would make the product a target for expensive legal claims, and it was therefore too risky to market.

Another company developed a chemical process that would speed up the natural bacterial decomposition of hazardous materials and might have been used to clean up hundreds of leaking underground storage sites. Despite its successful demonstration at several sites, the new technology was abandoned because the risk from potential lawsuits was too great.

In addition, even those companies that have been willing to stay in a particular business have been forced to increase the charges for the products they market, sometimes astronomically, in order to cover their cost of product liability litigation. Lederle Laboratories, which is now the lone maker of the DPT vaccine, all other manufacturers having abandoned the field, raised its price per dose from $2.80 in 1986 to $11.40 in 1987 to pay for the cost of lawsuits. One other company does continue to produce, solely out of a feeling of social responsibility.

This chart behind me indicates the litigation tax cost of a number of products produced and marketed in the United States: almost $24 for an 8-foot aluminum ladder; $3,000 for a heart pacemaker; $170 for a motorized wheelchair; 18 cents for a regulation baseball. There are example after example of the added costs to American consumers to pay for the lottery that is product liability litigation today.

What do we have in the litigation system itself? We have a system that is truly a lottery, one in which the average small claimant with a very minor injury is likely to recover much more than that person's actual losses, while the average seriously injured individual recovers much less, with a few lucky ones in a few States with high punitive damage award histories receiving much more. But the bottom line, the total cost, is that for every dollar which the system itself costs, every dollar that goes into the product liability litigation system, well under 50 cents goes to the victim. Mr. President, 50 cents or more goes to the lawyers, and an additional amount in transaction costs for related professions. There is no wonder the defense of the present system is so fierce.

So this bill is designed to do two things. It is designed, to a certain degree, to make more uniform and predictable the way in which the product liability litigation or claim system will work; to make it more just, actually to increase claimants' rights in some areas, like the statute of limitations; to reduce the cost of litigation and the overall transaction costs; to restore the competitiveness of American industry; to provide additional incentives for research, to develop, to offer for sale in the market widely the kinds of new and better medical devices, mechanical products, sporting goods that we, as Americans, have come to expect.

No one else in the world has a system like ours. No one else has a system more expensive, no one else has a system that so discourages research and development and marketing of new products.

Finally, Mr. President, we already have an example of how legislation like this works in the real world. In August 1994, less than 2 years ago, this Congress passed and this President signed an 18-year statute of repose for piston-driven aircraft, small aircraft. An industry that had almost been driven out of the United States—famous companies like Piper went into bankruptcy and others like Cessna, with barely one-tenth of the production that they had a decade earlier because of the cost of litigation—has now begun a recovery, a recovery which has proceeded much more rapidly, I think, even than the sponsors of that bill hoped, but one which is symbolized better than anything else by the construction of a new plant for Cessna at a cost of some $40 million to employ some 2,000 men and women at highly skilled, first-rate jobs, producing high-quality private aircraft for American purchasers.

This kind of legislation works, Mr. President. It works for the economy, it works for our consumers, it works for our system of justice. It should be passed and should become law.

Mr. KENNEDY addressed the Chair.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. Mr. President, I wonder if the Senator from South Carolina will yield me 15 minutes.

Mr. HOLLINGS. I will be delighted to yield the distinguished Senator 15 minutes.

Mr. KENNEDY. Mr. President, just in terms of schedules, I ask unanimous consent that the Senator from California be recognized for 15 minutes for her comments at the conclusion of my remarks.

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

Mr. KENNEDY. Mr. President, I think it is only appropriate that we look at the context in which this legislation has been presented to the Senate. Others have described the bill in great detail, and, if time permits, I will mention the various provisions in the bill that I find most objectionable. But I think this body and the American people ought to understand in a comprehensive way what is happening to consumer protections during the course of this Congress in this and other bills.

This bill is supported by a number of big business, special interest groups who have advanced a series of legislative and regulatory initiatives designed to protect those interests.

We cannot just look at this legislation in a vacuum, Mr. President. For example, we have to look at what is happening in the Appropriations Committees, where the appropriators are cutting back on inspections by the various agencies of Government responsible for protecting health and safety in the workplace. In the Occupational Safety and Health Administration, there is a 20-percent reduction in enforcement. In the Environmental Protection Agency, there is a 25-percent reduction in enforcement. The Consumer Product Safety Commission has been cut and is now at its lowest level of enforcement funding since 1972. Even the National Transportation Safety Administration is facing cuts, and that is an agency whose total enforcement budget is only about $8 million to begin with.

What is happening? The same forces that are supporting this tort-related legislation are trying to reduce protection for the American worker and the American consumer in the regulatory agencies by denying adequate enforcement of existing regulations.

Second, these same forces are proposing sweeping changes in the landmark legislation that established the regulatory agencies. In the Labor and Human Resources Committee, for example, last week we considered a bill to weaken the Occupational Safety and Health Act, and next week we're moving on to the Food and Drug Administration. In the OSHA bill, 90 percent of all the companies would be excluded from any kind of inspection at all. That so-called reform bill would reduce the penalties and reduce the kinds of enforcement mechanisms that would be available to OSHA.

So you have the cutbacks in inspections and you have the efforts by the same interests to reduce the effectiveness of the enforcement tools available to OSHA, FDA, EPA, and these other agencies. And at the same moment that is happening, we are presented with this product liability legislation. Anybody who believes that we are considering this in a vacuum does not understand what the legislative process is all about.

Nor are the limits on tort liability in this bill the only ones under consideration in this Congress. The Republican leadership in the House of Representatives has added medical malpractice liability limits to the bipartisan bill that Senator KASSEBAUM and I introduced. We will have a chance to debate that next month. And it was not long ago that we were debating the loser pays concept, an antiquated system used in Great Britain which is now being abandoned there because it fails to protect the consumers in that country. And no doubt we will again face proposals to create an ''FDA Defense''

under which medical devices or pharmaceuticals approved by the FDA would be immune from lawsuits, no matter how recklessly they are manufactured. How long are we going to have to wait for that particular proposal? And the list goes on and on.

So, Mr. President, we have to ask ourselves: What are the two major protections for American consumers? They are the tort system and regulatory protection. Those are the twin pillars under which the American people are protected. They are the twin pillars that assure us of the safest food, the safest water and the safest consumer products available. They are the twin pillars for the protection of the American worker in the workplace and against environmental hazards.

But both pillars are under assault. That is the context in which this bill comes before the Senate.

The other context in which we operate is a Republican Congress that has told us over and over again that Washington does not know best. But in the tort area, which has been recognized for over 200 years as being a State prerogative, its a different ballgame. I suppose our good friends who are proposing this bill say, ''All right, Washington knows best on this one.''

Well under this bill, it appears that Massachusetts does not know best. Because even though my State legislature has decided that Massachusetts consumers should have the benefit of no statute of repose, this bill is going to impose a Federal 15-year period of repose on them. So there is going to be fewer protections for the people of Massachusetts because Washington knows best. Any State that has provided additional kinds of protections for their consumers, they are out of business.

We have been listening to a lot of speeches in the last year and a half about how Washington does not always know best, there is local knowledge, States can fulfill their responsibilities to the people. I hope we will hear a diminution of the number of those speeches, because what in this particular proposal it turns out that the special interests, the special business interests, know what is best for the American consumer. That is hogwash, Mr. President, absolute hogwash.

The American consumer wants to know who is going to be on their side. They want a safe workplace, safe food, inspections to ensure that we are going to have clean air, clean water, and a safe transportation system.

All those are under assault in this Congress, and now in this product liability bill we are going to immunize the major companies that may even willingly or knowingly commit grievous negligence. In 15 years after they put a ticking time bomb on the market they are going to be immunized under this statute of repose. So, Mr. President, we should understand that this really is not about the research costs. This is not about health and safety costs to the consumer.

What about those 2,700 women who died from perforated uteruses from the Dalkon shield before we passed the medical device legislation? We had those hearings. It was not long ago. You talk to individual after individual who appeared at those hearings and they say, ''Why didn't someone do something to protect us? Why didn't someone speak out?'' This is the responsibility of Government. Individual citizens have limited resources. They do not have the great financial resources to protect their interests alone.

So, Mr. President, I agree with those who say to the consumer—beware, beware. This legislation has a head of steam. It is bad enough. But, my friends, this is just the camel's nose under the tent with regard to the attack on consumer protections in this country.

For that reason, and for all of the reasons that have been outlined in considerable detail in my statement which I will include in the RECORD, I hope this bill will be rejected in the Senate. And I admire the President of the United States for standing up against the special big business interests. He understands the anticonsumer context in which this bill may come before him. He understands what I am saying about the camel's nose under the tent. He understands that the next bill he sees may include medical malpractice liability limits.

According to the Harvard public health study, tens of thousands of people died in hospitals in this country last year from negligence in the medical system. We will have an opportunity to debate that issue in the coming months.

So, Mr. President, this is a matter of fundamental protection of American consumers. These extreme regulatory reform and tort reform bills are poised to deprive the American people of the safest food in the world, the safest air and water in the world and the safest products on the market. We must not sacrifice the interests of the American consumer.

If we accept this bill, Mr. President—and if we did not have a President with the guts to stand up and veto it—we would be retreating on our commitment to the American consumer to protect them from death and serious bodily injury. I hope this bill is rejected, and I ask that the text of my prepared statement, be printed in the RECORD, along with an editorial from today's New York Times.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

STATEMENT OF SENATOR EDWARD M. KENNEDY ON H.R. 956 THE PRODUCT LIABILITY CONFERENCE REPORT

I strongly oppose the conference report on the product liability bill, and I urge my colleagues to reject it, because it constitutes an unacceptable threat to the health and safety of American consumers.

This is not ''common sense legal reform.'' It is special interest legislation of the worst kind. Our Republican friends pretend that it is designed to end current abuses of the legal system. In reality, this bill panders to the worst instincts of big business. President Clinton has promised to veto this bill, and it eminently deserves the veto it will get.

This bill has three grave flaws. It arbitrarily caps punitive damages against the most reckless manufacturers of deadly products. It nullifies the sound common law principle of joint and several liability. And it preempts State law in ways that are both unwise and unfair.

Even worse, this bill does not come before the Senate in isolation. It is part of a shameful pattern. It comes before the Senate at a time when the Republican Congress is waging an all-out assault on the health and safety of the American public:

So-called regulatory reform bills would drastically weaken the existing rules that protect public health and safety.

Republican appropriations bills would drastically slash enforcement funds for agencies that carry out the current health and safety laws.

And now, the entire tort system, which provides basic legal protections for the public against defective products, is under Republican attack in this bill.

This is not a liability reform bill at all—it is an avoid-liability bill. It is part of a Republican triple play against the health and safety of the American people by irresponsible business interests.

The strategy is all too clear—undermine the Government's ability to protect health and safety by slashing agency rules and budgets, then slam the courthouse door in the face of all those harmed by the lack of consumer protections.

Wise regulation, effective enforcement, and access to the courts are three basic pillars of consumer protection. Regulation is intended to prevent the manufacture of defective products in the first place. Enforcement keeps business honest. Tort law guarantees adequate remedies for victims of dangerous and unsafe products when regulation and enforcement fail.

The same business interests who support this bill are also urging Congress to weaken the regulatory protections and defund enforcement.

It is ironic that the many Republican supporters of this bill who preach respect for the States refuse to practice what they preach. This legislation is intentionally designed to ride roughshod over State law.

For the past year and a half, we have heard a great deal from the Republican majority about States' rights. On issues such as welfare, education and crime, the Republican majority says it wants to return power to the States.

But when it comes to making sure that big business is protected from lawsuits brought by injured consumers, suddenly ''Washington knows best.''

Tort law is traditionally a State responsibility. In fact, in recent years, many State legislatures have enacted genuine reforms to address the problems of frivolous lawsuits and excessive damage awards. Federal intervention is completely unnecessary—and in this case, counter-productive.

This bill is also very different from the securities litigation reform bill enacted earlier this year, which I supported. The integrity of the stock market is clearly a Federal concern, and Congress has legislated in that area for over 60 years. The field of product liability law, in contrast, has been the province of State legislatures for over 200 years. There is no compelling reason for substituting the judgment of Congress for the judgment of elected State officials and the State courts where the vast majority of these cases are resolved.

Our specific objections to this bill are numerous and serious. It denies adequate compensation to victims of defective products, and undermines necessary incentives for manufacturers to produce safe products.

The cap on punitive damages will limit the ability of the courts to punish the most flagrant conduct by reckless manufacturers. Punitive damages serve a valid purpose by deterring wrongful conduct that injures innocent victims. Such damages are especially justified as a deterrent against manufacturers who engage in intentional wrongful conduct, or who are recklessly indifferent to the safety of others. They should not be let off with a slap on the wrist. Such extreme misconduct must be fully punished in a manner that creates a clear deterrent to future wrongdoing.

The so-called ''waiver'' in the conference report is supposed to permit courts to exceed the cap in flagrant cases. But there is serious doubt about the constitutionality of that provision under the seventh amendment. If it is struck down, all that is left will be a rigid Federal cap on damages.

The nullification of the common law principle of ''joint and several liability'' is also unacceptable. It will severely hamper the ability of innocent victims to obtain compensation for their injuries. For at least 100 years, courts and State legislatures have recognized the unfairness of forcing an innocent party to bear the cost of other people's negligence, if one or more of the wrongdoers are available to pay compensation. That is a sensible rule, and Congress should not undermine it.

Proponents of Federal product liability reform say they want national standards for goods that are sold across State lines. But the conference report before us achieves no such uniformity. It preempts State laws in an uneven and unfair manner.

Punitive damage laws favorable to plaintiffs will be replaced by the new Federal standard. But laws prohibiting punitive damages altogether will stand. Similarly, the bill creates a 15-year Federal statute of repose, but permits State statutes of shorter length to remain in effect.

The end result is not uniformity, but unfairness. This bill is rigged to benefit negligent manufacturers and their insurance companies, while ignoring injured plaintiffs and the millions of American consumers who will no longer be protected adequately from dangerous and defective products.

All of these flaws were present in the Senate bill that many of us opposed. But the anticonsumer bias of this legislation became even worse after the conference with the House of Representatives.

For example, the Senate bill contained a 20-year statute of repose, but the conferees have adopted a 15-year period. As a result, after 15 years, manufacturers of even the most defectively designed or recklessly produced products are immunized from liability and will get off scot-free, no matter how much injury their products may cause.

In addition, types of products that qualify for this blatant protection are expanded dramatically. In the Senate bill, only workplace machinery was covered. But now, all durable goods, including common household products, are given this unjustified protection.

Massachusetts currently has no statute of repose, so this bill represents a major loss of protection for consumers in my State.

When the Senate debated this bill last year, I spoke at length in opposition to medical malpractice amendments. I am pleased that the conference report does not include such amendments. Nor does it include the so-called ''FDA defense'' in the House bill, which would prevent punitive damages in cases involving drugs or medical devices approved by the FDA.

But the bill does apply to manufacturers of drugs and medical devices, just as it applies to other products. The cumulative effect of the many anticonsumer provisions in the bill is to protect these manufacturers at the expense of the health and safety of the people who rely on these products.

This bill is nonsense, not common sense. It pretends to support the legitimate goals of reducing frivolous litigation and improving the civil justice system. In reality, it is special interest legislation that denies fair compensation to victims of negligence and limits the ability of the tort system to deal effectively with gross misconduct by business.

If this bill came off the factory assembly line, it would be labeled ''unsafe for human use.'' And if the principle of quality control applies in the United States Senate, this bill would be soundly rejected. It is a sweetheart deal for business and insurance interests, and a raw deal for the public interest.

[From the New York Times, Mar. 21, 1996]

THE ANTI-CONSUMER ACT OF 1996

The Senate is preparing to vote today on a pernicious piece of anti-consumer legislation masquerading as product liability ''reform.'' The measure is little more than a bipartisan gift to manufacturers and trade associations that supplemented their lobbying and generous campaign contributions with misleading propaganda exaggerating the problem of high verdicts. The bill would arbitrarily cap the punitive damages that juries may award—dangerously weakening the ability of the civil justice system to punish, and thereby deter, the reckless manufacture or sale of unsafe products.

If a majority of senators will not heed legitimate concerns about the measure's rollback of consumer protection, President Clinton must be prepared to make good on his veto threat.

The bill is a convenient exception to Capitol Hill's prevailing philosophy of devolving power to the states. It would compel all states, even in their own courts, to limit punitive damages. The phony rationale given is the need to create a single national commercial standard. But that standard would be applied only when it would benefit the manufacturers. The bill would override the product liability laws of states that allow unlimited punitive damages, for example, but it would impose no such damages on states that do not now have them.

Under the measure, plaintiffs who sue successfully for farm from faulty products could be compensated, as they should be, for medical expenses, lost wages, damaged property and other actual damages. But punitive damages, which are awarded by juries in cases of egregious misconduct, would be limited in most cases to $250,000 or two times actual damages, whichever is greater. That is hardly enough money to serve as a deterrent to major corporations.

Senator John D. Rockefeller 4th of West Virginia, a Democratic architect of this attack on civil justice, has suggested that President Clinton is trying to scuttle the bill to reward major campaign contributors, like trial lawyers. True, the American Association of Trial Lawyers has been one of Mr. Clinton's strongest political and financial backers. But by now it is laughable for Mr. Rockefeller to make purity an issue, given the far greater sums tossed into this fight by the powerful business interests amassed on the other side.

''For irresponsible companies willing to put profits above all else, the bill's capping of punitive damages increases the incentive to engage in the egregious misconduct of knowingly manufacturing and selling of defective products,'' Mr. Clinton said last week. On the merits, the President was right.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Thank you very much, Mr. President.

I want to thank the Senator from Massachusetts for explaining, in his usual way, why this bill deserves to be defeated. Explaining that it is, in fact, part of a pattern of this Congress which continually brings up legislation that does not make life better for people, but in fact, puts them at risk. In fact, puts them at risk, whether it is cutting, as the Senator said, enforcement funds from the Environmental Protection Agency, or weakening our laws that have worked well to bring us the safest products in the world.

Mr. President, I come to this debate by asking a very straightforward question. I am not an attorney, and I tend to look at things in a different way. This is the question I ask: If a young woman, say age 21, is working in a factory and a faulty machine blows up in her face and she is disfigured beyond belief for the rest of her life, should the company who made that faulty product be penalized in such a way that they, and for that matter no other company, will ever make such a faulty product again? I say yes. I say yes.

The company that made that faulty product, and as you will see in many cases, knew they were doing it, should face damages that act as a deterrent for the future. This bill does just the opposite. It will let a company that made such a product, and other companies that might make such a product, off the hook. If we pass this bill, such a company, which might well have profits in the billions of dollars, will be given the equivalent of a slap on the wrist. Because those punitive damages meant to punish them—that is what punitive damages mean, punishment—will be so low they will not be large enough for them to care. Those are the brutal and cold facts. I wish they were not true, but they are true.

I have heard many businesses use words like this: ''Oh, well, it is just a cost of doing business.'' ''Just a cost of doing business.'' In other words, they will factor in lawsuits that go against them into their bottom line. I think the Senator from Washington has proved the point. They factor it into their bottom line. He shows it on his chart.

How cold can you get? If we cap punitive damages, as is put forth in this bill, we are taking the safest system in the world for consumers, changing it, and putting people at risk.

There are other problems in this bill that deal with the statute of repose. Some machinery has a lifetime of 30, or 40 years. In 15 years, those companies are completely off the hook under this bill.

I also join with the Senator from Massachusetts in thanking our President. He is taking the heat on this one. He is standing up for the consumers.

He is standing up for future victims. He is standing up so that we will not have so many victims of faulty products.

I want to give you some examples of actual cases. We are going to take the case of the Pinto automobile, and a young man named Richard Grimshaw. The exploding Pinto tank is a very clear example of what I am talking about. The gas tank exploded and burned in rear-end collisions. Many of us remember this. The company knew this was a problem. It all came out in court. But they sold the car anyway after they did a cost-benefit analysis and found out it would save them $21 million to delay the corrections for 2 years.

What happened when that fatal decision was made? A 13-year-old boy from my State, Richard Grimshaw, was badly burned in a rear-end accident while driving from Anaheim to Barstow. In the words of the California State court judge who presided over Richard's lawsuit, he suffered ''ghastly'' burns over 60 percent of his body, had whole fingers burned off, and required 60 surgeries over a 10-year period.

That was 25 years ago. That tragic accident is still with Richard. For the rest of his life, it will be with Richard. Is that the kind of world we want to encourage, where a company figures it is more cost effective to delay fixing a dangerous product than to risk a lawsuit? I hope not. Yet, if this bill passes, my friends, that is what is going to happen in the boardrooms across America.

Now, not all people in business fall into that category, but unfortunately we have got to look at history, my friends, and learn from it. The memos clearly showed in the Pinto case that a calculated decision was made to delay fixing that car.

Let me read from the pen of the California State judge who upheld that award. In part, ''Punitive damages remain the most effective remedy for consumer protection against defectively designed mass produced articles.'' ''* * *. Punitive damages thus remain the most effective remedy.'' What does this bill do? It guts that. The court concluded, ''Ford could have corrected the hazardous design defects at minimal cost but decided to defer defection of the shortcomings by engaging in a cost-benefit analysis, balancing human lives and limbs against corporate profits.''

Mr. President, are we going to ignore this judge's warning and turn back the clock to a time when callous companies ruined the lives of children, like that boy in Barstow, because of their bottom line? God, I hope we do not do that. If we do, in this particular Congress, I hope this President sticks with it and vetoes this bill.

Did you ever hear about the baby crib story? Another example of a situation that happened in California in the 1970's. A baby crib company produced a dangerous crib where side slats would strangle a baby trying to climb out. Six babies were strangled and the company stopped selling the crib, but it refused to warn the existing owners that there was a problem. They refused to do that. So the parents of Gail Crusan, she was 13 months old, did not know it was a dangerous crib. The company even refused a request by the Consumer Product Safety Commission to issue a national press release. It took an award of $475,000 in punitive damages against the company to finally get them to notify parents who had bought that crib. Punitive damages did what the Government could not do. It caused the manufacturer to warn parents that their children were in cribs that could kill them.

What are we going to do? We are going to make it possible for future companies to put our children at risk. I do not want to go back to those days, Mr. President. The proponents of this bill want us to substitute the long arm of the U.S. Senate and the Congress for the local jury of peers who sit in a courtroom.

Again, I back up what my colleague from Massachusetts says. State control, local control, give them the welfare, give them the Medicaid, cancel national nursing home standards, let the local people decide—that is what we hear out of the Republicans in this Congress, day in and day out. But when it comes to this, protecting consumers, we are going to pass a weaker law and force it on the States? Not on my watch. Not if I can help it. And not on this President's watch. Not if he can help it.

I cannot believe the selective logic that we hear around here. When it suits this Republican Congress, they are all for shipping things back to the States. But when it is in their interest, keep the control in Washington. Boy, I tell you, there is not much shame about that. It simply does not add up.

Now, we hear talk about special interests. Face it, there are special interests here. There are the lawyers on the one side and there are the corporations on the other. So I want to look at who does not have an ax to grind. Who are they? Let me tell you some of the people who oppose this bill. They have no ax to grind. They are not on one special interest or the other. The Brain Injury Association, the Center for Auto Safety, Children Afflicted by Toxic Substances, Citizen Action, Coalition for Consumer Rights, Coalition to Stop Gun Violence, Consumer Federation of America, Consumers Union, the Gray Panthers, National Consumers League, National Hispanic Council on Aging, Public Citizen, Remove Intoxicated Drivers, U.S. Public Interest Research Group, Violence Policy Center, Nuclear Information and Resource Services, Clean Water Action, the Sierra Club, Dalkon Shield Information Network, DES Action USA, the Feminist Majority, the National Organization of Women, the National Women's Health Network, the National Women's Law Center, and Women Employed.

Mr. President, I ask unanimous consent to have printed in the RECORD a list of all of these groups.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THIRTY-SEVEN CITIZEN GROUPS OPPOSING THE PRODUCT LIABILITY CONFERENCE REPORT

AFL–CIO.
Brain Injury Association.
Center for Auto Safety.
Children Afflicted by Toxic Substances.
Citizen Action.
Coalition for Consumer Rights.
Coalition to Stop Gun Violence.
Consumer Federation of America.
Consumers Union.
The Empower Program.
Gray Panthers.
International Association of Machinists and Aerospace Workers.
Int'l Union, United Automobile Aerospace & Agricultural Implement Workers of America.
Nat'l Conference of State Legislatures.
National Consumers League.
National Farmers Union.
National Hispanic Council On Aging.
Public Citizen.
Remove Intoxicated Drivers.
Safe Tables Our Priorities.
United Food and Commercial Workers.
U.S. Public Interest Research Group.
United Steelworkers of America.
Violence Policy Center.
Nuclear Groups:
Nuclear Information & Resource Service.
Public Citizen's Critical Mass.
Safe Energy Communication Council.
U.S. Public Interest Research Group.
Environmental Groups:
Clean Water Action.
Sierra Club.
Sierra Club Legal Defense Fund.
U.S. Public Interest Research Group.
Women's Groups:
Dalkon Shield Information Network.
DES Action USA.
Feminist Majority.
National Organization for Women.
National Women's Health Network.
National Women's Law Center.
Women Employed.

Mrs. BOXER. Mr. President, we should not look to the lawyers and we should not look to the companies. We should look to the people who stand up and speak for consumers and speak for victims.

Now, I think this bill is particularly tough on women. I do not know what has happened to this place, but do we forget things that just happened? Do we forget about the silicone gel breast implants which were introduced in the market in 1962 with no long-term testing before being placed inside women? Implant patients and some doctors were told by manufacturers that the implants were safe and would last a lifetime. However, the implants were found to leak or rupture, releasing silicone into the body, now known to migrate to the brain, liver, spinal fluid, and kidneys. Now many women with ruptured implants are sick with a variety of autoimmune diseases.

It was because of a lawsuit that included a punitive damage award of $6.5 million that the full extent of the hazards associated with silicone gel breast implants were brought to the public's attention. The availability of silicone

gel breast implants were restricted only after Dow-Corning was held liable for punitive damages.

Do we not think more about women's health? Have we forgotten that? Have we forgotten the Copper-Seven IUD? The manufacturer knew for more than 10 years that their product could cause loss of fertility, serious infection, and the need to remove reproductive organs. Instead of doing anything about it, the manufacturer continued to earn profits and put millions of women at risk. A jury awarded one $7 million punitive damage award for what it determined to be the manufacturer's intentional misrepresentation of its birth control devices. Under this bill, that manufacturer would have had to pay $250,000, or double the plaintiff's compensatory damages, whichever is higher. We know in most cases women do not get as much in compensatory damages as men because women often earn less money. We know that. This bill is antiwomen. We should call it what it is.

How about the Dalkon shield? You heard the Senator from Massachusetts talk about that. It took eight punitive damage awards before A.H. Robins discontinued the Dalkon shield. A $7.5 million punitive damage award was awarded to a 27-year-old woman who had to have her uterus removed, rendering her sterile and in need of dangerous synthetic hormone treatments. That was extraordinary. But it took more than one punitive damage award. They made so much profit they kept on producing it. They concealed studies of the dangerous effects and even misled the doctors into prescribing the IUD.

If it takes multiple punitive damage awards to force a major corporation like A.H. Robins to stop selling dangerous products, how could dangerous products be stopped by this legislation which caps punitive damage awards to relatively low amounts? The Dalkon shield is yet another example of how the current system finally took a dangerous contraceptive off the market.

I cannot believe there are those in this body who feel that this legislation can make life better for the people of this country, just on the few examples that I have brought here today. To the contrary, it will put our people at great risk.

The Senator from Washington shows you with his chart that businesses write it into the bottom line.

The proponents of this legislation argue that the current system prevents women from having more choices when it comes to contraceptives. Well, I have a daughter, and a lot of you have daughters. Do you want to see dangerous contraceptives come on the market? Let me tell you unequivocally—and I will debate this point toe to toe with anyone in this Chamber—if the current system is preventing other Copper-7 IUD's or Dalkon shields, or other dangerous contraceptives from coming on the market, I say that is good. Because I do not want my daughter sterile, and I do not want my daughter sick, and I want her to have more children if she chooses to do that, and to live a healthy life. We want contraceptives, but we want them to be safe.

In conclusion, Mr. President, let there be no mistake as to what this conference report is all about. This is not proconsumer legislation. This legislation is anticonsumer. That is why every major consumer group in this country opposes it strongly.

The conference report is about protecting wrongdoers. Now, if some of my colleagues, for whom I have great respect, see it another way, that is their right. But I am here to call it the way I see it. It is designed to relieve corporate America of its proper legal duty to make safe products, represent them accurately, and treat consumers fairly.

I have seen no justification put forth thus far in this debate by the proponents of this conference report that leads me to believe that it will help our people. I believe it will, in fact, trample on the rights of American consumers. We, in this Senate, are the last line of defense of the rights of the American consumers and for working families. I tell you, we need to protect them from this legislation.

Again, I thank the President for getting out there and saying he is standing on the side of the consumers. To those who say, ''He is doing it for lawyers,'' we can argue that from night until day, lawyers on one side, big business on the other. For some, that is a tough choice. That is not what the choice is about. The choice is about the consumer. The choice is about little babies in cribs. The choice is about women's reproductive health, safety in the workplace, at home, and when we are at leisure. That is what it is about. I say that this U.S. Senate should stand with the consumers. If you do that, you are fulfilling your responsibilities.

I thank the Chair, and I thank Senator HOLLINGS.

Mr. HOLLINGS. Mr. President, I thank the distinguished Senator, first, from Massachusetts, for his presentation this morning, in a most meaningful way and, of course, the Senator from California. She really keynoted the issue as it should be in a very cogent and persuasive fashion. When we say consumers, that is the people versus those making a profit on defective products, with shoddy manufacturing.

America is the safest place in the world to live. That is part and parcel, as mostly I would say, I guess, because of our State legislatures. The State legislatures have acted on the need of product liability provisions. They have acted and they have maintained their laws. But it now becomes an assault in the name of a cost of a hotel room, or a ski lift, and such nonsense as that, trying to really move the attention, I guess, of the Senators, thinking they, frankly, do not have much sense and will go along with that kind of nonsense. Thinking that Senators will not understand what the Senator from California is trying to emphasize—these are real life injuries, and the more we get into them in a very meaningful way, as we do in trial law practice, the less danger and injury has been caused. So I could not express my gratitude enough to the Senator from California. I wish we could go ahead and vote right now, but I will retain the balance of my time.

The PRESIDING OFFICER. Who yields time?

Mr. GORTON. Mr. President, I yield such time as the Senator from West Virginia may desire.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROCKEFELLER. I thank my colleague. Mr. President, I am very happy that we are here this morning with this remaining part of the debate. Already, a variety of charges have been made, which have no basis in fact, as they relate to the product liability reform. But I think rather than to try to go into that, it would be better to focus on what this law is trying to do and why it is a good conference report.

In a matter of a couple of hours, we are going to pass this conference report. It will pass. The House and the Senate, for the first time, I believe, in recent history will have passed product liability tort reform. So it is an interesting and, I think, a rather noteworthy point of history.

We have had really a couple of decades of hearings, markups, and arguments. I remember one time a number of years ago we actually had 60 votes on cloture, and the majority leader at that time—it was still legal to do so—stopped the vote, actually stopped the vote. The Presiding Officer was not here in this body yet. For 45 minutes we waited, and all of a sudden, two ''yes'' votes became two ''no'' votes. I retain in a desk drawer in my office the sheet which is held at the Democratic desk, which shows how the numbers go up, and they went up to 57, 58, 59, and got to 60, and then it went from 60 to 59 to 58. So there is a lot of history on this. Of course, there is a lot of emotion. A lot of that emotion is justified. Some of it is not. But history, there is.

I expect the House to approve this report in short order and send it on to the President, who has a chance, I think, to do something remarkable and significant for this country, if he should choose to sign what will then be the legislation.

I regret that yesterday's debate demonstrated—and already this morning some, too—there are some very fundamental misunderstandings. I think some of the misunderstandings are very deliberate. They are deliberately put forward to obscure and obfuscate. I think the reason for that is understandable. Product liability tort reform law is not everybody's first choice of the day when they get up in the morning. They do not say, ''How can I get deeper into product liability tort

reform law?'' Those of us who are not even lawyers understand best what I am talking about.

Therefore, it becomes easy to mislead. I suppose it is easy for the proponents, as well as for the opponents of this legislation, to mislead. But I think that the proponents have really tried not to mislead, to stick to what is in the legislation. The opponents have been vigorous in their work, which is part of the legislative process.

I want to emphasize that this conference report is only, Mr. President, about something called product liability reform. That is all it is. It does not pretend to be more. It does not pretend to solve the crisis in Bosnia or hunger in Rwanda, nor anything else. It is just about product liability reform.

It establishes some uniformity for consumers and businesses in our product liability system. That is what we attempted to do. That is it. Product liability reform. This is not broad civil justice reform. This is not an overreaching House contract item. This is not a bill that protects drug traffickers, or gun users, or those who sell drugs or guns. This is not an extreme bill. This is a limited bill.

The Senator from the State of Washington, who has been credible throughout this process, has been extraordinary, I think, in helping to discipline and to make sure that we sculpted this bill and then kept this bill basically in the form —virtually, with the main exception of the statute of repose—as the Senate passed it last May, which is almost a year ago.

One of the reasons for this long, long period of time is that it took a long time for the House to accept that we really meant it, and that when we said we were going to stick with the Senate bill, we really meant it, and that in fact we had to, in any event because it was a matter of mathematics. Yesterday we did not get 58 votes, we got 60 votes. Finally that was understood.

So what this bill does is establish a fair and a balanced commonsense rule which benefits both consumers and business persons, and it will create jobs. The Senator from Washington has discussed the aviation liability reform. I think it will improve product safety because it will allow manufacturers to make improvements.

Now, manufacturers often decline to make improvements to their product because they are afraid that if they make an improvement, it will infer somehow that their previous iteration of the same product was deficient or unsafe. So rather than take that chance they do not make the improvement. That does not help consumers.

I think it will encourage innovation. I know it is going to encourage innovation. And I think it will stimulate economic growth just as the aviation bill did.

I have to say once again that there are all kinds of ways of protecting the consumer. We can do it through being sure that there are punitive damages available. That is the reason for the additional amount that was added, and that is also the reason that at the suggestion of the Department of Justice we clarify, the additional amount to make it a stronger case should there be a constitutional challenge against it—because we are determined that there will be no cap on punitive damages except whatever the jury decides.

I am forced just by definition of the world that we live in to look at, once again, at our competition. You know that when people lose jobs in our country or do not gain jobs that they might gain, that is one of the worst things you can do to them. It is injuring them in a very severe way. It is depriving them of family and economic justice. In the case where it puts people on Medicaid, that is very obviously the consequence of that. Not having a job is a way to hurt somebody deep and hard.

In the European Economic Community, which has, I think, 350 million consumers—Europe is one of our huge competitors—there are 13 countries in that community. Those countries presumably have provinces, or whatever they call them. It does not make any difference. They overrun all of that, and they have one uniform product liability law for all of those countries because they want to be able to minimize transactional costs, maximize research and development, maximize jobs, and maximize their competition against the United States of America, which is their principal competitor. So they have banded together to do this because they know that, if they do that, they will have a leg up on us in terms of the creation of jobs.

Japan, which I think very few would argue is not a competitor to the United States economically, has just this year done the same thing. So they have a single uniform liability law for their entire nation. They do not sue a whole lot anyway. I think there are 13,000 lawyers in Japan, and there are 600,000 or 700,000 in the United States. Nevertheless, they are ready.

So they understand that the system that America has has very, very high transaction costs, and they understand that the high transaction costs exceed the compensation that is ultimately paid to the victims of defective products. That is great for lawyers—both for trial lawyers and defense lawyers. They are both equally guilty. But they get the money, not the victim. They get the majority of it. It used to be that in the Wild West people carried six-shooters, and they would just shoot. We have a different, more modern way of doing it now, and we destroy ourselves in other kinds of ways.

So these transaction costs, of course, are then real costs, and they have to be passed on to the consumers through higher priced products. People say when you pay more for a product that, ''Well, that is the kind of argument people make.'' It is true. We pay more. The Senator from Washington is prepared to give all kinds of statistics about that. He did yesterday. We pay more. Consumers pay more so that the trial lawyers and the defense lawyers can make more. In a sense, I am not blaming them because that is the system of law that they live under, as do we. That is why we are trying to change the law—so as to bring some more common sense into this process.

The system's unpredictability and inefficiency are big items. Unpredictability is a bad thing. It is a bad thing. It is a lack of uniformity, a lack of predictability. It is harmful. It stifles innovation. It stifles research and development.

What is the very first thing that happens in this country? I have heard many times the distinguished Senator from South Carolina say this. When a company gets in trouble, or a company is up against a lawsuit, or a company is whatever for whatever reason in trouble, what is the first thing they do? They cut out research and development. That is the first thing they cut, which is, in fact in many instances, one of the last things they should cut.

It is just like a hospital. When a hospital gets in trouble financially, what is the first thing they do? They close the emergency room because it is the most expensive, which is often the last thing they should do in terms of the community they serve. But they act as they believe they have to act, and we have to understand that.

So, stifling innovation and keeping beneficial products off the market has handicapped American firms as they try to compete in a global marketplace. The current system is simply unfair, therefore, again to consumers and to businesses alike, and that is why we are projecting this conference report forward.

Of course, many of the States have fully recognized the inequities of the current system, as has been pointed out by a number on the other side of this argument. The States are very aggressive on this, and they have moved ahead to enact product liability reform. Thirty States have made major changes in joint and several, for example, and in most cases—virtually all cases—it is limiting joint and several. But by doing so, while solving some issues, they have inadvertently created other kinds of problems.

Only through Federal product liability reform can we, in this Senator's judgment, resolve the problems caused by the current State-by-State product liability system. State legislatures can be very helpful in this area, but it is virtually impossible for them to be uniform because they are all different.

We have 134 legislators in our State of West Virginia in the senate and house. They are not going to do the same thing that Ohio does, or that Kentucky does, or that Virginia or Maryland do. They are just not going to. So you have, in fact, 51 different laws relating to product liability in our country.

As I said yesterday, years and years ago I suppose that the majority of products made in the States were sold in those States. That is no longer true. Seventy percent of products made in the State of Ohio, and in the State of the Presiding Officer, if it is at the national average, are sold outside of Ohio. The same is true with the State of West Virginia, the State of Washington, and the State of South Carolina. So we are an interstate as well as an international economy. Therefore, we need uniformity at certain points to shape and adapt to that.

For this reason, State reform legislation—because of the 70 percent being shipped outside of the State of manufactured goods, less than 30 percent effectiveness is the standard for State law. I mean, by definition, they have to be less than 30 percent effective. On the other hand, all of the State citizens who sue in the State are governed by that State's product liability statute, and thus they fall victim to an antiquated system, and the people here want to protect them.

That is why the National Governors' Association recognized both the need for product liability reform and the necessity of Federal action to effectuate that reform. They did not say, well, States, you have to do a better job and do things more alike. They said, no, there have to be places where the Federal Government sets uniform standards.

The Senator from South Carolina was talking yesterday about how the States always want to have more power; they want to have the power shifted to them. That is the direction in which our country is going.

That is not the direction of the National Governors' Association on product liability and tort reform. They want more Federal action. That is why the American Legislative Exchange Council, not very well-known, but it is a bipartisan group of over 2,500 State legislators—that is a lot of them—representing all 50 States, three times has called upon Congress to enact product liability law which is Federal. That is why President Clinton has said that he supports the enactment of limited but meaningful product liability reform at the Federal level. He said that in a number of statements—in a letter to us, in a statement of policy to us—during the course of this debate. H.R. 956 contains that limited but meaningful product liability reform which makes common sense and which has measures which are good for ordinary consumers and businesses.

Incidentally, Mr. President, I wish to make one point. People keep referring—and even there was an article this morning in the Washington Post—to big business versus trial lawyers. On the business side, it is not big business which is really at stake here. It is small business. That is the reason for the support of the National Federation of Independent Businesses.

Mr. President, 98 percent of businesses in America are small. Those are the people who get put out of business most quickly. Those are the people who have the least cash reserve. Those are the people who live at the margins. Those are also places, we have long established, from where often the best ideas come. That is the overwhelming dynamic center of the American economy.

So H.R. 956 contains, as I have said, what I believe is needed.

Mr. President, I ask unanimous consent that a list describing the major provisions of the conference report be printed in the RECORD at the conclusion of my remarks.

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

(See exhibit 1.)

Mr. ROCKEFELLER. Mr. President, the conference report does, however, provide the following: legal fairness for product sellers; a rule to discourage illegal use of alcohol and drugs—we cannot stop it but to discourage it, certainly not to reward it—a proconsumer statute of limitations, an enormously proconsumer statute of limitations; a statute of repose that will stimulate jobs and economic growth; alternative dispute resolution as a way of settling some of these matters. It is voluntary, which is not so thrilling to me. I wish it were not. I wish it were mandatory, but it is voluntary. At least it is there. That is the way they do things in Japan. That is why they settle everything over there, which is not to say they do not have their economic problems, but product liability is not one of their problems. Punitive damages fairness is in this bill. Opponents of the bill say we cap punitive damages. Untrue. Untrue. I will not vote for legislation which caps punitive damages, as I would not vote for legislation that caps what lawyers can make. Part of me would like to, but I do not believe that because I believe the market should make that decision. But punitive damages are not capped.

We added the additional amount provision, originally called the judge additur provision, a suggestion which was endorsed by a number of high-up folks at the White House and then the whole idea for making sure that it was more constitutional came from the Department of Justice, which I presume to be the executive branch of Government. So there are no caps on punitive damages, and I will assert there could not be because I was a part of this bill. I was not going to go along with a bill that would allow such a thing.

There is several liability for noneconomic loss; workers compensation subrogation; biomaterials access assurance.

These, Mr. President, are some of the highlights.

Now, in winding up here, I should like to take a moment to comment on where we stand in the legislative process. I wish to be hopeful; I try to be hopeful; I am hopeful; I will insist on being hopeful; I will be everlastingly hopeful that the President will reconsider his decision to veto this product liability conference report and that in fact he will sign it. I firmly believe that the President can sign this bill, even recognizing that he will not support each of its provisions. There are some provisions that I think ought to be in this. There are some provisions which I think ought to be changed, some. Nobody gets everything they want. There are 535 people in the Congress.

Even though the President might not support each of its provisions, when the product liability conference report is considered in its totality, in balance with the need for this reform, I remain hopeful that the President will still seize this opportunity to participate in product liability reform which will benefit in fact the American people and the American economy. From my point of view, I stand ready to work with the President to achieve what I believe is our common goal, his goal, my goal, our goal, of fairly balancing what needs to be fixed in our broken product liability system, which he surely must recognize, while preserving important rights for consumers. This is not business versus consumers. We are trying to achieve a balance where each business and consumer gets certain improvements, and providing business with the predictability that they need to compete in today's economy.

In conclusion, because I do not know how much time is remaining—and I am not interested—I wish to thank a few people. First of all, I again wish to thank Senator GORTON, Senator SLADE GORTON from the State of Washington, G-O-R-T-O-N. That is his name. He has been absolutely incredible over the years and continues to be in this process—remarkable, calm, intellectual, unflappable, fair, flexible. It is just a stunning privilege to be able to work with SLADE GORTON and with his staff, Jeanne Bumpus, Trent Erickson; Commerce Committee staff, Lance Bultena. We spend a lot of time together. When you do these things, you get real close.

I thank all of the Democratic supporters, not that that is a convention full of people, but I thank each and every one of them and all of their staff. And, obviously and particularly, I want to thank my own staff: Jim Gottlieb, a superb lawyer—inventive, flexible, calm, tough, a great negotiator and a marvelous human being; Ellen Doneski, who is just indefatigable. She is just like some kind of a rolling army—cannot be stopped. She has a tremendous sense of humor, is relaxed, adamant, just puts her mind to this or other things. She is actually part of my health care staff, but she is so smart and so flexible she can get this mastered. She is not a lawyer, but do not tell anybody that because everybody thinks she is.

Then I want to thank another person who is not here because her fiance has been through, and is still going through, a terrible, terrible crisis, and that is Tamera Stanton, who is kind of

here in spirit. When we were having this debate last year, she sat next to me. She is my legislative director, an extraordinary, brilliant, wonderful person who is now going through a very, very tough—but also encouraging—experience in terms of the health of her fiance, as they hope and plan to get married in June.

So, I am mindful of these people, grateful to these people, and I thank my colleagues for their forbearance.

Mr. President, I ask unanimous consent that numerous fact sheets, and a list and letter from small business organizations, be printed in the RECORD. I yield the floor.

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

(See exhibit 2.)

EXHIBIT 1

MAJOR PROVISIONS OF CONFERENCE REPORT

Legal Fairness For Product Sellers: Product sellers are held liable only for their own negligence or failure to comply with an express warranty. The product seller, however, remains liable as if it were the manufacturer if the manufacturer cannot be brought into court or is unable to pay a judgement. This provision assures injured persons will always have available an avenue for recovery, while relieving retailers and wholesaler-distributors of substantial unnecessary legal costs. The provision is ''consumer neutral'' and any attempt to characterize it another way lacks credibility.

Rule to Discourage Illegal Use of Alcohol and Drugs: The defendant has an absolute defense in a product liability action if the plaintiff was under the influence of intoxicating alcohol or illegal drugs and as a result this influence was more than 50 percent responsible for his or her own injuries. The alcohol/drug defense in H.R. 956 is consistent with law of the substantial majority of states implements sound public policy. It tells persons that if they are drunk or on drugs and that is the principal cause of an accident, they will not be rewarded through the product liability system. It also relieves law-abiding citizens from having to subsidize others' irresponsible conduct through higher consumer prices. This provision has not been controversial or challenged by professional consumer groups as unfair.

Pro-Consumer Statute of Limitation: H.R. 956 permits a plaintiff to file a complaint within 2 years after he or she discovers or should have discovered both the harm and its cause. This is a liberal, pro-claimant provision, which will be particularly helpful to persons who have been injured by products that result in latent inquiries (*e.g.,* drugs and chemicals). Contrary to the suggestion by some opponents, this provision will create a uniform, fair national standard which will open courthouse doors to plaintiffs in many states, such as Virginia.

Statue Of Repose Will Create Jobs and Stimulate Economic Growth: A limited statistic of repose of 15 years is established for durable goods used in the workplace, unless the defendant made an express warranty in writing as to the safety of the specified product involved, and the warranty was longer than the period of repose (15 years). Then, the statue of repose does not apply until that warranty period is complete. The statute of repose provision will not apply in cases involving a ''toxic harm.''

Strong support exists for this reform, particularly as a result of the enactment of the General Aircraft Revitalization Act of 1994, signed by President Clinton in August 1994, which created a federal eighteen year statute of repose of general aviation aircraft. This law has resulted in production of safer aircraft and the creation of thousands of new jobs and has not been perceived as unfair to consumers. A growing number of states have enacted legislation in this area as well. The statute of repose in H.R. 956 is both longer and more limited in scope than any existing law.

As one might expect, there are very few cases involving older workplace durable goods and they are generally won by defendants. Nevertheless, cases involving very old products bring about substantial legal costs and put American machine tool builders and other durable goods manufacturers at a disadvantage with foreign competitors. Foreign competitors rarely have machines in this country that are thirty or more years old, so they pay less liability insurance than their American competitors.

Alternative Dispute Resolution: Either party may offer to participate in a voluntary, non-binding state-approved alternative dispute resolution (ADR) procedure. This pro-consumer provision is intended to promote the use of ADR procedures, which can provide a quicker and cheaper mechanism of handling legal claims. This provision should help such individuals receive compensation for their claims more quickly and bypass the need to retain costly legal representation.

Punitive Damages Fairness: Punitive damages are quasi-criminal punishment for wrongdoing; they are a windfall to the claimant and have nothing to do with compensation for injury. H.R. 956 permits punitive damages to be awarded if a plaintiff proves, by clear and convincing evidence, that the harm was caused by the defendant's ''conscious, flagrant indifference to the rights or safety of others.'' The standard is consistent with law in most states.

Punitive damages may be awarded against a larger business up to the greater of $250,000 or two times the claimant's total economic and noneconomic damages; against an individual or small business, punitive damages can be awarded up to the lesser of $250,000 or two times the claimant's total economic and noneconomic damages. The provision is ''gender neutral'' and places no limitation on compensatory damages (economic damages plus ''noneconomic damages'' such as pain and suffering). A special rule allows a judge to augment the punitive damages award against a big business when the ''proportionate'' award is ''insufficient to punish the egregious conduct of the defendant.'' A controversial provision that would allow the defendant the right to a new trial if the court used this special power has been removed from the legislation and does not appear in the conference report—as Senator Gorton and I vowed it would not.

Approximately one-quarter of the States have set forth guidelines on punitive damages awards, including Illinois, Indiana, North Carolina, New Jersey, Oklahoma, and Texas in 1995. Because H.R. 956 is not preemptive, the outcome of many punitive damages cases involving larger businesses would not be affected. In some cases against small businesses, however, the outcome may help the business survive, because the bill limits the amount of punitive damages recoverable against a small business to $250,000. This is a particular benefit to the small business community, since an award exceeding $250,000 could virtually wipe out most small businesses.

Several Liability For Noneconomic Loss: The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages. This system is unfair and blunts incentives for safety, because it allows negligent actors to under-insure and puts full responsibility on those who may have been only marginally at fault. Thus, a jury's specific finding that a defendant is minimally at fault gets overridden and the minor player in the lawsuit bears an unfair and costly burden.

Joint and several liability produces extreme harm for our society. For example, Julie Nimmons, CEO of Shutt Sports Group, Inc. in Illinois, has testified that joint liability has caused manufacturers of protective sporting goods equipment, such as safety helmets, to withdraw products from the market or be chilled from introducing new products. Recognizing the urgent need for reform of this unfair doctrine, 33 states have already abolished or modified the principle of joint and several liability.

H.R. 956 adopts a balanced approach between those who call for joint liability to be abolished and those who wish for it to remain unchecked. The legislation eliminates joint liability for ''noneconomic damages'' (e.g., damages for pain and suffering or emotional distress), while permitting the states to retain full joint liability with respect to economic losses (e.g., lost wages, medical expenses, and substitute domestic services). This means that each defendant will be liable for noneconomic damages in an amount proportional to its percentage of fault of the harm. This ''fair share'' rule is based on a joint liability reform enacted in California through a ballot initiative approved by the majority of voters in 1986. The same approach was enacted by the Nebraska legislature in 1991.

It has been argued by some opponents that the provision is ''anti-women'' because their economic damages may be lower than men and, for that reason, they depend on noneconomic or so-called ''pain and suffering'' damages. However, there has been absolutely no showing in California, a large and litigious state, that the California approach discriminated against any sex or any group. In fact, noted California trial attorney Suzell Smith has testified that the California law is fair and has worked well for consumers.

Workers' Compensation Subrogation: This provision preserves an employer's right to recover workers' compensation benefits from a manufacturer whose product harmed a worker unless the manufacturer can prove, by clear and convincing evidence, that the employer caused the injury. This provision would modify state law in a very positive way. It would create a new private incentive on employers to keep their workplace safe and achieve this goal without reducing the amount an injured employee can recover in a product liability action. This provision has not been challenged by professional groups as controversial or unfair.

Biomaterials Access Assurance: Millions of citizens depend on the availability of lifesaving and life-enhancing medical devices, such as pacemakers and hip and knee joints. The availability of these devices is critically threatened, however, because suppliers have ceased supplying basic raw materials to medical device manufacturers. A 1994 study by Aronoff Associates concluded that there are significant numbers of raw materials that are ''at risk'' of shortages in the immediate future. Suppliers have found that the risks and costs of responding to litigation related to medical technology far exceeds potential sales revenues, even though costs are *not* finding suppliers liable!

H.R. 956 will safeguard the availability of a wide variety of lifesaving and life-enhancing medical devices. The provision was introduced in this Congress as S. 303, the

''Biomaterials Access Assurance Act of 1995,'' by Senators Lieberman and McCain and was added to the Senate version of H.R. 956 during the Commerce Committee's markup. The provision, which has been the subject of hearings and enjoys very strong bipartisan support, will help prevent a public health crisis by limiting the liability of biomaterials suppliers to instances of genuine fault and establishing a procedure to ensure that suppliers—not manufacturers, can avoid litigation without incurring heavy legal costs. This provision is critically important to all Americans, particularly women, according to Phyllis Greenberger, Executive Director for the Society for the Advancement of Women's Health Research.

Ironically, even though this bipartisan provision would unquestionably provide a tremendous public health benefit and would not adversely affect consumers, it is not well understood by some and, therefore, becomes a target by those who are willing to concoct and perpetuate untruths in the desperate attempt to selfishly promote their own economic agenda. The fact is that this is a proconsumer provision which does not in any way limit the ability of claimants to seek recovery from medical device manufacturers; the provision recognizes the ''common sense'' principal that suppliers of basic materials, who are *not* dcurrently found liable, should not be permitted to be indiscriminately hauled into court.

EXHIBIT 2

THE FACTS ON PRODUCT LIABILITY

Fact: There is no cap on economic or noneconomic damages. Claimants will continue to be able to recover whatever they are awarded in a court.

Fact: The statue of repose remains limited to durable goods in the workplace only. Statements being made that we now cover all goods are simply wrong.

Fact: Product sellers, lessors, or renters will NOT be protected from negligent entrustment liability. That is precisely why the ''negligent entrustment'' exception was moved to the product sellers section of the bill.

Fact: Dow Corning, and other companies who made or make breast implants will NOT be shielded from liability. Whether or not they supplied the silicone, they remain liable as manufacturers.

Fact: Drunk drivers, gun users, etc will NOT be protected from liability in any way. Opponents are intentionally trying to confuse harm caused by a product, which IS covered in the bill, and harm cause by the products' use by another, which is NOT covered in the bill and remains totally subject to existing state law. (See Sec 101 (15) and 102 (a)(1)—definition of product liability action includes only ''harm caused by a product'' not ''use.'' This is a big difference.

Fact: In all states that permit punitive damages, they will continue to be available, and the ''additional amount'' provision will apply in all those states, regardless of whether caps are higher or lower in that state.

Fact: Tolling of the statue of limitations will be covered as they now are, by applicable state and federal law. For example, see 11 USC 108c automatic tolling in bankruptcy cases. Nothing in the bill or omitted from the bill will change state law on tolling.

Fact: State law will continue to control whether or not electricity, stem, etc is considered a product or not.

Fact: This is NOT one-way preemption, but a mix of state and federal rules. Products are in interstate commerce, and should be subject to more uniform rules for businesses and consumers.

Fact: 30 states have modified joint and several liability at this point. The federal proposal follows the California law affecting ONLY noneconomic damages.

PROVISION AND PRODUCT LIABILITY CONFERENCE REPORT, MARCH 13, 1996

Liability of Product Seller

Same as Senate bill—Product seller can be held liable as manufacturer only in limited circumstances.

Applicability/Preemption

Same as Senate bill—Applicable to product liability cases only.

Alternative Dispute Resolution

Same as Senate bill—Dispute Resolution (ADR), with no defendant loser pays provision.

Defenses Regarding Alcohol or Drugs

Same as Senate bill—Complete defense if claimant was more than 50 percent responsible.

Reduction for Misuse or Alteration

Same as Senate bill—Reduction of damages by the percentage of harm which is the result of the misuse or alteration.

Punitive Damages

Same as Senate bill: (a) Ceiling of greater of $250,000 or 2 compensatory; (b) DeWine Amendment including assets in determination of damages; (c) DeWine small business amdt—limits punitive damage awards for business under 25 employees, to the lesser of $250,000 or 2 compensatory damages; and (d) Judge can award an additional amount for punitive damages in egregious cases, under factors set forth in bill. [Clarification that judge can award all the way up to the initial jury award.]

Statute of Limitations

Same as Senate bill—Two years after date of discovery of the harm and cause of harm or date that these should have been discovered.

Statute of Repose

Retains Senate scope—Limits to 15 years for durable goods in the workplace only, with exception for toxic harm.

Joint and Several Liability for Noneconomic Loss

Same as Senate bill—Joint and several liability for all economic damages, and several liability for noneconomic damages.

Federal Cause of Action

Same as Senate bill—No new federal cause of action.

Biomaterials

Same as Senate bill—Biomaterial suppliers who furnish raw materials or component parts, but who are not manufacturers or sellers, are protected from liability; amendments addressing shell corporation concerns and deleting the certificate of merit requirement.

Is this one-way pre-emption?

This is a real red herring argument. The truth is this is a balanced bill—for consumers and for business. In some cases state law prevails, and in some cases, the federal law controls.

The goal of federal legislation, especially where you are dealing with interstate commerce, is uniformity, fairness, and predictability. It naturally follows that Federal laws very often must preempt inconsistent state laws. And this product liability bill allows maximum flexibility for the states within a uniform federal system.

The interpretation of which laws apply to which situations, is complicated (and is best left to the lawyers). But lets look at a few of the specifics of the bill:

If a state has a shorter statute of limitations, and many do, this bill makes it longer. Period. Which way is that preemption?

If a state has a statute of repose, this bill makes no change as to the time period, but does make sure that victims of toxic harm receive compensation regardless of the time that their injury is discovered.

If a state doesn't allow punitive damages, at all under current law, this bill makes no change in that state's laws.

In some states that do permit punitive damages, such as Colorado and Maryland, the standard for allowing punitive damages is lessened, not stricter. (The standard goes from one requiring proof ''beyond a reasonable doubt'' and ''actual malice'' to ''clear and convincing evidence.)

If a state does permit punitive damages, I believe that the new federal rules will, for the first time, permit judicial flexibility in determining the amount of punitive damages, even if there is a cap on the amount of punitive damages under that state's law which is different that the new federal bill.

So, in summary, yes this bill does preempt state law in some situations. But to suggest that it is totally one-way is misleading at best.

The conference report is a tightly balanced bill seeking to make some uniformity out of a patchwork of conflicting state laws.

U.S. SENATE,
Washington, DC, March 20, 1996.

KATHERINE PRESCOTT,
National President, MADD, Irving, TX.

DEAR MS. PRESCOTT: Your letter of March 19 is wrong, and based on a totally incorrect quoting of the proposed law.

Your letter says that the product liability bill covers ''harm caused by a product or product use.'' that is incorrect.

The legislation reads: ''harm caused by a product'' only.

You have been misinformed, perhaps intentionally, in an effort to convince you that cases of drunk driving would be covered under the bill. The fact is that cases of drunk driving or so-called dram shop cases would not be covered by this legislation.

In addition, those who ''negligently entrust'' a product, such as alcohol, resulting in drunk driving situations, would not be protected in any way under the law.

I will read your incorrect letter, and this response, into the CONGRESSIONAL RECORD today, and I expect you will want for me to include your retraction letter as well.

Kindly FAX your retraction to me immediately at 202–224–9575.

Thank you.

Sincerely,

JOHN D. ROCKEFELLER IV.

IMPACT OF FEDERAL PROVISIONS ELIMINATING JOINT AND SEVERAL LIABILITY FOR NONECONOMIC DAMAGES IN PRODUCT LIABILITY CASES

The Conference Committee version of the product liability bill is currently expected to retain the Senate bill's provision eliminating joint liability for noneconomic damages. This Federal law provision would not significantly change the law in those states which already either have eliminated or severely limited joint liability, or have imposed specific limitations on the award of noneconomic damages.

Twelve states have eliminated joint liability altogether: Alaska, Arizona, Colorado, Idaho, Indiana, Kansas, Kentucky, North Dakota, Tennessee, Utah, Vermont and Wyoming.

Two states have eliminated joint liability for noneconomic damages: California and Nebraska.

Ten states have otherwise limited the availability of joint liability as to noneconomic damages or damages generally, so

as to make it significantly less likely that noneconomic damages would be subject to joint liability: Florida, Illinois, Iowa, Mississippi, Montana, New Hampshire, New Jersey, New York, Oregon, and Texas.

Three states have eliminated joint liability in cases in which the plaintiff is negligent: Georgia, Ohio and Oklahoma.

Five states (including three already mentioned) have capped awards of noneconomic damages: Alaska, California, Kansas, Maryland, Massachusetts and Michigan.

In all, 30 states have adopted measures that already limit the recovery of noneconomic damages. These include eight of the nine largest states in the union—California, New York, Texas, Florida, Illinois, Ohio, Michigan and New Jersey.

SMALL BUSINESS ORGANIZATIONS SUPPORTING PRODUCT LIABILITY REFORM

National Federation of Independent Business (600,000 small businesses).

National Association of Wholesaler-Distributors (156 trade associations representing 250,000 small businesses).

U.S. Chamber of Commerce (215,000 small businesses).

National Association of Manufacturers (10,000 small businesses).

Small Business Legislative Council.

National Association of Women Business Owners.

National Small Business United.

JOINT LETTER TO MEMBERS OF CONGRESS FROM AMERICAN SMALL BUSINESS LEADERS ON PRODUCT LIABILITY REFORM, APRIL 3, 1995

DEAR MEMBERS OF CONGRESS: On behalf of the nation's more than 21 million small and growing businesses, we are writing to strongly urge your support of S. 565, The Product Liability Fairness Act of 1995.

You know the problem: A single lawsuit can and has put many small business owners out of business.

For many small businesses, the explosion in product liability cases means it is simply impossible to find and keep affordable liability insurance.

You've heard the horror stories. (If you haven't, give us a call.)

Why should you care? Small businesses create virtually all the net new jobs in the economy. And businesses owned by women now employ more people than the entire Fortune 500 combined. While most of our company names are not household words, small business comprises the backbone of the nation's economy—from Main Street to Wall Street.

We need your help.

Product liability reform was the #1 issue at the White House Conference on Small Business in 1986. Finally, after more than a decade of struggle, product liability reform seems within our reach.

Please support S. 565, The Product Liability Fairness Act of 1995, and help protect U.S. consumers, workers and small businesses. Our future and the future of our nation's economy, depends on it.

Thank you for your support.

Gary Kushner, President, Kushner & Company, Inc., President, National Small Business United, Kalamazoo, Michigan

Carol Ann Schneider, President, Seek, Inc., President, Independent Business Association of Wisconsin

Patty DeDominici, President, National Association of Women Business Owners (NAWBO), Los Angeles, California

Willis T. White, President, California Black Chamber of Commerce, Burlingame, California

Thomas Gearing, President, The Patriot Company, Federal Reserve Board, Small Business Advisory Committee, Milwaukee, Wisconsin

Margaret M. Morris, NAWBO Chapter President, Chevy Chase, Maryland

Lewis G. Kranick, Chairman of the Board, Krandex Corporation, Wisconsin Delegation Chair—1986, White House Conference on Small Business, Milwaukee, Wisconsin

Linda Pinson, Principal, Out of Your Mind . . . and Into the Marketplace, NAWBO Financial Services Council, Tustin, California

Dale O. Anderson, President, Greater North Dakota Association, Bismark, North Dakota

Chellie Campbell, President, Cameren Diversified Management, Inc., NAWBO Public Policy Council, Pacific Palisades, California

Brooke Miller, NAWBO Chapter President, St. Louis, Missouri

John F. Robinson, President & C.E.O., National Minority Business Council, Inc., New York, New York

Lucille Treganowan, President, Transmissions by Lucille, Inc., NAWBO Chapter President, Pittsburgh, Pennsylvania

Wanda Gozdz, President, W. Gozdz Enterprises, Inc., NAWBO Public Policy Council, Plantation, Florida

Frank A. Buethe, Manager, Advance Business Development Center, Green Bay Chamber of Commerce, Green Bay, Wisconsin

Rachel A. Owens, Family Business Specialist, Mass Mutual, NAWBO Chapter President, Irvine, California

Brenda Dandy, Vice President, Marine Enterprises International, Inc., NAWBO Financial Services Council, Baltimore, Maryland

Terry E. Tullo, Executive Director, National Business Association, Dallas, Texas

Tana S. Davis, Owner, Tana Davis C.P.A., NAWBO Chapter President, Encino, California

Mary G. Zahn, President, M.C. Zahn & Associates, NAWBO Public Policy Council, Philadelphia, Pennsylvania

Gary Woodbury, President, Small Business Association of Michigan

Hector M. Hyacinthe, President, Packard Frank Organization, Inc., New York Delegation Chair—1986, White House Conference on Small Business, Ardsley, New York

Mary Ellen Mitchell, Executive Director, Independent Business Association of Wisconsin, NSBU Council of Regional Executives, Madison, Wisconsin

Susan J. Winer, President, Stratenomics, Illinois Delegation Chair—1986, White House Conference on Small Business, Chicago, Illinois

Lucy R. Benham, Vice President, Keywelland Rosenfeld, P.C., NAWBO Public Policy Council, Troy, Michigan

Beverly J. Cremer, Chief Executive Officer, I & S Packaging, NAWBO Chapter President, Kansas City, Missouri

C. Virginia Kirkpatrick, President/Owner, CVK Personnel Management & Training Specialists, NAWBO Financial Services Council, St. Louis, Missouri

Mary Ann Ellis, President, American Speedy Printing, NAWBO Chapter President, Boynton Beach, Florida

Shaw Mudge, Jr., Vice President, Operations, Shaw Mudge & Company, Connecticut Delegation Chair—1986, White House Conference on Small Business, Stamford, Connecticut

Eunice M. Conn, Executive Director, Small Business United of Illinois, NSBJ Council of Regional Executives, Niles, Illinois

Ronald B. Cohen, President, Cohen & Company, Immediate Past President, NSBJ, Cleveland, Ohio

Hilda Heglund, Executive Director, Council of Small Business Executives, Metropolitan Milwaukee Association of Commerce, Milwaukee, Wisconsin

Karin L. Kane, Owner/Operator, Dorrino's Pizza, NAVBO Chapter President, Salt Lake City, Utah

Suzanne F. Taylor, President & Owner, S.T.A. Southern California, Inc., Vice President—Public Policy Council, NAWBO, South Laguna, California

Suzanne Pease, Owner, Ampersand Graphics, NAWBO Chapter President, Morganville, New Jersey

Maryjane Rebick, Co-Owner, Executive Vice President, Copy Systems, NAWBO Public Policy Council, Little Rock, Arkansas

Arlene Weis, President, Heart to Home, Inc., NAWBO Public Policy Council, Great Neck, New York

Deepay Mukerjee, President, R.F. Technologies, 1995 Delegate, White House Conference on Small Business, Lewiston, Maine

David Sahagun, Dealer, Castro Street Chevron, 1995 Delegate, White House Conference on Small Business, San Francisco, California

Dona Penn, Owner, Gigantic Cleaners, NAWBO Public Policy Council, Aurora, Colorado

Barbara Baranowski, Owner, Condo Getaways, NAWBO Chapter President, North Monmouth, New Jersey

Sheelah R. Yawitz, President, Missouri Merchants and Manufacturers Association, Chesterfield, Missouri

David R. Pinkus, Executive Director, Small Business United of Texas, Texas Delegation Chair—1986, White House Conference on Small Business, Austin, Texas

David P. Asbridge, Partner, Sunrise Construction, Inc., 1995 Delegate, White House Conference on Small Business, Rapid City, South Dakota

Marj Flemming, Owner, Expeditions in Leadership, 1995 Delegate, White House Conference on Small Business, Signal Mountain, Tennessee

Jo Lee Lutnes, Owner, Studio 7 Public Relations, 1995 Delegate, White House Conference on Small Business, Columbus, Nebraska

Margaret Lescrenier, Vice President, Gammex RMI, Small Business Committee Member, Wisconsin Manufacturers and Commerce

Gordon Thomsen, Chief Executive Officer, Trail King Industries, Inc., 1994 Small Business Administration National Exporter of the Year, Mitchell, South Dakota

Leri Slonneger, NAWBO Chapter President, Washington, Illinois

Shalmerdean A. Knuths, Co-Owner/Director of Administration, Rosco Manufacturing Company, 1995 Delegate, White House Conference on Small Business, Madison, South Dakota

Alan M. Shaivitz, President, Allan Shaivitz Associates, Inc., 1995 Delegate, White House Conference on Small Business, Baltimore, Maryland

Linda Butts, President/Owner, Prairie Restaurant & Bakery, Member, NFIB, Carrington, North Dakota

Malcolm N. Outlaw, Owner/President, Sunwest Mud Company, Board Member, Small Business United of Texas, Midland, Texas

Suzanne Martin, Council of Smaller Enterprises, Greater Cleveland Growth Association, NSBJ Council of Regional Executives, Cleveland, Ohio

David L. Condra, President, Dalcon Computer Systems, 1995 Delegate, White House Conference on Small Business, Nashville, Tennessee
Doris Morgan, Vice President, Cherrybank, 1995 Delegate, White House Conference on Small Business, Hazlehurst, Mississippi
Dr. Earl H. Hess, Lancaster Laboratories, Inc., Pennsylvania Delegation Chair—1986, White House Conference on Small Business, Lancaster, Pennsylvania
Ralph S. Goldin, President, Goldin & Stafford, Inc., 1995 Delegate, White House Conference on Small Business, Landover, Maryland
John C. Rennie, President, Pacer Systems, Inc., Past President, NSBU, Billerica, Massachusetts
Murray A. Gerber, President, Prototype & Plastic Mold Company, Inc., Connecticut Delegation Chair—1986, White House Conference on Small Business, Middletown, Connecticut
Robert E. Greene, Chairman & CEO, Network Recruiters, Inc., 1995 Delegate, White House Conference on Small Business, Bel Air, Maryland
Jule M. Scofield, Executive Director, Smaller Business Association of New England, Waltham, Massachusetts
Jack Kavaney, President, Gateway Properties, 1995 Delegate, White House Conference on Small Business, Bismarck, North Dakota
Leo R. McDonough, President, Pennsylvania Small Business United, Pittsburgh, Pennsylvania
Sarah Lumley, Co-Proprietor, Save-A-Buck Auto Sales, 1995 Delegate, White House Conference on Small Business, Sumter, South Carolina
David A. Nicholas, General Manager, Dapco Welding Supplies, Inc., Hagerstown, Maryland
Joan Frentz, NAWBO Chapter President, 1995 Delegate, White House Conference on Small Business, Louisville, Kentucky
Bruce A. Hasche, Controller, Sencore, Inc., South Dakota Delegation Chair—1995, White House Conference on Small Business, Sioux Falls, South Dakota
Michael J. McCurdy, Franchisee, 7-Eleven, 1995 Delegate, White House Conference on Small Business, Baltimore, Maryland
Robert G. Clark, President, Clark Publishing, Inc., 1995 Delegate, White House Conference on Small Business, Lexington, Kentucky
Michael Stocklin, President, Flathead Business & Industry Association, Kalispell, Montana
Van Billington, Executive Director, Retail Confectioners International, NSBC Council of Regional Executives, Glenview, Illinois
Daniel L. Biedenbender, Vice President, Atlas Iron & Wire Works, Inc., National Treasurer, American Subcontractors Association, Milwaukee, Wisconsin
Earl B. Chavis, Owner, CTM Tech, Inc., 1995 Delegate, White House Conference on Small Business, Florence, South Carolina
Patricia F. Moenert, President & Owner, Moenert Executive Realty, Inc., Boynton Beach, Florida
Rudolph Lewis, President, National Association of Home Based Businesses, Owings Mills, Maryland
Robert F. Taylor, President, Erie Manufacturing Company, Board of Directors, Council of Small Business Executives, Milwaukee, Wisconsin
Duane E. Smith, Administrative Partner, Charles Bailly & Company, 1995 Delegate, White House Conference on Small Business, Billings, Montana
Gary Batey, General Manager, Independent Cement Corporation, Hagerstown, Maryland
G. Jesse Flynn, C.E.O., Flynn Brothers Contracting, Inc., 1995 Delegate, White House Conference on Small Business, Louisville, Kentucky
Frank J. Tooke, Montana Society of CPAs, 1995 Delegate, White House Conference on Small Business, Miles City, Montana
Brenda B. Schissler, President, StaffMasters, 1995 Delegate, White House Conference on Small Business, Louisville, Kentucky
Henry Carson III, Vice President, Henry Carson Company, Member, South Dakota Family Business Council, Sioux Falls, South Dakota
Roy H. Hunt, President & C.E.O., Hunt Tractor, Inc., Kentucky Delegation Chair—1995, White House Conference on Small Business, Louisville, Kentucky
Susan D. Cutaia, President, Tiger Security Products, 1995 Delegate, White House Conference on Small Business, Boca Raton, Florida
Charles F. Hood, Franchisee, 7-Eleven, Member, Baltimore Franchise Owners Association, Jarr, Maryland
Kenneth D. Gough, President, Accurate Machine Products Corporation, Chairman, Small Business Committee, Tri-Health Business Alliance, Johnson City, Tennessee
James W. Kessinger, President, Anderson Packaging, Inc., Kentucky Delegation Vice-Chair—1995, White House Conference on Small Business, Lawrenceburg, Kentucky
Charles Aiken, Owner, Health Force of Columbia, 1995 Delegate, White House Conference on Small Business, Columbia, South Carolina
Kay Meurer, President, Discount Office Interiors, 1995 Delegate, White House Conference on Small Business, Louisville, Kentucky
Kevin R. Nyberg, President, Nyberg's Ace Hardware, Member, National Retail Hardware Association, Sioux Falls, South Dakota
Tom Everist, President, L.G. Everist, Inc., Sioux Falls, South Dakota
Lewis A. Shattuck, Executive Vice President, Barre Granite Association, Member, Associated Industries of Vermont, Barre, Vermont
Tom Batcheller, President, Zip Feed Mills, Inc., 1995 Delegate, White House Conference on Small Business, Sioux Falls, South Dakota
Lalit K. Sarin, President & C.E.O., Shelby Industries, Inc., 1995 Delegate, White House Conference on Small Business, Shelbyville, Kentucky
Christine S. Huston, Manager, Economic & Business Development, Indiana Chamber's Small Business Council, NSBU Council of Regional Executives, Indianapolis, Indiana
Dean M. Randash, President, NAPA Auto Parts, 1995 Delegate, White House Conference on Small Business, Helena, Montana
Luis G. Fernandez, M.D., Director, Trauma Services, Mother Frances Hospital, Member, American College of Surgeons, Tyler, Texas
Ed Grogan, President & C.E.O., Montana Medical Benefit Plan, 1995 Delegate, White House Conference on Small Business, Kalispell, Montana
David Davis, President, Advanced Home Care, Inc., 1995 Delegate, White House Conference on Small Business, Unicoi, Tennessee
Joe Kropkowski, President, Baltimore Franchise Owners Association, Bel Air, Maryland
Susan Szymczak, President, Safeway Sling USA, Inc., Member, Metropolitan Milwaukee Association of Commerce, Milwaukee, Wisconsin
H. Victoria Nelson, Proprietor, Jarnel Iron & Forge, 1995 Delegate, White House Conference on Small Business, Hagerstown, Maryland
Helen Selinger, President, Sloan Products Company, Inc., 1995 Delegate, White House Conference on Small Business, Matawan, New Jersey
Charles B. Holder, President, Hol-Mac Corporation, 1995 Delegate, White House Conference on Small Business, Bay Springs, Mississippi
Marguerite Tebbets, President, Window Pretties, Inc., President, Women Business Development Center, Kennebunk, Maine
Catherine Pawelek, NAWBO Chapter President, Coral Gables, Florida
Mak Gonzenbach, Vice President, Valley Queen Cheese Factory, Inc., 1995 Delegate, White House Conference on Small Business, Milbank, South Dakota
Geoff Titherington, Owner, Bonanza, American Franchisees Association, Sanford, Maine
Richard Watson, Executive Vice President, Walker Machine Products, Inc., National Screw Machine Products Association, Collierville, Tennessee
Tonya G. Jones, President, Mark IV Enterprises, Inc., NFIE Guardian Advisory Council, 1995 Delegate, White House Conference on Small Business, Nashville, Tennessee

The PRESIDING OFFICER (Mr. COVERDELL). Who yields time?

The Chair recognizes the Senator from South Carolina.

Mr. HOLLINGS. Mr. President, my distinguished colleague from West Virginia just thanked a group of people. I wondered who they were. I knew no lawyer who had ever tried a case in a courtroom would ever put up a bill of this kind. So, having sponsored this measure, they would have to have some extraneous help of some kind to fashion an abortion as this ''conspiracy''—not conference—report. I emphasize ''conspiracy,'' Mr. President.

The distinguished Senator from West Virginia says when you work with him, it is very close and everything else. Of course, he did not thank the Senator from South Carolina because we never got close because we never conferred and we never were told about a meeting. We could not see the draft. We heard first about this so-called conference, or conspiracy, report, with Richard Threlkeld on CBS at 7:20 last Thursday evening on the evening news, when he said it was coming up. I had yet to get a copy, even though I am a member of the conference, struggling around on Friday to try to find out what we were going to have.

The story down in the local press, the way they politically work it, was that the Senator from South Carolina was going to filibuster. We had not had a chance to debate. We had not had a chance to debate. But the point of the matter is that, as the Senator from West Virginia talks about small business, small business—look at the chart. That is not small business. I think he ought to talk more closely with the

distinguished Senator from Washington, whom he has been working with, because they are not quite in step.

These heart pacemakers at $3,000, motorized wheelchairs, hotel bills, tonsillectomies, maternity stays, and all—maybe somebody is selling a baseball. We will let that one go by—18 cents. I hope we are not finding a Federal need up here, with all the States rights atmosphere, to all of a sudden pass a Federal law on account of 18 cents on the cost of a baseball.

We go through, and it is really sad, because, going right to the chart, we have never seen that before. I guess that is the option of those who do not have a case, to try to do it by sheer surprise. They came in first years ago—I will never forget it—and said there was a litigation explosion. You do not hear them arguing about the litigation explosion anymore.

They said there was an insurance crisis. We have here in the record that insurance companies are making billions and billions of dollars, so there is not that. Their reserves are up to an all-time high. They are doing great. So the insurance company is doing well, so you do not have that.

Then they had the matter of uniformity. Mr. President, they were going to get all the States together and have uniformity, but it is quite obvious that the many splendored thing, the test tube of federalism at the State level, clashed with that uniformity. And they created specific exemptions for those States who had more stringent requirements of an injured party. Those State laws could hold. Those who had less stringent laws would have to come under the stringent restrictions of this particular measure. So on the face of it, it showed absolutely no uniformity. So they gave up on uniformity, in a fashion.

Then they went to the matter of global competition. That is a sort of mystique around this Congress. We in Washington have discovered global competition. The matter of losing your job is psychological—the ''anxiety society'' they write about. ''Downsizing.'' It is all so polite. Heck, they have been fired, and they moved the jobs overseas. Who has moved them? It is not global; it is us.

It is like the Spanish Civil War with the fifth column. Over half of what we are importing in here are American multinational generated. I used the figure that they had researched back in the late 1970's. It was 41 percent. I know over 50 percent of the imports are by 200 companies of the Fortune 500. They are the big, powerful people who can afford it. Small business cannot move overseas, but big business has moved overseas and continues, in a veritable hemorrhage. We explained it to everyone so they could understand the cost of manufacture. It was 30 percent of volume for the associates or workers, employees—you can save as much as 20 percent.

It is a given, if you move to a low-wage country, a $500 million company can save $100 million if they just keep their executive office here, their sales force, but move their manufacture to a low-wage country. They can move offshore and get rich, or they can continue to stay and work their own people and go broke. That is the trade policy of this Congress. These companies are not greedy. If I ran the company, if you ran the company, we would do the same thing. Competition has moved. So are we going to sit around here and wonder—what? That Congress is running around in a circle about term limits and all these other little funny things they can think of, including product liability that the States have long handled.

The distinguished Senator from Rhode Island got up and said ''15 years, 15 years'' the Congress has considered this issue. But the State of Rhode Island has responded. That is the mystery to me, that the proponents come around and act, all of a sudden, like they have discovered these things. Assume everything is true on that chart next to the Senator of Washington. What has the legislature of the State of Washington done about it? They have acted. The State of Georgia has acted. The State of South Carolina had product liability reform back in 1988. It was fully debated. But all of a sudden, we in Congress discover things. Why? Because we take a poll. None of these pollsters has ever served in public office, but they get the hot-button items, six or seven of them—and you have Victor Schwartz, that is a good one—saying how they went after the lawyers. They go after the doctors. Everybody is against the doctors, until they need one. Everybody is against the lawyers, until they need one. That is a given in society.

But you do not just pass Federal laws to vitiate the laws of the 50 States on a statute of repose. Take the referendum they had in the State of Arizona. The proponents of this measure say, ''Forget about your referendum.'' They want to get back to the people, but ''we are going to tell you from Washington what to do, State of Arizona, regardless of your referendum.'' So what is going on up here?

Now they come with the shunt. We are used to trying cases. You are limited to the record and the proof that you have, but this crowd just makes it up at the last minute. They have gone back to the products that have been kept off the market, and the shunt. I had not heard about the shunt, so we called up the Food and Drug Administration and they said there is no problem.

Yes, Dow has been cited by our distinguished colleagues from Connecticut and Washington as going broke. It ought to go broke. They will never make—and a lot of other companies will never make—those implants like that again and try to sell them like hot cakes. Yes, sirree, that is what happens in our society, and we repair that kind of nonsense that goes on. Innocent women going in and thinking they are getting a health cure and instead they are ending their lives.

So Dow does not sell them anymore, but Applied Silicon sells silicon, Neusal sells silicon. And we get another list of those—that little bit of material that goes into the shunt that takes the water off the brain. The inference of the Senators here trying to use that argument is that children and individuals are going to die unless we pass product liability at the Federal level. Come on.

Take that chart next to the Senator from Washington. If a pacemaker costs $3,000, that has far more intricate materials than a shunt. They would take pacemakers off the market if you followed the logic of their argument. You could not afford $3,000 for that. I question that figure, to tell you the truth. I wish I had a chance to try it. My mother passed on just a few years ago, dying at 95 years of age, but she had four pacemakers and we never paid that. Maybe it is cheaper in Georgia and South Carolina than up here in this land—$18,000.

But let us assume the truth. If the truth is there, then pacemakers have to get off the market, using the logic of the argument about the shunt and a little bit of silicon material that goes into it. Come on. It is available. It is a false argument.

We are going to have to have a legislative congressional committee appointed on ski lifts, because it is only $2. It is way more dangerous than $2. I have been on them. The Presiding Officer has been on them. Get on one of those things and find out they are only spending $2 for safety. We have to get that up.

That is the real Federal problem. Their little charts. They had the coffee chart yesterday. They took down the coffee chart. At least they have some shame. We proved that punitive damages award had been cut. The judges in New Mexico have sense, but the coffee case had no sense. When the proponents finally found that out, they took the chart down.

What do they do here? Assuming all of that, as I say, is true, they act like the States have never acted before. I wanted to emphasize, too, coming in with this thing. Now let me read you this particular ad by the American pharmaceutical research companies, which appeared on the Federal page of the Washington Post on March 27, 1995. Here is what the American pharmaceutical group of manufacturers advertise in this ad:

> Drug companies target major diseases with record R&D investment. Pharmaceutical companies will spend nearly $15 billion on drug research and development in 1995. New medicines in development for leading diseases include 86 for heart disease and stroke, 124 for cancer, 107 for AIDS and AIDS-related diseases, 19 for Alzheimer's, 46 for mental diseases, and 79 for infectious diseases.

In this ad the pharmaceutical companies include a bar graph showing their steady increase in R&D investment

since 1977. They spent $1.3 billion in 1977, $2 billion in 1980, $3.2 billion in 1983, $4.7 billion in 1986, $7.3 billion in 1989, $11.5 billion in 1992, and an estimated $14.9 billion in 1995.

Maybe they will go out and research a new kind of silicon—they spent almost $15 billion on overall research in 1995. But if you listen to the Senator from Connecticut and the Senator from Washington, you would think you cannot get the drugs on account of product liability; the drug companies are all going out of business.

In fact, the foreign drug companies are all coming from Europe over here like gangbusters and investing. I will have a list before we end this debate this morning of the pharmaceutical companies joining in and they are not complaining. They are coming from Switzerland to South Carolina and Hoffmann-La Roche is not complaining about product liability. Wellcome is coming in with Glaxo in North Carolina. They are not complaining about product liability. We have product liability laws in our States.

What they do in this measure, Mr. President, if you read it, goes way too far. We see this the more we now have a chance to look at it and wonder why. For example, I wondered why MADD came out against this bill, and then when I read that provision about punitive damages and substances—let us have all the drunk drivers not worry about punitive damages, do not worry about punishment, go ahead, drive drunk. Here we have the finest movement under MADD at the Federal and the State level. But this crowd now wants to write a bill so zealous about punitive damages and getting rid of it—at least one Senator said he did not even believe in punitive damages—that I can tell you now that they said tell the drunk drivers to go ahead, do not worry about punishment, drive. Tell the trial judge that you are obligated under the common law to charge the jury with the law, but keep it a secret.

The Senator from West Virginia said we do not have a cap. I guess that is the part he is reading in the bill, because as far as the jury knows, there is no cap. Why? Because that is the law under the common law, but they have a provision in here where the judge does not tell the jury about the law.

Now come on, what kind of laws are we passing here? Tell the drunk drivers, ''Go ahead, drive drunk.'' Tell the judge who has the responsibility to stay out of the facts of the case, to, by gosh, keep the law secret and then come around and have a new hearing on the facts in violation of the Constitution.

The Cessna crowd, tell them now with the statute of repose, ''Don't worry about it, as long as the part would last for 15 years.'' Most of the planes I have been flying in are more than that. When you fly around in a State in small planes, you will find they are more than 15 years old. But tell Cessna that they can go like gangbusters, do not worry about the parts.

There, shoot the Maytag man. Put him out of business. He does not have to stand there and say, ''My refrigerator is not going to catch fire. It is 30 years old, and they still haven't called me to repair it.'' Shoot the Maytag man.

Blow up the furnaces. I went through a textile plant just the other day. It is 100 years old, but the machinery is brand new. They are competitive. When I first started, the shunts, as they call them, in the weaving machines used to be about 200; then they got to 400, then 1,500. The Japanese made machines up above that, I do not know how many thousands. They have the newest machinery.

Yes, somebody in the plant may have been hurt. But now, hereafter, when you have to put all that investment in there, do not worry about the cost of the safety of the worker after the machine is 15 years old. I think they will close down the textile show we have in Greenville for new machinery because we are going to pass the law that after 15 years you can forget about how safe a machine is. There is no more product liability. They will take the hindmost. Just get hurt. Do not worry about it. Let society take care of the injuries and everything else because the national Congress, in the face of the State laws and provisions that are working extremely well as of now, decided exactly what to do.

The utilities, oh, heavens, we had a good half-hour show on yesterday about the utilities. The utilities, now they did not want to write strict liability, so they wrote a double negative in the particular provision. Of course, the distinguished Senator had a difficult time trying to answer the questions because you could tell the lawyers downtown wrote this thing, not the staff. If the staff had written it, you would have seen somebody getting cussed out for writing that kind of thing. But the lawyers downtown were writing that thing up. They did not want to mention what they really meant.

That is, for the utilities, do not worry about the highest degree of care we require in Georgia, South Carolina and the States of America because now we have a provision in here to tell the utilities to go ahead, forget about the highest degree of care.

Then, the corporate head was riding with his worker after work in the evening. They get into a wreck. A big trucking company runs the red light. The corporate head can get $16 million—no, excuse me, it says double economic damages. We had one corporate head making $16 million, so he could get a $32 million verdict. But the poor fellow sitting in the front seat with him has got a cap—the gentleman said it ''ain't no cap'' —but he gets $250,000. He is capped.

That is how the workers and consumers got this. The proponents of the bill discriminate against the people they say they are trying to help. They cannot name an organization of workers, consumers or others who are not affluent that favors this nonsense. The proponents come around and discriminate against those of modest means—the senior citizens, women, children.

Oh, on pain and suffering, well, they are compensated. They have to have another hurdle. We put in another hurdle for them regarding joint and several liability. Mr. President, they come right down to the wire.

I was watching this morning when the distinguished majority leader was on TV. He was talking about guns and the second amendment. Let me read two other amendments.

> In suits at common law [amendment VII], where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

They absolutely mandate it be reexamined by the trial judge. That is in violation of amendment VII.

Then amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to States respectively, or to the people.

The distinguished majority leader always comes and says, ''Look, I have got here in my pocket'' the 10th amendment—some carry around the contract. The distinguished senior Senator from West Virginia carries around the Constitution. The distinguished majority leader carries around the 10th amendment, until this.

When it comes to Medicaid, let the States handle it. When it comes to education, abolish the Department; that is a function of the States. When it comes to welfare, the Governors come in and say, let the States handle it. When it comes, by cracky, to crime, we have had a 2-year intramural around here trying to make sure that we get back to a program that we know did not work.

President Nixon put in LEAA, block grants, to the States. The next thing you know, they had a tank down in Hampton, VA, to protect the courthouse. I do not know what was going to attack the courthouse in Hampton. They had the Governor of Indiana buying a plane, a Beechcraft, so his wife could go and buy her clothes in New York. They were buying planes and buying tanks and everything else. Trying to get the money down to the officer on the beat was like delivering letters by way of a rabbit; you could not get it there.

At the time the city, the council, got it, the State, whatever, a politician got his hands on it. It was all for law enforcement, but law enforcement never saw it. But they say, ''Oh, no, we've got to have block grants.'' After the experience where we had to abolish the LEAA, they come with this one on account of the political poll.

Lawyers. They have two giants, they say, the consumers and the trial lawyers, consumers and trial lawyers. The

Senator from California emphasized what needs to be emphasized, and that is that we are looking out for individuals and individual injuries. It is not easy to try these injury cases. As we all know, less than 4 percent of all civil cases are product liability, less than 1 percent get to the courts, and product liability accounts for less than 1 percent of the cost of any of these products. They can keep on putting up charts, but the Conference Board refuted that. They said less than 1 percent of the cost of any of their articles were attributable to product liability. So what did we do? What did we do? We pass a totally unconstitutional measure. But more than anything else, Mr. President, the word ''greed'' has been used around here. I could not, in conscience, come and say, now, let us apply this all to injured individuals but not to injured businesses. Oh, no. No, no.

I see where United Airlines wants to sue that manufacturer of the baggage handler. It got loose up in Denver, that machine. We had one of those machines, Mr. President, when I was in college. It had the laundry where you sent your clothes over there, and it had a machine that ripped the buttons off your shirt and shot them through your socks. I know that machine now is up at the Denver airport. It tears up the package, rips into the bags, and skirts it into the gears, stopping everything.

So now, Mr. President, we have the business that can go ahead and get its way on punitive damages—do not worry about any $250,000, keeping it a secret, and then tell the trial judge later to start on his own factual findings and everything else like that in violation of the Constitution. Do not worry about any of that. Sue, like Pennzoil did Texaco—get a $10 billion verdict, $10.2 billion. That is more than all the product liability verdicts for injured matters in the last 20 years put together—$10.2 billion. Add them up. One business.

The overwhelming majority of product liability is businesses suing businesses. They believe when they get a bad product misrepresented, they ought to have a cause of action. But they have done everything in the world to put hurdles in this thing, unconstitutional provisions, separating the injured parties, separating the businesses out, making sure that the corporate heads and those of affluence get big economic damages. They can get big verdicts; not women, not children, not senior citizens who have retired. They have all of a sudden become second class citizens.

That is the bill. It is a shame. I yield the floor.

Mr. GORTON. Mr. President, I think a few brief moments in outlining what this bill does and what it does not do may be particularly in order at this stage in the debate.

If we were to take at face value what we have heard from my distinguished colleague from South Carolina, coupled with his colleagues from Massachusetts and California, we would entirely lose sight of the fact that nothing in this bill limits in any respect the ability of any individual to recover a verdict in any court for all of the actual damages suffered by that individual as a result of what a jury may determine to have been a defective product.

Let me repeat that. The Presiding Officer, if he is injured by a defective product, will recover in the future, as he has in the past, all of his actual and provable damages. Obviously, there will be a difference in those damages from one person to another, even with similar injuries.

Second, Mr. President, nothing in this bill limits the ability of an injured person to recover as a result of a jury verdict all of the damages that jury may attribute to pain and suffering or to noneconomic damages.

I find the argument of the Senator from South Carolina particularly curious. He says this is a terrible bill because an executive making $2 million a year can recover more than someone making the minimum wage. Mr. President, that seems to me to be an argument that we ought to impose caps, caps that we have not imposed. Perhaps the Senator from South Carolina is suggesting a reform which no one, as far as I know, has ever proposed anywhere in the United States. That is, that there ought to be a cap on the economic damages that any individual can receive, and that if an individual making $100,000 loses a year of work, that person should not be able to recover any more than a person who makes $20,000, or vice versa. But that is a change in the law that, as far as I know, no one has ever proposed.

This bill allows you, Mr. President, to recover all of the actual damages that you have suffered as a result of an accident that is the fault of some product, including your lost wages, based on whatever your wages are. Is that unequal justice because some people have higher wages than others? I do not think so. It also allows the jury to award you or anyone else whatever it may determine in the way of noneconomic damages.

We did have a debate on this subject in this body the first time around, not in connection with punitive damages but in connection with medical malpractice. There was an attempt on the floor to put a ceiling on the amount of noneconomic damages that could be recovered in a medical malpractice case. That proposition lost on the floor of the Senate, Mr. President, and ultimately the entire medical malpractice section was taken out of the bill, to be dealt with separately.

This bill proposed no such limit in committee, no such limit on the floor when it was being debated last year, and has no such limitations now. What is limited in any respect is the imposition of punitive damage awards—by definition, an award that is above and beyond all of the damages caused by the defective product.

My distinguished friend and colleague who is so complimentary to me, the Senator from West Virginia, has said that he would not vote for a bill that had an absolute cap on punitive damages. This is a field in which we disagree. I would. In fact, I do not believe, as an individual Senator, that there is any place in the civil justice system for punitive damages at all. They are not permitted in tort litigation in the State of Washington and in a handful of other States.

There are very few serious arguments made that there is no justice available for civil litigants as a result. There is an extremely strong argument, it seems to me, against punitive damages at all. Why should any individual recover more than a jury thinks that individual has actually suffered, especially when there is no limitation on the ability of the jury to make an award for pain and suffering for noneconomic damages in addition to the proven actual damages in a case?

We have a system in this country that is peculiar with respect to punitive damages designed as punishment without any limitations whatever. Every criminal code, for every crime up to and including first-degree murder and treason, has some kind of limitation. You cannot be executed twice for two murders. But with respect to punitive damages, in most places there are no limitations at all.

The Supreme Court of the United States has asked us to address this issue. I think we ought to address this issue. We do address it in a modest fashion in this bill, a very modest fashion, but only punitive damages, not any of the actual losses to any plaintiff in a product liability action whatever.

If you heard only the arguments on the other side of this case, you would think everyone was being denied justice, that no one was going to be able to recover their losses, their actual damages in a piece of product liability litigation.

Why should there be some predictability, some limitation on punitive damages? First, of course, because under the present system there can be an infinite number of actions with respect to the same product. We have a sentence, a punishment imposed, not with all of the protections of the criminal code, not with the usual unanimous jury requirement, but just at the total, complete and unfettered discretion of juries.

I think, as I say, that it is a terribly poor system. I did not prevail in my debates with my allies on my own side of the aisle or with my friend from West Virginia. I cannot remember what the views of my friend from Connecticut are on the subject. So we have a form of control which is not a cap. The Senator from West Virginia is entirely correct with respect to that; however, nothing with respect to requiring a company or an individual to pay its full share of the damages that it has caused, whether noneconomic or economic.

Mr. President, this bill is about people. I spoke yesterday, and speak again today, briefly, about young Miss Tara Ransom in the State of Arizona who has spoken to Senator MCCAIN and to people in my office about her silicon-based shunt for hydrocephalus.

The great and deep concern that she and thousands of others have about the availability of a medical device, which has literally given her life and made that life worth living, is that it is increasingly unavailable due to a present system of absolutely uncontrolled and unlimited punitive damages.

The next to the last paragraph in the article about this young lady from Arizona reads:

> The good news is that there are reform efforts underway in Arizona and at the Federal level. The Senate is planning to vote, as early as today, on legislation to place reasonable limits on punitive damages and eliminate unfair allocations of liability in all civil cases. This would protect all Americans —not just the manufacturers of medical products, but also small businesses, service providers, local governments, and non-profit groups. Above all, it would save children like Tara.

This is about American business, and competitiveness, and low prices for products. But it is even more about the people who use those products.

Finally, Mr. President, we get this nonsense about drunk drivers, this utter nonsense about the drunk drivers. Well, of course, nothing in this bill has anything to do with suing drunk drivers. The implication that it has something to do with suing the people who supply them with alcohol negligently, the so-called dram stop situation—well, this bill specifically says, ''A civil action for negligent entrustment shall not be subject to the provisions of this section but shall be subject to any applicable State law.''

That argument, Mr. President, is pure nonsense. This is a product liability bill. It is not a negligent entrustment bill. It has nothing to do with someone who deliberately sells a gun to someone to kill a third person, or deliberately allow someone to become drunk and is sued under dram stop statutes at all. It does have to do with product liability, with people like Tara Ransom, with companies like Cessna, with those who manufacture devices and therapeutic drugs, and a myriad of other products for the American people. It does have to do with giving them a better deal than the present system does, which is a lottery for plaintiffs and a bonanza for those who represent them.

The PRESIDING OFFICER. Who yields time?

Mr. HOLLINGS. Mr. President, I yield the distinguished Senator from Alabama 15 or more minutes, as he may require.

The PRESIDING OFFICER. The Chair recognizes the Senator from Alabama.

Mr. HEFLIN. Mr. President, I just found out that Senator ROCKEFELLER is going to vote for the conference report. Senator GORTON has said that Senator ROCKEFELLER could never vote for a bill if it had a cap in it, a definite cap. And as I read it—now, maybe he can, in some way or another, explain this language —we have a language on page 10 of the report relating to punitive damages. First, the language in the report says the ''greater'' of two times the sum of the amount awarded to a claimant for economic loss and noneconomic loss, or $250,000. That is not a definite cap because the amount of economic loss and noneconomic loss is a variable. But language immediately thereafter says, ''special rule.'' This applies to the rule on punitive damages for small businesses where these corporations have 25 employees or less. I might add that this language applies also to individuals. The ''special rule'' provides that punitive damages shall not exceed the ''lesser'' of two times the economic loss and noneconomic loss, or $250,000. So punitive damages cannot exceed, in any event, $250,000. So that is a definite, established cap.

I am not going to hold Senator ROCKEFELLER to that since he did not make the statement to me. He must have made that statement to Senator GORTON who is present on the floor. I would not want to put him in an embarrassing situation. But I think this special rule shows very definitely that there is a cap in the bill.

Now, that also points out that a lot of language in this bill is slyly inserted, and so craftily placed, that I think some of its key features have escaped a great number of people's attention. That is true with regard to the biomaterials provision. The biomaterials provisions, to which Senator LIEBERMAN refers regarding raw materials, also contains language regarding component parts. There are numerous implants that have component parts. I mentioned before that I have a pacemaker which has numerous component parts. There is a battery, and there are various wires that go down into the chambers of the heart that causes electrical charges to emit; it has various sensors and a computer that records the history of my heartbeats over a period of time. When doctors check it, they can check and see whether or not there was some unusual rhythm or unusual activity taking place. Basically under the provisions of title II, on an implant that has component parts, there is complete immunity in regard to the supplier of the component parts, or the raw materials of an implant.

Now, there is an exception in the event the manufacturer of the component part is also the manufacturer of the entire device or also the seller. But most medical devices are made from component parts, such as the batteries, and people furnish those separately. Title II gives complete immunity to suppliers with no chance to even discover whether or not there was any negligence on the part of the supplier. It is interesting to see where the crafty language is written. It indicates that ''implant'' means—and this is the definition on page 17 of the conference report—

> a medical device that is intended by the manufacturer of a device to be placed into a surgically or naturally formed or existing cavity of the body for a period of at least 30 days, or to remain in contact with bodily fluids, or internal human tissue through a surgically produced opening for a period of less than 30 days.

Well, what is less than 30 days? I would assume that less than 30 days could mean 2 seconds or 1 second. It is very craftily designed. What is a surgically produced opening? Well, there is no definition in here, but a surgically produced opening would appear to me to be an opening in which you use surgical tools. Of course, that would mean that you normally think of a knife, of a scalpel, or of something like that. But what about intravenous materials, one of these locks where you tie it into you? You have devices where they put it in and out of your body, and they can put fluids into the body such as a blood transfusion. Consider a hypodermic needle—is that a surgical tube?

You have a situation where we find that title could have some applicability with a blood transfusion. We should consider where a blood transfusion occurs, and we know that blood has to be highly inspected and is subject to the highest standard of care because of AIDS and other matters. This bill is designed toward an interpretation that could mean that AIDS in blood is subject—where someone has made a mistake, who has been negligent or otherwise—to the provisions and the limitations and protections that are put within this bill.

It is very carefully crafted, as I pointed out yesterday, in inserting a comma in the definitions section of durable goods, now within the purview of the report is any type of a product that has a life of more than 3 years—baby cribs, lawn mowers, toasters, or virtually any type of kitchen appliance.

There are a great number of provisions in the bill that disturb me, in particular, the way that they are designed to favor the manufacturer or the seller, and it puts the injured party at such a disadvantage. For example, there is the misuse or alteration provision, which provides that in a product liability action, the damages of a defendant will be reduced by the percentage of responsibility for a claimant's harm attributable to the misuse or alteration. But I see problems where there could phantom defendants—the phantom defendants where there is nobody there to be held responsible—and they can try to invoke the several liability provisions in the report as to noneconomic damages. These phantoms are the ones that are all at fault and there is nobody left responsible for a claimant's injury.

Then we have a situation in regard to employer and coemployee, as to whether or not they might have misused or

altered, or were at fault. So, in order to leave the impression on the jury, this bill requires that that be the last issue that is presented to a jury, because when they leave and go back to the jury room to decide, that is the last thing that they heard. So they are trying to put it off—the negligence or the lack of responsibility on the part of the manufacturer—and impose it on someone else and to give it to that person just as he goes into the jury room as the last thing that they hear that will be predominantly on their mind. Is that fair to the claimant?

There are numerous other aspects of that which disturb me. I suppose one of the things that I just cannot understand at all in regard to this is how—if it is good for the goose, why is it not good for the gander? And they exempt business losses. One business suing another business can bring his suit for commercial losses, losses of profit, unlimited amount, unlimited amount relative to punitive damages, and different statutes of limitation.

The Uniform Commercial Code, I assume, is uniform everywhere. I understand there are a few differences in it. But in our State in Alabama, you have a 4-year statute of limitations in regard to the Uniform Commercial Code. The conference report imposes a shorter 2-year statute of limitations.

The Senate-passed bill contained an exception to the 2-year statute-of-limitation provision stating that if a civil action under the bill is stayed or enjoined, the statute of limitation is suspended or tolled until the end of the injunction. That provision was deleted from the conference report. Is that fair? I think not.

I yield the floor.

The PRESIDING OFFICER (Mr. SHELBY). Who yields time?

Mr. GORTON. How much time remains?

The PRESIDING OFFICER. Thirty-four minutes.

Mr. GORTON. How much of that time does the Senator from Connecticut request?

I yield 15 minutes to the Senator from Connecticut.

The PRESIDING OFFICER. The Senator from Connecticut is recognized.

Mr. LIEBERMAN. I thank the Chair. I thank my friend from the State of Washington.

Mr. President, I have been thinking as I listened to the debate this morning, and what preceded it yesterday and before that, that there is a way of thinking around the Capitol that is not the way of thinking that I hear back home in Connecticut. It is what I call either-or. You know if an idea is put forward by a Republican, no Democrat shall be for it. If an idea is put forward by a Democrat, no Republican should be for it, or, in this case, if something is good for business, it has to be bad for consumers. That does not figure, particularly if you look at the overall effects of this bill.

What I want to contend here is that because of the extraordinary work done by Senators GORTON and ROCKEFELLER, and by the conferees from the Senate and the House, this is a win-win bill.

This is a bill that is good for consumers and good for business. In that sense, it is good for our country overall.

There is a way in which the opponents to the legislation approach it with such skepticism, turning every word in the most potentially damaging light and not considering the intentions of the sponsors and the authors and the record that we have tried constantly to build on the floor.

Everybody in America knows, at least most everybody knows, that our civil justice system is not working well. I do not think anybody really can stand up and defend the status quo of the litigation system in America. Nothing is wrong with it. That is preposterous. The average person on the street—I stop them in Hartford, New Haven, Bridgeport—knows that lawsuits take too long; that people do not get justice in a timely fashion; that too much of the money goes to lawyers. They know that.

I think the question is, how are we going to make it better? Why should we make it better? Because of the specific problems and shortcomings of the current system I just referred to and also because the public, the people have as little faith as the people of our country do today in our system of justice. That is a profound problem that goes beyond tort reform and anything else. It strikes at the very heart of people's faith in the Government they have. Lord knows, we know they have enough lack of confidence in the legislative branch, maybe some in the executive, but it goes to the judicial as well.

I honestly believe, deeply believe that this bill—moderate, modest, sensible, small, incremental reform—is a step in the direction of beginning to restore some faith in the system, making it work for people who are injured and making sure that it does not destroy faith in the system by punishing people who are not guilty and letting those who are guilty often off without being punished.

So I say this is win-win. It is good for business and it is good for consumers. It will create jobs by removing a deterrent to innovation and investment. It will reduce consumer prices by making litigation less expensive. If 20 percent of the costs that we are paying for a ladder is litigation-related costs, the cost of that ladder is going to go down if we can reduce that litigation cost some, and it goes on and on throughout the system.

I wish to talk particularly again about this biomaterials section of the bill of which I am a cosponsor. It comes from something that is very real that is threatening something very good. The very real element here is that there is an unnatural shortage of raw materials. Judge HEFLIN referred to it. Thank God, Judge HEFLIN is healthy and well today because of the pacemaker he has. He is one of 8 million people who have benefited from medical implants of one kind or another. The device is put together by a manufacturer but it takes parts they buy from people who do not make these parts particularly for this purpose. They are not making much money on selling those parts. Batteries are one. The information I put into the RECORD yesterday shows that one of the manufacturers of batteries—a couple actually—used in pacemakers have stopped selling to the manufacturers of pacemakers because they are afraid they are going to get sued for something that is not their fault. They would just as well sell the batteries to somebody else where the chance of a lawsuit is not as great. They are not worried about the negligence. They are worried about what it is going to cost them if they get tied up in a lawsuit.

In the debate there is such skepticism expressed about these medical devices and pharmaceutical companies, et cetera. Sometimes when I look back and read history and I say, now, how far have we really come; how much better is the human race? I wonder if we have ascended very far in the way in which we deal with one another.

However, there is one way we can objectively show that there has been extraordinary progress in human experience and that is in our health. We are living longer. You can see it year-by-year. We are up, I guess, in the mid-seventies now in terms of average lifespan. A lot of that has to do with pharmaceuticals, these wonder drugs that have been invented. And a lot of it has to do with these medical devices that we are trying to protect by making sure that the manufacturers can continue to get the parts, the materials and the component parts, and are not frightened out of supplying those parts because of the fear of lawsuits.

I said yesterday, when I talked about the allegations, the opponents of this bill keep lighting fires around the periphery to sort of stop people from voting for the bill. Those of us who support it put out one or two fires and there are three more burning over here. And one of the fires has been lit about how this bill would affect the existing breast implant procedure. I said at length yesterday—I will not repeat it today—the bill will not impact this procedure. This is prospective, only affects people who may file claims later. Breast implants are not being done any more. They were stopped by the FDA, except for a small number of clinical trials in 1992.

With regard to new products, you cannot escape liability under the biomaterials section of this bill, if you are not just a supplier but you are a manufacturer or a seller or what you have done is negligently done in the sense that it violates either the contract requirements that the manufacturer has given you for the raw material or component part, which obviously would be for a part or material

that is not negligently made, or the specifications for that part that are issued as part of the approval process. Every one of these medical devices has to go through the FDA before it can be sold and used to benefit people.

Senator GORTON has spoken about one young girl and the extraordinary benefit to her life from the shunt that was put in her brain. We had testimony at a hearing I conducted from a Mr. Martin Reily of Houston, TX, about his young child, Thomas, who was discovered when he was 8 months old to have water on the brain, hydrocephalus. Mr. Reily said:

Jane and I will never forget the Saturday in late October 1985, when we learned that Thomas had hydrocephalus. We initially were told that based on the level of fluid accumulated on his brain and the resulting pressure, he would surely have brain damage, probably severe. Surgery to place a shunt in Thomas was scheduled for the first thing Monday morning [2 days later]. The hours from late Saturday to Monday morning were the longest and darkest we have ever experienced.

The thought of waiting even 1 day to have the surgery was almost unbearable, for each minute that passed the pressure was building in Thomas' head, which could further damage him. . . .

On Monday morning, Thomas received a shunt. Within hours, he was showing improvement. His lethargy disappeared. He was alert. He smiled again for the first time in weeks and even stood up in his hospital crib. Within 36 hours, we were back home with the new Thomas. How different the outcome would have been for Thomas that day without the availability of the medical device he so desperately needed.

What a miracle. Mr. Reily continues:

Six months after his original surgery, Thomas' shunt clogged and required revision. In the 6 hours that Thomas waited for his shunt revision surgery, he became violently ill, vomiting continuously and finally becoming semi-comatose. Mercifully, his revision was successful and immediately he regained his old form, laughing and smiling while playing games in his hospital bed. Again, how different yet predictably sad and final would have been Thomas' fate without this medical device. As I reflect on Thomas' brief life, I see a child who has already overcome a lifetime of medical difficulties.

* * * * *

Early on, Thomas' mother and I went through a grieving process. We were grieving for the death of our vision of our perfect child. It was not until we let that vision go that we were able to see something much more beautiful; a young boy with an indomitable yet loving spirit who will not let his personal medical setbacks defeat him. I think that must be surely God's spirit living inside him.

Mr. Reily concluded:

So I stand before you today, as the guardian of that spirit, as Thomas' father, beseeching you to do everything in your power to ensure that the biomaterials necessary for Thomas' medical implant device be readily available and of the highest quality. For some time in the future, perhaps next month or next year, Thomas will wake me in the middle of the night to tell me that his head hurts and that he thinks his shunt has broken. He will ask if we can go to the hospital to get a new one right away. I pray I will be able to give him the only acceptable answer.

It is remarkable testimony. We had other testimony that day from a most impressive woman, Peggy Phillips, who has worked for awhile as chief of congressional affairs for the Air Force Surgeon General, going to law school in the evening, getting home at 10 p.m., working until midnight, and so on, office work, very busy. ''However, on November 26, 1986,'' as she says, ''my life changed. I am told that I collapsed as I walked from my office to my car. I stopped breathing. I had no pulse. I had no blood flow to my brain, I was clinically dead.''

The story ends happily. She agreed to have an automatic implantable cardioverter defibrillator put into her stomach.

''Following a few minor adjustments,'' she says, ''life with the AICD has not been much different than before.'' She goes on to document changes that have occurred, and appeals to us to make sure that some of the simple parts of that AICD, which keeps her going, monitors her heartbeat, gives her a shock when there is a danger that her heart is going to stop, keeping her alive—that flow of materials is not going to stop.

These are consumers. Does this help business? It helps the businesses that make the medical devices; it helps Thomas Reily; it helps Peggy Phillips; it helps 8 million other people who are going to be kept alive, allowed to live normally by these devices.

Earlier this morning my friend from California made some references about the impact of this legislation—somewhat on breast implant cases which I have spoken to earlier—but on women generally. I do want to put into the RECORD a statement here. I am going quote from it.

Phyllis Greenburger, who is the executive director of a group called the Society for the Advancement of Women's Health Research, testified on April 4, 1995, to that same Senate subcommittee, that, ''* * * the current liability climate is preventing women from receiving the full benefits that science and medicine can provide. That,'' she says, ''is the reason I am here before you today.''

She went on to say:

. . . there is evidence that maintaining the current liability system harms the advancement of women's health research.

She completed her testimony by stating:

Manufacturers of raw materials, unwilling to risk lawsuits, are limiting, and in some cases, terminating the sale of their product for use in an implantable medical device. . . . The threat to health is further magnified in cases where suitable substitute materials are not available.

Women may be disproportionately impacted by such a shortage simply because they live longer than men, and as a result, suffer more from chronic disease, increasing their chances of needing a medical device, such as hip or joint replacements. For those of us currently in good health, the loss of these substances seems inconsequential. Yet for those like Peggy Phillips . . . [Whom I spoke of before] and others suffering from osteoporosis, heart disease, rheumatoid arthritis, and other diseases, access to a full range of medical devices is crucial.

I wonder if I might ask the Senator from Washington for 5 more minutes?

The PRESIDING OFFICER. Who yields time?

Mr. GORTON. The Senator from Nebraska also wishes to speak on our side. Will the Senator from Connecticut settle for 2?

Mr. LIEBERMAN. I will settle for 3.

Mr. GORTON. Fine.

The PRESIDING OFFICER. The Senator is recognized for 3 minutes.

Mr. LIEBERMAN. A study by the Committee for Contraceptive Development, jointly staffed and administered by the National Research Council and the Institute of Medicine, found that only one major U.S. pharmaceutical company still invests in contraceptive research. Why? The study blamed the legal climate, fear of lawsuits, for this situation. H.R. 956, this bill before us, would make these drugs and other medical devices more available.

We have said over and over again, this bill protects the right of an injured plaintiff to get full recovery for damages, cost of medical care, loss of wages, any other provable item. It goes beyond, and says you can get recovery for noneconomic losses, intangibles like pain and suffering, from those who are responsible for the negligence.

It simply puts a small limit on punitive damages. In doing so, yes, it helps some businesses expand, provide the miraculous products I have talked about, sell products for less; but it helps millions of other people. In a way, the beneficiaries of this legislation are not so visible. That is why I read from this testimony. But they, and millions and millions of others of them, are counting on us to pass this bill to bring balance and trust back to our legal system.

I thank the Chair and I yield the floor.

The PRESIDING OFFICER. Who yields time?

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Several Senators addressed the Chair.

The PRESIDING OFFICER. Who yields time?

Mr. HOLLINGS. Mr. President, let me just for a minute respond.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. I will yield to the distinguished Senator from Nebraska.

The distinguished Senator from Connecticut is very persuasive and I wanted to answer these pleading comments about ''walking down the street'' and ''everybody knows the litigation system is in disrepair.'' Absolutely false, with respect to the civil justice system.

We have all seen the O.J. case and that jury of 12 let him go. But the American public jury did not let him go. Everybody knows that.

We have, here, just this past week, March 18, U.S. News & World Report:

In New York City, a movement is under way to impeach Criminal Court Judge Laurin Duckman. A 33-year-old woman sought court protection from a former boyfriend, a convicted rapist, who had attacked her three times. Despite the beatings, Judge Duckman coolly noted that the woman was ''bruised but not disfigured,'' lowered bail in the case and suggested that the man would stop bothering the woman if she gave back his dog. Three weeks later, the man shot her to death.

In another case:

Police in a high-activity drug area at 5 a.m. noticed a slowly moving car with out-of-state plates. The car stopped, the driver popped the hood of the trunk and four men placed two large duffel bags inside. When police approached, the men moved away rapidly in different directions. One ran. Police searched the trunk and found 80 pounds of cocaine. The driver, a Michigan woman, confessed in a 40-minute videotaped statement, saying that this was just one of more than 20 large drug buys she had made in Manhattan. But Judge Baer ruled that police had conducted an unreasonable search. What about the men bolting from the scene? Since residents in the area regard cops as corrupt and abusive, opined the judge, it would have been unusual if the men hadn't run away, so fleeing was no cause for a search. In other words, the perps had reason to be suspicious of police, but police had no reason to be suspicious of the perps.

Come on. I ask unanimous consent to have this list of cases printed in the RECORD

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

(See exhibit 1.)

Mr. HOLLINGS. We are all disturbed about the criminal court system. But not, where the distinguished Senator from Connecticut served as the majority leader in the State legislature of Connecticut, he acts—''walking down the street,'' that he is the only one walking down the street talking.

Come on. We even had one former member went up as Governor and pull an income tax on the people of Connecticut, Governor Weicker. The people of Connecticut will respond, with leadership. And they do have a product liability statute in that State.

But these folks come and talk about fair. ''Yes, I hope I can certainly get this shot so I can continue breathing.'' I mean, grown folks, men and women in the U.S. Senate, acting like this? That case would be thrown out. Talking about what is not good for the consumer, good for business.

I ask unanimous consent to have printed in the RECORD ''Suing For Safety.'' It is by Thomas Lambert, Jr. I ask to have this printed in the RECORD, included with the ''Stupid Court Tricks.'' Include them both.

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

(See exhibit 2.)

Mr. HOLLINGS. Mr. President, that ''Suing for Safety'' gives case after case after case where it had not been good for the consumer. The consumer had to get a trial lawyer, had to go before 12 jurors in his community, had to go up on appeal and pay all the court costs and finally get a verdict.

Why is it good for the consumer and good for the business? On account of product liability. We have it at the State level, and it is working. That is why I put that case in the RECORD.

We know what business does. Some businesses will cut corners, they will not give warnings, they try to save money. Everybody knows there were a few dollars in the Pinto case. Now we see time and again, week after week, recalls. They just recalled one of my cars to put another safety device on.

Why do you think that was done? On account of the trial lawyers. Product liability. That is why they have done it, and everybody in the Senate knows it. But the little poll says get rid of the lawyers, like Dick the Butcher in Henry VI, ''Kill all the lawyers.'' That is a popular thing.

So that is what we have. I reserve the remainder of my time.

EXHIBIT 1

[From U.S. News & World Report, Mar. 18, 1996]

STUPID COURT TRICKS

(By John Leo)

Some judges and some judges' decisions are better than others. Here are some others:

In New York City, a movement is under way to impeach Criminal Court Judge Laurin Duckman. A 33-year-old woman sought court protection from a former boyfriend, a convicted rapist, who had attacked her three times. Despite the beatings, Judge Duckman coolly noted that the woman was ''bruised but not disfigured,'' lowered bail in the case and suggested that the man would stop bothering the woman if she gave back his dog. Three weeks later, the man shot her to death. In another domestic violence case, Judge Duckman allowed a beater to go free hours after a jury had found him guilty. Last month, the man was charged with another attack on the same woman.

North of the border, the loopiest judicial decision of the year came when the Canadian Supreme Court ruled that drunkenness was a defense against rape charges. It ordered a new trial for a Montreal man who had been convicted of sexually assaulting a 65-year-old woman in a wheelchair. The court predicted that the alcohol defense would be rare, but within weeks drunks and addicts were being acquitted across Canada. Sanity prevailed, however. Parliament passed a law banning the drunkenness defense.

Judge Rosemary Barkett, a Clinton appointee, has brought sexual harassment litigation into the fifth grade. Writing for the majority on the 11th Circuit Court of Appeals last month, she said that the mother of a fifth grader who was repeatedly pestered by another fifth grader could sue the school district under Title IX of the 1972 Education Amendments. In a recent dissent in another case, Barkett implied that a statute requiring drug tests for some state jobs in Georgia may violate the First Amendment by seeking to keep persons ''who might disagree with the current policy criminalizing drug use'' out of government.

Another Clinton appointee, Judge Harold Baer, caused a spreading uproar with his colorful botching of a drug case. Police in a high-activity drug area at 5 a.m. noticed a slowly moving car with out-of-state plates. The car stopped, the driver popped the hood of the trunk and four men placed two large duffel bags inside. When police approached, the men moved away rapidly in different directions. One ran. Police searched the trunk and found 80 pounds of cocaine. The driver, a Michigan woman, confessed in a 40-minute videotaped statement, saying that this was just one of more than 20 large drug buys she had made in Manhattan. But Judge Baer ruled that police had conducted an unreasonable search. What about the men bolting from the scene? Since residents in the area regard cops as corrupt and abusive, opined the judge, it would have been unusual if the men hadn't run away, so fleeing was no cause for a search. In other words, the perps had reason to be suspicious of police, but police had no reason to be suspicious of the perps. Since the confession stemmed from the search, Baer threw it out. The prevailing New York opinion: Judge Baer is an idiot.

Can the state legally confiscate the property of innocent people? The U.S. Supreme Court said yes this month in a Detroit case. A 5-to-4 ruling allowed confiscation of a 1977 Pontiac half-owned by a woman after her husband was arrested for having sex with a prostitute in the car. The Wayne County prosecutor's office had sued to confiscate the car under Michigan's public nuisance statutes. In a dry dissent, Justice John Paul Stevens said that until this case, no state had ''decided to experiment with the punishment of innocent third parties.''

In a notably tortured decision, the federal 10th Circuit Court of Appeals ruled that a male prisoner who wishes to become a female is not entitled to get hormone injections at public expense under the 14th Amendment, but he may be entitled to them under the Eighth Amendment, which bans cruel and unusual punishment.

Much egg on is on the faces of federal judges of the Fourth Circuit Court of Appeals for their handling of the Rodney Hamrick case. While serving prison time for threatening the life of President Reagan, Hamrick built five bombs and threatened to blow up a courthouse, an airplane and NAACP headquarters. While serving more time for threatening to kill the judge in his case, he built and mailed a bomb to a U.S. attorney who had prosecuted him. The bomb fizzled, scorching the envelope but not detonating. Hamrick was convicted, but a three-judge panel of the Fourth Circuit reversed the conviction on grounds that the bomb was not a deadly or dangerous weapon because it had been badly built. This decision flew in the face of a relevant Supreme Court ruling that even an unloaded gun could be considered dangerous. For some strange reason, Solicitor General Drew Days did not request a rehearing on the Hamrick ruling by all the judges of the entire Fourth Circuit. But the judges decided to do so on their own, and they narrowly upheld Hamrick's conviction. Eight judges thought that the faulty bomb qualified as dangerous, while six judges disagreed. No word yet from Drew Davis. Is anybody in charge here?

EXHIBIT 2

[From the Trial magazine, November 1983]

SUING FOR SAFETY

(By Thomas F. Lambert, Jr.)

It has been well and truly said, ''If you would plant for a year, plant grain; for a decade, plant trees; but if you would plant for eternity, educate a man.'' For nearly four generations, ATLA has been teaching its men and women, and they have been demonstrating to one another, that you can sue for safety. Indeed, one of the most practical measures for cutting down accidents and injuries in the field of product failure is a successful lawsuit against the supplier of the

flawed product. Here, as well as elsewhere in Tort Law, immunity breeds irresponsibility while liability induces the taking of preventive vigilence. The best way to make a merchant responsible is to make him accountable for harms caused by his defective products. The responsible merchant is the answerable merchant.

Harm is the tort signature. The primary aim at Tort Law, of the civil liability system, is compensation for harm. Tort law also has a secondary, auxiliary and supportive function—the accident prevention function or prophylactic purpose of tort law—sometimes called the deterrent or admonitory function. Accident prevention, or course, is even better than accident compensation, an insight leading to ATLA's longstanding credo: ''A Fence at the Top of the Cliff Is Better Than an Ambulance in the Valley Below.''

As trial lawyers say, however, ''If you would fortify, specify.'' The proposition that you can sue for safety is readily demonstratable because it is laced and leavened with specifics. They swarm as easily to mind as leaves to the trees.

ACCIDENT PREVENTION THROUGH SUCCESSFUL SUITS IN THE PRODUCTS LIABILITY FIELD

(1) Case for Charcoal Briquets Causing Death from Carbon Monoxide. Liability was imposed on the manufacturer of charcoal briquets for the carbon monoxide death and injury of young men who used the briquets indoors to heat an unvented mountain cabin. The 10-pound bags read, ''Quick to Give Off Heat'' and ''Ideal for Cooking in or Out of Doors.'' The manufacturer was guilty of failure to warn of a lethal latent danger. Any misuse of the product was foreseeable because it was virtually invited. Next time you stop in at the local supermarket or hardware store, glance at the label on the bags of charcoal briquets. In large capital letters you will find the following: ''WARNING. DO NOT USE FOR INDOOR HEATING OR COOKING UNLESS VENTILATION IS PROVIDED FOR EXHAUSTING FUMES TO OUTSIDE. TOXIC FUMES MAY ACCUMULATE AND CAUSE DEATH.'' Liability here inspired and exacted a harder, more emphatic warning, once again reducing the level of excessive preventable danger.

(2) Case of the Exploding Cans of Draino. When granular Drano is combined with water, its caustic soda interacts with aluminum, another ingredient in its formula and produces intensive heat converting any water into steam at a rapid rate. If the mixture is confined, the pressure builds up until an explosion results. The manufacturer's use of a screw-on top in the teeth of such well known hazard was a design for tragedy. The expectable came to pass (as is the fashion with expectability). In Moore v. Jewel Tea Co., a 48-year-old housewife suffered total blindness from the explosion of a Drano can with a screw-on top, eventuating in a $900,000 compensatory and $10,000 punitive award to the wife and a $20,000 award to her husband for loss of conjugal fellowship.

A high school chemistry student could see that what was needed was a ''flip top'' or ''snap cap'' designed to come off at a pressure of, say, 15–20 pounds per square inch. After a series of adverse judgments, the manufacturer substituted the safer flip top. Of course, even the Drano flip top will be marked for failure if not accompanied by adequate testing and quality control. Capers involved a suit for irreversible blindness suffered by 10-year-old Joe Capers when the redesigned flip top of a can of Drano failed to snap off when the can fell into the bathtub and the caustic contents spurted 8½ feet high impacting Joe in the face and eyes with resulting total blindness. The shortcomings in testing the can with the reformulated design cost the company an award of $805,000. As a great Torts scholar has said, ''Defective products should be scrapped in the factory, not dodged in the home.''

Drayton v. Jiffee Chemical Corp., is a grim and striking companion case to the Drano decisions mentioned above, and it underscores the same engineering verities of those cases: the place to design out dangers is on the drawing boards or when prescribing the chemical formula. A one-year-old black girl suffered horrendous facial injuries, ''saponification'' or fusion of her facial features, when an uncapped container of Liquid-Plumr was inadvertently tipped over. At the time of the accident, this excessively and unnecessarily caustic drain cleaner was composed of 26 percent sodium hydroxide, i.e., lye. No antidote existed because, as the manufacturer knew, Liquid-Plumr would dissolve human tissue in a fraction of a second. To a child (or any human being) a chemical bath of this drain cleaner could be as disfiguring as falling into a pool of piranha fish. Liquid-Plumr, mind you, was a household product, which means that its expectable environment of use must contemplate the ''patter of little feet,'' as the children's hour in the American home encompasses 24 hours of the day.

At the time of marketing this highly caustic drain cleaner, having made no tests as to its effect on human tissue, within the existing state of the art, the defendant could have reformulated the design to use 5 percent potassium hydroxide which would have been less expensive, just as effective and much safer. After some 59 other Liquid-Plumr injuries were reported to defendant, it finally reformulated its design to produce a safer product. In Drayton the defendant was allowed to argue in defense and mitigation that its management was new, that it had learned from its prior claims and litigation experience and that it had purged the enterprise of its prior egregious misconduct.

To open the courtroom door is often to open a school door for predatory producers.

(3) Case of the Tip-Over Steam Vaporizer. A tip-over steam vaporizer, true to that ominous description, was upset by a little girl who tripped over the unit's electric outlet cord on the way to the bathroom in the middle of the night. The sudden spillage of scalding water in the vaporizer's glass jar severely burned the 3-year-old child. The worst injuries in the world are burn injuries. The cause of the catastrophe was a loose-lidded top which could have been eliminated by adopting any one of several accessible, safe, practical, available, desirable and feasible design alternatives, such as a screw-on or child-guard top. The truth is that the manufacturer, Hankscraft, had experienced a dozen prior similar disasters. In the instant case, the little girl recovered a $150,000 judgment against the heedless manufacturer, impeaching the vaporizer's design because of lack of a screw-on or child-guard top. When the manufacturer, with icy indifference to the serious risks to infant users of its household product refused to take its liability carrier's advice to recall and redesign its loose-lidded vaporizer, persisting in its stubborn refusal when over 100 claims had been filed against it, the carrier finally balked and refused to continue coverage unless the company would recall and redesign. Then and only then did Hankscraft stir itself to redeem and correct the faulty design of its product, thereafter proudly proclaiming (and I quote), ''Cover-lock top protects against sudden spillage if accidentally tipped.'' Once again Tort Law had to play professor and policeman and teach another manufacturer that safety does not cost: It pays. Under what might be called the Cost-Cost formula, the manufacturer will add safety features when it comes to understand that the cost of accidents is greater than the cost of their prevention. The Tip-Over Steam Vaporizer case is the most graphic example known to use showing that corporate management can be recalled to its social responsibilities by threat of stringent liability, enhanced by deserved civil punishment via punitive damages, and that belief in such a proposition is more than an ivory tower illusion.

A good companion case to the Tip-Over-Steam-Vaporizer case, serving the same Tort Touchstone of Deterrence, is the supremely instructive Case of the Remington Mohawk 600 Rifle. While a 14-year-old boy was seeking to unload one of these rifles, pushing the safety to the ''off'' position as required for the purpose, the rifle discharged with the bullet entering the boy's father's back, leaving him paralyzed and near death for a long time. The agony of his guilt, his feeling that he was to blame for his father's devastating injuries, pressed down on the boy's brow like a crown of thorns and almost unhinged his sanity. Assiduous investigation by the family's lawyer unearthed expert evidence of unsafe design and construction and lax quality control of the safety selector and trigger assemblies of the Mohawk 600.

The result of the exertions of the plaintiff's lawyer, deeply and redoubtedly involved in challenging the safety history of the rifle model, was a capitulation by Remington and an agreement to settle the father's claim (he was a seasoned and successful defense trial lawyer) for $6.8 million. Remington also wrote the son a letter, muting some of his anguish by stating that the weapon was the whole problem and that he was in no way responsible for his father's injuries. Then, facing the threat of cancelled coverage from its carriers for skyrocketing premiums in the projection of other multimillion dollar awards, Remington commendably served the public interest by announcing the recall campaign in which we see another electrifying example of Tort Law litigating another hazardous product feature from the market.

Remington's nationwide recall program affected 200,000 firearms; notices in newspapers and magazines similar to this one that appeared in the January 1979 issue of Field and Stream cut back on the harvest of hurt and heartbreak: ''IMPORTANT MESSAGE TO OWNERS OF REMINGTON MODEL 600 AND 660 RIFLES, MOHAWK 600 RIFLES, AND XP–100 PISTOLS. Under certain unusual circumstances, the safety selector and trigger of these firearms could be manipulated in a way that could result in accidental discharge. The installation of a new trigger assembly will remedy this situation. Remington is therefore recalling all Model 600 rifles except those with a serial number starting with an 'A' . . . Remington recommends that prior to any further usage of guns included in the recall, they be inspected and modified if necessary. [Directions are then given for obtaining name and address of nearest Remington Recommended Gunsmith who would perform the inspection and modification service free of charge.].''

Tort Law forced Remington to look down the barrel and see what it was up against. Once again Tort Law was the death knell to excessive preventable danger.

For a wonderfully absorbing account of the Mohawk 600, see Stuart M. Speiser's justly praised Lawsuit (Horizon Press, New York, 1980) 348–55.

(4) Case of MER/29, the Anti-Cholesterol Drug Which Turned out to Cause Cataracts. Many trial lawyers will recall the prescription drug MER/29 marketed for its benign and benevolent effect in lowering blood cholesterol levels and treating hardening of the

arteries but which turned out to have an unpleasant and unbargained-for effect on users, the risk of causing cataracts. As Peter DeVries recently observed, ''There is nothing like a calamity to help us fight our troubles.'' Blatant fraud and suppression of evidence from animal experiments were proved on the manufacturer's part in the marketing of this dangerous drug. Who did more—the federal government or private trial lawyers—in getting this dangerous drug off the market and compensating the numerous victims left in its wake? The question carries its own answer. The United States drug industry has annual sales of 16 billion dollars per year, while the Food and Drug Administration has an annual budget of 65 million dollars to oversee all drug manufacture, production and safety. How can the foothills keep the Alps under surveillance? Worse, as shown by the MER/29 experience, enforcement of the law in that situation, far from being vigorous and vigilant, was lame, limp and lackluster. It was only private suits advanced by trial lawyers that furnished the real muscle of enforcement and sanction, compensation for victims, deterrence of wrongdoing, and discouragement of corporate attitudes toward the public recalling that attributed to Commodore Vanderbilt.

As to the indispensible role and mission of the trial lawyer in Suing for Safety, it should not be overlooked that the current Administration has moved to sharply restrict the regulation of product safety by the Consumer Product Safety Commission. The 1982 budget for the commission was reduced by 30 percent in the first round of Reagan Administration budget cuts and is marked for further cuts in the future.

As the Thalidomide, MER/29, Dalkon Shield, Asbestos, DES, Slip-into-Reverse Transmissions and Fuel Tank scandals have been starkly revealed, we have crime in the suites as well as crime in the streets. Corporate culpability calls for corporate accountability, and our society has developed no better instrument to encourage socially responsible corporate behavior than the vehicle of adverse judgments beefed up by punitive damages. In the MER/29 situation, for example, the criminal fines levied on the corporate producer and its executives were slap-on-the-wrist trivial when contrasted with the deterrent impact of punitive damage awards in current uncrashworthiness cases where flagrant corporate indifference to public safety was established.

Our leading scholar in the field of punitive damages, writing with verve and virtuosity on that subject, concluded in 1976 that punitive damages awards should be permitted in appropriate products liability cases. Writing in 1982 with the same unbeatable authority, Professor David G. Owen traces the ferment and developments of doctrine in the ensuing years and then delivers a conclusion informed by exhaustive research, seasoned reflection, and an obvious morality of mind. ''I remain convinced of the need to retain this tool of legal control over corporate abuses. . . .''

(5) Case of the Infant Who Died from Drinking Toxic Furniture Polish Where Manufacturer Failed to Warn Mother to Keep Toxic Product out of Reach of Children. This is the celebrated case of Spruill v. Boyle-Midway, Inc., in which a 14-month-old child reach over from his crib and pulled a doily off a bureau, causing a bottle of Old English Red Oil Furniture Polish, manufactured by the defendant, to fall into the toddler's crib. During the few minutes his mother was out of the room, the baby got the cap off the bottle and drank a little bit of the polish. He was dead within two days of resulting chemical pneumonia. The bottle had a separate warning about combustibility in letters ⅛ inch high, but only in the midst of other text entitled ''Directions'' in letters 1/32 inch high did it say ''contains refined petroleum distillates. May be harmful if swallowed, especially by children.'' The mother testified that she saw the warning about combustibility but did not read the directions because she knew how to use furniture polish. In a negligence action against the maker, the jury found that both defendant and the baby's mother were negligent and awarded wrongful death damages to the child's father and siblings but not to the mother. The Fourth Circuit in keeping with the grain of modern authority held that it was irrelevant that the child's ingestion of the toxic polish was an unintended use of the product. The jury could properly find that in the absence of an adequate warning to the mother that she could read and heed—to keep the polish out of the reach of children—such misuse of the product was a foreseeable one. The defect was to be tested not only by intended uses but by foreseeable misuses.

The jury could find that the manufacturer's placement of the warning was designed more to conceal than reveal, especially in view of the grater prominence given the fire warning (⅛ of an inch compared to the Liliputian print, 1/32 of an inch, as to the contents containing ''refined petroleum distillates''). The poison warning could be found to fall short to what was required to convey to the average person the dangerous nature of this household product. The label suggested that harm from drinking the polish was not certain but merely possible, while experts on both sides agreed that a single teaspoon would be lethal to children.

The warning in short could properly be found to be inadequate—too soft, mispositioned and not sufficiently eye-arresting. Defendant admitted in answer to interrogatories that it knew of 32 prior cases of poisoning from ingestion of its ''Old English Red Polish.''

Did the imposition of liability in this seminal Spruill case supra stimulate, goad or spur the manufacturer to take safety measures against the foreseeable risk of ingestion by innocent children? A trip to the local hardware store a couples of days ago reveals that Old English Red Oil Polish now sports the following on its label: ''DANGER HARMFUL OR FATAL IF SWALLOWED. COMBUSTIBLE. KEEP OUT OF REACH OF CHILDREN. SAFETY CAP.''

An error is not a mistake unless you refuse to correct it.

(6) Case Holding Manufacturer of PAM (Intended to Keep Food from Sticking to Cooking Surfaces) Liable for Death of Teen-Ager from Inhalation of PAM's Concentrated Vapors. Harless v. Boyle-Midway Div. of Amer. Home Products, involved an increasing number of teenagers who were dying of a ''glue-sniffing syndrome,'' inhaling the concentrated vapors of PAM, a household product intended to keep food from sticking to cooking surfaces. Originally, the manufacturer used only a soft warning on the can's label: ''Avoid direct inhalation of concentrated vapors. Keep out of the reach of children.'' However, to the knowledge of defendant, the children continued sniffing and dying. Then the manufacturer, as an increasing number of lawsuits were pressed upon it for the preventable deaths of such children, changed the warning on its labels. shifting to harder warning: ''CAUTION: Use only as directed, intentional misuse by deliberately concentrating and inhaling the contents can be fatal.'' This was, of course, a much harder and more emphatic warning. The Fifth Circuit held that it was reversible error to exclude plaintiff's evidence (in an action for the wrongful death of a PAM-sniffing 14-year-old) that no deaths had occurred from PAM sniffing after the defendant had hardened its warning by warning against the danger of death, the ultimate trauma.

On remand the jury brought in a verdict for the boy's estate in the amount of $585,000 with an additional finding by the jury that the lad's administrator was entitled to an award of punitive damages. Prior to the punitive damages suit, the case was settled for a total of $1.25 million. It was uncontested that prior to the lad's death the manufacturer knew of 45 inhalation deaths from foreseeable misuse of its product, and upon remand admitted to an additional 68 from the same expectable cause.

If you will examine the label on the can of PAM on your shelf, as the writer has just done, you will find: ''WARNING: USE ONLY AS DIRECTED. INTENTIONAL MISUSE BY DELIBERATELY CONCENTRATING AND INHALING THE CONTENTS CAN BE HARMFUL OR FATAL.'' Once again the pressures of liability stimulated a producer to avoid excessive preventable dangers in its product's use by strengthening its warning label, thereby enhancing consumer protection.

(7) Case of the Poisonous Insecticide Holding That Warnings Must Contain Appropriate Symbols. Such as Skull and Crossbones, Where Manufacturer knows That Product May Be Used by Illiterate Workers (Spanish-Speaking Imported Puerto Rican Laborers) Who Would Not Understand English. This is the salutary holding in the celebrated case of Hubbard-Hall Chem. Co. v. Silverman. The First Circuit upheld judgments entered on jury verdicts for the wrongful death of two illiterate migrant farm workers who were imported by a Massachusetts tobacco farmer and killed by contact with a highly toxic insecticide manufactured and distributed by defendant. Even though the comprehensive and detailed danger warnings on the sacks fully complied with label requirements of the Department of Agriculture, the jury could properly find that because of the lack of a skull or crossbones or other comparable symbols the warning was inadequate. Use of the admittedly dangerous product by persons who were of limited education and reading ability was within the range of apprehension of the manufacturer. While evidence of compliance with governmental regulations was admissible, it was not decisive. Governmental standards are ''minimums,'' a floor not a ceiling, and so far as adequate precautions are concerned, federal regulations do not oust the possibly higher common-law standards of the Commonwealth of Massachusetts.

The steady, unflagging pressures of litigation against the inertia, complacency and moral obtuseness of manufacturers have not only resulted in enhanced safety in the field of conscious design choices (substituting child-guard screw-on tops on tip-over steam vaporizers or over-the-axle fuel tanks for those mispositioned more vulnerably in front of the axle or adding rear-view mirrors to blind behemothic earth-moving machines whose design obstructs the vision of a reversing operator, etc.) But also in inducing product suppliers to reduce marketing defects in the products they sell by strengthening the adequacy of the instructions and warnings that accompany their products set afloat in the stream of commerce.

The net effect of such benign and beneficial litigation has been to improve the adequacy and efficacy of the educational information given to consumers by producers via improvements in the conspicuousness of warnings given; making them more prominent, eye-arresting, comprehensive, complete and emphatic; placing the warnings in more effective locations; avoiding ambiguous warning; extending warnings to the safe disposition of the product; and avoiding any dilution of the warnings given. In short, the

bottom line, as indicated in the cited representative sampling of cases, is that successful lawsuits operate as safety incentives to ''inspire'' product suppliers to furnish instructions and warnings that are in ratio to the risk and in proportion to the perils attending foreseeable uses of the marketed products.

Here, too, we see the conspicuous usefulness of the lawsuit as the weapon for ferreting out marketing defects, whether ingenious or ingenuous, in selling dangerously defective products.

(8) Case of Marketing Carbon Tetrochloride Using Warnings Found to Be Inadequate Because Inconspicuous. Suppose a defendant sells carbon tetrachloride and places on all four sides of the can, in large letters, the words ''Safety Kleen,'' and then uses small letters (Lippiputian print) to warn of the serious risk of using the cleaning fluid in an unventialated place (of places the fine print warning only on the bottom of the can). It requires no tongue of prophecy to predict that this warning will be found inadequate because too inconspicuous. It was so held in Maize v. Atlantic Refining Co. Not only was the warning inadequate because not conspicuous enough, but the representation of safety (''Safety Kleen'') operated to dilute, weaken, and counteract the warning. Moreover, in Tampa Drug Co. v. Wait, the court upheld a judgment for the wrongful death of a 38-year-old husband who died from carbon tetrachloride poisoning after using a jug of the product to clean the floors of his home. While the label warned that the vapor from the liquid was harmful and that prolonged breathing of it or repeated contact with the skin should be avoided and that the product should only be used in well ventilated areas, the court with laser-beam accuracy ruled that the warning nonetheless could be found inadequate because of its failure to warn with qualitative sufficiency as to deadly effects or fatal potentialities which might follow from exposure to its fumes.

Decisions such as Maize and Wait supra were the prologue and predicate for the action taken by the FDA in 1970, under the Federal Hazardous Substances Act, to ban and outlaw carbon tetrachloride.

Torts archivists know that successful private lawsuits to recover for harm from products simply too dangerous to be sold at all, regardless of the completeness or urgency of the warning given, frequently lead to a recall and reformulation of the product's design or to a decision to ban the product from the market. Life and limb are too important to trade off against unmarketed inventory.

(9) Case of the 8-Year-Old Boy Who Choked to Death from Strangling on a Quarter-Inch Rubber Rivet, Part of a Riviton Toy Kit Given Him for Christmas. This case will indeed rivet the attention (in the sense of attract, fasten and hold) of concerned citizens who wish to understand how the threat of liability operates as a spur to safety on the part of product producers. The present example involves a toymaker whose work is indeed ''child's play.''

Parker Brothers, a General Mills subsidiary headquartered some 18 miles north of Boston, had big plans for Riviton. This was a toy kit consisting of plastic parts, rubber rivets and a riveting tool with which overjoyed children could put together anything from a windmill to an airplane. In the first year on the market in 1977, the Riviton set seemed on its way to becoming one of those classic toys that parents will buy everlastingly. However, one of the 450,000 Riveton sets bought in 1977 ended up under the Christmas tree of an 8-year-old boy in Menomonee Falls, Wis. He played with it daily for three weeks. Then he put one of the quarter-inch long rubber rivets into his mouth and choked to death. Ten months later, with Riveton sales well on their way to an expected $8.5 million for the year, a second child strangled on a rivet.

What should the company do? Just shrug off the two fatal child strangulations, ascribe the deaths to freakish mischance, try to shift the blame to parental failure to supervise and police their children at play, or assign responsibility to the child's abnormal misuse or abuse of their product? Could not the company cap its disavowal of responsibility by a bromidic disclaimer that, ''After all, peanuts are the greatest cause of strangulation among children and nobody advocates the banning of the peanut.''

However, as manufacturers, Parker Brothers well knew that they would be held liable to an expert's skill and knowledge in the particular business of toymaking and were bound to keep reasonably abreast of scientific knowledge, discoveries and hazards associated with toys in their expectable environment of use by unsupervised children in the home. The toymaker knew that the Riveton set must be so designed and accompanied by proper instructions and warnings that its parts would be reasonably safe for purposes for which it was intended but also for other uses which, in the hands of the inexperienced, impulsive and artless children, were reasonably foreseeable. When you manufacture for children, you produce for the improvident, the impetuous, the irresponsible. As a seasoned judge put it: ''The concept of a prudent child, God forbid, is a grotesque combination.'' Much must be expected from children not to be anticipated when you are dealing with adults, especially the propensity of children to put dangerous or toxic or air-stopping objects into their mouths. The motto of childhood seems to be: ''When in doubt, eat it.'' Knowledge of such childish propensity is imputed to all manufacturers who produce products, especially toys, which are intended for the use of or exposure to children. Cases abound to document this axiom.

Recently, Wham-O Manufacturing Co. of San Gabriel, Calif., voluntarily recalled its Water Wiggle, a garden hose attachment that drowned a child when it jammed in its throat. Still more recent, Mattel, Inc. of Hawthorne, Calif., initiated a recall of missiles fired by it Battlestar Gallactica toys when a 4-year-old boy inhaled one and died. The manufacturer of a ''Play Family'' set of toy figurines would have been well advised to pull from the market and redesign the small carved and molded figures in the toy set, intended for children of the teething age. A 14-month-old child swallowed one of the toy figures 1¾″ high and ⅞″ in diameter, and before it could be extricated from his throat at a hospital's emergency room, the child was reduced to vegetable status as a result of irreversible brain damage from the toy's windpipe blockage of air supply to the brain. The manufacturer's dereliction of design and lack of product testing were to cost it a $3.1 million jury verdict for the child and his parents.[24]

Against the marketing milieu and the legal setting sketched above, what should be the proper response of Parker Brothers, manufacturers of the Riviton toy set, when its executives learned of the second child's death from strangulation on the quarter-inch rubber rivet in the toy kit? Should they have tried to tough it out or luck it out in the well known lottery called ''do nothing and wait and see''? The company was sensitive not only to the constraints of the law (liability follows the marketing of defective products), but also to the imperatives of moral duty and social responsibility, and the commercial value of an untarnished public image. Parker Brothers decided to halt sales and recall the toy. As the company president succinctly stated, ''Were we supposed to sit back and wait for death No. 3?''

Business, the Frenchman observed, is a combination of war and sport. Tort Law pressures business to realize how profitless it may provide to war against children or to trifle and jest with their safety. The commendable conduct of Parker Brothers in this case is one of the most striking tributes we know to the deterrent value and efficacy of Tort Law and the example would make a splendid case study for the nation's business schools.

(10) Case of the Recycling Washing Machine That Pulled Out a Boy's Arm. In Garcia v. Halsett, the plaintiff, an 11-year-old boy, sued the owner of a coin-operated laundromat for injuries inflicted while he was using one of the washing machines in the launderette. He waited several minutes after the machine had stopped its spin cycle before opening the door to unload his clothing. As he was inserting his hand into the machine a second time to remove a second handful of clothes the machine suddenly recycled and started spinning, entangling his arm in the clothing, causing him serious resulting injuries. The evidence was clear that a common $2 micro switch—feasible, desirable, long available—would have prevented the accident by automatically shutting off the electricity in the machine when the door was opened. The reviewing court held the launderette owner strictly liable for defective design because the machine lacked a necessary safety device, an available micro switch. Shortly thereafter the defendant obtained 12 of these micro switches and installed them himself on the machines. Once again, the threat of tort liability serves to deter—the prophylactic purpose of Tort Law at work. The deterrent function of Tort Law is not just an idea in the air; it has landing gear, has come down to earth and gone to work.

SUMMARY

The foregoing 10 cases and categories are merely random and representative examples, not intended to be complete or exhaustive, of the deterrent aim and effect of Tort Law in the field of product failure or disappointment.

It needs to be emphasized that the preventive aim of Tort Law is pervasive and runs like a red thread throughout the entire corpus of Torts. For example, the private Tort litigation system has served, continues to serve, as an effective and useful therapeutic and prophylactic tool in achieving better health care for our people by discouraging and thereby reducing the incidence of medical mistakes, mishaps and ''misadventures.'' An error does not become a mistake unless you refuse to correct it. For example, successful medical malpractice suits have induced hospitals and doctors to introduce such safety procedures as sponge counts, electrical grounding of anesthesia machines, the padding of shoulder bars on operating tables, and the avoidance of colorless sterilizing solutions in spinal anesthesia agents. Remember, the fraudulent butchery practiced on defenseless patients by the notorious Dr. John Nork was not unearthed, pilloried or ended by the vigilant action of hospital administrators, peer review groups, or medical societies but by successful, energetically pressed malpractice actions prosecuted by trial lawyers in behalf of the victimized patients.

So we come full circle and end as we began: Accident Prevention Is Better Than Accident Compensation: ''A Fence at the Top of the Cliff Is Better Than an Ambulance in the Valley Below.'' A successful lawsuit and the pressures of stringent liability are one of the most effective means for cutting down on excessive preventable dangers in our risk-beleaguered society.

My hero in the foregoing chronicle of good lawyering has been the hard-working trial lawyer with his care, commitment and concern for public safety, the civil religion of us all.

He more than any other professional has proved that we can indeed Sue for Safety. My tribute to him is in words Raymond Chandler used to salute his hero: ''Down these mean streets a man must go who is not himself mean, who is neither tarnished nor afraid.''

PRODUCT LIABILITY DOES NOT EXTEND TO NEGLIGENT ENTRUSTMENT

Mr. ROCKEFELLER. Will the Senator from Washington yield for a question about the applicability of the bill?

Mr. GORTON. Yes, I would be glad to do so.

Mr. ROCKEFELLER. Mr. President, we have been seeing a lot of paper about this conference reports' effects on so-called dram shop laws which allow victims of drunk driving crashes to seek recovery from those individuals or establishments who negligently sell, or serve, alcoholic beverages to persons who are intoxicated or to minors who subsequently kill or injure someone while driving under the influence.

Mr. GORTON. Yes, we have. I believe those laws can be valuable and help enhance highway safety and antidrunk driving initiatives, as well as encourage the responsible service of alcoholic beverages. Section 104 of the conference report is an example of a provision in the very bill we are considering which tries, in a small way, to discourage alcohol and drug abuse in this country. Section 104 tells persons that, if they are drunk or on drugs and that is the principal cause of an accident, they will not be rewarded through the product liability system.

Mr. ROCKEFELLER. I agree. I am troubled that I continue to hear opponents of product liability reform, claim that these laws will be adversely affected by the proposed legislation.

Mr. GORTON. The short response, Senator, is these laws will not be adversely affected or affected in any way. The Senate Commerce Committee report, which has been adopted as the legislative history of the conference report, states unequivocally at page 25, footnote 90:

[T]he provisions of the Act would not cover a seller of liquor in a bar who sold to a person who was intoxicated or a car rental agency that rents a car to a person who is obviously unfit to drive or a gun dealer that sells a firearm to a ''straw man'' fronting for children or felons. These actions would not be covered by the Act, because they involved a claim that the product seller was negligent with respect to the purchaser and not the product. Such actions would continue to be governed by state law.

Clearly, H.R. 956 will not in any way affect State law regarding the liability of those individuals who serve additional alcohol to persons who are obviously under the influence. Similarly, H.R. 956 will not affect State law regarding the liability of a product seller who fails to exercise reasonable care in selling a weapon, such as a handgun, to a minor or known criminals. The legislation also will not affect State law regarding the liability of a rental agency that fails to exercise reasonable care by renting an automobile to someone who, at the time, is obviously unfit to drive.

Mr. ROCKEFELLER. Mr. President, I think we should say to our colleagues that the product seller provision's application does not mean that these cases will be affected.

Mr. GORTON. The Senator is absolutely correct, these cases are not affected. First and foremost, this is a product liability bill and it applies to product liability actions. Product liability actions generally involve harm caused by alleged product defect.

As all are aware, the harm in cases involving drunk drivers is often severe, indeed, and may even mean the death of an innocent person or a child. It is important, however, to avoid the misleading arguments by those who oppose legal fairness and who intentionally attempt to confuse product liability actions, which are covered by the conference report, with negligent entrustment cases, which are not covered by the legislation. As in the past, they use attention-getting, but totally irrelevant examples, such as drunk driving cases and gun violence.

Mr. ROCKEFELLER. And that remains true, regardless of the fact that the applicability section of the conference report, says that the act applies to ''any product liability action brought in any State or Federal Court on any theory for harm caused by a product.'' Is that not right?

Mr. GORTON. The reason for this broad definition is to assure that the bill covers all theories of product liability, such as negligence, implied warranty, and strict liability. It is not broadly defined in order to extend to cases beyond product liability, and certainly not to extend the bill to cases involving negligent entrustment, such as in cases involving the sale of alcohol to an obviously intoxicated individual or the sale of a gun to a known felon.

Mr. ROCKEFELLER. Mr. President, section 103 of the bill, the so-called product sellers provision, imposes liability when a product seller fails to exercise reasonable care with respect to a product. If a tavern owner fails to exercise reasonable care in selling alcohol to an intoxicated person, would that case be subject to the bill?

Mr. GORTON. No. The case against the tavern owner is based on the tavern owner's action; it is not based on an alleged defect in the product, that is, the alcohol. Cases in which a tavern owner sells alcohol to an intoxicated person involve negligent entrustment and are not subject to the provisions of the conference report; State law continues to apply.

To hold that such laws were affected by the bill would be a clear and obvious misconstruction of the bill. To make this clear, one only need look to the acts covered by product sellers in the conference report. This appears in the definition of product seller, which is set forth in sections 101(11)(B), 101(16)(A). H.R. 956 is applicable to product sellers, ''but only with respect to those aspects of a product (or component part of a product) which are created or affected when before placing the product in the stream of commerce.'' The definition then addresses those things where the product seller ''produces, creates, makes, constructs, designs, or formulates * * * an aspect of the product * * * made by another.'' This is classic product liability and simply does not apply to the negligent tavern owner.

Mr. ROCKEFELLER. And would you agree with me that the ''product sellers'' provision, as it applies to rented or leased products (section 103(c)(2)) in the conference report which states that a '''product liability action' means a civil action brought on any theory for harm caused by a product or product use,'' cannot be interpreted to mean use of alcohol, or use of a gun?

Mr. GORTON. The Senator is correct. First, the clarification is only included in the rented or leased products portion of the product seller provision. Thus, by way of example, in a situation where a car rental agency has exercised reasonable care with respect to maintaining and inspecting a vehicle, for example, the brakes, the engine, or the tires, and the person who shows up at the desk to rent the vehicle has an impeccable driving record, does not appear unfit to drive, and has a valid driver's license. The renter then takes the car and is subsequently involved in an accident. The product use language in section 103(c)(2) holds that the rental company cannot be held vicariously liable for the negligence of the renter simply because the company owns the product and has given permission for its use.

In contrast, if the rental agency rented a car to an obviously intoxicated person and that person was in a subsequent accident, then the rental agency would have been negligent in renting, or in negligently entrusting, the car to the person who was, at the time, obviously intoxicated. As spelled out clearly in the legislative history, ''Such actions would continue to be governed by State law,'' and are not subject to H.R. 956.

Thus, even in the renter and lessor context, the distinction comes down to whether the seller was negligent as to the product, such as by failing to inspect the brakes, or negligent as to the person, such as by renting to a person with no driver's license and a notorious criminal record. H.R. 956 covers product liability actions; it does not cover negligent entrustment actions.

Mr. ROCKEFELLER. Thank you for that discussion. I hope it will help counter some of the misinformation that has been circulating regarding this provision. Is there any special provision of the bill that emphasizes what you have said here today?

Mr. GORTON. In fact, in order to address these very concerns you have

thoughtfully raised, Senator, the product seller section specifically provides that the conference report does not cover negligent entrustment or negligence in selling, leasing or renting to an inappropriate party. Section 103(d) expressly states: ''A civil action for negligent entrustment shall not be subject to the provisions of this Act, but shall be subject to any applicable State law.'' Frankly, I believe this provision is superfluous, and for this reason, it does not matter if, or where the provision appears in the conference report.

In sum, the product liability bill covers product liability, not negligent entrustment or failure to exercise reasonable care with regard to whom products are sold, rented or leased. H.R. 956 clearly would not cover ''a seller of liquor in a bar who sold to a person who was intoxicated or a car rental agency that rents a car to a person who is obviously unfit to drive or a gun dealer that sells a firearm to a 'straw man' fronting for children or felons.''

Mr. ABRAHAM. Mr. President, I rise today in support of H.R. 956, a bill to reform product liability law.

A few months ago, the 104th Congress took the first momentous step toward legal reform. Over President Clinton's veto, we passed H.R. 1056, a bill to reform securities litigation.

This legislation will significantly curb the epidemic of frivolous lawsuits that are diverting our Nation's resources away from productive activity and into transaction costs.

In passing H.R. 956, the Senate will be taking an equally important second step on the road toward a sane legal regime of civil justice.

Our current legal system, under which we spend $300 billion or 4.5 percent of our gross domestic product each year, is not just broken, it is falling apart.

This is a system in which plaintiffs receive less than half of every dollar spent on litigation-related costs. It is a system that forces necessary goods, such as pharmaceuticals that can treat a number of debilitating diseases and conditions, off the market in this country.

This is a system in which neighbors are turned into litigants. I was particularly struck by a recent example reported in the Washington Post. This case involved two 3-year-old children whose mothers could not settle a sandbox dispute—literally, a pre-school altercation in the sandbox—without going to court.

Something must be done about this situation and this litigious psychology, Mr. President, and this bill puts us on the road to real, substantive reform.

It institutes caps on punitive damages, thereby limiting potential windfalls for plaintiffs without in any way interfering with their ability to obtain full recovery for their injuries.

It provides product manufacturers with long-overdue relief from abusers of their products.

And it protects these makers, and sellers, from being made to pay for all or most non-economic damages when they are responsible for only a small percentage.

First, as to punitive damages. No one wants to see plaintiffs denied full and fair compensation for their injuries. And this bill would do nothing to get in the way of such recoveries.

Unfortunately, punitive damages have come to be seen as part of the normal package of compensation to be expected by plaintiffs. George Priest of the Yale Law School reports that in one county, Bullock, AL, 95.6 percent of all cases filed in 1993–94 included claims for punitive damages.

Punitive damages are intended to punish and deter wrongdoing. When they become routine—one might say when they reach epidemic proportions—they end up hurting us all by increasing the cost of important goods and services.

For example, the American Tort Reform Association reports that, of the $18,000 cost of a heart pacemaker, $3,000 goes to cover lawsuits, as does $170 of the $1,000 cost of a motorized wheelchair and $500 of the cost of a 2-day maternity hospital stay.

We can no longer afford to allow this trend to continue. I am glad, therefore, that this bill begins to cap punitive damages—although in my judgment it only makes a beginning in that area.

I am particularly glad that the bill imposes a hard cap of $250,000 on punitive damages assessed against small businesses—the engine of growth and invention in our Nation.

Of course, punitive damage awards are not the only things increasing the costs of needed products.

Throughout the debate over civil justice reform I have been referring to the case of Piper Aircraft versus Cleveland. I use that example because it shows how ridiculous legal standards can literally kill an industry—as they did light aircraft manufacturing in America—and cost thousands of American jobs.

In Piper Aircraft, a man took the front seat out of his plane and intentionally attempted to fly it from the back seat. He crashed, not surprisingly, and his family sued and won over $1 million in damages on the grounds that he should have been able to fly safely from the back seat.

These are the kinds of decisions we must stop. Drunken plaintiffs, plaintiffs who abuse and misuse products—plaintiffs who blame manufacturers and sellers for their own misconduct—should not be rewarded with large sums of money. They may deserve our concern and sympathy, but we as a people do not deserve to pay for their misconduct through the loss of entire industries.

I am happy that this bill establishes defenses based on plaintiff inebriation and abuse of the product because I believe these defenses will benefit all Americans.

Finally, it seems clear to me that no manufacturer should be held liable for non-economic damages which that individual or company did not cause.

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

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

This is unfair. And the unfairness is aggravated when noneconomic damages are awarded.

Noneconomic damages are intended to compensate plaintiffs for subjective harm, like pain and suffering, emotional distress, and humiliation.

Because noneconomic damages are not based on tangible losses, however, there are no objective criteria for calculating their amount. As a result, the size of these awards often depends more on the luck of the draw, in terms of the jury, than on the rule of law. Defendants can be forced to pay enormous sums for unverifiable damages they did not substantially cause.

This bill would reform joint liability in the product liability context by allowing it to be imposed for economic damages only, so that a defendant could be forced to pay for only his proportionate share of noneconomic damages.

As a result, plaintiffs would be fully compensated for their out-of-pocket losses, while defendants would be better able to predict and verify the amount of damages they would be forced to pay.

This reform thus would address the most pressing concerns of plaintiffs and defendants alike.

Mr. President, problems will remain with our civil justice system after this bill is made into law—if this bill is signed by President Clinton and made law.

Charities and their volunteers will remain unprotected from frivolous lawsuits.

Our municipalities will remain exposed to profit-seeking plaintiffs.

And the nonproducts area of private civil law in general will remain unreformed—3-year-olds and their mothers may still end up in court over a sandbox altercation.

In the last session I and some of my colleagues fought for more extensive, substantive, and programmatic reforms to our civil justice system. These were consistently turned back.

I believe at this point it is time for us to consider more neutral, procedural reforms, such as in the area of Federal conflicts rules, to rationalize a system we cannot seem to tame.

But I am certain, Mr. President, that this bill marks an important step toward a fairer, more reasonable and less expensive civil justice system.

This is why I am frustrated that President Clinton has threatened to veto this bill.

The President has stated repeatedly that he would support balanced, limited product liability reform. He has been singularly unhelpful in his opposition to more far-reaching reforms that would do more for American workers and consumers. But he has claimed that he would support product liability reform.

Now the President is claiming that this legislation is somehow ''unfair to consumers.''

Mr. President, is a system in which fifty-seven cents of every dollar awarded in court goes to lawyers and other transaction costs fair to consumers of legal services?

Is it really pro-consumer to have a system in which, as reported in a conference board survey, 47 percent of firms withdraw products from the marketplace, 25 percent discontinue some form of research, and 8 percent lay off employees, all out of fear of lawsuits?

Please tell me, Mr. President, are consumers helped by a system in which, according to a recent Gallup survey, one out of every five small businesses decides not to introduce a new product, or not to improve an existing one, out of fear of lawsuits?

The clear answer, I believe, is that consumers are hurt by our out-of-control civil justice system, a system which makes them pay more for less sophisticated and updated goods.

I respectfully suggest that President Clinton look beyond the interests of his friends among the trial lawyers to the interests of the American people as a whole.

If he looks to that interest he will find a nation hungry for reform, yearning to be freed from a civil justice system that is neither civil nor just, seeking protection from egregious wrongs, but not willing to sacrifice necessary goods, important public and voluntary services, and the very character of their communities to a system that no longer produces fair and predictable results.

If we in this chamber consult the interest of the people, Mr. President, we will pass this bill. If President Clinton consults that primary interest, he will sign the bill and make it law.

Mr. President, I yield the floor.

Ms. SNOWE. Mr. President, for those who were becoming skeptical, the conference report before us demonstrates that bipartisanship is still alive and well in the U.S. Congress.

First, I would like to express my appreciation to those who have contributed so greatly to the completion of this legislation—not only in the 104th Congress, but in some cases for more than a decade. The chairman of the Commerce Committee, Senator PRESSLER, has been instrumental in shepherding this legislation from the committee, to the Senate floor, into conference, and now back to the Senate floor. Also, Senator ROCKEFELLER and Senator GORTON—whose commitment and leadership on this issue have been unsurpassed in the Senate, and without whose efforts we would not be voting on this conference report today—were invaluable in crafting this legislation.

As I stated during the markup of S. 565 in the Senate Commerce Committee, and later during consideration of the bill on the floor of the Senate, I believe there is a compelling case for product liability reform in this country.

I firmly believe the legislation the Senate adopted early last year was a critical and long overdue first step to reforming an area of law that touches each and every one of us as consumers in America. Therefore, I am now eager to see a well-conceived and balanced bill accomplishing this goal enacted during the 104th Congress. It is a goal I think we can and should reach. I believe the conference report before us is well-conceived and balanced, and am particularly pleased that it contains the punitive damage cap I offered, and which was adopted, during consideration of the Senate bill.

In my statement on product liability on the floor of the Senate many months ago, I established my own personal checklist of critical issues I believed this legislation ought to address to make the bill fair, equitable, and effective. That is now also true for this conference report.

First, we must allow safe consumer products to be developed to meet consumer needs, and ensure that consumers can seek reasonable compensation when injuries and damages occur.

Second, the law must dissuade consumers from filing frivolous lawsuits, without discouraging Americans who have substantive complaints from filing legitimate suits.

Third, a uniform law must encourage companies to police the safety of their own products—both by providing incentives for excellence in safety and strong punishment when product safety is breached.

Last, and perhaps most importantly, one of our fundamental goals must be to ensure that this legislation protects the interests of the average American consumer who makes hefty use of products, but knows little of their innate safety or risk.

I believe that this conference report—like the Senate-passed bill—meets these criteria. One component of this conference report that I considered crucial to fulfilling these requirements is the cap on punitive damages.

To understand the issue of a punitive damage cap, I think it is valuable to remember what punitive damages are—and are not. I believe this issue is particularly important before today's vote because of recent reports in various news sources that have confused a cap on punitive damages with a cap on pain-and-suffering, or a cap on economic damages.

Punitive damages are punishment that serve an invaluable role in deterring quasi-criminal behavior by businesses. They have nothing to do with providing compensation to a person who has been harmed and are not intended in any way to make the plaintiff. That purpose is served by compensatory damages, which provide recovery for both economic damages—which include lost wages and medical expenses—and noneconomic damages, which include pain and suffering and other losses, such as those cased by the loss of one's sight, appendage, or reproductive organs.

One of the overriding problems in our current system is the absence of any consistent, meaningful standards for determining whether punitive damages should be awarded and—if so—in what amounts. The absence of consistent standards not only leads to widely disparate and runaway punitive awards, but it also affects the settlement process. Individuals and companies that are sued often face a catch 22: pay high legal fees to fight a case through trial, verdict, and appeal—or simply settle out of court for any amount less than these anticipated legal fees.

Even for the defendant who recognizes the cost of proving innocence to be too great, or simply hopes to avoid the lottery nature of a possible punitive award—seeking a settlement carries a hidden cost. The lack of a uniform national standard—or simply the existence of vague State standards—forces the defendant to include a punitive premium in their settlements, even when the likelihood of a punitive award is small or even nonexistent. In addition, the high reversal rate of punitive damage awards underscores the absence of clear and understandable rules.

Therefore, in establishing a cap, I considered it vital that the measure we chose be fair, uniform, act as adequate punishment, and serve as an adequate deterrent. I believe a cap based on compensatory damages accomplishes all of these objectives, which is why I fought to include such a measure in the Senate bill. This measure is fair because it is blind to the socioeconomic position of the plaintiff. In addition, because a punitive cap that includes noneconomic damages in its formula is inherently unpredictable, one cannot argue that a business with quasi-criminal intents will be able to predict the ultimate cost of all possible punitive claims and make a financial decision to produce a dangerous product.

At the same time, I do not believe that a cap based on a measure of economic damages alone would accomplish all of these objectives in all circumstances. Although such a measure might serve as adequate punishment and act as an adequate deterrent in many cases, it relies too greatly on the economic position of the plaintiff in establishing a sufficient level of punishment.

While the Senate bill also included an additur provision that allowed the judge to impose a higher punitive damage award in particularly egregious circumstances—and this conference report also includes a modified additur

provision—I believe the measure based on compensatory damages will work for everyone and will subject egregious offenders to strong punishment. This standard is fair and nondiscriminatory. It will apply to all litigants equally—whether you are a man or woman, wealthy or poor, a child or an adult. Therefore, I am particularly pleased that the conference report before us maintains the Snowe amendment on punitive damages. And while I believe that the additur will be proven to be unnecessary due to the inherently even-handed and unpredictable nature of total compensatory damages, I accept its inclusion in the conference report as a means of providing the opportunity for additional punishment in cases where a judge—staying within the parameters set by the jury—deems it necessary.

Mr. President, the bill before us—as outlined by Senators GORTON and ROCKEFELLER—is a targeted bill that brings common sense and reform to one class of lawsuits: those pertaining to product liability. I believe this legislation is sound and will benefit consumers and businesses. As a result, I share the disappointment of other Members of this body in President Clinton's statement that he would veto this bipartisan legislation. At the least, I found it surprising that President Clinton opposes legislation that he endorsed as a member of the National Governors' Association when he was Governor Clinton. I remain hopeful that President Clinton will reconsider his opposition in the coming days. I think a strong bipartisan vote in favor of this legislation is just what the President needs in order to see the light on this issue.

Mr. President, we must be able to show the American people that we not only considered this essential and historic legislation, but that we passed it with strong bipartisan support as well. There is simply no question that, if enacted, this reform will have a positive and wide-ranging impact on millions of Americans. Thank you, Mr. President, I yield the floor.

Mr. COHEN. Mr. President, I continue to oppose the product liability reform bill for two main reasons: it unnecessarily intrudes upon the prerogatives of our State governments and the purported problem the bill attempts to address—the impact of punitive damages—is overstated.

For over two centuries, tort law has been developed by our common law courts and State legislatures. The same is true for our contract law, real property law, insurance law, and a host of other subjects. The core principles of tort law are the same across the country, but each State has adjusted its laws to suit its individual needs, experimented with liability reforms, and attempted to strike a careful balance the interests of business and consumers.

The Federal product liability bill would put an end to this era of local experimentation and adjustment. Instead, it would contribute to the trend of the last half century of centralizing power in Washington. Unfortunately, the product liability bill will be only the first step in this process. Once it is completed other interests will follow with pleas for Federal intervention. And eventually the States will be stripped of yet another area of authority. This trend runs entirely counter to the generally accepted principle that the Federal Government is too big and that more authority should be returned to the States and localities.

Ironically, we are taking this step at a time when the States are vigorously engaged in the topic of tort reform. Just this year, New Jersey, Indiana, Wisconsin, Illinois, and Texas have passed tort reform legislation. In fact, since 1986, 31 States have altered their product liability laws, 30 States limit the amount of punitive damages in some manner and 41 States have changed or abolished the rule of joint and several liability. With this much activity on the state level, there is no justification for this sweeping, intrusive Federal bill.

I also believe that the case for tort reform has been exaggerated. Unfortunately, the debate over this legislation has been driven more by anecdote and horror stories than objective facts. Indeed, the dearth of solid, unbiased research led the Wall Street Journal to conclude last year that ''Truth Is the First Casualty of the Tort-Reform Debate.''

A review of some data collected by the Bureau of Justice Statistics, a neutral arbiter on this topic, demonstrates that runaway jury verdicts are not as great of a problem as the tort reform advocates suggest. The study showed that courts in the 75 largest counties in the country decided 762,000 civil cases in 1992. Punitive damages were awarded in only 364 of these cases—.04 percent. Only 360 of the 762,000 cases involved product liability. Punitive damages were awarded in only three of those cases. And the total amount of punitive damages awarded was only $40,000.

The study also suggests that if we are looking to solve problems with the application of punitive damages, perhaps we should be addressing other areas of the law. Of the cases in which the plaintiff won a jury verdict, punitive damages were awarded in 30 percent of all slander cases, 21 percent of all fraud cases, but only 2 percent of all product liability cases.

I do not deny that there have been abusive cases where excessive awards have been made for minor injuries. But to address this problem, we need to do more to punish attorneys who bring frivolous cases or use the force of the legal system to coerce companies to settle meritless claims. We also need to encourage judges to intervene when juries run amok. Instead of taking these steps, this bill places caps on damages and limits the ability of injured parties to collect judgments imposed against wrongdoers. In essence, it limits the ability of those with meritorious claims to gain full compensation in order to rid the system of shameful cases that should have never been filed in the first place.

In my view, this is an unwise approach that will do damage to our principle of federalism. I will vote against this conference report.

Mrs. MURRAY. Mr. President, I would like to explain why I voted against this product liability conference report.

All of us in this room have heard horrific stories about people who got hurt when they did stupid or silly things with a product and then recovered tremendous amounts of money from innocent businesses. Those few stories have gotten a lot of mileage. They have gotten us to a conference report that takes power from consumers and gives it to corporations.

Mr. President, I am a mother who wants to be responsible for passing laws that improve the chances for my children to live healthy, safe lives. I am glad that victims have used the current State-based product liability laws to force manufacturers to make safe toys, nonflammable pajamas, and cars and trucks that don't explode. The current legal system forced companies to be responsible or face the possibility of significant financial loss.

I also want to be responsible for passing laws that provide the hard working men and women of this country an opportunity to be fully compensated for injuries that are a direct result of products they use in the workplace. This conference report makes it much harder for our workers to recover damages from those responsible for their injuries. It is designed to give advantage to corporations and disadvantage to our workers through its limits on joint liability for noneconomic damages, on punitive damages, and on seller liability, as well as its broadly drawn defenses to liability, such as the statute of repose.

In addition, I want to support legislation that allows our citizens to trust that the medical devices they are receiving are safe. So many women needlessly suffered when the maker of silicone gel breast implants refused to heed initial warning signs that their product was flawed. Today, there is no dispute that there is a strong correlation between silicone breast implants and serious health disorders, including joint and muscle pain, tremors, and autoimmune diseases. And, unfortunately, not all of the victims of these implants are known. For those who have not yet filed, this bill will block them from seeking redress from this grossly negligent company. That is wrong.

Finally, I want to be responsible for legislation that improves our citizens' quality of life. This bill could severely limit lawsuits involving products that damage the environment, such as pesticides and toxic chemicals. In particular, the provision addressing joint and

several liability could make it nearly impossible for victims to receive full and fair compensation for harm caused by a mixture of toxic substances where a victim is unable to prove the percentage of damage caused by each chemical. Especially now, when we see efforts to scale back Government's role in environmental protection, the civil justice system is an even more important mechanism for deterring environmental degradation.

I know that responsible businesses feel threatened by the current system. I believe we should seek to reform and improve our system. But this approach is too sweeping. We need to take smaller steps and make more incremental reforms.

Mr. President, I have voted against this conference report for all of the above reasons. I cannot support a products liability law that shifts power from the States to the Federal Government and takes power away from our children, the elderly and working people and gives it to the companies that produce harmful products.

Mr. DOMENICI. Mr. President, today I am pleased to support the conference agreement on product liability litigation reform—reached after tremendous efforts by my colleagues in both the House and Senate. The Senator from Washington [Mr. GORTON], the Senator from Utah [Mr. HATCH], and the Senator from West Virginia [Mr. ROCKEFELLER] deserve a lot of credit for putting together a thoughtful, bi-partisan approach to solving the problems associated with products liability lawsuits. This is a bill that President Clinton should sign.

I also must commend the House conferees, particularly the distinguished chairman of the House Judiciary Committee, Mr. Hyde, for their willingness to reach a compromise on some of the more controversial provisions in their bill, in order that we could successfully pass a conference report that still will have a positive impact on our products liability litigation system. There are some, and I am among them, who would have liked to see a conference report which went even further on some issues than the agreement we have before us. However, I realize that we would have had a difficult time passing a more expansive and comprehensive legal reform bill. Clearly some reform is better than no reform at all. Our legal system needs it.

I have watched the products liability reform debate over the past several months with great interest. There was a time when many believed that this type of legal reform would not be possible. No one, least of all me, underestimates the power of the trial lawyers to derail even the most reasonable lawsuit reform efforts. Senator DODD and I fought for years to fix our Nation's securities class-action system, and late last year the Congress overrode President Clinton's veto of the bill and enacted comprehensive securities litigation reform. I hope that the President will examine this bill closely, because if he does, the only conclusion he should reach is that this is a reasonable, commonsense approach to reform that is good for the country.

There can be no doubt that our current products liability system extracts tremendous costs from the business community and from consumers. The great expense associated with products liability lawsuits drives up the cost of producing and selling goods, and these costs are passed on to the American consumer. I have heard many tell me about how half of the cost of a $200 football helmet is associated with products liability litigation, and how $8 out of the cost of a $12 vaccine goes to products liability costs. We can no longer afford to require our consumers to pay this tort tax.

Because of the high costs associated with products liability litigation, American companies often find it difficult to obtain liability insurance. The insurance industry has estimated that the current cost to business and consumers of the U.S. tort system is over $100 billion. Insurance costs in the United States are 15 to 20 times greater than those of our competitors in Europe and Japan. Much of this money ends up in the pockets of lawyers, who exploit the system and reap huge fee awards while plaintiffs go under compensated. Meanwhile, businesses which create jobs and prosperity in America suffer.

For companies involved in the manufacture of certain products, like machine tools, medical devices, and vaccines, this means that beneficial products go undeveloped, or after they are developed, they do not make it to the marketplace out of fear of generating a products liability lawsuit. This hampers our competitiveness abroad, and limits the products available to consumers. Harvard Business School Prof. Michael Porter has written about how products liability affects American competitiveness. He has written:

> In the United States . . . product liability is so extreme and uncertain as to retard innovation. The legal and regulatory climate places firms in constant jeopardy of costly, and, as importantly, lengthy product liability suits. The existing approach goes beyond any reasonable need to protect consumers, as other nations have demonstrated through more pragmatic approaches.

In the case of manufacturers of vaccines and other medical devices, the cost of our unreasonable and certainly un-pragmatic products liability litigation system often means that potentially life-saving innovations never make it to the American public. Products liability adds $3,000 to the cost of a pacemaker, and $170 to the cost of a motorized wheelchair. It also has caused the DuPont Co. to cease manufacturing the polyester yarn used in heart surgery out of fears of products liability litigation. Five cents worth of yarn cost them $5 million to defend a case, and DuPont decided that they simply could not afford further litigation costs. Now, foreign companies manufacture the yarn, but will not sell it in the United States out of fear of also being sued. These are products which could save lives and improve the quality of living for all Americans.

In cases where a truly defective product has injured an individual, the litigation process is too slow, too costly and too unpredictable. This bill, because it creates a Federal system of products liability law, will return some certainty to a system that now often undercompensates those really injured by defective products and overcompensates those with frivolous claims.

Those injured by defective products often must wait 4 or 5 years to receive compensation. This leads some victims to settle more quickly in order to receive relief within a reasonable time. Companies often must expend huge amounts of money in legal fees to settle or litigate these long, complicated cases. These again are resources that could be better spent developing new products or improving the designs of existing ones.

I believe that the most important reform in this conference report is the way it treats punitive damages. As their name implies, punitive damages are designed to punish companies and deter future wrongful conduct. They are assessed in these cases in addition to the actual damages suffered by injured victims.

Unfortunately, these damages do not do much, except line the pockets of lawyers. They serve relatively little deterrent purpose and led former Supreme Court Justice Lewis Powell to describe them as inviting ''punishment so arbitrary as to be virtually random.'' Justice Powell wisely has commented that because juries can impose virtually limitless punitive damages, they act as ''legislator and judge, without the training, experience, or guidance of either.'' Justice Powell is absolutely correct, and I applaud the drafters of this bill for dealing with the problems associated with these types of damages.

The Washington Post also agrees that punitive damages reform is necessary. An editorial in support of the conference report printed last week notes that ''there are no ground rules for judges and juries in this area'' and that ''the whole thing is like a lottery, which is terribly unfair.'' The editorial concludes that ''the compromise should be accepted by both houses and signed by the President.''

Reform of punitive damages will return some common sense to the system. Huge punitive damage awards threaten to wipe out small businesses and charitable organizations and I applaud the conferees for providing special protection for these important entities, which are particularly vulnerable to legal extortion by trial lawyers.

By capping the amount of punitive damages available in product liability cases and raising the legal threshold for an award of punitive damages, the conference report will relieve some of

the pressure on even the most innocent defendant to settle or face an award which could potentially bankrupt the company. It however reasonably allows judges some flexibility to go above the cap in truly egregious cases, where increased punitive damages might be warranted.

The conferees also have taken the wise step to reform joint liability, without limiting the ability of plaintiffs to recover their economic damages. The new law will abolish joint liability for noneconomic damages, like pain and suffering, but allows States to retain it for economic damages like hospital bills. This will reduce the pressure on defendants who are only nominally responsible for the injury to settle the case or risk huge liability out of proportion to their degree of fault, while ensuring that injured victims get compensated for their out-of-pocket loss.

The compromise also limits liability in cases where the victim altered or misused the allegedly defective product in an unforeseeable way. It simply is unfair to hold manufacturers liable in cases where consumers use products in ways for which they were not intended. It also is unfair to hold defendants liable in cases where the plaintiff's use of alcohol or drugs significantly contributed to their injury. I am happy to see that the new law will provide an absolute defense in such cases.

Mr. President, as I said earlier, I am no stranger to legal reform. Many of those who are responsible for this important and well-crafted legislation were cosponsors of the securities reform bill Senator DODD and I authored earlier this Congress. Our tort system is badly in need of reform, and the conference report on products liability before us is a step in the right direction. I support it, and I hope that my colleagues and the President will as well.

Ms. MOSELEY-BRAUN. Mr. President, I voted for S. 565, the Senate product liability bill, when it was before the Senate last May, and I support this conference report, which is, in virtually all of its essential provisions, identical to that bill. I supported the bill last year, and I continue to support it now, because I believe that Federal product liability reform makes sense for Americans, and because it makes sense for America.

Lets be clear what product liability reform is and is not about. It is not about an explosion of litigation that our courts physically cannot handle. It is about the chilling effect that product liability judicial decisions in one State can have on businesses across the Nation.

It is not about making it more difficult for Americans injured by products to get justice from those who injured them. It is about reducing the number of frivolous suits and unnecessary legal costs.

It is not about tilting the playing field in favor of business and against consumers or employees. It is about taking a step toward making the playing field more level for consumers, employees and businesses all across this Nation.

And it is not about taking powers away from States in order to disadvantage ordinary Americans. Rather, it is a narrow, carefully crafted approach to reform based on the realities of commerce today.

The basic fact that underlies this bill is that commerce is not local, but national and international. Over 70 percent of what is manufactured in Illinois is sold elsewhere, and Illinois is not unique in that regard. Because commerce is national, and indeed, increasingly international, the laws of any one State are simply not effective in establishing product liability standards for manufacturers in that State. Our Nation's Governors have recognized that fact, which is why the National Governor's Association has three times unanimously approved resolutions supporting Federal product liability reform.

Article I, section 8 of the Constitution grants Congress the power to regulate interstate commerce. Given the interstate and international nature of commerce, and the importance of having a healthy climate for manufacturing here in the United States, reform is essential, both so we can compete successfully in an ever-more competitive world marketplace and so we can generate the kind of economic growth needed to offer every American the opportunity to achieve the American Dream.

Achieving that dream depends on being able to find a good job at good wages, jobs that make it possible for American families to purchase their own homes and to send their children to college, and that suggests a healthy climate for manufacturing—which tends to produce the kinds of jobs Americans want and need—is in our national interest.

The current fragmented product liability system offers less certainty than a casino. That lack of certainty means that the current product liability system imposes costs far greater than the amounts awarded to successful plaintiffs, or the costs involved in defending and pursuing product liability cases. It adds costs to products, even when a company has never been sued, and unnecessary higher costs hurt consumers, and hurt job creation. And, while it is impossible to quantify, there is no doubt that the current product liability system causes some companies not to produce some products. That, too, means fewer good paying manufacturing jobs.

I do not suggest that Americans who might be injured by products should sacrifice their rights to redress for their injuries in order to help our economy generate new, good paying jobs—and this bill does not ask that of any American. But we must all remember that Americans aren't just consumers; they don't have just one interest at stake. Instead of dividing Americans from one another, therefore, we should be working together for the kind of reform that is in all of our interests.

By creating greater certainty, by reducing unnecessary cost, and by addressing the inadvertent chilling effect the current system has on new product creation, product liability reform will help generate new economic growth, and new jobs. And reform will add to the competitiveness of U.S. manufacturing, something that is essential in this ever more competitive world economy.

Some continue to argue that we should leave this issue to the States to address. However, the fact is that, given today's economic realities—and tomorrow's—product liability, no less than health care and other components of our social safety net, is a legitimate and necessary subject for Federal action. And the fact is is that the right kind of product liability reform, like the right kind of health care reform, and the right kind of welfare reform, and expand opportunity, and help create a brighter future for Americans individually and for our Nation collectively.

While this bill is not perfect, I think that, in general, it is the right kind of reform. It will bring greater uniformity to product liability law. It will help cut out the unnecessary costs the current product liability system imposes on businesses, consumers, and employees. And it tries very hard to appropriately balance the competing concerns involved.

I know that some Americans do not share the view that Federal product liability reform is needed, and that there are a number of concerns regarding specific provisions of the bill. I think it is worth noting, however, that the conference report now before us is, with very modest changes, the bill this Senate sent to conference. I ask unanimous consent, Mr. President, that a table comparing the original Senate bill and the conference report be printed in the RECORD at the conclusion of my remarks.

I know the statute of repose has generated some controversy. I would simply point out three things. First, the 15-year statute of repose applies to workplace goods only.

Second, no State with a statute of repose provides a more liberal time period than the one in the conference report; and

Third, the bill permits plaintiffs in every State to file a complaint after she or he discovers or should have discovered both the harm and its cause, a provision that is particularly important to plaintiffs who have trouble identifying the cause of the injury they suffered. For example, a person who developed a cancer many years after exposure to a chemical would be able to file suit anytime up to 2 years after the link between the chemical, and the harm he or she suffered, was identified.

The punitive damages provision has also been controversial. However, this

provision is virtually identical to the bill as it passed the Senate last year. And it is more proconsumer than the laws in about half of the States.

Moreover, the bill does not put a hard cap on punitive damages. For cases involving all but the smallest of businesses, it allows punitive damages to be imposed up to the greater of $250,000 or twice the plaintiff's economic and noneconomic damages, including pain and suffering, and allows the judge in the case to increase the award by up to double those limits—in other words, to go up to four times the plaintiff's economic and noneconomic damages—if necessary ''to punish the egregious conduct of the defendant.'' This approach was modeled on a recommendation made by the American College of Trial Lawyers, and it will permit huge punitive damages awards in cases where such awards are justified by the nature of the conduct and the severity of the harm involved, even when the harm is mostly noneconomic in nature.

As to the concerns regarding joint and several liability, I think it is worth pointing out that the conference report, like the original Senate-passed bill, only eliminates joint and several liability for noneconomic damages. This formulation is already the law in California, and it provides reasonable protection both for plaintiffs and for businesses who have only a minor involvement in the harm suffered by the plaintiff, but who can be held responsible for the entire amount of damages if the other defendants in the case are not able to pay their share of the amount awarded.

It is also worth noting that the conference report does not contain the broad, unjustified preemption of State civil justice systems that was in the House-passed bill, provisions that could of undermined the civil rights of Americans, and which would have almost casually overturned our whole State justice system. And it does not contain the medical malpractice provisions that were in the House bill, provisions that did not and do not belong in a product liability bill.

Moreover, the conference report does not contain the so-called FDA excuse that I strongly opposed in the last Congress. The bill that emerged from conference is the kind of narrow, carefully tailored approach that was needed, and the only approach that I could possibly support.

Mr. President, I said in 1994 that the problems present in our product liability system are problems that this body must address. Last year, when the product liability bill was before the Senate, I reiterated my view that reform is necessary, and I supported S. 565 as a reasonable approach to achieving that necessary reform. The conference report before now before us does not contain the provisions from the House bill that I believe have no place in this legislation. And, as I said at the outset of my remarks, it is close to identical to the bill I voted for last May. I therefore voted for cloture yesterday, and will vote in favor of sending this conference report to the President. I hope he will reconsider his position, and sign it, because enacting this bill into law is in the interest of every American.

Mr. President, I want to conclude by congratulating Senators GORTON and ROCKEFELLER for their leadership in bringing the bill to this point. I particularly want to thank my colleague from West Virginia. He went to great lengths to consult with me, and with other Senators, and to make all of us part of that conference, even though we technically were not among the conferees. I greatly appreciate his commitment to the kind of balanced, narrowly crafted reform that is so greatly needed and so long overdue. I am pleased to have this opportunity to vote with him, and with the other supporters on a set of reforms that are based on common sense, and that make sense for America.

Mr. KERRY. Mr. President, our laws play an important role in fostering a competitive economic environment by establishing ground rules for fair competition and by helping to reduce the costs of doing business. But our laws play an even more critical role in protecting the rights of individuals, workers, and consumers. Congress, therefore, has a special responsibility to ensure that the laws we write are reasonable and fair.

The conference report on H.R. 956, the so-called Common Sense Product Liability Reform Act of l996, fails the ''reasonable and fair'' test.

The conference report, if enacted, will take away the rights U.S. citizens enjoy today in seeking redress for harm caused by unsafe products while giving manufacturers no incentive to produce safer products. This conference report is not fair to the working men and women of this country. It is biased against low-income individuals, women, and the elderly and it is plain dangerous for consumers. The products liability conference report will overturn the laws of every State and, I fear, will do great harm.

Consider that every year thousands of workers are injured or killed as a direct result of defects in products they use in the workplace. For many of them, the tort system is the only recourse for full redress of their injuries. Yet, this conference report will make it harder for workers to hold fully accountable those who cause the injury. The limits on joint liability for noneconomic damages, on punitive damages, on seller liability and the greatly expanded coverage under the statute of repose are all one-sided. Together, these provisions clearly favor wealthy corporations at the expense of working Americans.

The 15-year statute of repose would affect more than one-half of the products claims filed against machine tool manufacturers. Under the conference report, workers injured by defective machinery 15 years after first delivery would be prohibited from seeking to prove in court that even a grossly negligent manufacturer was responsible for their injury. On the other hand, the right of the business to pursue an action against the same manufacturer for commercial loss would be fully preserved.

The conference report would cap punitive damages at $250,000 or two times compensatory damages, whichever is greater, except in cases involving small businesses with fewer than 25 employees, where punitives would be capped at $250,000 or two times compensatories, whichever is the lesser amount. Such limits clearly undermine the deterrent value of punitive damages.

The threat of punitive damages has in part contributed to the recall, discontinuance, or change in the use of many dangerous and defective products, including the Ford Pinto, asbestos, the Dalkon shield, the Suzuki Samurai, heart valves, and silicone breast implants. Punitive damages have also helped make products safer: the redesign of the Jeep CJ–5; adding guards to chainsaws; the replacement of lap-belts with rear-seat three-point safety belts in passenger cars; the use of roll bars on farm tractors; warnings on toxic household chemicals; the use of flame-retardant fabric in children's sleepwear; and the list goes on and on. The conference report will defang the threat inherent in punitive damages.

But perhaps the most disturbing aspect of this legislation is that Ford Motor calculated that it was cheaper under the current tort system to settle rather than to try to protect the lives of every Pinto owner with a recall. The manufacturers of silicone breast implants calculated it was cheaper under the current tort system to continue selling implants that their own sales force reported had leakage problems rather than to alert the more than 1 million women in this country with implants about the danger of the products. Playtex calculated it was cheaper to continue to market its super-absorbent tampon than to try to warn women about the deadly effects of toxic shock syndrome. If Ford Motor, Dow, Playtex, and other major manufacturers failed to take corrective action to make their products safer under the present tort system, there is no reason to expect this conference report will encourage them to act more responsibly.

Would anyone settle for $250,000 in exchange for losing a loved one to death by a product that the manufacturer knew was unsafe? If this conference report becomes law, no one would be able to get even $250,000 because there is not a lawyer in this country who would take the case. No law firm could afford to go up against companies like Ford Motor or Dow or others with their host of attorneys and huge legal budgets and an infinite ability to push motions and appeals to the

limit and slow down the process to their advantage. It just would not happen.

Proponents of this legislation stress that the current tort system is biased against them: they point to insurance rates that disable American manufacturers by forcing them to pay 10 to 50 times more for product liability insurance than their foreign competitors; they claim there is an ''explosion'' in products liability litigation, with uncontrollable punitive damages awards; and they argue that the present system of ''lottery'' liability, where liability differs from state to state, does not enhance the safety of U.S. products. The proponents are wrong on each of these points.

Over the past decade, products liability insurance cost 26 cents per $100 of retail product sales, or about $26 on the price of a $10,000 automobile. Two recent reports by the National Association of Insurance Commissioners confirm there is no ''crisis'' in the cost of product liability insurance. In fact, the Association reported in January 1995 that earned premiums for product liability have steadily dropped from more than $2.1 billion in 1989 to $1.6 billion in 1994—a drop of 26 percent. The Association pointed to shifts to self-insurance and competition in the industry as reasons for the decline, but did not mention tort reform as a factor. Moreover, the Association reported in October 1995 that the premium volume for product liability insurance premiums has remained virtually flat from 1986 through 1994.

The so-called explosion in products cases is another myth. While consumer products are responsible for some 39,000 deaths and 30 million injuries each year, a 1993 study by Boston's Suffolk University Law School and Northeastern University found there were only 355 awards in products suits from 1965 through 1990, and that half of these were overturned or reduced. Indeed, the National Center for State Courts reported that product liability cases accounted for .0036 percent of the total civil case load in 1992, and the Legal Times reported that products claims in Federal courts declined by 36 percent from 1985 to 1991. In my own state of Massachusetts, there were absolutely no punitive damages awarded in products cases; punitive damages are only permitted in wrongful death cases.

The conference report on H.R. 956 will not resolve the problem of 51 different products liability laws in the United States. On the contrary, it will only serve to further complicate the tort system and tilt it strongly in favor of manufacturers and against consumers. The conference report contains only one-way preemption.

The conference report places caps on punitive damages in products cases, yet allows the laws to stand in the 39 States where those laws prohibit punitive damage awards or where they place more restrictions on victims' rights. On the other hand, the conference report does not require that these States award punitive damages.

The conference report preempts State law on misuse or alteration of a product only to the extent state law is inconsistent with the conference report, meaning that the 37 States that provide a complete defense to liability in some cases of product misuse or alteration would not be preempted.

The conference report prohibits lawsuits involving durable goods that are more than 15 years old, but specifically preserves State laws with shorter limitations.

The Products Liability Fairness Act, S. 565, will overturn the laws of every State that enable people who have been harmed by unsafe or faulty products from obtaining full and fair recovery. It will prevent citizens from holding wrongdoers accountable. It will preempt legitimate claims that deserve to be heard. It will strip citizens of their rights and it should be rejected.

I cannot support legislation that would have placed limits on punitive damages for the family of the 5-year-old boy in New Bedford, MA, who died in a house fire after igniting a couch with matches. I cannot support legislation that would have limited damages for the family of the 8-month-old boy who suffered second and third degree burns on his arms, legs and back in a house fire that started when the bedding in his crib was ignited by a portable electric heater that had been placed within 6 inches of his crib to keep him warm.

I surely cannot support legislation that would have limited the liability of the big corporations in Woburn, MA, whose highly toxic pollutants killed and injured children. The Woburn case, in which eight working class families sued two of our Nation's biggest corporations because they suspected the companies had polluted the water supply with highly toxic industrial solvents, took 9 years. The young attorney that pleaded the case spent $1 million of his own money on it. The jury ultimately found one of the companies negligent, and the scientific research done during the 9-year trial demonstrated the link between the industrial solvents in the water supply and human disease. The company is now helping to cleanup the polluted aquifer. The attorney has said that if this bill were law today, he would never have considered the case.

Mr. President, the conference report on H.R. 956 will take away the right every American enjoys today through the jury box to force accountability for dangerous, careless or reckless behavior. In the jury box, every American can bring about positive change. If we take away this fundamental right, we will have compromised our Nation's core values.

The conference report promotes the interests of business at the expense of the rights of consumers. It will create a nightmarish new legal thicket that should be avoided rather than embraced. After we have argued all the complicated points of law, after we have poured over horror story after horror story, the issues boil down to one simple point: this bill is not fair, it is not reasonable and it should be rejected.

Mr. GLENN. Mr. President, I rise in support of this legislation and want to commend the efforts of Senators ROCKEFELLER and GORTON on their work. This legislation has been needed for a long time and I am pleased that we will be taking this positive step forward today.

I have been concerned for years about our current product liability system and I believe that meaningful reform is long overdue. I believe that this bill will benefit both consumers and businesses. Under our current system, manufacturers of products are subject to a patchwork of varying State laws which contribute to unpredictable outcomes. In some cases plaintiffs receive less than they deserve and in others, plaintiffs receive too much. Because of the unpredictability, cases that are substantially similar receive very different results.

The Congress is currently debating the proper role of the Federal Government across a broad range of issue areas. Many believe that functions now conducted at the Federal level should be moved to the States. On this issue I believe that we need a more uniform system of product liability and therefore Federal standards are necessary.

I believe this legislation will improve the competitiveness of our industries which means jobs. I also believe that the biomaterials provisions will help insure that much needed medical devices will remain available to many Americans. Because of liability concerns many products are becoming unavailable. Examples include materials used in heart valves, artificial blood vessels, and other medical implants. In Cincinnati, OH, Fusite, a part of Emerson Electric Co., has been in business since 1943. They supply glass-to-metal sealed hermetic terminals. One terminal body is used by the makers of implantable batteries in heart pacemakers. In 1995, because of the liability concerns, Fusite determined it would no longer supply this product.

The current system is unfair to consumers. Much too much money is spent on litigation rather than compensation and the high cost of product liability insurance means higher costs for consumers.

Without doubt an injured party deserves fair compensation, however the cost of litigation is substantial. More and more is spent on legal fees and less is spent on important areas such as research and development. In some cases manufacturers decide not to invest in or develop new products because of product liability concerns. Ultimately this burden of product liability makes our companies less competitive in world markets than foreign companies.

I have been particularly concerned that as we reform our product liability

laws we do not affect the rights of individuals to bring suits when they have been harmed. On the contrary, it is my intent to bring rationality to a system that has become more like a lottery. For me, legal reform does not mean putting a padlock on the court house door.

There are several very important improvements that this legislation will provide. A statute of repose of fifteen years is established. Joint liability is abolished for noneconomic damages in product liability cases. Defendants are liable only in direct proportion to their responsibility for harm. Therefore, fault will be the controlling factor in the award of damages, not the size of a defendant's wallet.

Another important area is punitive damages. Although I am concerned about the establishment of caps on punitive damages, I believe that the judge additur provision included in the bill will allow for appropriate punitive damages in egregious cases.

Mr. President, not every provision in this legislation is written the way I would have preferred, but I believe that it is significant reform and urge its passage.

Mr. GORTON. Mr. President, I would like to clarify an issue I discussed in a lengthy, and frankly, rather confusing colloquy with my colleague from North Dakota, Mr. DORGAN.

Mr. DORGAN sought clarification of a provision on the Product Liability Conference Report dealing with the way in which this legislation will apply to utilities. Although I had characterized a change made in conference as technical, he asserted that the change was substantive.

The intent of the bill is to cover all products. This intent is expressed in the comprehensive definition of a product found in section 101(14) of the conference report, which defines products to include ''any object, substance, mixture, or raw material in a gaseous, liquid, or solid state * * *'' This definition clearly encompasses electricity, water delivered by a utility, natural gas, and steam. To simplify this discussion I will refer only to electricity.

Another goal of the legislation, however, is to leave in place state determinations of when electricity is a product. Most States treat the transmission of electricity as a service. For this reason, the Senate bill excluded electricity from the definition of product. This exclusion, however, overlooked the fact that once electricity has passed through a customer's meter, many States consider it to be a product, and subject it to a strict liability standard.

Because of this oversight, the Senate provision created an unintended conflict between the two goals of this bill: First to cover all products, and second, to leave undisturbed the state determination of whether or not electricity is a product. The desire to meet both these goals is reflected on page 24, footnote 86, of the Committee on Commerce, Science, and Transportation Report on the Senate bill. But to repeat, the language of the Senate did not do what it needed; it exempted electricity, whether or not it was treated as a product by state law and whether or not it was subject to a rule of strict liability.

In conference, the statutory language was made explicitly consistent with those dual intentions. That is to say, the bill should respect state choice as to whether or not a utility is a product, but the bill should apply evenly to all products. Consequently, language was added to the conference report saying that electricity was excluded from the definition of product, unless it was subject under State law to strict liability, that is to say, is treated as a product.

Senator DORGAN is correct that the conference report does change the substance of this provision. I think it does so wisely and in order to make the legislation clearly express our intent.

Mr. SPECTER. Mr. President, after extensive deliberation, on a very close call, I have decided to vote against the conference report on product liability legislation.

This is a close question for me because the conference report corrects my concern on punitive damages and there is a need to make American business more competitive in world markets to provide economic expansion and job opportunities.

In the final analysis, my judgment is that the disadvantages of the bill outweigh the advantages. For example, the 15-year statute of repose would deny recovery to injured parties from products intended for and used long after 15 years.

The changes in the law involving workmen's compensation make it more difficult for plaintiffs to recover where a coworker or the employer is at fault. That provision also limits the employer's traditional subrogation rights leading to the opposition of homebuilders, workmen's compensation insurance carriers and other business interests because workmen's compensation costs will escalate.

The conference report further limits the manufacturers' liability in cases where injuries result from a defective product where alcohol has been used. A defective seat belt is supposed to protect the car's driver regardless of his/her condition.

This vote against the conference report is consistent with my vote yesterday for cloture. As I said in my statement on yesterday's vote, I believe the Senate's final determination on product liability legislation should be decided by majority vote rather than the super majority of 60 required for cloture.

A decision on whether to support cloture depends upon a variety of factors such as whether there should be more debate to fully air the issue or whether a constitutional issue or some other fundamental issue is involved which warrants a super majority of 60.

On this bill on the merits, I believe it should be decided by the traditional majority vote because it is such a close question without an underlying constitutional issue or some other fundamental matter. On the merits of the bill, in my judgment the disadvantages outweigh the advantages.

Mr. GRAMS. Mr. President, today is a day of victory and celebration for America's manufacturers, consumers, and taxpayers. Congress has finally succeeded in taking the first important step in overhauling our Nation's badly broken product liability system.

Mr. President, I would like to commend my colleagues, Senators GORTON and ROCKEFELLER for their endless hours of hard work and commitment to enacting long-needed product liability reforms. This truly is a significant accomplishment.

Unfortunately, the President has already issued his press release stating that he will stop this important bill—dead in its tracks—with his veto pen. Despite bipartisan support, he claims this bill fails to ''fairly balance the interests of consumers with those of manufacturers and sellers.'' Mr. President, I disagree.

This bill is a good compromise; it's fair; and it does protect sellers, manufacturers and most importantly, consumers.

Mr. President, too many people today are filing lawsuits in the hopes that they will hit the jackpot even if there is little merit to their case. The lawyers get wealthy, but under our current system, that wealth comes at the expense of America's consumers.

Our society has become so accustomed to suing that a recent study showed that 90 percent of all U.S. companies can expect to be named in a product liability lawsuit. Furthermore, 89 percent of Americans believe that ''too many lawsuits are being filed in America today.''

Mr. President, the price tag of lawsuits is astronomical. In fact, some experts have estimated that the total cost of all lawsuits filed in America exceeds $300 billion each year. And according to the Product Liability Coordinating Committee, the cost of product liability lawsuits, alone, ranges anywhere from $80 to $120 billion annually.

American consumers ultimately pay the price of frivolous lawsuits which are paralyzing our country's economic growth and ability to create new jobs. Instead, prices increase and jobs are eliminated when businesses close, downsize or decline new product introduction for fear of a frivolous lawsuit.

As a former small businessman, I understand how devastating the threat of a potential lawsuit can be on any company. Our laws have created a hostile business climate that has compromised the competitive position of many companies, forcing them to reduce salaries or lay off employees to avoid going out of business.

Companies who are sued have two choices: endure a lengthy and costly trial in the hopes of proving their innocence or settle out of court to save

trial costs. Small businesses don't have the time or resources to spend countless days in a courtroom when they are struggling to make payroll and meet customer needs.

Everyone agrees that an injured person should have a day in court, and this legislation will not prevent legal recourse for justifiable claims. However, it will put an end to the fishing expeditions that trial attorneys use to extract huge, unwarranted settlements from businesses fearful of protracted litigation costs.

Businesses, taxpayers, and consumers can no longer bear this burden, making passage of this legislation critical. Americans understand that our current system is a litigation lottery which increases the costs consumers pay when they purchase a product. It even forces companies to lay-off employees.

Far too often, the cost of meeting these outrageous judgments eats up resources that could have gone toward new jobs and better salaries. The President and the trial lawyers are kidding themselves if they believe these costs are not passed on to you and me as consumers. Appropriately, this is called the tort tax.

Mr. President, most of my colleagues know that I am a strong opponent of tax increases of any kind. I believe the Product Liability Conference Report will lessen the tort tax on America's consumers.

This legislation addresses many of the problems in our current system. It limits manufacturer liability when a product is misused or altered by the user; it caps punitive damages to twice the compensatory damages or $250,000, whichever is greater; it allows judges the flexibility to impose higher damages in extreme cases; and, it eliminates joint and several liability for certain damages, such as pain and suffering, so defendants pay only for the damages they cause—not those caused by others.

In addition to the overall benefits consumers will enjoy after enactment of this bill, Minnesota will see an additional benefit. The reality is our current system is stifling technological innovation, in particular, the production of medical devices.

Mr. President, Minnesota is a world leader in the development of lifesaving medical technology and this industry is a vital part of Minnesota's growing economy.

In 1994, there were 568 registered medical device establishments in Minnesota. Furthermore, Minnesota ranks 2nd in the Nation with over 16,000 people employed in medical device manufacturing.

More than 11 million Americans rely on implanted medical technologies to sustain or enhance the quality of their lives. Many of these products are manufactured in my State including artificial joints, cardiac defibrillators, drug infusion pumps and heart valves.

Unfortunately, many suppliers of the raw materials used to make medical devices are restricting the use of their products in medical implants for fear of exposing themselves to costly product liability litigation.

Suppliers of raw materials play no role in the design or manufacture of the medical device and courts have consistently found them free from liability. Unfortunately, the costs of the lawsuit ''discovery'' process are surpassing the profits raw material suppliers will receive from selling their products to device manufacturers.

If biomaterials suppliers refuse to sell their raw materials to America's medical device companies, device manufacturers are forced to either substitute another material, which many times is impossible, or discontinue production of a device which is fulfilling a vital need for patients.

A recent example was highlighted in the Wall Street Journal by a mother whose daughter suffers from hydrocephalus, or water on the brain. The only medical therapy that treats this is a surgically implanted device, called a shunt, made of silicone.

Fifty-thousand Americans depend on shunts to keep them alive, but because of recent lawsuits, companies who supply silicone for the production of devices like shunts are no longer willing to sell the raw materials. This situation is devastating to patients who desperately need these lifesaving devices.

Essentially, this legislation's Biomaterials Access Assurance provision would allow suppliers of the raw materials or biomaterials used to make medical devices, to obtain dismissal, without extensive discovery or other legal costs, in certain tort suits in which plaintiffs allege harm from a finished medical device.

This provision would allow raw materials suppliers to be dismissed from lawsuits if the generic raw material used in the medical device met contract specifications, and if the biomaterials supplier cannot be classified as either a manufacturer or seller of the medical device. Most importantly, this provision would not affect the ability of plaintiffs to sue manufacturers or sellers of medical devices.

As the chairman of the Senate's Medical Technology Caucus, I would like to thank the Senator from Connecticut for all his hard work to ensure that the Product Liability bill recognizes the urgency of providing much-needed relief to suppliers of bio-materials who have no direct role in the raw material's ultimate use as a ''biomaterial'' in a medical device.

Mr. President, I would like to note that even President Clinton recognizes this provision as ''a laudable attempt to ensure that suppliers of biomaterials will provide sufficient quantities of their products'' to medical device manufacturers.

The bill before us today is the first step in the right direction, but certainly not the last. While we have made great progress toward reforming our current system, I believe we should do more. We need to extend protections to America's consumers in civil liability cases which have devastated local girl scout troops, neighborhood little leagues and community recreational organizations.

Furthermore, Congress should pass medical malpractice reforms to ensure that the doctor-patient relationship is protected from lawyers. Doctors complain that many times they are forced to order unnecessary tests just to protect themselves against frivolous lawsuits. This practice called ''defensive medicine'' costs our country over $15 billion each year.

Mr. President, the Senate should adopt this first step and continue moving forward to reform our overall liability system. Failing to enact this legislation will result in even higher costs to customers, fewer products developed and fewer jobs as companies downsize to adjust to increasingly high legal costs.

I urge my colleagues to recognize the positive impact this legislation will have on countless businesses across our country. Ultimately, it will benefit the employees whose jobs will be secured as a result of enactment of this long overdue legislation, while at the same time, we continue to protect consumers seeking judgements against companies who have manufactured faulty products.

Mr. DORGAN. Mr. President, today the Senate will vote on the conference report on H.R. 956, the Common Sense Product Liability Legal Reform Act of 1996. I intend to vote in favor of this legislation because I believe that modest legislation in this area is necessary.

The issue of product liability reform is one of those circumstances where I think there is some truth on both sides. Tort reform is by its very nature controversial. The ability of citizens to seek redress through the courts for harm caused to them is a very important right we must respect and protect. At the same time, it is a fact that our court system in the United States is deluged with a flood of lawsuits, many of which have no merit.

Unfortunately, the excesses of some force a reaction that affects everyone. I appreciate the sensitivity with which we in the Congress must proceed in passing any Federal legislation that reforms tort laws. I realize that because of our court system and because of the activism of well meaning consumer advocates, our Nation does have safer cars, toys, and other products. If it had not been for key cases that put the fire to the feet of corporations who would rather cut corners to enhance the bottom line than concern themselves with the safety of consumers, I am convinced that there would be more exploding cars and more dangerous toys that hurt children.

Deadly and dangerous products such as asbestos, flammable children's pajamas, and exploding Ford Pintos were all removed from the market only after action was taken in court to hold the

manufacturers of these products accountable. Because these cases occurred, our lives are safer as a result. There have been many cases where manufacturers were legitimately held liable for their negligent or egregious actions.

However, these cases do not tell the entire story about our tort system. Unfortunately, there are so many other cases that may have little merit that are filed, not with the goal to seek fair compensation or change the behavior of a manufacture, but are filed with a goal to get rich quick. The result is that many manufacturers and businesses are strangled in liability cases that defy common sense. These cases don't help consumers.

It seems to me that Federal action is warranted in the area of product liability suits. But, I believe that any Federal action in this area must be modest and narrowly construed. Over the past few years, I have been an active participant in the development of this legislation. In the 103d Congress, I fought against a provision that would have provided complete immunity to manufacturers of medical products and aircraft manufacturers from all punitive damage awards. The FDA/FAA defense provision, as it was called, took this reform effort way too far in my judgment. That is why I fought to have the provision removed and if this provision existed in the legislation before the Senate today, I would be voting no.

Fortunatly, the bill sponsors saw fit to not include the FDA/FAA defense provision in the conference report we are considering today. As a result, we have a bill which I believe advances some modest reform without closing the door on consumers who legitimately need to look to the courts for compensation.

I believe it is important to advance this modest tort reform legislation. It is my hope that if this legislation becomes law, it will result in more reasonableness in our tort system.

I am under no illusions that this legislation is going to create a perfect world in the courts. However, I hope this legislation will create a better world that restores some moderation to excessive litigation, while not destroying the rights of consumers to seek redress for their grievances in the courts.

The PRESIDING OFFICER. Who yields time?

Mr. GORTON. Mr. President, I yield 5 minutes to the Senator from Nebraska.

The PRESIDING OFFICER. The Senator from Nebraska is recognized for 5 minutes.

Mr. EXON. Mr. President, I thank the Chair and thank my friend and colleague from Washington. I signed the conference report with regard to the product liability measure that is before us. I recommend that the Senate accept this. I hope the President will not veto it, as he has threatened.

I have been listening to the debate, and I have studied this issue for a long, long time. Over 20 years ago, when I had the opportunity to serve my State as Governor, we worked on and we enacted a piece of legislation that is related to this whole area. It was with regard to malpractice in the health care field. There were concerns about that. I listened to both sides at that time. I finally decided, in the best interest of Nebraska, that malpractice piece of legislation should go into effect to provide adequate and better health care, to keep everyone involved.

I must say, that was one of the early pieces of legislation with regard to placing caps on malpractice legislation, and I must say that it has been a resounding success in Nebraska.

I recognize and have heard the debate on both sides of the issue, and, as so often is the case, Mr. President, we do not pass perfect legislation here, but ignoring the problem that we have today, that we have had for all of these years—this is as near a place we can solve it with what I think is a reasonable piece of legislation, a piece of legislation that where, if there is gross misconduct on the part of the manufacturer or the inventor, there is some relief.

I think we accomplish very little by citing this case and citing that case. If we continue with that kind of a proposition, we will simply confuse the public at large, and maybe the House and Senate, that we should do nothing. I think if there is one thing that is obvious, it is that we have to do something. I think the ''something'' is this bill that has been carefully crafted, that has been worked out in committee, that has been worked out in the conference between the House and the Senate, and I believe if there was ever a true workable compromise, this is a principal example.

So, I simply salute the people who have provided the leadership in this over the years. I hope the bill will be resoundingly approved by the Senate with our vote around noontime today. Maybe we can get on with solving this problem. There is a problem. No one can deny that. I am sure many of my colleagues feel very strongly that this is a bad piece of legislation. It is not a perfect piece of legislation, but it is a piece of legislation that has been carefully crafted, compromised. I think it is the best we can do under the circumstances, and I believe we should do it.

I intend to vote enthusiastically in support of this legislation. I thank the Chair and thank my friend from Washington.

Mr. GORTON. Mr. President, I yield 5 minutes to the Senator from West Virginia.

The PRESIDING OFFICER. The Senator from West Virginia is recognized for 5 minutes.

Mr. ROCKEFELLER. Mr. President, I thank the distinguished Senator from Washington. The debate now is about over, and we are about to vote. We are about to vote on a bill which I think is profoundly important, not only in the symbolism of it but in the reality. You cannot have an engine in a car that is invented by 51 separate people who do not communicate with each other and expect the engine to move the car forward.

Similarly, you cannot protect and extend predictability and fairness and consumer protection—for example, as witness the statute of limitations—to help people in this country get justice from injury, from defective products if the engine that they have to depend upon is invented by 51 separate people who never talk to each other, and then somebody turns the key on and who knows where the system goes, or where the car goes. Probably nowhere.

We have a system that works particularly well for a few. We have, however, a system that works particularly poorly for the most. It is the job, it seems to me, of the U.S. Senate and the U.S. Congress to try to improve the condition and the lot of our people in a fair and balanced manner. One cannot reasonably come into this Chamber all the time and say, ''I'm only going to do things which will help an injured person but pay no attention to other aspects of their life,'' for example, whether they are employed, whether they have a reasonable expectation of having a job.

What we have tried to do in this product liability conference report is to make a fair, reasonable balance between the interests of consumers and business. We have done that. We have had asserted constantly against us that we have not, assertions which are made every year we discuss these things, which are wrong.

So now we are prepared to do something, and I fully expect the Senate will adopt this conference report. It is an important bill. I repeat that I hope the President of the United States, who I think very much wants to sign a product liability reform bill—in fact, I am told very directly that he wants to sign a product liability bill. The question is what condition must it be in. I think we are presenting the President with a fair bill, one in which the Senate did not try to expand beyond products, one in which the Senate rejected virtually all other suggestions in which the only basic change was the statute of repose.

It is a very good bill. There is no other way to say it than that. I also want to thank the Senator from Connecticut, Senator LIEBERMAN, for his enormous role in all of this product liability debate, and his chief of staff, Bill Bonvillian, who is also an extraordinary person, who has been unbelievably kind and attentive to my legislative director, Tamera Stanton, to whom I referred earlier, who is going through a difficult situation just now.

This is fair. This is the way America ought to work. The bill, I believe, will pass. I can only pray that the President will sign it. I thank the President and yield the floor.

The PRESIDING OFFICER. Who yields time?

The Senator from South Carolina has 12 minutes.

Mr. HOLLINGS. How much, Mr. President?

The PRESIDING OFFICER. The Senator has 12 minutes.

Mr. HOLLINGS. I thank the distinguished Chair. I want to reserve time for the distinguished minority leader, the Senator from South Dakota, who just notified us he would like a little time here.

Mr. President, I rise to urge my colleagues to reject this legislation. The only thing that stands in the way of an act of Congress overturning 200 years of State law and placing severe restrictions on the civil rights of American citizens is the vote on this conference report.

Some try to simplify this issue as a debate between trial lawyers and manufacturers. But this issue is larger than that. This matter goes to the heart of our Nation's constitutional federalism. I am convinced that to the extent Congress can selectively preempt State law, override State constitutions, overturn State legislative decisions, and dictate to State judges and juries the standards they must follow on matters that have nothing to do with Federal constitutional rights, then States essentially have lost their sovereignty. Maintaining an independent civil justice system is the essence of a free state. This freedom, however, would be seriously eroded by this bill.

I. STATE SOVEREIGNTY/DUAL FEDERALISM

The stated purpose of this bill is to erect barriers regarding the use of the civil justice system for redress of injuries caused by dangerous products. However, I would remind my colleagues that, unlike the judicial systems of other countries, the American judicial system is rooted in democratic principles of individual redress, the right to a jury trial, and reliance on the people to resolve disputes. These were principles established by the Founding Fathers when they adopted the 7th and 10th amendments to the Constitution. Surely, issues such as whether to limit access to courts, limit redress remedies, or penalize citizens for merely bringing suits were considered by the Founding Fathers, as well as the judges and State officials that have administered our system of justice for over 200 years. But they decided against such measures, and opted instead to maintain a system that features free access to the courts, common law, and giving the people the ultimate authority to resolve conflicts.

The supporters of this bill, however, are seeking to overturn this longstanding American history and judicial precedent. They would prefer to ram through this sweeping and unprecedented legislation.

I am, indeed, confounded that the Senate is even considering this legislation. At the beginning of this Congress, Member after Member came to the floor during consideration of S. 1, the unfunded mandates bill, to declare that this would be the Congress of States' rights, where Government would be returned to the people. The Jeffersonian democracy of government was revived. If we've heard it once, we've heard it a million times, that State and local governments know best how to protect the health and safety of their citizens, and that they do not need Congress telling them what to do. How many times did we hear that the one clear message sent by the voters in November 1994 was that the people wanted to get the Federal Government off their backs and out of their pockets?

The 10th amendment, lost in the shuffle for many years, was given new light. The majority leader himself, in his opening address to the new Congress, proclaimed:

. . . America has reconnected us with the hopes for a nation made free by demanding a Government that is more limited. Reigning in our government will be my mandate, and I hope it will be the purpose and principal accomplishment of the 104th Congress.

. . . We do not have all the answers in Washington, D.C. Why should we tell Idaho, or the State of South Dakota, or the State of Oregon, or any other State that we are going to pass this Federal law and that we are going to require you to do certain things . . .

The majority leader went on to say:

. . . Federalism is an idea that power should be kept close to the people. It is an idea on which our nation was founded. But there are some in Washington—perhaps fewer this year than last—who believe that our states can't be trusted with power. . . . If I have one goal for the 104th Congress, it is this: That we will dust off the 10th Amendment and restore it to its rightful place.

If we are going to respect the 10th amendment, Mr. President, then we must be consistent.

But consistency is not something in which this Congress seems to be interested. The same Congress that has championed States rights regarding welfare is now advancing the power of the Federal Government over State civil courts. It appears that some believe the States have all the answers when it comes to welfare and education, but for some reason are incapable of running their own courts.

To the extent any reforms are needed, the States already have instituted such measures. Since 1986, over 40 States have enacted tort reform legislation. This includes my home State of South Carolina, which enacted a major tort reform measure in 1988. The States—through their work with members of the bar, the chamber of commerce, the insurance industry, and consumer groups—have addressed concerns about the tort system, and have crafted legislation they believe is in the best interest of their citizens. The proponents of this bill, however, would override the enormous and commendable efforts and time the States have devoted to this issue, and force their own brand of reform on the States.

Ironically, during the 1994 elections, when many of those who now so vehemently champion States rights were elected, the people of Arizona considered a State-wide tort reform referendum that consisted of many of the initiatives in this conference agreement. By a 2-to-1 vote, the people of Arizona rejected the referendum. Now some Members would like to reward them by using their Federal power to force on the citizens of Arizona the initiatives they soundly rejected at the ballot box.

II. REFUTATION OF CLAIMS REGARDING NEED OF LEGISLATION

The conference report contains a number of ''findings'' regarding the need for this legislation. Most of the findings are repeats of the various claims that have been made over the last decade. Nevertheless, it is necessary again to set the record straight with the facts.

Finding No. 1 states:

Our nation is overly litigious, the civil justice system is overcrowded, sluggish, and excessively costly and the costs of lawsuits, both direct and indirect, are inflicting serious and unnecessary injury on the national economy.

Rebuttal:

This is the old litigation explosion claim. However, there has never been any evidence of a litigation explosion as the following data demonstrate:

A 1991 Rand study found that only 2 percent of Americans injured by products ever file a lawsuit.

A 1994 report by the National Center for State Courts found that product liability cases are less than 1 percent of all civil filings.

A 1995 study by the National Center for State Courts found that, of the 2 percent of lawsuits that are filed, 90 percent are disposed of by nontrial, such as dismissals or settlements.

In June 1994, the New York Times featured a front page story on how juries are growing tougher on plaintiffs. Citing the latest research by Jury Verdicts Research, Inc., the Times stated that plaintiffs' success rates in product liability cases have dropped from 59 to 41 percent between 1989 and 1994. A 1995 report by the National Center for State Courts shows that tort filings have declined 6 percent since 1991.

Profs. James Henderson, a supporter of State product liability reform, and Theodore Eisenberg of Cornell University released a study in 1992, which showed that product liability filings had declined by 44 percent by 1991. They concluded that by ''most measures, product liability has returned to where it was at the beginning of the decade,'' beginning in the 1980's.

BUSINESS LITIGATION

Where is the real litigation explosion? It is in the corporate board rooms. According to professor Marc Galanter of the University of Wisconsin Law School, the real litigation explosion in recent years has involved businesses suing each other, not injured persons seeking redress of their rights. He found that business contract filings in Federal courts increased by 232 percent between 1960 and 1988, and

by 1988 comprised the largest category of civil cases in the Federal courts.

In August 1995, the National Law Journal released the findings of its study of judicial emergencies in Federal courts. The study found that 33 percent of the judicial emergencies involved business litigation.

Between 1989 and 1994, of the 83 largest civil damage awards nationwide, 73 percent involved business suits. Between 1987 and 1994, just 76 of the top business verdicts alone accounted for more than $10 billion. They included: Litton Systems versus Honeywell, a patent infringement dispute—$1.2 billion; Rubicon Petroleum versus Amoco, a breach of contract dispute—$500 million, including $250 million in punitive damages; Amoco Chemical versus Certain Lloyds of London, a breach of contract dispute—$425 million, including $341 million in punitive damages; Avia Development versus American General Reality Investment, a breach of contract—$309 million, including $262 million in punitive damages. Of course, this does not include the greatest verdict of them all—the $10.5 billion awarded in 1985 in the Pennzoil versus Texaco case.

Notwithstanding the excessiveness of business suites, however, the bill specifically exempts business litigation from the legislation.

II. COMPETITIVENESS

Finding No. 2 of the conference report states:

Excessive, unpredictable, and often arbitrary damage awards and unfair allocations of liability have a direct and undesirable effect on interstate commerce by increasing the cost and decreasing the availability of goods and services.

Rebuttal:

To refute these unfounded claims about competitiveness, I simply cite the comments of Mr. Jerry Jasinowski, president of the National Association of Manufacturers [NAM], that appeared in the Washington Post editorial section on Sunday, March 17, 1996. Mr. Jasinowski severely decried those who have criticized American business competitiveness.

According to Mr. Jasinowski: the American industrial renaissance over the last 4 years has restored the United States ''to the top spot among the world's economies.'' While some are ''busy berating our capitalist system, the U.S. economy has become the envy of the industrialized world.'' ''The American economy has quietly grown richer—gaining 8 million new jobs since 1992 and putting the unemployment rate at an historically low 5.5 percent.'' ''In the past 25 years''—during the midst of the so-called product liability crisis—''U.S. employment has increased 59 percent and we have created more than 5 times as many net jobs as all the countries of Europe combined.''

OTHER STUDIES ON COMPETITIVENESS

Mr. Jasinowski's editorial affirms other studies which have found no evidence relating product liability to U.S. competitiveness.

A 1987 Conference Board survey of risk managers of 232 corportions shows that product liability costs for most businesses are 1 percent or less of the final price of products, and have very little impact on larger economic issues such as market share or jobs.

The Rand Corporation found that less than 1 percent of U.S. manufacturers are ever named in a product liability lawsuit, and that ''available evidence does not support the notion that product liability is crippling American business.''

In 1991, the GAO released a study of the effects of product liability on competitiveness, and stated that it could find ''no acceptable methodology for relating product liability to competitiveness.''

FINDINGS ON INSURANCE COSTS

Finding No. 7 states:

The unpredictability of damage awards is inequitable to both plaintiffs and defendants and has added considerably to the high cost of liability insurance, making it difficult for producers, consumers, volunteers, and nonprofit organizations to protect themselves from liability with any degree of confidence and at a reasonable cost.

Rebuttal:

The claim that there was an insurance crisis was one of the first justifications put forth by supporters of the legislation in the 1980's. However, there is ample evidence that there never was, and is not currently, a product liability insurance crisis.

A study released in March 1995 by Bob Hunter of the Consumer Federation of America, who was formerly the Texas Insurance Commissioner, shows that product liability insurance costs for U.S. businesses amount to no more than 26 cents for every $100 of total costs.

In January 1995, the National Association of Insurance Commissioners reported that between 1989 and 1993 product liability insurance premiums declined by 26 percent.

According to the Insurance Information Institute, insurance companies' surplus, assets minus liabilities, rose from $29 billion to over $230 billion between 1977 and 1995. Surplus is the money available after all losses and bills have been paid. These figures show that, to the extent there was an insurance downfall, it sure was not felt by the insurance industry.

Additionally, according to the testimony of the American Insurance Association [AIA], the legislation will have no effect on insurance rates anyway.

UNIFORMITY

Finding No. 10 states:

The rules of law governing product liability actions, damage awards, and allocations of liability have evolved inconsistently within and among the states, resulting in a complex, contradictory, and uncertain regime that is inequitable to both plaintiffs and defendants and unduly burdens interstate commerce.

Rebuttal:

This finding is part of the proponents' claim regarding uniformity. However, contrary to the proponents' claims, the bill does not, and is not intended to, create uniformity. State law is preempted in this bill only to the extent it favors defendant corporations. For example, with respect to punitive damages, the legislation would not disturb the law in the State of Washington since that State prohibits punitive damages, but would preempt the law in South Carolina, which permits punitive awards.

The Chief Justices of the States have indicated that the legislation is likely to create considerable confusion, and lead to more litigation, as a result of the varying interpretations and applications of its provisions by different State courts.

The bill imposes its own set of rules on State courts without imposing the same rules directly on the Federal courts. Because of the absence of a Federal cause of action, Federal courts will hear cases involving the legislation only if there is diversity of citizenship or location of the parties.

CONFERENCE REPORT HURTS CONSUMERS MORE THAN SENATE BILL

Proponents continue to state that the conference report is not expanded beyond the Senate amendment. However, the conference agreement extends well beyond the Senate amendment in undercutting the rights of victims. The bill now limits victims' rights to be compensated for harm caused by energy and utility related disasters, such as hazardous gas storage facilities, and negligent entrustment cases, including the unlawful sale of dangerous products to minors. In addition, the statute of repose has been reduced from 20 to 15 years. Once restricted to workplace products, this provision has also been expanded to cover any product that has an expected life span of more than 3 years. Further, products now covered by the legislation include used cars, elevators, children's toys, and medical devices made for handicapped citizens.

The bill has retained the abolition of joint liability for pain and suffering damages. The restriction is applicable even if there is proof that defendants worked together as a joint venture, or as parent and subsidiary.

The bill has maintained discriminatory punitive damages caps. By basing the cap on income and wealth, the bill permits higher punitive awards for individuals with the most economic advantages. In an effort to rectify the disparate treatment of high income and low income victims, a provision was added on the Senate floor to permit judges to increase punitive awards beyond the cap. Federal judges, and judges in most State jurisdictions, however, are constitutionally prohibited from increasing damages without the consent of the parties. Indeed, we find it hard to believe that any defendant would consent to higher punitive awards. The proponents stated the constitutional issue would be resolved in conference. The conference agreement, however, has actually enhanced the

power of judges to increase damages, all but ensuring the provision will be deemed unconstitutional. The end result will be that additur will be removed, and the discriminatory cap will remain. Additionally, we question why Congress would pass a law it recognizes as unfair, and then shift the responsibility to judges to rectify the problem.

CONCLUSION

Simply put, Mr. President, there is no product liability crisis. Indeed, if there are problems that need to be examined in the tort system, they already are being addressed by the States, where this issue belongs.

This legislation is the epitome of congressional arrogance. It takes away from the States an area of the law that has been reserved to the States for 200 years.

What will this bill do? It will make it more difficult for consumers to be compensated for their harm from products; it will shield from liability manufacturers which consciously manufacture defective products; it will take away from the States rules of law they have carefully developed; and it will remove incentives for manufacturers to make their products safe. These are some of the results of this bill, results which are not in the best interests of our citizens.

I conclude by urging my colleagues to reject cloture on this conference report. Despite years of effort, no case has ever been made for Federal product liability law. The proponents move from claim to claim about the need for this bill, because they know that this is a sham. If there ever was special interest legislation, it is this bill. It is special interest at the expense of the constitutional and civil liberties of the American people. I urge my colleagues not to be misled by the proponents' claims, and to vote against this conference report.

There are so many things to say in the limited time. But section 106(b)(3)(C) refers to a general aviation statute of repose limitation period. It is for 18 years. That is the way the distinguished Senator from Washington started talking about this bill yesterday. It was all about Cessna and aviation and everything else like that.

All the provisions of the products bill apply to general aviation, so there are no longer protections for people injured, of course, on the ground or the air ambulance people, even though the 1994 law provided those protections. But what I wonder about, if this general aviation provision of 18 years has done such a remarkable revival of the aviation industry, why are we limiting it? There we go.

No. The Senator from Nebraska says there is a real problem and everybody knows it. That is absolutely false. We know that the States have taken care of this problem. Yes, there is a political problem, because Presidential politics has preempted everything up here in Washington.

I saw some article in one of the magazines about the campaign starting. The campaign started early last year. In 100 days we were going to do this, get rid of everybody, 10 things in the Contract, we are going to pass them in 100 days, and whoopee. And we were off, and everything else of that kind—until reality set in.

But now there is the time of some embarrassment, since some of these things have not been passed—and for very, very good reason. A good reason, of course, assuming the truth of everything that the Senator from Connecticut says, is that the State Legislature of Connecticut is ready, willing, able, alert, and responsive. He was a majority leader of it. The State of Connecticut has taken care of these problems. We all take care of these problems in the several States.

But right to the point, this bill is a travesty, Mr. President. The Presiding Officer knows it. It separates people. It separates them according to their economic worth. That is a dastardly thing to do. I cannot see people of good sense and reason voting for a thing of this kind and hoping the President will sign it. The President knows the facts. He has reiterated them in the letter. He said, if it is so good and so fair, as they plead, then why does it not apply to business—the very people who drew it up? This thing was drafted by business, of business, for business, greedy business. That is what it has been for, and the proponents all know it.

I say that advisedly. I have gotten every business award you can find. I am proud of them. I work closely with business. We have more business coming to our State than all these other States that these Senators represent. I challenge them to compete with us on taking care of business. That has been my 40-year record of public service.

So I know when they step over the line. The fact of the matter is, there is a small segment, Victor Schwartz and his crowd, stepping over the line that has picked up the political fever of ''kill all the lawyers.'' It is the business of travesty that increases the legal costs for those trying to really try their cases. They know that these are contingency fees.

So if you get a good verdict, and it is a punitive damage verdict, you do OK. We put in the RECORD where punitive damages have disciplined these businesses. Thank heavens it has because we are all safer on account of it. That is why we get the recalls, because the manufacturers are put on notice. The proponents know that is why we are getting the recalls in our society. But now they have to go through a whole new hearing. And they talk about simplicity and transaction costs.

How can they claim simplicity with all the different proceedings they have here now, trying to limit legal costs? They tell the utilities they can forget about strict liability, they can forget about the highest degree of care. The Senator from North Dakota and the Senator from Washington got into a very clear dialog about simple negligence. Let the boilers blow up, let the gas blow up, let it explode. The highest degree of care now is no longer required under this bill.

Yes, we put in the RECORD about the drunk drivers. I reiterate, in the letter of MADD in opposition, Mothers Against Drunk Drivers, they oppose this bill. They know and they read and they understand and they stand by their particular opposition.

It encourages the lack of care with that statute of repose on manufacturers. Manufacturers here are exercising the highest degree of care. They are not in these other lands. But now the proponents want to talk about global competition. I have touched on that. They are competing with themselves. They want to take down the high degree of care by overriding the strict liability. Punitive damages is another thing that has given us safe products in this land, safe places to work, safe places to sleep, safe drugs and food, and everything else of that kind.

More than anything else, Mr. President, it is just patently unconstitutional. Amendment VII:

> In suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States. . . .

This particular bill says reexamine it at the trial court level, but keep it a secret. The judge is supposed to charge the jury under the law, stay out of the facts. But this bill says, by gosh, reexamine it in violation of amendment VII. Of course, it ignores amendment X that the distinguished majority leader has run all over the entire United States talking about, saying, ''I've got one thing here in my pocket, the 10th amendment.''

These folks all come up here and act like they never heard of the States from which they were sent. The States have acted on product liability over the 15 years that the Senator from Rhode Island complained about. They have acted very judiciously. It is not a problem. It is a little political gimmick in the contract. It is a shame and disgrace that we have taken up the time of the National Congress on this matter that the States have taken care of.

I reserve the remainder of my time. How many minutes do I have?

The PRESIDING OFFICER. The Senator from South Carolina has 3 minutes 30 seconds.

Mr. DASCHLE addressed the Chair.

The PRESIDING OFFICER. The minority leader.

Mr. DASCHLE. I thank the distinguished Senator from South Carolina for yielding. I will use whatever leader time I may require to finish my statement.

Let me commend the Senator from South Carolina for the arguments he has again made in his summary on this

debate. I applaud him for the leadership and the effort he has put forth. I very enthusiastically endorse his position. Let me also thank the distinguished Senators from Washington and from West Virginia and from Connecticut that have, as well as they have, brought this bill closer to a bill that is reasonable.

As the distinguished Senator from South Carolina said, Mr. President, it is ironic in the extreme that, in this era of devolution, in this era of States rights, in this era of empowering States with more opportunities to deal with issues at the local level, this Congress, of all Congresses, would now pass a bill that says the Federal Government knows better. It is especially ironic that this Congress would say the Federal Government knows better on an issue as profound as this, affecting victims in the worst set of circumstances.

I respect the Presiding Officer for his consistency in suggesting that devolution and new Federalism, or whatever we call it, ought to be sustained, regardless of the issue, that we ought not pick issues depending on the special interests, that we really have a responsibility to be consistent.

Certainly in this case it would require, I believe, a second look. We can do better than this. We can do better than what we are going to be voting on this afternoon.

I am very troubled by a couple of provisions. One in particular troubles me. Mr. President, to say that someone working on a defective piece of machinery is going to be protected if that machinery is functional for 15 years, but not for 16 years, to me is amazing. To ask people on the work line, to ask people on the combine, to ask people in whatever set of working circumstances they face, to accept the risk that this equipment is going to hold out after that period is more than I can support. To ask American companies to live up to their obligation, to understand how important it is that people working on assembly lines or in a field have the protection and the certainty and the opportunity to come to work knowing they will be able to come home whole is not too much to ask. A 20-year statute of repose is not too much to ask.

Mr. President, the other issue has to do with component parts. We have gone through some terrible situations in the last several years involving defective component parts. One example involves women who were given breast implants that were defective, when it was well known that a component of the breast implants posed severe health risks in the body of a woman. Now to immunize from liability people who manufacture defective component parts and to say we are going to, through statute, give them our blessing is wrong. It is wrong.

Mr. President, we can do better than this. We have to do better than this. Those of us opposing this bill will continue to do so. This fight is not over. The President has said in no uncertain terms this bill will be vetoed. I predict we will have more than enough votes to sustain a veto.

Again, this fight is not over. We can do better than this. We ought to do better than this. In working with the President, the Presiding Officer and others, we will. I yield the floor.

Mr. GORTON. Mr. President, I yield 3 minutes to the Senator from Missouri.

Mr. ASHCROFT. Mr. President, I thank the Senator from Washington. I commend the Senator from Washington and the Senator from West Virginia for bringing to the floor of the Senate a reasonable, moderate product liability bill which the President ought to sign.

The representations in this Chamber that we should do better and could do better belie the current performance of this Chamber, which for 15 years has sought to enact a bill like this, but never really brought one forward that could be passed. This is a bill that can be passed.

There can be debate about whether or not there is a litigation explosion in this country. Some can say we have too much litigation or too little. Let me give you a fact. The fact is that tort costs are 2.3 percent of the Gross Domestic Product in the United States, according to the Tillinghast study. That is 2½ times the world average. In short, we have the most expensive tort liability system in the world. It is time for us to change that. We must stop wasting money by exchanging it between the trial lawyers and punitive damage recipients instead of using it to create the competitive and economic edge that will allow us to be successful—to create jobs and build equipment, and to grow this economy. We need to revitalize the industrial base of the United States of America.

Uniform standards in product liability law would help return good products to the markets, reduce the price of consumer goods, and break the legal shackles on American businesses to help them become more competitive internationally.

This bill will make products safer. Litigation, which we have had plenty of, stifles innovation that makes products safe. Overall product safety in the United States improved steadily in the first half of this century, when a much more limited liability system was in effect. We need to make sure that safety, not greed, is what is emphasized by our laws in this area.

Let me make another point. We need to make this fundamentally clear: No person will be denied the right to recover actual damages under this bill. Every cent of damages, even damages for pain and suffering previously that has been available, is available under this bill. The bill has limits on punitive damages, but those are damages to punish. Those are not damages to make a person whole for what has happened to them.

One last point that I raise, this bill was pared down from what it ought to be and what it should be—in an effort to accommodate the President. We ought to really be extending some tort reform protection to our charities. This bill does not provide protection to churches, to voluntary and charitable organizations, which means there will be no liability protection for volunteers in the Little League, the American Red Cross, the Salvation Army, the American Cancer Society, for people who run soup kitchens. We need an explosion of people helping solve America's endemic social pathologies. What do we have in the United States instead? A tort system which threatens everyone who tries to help his neighbor with the potential of bankrupting liability.

Dick Aft, president of the United Way & Community Chest of Cincinnati, put it this way, ''The litigious climate imposes a cost for all charities, costs that can be measured in resigning trustees, lost volunteer hours and sky-high insurance premiums. These are tough times for charities. The last thing we need is a legal system that adds to our burden.''

Mr. President, as long as our litigation system forces a would-be volunteer to consider whether the risks of being sued outweigh the benefits of contributing one's time and talent to charitable organizations efforts to solve society's problems will continue to be unnecessarily stymied.

In order to try to entice the President of the United States to go back to his previous position supporting federal product liability reform, the Senate has had to take the protections for non-profits out of this bill. Then the President still comes out and opposes the bill. As a result, I do not know how to trust the President on anything he says. He previously said he supports it. Now he says he does not.

Maybe we should distrust his latest representation that he will veto this. We should pass this legislation and give the President a chance to flip-flop back to the right side of the agenda, and I do not mean political right, I mean right versus wrong as a matter of good government policy. This bill is right, it provides a reasonable framework to do business in the United States. It will protect consumers. I believe it should be enacted for the good of consumers and the good of the country.

Mr. GORTON. I yield 30 seconds to the Senator from Virginia.

Mr. WARNER. I thank the distinguished managers of the bill. I strongly support the bill and commend the managers of this bill.

Mr. President, this is a jobs bill. It throws a liferaft to small business. Small business today is being buffeted in the turbulent seas of lawsuits, yet it affords adequate protection in litigation for those who are wrongfully hurt.

Mr. President, I rise in support of the Commonsense Product Liability and Legal Reform Act of 1996. I do so because I believe that this bill is strongly

proconsumer. The opponents of this bill may claim to be defending the rights of the injured. Well, this bill not only defends their rights to be fairly compensated for injuries caused by defective products, but also defends the rights of the rest of us not to pay for the outrageous verdicts, settlements, and insurance payments that American businesses pass on to consumers because of our broken legal system.

It is important to remember what exactly this bill does. There are a number of commonsense provisions which nobody besides the trial lawyers could oppose. For example, no longer would companies be liable when the injured party was drunk, on drugs, or otherwise responsible for their own injuries, or when the consumer had altered the product. It also would provide protection to companies producing biomaterials for use in medical implants: These sections are necessary to allow these companies to help save lives and to worry less about being sued for merely providing raw materials which ended up in a heart valve or pacemaker.

Then there is the issue of punitive damages which have been the subject of so much discussion. Again, it is important to remember what punitive damages are. Imagine a plaintiff injured by a defective product, say a car with faulty brakes which causes an accident. The plaintiff will be able to recover every last penny of lost income, medical costs, and financial losses he can demonstrate. In addition, he will be entitled to recover for pain and suffering as the jury sees fit and in relation to the injuries suffered. Then, on top of being completely compensated, he can ask for punitive damages which may have no relation to the amount he received for compensatory damages. Sometimes punitive damages are granted, sometimes not: more often a company is forced to settle a case to avoid the possibility of a outrageous jury verdict. This is a pure lottery having nothing to do with the injuries suffered by the plaintiff which mainly benefits the lawyer working on a contingent fee. It is a crazy way to dispense justice.

My State of Virginia has recognized this problem and placed a reasonable cap on punitive damages. But Virginians buy products produced in other States and pay for the costs of this legal lottery created by the legal systems in other States. President Clinton says that this bill usurps the power of the States. Commerce, however, is nationwide and where States are placing undue burdens on interstate commerce, Congress is correct to step in and make reforms.

Now remember also that when President Clinton was Governor, he endorsed uniform legislation for punitive damages. Even the Washington Post has recognized that the President and the opponents of this bill are on the side of the trial attorneys, rather than American consumers and businesses.

I urge that the Senate move to consideration of this badly needed legislation and that it be enacted as soon as possible.

Mr. GORTON. Mr. President, article 1, section 8 of the Constitution of the United States reads in part as follows: ''The Congress shall have power to regulate commerce among the several States.'' The purposes of this bill, as outlined in this bill, read as follows:

Based upon the powers contained in Article 1, Section 8, Clause 3 of the 14th amendment of the United States Constitution, the purposes of this act are to promote the free flow of goods and services, to lessen burdens on interstate commerce, and to uphold the constitutionally protected due process by, (1), establishing certain uniform legal principles of product liability which provide a fair balance among the interests of product users, manufacturers and product sellers; (2), placing reasonable limits on damages over and above the actual damages suffered by a claimant; (3), ensuring the fair allocation of liability in civil actions; (4), reducing the unacceptable cost and delays of our civil justice system caused by excessive litigation which harm both plaintiffs and defendants; (5), establishing greater fairness, rationality, and predictability, in the civil justice system.

That is precisely what this bill is designed to do, Mr. President. That is precisely what this bill does.

I yield the remaining 2 minutes to the distinguished chairman of the Commerce Committee.

Mr. PRESSLER. Mr. President, I rise in strong support of this legislation. I want to pay tribute to both Senator ROCKEFELLER and Senator GORTON who have had such great courage, leading this controversial bill and bringing it here. This is perhaps one of the most important pieces of legislation this Congress will consider because of the benefits it will have for small business.

Senator GORTON, who has appeared before the Supreme Court 14 times, is a legal expert. His expertise in explaining this bill, both in the committee and on the floor, have been very, very valuable. This bill would not be here without Senator SLADE GORTON. He has been able to explain this bill, the technical parts of it.

Senator ROCKEFELLER, in my opinion has shown great courage. I wanted to use my time to pay tribute to those two leaders who have fought so long and hard through the committee.

I strongly support this legislation.

Mr. GORTON. Mr. President, I simply would like to say after this extended debate, not only over the period of the last 2 days but over the period of the last year, and for that matter several Congresses, that it is wonderful to have at least this phase of it completed. This very important element in the reform of our country's legal system would not have been completed with this degree of success without the help of both many Members and a significant number of staff.

When one names names, one runs the risk of leaving out many people who deserve credit, but particular credit from my perspective belongs to Lance Bultena of the Commerce Committee staff, and my own Jeanne Bumpus and Trent Erickson. Together they have put in so many hours on this subject that it cannot possibly be measured, and have done a wonderful job in educating and advising me.

For Senator ROCKEFELLER, Jim Gottlieb, a magnificent and skilled attorney, and Ellen Doneski have provided similar services. All of my cosponsors I wish to thank. All those who voted with me, I wish to thank. Most particularly, however, is the Senator from West Virginia [Mr. ROCKEFELLER]. We have come to be close personal friends during the course of the many years that we have worked together on this subject. He is a wonderful, thoughtful, and hard-working individual. In this connection, he is a courageous individual with the willingness to take on a majority of his own party and his own President.

His devotion to the public interest is not exceeded by any Member of this body. The ability to become such a close personal friend has been an important ancillary privilege of leading the debate on product liability.

With that, Mr. President, I am sure it is time to move on.

Mr. President, I yield the remainder of our time.

The PRESIDING OFFICER. The question is on agreeing to the conference report to accompany H.R. 956.

The yeas and nays have been ordered.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. FORD. I announce that the Senator from Nebraska [Mr. KERREY] is necessarily absent.

The result was announced—yeas 59, nays 40, as follows:

[Rollcall Vote No. 46 Leg.]

YEAS—59

Abraham	Glenn	Mack
Ashcroft	Gorton	McCain
Bennett	Gramm	McConnell
Bond	Grams	Moseley-Braun
Brown	Grassley	Murkowski
Burns	Gregg	Nickles
Campbell	Hatch	Nunn
Chafee	Hatfield	Pell
Coats	Helms	Pressler
Cochran	Hutchison	Pryor
Coverdell	Inhofe	Rockefeller
Craig	Jeffords	Santorum
DeWine	Johnston	Smith
Dodd	Kassebaum	Snowe
Dole	Kempthorne	Stevens
Domenici	Kohl	Thomas
Dorgan	Kyl	Thompson
Exon	Lieberman	Thurmond
Faircloth	Lott	Warner
Frist	Lugar	

NAYS—40

Akaka	Feingold	Moynihan
Baucus	Feinstein	Murray
Biden	Ford	Reid
Bingaman	Graham	Robb
Boxer	Harkin	Roth
Bradley	Heflin	Sarbanes
Breaux	Hollings	Shelby
Bryan	Inouye	Simon
Bumpers	Kennedy	Simpson
Byrd	Kerry	Specter
Cohen	Lautenberg	Wellstone
Conrad	Leahy	Wyden
D'Amato	Levin	
Daschle	Mikulski	

NOT VOTING—1

Kerrey

So the conference report was agreed to.

Mr. GORTON. Mr. President, I move to reconsider the vote.

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

The motion to lay on the table was agreed to.

WHITEWATER DEVELOPMENT CORP. AND RELATED MATTERS

CLOTURE MOTION

The PRESIDING OFFICER (Mr. FAIRCLOTH). Under the previous order, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will report.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the motion to proceed to Senate Resolution 227, regarding the Whitewater extension:

Alfonse D'Amato, Dan Coats, Phil Gramm, Bob Smith, Mike DeWine, Bill Roth, Bill Cohen, Jim Jeffords, R.F. Bennett, John Warner, Larry Pressler, Spencer Abraham, Conrad Burns, Al Simpson, John H. Chafee, Frank H. Murkowski.

VOTE

The PRESIDING OFFICER. The question is, Is it the sense of the Senate that debate on the motion to proceed to Senate Resolution 227 shall be brought to a close? The yeas and nays are required. The clerk will call the roll.

The legislative clerk called the roll.

Mr. LOTT. I announce that the Senator from Vermont [Mr. JEFFORDS] is necessarily absent.

Mr. FORD. I announce that the Senator from Nebraska [Mr. KERREY] is necessarily absent.

The yeas and nays resulted—yeas 52, nays 46, as follows:

[Rollcall Vote No. 47 Leg.]

YEAS—52

Abraham	Frist	McConnell
Ashcroft	Gorton	Murkowski
Bennett	Gramm	Nickles
Bond	Grams	Pressler
Brown	Grassley	Roth
Burns	Gregg	Santorum
Campbell	Hatch	Shelby
Chafee	Hatfield	Simpson
Coats	Helms	Smith
Cochran	Hutchison	Snowe
Cohen	Inhofe	Specter
Coverdell	Kassebaum	Stevens
Craig	Kempthorne	Thomas
D'Amato	Kyl	Thompson
DeWine	Lott	Thurmond
Dole	Lugar	Warner
Domenici	Mack	
Faircloth	McCain	

NAYS—46

Akaka	Bumpers	Feinstein
Baucus	Byrd	Ford
Biden	Conrad	Glenn
Bingaman	Daschle	Graham
Boxer	Dodd	Harkin
Bradley	Dorgan	Heflin
Breaux	Exon	Hollings
Bryan	Feingold	Inouye
Johnston	Mikulski	Robb
Kennedy	Moseley-Braun	Rockefeller
Kerry	Moynihan	Sarbanes
Kohl	Murray	Simon
Lautenberg	Nunn	Wellstone
Leahy	Pell	Wyden
Levin	Pryor	
Lieberman	Reid	

NOT VOTING—2

Jeffords Kerrey

The PRESIDING OFFICER. On this vote, the yeas are 52, the nays are 46. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

PRIVILEGE OF THE FLOOR

Mr. GORTON. Mr. President, I ask unanimous consent that A.J. Martinez of Senator BENNETT's staff be permitted privilege of the floor during consideration of the Public Rangelands Management Act.

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

PUBLIC RANGELANDS MANAGEMENT ACT

The PRESIDING OFFICER. The Chair lays before the Senate, S. 1459, the Public Rangelands Management Act, with 75 minutes equally divided on the Bumpers amendment.

The clerk will report.

The bill clerk read as follows:

A bill (S. 1459) to provide for uniform management of livestock grazing on Federal land, and for other purposes.

The Senate resumed consideration of the bill.

Pending:

Domenici amendment No. 3555, in the nature of a substitute.

Bumpers modified amendment No. 3556 (to amendment No. 3555), to maintain the current formula used to calculate grazing fees for small ranchers with 2,000 animal unit months [AUM's] or less, with certain minimum fees, and establish a separate grazing fee for large ranchers with more than 2000 AUMs.

AMENDMENT NO. 3556, AS MODIFIED

Mr. DOMENICI. Mr. President, Senator BUMPERS is here. Might I inquire of Senator BUMPERS, we do not need our entire 37 minutes. Is there any chance, in the interest of moving the Senate's business along, you might get by with a little less of your time so that we could vote a little earlier?

Mr. BUMPERS. I am quite sure we will not use our all of our time, either. We will be happy to yield the balance of such time. I only know of two people on this side, Senator JEFFORDS and I, who will be speaking.

Mr. DOMENICI. Thank you. Mr. President, on this side, might I say in earshot of staff and administrative assistants, that some Republican Senators have indicated they want to speak on this very amendment. Senator CAMPBELL has indicated, the distinguished Senator from the State of Colorado; I think Senator CRAIG has indicated that he would like to speak; and perhaps a couple of others. Let me put the word out, we are trying very hard to move this bill along and use as little time on the amendments as possible. If you could get hold of me, perhaps I could set up a time, and perhaps we could agree at a certain time that Senator CAMPBELL will speak for 8 or 9 minutes. If we can work to arrange that, I will not have to be here anxiously wondering who is coming because they will have a time set.

Mr. President, let me suggest that this amendment with reference to grazing fees, if it were adopted and if it becomes law, would put out of business, in this Senator's opinion, hundreds and hundreds of small ranches and ranching families that have been the backbone of this kind of activity for a long time. Let me yield myself 5 minutes and see if I can make the case for that, and then I will yield back to Senator BUMPERS.

Mr. President, first of all, this amendment attempts to set up a two-tier fee system. That two-tier system that is established here, the distinguished Senator indicates it is only going to have an impact on the very large ranches. I want to get to that in a moment to try to make sure that the Senate understands that all grazing permits do not have the same tenure. Some are for 3 months, some are for 5 months during the year. In a State like New Mexico, parts of Arizona, parts of California, and parts of a few of the other States that have year-long grazing.

Some private property, small portion of State property, and Federal leases make up a ranching unit in a State like mine. We are called water-based States. Essentially, the water and everything is on that unit. So you do not move the cattle off to public property for part of the year. The livestock are there all the time.

As a consequence, when the distinguished Senator who had in mind that this would be just for very, very large ranches, those numbers did not take into consideration a ranch in New Mexico, Arizona, or California, that had 12-month-a-year permits and was substantially—that is, a lot of the property—federally controlled. I will come back to that point when I get the actual numbers.

Having laid the foundation to establish this fact that it will apply to small ranches, not large ranches, that are on a 12-month basis and have a lot of public domain, let me tell you what we try to do in the bill. We attempt to increase the grazing fee 37-percent. We intend it go up to $1.85. This is a 37-percent increase. Now, Mr. President, in addition to a 37 percent increase, we are aware of the fact that you cannot have ranching units continue to operate, and have prices go arbitrarily up in total disregard for the market, based upon what the State might charge for completely different land. Ours is based upon the 3-year rolling average of the gross value of the commodity, which takes into account such things,