

that which is set out in 4(d) of the bill or by a preemption analysis in which a court concludes that the overall meaning of the federal law and its plain text do not preclude state common law tort claims. That is unlikely for two reasons. First, the plain meaning if the bill (congressional intention) is the elimination of liability, and second, the list of those areas that are "preserved" or carved out does not include state common law tort claims.

On the question of preemption, listed at the end of this letter are citations to three fairly recent cases in which federal courts have struggled with the question of whether a federal bill has a preemptive effect on state tort claims. I inserted footnote 14 from the *Welding Fume Products Liability* case directly below to give you an idea of the complexity of this field. The short of it is, as Richard Ausness said in note 14: "[T]he Court's preemption jurisprudence appears to be bereft of any coherent theory or methodology" and "is in a terrible state. . . ." Therefore, one would not want to leave to subsequent judicial interpretation whether state common law tort claims for failure to exercise due care in hiring coaches, investigating backgrounds, or overseeing inappropriate activity would be actionable.

If it is the intention of the drafters of this legislation to exempt State common law tort claims from liability, they must say so, or the obvious effect of the bill—what will be seen as the clear intent of congress—will dominate.

H.R. 1176 has only one purpose: limitation of liability. It is hard to see any other purpose. As the case law makes clear, the dominant analytical factor in exclusion (carve-out) and preemption cases is congressional intent. The more elaborate interpretations, such as those in the cases below, are required when the purpose of the legislation is regulation of a field and the open question is the extent to which that regulation and a state law can co-exist. Sadly, will not be a question if this bill passes and becomes law.

After reading the bill, I see no language that exempts state common law tort claims. To the contrary, the specific areas exempted (e.g. labor law, antitrust law, statutory claims, etc.) suggest that Congress intends to exempt very specific areas only. Given that list in 4(d), unless the bill were amended to include an exemption for all state common law tort claims, the bill will be seen as a bar to cases involving negligent hiring, failure to assess background, negligent oversight of individuals who may well do great harm to children, to athletes, to those most in need of protection.

A plain reading of Section 4(d) and Section 5 suggests that those claims would be barred—and that is really quite horrendous. Cutting off liability, arbitrarily, undermines the incentives for better products and services. From the perspective of children who might be victimized by adults, treated in ways that are patently destructive from an emotional or psychological vantage point, what possible reason could there be to pass this bill?

During the earlier debates regarding the Volunteer Immunity ACT, supporters contended that while the legislation liberated coaches and volunteers from the risk of liability, even when they were negligent, it left the organizations as viable defendants in the event a plaintiff could fashion a respondent superior theory or a general vicarious liability claim under State law. H.R. 1176 would destroy that protection.

Although the three cases listed below hold out hope that a State common law tort claim might survive, H.R. 1176 is not a bill that regulates a field. Therefore, it would not give rise to the question of whether the

federal regulation can co-exist with State law, or whether state law creates obligation "in addition to and different from" federal requirements.

This is exactly the kind of tort reform that has been proposed for the last 25 years: a limitation on liability, blocking those who most need protection from access to the civil justice system. It is clear to see why large nonprofits want to limit liability. It is very hard to see why Congress would give in to that demand when the consequence would be to eviscerate an important set of incentives that protect those likely to be victimized.

Tort reform has always been an unfair fight. Think about the alignment of forces. On the side of those seeking to limit liability is the entire GNP. All of U.S. manufacturing, all of retailing, the health care industry, the pharmaceuticals, the insurance companies (who have as yet produced a coherent reason why this protection is badly needed based on anything resembling a juried study, comprehensive payout or case list, or other credible source), and, in this bill, all of U.S. higher education—every college and university, every athletic program, indeed, every nonprofit involved in orchestrating sports and entertainment for tens of millions of children and young adults, and finally, much of the press who have abandoned consumers on this issue, with the hope of never having to pay punitive damages when they defame into reputational oblivion a private citizen.

On the other side, opposing these limits on accountability, are the defenders of the tort system—under-funded and often fragmented consumer groups, a few victims rights groups, some of whom have been mocked as shameless seekers of undeserved damage awards and, of course, trial lawyers. Trial lawyers—the architects of the consumer rights movement, the advocates for you and me when we are injured, the lawyers who represent the consumer perspective—who have been horribly vilified by a decades long comprehensive campaign to undermine their credibility, and in the shadow of this outrageous legislation, student groups (who have a voice, presumably, but are as yet unheard).

This is hardly a fair fight.

And then there is the term "tort reform." Laws that provide the protection for consumers, no incentive for greater safety, and limit the rights of those who lack power are hardly the stuff of reform.

And the data—or lack thereof—regarding the current civil justice system. From the CRS report forward, no credible juried study documents a crisis in the tort or insurance system or in the non-profit world that could conceivably justify legislation that limits arbitrarily consumer rights, as docs H.R. 1172.

This is tort reform as I have come to understand it—a series of bills that have but one meaning: reducing accountability and giving consumers nothing in exchange. It is not that it is incomprehensible. In fact, the reasoning is all too understandable. Who would not like to be excused of responsibility after they engaged in misconduct? The fact that the reasoning underlying this bill is understandable, however, does not mean that it is right, proper, just and fair. It is none of those things.

Let me know if you are interested in discussing this further.

Sincerely,

ANDREW F. POPPER,  
*Professor of Law.*

TRIBUTE TO CONGRESSMAN CHRIS CHOCOLA

HON. STEVE BUYER

OF INDIANA

IN THE HOUSE OF REPRESENTATIVES

Friday, December 8, 2006

Mr. BUYER. Mr. Speaker, my colleague CHRIS CHOCOLA of Indiana will be leaving Congress at the end of this session. I was impressed by the dedicated service offered during his tenure in the House of Representatives. His background as a lawyer and successful businessman was instrumental as a constant champion of fiscal restraint by the Federal Government. His extensive experience of managing a large public corporation proved invaluable to his vision of how the Federal Government should operate. It inspired his advocacy that government should be run like a business, efficient and effective, always with the customer and our fellow citizens.

As a member of both the Ways and Means and Budget Committees, he introduced legislation to streamline the budget process with the hope of reining in excessive and unfocused spending. CHRIS sought a reformation of the tax code so that hard working Americans could keep more of their paycheck. He introduced legislation so that families could continue to make tax free withdrawals from an education savings plan, as well as legislation to allow individuals to make tax free deductions of medical expenses without a gross income limitation. His boundless leadership and bold initiatives will always be looked upon as an asset to a grateful nation.

As a member of the Transportation and Infrastructure Committee, he secured \$12 million in Federal funding needed to make historic improvements to U.S. 31, a roadway connecting South Bend to Indianapolis. In addition, his work on the committee also helped to complete the Hoosier Heartland Corridor, a transportation project that after over a decade is in its final stage of construction.

CHRIS CHOCOLA's service to this Nation and to Indiana's Second Congressional District will leave an indelible mark for years to come.

PAYING TRIBUTE TO GEORGE ANN RICE

HON. JON C. PORTER

OF NEVADA

IN THE HOUSE OF REPRESENTATIVES

Friday, December 8, 2006

Mr. PORTER. Mr. Speaker, I rise today to honor my dear friend, Dr. George Ann Rice, for her outstanding service and continued contributions to our society.

Dr. Rice has been an invaluable asset to the Las Vegas community throughout the years. Throughout her many years of service, she has committed herself to improving our schools as the Associate Superintendent of the Clark County School District. Her responsibilities included recruiting and selecting licensed teachers, administrators and support staff as well as securing changes in Nevada Law and Nevada Administrative Codes related to employment and licensure issues. Dr. Rice served on the Clark County School District Investment Committee for 15 years and as Executive Board Director to the Silver State