

104TH CONGRESS
1ST SESSION

S. 672

To provide a fair and balanced resolution to the problem of multiple imposition of punitive damages, and for the reform of the civil justice system.

IN THE SENATE OF THE UNITED STATES

APRIL 4 (legislative day, MARCH 27), 1995

Mr. HATCH (for himself, Mr. McCONNELL, and Mr. THOMAS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide a fair and balanced resolution to the problem of multiple imposition of punitive damages, and for the reform of the civil justice system.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Civil Justice Fairness
5 Act of 1995”.

6 **TITLE I—PUNITIVE DAMAGES**
7 **REFORM**

8 **SEC. 101. DEFINITIONS.**

9 For purposes of this title, the term—

1 (1) “claimant” means any person who brings a
2 civil action and any person on whose behalf such an
3 action is brought; if such an action is brought
4 through or on behalf of an estate, the term includes
5 the claimant’s decedent; if such action is brought
6 through or on behalf of a minor or incompetent, the
7 term includes the claimant’s legal guardian;

8 (2) “clear and convincing evidence” is that
9 measure or degree of proof that will produce in the
10 mind of the trier of fact a firm belief or conviction
11 as to the truth of the allegations sought to be estab-
12 lished; the level of proof required to satisfy such
13 standard is more than that required under prepon-
14 derance of the evidence, but less than that required
15 for proof beyond a reasonable doubt;

16 (3) “harm” means any legally cognizable wrong
17 or injury for which punitive damages may be im-
18 posed;

19 (4) “economic damages” means objectively veri-
20 fiable monetary losses including medical expenses,
21 loss of earnings, burial costs, loss of use of property,
22 costs of repair or replacement, costs of obtaining
23 substitute domestic services, loss of employment and
24 loss of business or employment opportunities, to the

1 extent such recovery is allowed under applicable
2 Federal or State law;

3 (5) “nominal damages” means damages less
4 than or equal to \$500;

5 (6) “person” means any individual, corporation,
6 company, association, firm, partnership, society,
7 joint stock company, or any other entity (including
8 any governmental entity);

9 (7) “punitive damages” means damages award-
10 ed against any person or entity to punish or deter
11 such person or entity, or others, from engaging in
12 similar behavior in the future;

13 (8) “specific findings of fact” means findings in
14 written form focusing on specific behavior of a de-
15 fendant; and

16 (9) “State” means any State of the United
17 States, the District of Columbia, Puerto Rico, the
18 Northern Mariana Islands, the Virgin Islands,
19 Guam, American Samoa, and any other territory or
20 possession of the United States, or any political sub-
21 division thereof.

22 **SEC. 102. MULTIPLE PUNITIVE DAMAGES FAIRNESS.**

23 (a) FINDINGS.—The Congress finds that—

24 (1) multiple or repetitive imposition of punitive
25 damages for harms arising out of a single act or

1 course of conduct may deprive a defendant of all the
2 assets or insurance coverage of the defendant, and
3 may endanger the ability of future claimants to re-
4 ceive compensation for basic out-of-pocket expenses
5 and damages for pain and suffering;

6 (2)(A) the detrimental impact of multiple puni-
7 tive damages exists even in cases that are settled,
8 rather than tried, because the threat of punitive
9 damages being awarded results in a higher settle-
10 ment than would ordinarily be obtained; and

11 (B) to the extent this premium exceeds what
12 would otherwise be a fair and reasonable settlement
13 for compensatory damages, assets that could be
14 available for satisfaction of future compensatory
15 claims are dissipated;

16 (3) fundamental unfairness results when anyone
17 is punished repeatedly for what is essentially the
18 same conduct;

19 (4) Federal and State appellate and trial
20 judges, and well-respected commentators, have ex-
21 pressed concern that multiple imposition of punitive
22 damages may violate constitutionally protected due
23 process rights;

1 (5) multiple imposition of punitive damages
2 may be a significant obstacle to comprehensive set-
3 tlement negotiations in repetitive litigation;

4 (6) limiting the imposition of multiple punitive
5 damages awards would facilitate resolution of mass
6 tort claims involving thousands of injured claimants;

7 (7) Federal and State trial courts have not pro-
8 vided adequate solutions to problems caused by the
9 multiple imposition of punitive damages because of
10 a concern that such courts lack the power or author-
11 ity to prohibit subsequent awards in other courts;
12 and

13 (8) individual State legislatures can create only
14 a partial remedy to address problems caused by the
15 multiple imposition of punitive damages, because
16 each State lacks the power to control the imposition
17 of punitive damages in other States.

18 (b) GENERAL RULE.—Except as provided in sub-
19 section (c), punitive damages shall be prohibited in any
20 civil action in any State or Federal court in which such
21 damages are sought against a defendant based on the
22 same act or course of conduct for which punitive damages
23 have already been sought or awarded against such defend-
24 ant.

1 (c) CIRCUMSTANCES FOR AWARD.—If the court de-
2 termines in a pretrial hearing that the claimant will offer
3 new and substantial evidence of previously undiscovered,
4 additional wrongful behavior on the part of the defendant,
5 other than the injury to the claimant, the court may award
6 punitive damages in accordance with subsection (d).

7 (d) LIMITATIONS ON AWARD.—A court awarding pu-
8 nitive damages pursuant to subsection (c) shall—

9 (1) make specific findings of fact on the record
10 to support the award;

11 (2) reduce the amount of the punitive portion
12 of the damage award by the sum of the amounts of
13 punitive damages previously paid by the defendant
14 in prior actions based on the same act or course of
15 conduct; and

16 (3) prohibit disclosure to the jury of the court's
17 determination and action under this subsection.

18 (e) APPLICABILITY AND PREEMPTION.—

19 (1) IN GENERAL.—Except as provided in para-
20 graph (3), this section shall apply to any civil action
21 brought on any theory where punitive damages are
22 sought based on the same act or course of conduct
23 for which punitive damages have already been
24 sought or awarded against the defendant.

1 (2) APPLICATION TO TRIALS.—Except as pro-
2 vided in paragraph (3), this section shall apply to all
3 civil actions in which the trial has not commenced
4 before the effective date of this Act.

5 (3) DAMAGES UNDER OTHER FEDERAL OR
6 STATE STATUTE.—This section shall not apply to
7 any civil action involving damages awarded under
8 any Federal or State statute that prescribes the pre-
9 cise amount of punitive damages to be awarded.

10 (4) PREEMPTION.—This section shall not pre-
11 empt or supersede any existing Federal or State law
12 limiting or otherwise restricting the recovery for pu-
13 nitive damages to the extent that such law is incon-
14 sistent with the provisions of this section.

15 **SEC. 103. UNIFORM STANDARDS FOR AWARD OF PUNITIVE**
16 **DAMAGES.**

17 (a) FINDINGS.—The Congress finds that—

18 (1) punitive damages are imposed pursuant to
19 vague, subjective, elastic and often retrospective
20 standards of liability, and these standards vary from
21 State to State;

22 (2) the magnitude and unpredictability of puni-
23 tive damage awards in civil actions have increased
24 dramatically over the last 30 years, unreasonably in-

1 flating the cost of settling litigation, and discourag-
2 ing socially useful and productive activity;

3 (3) the Supreme Court of the United States has
4 recognized that punitive damages can produce gross-
5 ly excessive, wholly unreasonably and often arbitrary
6 punishment, and therefore raise serious constitu-
7 tional due process problems; and

8 (4) excessive, arbitrary and unpredictable puni-
9 tive damage awards disrupt, impair and burden
10 interstate commerce, imposing unreasonable and un-
11 justified costs on consumers, taxpayers, govern-
12 mental entities, large and small businesses, volunteer
13 organizations, and nonprofit entities.

14 (b) GENERAL RULE.—

15 (1) LIMITATION ON AWARD OF PUNITIVE DAM-
16 AGES.—Punitive damages may, to the extent per-
17 mitted by applicable Federal or State law, be award-
18 ed in any civil action in any Federal or State court
19 against a defendant if the claimant establishes by
20 clear and convincing evidence that the harm suffered
21 was the result of conduct that is either—

22 (A) specifically intended to cause harm; or

23 (B) carried out with conscious, flagrant
24 disregard for the rights or safety of other per-
25 sons.

1 (2) PROHIBITION OF PUNITIVE DAMAGES.—Pu-
2 nitive damages may not be awarded in the absence
3 of an award of compensatory damages exceeding
4 nominal damages.

5 (c) LIMITATION CONCERNING CERTAIN DRUGS AND
6 MEDICAL DEVICES.—

7 (1) IN GENERAL.—Punitive damages shall not
8 be awarded pursuant to this section against a manu-
9 facturer or product seller of a drug (as defined in
10 section 201(g)(1) of the Federal Food, Drug, and
11 Cosmetic Act (21 U.S.C. 321(g)(1))) or medical de-
12 vice (as defined in section 201(h) of the Federal
13 Food, Drug, and Cosmetic Act (21 U.S.C. 321(h)))
14 which caused the claimant’s harm where—

15 (A) such drug or device was subject to pre-
16 market approval by the Food and Drug Admin-
17 istration with respect to the safety of the for-
18 mulation or performance of the aspect of such
19 drug or device which caused the claimant’s
20 harm or the adequacy of the packaging or label-
21 ing of such drug or device, and such drug or
22 device was in fact approved by the Food and
23 Drug Administration; or

24 (B) the drug or device is generally recog-
25 nized as safe and effective pursuant to condi-

1 tions established by the Food and Drug Admin-
2 istration and applicable regulations, including
3 packaging and labeling regulations.

4 (2) NONAPPLICABILITY.—The provisions of
5 paragraph (1) shall not apply in any case in which—

6 (A) the defendant, before or after pre-mar-
7 ket approval of a drug or device, withheld from
8 or misrepresented to the Food and Drug Ad-
9 ministration or any other agency or official of
10 the Federal Government required information
11 that is material and relevant to the perform-
12 ance of such drug or device and is causally re-
13 lated to the harm which the claimant allegedly
14 suffered; or

15 (B) the defendant made an illegal payment
16 to an official of the Food and Drug Administra-
17 tion for the purpose of either securing or main-
18 taining approval of such drug or device.

19 (d) PLEADING OF PUNITIVE DAMAGES.—No com-
20 plaint or other such pleading shall be filed containing a
21 prayer for relief seeking punitive damages in any civil ac-
22 tion subject to this section. A claimant may, however, pur-
23 suant to a pretrial motion and after a hearing before the
24 court, amend the complaint or other such pleading to in-
25 clude a prayer for relief seeking punitive damages. The

1 court shall allow such motion to amend if the claimant
2 establishes at the hearing a reasonable likelihood of prov-
3 ing facts at trial sufficient to support an award of punitive
4 damages. Any such motion to amend shall be made not
5 later than 30 days after the close of discovery. A prayer
6 for relief added pursuant to this subsection shall not be
7 barred by lapse of time under any statute prescribing or
8 limiting the time within which an action may be brought
9 or right asserted if the time prescribed or limited had not
10 expired when the original pleading was filed.

11 (e) BIFURCATION AT DEFENDANT'S REQUEST.—

12 (1) SEPARATE PROCEEDING.—At the request of
13 the defendant, the trier of fact shall consider in a
14 separate proceeding whether punitive damages are to
15 be awarded and the amount of such award.

16 (2) ADMISSIBILITY OF EVIDENCE.—If a sepa-
17 rate proceeding is requested, evidence relevant only
18 to the claim of punitive damages, as determined by
19 applicable State law, shall be inadmissible in any
20 proceeding to determine whether compensatory dam-
21 ages are to be awarded. Evidence admissible in the
22 separate proceeding for punitive damages may in-
23 clude evidence of the defendant's profits, if any,
24 from its alleged wrongdoing, but shall not include
25 evidence of the defendant's overall wealth.

1 (f) PROPORTIONAL AWARDS.—The amount of puni-
2 tive damages that may be awarded to a claimant in any
3 civil action subject to this title shall not exceed 3 times
4 the amount of damages awarded to the claimant for the
5 economic damages, or \$250,000, whichever is greater.
6 This provision shall be applied by the court and shall not
7 be disclosed to the jury.

8 (g) APPLICABILITY AND PREEMPTION.—

9 (1) APPLICABILITY.—This section shall apply
10 to—

11 (A) any civil action brought in any Federal
12 or State court on any theory where punitive
13 damages are sought; and

14 (B) all civil actions in which the trial has
15 not commenced before the effective date of this
16 Act.

17 (2) PREEMPTION.—This section supersedes
18 State law only to the extent that State law applies
19 to an issue covered by this section. Any issue that
20 is not governed by this section shall be governed by
21 applicable State or Federal law.

22 **SEC. 104. EFFECT ON OTHER LAW.**

23 Nothing in this title shall be construed to—

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

1 (2) supersede any Federal law;

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

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

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

9 (6) affect the right of any court to transfer
10 venue or to apply the law of a foreign nation or to
11 dismiss a claim of a foreign nation or of a citizen
12 of a foreign nation on the ground of inconvenient
13 forum; or

14 (7) create a cause of action for punitive dam-
15 ages.

16 **TITLE II—JOINT AND SEVERAL**
17 **LIABILITY REFORM**

18 **SEC. 201. SEVERAL LIABILITY FOR NONECONOMIC LOSS.**

19 (a) FINDINGS.—The Congress finds that—

20 (1) because of the joint and several liability
21 doctrine, municipalities, volunteer groups, nonprofit
22 entities, property owners, and large and small busi-
23 nesses are often brought into litigation despite the
24 fact that their conduct often had little or nothing to

1 do with the accident or transaction giving rise to the
2 lawsuit;

3 (2) noneconomic damages are not assessed pur-
4 suant to any objective criteria and are therefore im-
5 possible to quantify, leading to unpredictable, highly
6 subjective and often excessive awards;

7 (3) the imposition of joint and several liability
8 for noneconomic damages frequently results in the
9 assessment of unfair and disproportionate damages
10 against defendants that bear no relationship to their
11 fault or responsibility; and

12 (4) the unfair allocation of noneconomic dam-
13 ages under the joint and several liability doctrine
14 disrupts, impairs, and burdens interstate commerce,
15 imposing unreasonable and unjustified costs on con-
16 sumers, taxpayers, governmental entities, large and
17 small businesses, volunteer organizations, and non-
18 profit entities.

19 (b) DEFINITIONS.—For purposes of this section, the
20 term—

21 (1) “economic damages” means objectively veri-
22 fiable monetary losses including medical expenses,
23 loss of earnings, burial costs, loss of use of property,
24 costs of repair or replacement, costs of obtaining

1 substitute domestic services, loss of employment and
2 loss of business or employment opportunities; and

3 (2) “noneconomic damages” means subjective,
4 nonmonetary losses including, but not limited to,
5 pain, suffering, inconvenience, mental suffering,
6 emotional distress, loss of society and companion-
7 ship, loss of consortium, injury to reputation and
8 humiliation.

9 (c) IN GENERAL.—In any civil action for personal in-
10 jury, wrongful death, or based upon principles of compara-
11 tive fault, the liability of each defendant for noneconomic
12 damages shall be several only and shall not be joint. Each
13 defendant shall be liable only for the amount of non-
14 economic damages allocated to such defendant in direct
15 proportion to such defendant’s percentage of responsibility
16 as determined under subsection (d). A separate judgment
17 shall be rendered against such defendant for that amount.

18 (d) PROPORTION OF RESPONSIBILITY.—For pur-
19 poses of this section, the trier of fact shall determine the
20 proportion of responsibility of each person for the claim-
21 ant’s harm whether or not such person is a party to the
22 action.

23 (e) APPLICABILITY AND PREEMPTION.—This title
24 shall not preempt or supersede any Federal or State law

1 to the extent that such law would further limit the applica-
2 tion of joint liability to any kind of damages.

3 **TITLE III—CIVIL PROCEDURAL**
4 **REFORM**

5 **SEC. 301. SANCTIONS FOR ABUSIVE LITIGATION PRAC-**
6 **TICES.**

7 Rule 11 of the Federal Rules of Civil Procedure is
8 amended to read as follows:

9 **“Rule 11. Signing of Pleadings, Motions, and Other**
10 **Papers; Representations to Court; Sanc-**
11 **tions**

12 “(a) SIGNATURE.—Every pleading, written motion,
13 and other paper shall be signed by at least one attorney
14 of record in the attorney’s individual name, or, if the party
15 is not represented by an attorney, shall be signed by the
16 party. Each paper shall state the signer’s address and tele-
17 phone number, if any. Except when otherwise specifically
18 provided by rule or statute, pleadings need not be verified
19 or accompanied by affidavit. An unsigned paper shall be
20 stricken unless omission of the signature is corrected
21 promptly after being called to the attention of the attorney
22 or party.

23 “(b) REPRESENTATIONS TO COURT.—By presenting
24 to the court (whether by signing, filing, submitting, or
25 later advocating) a pleading, written motion, or other

1 paper, an attorney or unrepresented party is certifying
2 that to the best of the person’s knowledge, information,
3 and belief, formed after an inquiry reasonable under the
4 circumstances—

5 “(1) it is not being presented for any improper
6 purpose, such as to harass or to cause unnecessary
7 delay or needless increase in the cost of litigation;

8 “(2) the claims, defenses, and other legal con-
9 tentions therein are warranted by existing law or by
10 a nonfrivolous argument for the extension, modifica-
11 tion, or reversal of existing law or the establishment
12 of new law;

13 “(3) the allegations and other factual conten-
14 tions have evidentiary support; and

15 “(4) the denials of factual contentions are war-
16 ranted on the evidence or, if specifically so identi-
17 fied, are reasonably based on a lack of information
18 or belief.

19 “(c) SANCTIONS.—If, after notice and a reasonable
20 opportunity to respond, the court determines that subdivi-
21 sion (b) has been violated, the court shall, subject to the
22 conditions stated below, impose an appropriate sanction
23 upon the attorneys, law firms, or parties that have violated
24 subdivision (b) or are responsible for the violation.

25 “(1) HOW INITIATED.—

1 “(A) BY MOTION.—A motion for sanctions
2 under this rule shall be made separately from
3 other motions or requests and shall describe the
4 specific conduct alleged to violate subdivision
5 (b). It shall be served as provided in rule 5.

6 “(B) ON COURT’S INITIATIVE.—On its own
7 initiative, the court may enter an order describ-
8 ing the specific conduct that appears to violate
9 subdivision (b) and directing an attorney, law
10 firm, or party to show cause why it has not vio-
11 lated subdivision (b) with respect thereto.

12 “(2) NATURE OF SANCTION; LIMITATIONS.—A
13 sanction imposed for violation of this rule shall be
14 sufficient to deter repetition of such conduct or com-
15 parable conduct by others similarly situated, and to
16 compensate the parties that were injured by such
17 conduct. Subject to the limitations in subparagraphs
18 (A) and (B), the sanction may consist of, or include,
19 directives of a nonmonetary nature, an order to pay
20 a penalty into court, or, if imposed on motion, an
21 order directing payment to the movant of the rea-
22 sonable attorneys’ fees and other expenses incurred
23 as a direct result of the violation.

1 “(A) Monetary sanctions may not be
2 awarded against a represented party for a viola-
3 tion of subdivision (b)(2).

4 “(B) Monetary sanctions may not be
5 awarded on the court’s initiative unless the
6 court issues its order to show cause before a
7 voluntary dismissal or settlement of the claims
8 made by or against the party which is, or whose
9 attorneys are, to be sanctioned.

10 “(3) ORDER.—When imposing sanctions, the
11 court shall describe the conduct determined to con-
12 stitute a violation of this rule and explain the basis
13 for sanctions imposed.

14 “(d) INAPPLICABILITY TO DISCOVERY.—Subdivisions
15 (a) through (c) of this rule do not apply to disclosures
16 and discovery requests, responses, objections, and motions
17 that are subject to the provisions of rules 26 through 37.

18 “(e) NONLIMITATION ON INHERENT POWER OF THE
19 COURT.—Nothing in this rule limits the inherent power
20 of the Federal courts to sanction misconduct of attorneys
21 or parties appearing before such courts.”.

22 **SEC. 302. TRIAL LAWYER ACCOUNTABILITY.**

23 (a) SENSE OF THE CONGRESS.—It is the sense of the
24 Congress that each State should require, under penalty
25 of law, each attorney admitted to practice law in such

1 State to disclose in writing, to any client with whom such
2 attorney has entered into a contingency fee agreement—

3 (1) the actual services performed for such client
4 in connection with such agreement;

5 (2) the precise number of hours actually ex-
6 pended by such attorney in the performance of such
7 services; and

8 (3) whether a referral fee was paid to any other
9 person.

10 (b) STUDY AND DEVELOPMENT OF MODEL LEGISLA-
11 TION.—The Attorney General shall—

12 (1) study and evaluate contingent fee awards
13 and their abuses in cases arising in State and Fed-
14 eral court, with particular emphasis on cases in
15 which the resulting fees received by attorneys are
16 grossly disproportionate to the fees such attorneys
17 would command if they offered identical services on
18 an hourly rate competitive with that available in the
19 relevant legal market;

20 (2) develop model State legislation—

21 (A) described in subsection (a) of this sec-
22 tion; and

23 (B) based on the study conducted under
24 paragraph (1), to curb abuses of contingent fee
25 awards, taking into particular account—

1 (i) the risk that individual clients may
2 end up in an unduly weak bargaining posi-
3 tion where they, for lack of available funds
4 up front, are unable to pay an hourly rate
5 and must enter into a contingent fee
6 agreement if they are to obtain legal serv-
7 ices;

8 (ii) the danger that such clients may
9 ultimately pay what are effectively fla-
10 grantly excessive hourly rates;

11 (iii) the ways in which requiring attor-
12 neys to disclose to clients the hours ex-
13 pended on a contingent fee case may im-
14 prove civil justice, enhance the recovery re-
15 ceived by injured persons, and eliminate
16 abusive practices by attorneys who take
17 advantage of vulnerable clients;

18 (iv) the possibility that similar bene-
19 ficial effects may accrue from requiring, in
20 contingent fee cases, pre-agreement disclo-
21 sure of an attorney's best estimate of the
22 hours that a case will require if it proceeds
23 to various stages, the likelihood and
24 amount of an award expected at various

1 stages, and the attorney's hourly rate for
2 the legal services required;

3 (v) the further possibility that other
4 disclosure requirements or restrictions on
5 contingent fee awards may enhance civil
6 justice; and

7 (vi) the possibility that any other in-
8 equities in attorney fee payment in contin-
9 gent fee cases may appropriately be ad-
10 dressed through legislation, such as inequi-
11 ties that might result where an attorney
12 receives a fee award from a court but still
13 receives a full contingent fee award such
14 that the client receives no benefit whatso-
15 ever from court-awarded fees; and

16 (3) prepare and disseminate to State authorities
17 the findings made and model legislation developed as
18 a result of the study and evaluation.

19 (c) REPORTING REQUIREMENTS.—Not later than the
20 date that is 1 year after the effective date of this Act,
21 the Attorney General shall report to the Congress—

22 (1) the findings of the study and the model leg-
23 islation required by this section; and

1 (2) recommendations based on the findings on
2 the need for and appropriateness of further action
3 by the Federal Government.

4 **SEC. 303. HONESTY IN EVIDENCE.**

5 (a) OPINION TESTIMONY BY EXPERTS.—Rule 702 of
6 the Federal Rules of Evidence is amended—

7 (1) by inserting “(a) IN GENERAL.—” before
8 “If”, and

9 (2) by adding at the end the following:

10 “(b) ADEQUATE BASIS FOR OPINION.—

11 “(1) Testimony in the form of an opinion by a
12 witness that is based on scientific, technical or medi-
13 cal knowledge shall be inadmissible in evidence un-
14 less the court determines that such opinion—

15 “(A) is based on scientifically valid reason-
16 ing;

17 “(B) is sufficiently reliable so that the pro-
18 bative value of such evidence outweighs the
19 dangers specified in rule 403; and

20 “(C) the techniques, methods, and theories
21 used to formulate that opinion are generally ac-
22 cepted within the relevant scientific, medical, or
23 technical field.

1 “(2) In determining whether an opinion satis-
2 fies conditions in paragraph (1), the court shall con-
3 sider—

4 “(A) whether the opinion and any theory
5 on which it is based have been experimentally
6 tested;

7 “(B) whether the opinion has been pub-
8 lished in peer-review literature; and

9 “(C) whether the theory or techniques sup-
10 porting the opinion are sufficiently reliable and
11 valid to warrant their use as support for the
12 proffered opinion.

13 “(c) EXPERTISE IN THE FIELD.—Testimony in the
14 form of an opinion by a witness that is based on scientific,
15 technical, or medical knowledge shall be inadmissible in
16 evidence unless the witness’s knowledge, skill, experience,
17 training, education, or other expertise lies in the particular
18 field about which such witness is testifying.

19 “(d) DISQUALIFICATION.—Testimony by a witness
20 who is qualified as described in subsection (a) is inadmis-
21 sible in evidence if such witness is entitled to receive any
22 compensation contingent on the legal disposition of any
23 claim with respect to which such testimony is offered.”.

1 **SEC. 304. FAIR SHIFTING OF COSTS AND REASONABLE AT-**
2 **TORNEY FEES.**

3 (a) IN GENERAL.—Rule 68 of the Federal Rules of
4 Civil Procedure is amended to read as follows:

5 **“Rule 68. Offer of judgment or settlement**

6 “(a) OFFER OF JUDGMENT OR SETTLEMENT.—At
7 any time, any party may serve upon an adverse party a
8 written offer to allow judgment to be entered against the
9 offering party or to settle a case for the money, property,
10 or to such effect as the offer may specify, with costs then
11 accrued.

12 “(b) ACCEPTANCE OR REJECTION OF OFFERS.—If
13 within 21 days after service of the offer, or such additional
14 time as the court may allow, the adverse party serves writ-
15 ten notice that the offer is accepted, either party may then
16 file the offer and notice of acceptance together with proof
17 of service thereof and thereupon the clerk, or the court
18 if so required, shall enter judgment. An offer not accepted
19 shall be deemed withdrawn and evidence thereof is not ad-
20 missible except in a proceeding to determine costs and rea-
21 sonable attorney fees.

22 “(c) DETERMINATION OF FINAL JUDGMENTS.—If
23 the judgment finally obtained is not more favorable to the
24 offeree than the offer, then the offeree must pay the actual
25 costs and reasonable attorney fees incurred after the expi-
26 ration of the time for accepting the offer, but only to the

1 extent necessary to make the offeror whole for actual costs
2 and reasonable attorney fees incurred as a consequence
3 of the rejection of the offer. When comparing the amount
4 of any offer of settlement to the amount of a final judg-
5 ment actually awarded, any amount of the final judgment
6 representing interest subsequent to the date of the offer
7 in settlement shall not be considered.

8 “(d) DETERMINATION OF COSTS.—(1) Upon the mo-
9 tion of either party, the court shall hold a hearing at which
10 the parties may prove costs and reasonable attorney fees,
11 and, upon hearing the evidence, the court shall enter an
12 appropriate order or judgment under this section.

13 “(2) Allowable costs under this rule shall include—

14 “(A) filing, motion, and jury fees;

15 “(B) juror food and lodging while the jury is
16 kept together during trial and after the jury retires
17 for deliberation;

18 “(C) taking, videotaping, and transcribing nec-
19 essary depositions including an original and one
20 copy of those taken by the claimant and one copy of
21 depositions taken by the party against whom costs
22 are allowed, and travel expenses to attend deposi-
23 tions;

24 “(D) service of process by a public officer, reg-
25 istered process server, or other means;

1 “(E) expenses of attachment;

2 “(F) premiums on necessary surety bonds;

3 “(G) ordinary witness fees;

4 “(H) fees of expert witnesses who are not regu-
5 lar employees of any party;

6 “(I) transcripts of court proceedings;

7 “(J) attorney fees, when authorized by contract
8 or law;

9 “(K) court reporters’ fees;

10 “(L) models and blowups of exhibits and photo-
11 copies of exhibits may be allowed if they were rea-
12 sonably helpful to aid the trier of fact; and

13 “(M) any other item that is required to be
14 awarded to the prevailing party pursuant to statute
15 as an incident to prevailing in the action at trial or
16 on appeal.

17 “(3) Unless expressly authorized by law, allowable
18 costs under this rule shall not include—

19 “(A) investigation expenses in preparing the
20 case for trial;

21 “(B) postage, telephone, facsimile, and
22 photocopying charges, except for exhibits;

23 “(C) costs in investigation of jurors or in prepa-
24 ration for voir dire; and

1 “(D) transcripts of court proceedings not or-
2 dered by the court.

3 “(e) DETERMINATION OF LIABILITY.—When the li-
4 ability of one party to another has been determined by
5 verdict of order or judgment, but the amount or extent
6 of the liability remains to be determined by further pro-
7 ceedings, any party may make an offer of judgment, which
8 shall have the same effect as an offer made before trial,
9 except that a court may shorten the period of time an
10 offeree may have to accept an offer, but in no case to less
11 than 10 days.

12 “(f) SUBSEQUENT OFFERS.—The fact that an offer
13 is made but not accepted does not preclude a subsequent
14 offer. An offeror shall not be deprived of the benefits of
15 an offer by a subsequent offer, unless and until the offeror
16 fails to accept an offer more favorable than the judgment
17 obtained.

18 “(g) NONMONETARY AWARDS.—If the judgment ob-
19 tained includes nonmonetary relief, a determination that
20 it is more favorable to the offeree than was the offer shall
21 be made only when the terms of the offer included such
22 nonmonetary relief.

23 “(h) REDUCTION OF AWARD TO AVOID UNDUE
24 HARDSHIP.—A court may reduce an award of costs and
25 reasonable attorney fees by up to 50 percent of the award

1 if the court finds special circumstances that make a full
2 award of attorney fees and costs unjust.

3 “(i) REASONABLE ATTORNEY’S FEES.—For pur-
4 poses of this rule, a reasonable attorney’s fee shall be cal-
5 culated on the basis of an hourly rate which shall not ex-
6 ceed that which is considered acceptable in the community
7 in which the attorney practices, considering the attorney’s
8 qualifications and experience and the complexity of the
9 case.

10 “(j) APPLICABILITY.—This rule shall not apply to
11 class and derivative actions under rules 23, 23.1, and
12 23.2.”.

13 (b) APPLICATION.—The provisions of rule 68 of the
14 Federal Rules of Civil Procedure (as amended by sub-
15 section (a) of this section) shall supersede any statute
16 that—

17 (1) provides for the shifting of costs by which
18 a specified party makes payment; and

19 (2) does not provide for the shifting of costs by
20 which such party may receive payment.

1 **TITLE IV—HEALTH CARE**
2 **LIABILITY REFORM**

3 **SEC. 401. LIMITATION ON NONECONOMIC DAMAGES IN**
4 **HEALTH CARE LIABILITY ACTIONS.**

5 (a) MAXIMUM AWARD OF NONECONOMIC DAM-
6 AGES.—

7 (1) IN GENERAL.—In any health care liability
8 action, in addition to actual damages or punitive
9 damages, or both, a claimant may also be awarded
10 noneconomic damages (including damages awarded
11 to compensate injured feelings, such as pain and
12 suffering and emotional distress) in an amount not
13 to exceed the maximum amount described in para-
14 graph (2).

15 (2) MAXIMUM AMOUNT.—The maximum
16 amount described in this paragraph is \$250,000, re-
17 gardless of—

18 (A) the number of parties against whom
19 the health care liability action is brought; or

20 (B) the number of claims or actions
21 brought with respect to the health care injury.

22 (3) NO DISCOUNTING TO PRESENT VALUE.—An
23 award for future noneconomic damages in a health
24 care liability action shall not be discounted to
25 present value.

1 (4) REDUCTION IN JURY AWARD.—

2 (A) With respect to a health care liability
3 action heard by a jury, the jury shall not be in-
4 formed about the limitation on noneconomic
5 damages, but any award for noneconomic dam-
6 ages in excess of \$250,000 shall be reduced ei-
7 ther before the entry of judgment or by amend-
8 ment of the judgment after entry.

9 (B)(i) An award of damages for non-
10 economic losses in excess of \$250,000 shall be
11 reduced to \$250,000 before accounting for any
12 other reduction in damages required by law.

13 (ii) If separate awards of damages for past
14 and future noneconomic damages are rendered
15 and the combined award exceeds \$250,000, the
16 award of damages for future noneconomic
17 losses shall be reduced first.

18 (b) APPLICABILITY.—This section—

19 (1) shall apply to any health care liability action
20 brought in any Federal or State court on any theory
21 where noneconomic damages are sought;

22 (2) does not create a cause of action for non-
23 economic damages;

1 (3) does not preempt or supersede any Federal
2 or State law to the extent that such law would fur-
3 ther limit the award of noneconomic damages; and

4 (4) does not preempt any State law enacted be-
5 fore the date of the enactment of this Act that
6 places a cap on the total liability in a health care li-
7 ability action.

8 **SEC. 402. STATUTE OF LIMITATIONS.**

9 (a) IN GENERAL.—Except as provided in subsection
10 (b), no health care liability action may be initiated after
11 the expiration of the 2-year period that begins on the date
12 on which the alleged injury and its cause was or should
13 reasonably have been discovered, but in no event later
14 than 6 years after the date of the alleged occurrence of
15 the injury.

16 (b) EXCEPTION FOR MINORS.—In the case of an al-
17 leged injury suffered by a minor who has not attained 6
18 years of age, no health care liability action may be initi-
19 ated after the expiration of the 2-year period that begins
20 on the date on which the alleged injury and its cause was
21 or should reasonably have been discovered, but in no event
22 later than 6 years after the date of the alleged occurrence
23 of the injury and its cause or the date on which the minor
24 attains 12 years of age, whichever is later.

1 **SEC. 403. PERIODIC PAYMENT OF FUTURE DAMAGES.**

2 (a) NEGOTIATED AGREEMENT FOR PERIODIC PAY-
3 MENT OF FUTURE DAMAGES.—In any health care liability
4 action in which the damages awarded for any losses to
5 be incurred after the date on which the decision or judg-
6 ment is entered (hereafter in this section referred to as
7 “future damages”) exceeds \$100,000, the court shall pro-
8 vide that the parties to the action shall have 60 days to
9 negotiate and consent to an agreement to provide for the
10 payment of such damages in a lump sum, periodic install-
11 ment payments, or a combination of both.

12 (b) COURT DETERMINED PERIODIC PAYMENT OF
13 FUTURE DAMAGES.—If the parties to health care liability
14 action described in subsection (a) fail to agree on the
15 terms and amount of payments of future damages pursu-
16 ant to such subsection, a defendant may elect to pay the
17 future damages on a periodic basis instead of a single
18 lump-sum payment. If the defendant elects to make peri-
19 odic payments, the periods for such payments and the
20 amount of such payments shall be determined by the
21 court, based upon projections of such future losses and
22 costs. For purposes of determining the total amount of
23 future damages, the court shall reduce the amounts to be
24 paid to present value for purposes of determining the
25 funding obligation of the individual required to make such
26 periodic payments.

1 (c) CONDITIONS FOR THE TERMINATION OF FUTURE
2 DAMAGES PAYMENTS.—

3 (1) IN GENERAL.—Except as provided in para-
4 graph (2), periodic payments for future damages
5 shall terminate in the event of the death of the
6 claimant or in the event of the claimant’s recovery
7 or return to work.

8 (2) EXCEPTION FOR INDIVIDUALS WHO ARE
9 OWED A DUTY OF SUPPORT.—The portion of any
10 periodic payment allocable to loss of future earnings
11 shall be paid to any individual to whom the claimant
12 owed a duty of support immediately prior to the
13 claimant’s death to the extent such duty of support
14 exists under applicable law at the time of death.
15 Such payments shall terminate at the earlier of the
16 death of the last person to whom a duty of support
17 is owed or the expiration of the payment obligation
18 pursuant to the judgment for periodic payments.

19 **SEC. 404. STATE NO-FAULT DEMONSTRATION PROJECTS.**

20 (a) DEFINITIONS.—For purposes of this section:

21 (1) MEDICAL ADVERSE EVENT.—The term
22 “medical adverse event” means an injury that is the
23 result of medical management as opposed to a dis-
24 ease process that creates disability lasting at least 1
25 month after discharge, or that prolongs a hos-

1 pitalization for more than 1 month, and for which
2 compensation is available under a no-fault medical
3 liability system established under this section.

4 (2) NO-FAULT MEDICAL LIABILITY SYSTEM.—
5 The terms “no-fault medical liability system” and
6 “system” mean a system established by a State con-
7 ducting a demonstration project under this section
8 that replaces the common law tort liability system
9 for medical injuries with respect to certain qualified
10 health care organizations and qualified insurers and
11 which meets the requirements of this section.

12 (3) PROVIDER.—The term “provider” means
13 physician, physician assistant, or other individual
14 furnishing health care services in affiliation with a
15 qualified health care organization.

16 (4) QUALIFIED HEALTH CARE ORGANIZA-
17 TION.—The term “qualified health care organiza-
18 tion” means a hospital, a hospital system, a man-
19 aged care network, or other entity determined appro-
20 priate by the Secretary that elects in a State con-
21 ducting a demonstration project under this section
22 to participate in a no-fault medical liability system
23 and meets the requirements of this section.

24 (5) QUALIFIED INSURER.—The term “qualified
25 insurer” means a health care malpractice insurer,

1 including a self-insured qualified health care organi-
2 zation, that elects in a State conducting a dem-
3 onstration project under this section to participate
4 in a no-fault medical liability system and meets the
5 requirements of this section.

6 (b) ESTABLISHMENT.—The Secretary of Health and
7 Human Services (hereafter in this section referred to as
8 the “Secretary”) shall award grants to 1 or more States
9 to establish demonstration projects under which the State
10 establishes a no-fault medical liability system in accord-
11 ance with this section.

12 (c) APPLICATIONS BY STATES.—

13 (1) IN GENERAL.—To be eligible to receive a
14 grant under this section, a State shall prepare and
15 submit to the Secretary an application at such time,
16 in such manner, and containing such information as
17 the Secretary may require, including the following
18 information:

19 (A) Identification of the State agency or
20 agencies that will administer the no-fault medi-
21 cal liability system and be the grant recipient of
22 funds for the State.

23 (B) Identification of each qualified health
24 care organization selected by the State to par-
25 ticipate in the system, including—

- 1 (i) the location of each organization;
- 2 (ii) the number of patients generally
3 served by each organization;
- 4 (iii) the types of patients generally
5 served by each organization;
- 6 (iv) an analysis of any characteristics
7 of each organization that makes the orga-
8 nization appropriate for participation in
9 the system;
- 10 (v) whether the organization is self-in-
11 sured for malpractice liability; and
- 12 (vi) such other information as the
13 Secretary determines appropriate.

14 (C) Identification of each qualified insurer
15 selected by the State to participate in the sys-
16 tem including—

- 17 (i) a schedule of the malpractice in-
18 surance premiums generally charged by
19 each insurer under the common law tort li-
20 ability system; and
- 21 (ii) such other information as the Sec-
22 retary determines appropriate.

23 (D) A description of the procedure under
24 which qualified health care organizations and
25 insurers elect to participate in the system.

1 (E) A description of the system established
2 by the State to assure compliance with the re-
3 quirements of this section by each qualified
4 health care organization and insurer.

5 (F) A description of how funds granted to
6 a State will be expended and a description of
7 fiscal control, accounting, and audit procedures
8 to assure the proper disbursement of and ac-
9 counting for funds received under this section.

10 (G) A description of procedures for the
11 preparation and submission to the State of an
12 annual report by each qualified health care or-
13 ganization and qualified insurer participating in
14 a system that shall include—

15 (i) a description of activities con-
16 ducted under the system during the year;
17 and

18 (ii) the extent to which the system ex-
19 ceeded or failed to meet relevant perform-
20 ance standards including compensation for
21 and deterrence of medical adverse events.

22 (2) CONSIDERATION OF APPLICATIONS.—In re-
23 viewing all applications received from States desiring
24 to establish demonstration projects under this sec-
25 tion, the Secretary shall consider—

1 (A) data regarding medical malpractice
2 litigation patterns in each State;

3 (B) the contributions that any system shall
4 make toward reducing costs associated with
5 health care injuries;

6 (C) diversity among the populations served
7 by the systems;

8 (D) geographic distribution; and

9 (E) such other criteria as the Secretary de-
10 termines appropriate.

11 (d) WAIVER.—The Secretary may waive compliance
12 with any requirement of this title applicable to health care
13 negligence to permit the operation of a demonstration
14 project established under this section.

15 (e) DURATION.—A demonstration project under this
16 section shall be conducted for a period of not more than
17 5 years.

18 (f) EVALUATION AND REPORTS.—

19 (1) BY THE STATES.—Each State conducting a
20 demonstration project under this section shall con-
21 duct ongoing evaluations of the effectiveness of any
22 no-fault medical liability system established in such
23 State and shall submit an annual report to the Sec-
24 retary concerning the results of such evaluations at

1 such times and in such manner as the Secretary
2 shall require. The report shall—

3 (A) incorporate information from annual
4 reports submitted to the State by qualified
5 health care organizations and insurers partici-
6 pating in the system;

7 (B) include an analysis of the feasibility
8 and desirability of developing and implementing
9 a no-fault medical liability program; and

10 (C) include a recommendation for legisla-
11 tion on the development and implementation of
12 no-fault medical liability programs.

13 (2) BY THE SECRETARY.—The Secretary shall
14 submit an annual report to the Congress concerning
15 the effectiveness of the demonstration projects con-
16 ducted under this section. Such report shall analyze
17 the reports received by the Secretary under para-
18 graph (1).

19 (g) LIMITATIONS ON USE OF GRANTS.—

20 (1) ADMINISTRATIVE EXPENSES.—Not more
21 than 10 percent of the amount of each grant award-
22 ed to a State under this section may be used for ad-
23 ministrative expenses.

1 (2) WAIVER OF LIMITATION.—The limitation
2 under paragraph (1) may be waived as determined
3 appropriate by the Secretary.

4 (h) AUTHORIZATION OF APPROPRIATIONS.—There
5 are authorized to be appropriated such sums as may be
6 necessary to carry out the purposes of this section.

7 **SEC. 405. DEFINITIONS.**

8 For purposes of this title:

9 (1) CLAIMANT.—The term “claimant” means
10 any person who asserts a health care liability claim
11 or who files a health care liability action, including
12 a person who asserts or claims a right to legal or eq-
13 uitable contribution, indemnity or subrogation, aris-
14 ing out of a health care liability claim or action, and
15 any person on whose behalf such a claim is asserted
16 or such an action is brought, whether deceased, in-
17 competent, or a minor.

18 (2) ECONOMIC DAMAGES.—The term “economic
19 damages” has the same meaning as defined under
20 section 101(4).

21 (3) HEALTH CARE LIABILITY ACTION.—The
22 term “health care liability action” means a civil ac-
23 tion brought in a Federal or State court, against a
24 health care provider, an entity which is obligated to
25 provide or pay for health benefits under any health

1 plan (including any person or entity acting under a
2 contract or arrangement to provide or administer
3 any health benefit), or the manufacturer, distributor,
4 supplier, marketer, promoter, or seller of a medical
5 product, in which the claimant alleges a claim (in-
6 cluding third party claims, cross claims, counter
7 claims, or distribution claims) based upon the provi-
8 sion of (or the failure to provide or pay for) health
9 care services or the use of a medical product, re-
10 gardless of the theory of liability on which the claim
11 is based, or the number of plaintiffs, or defendants
12 or causes of action.

13 **TITLE V—CONTROL OF ABUSIVE**
14 **PRISONER LITIGATION PRAC-**
15 **TICES**

16 **SEC. 501. REFORM OF IN FORMA PAUPERIS DETERMINA-**
17 **TIONS.**

18 (a) PARTIAL PAYMENT OF FEES.—Section 1915(a)
19 of title 28, United States Code, is amended in the first
20 sentence—

21 (1) by inserting “or with payment of a partial
22 fee or with payment of the total fees and costs in
23 installment payments,” after “security therefor,”;
24 and

1 (2) by inserting “the full amount of” after “un-
2 able to pay”.

3 (b) PRISONER’S STATEMENT OF ASSETS.—Section
4 1915 of title 28, United States Code, is amended by add-
5 ing at the end the following:

6 “(f) If a prisoner in a correctional institution files
7 an affidavit in accordance with subsection (a), such pris-
8 oner shall include in the affidavit a statement of all assets
9 the prisoner possesses. The court shall make inquiry of
10 the correctional institution in which the prisoner is incar-
11 cerated for information available to such institution relat-
12 ing to the extent of the prisoner’s assets. The court shall
13 require full or partial payment of filing fees according to
14 the prisoner’s ability to pay.”.

15 **SEC. 502. IMPROVING COURTS’ ABILITIES TO DISMISS**
16 **NONMERITORIOUS IN FORMA PAUPERIS**
17 **CLAIMS.**

18 Section 1915(d) of title 28, United States Code, is
19 amended—

20 (1) by striking “and may” and inserting “at
21 any time and shall”; and

22 (2) by inserting “, or fails to state a claim on
23 which relief can be granted, or the claim is insub-
24 stantial in that the plaintiff suffered no injury or an

1 insubstantial injury, even if partial filing fees have
2 been imposed by the court” before the period.

3 **SEC. 503. EXHAUSTION OF ADMINISTRATIVE REMEDIES IN**
4 **PRISONER LITIGATION.**

5 (a) EXHAUSTION REQUIREMENT.—Section 7(a) of
6 the Civil Rights of Institutionalized Persons Act (42
7 U.S.C. 1997e) is amended—

8 (1) in paragraph (1)—

9 (A) by striking “in any action brought”
10 and inserting “no action shall be brought”;

11 (B) by striking “the court shall” and all
12 that follows through “require exhaustion of”
13 and insert “until”; and

14 (C) by inserting “are exhausted” after
15 “available”; and

16 (2) in paragraph (2) by inserting “or are other-
17 wise fair and effective” before the period at the end.

18 (b) MODIFICATION OF REQUIRED MINIMUM STAND-
19 ARDS.—Section 7(b)(2) of the Civil Rights of Institu-
20 tionalized Persons Act (42 U.S.C. 1997e(b)(2)) is amend-
21 ed—

22 (1) by striking subparagraph (A); and

23 (2) by redesignating subparagraphs (B)
24 through (E) as subparagraphs (A) through (D), re-
25 spectively.

1 (c) REVIEW AND CERTIFICATION PROCEDURE
 2 CHANGES.—Section 7(c) of the Civil Rights of Institu-
 3 tionalized Persons Act (42 U.S.C. 1997e(c)) is amended—

4 (1) in paragraph (1), by inserting “or are oth-
 5 erwise fair and effective” before the period at the
 6 end; and

7 (2) in paragraph (2), by inserting “or is no
 8 longer fair and effective” before the period at the
 9 end.

10 **TITLE VI—MISCELLANEOUS** 11 **PROVISIONS**

12 **SEC. 601. FEDERAL CAUSE OF ACTION PRECLUDED.**

13 This Act shall not provide a basis for Federal court
 14 jurisdiction pursuant to section 1331 or 1337 of title 28,
 15 United States Code.

16 **SEC. 602. EFFECTIVE DATE.**

17 Except as otherwise provided in this Act, this Act
 18 shall take effect 30 days after the date of its enactment
 19 and shall apply to all civil actions commenced on or after
 20 such date, including any action in which the harm or the
 21 conduct which caused the harm occurred before the effec-
 22 tive date of this Act.

○

S 672 IS—2

S 672 IS—3

S 672 IS—4