

105TH CONGRESS  
1ST SESSION

# H. R. 1091

To impose certain requirements on health care liability claims.

---

## IN THE HOUSE OF REPRESENTATIVES

MARCH 18, 1997

Mr. STUMP (for himself, Mr. CALLAHAN, and Mr. EVERETT) introduced the following bill; which was referred to the Committee on the Judiciary

---

## A BILL

To impose certain requirements on health care liability claims.

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; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the  
5 “Health Care Liability Reform Act of 1997”.

6 (b) TABLE OF CONTENTS.—The table of contents for  
7 this Act is as follows:

Sec. 1. Short title; table of contents.

#### TITLE I—GENERAL PROVISIONS

Sec. 101. Federal reform of medical injury compensation.

Sec. 102. Preemption of State law.

Sec. 103. Definitions.

Sec. 104. Effective date.

## TITLE II—HEALTH CARE LIABILITY REFORM

## Subtitle A—Reform Described

- Sec. 201. Requirement for initial resolution of action through alternative dispute resolution.
- Sec. 202. Statute of limitations.
- Sec. 203. Attorneys' fees.
- Sec. 204. Calculation and payment of damages.
- Sec. 205. Joint and several liability.
- Sec. 206. Injunctive relief.
- Sec. 207. Permitting State professional societies to participate in disciplinary activities.

Subtitle B—Requirements for State Alternative Dispute Resolution Systems (ADR)

- Sec. 211. Basic requirements.
- Sec. 212. Certification of State systems; applicability of alternative Federal system.
- Sec. 213. Reports on implementation and effectiveness of alternative dispute resolution systems.

1 **TITLE I—GENERAL PROVISIONS**

2 **SEC. 101. FEDERAL REFORM OF MEDICAL INJURY COM-**  
 3 **PENSATION.**

4 (a) CONGRESSIONAL FINDINGS.—

5 (1) EFFECT ON INTERSTATE COMMERCE.—The  
 6 Congress finds that the health care and insurance  
 7 industries are industries affecting interstate com-  
 8 merce and the medical malpractice litigation systems  
 9 existing throughout the United States affect inter-  
 10 state commerce by contributing to the high cost of  
 11 health care and premiums for malpractice insurance  
 12 purchased by health care providers.

13 (2) EFFECT ON FEDERAL SPENDING.—The  
 14 Congress finds that the medical malpractice litiga-  
 15 tion systems existing throughout the United States

1 have a significant effect on the amount, distribution,  
2 and use of Federal funds because of—

3 (A) the large number of individuals who  
4 receive health care benefits under programs op-  
5 erated or financed by the Federal Government;

6 (B) the large number of individuals who  
7 benefit because of the exclusion from Federal  
8 taxes of the amounts spent by their employers  
9 to provide them with health insurance benefits;

10 (C) the large number of health care provid-  
11 ers and health care professionals who provide  
12 items or services for which the Federal Govern-  
13 ment makes payments; and

14 (D) the large number of such providers  
15 and professionals who have received direct or  
16 indirect financial assistance from the Federal  
17 Government because of their status as such  
18 professionals or providers.

19 (b) APPLICABILITY.—This Act shall apply with re-  
20 spect to any health care liability claim and to any health  
21 care liability action brought in any State or Federal court,  
22 except that this Act shall not apply to—

23 (1) a claim or action for damages arising from  
24 a vaccine-related injury or death to the extent that

1 title XXI of the Public Health Service Act applies to  
2 the claim or action; or

3 (2) a claim or action in which the claimant's  
4 sole allegation is an allegation of an injury arising  
5 from the use of a medical product.

6 (c) FEDERAL COURT JURISDICTION NOT ESTAB-  
7 LISHED ON FEDERAL QUESTION GROUNDS.—Nothing in  
8 this Act shall be construed to establish any jurisdiction  
9 in the district courts of the United States over health care  
10 liability actions on the basis of section 1331 or 1337 of  
11 title 28, United States Code.

12 **SEC. 102. PREEMPTION OF STATE LAW.**

13 (a) IN GENERAL.—Subject to the provisions con-  
14 tained in subsection (b) of this section, the provisions gov-  
15 erning health care liability actions set forth in this Act  
16 supersede State law to the extent that State law differs  
17 from any provisions of law established by or under this  
18 Act with respect to the limitation contained in such provi-  
19 sions. Any issue that is not governed by any provision of  
20 law established herein will be governed by otherwise appli-  
21 cable State or Federal law.

22 (b) LIMITATIONS.—The provisions of this Act will su-  
23 persede any State law, with respect to both procedural and  
24 substantive matters, only to the extent that State law per-  
25 mits the recovery of a greater amount of damages by a

1 plaintiff than that authorized under section 204, permits  
2 the awarding of a greater amount of attorneys' fees than  
3 what is authorized under section 203, reduces the applica-  
4 bility or scope of the regulation of periodic payment of  
5 future damages authorized under section 204(b), or estab-  
6 lishes a longer period during which a health care liability  
7 claim may be initiated than that permitted under section  
8 202. The provisions of this Act shall supersede any Fed-  
9 eral or State law which mandates reimbursement from the  
10 plaintiff's recovery for the cost of collateral source bene-  
11 fits. The provisions of this Act shall not preempt any State  
12 law that imposes greater restrictions on liability or dam-  
13 ages than those provided herein.

14 (c) VACCINE INJURY.—

15 (1) To the extent that title XXI of the Public  
16 Health Service Act establishes a Federal rule of law  
17 applicable to a civil action brought for a vaccine-re-  
18 lated injury or death—

19 (A) this Act does not affect the application  
20 of the rule of law to such an action, and

21 (B) any rule of law prescribed by this Act  
22 in conflict with a rule of law of such title XXI  
23 shall not apply to such action.

24 (2) If there is an aspect of a civil action  
25 brought for a vaccine-related injury or death to

1       which a Federal rule of law under title XXI of the  
2       Public Health Service Act does not apply, then this  
3       Act or otherwise applicable law (as determined  
4       under this Act) will apply to such aspect of such  
5       action.

6       (d) OTHER FEDERAL LAW.—Except as provided in  
7       this section, nothing in this Act shall be deemed to effect  
8       any defense available to a defendant in a health care liabil-  
9       ity claim or action under any other provision of Federal  
10      law.

11   **SEC. 103. DEFINITIONS.**

12      As used in this Act:

13           (1) ALTERNATIVE DISPUTE RESOLUTION SYS-  
14      TEM; ADR.—The term “alternative dispute resolution  
15      system” or “ADR” means a system that provides  
16      for the resolution of health care liability claims in a  
17      manner other than through health care liability ac-  
18      tions brought in the State or Federal courts.

19           (2) CLAIMANT.—The term “claimant” means  
20      any person who asserts a health care liability claim  
21      or bring a health care liability action, including a  
22      person who asserts or claims a right to legal or equi-  
23      table contribution, indemnity or subrogation, arising  
24      out of a health care liability claim or action, and any  
25      person on whose behalf such a claim is asserted or

1       such an action is brought, whether deceased, incom-  
2       petent or a minor.

3               (3) DERIVATIVE CLAIM.—The term “derivative  
4       claim” means any third-party claim arising from the  
5       claim of injury of a person by a health care service  
6       or product, such as loss of consortium, emotional  
7       distress, injury to an unborn child, or wrongful  
8       death.

9               (4) ECONOMIC DAMAGES.—The term “economic  
10      damages” means objectively verifiable monetary  
11      losses incurred as a result of the provision of (or  
12      failure to provide) health care services or the use of  
13      a medical product, such as past and future medical  
14      expenses, loss of past and future earnings, cost of  
15      obtaining domestic services, loss of employment, and  
16      loss of business or employment opportunities.

17              (5) HEALTH CARE LIABILITY ACTION.—The  
18      term “health care liability action” means a civil ac-  
19      tion brought in a State or Federal court or pursuant  
20      to ADR, against a health care provider, a health  
21      care organization, or the manufacturer, distributor  
22      or supplier of a medical product, regardless of the  
23      theory of liability on which the claim is based, or the  
24      number of plaintiffs, or defendants or causes of ac-

1       tion, in which the claimant alleges a health care li-  
2       ability claim.

3           (6) HEALTH CARE LIABILITY CLAIM.—The  
4       term “health care liability claim” means a demand  
5       by any person, whether or not pursuant to ADR,  
6       against a health care provider, health care organiza-  
7       tion, or the manufacturer, distributor or supplier of  
8       a medical product, including, but not limited to,  
9       third-party claims, cross-claims, counter-claims or  
10      contribution claims, which are based upon the provi-  
11      sion of (or the failure to provide) health care serv-  
12      ices or the use of a medical product, regardless of  
13      the theory of liability on which the claim is based,  
14      or the number of plaintiffs, defendants, or causes of  
15      action.

16          (7) HEALTH CARE ORGANIZATION.—The term  
17      “health care organization” means any person or en-  
18      tity which is obligated to provide health benefits  
19      under any health plans, including any person or en-  
20      tity acting under a contract or arrangement with a  
21      health care organization to provide or administer  
22      any health benefit.

23          (8) HEALTH CARE PROVIDER.—The term  
24      “health care provider” means any person or entity  
25      required by State or Federal laws or regulations to

1 be licensed, registered, or certified to provide health  
2 care services, and being either so licensed, reg-  
3 istered, or certified, or exempted from such require-  
4 ment by other statute or regulation.

5 (9) HEALTH CARE SERVICES.—The term  
6 “health care services” means any service provided by  
7 a health care provider, or by any individual working  
8 under the supervision of a health care provider, that  
9 relates to the diagnosis, prevention, or treatment of  
10 any human disease or impairment, or the assessment  
11 of the health of human beings.

12 (10) MEDICAL PRODUCT.—The term “medical  
13 product” means a drug (as defined in section  
14 201(g)(1) of the Federal Food, Drug and Cosmetic  
15 Act (21 U.S.C. 321(g)(1))) or a medical device as  
16 defined in section 201(h) of the Federal Food, Drug  
17 and Cosmetic Act (21 U.S.C. 321(h)), including any  
18 component or raw material used therein, but exclud-  
19 ing health care services, as defined in paragraph (1)  
20 of this section.

21 (11) NONECONOMIC DAMAGES.—The term  
22 “noneconomic damages” means damages for phys-  
23 ical and emotional pain, suffering, inconvenience,  
24 physical impairment, mental anguish, disfigurement,  
25 loss of enjoyment of life, loss of society and compan-

1       ionship, loss of consortium (other than loss of do-  
2       mestic service), hedonic damages, injury to reputa-  
3       tion and all other nonpecuniary losses of any kind  
4       or nature.

5           (12) PUNITIVE DAMAGES.—The term “punitive  
6       damages” means damages awarded, for the purpose  
7       of punishment or deterrence, and not solely for com-  
8       pensatory purposes, against a health care provider,  
9       health care organization, or a manufacturer, dis-  
10      tributor or supplier of a medical product. Punitive  
11      damages are neither economic nor noneconomic  
12      damages.

13          (13) STATE.—The term “State” means each of  
14      the several States, the District of Columbia, the  
15      Commonwealth of Puerto Rico, the Virgin Islands,  
16      Guam, American Samoa, the Northern Mariana Is-  
17      lands, the Trust Territory of the Pacific Islands, and  
18      any other territory or possession of the United  
19      States.

20   **SEC. 104. EFFECTIVE DATE.**

21          (a) IN GENERAL.—Except as provided in subsection  
22      (b) and section 207, this Act shall apply with respect to  
23      claims accruing or actions brought on or after the expira-  
24      tion of the 3-year period that begins on the date of the  
25      enactment of this Act.

1       (b) EXCEPTION FOR STATES REQUESTING EARLIER  
2 IMPLEMENTATION OF REFORMS.—

3           (1) APPLICATION.—A State may submit an ap-  
4 plication to the Secretary requesting the early imple-  
5 mentation of this Act with respect to claims or ac-  
6 tions brought in the State.

7           (2) DECISION BY SECRETARY.—The Secretary  
8 shall issue a response to a State’s application under  
9 paragraph (1) not later than 90 days after receiving  
10 the application. If the Secretary determines that the  
11 State meets the requirements of this Act at the time  
12 of submitting its application, the Secretary shall ap-  
13 prove the State’s application, and this Act shall  
14 apply with respect to actions brought in the State on  
15 or after the expiration of the 90-day period that be-  
16 gins on the date the Secretary issues the response.  
17 If the Secretary denies the State’s application, the  
18 Secretary shall provide the State with a written ex-  
19 planation of the grounds for the decision.

1                   **TITLE II—HEALTH CARE**  
2                   **LIABILITY REFORM**  
3                   **Subtitle A—Reform Described**

4   **SEC. 201. REQUIREMENT FOR INITIAL RESOLUTION OF AC-**  
5                   **TION THROUGH ALTERNATIVE DISPUTE RES-**  
6                   **OLUTION.**

7           (a) IN GENERAL.—

8               (1) STATE CASES.—A health care liability ac-  
9           tion may not be brought in any State court during  
10          a calendar year unless the health care liability claim  
11          that is the subject of the action has been initially re-  
12          solved under an alternative dispute resolution system  
13          certified for the year by the Secretary under section  
14          212(a), or, in the case of a State in which such a  
15          system is not in effect for the year, under the alter-  
16          native Federal system established under section  
17          212(b).

18           (2) FEDERAL DIVERSITY ACTIONS.—A health  
19          care liability action may not be brought in any Fed-  
20          eral court under section 1332 of title 28, United  
21          States Code, during a calendar year unless the  
22          health care liability claim that is the subject of the  
23          action has been initially resolved under the alter-  
24          native dispute resolution system referred to in para-

graph (1) that applied in the State whose law applies in such action.

(3) CLAIMS AGAINST UNITED STATES.—

(A) ESTABLISHMENT OF PROCESS FOR CLAIMS.—The Attorney General shall establish an alternative dispute resolution process for the resolution of tort claims consisting of health care liability claims brought against the United States under chapter 171 of title 28, United States Code. Under such process, the resolution of a claim shall occur after the completion of the administrative claim process applicable to the claim under section 2675 of such title.

(B) REQUIREMENT FOR INITIAL RESOLUTION UNDER PROCESS.—A health care liability action based on a health care liability claim described in subparagraph (A) may not be brought in any Federal court unless the claim has been initially resolved under the alternative dispute resolution process established by the Attorney General under such subparagraph.

(b) INITIAL RESOLUTION OF CLAIMS UNDER ADR.—For purposes of subsection (a), an action is “initially resolved” under an alternative dispute resolution system if—

1 (1) the ADR reaches a decision on whether the  
2 defendant is liable to the plaintiff for damages; and

3 (2) if the ADR determines that the defendant  
4 is liable, the ADR reaches a decision on the amount  
5 of damages assessed against the defendant.

6 (c) PROCEDURES FOR FILING ACTIONS.—

7 (1) NOTICE OF INTENT TO CONTEST DECISION.—Not later than 60 days after a decision is is-  
8 sued with respect to a health care liability claim  
9 under an alternative dispute resolution system, each  
10 party affected by the decision shall submit a sealed  
11 statement to a court of competent jurisdiction indi-  
12 cating whether or not the party intends to contest  
13 the decision.  
14

15 (2) DEADLINE FOR FILING ACTION.—A health  
16 care liability action may not be brought by a party  
17 unless—

18 (A) the party has filed the notice of intent  
19 required by paragraph (1); and

20 (B) the party files the action in a court of  
21 competent jurisdiction not later than 90 days  
22 after the decision resolving the health care li-  
23 ability claim that is the subject of the action is  
24 issued under the applicable alternative dispute  
25 resolution system.

1 (3) COURT OF COMPETENT JURISDICTION.—

2 For purposes of this subsection, the term “court of  
3 competent jurisdiction” means—

4 (A) with respect to actions filed in a State  
5 court, the appropriate State trial court; and

6 (B) with respect to actions filed in a Fed-  
7 eral court, the appropriate United States dis-  
8 trict court.

9 (d) LEGAL EFFECT OF UNCONTESTED ADR DECISION.—  
10 The decision reached under an alternative dispute  
11 resolution system shall, for purposes of enforcement by a  
12 court of competent jurisdiction, have the same status in  
13 the court as the verdict of a health care liability action  
14 adjudicated in a State or Federal trial court. The previous  
15 sentence shall not apply to a decision that is contested  
16 by a party affected by the decision pursuant to subsection  
17 (c)(1).

18 **SEC. 202. STATUTE OF LIMITATIONS.**

19 (a) GENERAL STATUTE OF LIMITATIONS.—No health  
20 care liability claim or action may be commenced later than  
21 one year after the plaintiff discovers, or through the use  
22 of reasonable diligence should have discovered, the injury.  
23 In no event shall a health care liability claim or action  
24 be permitted to be filed later than 3 years after the date  
25 of the injury. Such time limitation may be tolled upon

1 proof of the presence of a foreign object, exclusive of infec-  
2 tious agents, which has no therapeutic or diagnostic pur-  
3 pose or effect in the person of the injured plaintiff.

4 (b) MINORS UNDER THE AGE OF 6.—In the case of  
5 an alleged injury sustained by a minor before the age of  
6 6, no health care liability claim or action may be com-  
7 menced by or on behalf of the minor later than (1) 3 years  
8 from the date of injury or (2) the date on which the minor  
9 attains the age of 8, whichever provides a longer period.  
10 Such limitation may be tolled upon proof of the presence  
11 of a foreign object, exclusive of infectious agents, which  
12 has no therapeutic or diagnostic purpose or effect in the  
13 person of the injured plaintiff.

14 **SEC. 203. ATTORNEYS' FEES.**

15 (a) LIMITATION ON CONTINGENCY FEES.—An attor-  
16 ney shall not contract for or collect a contingency fee for  
17 representing a claimant in a health care liability action  
18 in excess of the following:

19 (1) 25 percent of the first \$100,000 (or portion  
20 thereof) recovered by the claimant.

21 (2) 20 percent of the next \$150,000 (or portion  
22 thereof) recovered by the claimant.

23 (3) 15 percent of the next \$250,000 (or portion  
24 thereof) recovered by the claimant.

1           (4) 10 percent of any amount in excess of  
2       \$500,000 recovered by the claimant.

3       (b) REQUIRING PARTY CONTESTING ADR RULING  
4 TO PAY ATTORNEY'S FEES AND OTHER COSTS.—

5           (1) IN GENERAL.—The court in a health care  
6       liability action shall require the party that (pursuant  
7       to section 201(c)(1)) contested the ruling of the al-  
8       ternative dispute resolution system with respect to  
9       the health care liability claim that is the subject of  
10      the action to pay to the opposing party the costs in-  
11      curred by the opposing party under the action, in-  
12      cluding attorney's fees, fees paid to expert witnesses,  
13      and other litigation expenses (but not including  
14      court costs, filing fees, or other expenses paid di-  
15      rectly by the party to the court, or any fees or costs  
16      associated with the resolution of the claim under the  
17      alternative dispute resolution system), but only if—

18           (A) in the case of an action in which the  
19           party that contested the ruling is the claimant,  
20           the amount of damages awarded to the party  
21           under the action does not exceed the amount of  
22           damages awarded to the party under the ADR  
23           system by at least 10 percent; and

24           (B) in the case of an action in which the  
25           party that contested the ruling is the defendant,

1 the amount of damages assessed against the  
2 party under the action is not at least 10 per-  
3 cent less than the amount of damages assessed  
4 under the ADR system.

5 (2) EXCEPTIONS.—Paragraph (1) shall not  
6 apply if—

7 (A) the party contesting the ruling made  
8 under the previous alternative dispute resolu-  
9 tion system shows that—

10 (i) the ruling was procured by corrup-  
11 tion, fraud, or undue means,

12 (ii) there was partiality or corruption  
13 under the system,

14 (iii) there was other misconduct under  
15 the system that materially prejudiced the  
16 party's rights, or

17 (iv) the ruling was based on an error  
18 of law;

19 (B) the party contesting the ruling made  
20 under the alternative dispute resolution system  
21 presents new evidence before the trier of fact  
22 that was not available for presentation under  
23 the ADR system;

24 (C) the health care liability action raised a  
25 novel issue of law; or

1 (D) the court finds that the application of  
2 such paragraph to a party would constitute an  
3 undue hardship, and issues an order waiving or  
4 modifying the application of such paragraph  
5 that specifies the grounds for the court's deci-  
6 sion.

7 (3) REQUIREMENT FOR PERFORMANCE  
8 BOND.—The court in a health care liability action  
9 shall require the party that (pursuant to section  
10 201(c)(1)) contested the ruling of the alternative  
11 dispute resolution system with respect to the health  
12 care liability claim that is the subject of the action  
13 to post a performance bond (in such amount and  
14 consisting of such funds and assets as the court de-  
15 termines to be appropriate), except that the court  
16 may waive the application of such requirement to a  
17 party if the court determines that the posting of  
18 such a bond is not necessary to ensure that the  
19 party shall meet the requirements of this subsection  
20 to pay the opposing party the costs incurred by the  
21 opposing party under the action.

22 (4) LIMIT ON ATTORNEYS' FEES PAID.—Attor-  
23 neys' fees that are required to be paid under para-  
24 graph (1) by the contesting party shall not exceed  
25 the amount of the attorneys' fees incurred by the

1       contesting party in the action. If the attorneys' fees  
2       of the contesting party are based on a contingency  
3       fee agreement, the amount of attorneys' fees for  
4       purposes of the preceding sentence shall not exceed  
5       the reasonable value of those services.

6           (5) RECORDS.—In order to receive attorneys'  
7       fees under paragraph (1), counsel of record in the  
8       health care liability action involved shall maintain  
9       accurate, complete records of hours worked on the  
10      action, regardless of the fee arrangement with the  
11      client involved.

12       (c) CALCULATION OF PERIODIC PAYMENTS.—If peri-  
13      odic payments are awarded to the claimant pursuant to  
14      section 204(b), the court shall place a total value on these  
15      payments based upon the projected life expectancy of the  
16      claimant and include this amount in computing the total  
17      award from which attorneys' fees are calculated under  
18      subsection (a).

19       (d) EFFECT OF FAILURE TO COMPLY.—Failure to  
20      comply with this section by an attorney at law shall be  
21      grounds for professional discipline by the appropriate  
22      State agency responsible for the conduct of disciplinary  
23      actions against attorneys-at-law.

24       (e) DEFINITIONS.—For purposes of this section—

1           (1) the term “contingency fee” means any fee  
2           for professional legal services which is in whole or in  
3           part contingent upon the recovery of any amount of  
4           damages, whether through judgment or settlement;  
5           and

6           (2) the term “recovered” means the net sum re-  
7           covered after deducting any disbursements or costs  
8           incurred in connection with prosecution or settle-  
9           ment of the claim, except that costs of medical care  
10          incurred by the claimant and the attorney’s office  
11          overhead costs or charges shall not be deductible dis-  
12          bursements under this paragraph.

13 **SEC. 204. CALCULATION AND PAYMENT OF DAMAGES.**

14          (a) **LIMITATION ON NONECONOMIC DAMAGES.**—The  
15          total amount of noneconomic damages that may be award-  
16          ed to a claimant for losses resulting from the injury which  
17          is the subject of a health care liability action may not ex-  
18          ceed \$250,000, regardless of the number of parties against  
19          whom the action is brought or the number of actions  
20          brought with respect to the injury.

21          (b) **PERIODIC PAYMENTS FOR FUTURE LOSSES.**—If  
22          more than \$50,000 in damages for expenses to be incurred  
23          in the future is awarded to the claimant in a health care  
24          liability action, the court shall, at the request of either  
25          party, enter a judgment ordering such damages to be paid

1 on a periodic basis determined appropriate by the court  
2 (based upon projections of when such expenses are likely  
3 to be incurred).

4 (c) MANDATORY OFFSETS FOR DAMAGES PAID BY A  
5 COLLATERAL SOURCE.—The total amount of damages re-  
6 ceived by a claimant in a health care liability action shall  
7 be reduced by any other payment that has been or will  
8 be made to the individual to compensate the claimant for  
9 the injury that was the subject of the action, including  
10 payment under—

11 (1) Federal or State disability or sickness pro-  
12 grams;

13 (2) Federal, State, or private health insurance  
14 programs;

15 (3) private disability insurance programs;

16 (4) employer wage continuation programs; and

17 (5) any other source of payment intended to  
18 compensate the claimant for such injury.

19 (d) TREATMENT OF PUNITIVE DAMAGES.—

20 (1) IN GENERAL.—Punitive damages may, if  
21 otherwise permitted by applicable law, be awarded in  
22 any civil actions subject to this Act only if it is prov-  
23 en by clear and convincing evidence that the defend-  
24 ant intended to injure the claimant for a reason un-  
25 related to the provision of health care services, or

1       that the defendant understood the claimant was sub-  
2       stantially certain to suffer unnecessary injury, yet  
3       the defendant deliberately failed to avoid such in-  
4       jury. Punitive damages may not be awarded against  
5       a defendant, however, with respect to any claim  
6       where no judgment for compensatory damages (in-  
7       cluding nominal damages) is rendered against such  
8       defendant.

9               (2) LIMITATION CONCERNING CERTAIN MEDI-  
10       CAL PRODUCTS.—

11               (A) IN GENERAL.—Punitive damages shall  
12       not be awarded pursuant to this section against  
13       a manufacturer or distributor of a medical  
14       product which caused the claimant's harm  
15       where—

16               (i) such medical product was subject  
17       to premarket approval of review by the  
18       Food and Drug Administration under sec-  
19       tion 505, 506, 510, 515, or 520 of the  
20       Federal Food, Drug, and Cosmetic Act (21  
21       U.S.C. 355, 356, 360, 360e, or 360j) or  
22       section 351 of the Public Health Service  
23       Act (42 U.S.C. 262) with respect to the  
24       safety of the formulation or performance of  
25       the aspect of such medical product which

1 caused the claimant's harm or the ade-  
2 quacy of the packaging or labeling of such  
3 medical product, and, where required, such  
4 medical product was marketed in conform-  
5 ity with regulations of the Food and Drug  
6 Administration; or

7 (ii) the medical product is generally  
8 recognized as safe and effective pursuant  
9 to conditions established by the Food and  
10 Drug Administration and applicable regu-  
11 lations, including without limitations those  
12 related to packaging and labeling.

13 (B) EXCEPTIONS.—The provisions of sub-  
14 paragraph (A) shall not apply in any case in  
15 which—

16 (i) the defendant, before or after the  
17 grant of permission to market such medi-  
18 cal product, knowingly withheld from or  
19 misrepresented to the Food and Drug Ad-  
20 ministration required information that is  
21 material and relevant to the performance  
22 of such medical product and is casually re-  
23 lated to the harm which the claimant alleg-  
24 edly suffered; or

1 (ii) the defendant made an illegal pay-  
2 ment to an official of the Food and Drug  
3 Administration for the purpose of either  
4 securing or maintaining approval of such  
5 medical product.

6 (3) REQUIREMENTS FOR PLEADING OF PUNI-  
7 TIVE DAMAGES.—No demand for punitive damages  
8 shall be included in a claim or action for health care  
9 liability as initially filed. A court may allow a claim-  
10 ant to file an amended pleading for punitive dam-  
11 ages only upon motion by a claimant and after a  
12 finding by a court upon review of supporting and op-  
13 posing affidavits or after a hearing, that after weigh-  
14 ing the evidence the claimant has established by a  
15 substantial probability that the claimant will prevail  
16 on the claim for punitive damages. The court shall  
17 not grant a motion allowing the filing of an amended  
18 pleading that includes a claim for punitive damages  
19 if the motion for such an order is not filed within  
20 2 years after the complaint or initial pleading is filed  
21 or not less than 9 months before the date the matter  
22 is first set for trial, whichever is earlier.

23 (4) SEPARATE PROCEEDING.—At the request of  
24 any defendant in a health care liability action, the  
25 trier of fact shall consider in a separate proceeding

1 (1) whether punitive damages are to be awarded and  
2 the amount of such award, or (2) the amount of pu-  
3 nitive damages following a determination of punitive  
4 liability. If a separate proceeding is requested, evi-  
5 dence relevant only to the claim of punitive damages,  
6 as determined by applicable State law, shall be ad-  
7 missible in any proceeding to determine whether  
8 compensatory damages are to be awarded.

9 (5) DETERMINING AMOUNT OF PUNITIVE DAM-  
10 AGES.—

11 (A) FACTORS CONSIDERED.—In determin-  
12 ing the amount of punitive damages, the trier  
13 of fact shall consider only—

14 (i) the severity of the harm caused by  
15 the conduct of the defendant;

16 (ii) the duration of the conduct or any  
17 concealment of it by the defendant;

18 (iii) the profitability of the conduct to  
19 the defendant;

20 (iv) the number of products sold or  
21 medical procedures rendered for compensa-  
22 tion, as the case may be, by the defendant  
23 of the kind causing the harm complained  
24 of by the claimant;

1 (v) awards of punitive or exemplary  
2 damages to persons similarly situated to  
3 the claimant;

4 (vi) prospective awards of compen-  
5 satory damages to persons similarly situ-  
6 ated to the claimant;

7 (vii) any criminal imposed on the de-  
8 fendant as a result of the conduct com-  
9 plained of by the claimant; and

10 (viii) the amount of any civil fines as-  
11 sessed against the defendant as a result of  
12 the conduct complained of by the claimant.

13 (B) GENERAL LIMITATION.—In no event  
14 shall the amount of punitive damages awarded  
15 exceed 2 times the amount of compensatory  
16 damages awarded or \$250,000 whichever is  
17 greater. The jury shall not be informed of this  
18 limitation.

19 **SEC. 205. JOINT AND SEVERAL LIABILITY.**

20 A defendant may be held severally but not jointly lia-  
21 ble in a health care liability action. A person found liable  
22 for damages in any such action may be found liable, if  
23 at all, only for those damages directly attributable to the  
24 person's proportionate share of fault or responsibility for  
25 the injury, and may not be found liable for damages at-

1   tributable to the proportionate share of fault or respon-  
2   sibility of any other person (without regard to whether  
3   that person is a party to the action) for the injury, includ-  
4   ing any person bringing the action.

5   **SEC. 206. INJUNCTIVE RELIEF.**

6       Whenever any person has engaged or is about to en-  
7   gage in any conduct in violation of this subtitle, the appro-  
8   priate court may, upon application of an interested party,  
9   issue an injunction or other appropriate order restraining  
10  such conduct.

11  **SEC. 207. PERMITTING STATE PROFESSIONAL SOCIETIES**  
12                   **TO PARTICIPATE IN DISCIPLINARY ACTIVI-**  
13                   **TIES.**

14       (a) **ROLE OF PROFESSIONAL SOCIETIES.**—Notwith-  
15  standing any other provision of State or Federal law, a  
16  State agency responsible for the conduct of disciplinary  
17  actions for a type of health care practitioner may enter  
18  into agreements with State or county professional societies  
19  of such type of health care practitioner to permit such so-  
20  cieties to participate in the licensing of such health care  
21  practitioner, and to review any health care malpractice ac-  
22  tion, health care malpractice claim or allegation, or other  
23  information concerning the practice patterns of any such  
24  health care practitioner. Any such agreement shall comply  
25  with subsection (b).

1       (b) REQUIREMENTS OF AGREEMENTS.—Any agree-  
2   ment entered into under subsection (a) for licensing activi-  
3   ties or the review of any health care malpractice action,  
4   health care malpractice claim or allegation, or other infor-  
5   mation concerning the practice patterns of a health care  
6   practitioner shall provide that—

7           (1) the health care professional society conducts  
8       such activities or review as expeditiously as possible;

9           (2) after the completion of such review, such so-  
10   ciety shall report its findings to the State agency  
11   with which it entered into such agreement;

12          (3) the conduct of such activities or review and  
13   the reporting of such findings be conducted in a  
14   manner which assures the preservation of confiden-  
15   tiality of health care information and of the review  
16   process; and

17          (4) no individual affiliated with such society is  
18   liable for any damages or injury directly caused by  
19   the individual's actions in conducting such activities  
20   or review.

21       (c) AGREEMENTS NOT MANDATORY.—Nothing in  
22   this section may be construed to require a State to enter  
23   into agreements with societies described in subsection (a)  
24   to conduct the activities described in such subsection.

1 (d) EFFECTIVE DATE.—This section shall take effect  
2 2 years after the date of the enactment of this Act.

3 **Subtitle B—Requirements for State**  
4 **Alternative Dispute Resolution**  
5 **Systems (ADR)**

6 **SEC. 211. BASIC REQUIREMENTS.**

7 (a) IN GENERAL.—A State’s alternative dispute reso-  
8 lution system meets the requirements of this section if the  
9 system—

10 (1) applies to all health care liability claims  
11 under the jurisdiction of the courts of that State;

12 (2) requires that a written opinion resolving the  
13 dispute be issued not later than 6 months after the  
14 date by which each party against whom the claim is  
15 filed has received notice of the claim (other than in  
16 exceptional cases for which a longer period is re-  
17 quired for the issuance of such an opinion), and that  
18 the opinion contain—

19 (A) findings of fact relating to the dispute,  
20 and

21 (B) a description of the costs incurred in  
22 resolving the dispute under the system (includ-  
23 ing any fees paid to the individuals hearing and  
24 resolving the claim), together with an appro-

1           priate assessment of the costs against any of  
2           the parties;

3           (3) requires individuals who hear and resolve  
4           claims under the system to meet such qualifications  
5           as the State may require (in accordance with regula-  
6           tions of the Secretary);

7           (4) is approved by the State or by local govern-  
8           ments in the State;

9           (5) with respect to a State system that consists  
10          of multiple dispute resolution procedures—

11                (A) permits the parties to a dispute to se-  
12               lect the procedure to be used for the resolution  
13               of the dispute under the system, and

14               (B) if the parties do not agree on the pro-  
15               cedure to be used for the resolution of the dis-  
16               pute, assigns a particular procedure to the  
17               parties;

18          (6) provides for the transmittal to the State  
19          agency responsible for monitoring or disciplining  
20          health care professionals and health care providers  
21          of any findings made under the system that such a  
22          professional or provider committed malpractice, un-  
23          less, during the 90-day period beginning on the date  
24          the system resolves the claim against the profes-  
25          sional or provider, the professional or provider

1 brings an action contesting the decision made under  
 2 the system; and

3 (7) provides for the regular transmittal to the  
 4 Administrator for Health Care Policy and Research  
 5 of information on disputes resolved under the sys-  
 6 tem, in a manner that assures that the identity of  
 7 the parties to a dispute shall not be revealed.

8 (b) APPLICATION OF MALPRACTICE LIABILITY  
 9 STANDARDS TO ALTERNATIVE DISPUTE RESOLUTION.—  
 10 The provisions of subtitle A shall apply with respect to  
 11 claims brought under a State alternative dispute resolu-  
 12 tion system or the alternative Federal system in the same  
 13 manner as such provisions apply with respect to health  
 14 care liability actions brought in the State.

15 **SEC. 212. CERTIFICATION OF STATE SYSTEMS; APPLICABIL-**  
 16 **ITY OF ALTERNATIVE FEDERAL SYSTEM.**

17 (a) CERTIFICATION.—

18 (1) IN GENERAL.—Not later than October 1 of  
 19 each year (beginning with 1997), the Secretary, in  
 20 consultation with the Attorney General, shall deter-  
 21 mine whether a State's alternative dispute resolution  
 22 system meets the requirements of this subtitle for  
 23 the following calendar year.

24 (2) BASIS FOR CERTIFICATION.—The Secretary  
 25 shall certify a State's alternative dispute resolution

1 system under this subsection for a calendar year if  
2 the Secretary determines under paragraph (1) that  
3 the system meets the requirements of section 211.

4 (b) APPLICABILITY OF ALTERNATIVE FEDERAL SYS-  
5 TEM.—

6 (1) ESTABLISHMENT AND APPLICABILITY.—

7 Not later than October 1, 1997, the Secretary, in  
8 consultation with the Attorney General, shall estab-  
9 lish by rule an alternative Federal ADR system for  
10 the resolution of health care liability claims during  
11 a calendar year in States that do not have in effect  
12 an alternative dispute resolution system certified  
13 under subsection (a) for the year.

14 (2) REQUIREMENTS FOR SYSTEM.—Under the  
15 alternative Federal ADR system established under  
16 paragraph (1)—

17 (A) paragraphs (1), (2), (6), and (7) of  
18 section 211(a) shall apply to claims brought  
19 under the system;

20 (B) if the system provides for the resolu-  
21 tion of claims through arbitration, the claims  
22 brought under the system shall be heard and  
23 resolved by arbitrators appointed by the Sec-  
24 retary in consultation with the Attorney Gen-  
25 eral; and

1 (C) with respect to a State in which the  
2 system is in effect, the Secretary may (at the  
3 State's request) modify the system to take into  
4 account the existence of dispute resolution pro-  
5 cedures in the State that affect the resolution  
6 of health care liability claims.

7 (3) TREATMENT OF STATES WITH ALTER-  
8 NATIVE SYSTEM IN EFFECT.—If the alternative Fed-  
9 eral ADR system established under this subsection is  
10 applied with respect to a State for a calendar year—

11 (A) the State shall reimburse the United  
12 States (at such time and in such manner as the  
13 Secretary may require) for the costs incurred  
14 by the United States during the year as a result  
15 of the application of the system with respect to  
16 the State; and

17 (B) notwithstanding any other provision of  
18 law, no funds may be paid to the State (or to  
19 any unit of local government in the State) or to  
20 any entity in the State pursuant to the Public  
21 Health Service Act.

1 **SEC. 213. REPORTS ON IMPLEMENTATION AND EFFECTIVE-**  
2 **NESS OF ALTERNATIVE DISPUTE RESOLU-**  
3 **TION SYSTEMS.**

4 (a) IN GENERAL.—Not later than 5 years after the  
5 date of the enactment of this Act, the Secretary shall pre-  
6 pare and submit to the Congress a report describing and  
7 evaluating State alternative dispute resolution systems op-  
8 erated pursuant to this part and the alternative Federal  
9 system established under section 212(b).

10 (b) CONTENTS OF REPORT.—The Secretary shall in-  
11 clude in the report prepared and submitted under sub-  
12 section (a)—

13 (1) information on—

14 (A) the effect of the alternative dispute  
15 resolution systems on the cost of health care  
16 within each State,

17 (B) the impact of such systems on the ac-  
18 cess of individuals to health care within the  
19 State, and

20 (C) the effect of such systems on the qual-  
21 ity of health care provided within the State; and

22 (2) to the extent that such report does not pro-  
23 vide information on no-fault systems operated by  
24 States as alternative dispute resolution systems pur-  
25 suant to this part, an analysis of the feasibility and  
26 desirability of establishing a system under which

- 1 health care liability claims shall be resolved on a no-
- 2 fault basis.



HR 1195 IH—2

HR 1195 IH—3