

105TH CONGRESS  
1ST SESSION

# S. 79

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.

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## IN THE SENATE OF THE UNITED STATES

JANUARY 21, 1997

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

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## 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 1997”.

### 6 **SEC. 2. TABLE OF CONTENTS.**

7 The table of contents is as follows:

Sec. 1. Short title.

Sec. 2. Table of contents.

## TITLE I—PUNITIVE DAMAGES REFORM

Sec. 101. Definitions.

- Sec. 102. Multiple punitive damages fairness.  
 Sec. 103. Uniform standards for award of punitive damages.  
 Sec. 104. Effect on other law.

## TITLE II—JOINT AND SEVERAL LIABILITY REFORM

- Sec. 201. Several liability for noneconomic loss.

## TITLE III—CIVIL PROCEDURAL REFORM

- Sec. 301. Trial lawyer accountability.  
 Sec. 302. Honesty in evidence.  
 Sec. 303. Fair shifting of costs and reasonable attorney fees.

## TITLE IV—HEALTH CARE LIABILITY REFORM

- Sec. 401. Definitions.  
 Sec. 402. Limitation on noneconomic damages in health care liability actions.  
 Sec. 403. Statute of limitations.  
 Sec. 404. Periodic payment of future damages.  
 Sec. 405. State no-fault demonstration projects.

## TITLE V—MISCELLANEOUS PROVISIONS

- Sec. 501. Federal cause of action precluded.  
 Sec. 502. Effective date.

# 1      **TITLE I—PUNITIVE DAMAGES** 2                                      **REFORM**

## 3      **SEC. 101. DEFINITIONS.**

4            In this title:

- 5                    (1) CLAIMANT.—The term “claimant” means  
 6            any person who brings a civil action and any person  
 7            on whose behalf such an action is brought. If such  
 8            an action is brought through or on behalf of an es-  
 9            tate, the term includes the claimant’s decedent. If  
 10           such action is brought through or on behalf of a  
 11           minor or incompetent, the term includes the claim-  
 12           ant’s legal guardian.

1           (2) CLEAR AND CONVINCING EVIDENCE.—The  
 2       term “clear and convincing evidence” is that meas-  
 3       ure or degree of proof that will produce in the mind  
 4       of the trier of fact a firm belief or conviction as to  
 5       the truth of the allegations sought to be established.  
 6       The level of proof required to satisfy such standard  
 7       is more than that required under preponderance of  
 8       the evidence, but less than that required for proof  
 9       beyond a reasonable doubt.

10          (3) HARM.—The term “harm” means any le-  
 11       gally cognizable wrong or injury for which punitive  
 12       damages may be imposed.

13          (4) ECONOMIC DAMAGES.—The term “economic  
 14       damages” means objectively verifiable monetary  
 15       losses including medical expenses, loss of earnings,  
 16       burial costs, loss of use of property, costs of repair  
 17       or replacement, costs of obtaining substitute domes-  
 18       tic services, loss of employment and loss of business  
 19       or employment opportunities, to the extent such re-  
 20       covery is allowed under applicable Federal or State  
 21       law.

22          (5) NOMINAL DAMAGES.—The term “nominal  
 23       damages” means damages less than or equal to  
 24       \$500.

1           (6) PERSON.—The term “person” means any  
 2           individual, corporation, company, association, firm,  
 3           partnership, society, joint stock company, or any  
 4           other entity (including any governmental entity).

5           (7) PUNITIVE DAMAGES.—The term “punitive  
 6           damages” means damages awarded against any per-  
 7           son or entity to punish or deter such person or en-  
 8           tity, or others, from engaging in similar behavior in  
 9           the future.

10          (8) SPECIFIC FINDINGS OF FACT.—The term  
 11          “specific findings of fact” means findings in written  
 12          form focusing on specific behavior of a defendant.

13          (9) STATE.—The term “State” means any  
 14          State of the United States, the District of Columbia,  
 15          Puerto Rico, the Northern Mariana Islands, the Vir-  
 16          gin Islands, Guam, American Samoa, and any other  
 17          territory or possession of the United States, or any  
 18          political subdivision thereof.

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

20          (a) FINDINGS.—Congress finds that—

21               (1) multiple or repetitive imposition of punitive  
 22               damages for harms arising out of a single act or  
 23               course of conduct may deprive a defendant of all the  
 24               assets or insurance coverage of the defendant, and

1       may endanger the ability of future claimants to re-  
2       ceive compensation for basic out-of-pocket expenses  
3       and damages for pain and suffering;

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

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

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

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

22              (5) multiple imposition of punitive damages  
23      may be a significant obstacle to comprehensive set-  
24      tlement negotiations in repetitive litigation;

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

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

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

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

22          (c) CIRCUMSTANCES FOR AWARD.—If the court de-  
23 termines in a pretrial hearing that the claimant will offer  
24 new and substantial evidence of previously undiscovered,  
25 additional wrongful behavior on the part of the defendant,

1 other than the injury to the claimant, the court may award  
 2 punitive damages in accordance with subsection (d).

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

5 (1) make specific findings of fact on the record  
 6 to support the award;

7 (2) reduce the amount of the punitive portion  
 8 of the damage award by the sum of the amounts of  
 9 punitive damages previously paid by the defendant  
 10 in prior actions based on the same act or course of  
 11 conduct; and

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

14 (e) APPLICABILITY AND PREEMPTION.—

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

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

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

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

11 **SEC. 103. UNIFORM STANDARDS FOR AWARD OF PUNITIVE**  
 12 **DAMAGES.**

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

14           (1) punitive damages are imposed pursuant to  
 15       vague, subjective, elastic and often retrospective  
 16       standards of liability, and these standards vary from  
 17       State to State;

18           (2) the magnitude and unpredictability of puni-  
 19       tive damage awards in civil actions have increased  
 20       dramatically over the last 30 years, unreasonably in-  
 21       flating the cost of settling litigation, and discourag-  
 22       ing socially useful and productive activity;



1           (3) the Supreme Court of the United States has  
 2           recognized that a punitive damage award can be un-  
 3           constitutional if the award is grossly excessive in re-  
 4           lation to the government’s legitimate interest in the  
 5           punishment and deterrence of unlawful conduct; and

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

12          (b) GENERAL RULE.—

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

20                   (A) specifically intended to cause harm; or

21                   (B) carried out with conscious, flagrant  
 22          disregard for the rights or safety of other  
 23          persons.

24           (2) PROHIBITION OF PUNITIVE DAMAGES.—Pu-  
 25          nitive damages may not be awarded in the absence

1 of an award of compensatory damages exceeding  
2 nominal damages.

3 (c) LIMITATION CONCERNING CERTAIN DRUGS AND  
4 MEDICAL DEVICES.—

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

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

1 (B) the drug or device is generally recog-  
2 nized as safe and effective pursuant to condi-  
3 tions established by the Food and Drug Admin-  
4 istration and applicable regulations, including  
5 packaging and labeling regulations.

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

8 (A) the defendant, before or after pre-  
9 market approval of a drug or device, withheld  
10 from or misrepresented to the Food and Drug  
11 Administration or any other agency or official  
12 of the Federal Government required informa-  
13 tion that is material and relevant to the per-  
14 formance of such drug or device and is causally  
15 related to the harm which the claimant alleg-  
16 edly suffered; or

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

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

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

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

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

18 (2) ADMISSIBILITY OF EVIDENCE.—If a sepa-  
 19 rate proceeding is requested, evidence relevant only  
 20 to the claim of punitive damages, as determined by  
 21 applicable State law, shall be inadmissible in any  
 22 proceeding to determine whether compensatory dam-  
 23 ages are to be awarded. Evidence admissible in the  
 24 separate proceeding for punitive damages may in-  
 25 clude evidence of the defendant's profits, if any,

1 from its alleged wrongdoing, but shall not include  
2 evidence of the defendant's overall wealth.

3 (f) PROPORTIONAL AWARDS.—

4 (1) IN GENERAL.—The amount of punitive  
5 damages that may be awarded to a claimant in any  
6 civil action subject to this title shall not exceed 3  
7 times the amount of damages awarded to the claim-  
8 ant for the economic damages, or \$250,000, which-  
9 ever is greater. This provision shall be applied by the  
10 court and shall not be disclosed to the jury.

11 (2) SPECIAL RULE.—

12 (A) LIMITATION.—Notwithstanding para-  
13 graph (1), in any action described in such para-  
14 graph against an individual whose net worth  
15 does not exceed \$500,000 or against an owner  
16 of an unincorporated business, or any partner-  
17 ship, corporation, association, unit of local gov-  
18 ernment, or organization which has fewer than  
19 25 full-time employees, the punitive damages  
20 shall not exceed the lesser of—

21 (i) 3 times the sum of the amount  
22 awarded to the claimant for economic loss;

23 or

24 (ii) \$250,000.

1 (B) APPLICATION TO CORPORATIONS.—

2 For the purpose of determining the applicability  
3 of this paragraph to a corporation, the number  
4 of employees of a subsidiary or wholly owned  
5 corporation shall include all employees of a par-  
6 ent or sister corporation.

7 (g) APPLICABILITY AND PREEMPTION.—

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

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

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

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

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

22 Nothing in this title shall be construed to—

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

25 (2) supersede any Federal law;

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

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

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

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

13          (7) create a cause of action for punitive  
14          damages.

## 15       **TITLE II—JOINT AND SEVERAL** 16       **LIABILITY REFORM**

### 17       **SEC. 201. SEVERAL LIABILITY FOR NONECONOMIC LOSS.**

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

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

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

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

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

17          (b) DEFINITIONS.—In this section

18           (1) ECONOMIC DAMAGES.—The term “economic  
 19           damages” means objectively verifiable monetary  
 20           losses including medical expenses, loss of earnings,  
 21           burial costs, loss of use of property, costs of repair  
 22           or replacement, costs of obtaining substitute domes-  
 23           tic services, loss of employment and loss of business  
 24           or employment opportunities.



1           (2) NONECONOMIC DAMAGES.—The term “non-  
2       economic damages” means subjective, nonmonetary  
3       losses including, but not limited to, pain, suffering,  
4       inconvenience, mental suffering, emotional distress,  
5       loss of society and companionship, loss of consor-  
6       tium, injury to reputation and humiliation.

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

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

21      (e) APPLICABILITY AND PREEMPTION.—This section  
22      shall not preempt or supersede any Federal or State law  
23      to the extent that such law would further limit the applica-  
24      tion of joint liability to any kind of damages.

1     **TITLE III—CIVIL PROCEDURAL**  
2                     **REFORM**

3     **SEC. 301. TRIAL LAWYER ACCOUNTABILITY.**

4             (a) SENSE OF THE CONGRESS.—It is the sense of the  
5 Congress that each State should require, under penalty  
6 of law, each attorney admitted to practice law in such  
7 State to disclose in writing, to any client with whom such  
8 attorney has entered into a contingency fee agreement—

9                 (1) the actual services performed for such client  
10             in connection with such agreement;

11                (2) the precise number of hours actually ex-  
12             pended by such attorney in the performance of such  
13             services; and

14                (3) whether a referral fee was paid to any other  
15             person.

16             (b) STUDY AND DEVELOPMENT OF MODEL LEGISLA-  
17     TION.—The Attorney General of the United States shall—

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

1           (2) develop model State legislation—

2                   (A) containing the requirements described  
3           in subsection (a); and

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

7                   (i) the risk that individual clients may  
8                   end up in an unduly weak bargaining posi-  
9                   tion where they, for lack of available funds  
10                  up front, are unable to pay an hourly rate  
11                  and shall enter into a contingent fee agree-  
12                  ment if they are to obtain legal services;

13                  (ii) the danger that such clients may  
14                  ultimately pay what are effectively fla-  
15                  grantly excessive hourly rates;

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

23                  (iv) the possibility that similar bene-  
24                  ficial effects may accrue from requiring, in

1 contingent fee cases, pre-agreement disclo-  
2 sure of an attorney's best estimate of the  
3 hours that a case will require if it proceeds  
4 to various stages, the likelihood and  
5 amount of an award expected at various  
6 stages, and the attorney's hourly rate for  
7 the legal services required;

8 (v) the further possibility that other  
9 disclosure requirements or restrictions on  
10 contingent fee awards may enhance civil  
11 justice; and

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

21 (3) prepare and disseminate to State authorities  
22 the findings made and model legislation developed as  
23 a result of the study and evaluation.

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

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

6 (2) recommendations based on the findings on  
 7 the need for and appropriateness of further action  
 8 by the Federal Government.

9 **SEC. 302. HONESTY IN EVIDENCE.**

10 Rule 702 of the Federal Rules of Evidence is amend-  
 11 ed—

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

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

15 “(b) ADEQUATE BASIS FOR OPINION.—

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

20 “(A) is based on scientifically valid  
 21 reasoning;

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

1           “(C) the techniques, methods, and theories  
2           used to formulate that opinion are generally ac-  
3           cepted within the relevant scientific, medical, or  
4           technical field.

5           “(2) In determining whether an opinion satis-  
6           fies conditions in paragraph (1), the court shall  
7           consider—

8           “(A) whether the opinion and any theory  
9           on which it is based have been experimentally  
10          tested;

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

13          “(C) whether the theory or techniques sup-  
14          porting the opinion are sufficiently reliable and  
15          valid to warrant their use as support for the  
16          proffered opinion.

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

23          “(d) DISQUALIFICATION.—Testimony by a witness  
24          who is qualified as described in subsection (a) is inadmis-  
25          sible in evidence if such witness is entitled to receive any

1 compensation contingent on the legal disposition of any  
 2 claim with respect to which such testimony is offered.”.

3 **SEC. 303. FAIR SHIFTING OF COSTS AND REASONABLE AT-**  
 4 **TORNEY FEES.**

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

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

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

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

24 “(c) DETERMINATION OF FINAL JUDGMENTS.—If  
 25 the judgment finally obtained is not more favorable to the

1 offeree than the offer, then the offeree shall pay the actual  
 2 costs and reasonable attorney fees incurred after the expi-  
 3 ration of the time for accepting the offer, but only to the  
 4 extent necessary to make the offeror whole for actual costs  
 5 and reasonable attorney fees incurred as a consequence  
 6 of the rejection of the offer. When comparing the amount  
 7 of any offer of settlement to the amount of a final judg-  
 8 ment actually awarded, any amount of the final judgment  
 9 representing interest subsequent to the date of the offer  
 10 in settlement shall not be considered.

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

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

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

18 “(B) juror food and lodging while the jury is  
 19 kept together during trial and after the jury retires  
 20 for deliberation;

21 “(C) taking, videotaping, and transcribing nec-  
 22 essary depositions including an original and one  
 23 copy of those taken by the claimant and one copy of  
 24 depositions taken by the party against whom costs



1 are allowed, and travel expenses to attend  
2 depositions;

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

5 “(E) expenses of attachment;

6 “(F) premiums on necessary surety bonds;

7 “(G) ordinary witness fees;

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

10 “(I) transcripts of court proceedings;

11 “(J) attorney fees, when authorized by contract  
12 or law;

13 “(K) court reporters’ fees;

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

17 “(M) any other item that is required to be  
18 awarded to the prevailing party pursuant to statute  
19 as an incident to prevailing in the action at trial or  
20 on appeal.

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

23 “(A) investigation expenses in preparing the  
24 case for trial;

1           “(B) postage, telephone, facsimile, and  
2 photocopying charges, except for exhibits;

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

5           “(D) transcripts of court proceedings not or-  
6 dered by the court.

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

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

22          “(g) NONMONETARY AWARDS.—If the judgment ob-  
23 tained includes nonmonetary relief, a determination that  
24 it is more favorable to the offeree than was the offer shall

1 be made only when the terms of the offer included such  
2 nonmonetary relief.

3 “(h) REDUCTION OF AWARD TO AVOID UNDUE  
4 HARDSHIP.—A court may reduce an award of costs and  
5 reasonable attorney fees by up to 50 percent of the award  
6 if the court finds special circumstances that make a full  
7 award of attorney fees and costs unjust.

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

15 “(j) APPLICABILITY.—This rule shall not apply to  
16 class and derivative actions under rules 23, 23.1, and  
17 23.2.”.

18 (b) APPLICATION.—The provisions of rule 68 of the  
19 Federal Rules of Civil Procedure (as amended by sub-  
20 section (a) of this section) shall supersede any statute  
21 that—

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

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

## **TITLE IV—HEALTH CARE LIABILITY REFORM**

### **SEC. 401. DEFINITIONS.**

In this title:

(1) CLAIMANT.—The term “claimant” means any person who asserts a health care liability claim or who files a health care liability action, including a person who asserts or claims a right to legal or equitable contribution, indemnity or subrogation, arising out of a health care liability claim or action, and any person on whose behalf such a claim is asserted or such an action is brought, whether deceased, incompetent, or a minor.

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

(3) HEALTH CARE LIABILITY ACTION.—The term “health care liability action” means a civil action brought in a Federal or State court, against a health care provider, an entity which is obligated to provide or pay for health benefits under any health plan (including any person or entity acting under a contract or arrangement to provide or administer any health benefit), or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical

product, in which the claimant alleges a claim (including third party claims, cross claims, counter claims, or distribution claims) based upon the provision of (or the failure to provide or pay for) health care services or the use of a medical product, regardless of the theory of liability on which the claim is based, or the number of plaintiffs, or defendants or causes of action.

**SEC. 402. LIMITATION ON NONECONOMIC DAMAGES IN HEALTH CARE LIABILITY ACTIONS.**

(a) MAXIMUM AWARD OF NONECONOMIC DAMAGES.—

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

(2) MAXIMUM AMOUNT.—The maximum amount described in this paragraph is \$250,000, regardless of—

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

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

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

7 (4) REDUCTION IN JURY AWARD.—

8 (A) IN GENERAL.—With respect to a  
 9 health care liability action heard by a jury, the  
 10 jury shall not be informed about the limitation  
 11 on noneconomic damages, but any award for  
 12 noneconomic damages in excess of \$250,000  
 13 shall be reduced either before the entry of judg-  
 14 ment or by amendment of the judgment after  
 15 entry.

16 (B) ORDER OF REDUCTIONS.—(i) An  
 17 award of damages for noneconomic losses in ex-  
 18 cess of \$250,000 shall be reduced to \$250,000  
 19 before accounting for any other reduction in  
 20 damages required by law.

21 (ii) If separate awards of damages for past  
 22 and future noneconomic damages are rendered  
 23 and the combined award exceeds \$250,000, the  
 24 award of damages for future noneconomic  
 25 losses shall be reduced first.

1 (b) APPLICABILITY.—This section—

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

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

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

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

14 **SEC. 403. STATUTE OF LIMITATIONS.**

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

22 (b) EXCEPTION FOR MINORS.—In the case of an al-  
23 leged injury suffered by a minor who has not attained 6  
24 years of age, no health care liability action may be initi-  
25 ated after the expiration of the 2-year period that begins

1 on the date on which the alleged injury and its cause was  
 2 or should reasonably have been discovered, but in no event  
 3 later than 6 years after the date of the alleged occurrence  
 4 of the injury and its cause or the date on which the minor  
 5 attains 12 years of age, whichever is later.

6 **SEC. 404. PERIODIC PAYMENT OF FUTURE DAMAGES.**

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

17 (b) COURT DETERMINED PERIODIC PAYMENT OF  
 18 FUTURE DAMAGES.—If the parties to health care liability  
 19 action described in subsection (a) fail to agree on the  
 20 terms and amount of payments of future damages pursu-  
 21 ant to such subsection, a defendant may elect to pay the  
 22 future damages on a periodic basis instead of a single  
 23 lump-sum payment. If the defendant elects to make peri-  
 24 odic payments, the periods for such payments and the  
 25 amount of such payments shall be determined by the



1 court, based upon projections of such future losses and  
2 costs. For purposes of determining the total amount of  
3 future damages, the court shall reduce the amounts to be  
4 paid to present value for purposes of determining the  
5 funding obligation of the individual required to make such  
6 periodic payments.

7 (c) CONDITIONS FOR THE TERMINATION OF FUTURE  
8 DAMAGES PAYMENTS.—

9 (1) IN GENERAL.—Except as provided in para-  
10 graph (2), periodic payments for future damages  
11 shall terminate in the event of the death of the  
12 claimant or in the event of the claimant's recovery  
13 or return to work.

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

1 **SEC. 405. STATE NO-FAULT DEMONSTRATION PROJECTS.**

2 (a) DEFINITIONS.—In this section:

3 (1) MEDICAL ADVERSE EVENT.—The term  
4 “medical adverse event” means an injury that is the  
5 result of medical management as opposed to a dis-  
6 ease process that creates disability lasting at least 1  
7 month after discharge, or that prolongs a hos-  
8 pitalization for more than 1 month, and for which  
9 compensation is available under a no-fault medical  
10 liability system established under this section.

11 (2) NO-FAULT MEDICAL LIABILITY SYSTEM.—  
12 The terms “no-fault medical liability system” and  
13 “system” mean a system established by a State con-  
14 ducting a demonstration project under this section  
15 that replaces the common law tort liability system  
16 for medical injuries with respect to certain qualified  
17 health care organizations and qualified insurers and  
18 which meets the requirements of this section.

19 (3) PROVIDER.—The term “provider” means  
20 physician, physician assistant, or other individual  
21 furnishing health care services in affiliation with a  
22 qualified health care organization.

1           (4) QUALIFIED HEALTH CARE ORGANIZA-  
2           TION.—The term “qualified health care organiza-  
3           tion” means a hospital, a hospital system, a man-  
4           aged care network, or other entity determined appro-  
5           priate by the Secretary that elects in a State con-  
6           ducting a demonstration project under this section  
7           to participate in a no-fault medical liability system  
8           and meets the requirements of this section.

9           (5) QUALIFIED INSURER.—The term “qualified  
10          insurer” means a health care malpractice insurer,  
11          including a self-insured qualified health care organi-  
12          zation, that elects in a State conducting a dem-  
13          onstration project under this section to participate  
14          in a no-fault medical liability system and meets the  
15          requirements of this section.

16          (b) ESTABLISHMENT.—The Secretary of Health and  
17          Human Services (hereafter in this section referred to as  
18          the “Secretary”) shall award grants to 1 or more States  
19          to establish demonstration projects under which the State  
20          establishes a no-fault medical liability system in accord-  
21          ance with this section.

22          (c) APPLICATIONS BY STATES.—

23                (1) IN GENERAL.—To be eligible to receive a  
24                grant under this section, a State shall prepare and  
25                submit to the Secretary an application at such time,

1 in such manner, and containing such information as  
2 the Secretary may require, including the following  
3 information:

4 (A) Identification of the State agency or  
5 agencies that will administer the no-fault medi-  
6 cal liability system and be the grant recipient of  
7 funds for the State.

8 (B) Identification of each qualified health  
9 care organization selected by the State to par-  
10 ticipate in the system, including—

11 (i) the location of each organization;

12 (ii) the number of patients generally  
13 served by each organization;

14 (iii) the types of patients generally  
15 served by each organization;

16 (iv) an analysis of any characteristics  
17 of each organization that makes the orga-  
18 nization appropriate for participation in  
19 the system;

20 (v) whether the organization is self-in-  
21 sured for malpractice liability; and

22 (vi) such other information as the  
23 Secretary determines appropriate.

1 (C) Identification of each qualified insurer  
2 selected by the State to participate in the sys-  
3 tem including—

4 (i) a schedule of the malpractice in-  
5 surance premiums generally charged by  
6 each insurer under the common law tort li-  
7 ability system; and

8 (ii) such other information as the Sec-  
9 retary determines appropriate.

10 (D) A description of the procedure under  
11 which qualified health care organizations and  
12 insurers elect to participate in the system.

13 (E) A description of the system established  
14 by the State to assure compliance with the re-  
15 quirements of this section by each qualified  
16 health care organization and insurer.

17 (F) A description of how funds granted to  
18 a State will be expended and a description of  
19 fiscal control, accounting, and audit procedures  
20 to assure the proper disbursement of and ac-  
21 counting for funds received under this section.

22 (G) A description of procedures for the  
23 preparation and submission to the State of an

1 annual report by each qualified health care or-  
2 ganization and qualified insurer participating in  
3 a system that shall include—

4 (i) a description of activities con-  
5 ducted under the system during the year;  
6 and

7 (ii) the extent to which the system ex-  
8 ceeded or failed to meet relevant perform-  
9 ance standards including compensation for  
10 and deterrence of medical adverse events.

11 (2) CONSIDERATION OF APPLICATIONS.—In re-  
12 viewing all applications received from States desiring  
13 to establish demonstration projects under this sec-  
14 tion, the Secretary shall consider—

15 (A) data regarding medical malpractice  
16 litigation patterns in each State;

17 (B) the contributions that any system shall  
18 make toward reducing costs associated with  
19 health care injuries;

20 (C) diversity among the populations served  
21 by the systems;

22 (D) geographic distribution; and

23 (E) such other criteria as the Secretary de-  
24 termines appropriate.

1 (d) WAIVER.—The Secretary may waive compliance  
 2 with any requirement of this section applicable to health  
 3 care negligence to permit the operation of a demonstration  
 4 project established under this section.

5 (e) DURATION.—A demonstration project under this  
 6 section shall be conducted for a period of not more than  
 7 5 years.

8 (f) EVALUATION AND REPORTS.—

9 (1) BY THE STATES.—Each State conducting a  
 10 demonstration project under this section shall con-  
 11 duct ongoing evaluations of the effectiveness of any  
 12 no-fault medical liability system established in such  
 13 State and shall submit an annual report to the Sec-  
 14 retary concerning the results of such evaluations at  
 15 such times and in such manner as the Secretary  
 16 shall require. The report shall—

17 (A) incorporate information from annual  
 18 reports submitted to the State by qualified  
 19 health care organizations and insurers partici-  
 20 pating in the system;

21 (B) include an analysis of the feasibility  
 22 and desirability of developing and implementing  
 23 a no-fault medical liability program; and

1 (C) include a recommendation for legisla-  
2 tion on the development and implementation of  
3 no-fault medical liability programs.

4 (2) BY THE SECRETARY.—The Secretary shall  
5 submit an annual report to the Congress concerning  
6 the effectiveness of the demonstration projects con-  
7 ducted under this section. Such report shall analyze  
8 the reports received by the Secretary under para-  
9 graph (1).

10 (g) LIMITATIONS ON USE OF GRANTS.—

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

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

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



1       **TITLE V—MISCELLANEOUS**  
2                   **PROVISIONS**

3   **SEC. 501. FEDERAL CAUSE OF ACTION PRECLUDED.**

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

7   **SEC. 502. EFFECTIVE DATE.**

8       Except as otherwise provided in this Act, this Act and  
9 the amendments made by this Act shall take effect 30  
10 days after the date of its enactment and shall apply to  
11 all civil actions commenced on or after such date, includ-  
12 ing any action in which the harm or the conduct which  
13 caused the harm occurred before the effective date of this  
14 Act.

○