

105TH CONGRESS  
1ST SESSION

# S. 836

To offer small businesses certain protections from litigation excesses.

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## IN THE SENATE OF THE UNITED STATES

JUNE 5, 1997

Mr. ABRAHAM (for himself, Mr. McCONNELL, Mr. COVERDELL, Mr. SANTORUM, Mr. MCCAIN, and Mr. ASHCROFT) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To offer small businesses certain protections from litigation excesses.

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 “Small Business Law-  
5       suit Abuse Protection Act of 1997”.

6       **SEC. 2. FINDINGS.**

7       Congress finds that—

8               (1) the United States civil justice system is in-  
9       efficient, unpredictable, unfair, costly, and impedes

1 competitiveness in the marketplace for goods, serv-  
2 ices, business, and employees;

3 (2) the defects in the civil justice system have  
4 a direct and undesirable effect on interstate com-  
5 merce by decreasing the availability of goods and  
6 services in commerce;

7 (3) there is a need to restore rationality, cer-  
8 tainty, and fairness to the legal system;

9 (4) the spiralling costs of litigation and the  
10 magnitude and unpredictability of punitive damage  
11 awards and noneconomic damage awards have con-  
12 tinued unabated for at least the past 30 years;

13 (5) the Supreme Court of the United States has  
14 recognized that a punitive damage award can be un-  
15 constitutional if the award is grossly excessive in re-  
16 lation to the legitimate interest of the government in  
17 the punishment and deterrence of unlawful conduct;

18 (6) just as punitive damage awards can be  
19 grossly excessive, so can it be grossly excessive in  
20 some circumstances for a party to be held respon-  
21 sible under the doctrine of joint and several liability  
22 for damages that party did not cause;

23 (7) as a result of joint and several liability, en-  
24 tities including small businesses are often brought  
25 into litigation despite the fact that their conduct

1 may have little or nothing to do with the accident  
2 or transaction giving rise to the lawsuit, and may  
3 therefore face increased and unjust costs due to the  
4 possibility or result of unfair and disproportionate  
5 damage awards;

6 (8) the costs imposed by the civil justice system  
7 on small businesses are particularly acute, since  
8 small businesses often lack the resources to bear  
9 those costs and to challenge unwarranted lawsuits;

10 (9) due to high liability costs and unwarranted  
11 litigation costs, small businesses face higher costs in  
12 purchasing insurance through interstate insurance  
13 markets to cover their activities;

14 (10) liability reform for small businesses will  
15 promote the free flow of goods and services, lessen  
16 burdens on interstate commerce, and decrease liti-  
17 giousness; and

18 (11) legislation to address these concerns is an  
19 appropriate exercise of Congress' powers under Arti-  
20 cle I, section 8, clauses 3, 9, and 18 of the Constitu-  
21 tion, and the fourteenth amendment to the Constitu-  
22 tion.

23 **SEC. 3. DEFINITIONS.**

24 In this Act:

1           (1) ACT OF INTERNATIONAL TERRORISM.—The  
2           term “act of international terrorism” has the same  
3           meaning as in section 2331 of title 18, United  
4           States Code).

5           (2) CRIME OF VIOLENCE.—The term “crime of  
6           violence” has the same meaning as in section 16 of  
7           title 18, United States Code.

8           (3) DRUG.—The term “drug” means any con-  
9           trolled substance (as that term is defined in section  
10          102 of the Controlled Substances Act (21 U.S.C.  
11          802(b)) that was not legally prescribed for use by  
12          the defendant or that was taken by the defendant  
13          other than in accordance with the terms of a law-  
14          fully issued prescription.

15          (4) ECONOMIC LOSS.—The term “economic  
16          loss” means any pecuniary loss resulting from harm  
17          (including the loss of earnings or other benefits re-  
18          lated to employment, medical expense loss, replace-  
19          ment services loss, loss due to death, burial costs,  
20          and loss of business or employment opportunities) to  
21          the extent recovery for such loss is allowed under ap-  
22          plicable State law.

23          (5) HARM.—The term “harm” includes phys-  
24          ical, nonphysical, economic, and noneconomic losses.

1           (6) HATE CRIME.—The term “hate crime”  
 2       means a crime described in section 1(b) of the Hate  
 3       Crime Statistics Act (28 U.S.C. 534 note)).

4           (7) NONECONOMIC LOSSES.—The term “non-  
 5       economic losses” means losses for physical and emo-  
 6       tional pain, suffering, inconvenience, physical im-  
 7       pairment, mental anguish, disfigurement, loss of en-  
 8       joyment of life, loss of society and companionship,  
 9       loss of consortium (other than loss of domestic serv-  
 10      ice), injury to reputation, and all other nonpecuniary  
 11      losses of any kind or nature.

12          (8) SMALL BUSINESS.—

13               (A) IN GENERAL.—The term “small busi-  
 14       ness” means any unincorporated business, or  
 15       any partnership, corporation, association, unit  
 16       of local government, or organization that has  
 17       less than 25 full-time employees.

18               (B) CALCULATION OF NUMBER OF EM-  
 19       PLOYEES.—For purposes of subparagraph (A),  
 20       the number of employees of a subsidiary of a  
 21       wholly-owned corporation includes the employ-  
 22       ees of—

- 23                       (i) a parent corporation; and
- 24                       (ii) any other subsidiary corporation
- 25                       of that parent corporation.

1           (10) STATE.—The term “State” means each of  
 2           the several States, the District of Columbia, the  
 3           Commonwealth of Puerto Rico, the Virgin Islands,  
 4           Guam, American Samoa, the Northern Mariana Is-  
 5           lands, any other territory or possession of the Unit-  
 6           ed States, or any political subdivision of any such  
 7           State, territory, or possession.

8   **SEC. 4. LIMITATION ON PUNITIVE DAMAGES FOR SMALL**  
 9                           **BUSINESSES.**

10          (a) GENERAL RULE.—Except as provided in section  
 11   6, in any civil action against a small business, punitive  
 12   damages may, to the extent permitted by applicable State  
 13   law, be awarded against the small business only if the  
 14   claimant establishes by clear and convincing evidence that  
 15   conduct carried out by that defendant through willful mis-  
 16   conduct or with a conscious, flagrant indifference to the  
 17   rights or safety of others was the proximate cause of the  
 18   harm that is the subject of the action.

19          (b) LIMITATION ON AMOUNT.—In any civil action  
 20   against a small business, punitive damages shall not ex-  
 21   ceed the lesser of—

- 22                   (1) two times the total amount awarded to the  
 23                   claimant for economic and noneconomic losses; or  
 24                   (2) \$250,000.

1 (c) APPLICATION BY COURT.—This section shall be  
 2 applied by the court and shall not be disclosed to the jury.

3 **SEC. 5. LIMITATION ON SEVERAL LIABILITY FOR NON-**  
 4 **ECONOMIC LOSS FOR SMALL BUSINESSES.**

5 (a) GENERAL RULE.—Except as provided in section  
 6 6, in any civil action against a small business, the liability  
 7 of each defendant that is a small business, or the agent  
 8 of a small business, for noneconomic loss shall be deter-  
 9 mined in accordance with subsection (b).

10 (b) AMOUNT OF LIABILITY.—

11 (1) IN GENERAL.—In any civil action described  
 12 in subsection (a)—

13 (A) each defendant described in that sub-  
 14 section shall be liable only for the amount of  
 15 noneconomic loss allocated to that defendant in  
 16 direct proportion to the percentage of respon-  
 17 sibility of that defendant (determined in accord-  
 18 ance with paragraph (2)) for the harm to the  
 19 claimant with respect to which the defendant is  
 20 liable; and

21 (B) the court shall render a separate judg-  
 22 ment against each defendant described in that  
 23 subsection in an amount determined pursuant  
 24 to subparagraph (A).

1           (2) PERCENTAGE OF RESPONSIBILITY.—For  
 2           purposes of determining the amount of noneconomic  
 3           loss allocated to a defendant under this section, the  
 4           trier of fact shall determine the percentage of re-  
 5           sponsibility of each person responsible for the harm  
 6           to the claimant, regardless of whether or not the  
 7           person is a party to the action.

8 **SEC. 6. EXCEPTIONS TO LIMITATIONS ON LIABILITY.**

9           The limitations on liability under sections 4 and 5  
 10          do not apply to any misconduct of a defendant—

11           (1) that constitutes—

12                   (A) a crime of violence;

13                   (B) an act of international terrorism; or

14                   (C) a hate crime;

15           (2) that involves—

16                   (A) a sexual offense, as defined by applica-  
 17                   ble State law; or

18                   (B) a violation of a Federal or State civil  
 19                   rights law; or

20           (3) if the defendant was under the influence (as  
 21           determined pursuant to applicable State law) of in-  
 22           toxicating alcohol or a drug at the time of the mis-  
 23           conduct, and the fact that the defendant was under  
 24           the influence was the cause of any harm alleged by  
 25           the plaintiff in the subject action.

1 **SEC. 7. PREEMPTION AND ELECTION OF STATE NON-**  
 2 **APPLICABILITY.**

3 (a) PREEMPTION.—Subject to subsection (b), this  
 4 Act preempts the laws of any State to the extent that  
 5 State laws are inconsistent with this Act, except that this  
 6 Act shall not preempt any State law that provides addi-  
 7 tional protections from liability for small businesses.

8 (b) ELECTION OF STATE REGARDING NON-  
 9 APPLICABILITY.—This Act does not apply to any action  
 10 in a State court against a small business in which all par-  
 11 ties are citizens of the State, if the State enacts a stat-  
 12 ute—

13 (1) citing the authority of this subsection;

14 (2) declaring the election of such State that this  
 15 Act does not apply as of a date certain to such ac-  
 16 tions in the State; and

17 (3) containing no other provision.

18 **SEC. 8. EFFECTIVE DATE.**

19 (a) IN GENERAL.—This Act shall take effect 90 days  
 20 after the date of enactment of this Act.

21 (b) APPLICATION.—This Act applies to any claim for  
 22 harm caused by an act or omission of a small business,  
 23 if the claim is filed on or after the effective date of this  
 24 Act, without regard to whether the harm that is the sub-

- 1 ject of the claim or the conduct that caused the harm oc-
- 2 curred before such effective date.

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