

107TH CONGRESS
1ST SESSION

S. 1370

To reform the health care liability system.

IN THE SENATE OF THE UNITED STATES

AUGUST 3, 2001

Mr. McCONNELL introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To reform the health care liability 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; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Common Sense Medical Malpractice Reform Act of
6 2001”.

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

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings and purpose.
- Sec. 3. Definitions.
- Sec. 4. Applicability.
- Sec. 5. Statute of limitations.
- Sec. 6. Limitation on non-economic damages.
- Sec. 7. Reform of punitive damages.
- Sec. 8. Periodic payments.

Sec. 9. Scope of liability.

Sec. 10. Mandatory offsets for damages paid by a collateral source.

Sec. 11. Treatment of attorneys' fees and other costs.

Sec. 12. State-based alternative dispute resolution mechanisms.

Sec. 13. Applicability.

Sec. 14. Severability.

1 **SEC. 2. FINDINGS AND PURPOSE.**

2 (a) FINDINGS.—Congress finds the following:

3 (1) EFFECT ON HEALTH CARE ACCESS AND
 4 COSTS.—The civil justice system of the United
 5 States is a costly and inefficient mechanism for re-
 6 solving claims of health care liability and compen-
 7 sating injured patients and that the problems associ-
 8 ated with the current system are having an adverse
 9 impact on the availability of, and access to, health
 10 care services and the cost of health care in the
 11 United States.

12 (2) EFFECT ON INTERSTATE COMMERCE.—The
 13 health care and insurance industries are industries
 14 affecting interstate commerce and the health care li-
 15 ability litigation systems existing throughout the
 16 United States affect interstate commerce by contrib-
 17 uting to the high cost of health care and premiums
 18 for health care liability insurance purchased by par-
 19 ticipants in the health care system.

20 (3) EFFECT ON FEDERAL SPENDING.—The
 21 health care liability litigation systems existing
 22 throughout the United States have a significant ef-

1 fect on the amount, distribution, and use of Federal
2 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 to provide them
9 with health insurance benefits; and

10 (C) the large number of health care pro-
11 viders who provide items or services for which
12 the Federal Government makes payments.

13 (b) PURPOSE.—It is the purpose of this Act to imple-
14 ment reasonable, comprehensive, and effective health care
15 liability reform that is designed to—

16 (1) ensure that individuals with meritorious
17 health care injury claims receive fair and adequate
18 compensation;

19 (2) improve the availability of health care serv-
20 ice in cases in which health care liability actions
21 have been shown to be a factor in the decreased
22 availability of services; and

23 (3) improve the fairness and cost-effectiveness
24 of our current health care liability system of the
25 United States to resolve disputes over, and provide

1 compensation for, health care liability by reducing
2 uncertainty and unpredictability in the amount of
3 compensation provided to injured individuals.

4 **SEC. 3. DEFINITIONS.**

5 In this Act:

6 (1) ALTERNATIVE DISPUTE RESOLUTION
7 (ADR).—The term “alternative dispute resolution” or
8 “adr” means a system that provides for the resolu-
9 tion of health care liability claims or actions in a
10 manner other than through a civil action brought in
11 a Federal or State court.

12 (2) ATTORNEY.—The term “attorney” means
13 any natural person, professional association, cor-
14 poration, or partnership authorized under applicable
15 law to practice law.

16 (3) ATTORNEY SERVICES.—The term “attorney
17 services” means the professional advice or counseling
18 of or representation by an attorney. Such term shall
19 not include out-of-pocket expenses in connection
20 with providing attorney services, such as travel ex-
21 penses, witness fees, copying, messengers, postage,
22 phone, or preparation by a person other than the at-
23 torney of any study, analysis, report, or test.

24 (4) CLAIMANT.—The term “claimant” means
25 any person who commences a health care liability ac-

1 tion, and any person on whose behalf such an action
2 is commenced, including the decedent in the case of
3 an action brought through or on behalf of an estate.

4 (5) CLEAR AND CONVINCING EVIDENCE.—The
5 term “clear and convincing evidence” means that
6 measure or degree of proof that will produce in the
7 mind of the trier of fact a firm belief or conviction
8 as to the truth of the allegations sought to be estab-
9 lished, except that such measure or degree of proof
10 is more than that required under preponderance of
11 the evidence, but less than that required for proof
12 beyond a reasonable doubt.

13 (6) COLLATERAL SOURCE BENEFIT.—The term
14 “collateral source benefit” means a rule, either es-
15 tablished in statute or established at common law,
16 that prevents the introduction of evidence regarding
17 collateral source benefits or that prohibits the deduc-
18 tion of collateral source benefits from an award of
19 damages in a health care liability action.

20 (7) ECONOMIC LOSSES.—The term “economic
21 losses” means objectively verifiable monetary losses
22 incurred as a result of the provision of (or failure to
23 provide or pay for) health care services or the use
24 of a medical product, including past and future med-
25 ical expenses, loss of past and future earnings, cost

1 of obtaining replacement services in the home (in-
2 cluding child care, transportation, food preparation,
3 and household care), cost of making reasonable ac-
4 commodations to a personal residence, loss of em-
5 ployment, and loss of business or employment oppor-
6 tunities. Economic losses are neither non-economic
7 losses nor punitive damages.

8 (8) HEALTH CARE LIABILITY ACTION.—The
9 term “health care liability action” means a civil ac-
10 tion brought in a State or Federal court pursuant to
11 ADR against a health care provider, health care pro-
12 fessional, or other defendant, including a right to
13 legal or equitable contribution, indemnity, subroga-
14 tion, third-party claims, cross claims, or counter-
15 claims, in which the claimant alleges injury related
16 to—

17 (A) the provision of health care services or
18 medical products; or

19 (B) the failure to provide for health care
20 services or medical products;

21 regardless of the theory of liability on which the ac-
22 tion is based. Such term does not include a product
23 liability action, except where such an action is
24 brought as part of a broader health care liability ac-
25 tion.

1 (9) HEALTH CARE PROFESSIONAL.—The term
2 “health care professional” means any individual who
3 provides health care services in a State and who is
4 required by Federal or State laws or regulations to
5 be licensed, registered or certified to provide such
6 services or who is certified to provide health care
7 services pursuant to a program of education, train-
8 ing and examination by an accredited institution,
9 professional board, or professional organization.

10 (10) HEALTH CARE PROVIDER.—The term
11 “health care provider” means any organization or
12 institution that is engaged in the delivery of health
13 care items or services in a State and that is required
14 by Federal or State laws or regulations to be li-
15 censed, registered or certified to engage in the deliv-
16 ery of such items or services.

17 (11) HEALTH PLAN.—The term “health plan”
18 means an employee welfare benefit plan (as defined
19 in section 3(1) of the Employee Retirement Income
20 Security Act of 1974 (29 U.S.C. 1002(1))) to the
21 extent that the plan provides medical care (including
22 items and services paid for as medical care) to em-
23 ployees or their dependents (as defined under the
24 terms of the plan) directly or through insurance, re-
25 imbursement, or otherwise.

1 (12) HEALTH CARE SERVICES.—The term
2 “health care services” means any services provided
3 by a health care professional or health care provider,
4 or any individual working under the supervision of
5 a health care professional, that relate to the diag-
6 nosis, prevention, or treatment of any disease or im-
7 pairment, or the assessment of the health of human
8 beings.

9 (13) INJURY.—The term “injury” means any
10 illness, disease, or other harm that is the subject of
11 a health care liability action.

12 (14) NONECONOMIC LOSSES.—The term “non-
13 economic losses” means losses for physical and emo-
14 tional pain, suffering, inconvenience, physical im-
15 pairment, mental anguish, disfigurement, loss of en-
16 joyment of life, loss of consortium, loss of society or
17 companionship (other than loss of domestic serv-
18 ices), and other non-pecuniary losses incurred by an
19 individual with respect to which a health care liabil-
20 ity action is brought. Noneconomic losses are neither
21 economic losses nor punitive damages.

22 (15) PUNITIVE DAMAGES.—The term “punitive
23 damages” means damages awarded, for the purpose
24 of punishment or deterrence, and not for compen-
25 satory purposes, against a health care provider,

1 health care professional, or other defendant in a
2 health care liability action. Punitive damages are
3 neither economic nor noneconomic damages.

4 (16) SECRETARY.—The term “Secretary”
5 means the Secretary of Health and Human Services.

6 (17) STATE.—The term “State” means each of
7 the several States of the United States, the District
8 of Columbia, and the Commonwealth of Puerto Rico,
9 a territory of possession of the United States, an
10 agency or instrumentality of a State, and a multi-
11 State, regional, or interstate entity having govern-
12 mental duties and powers.

13 (18) STATE LAW.—The term “State law” in-
14 cludes all constitutional provisions, statutes, laws,
15 judicial decisions, rules regulations, or other State
16 action having the effect of law of, or any State.

17 **SEC. 4. APPLICABILITY.**

18 (a) IN GENERAL.—Except as provided in subsections
19 (c) and (d), this Act shall apply with respect to any health
20 care liability action brought in any Federal or State court,
21 and any claim brought pursuant to an alternative dispute
22 resolution, except that this Act shall not apply to an action
23 for damages arising from a vaccine-related injury or death
24 to the extent that title XXI of the Public Health Service
25 Act applies to the action.

1 (b) PREEMPTION.—

2 (1) IN GENERAL.—The provisions of this Act
3 shall preempt any State law in effect on, or enacted
4 after, the date of enactment of this Act to the extent
5 that such law is inconsistent with the limitations
6 contained in such provisions. The provisions of this
7 Act shall not preempt any State law to the extent
8 that such law—

9 (A) places greater restrictions on the
10 amount of or standards for awarding economic
11 or punitive damages than those provided for in
12 this Act;

13 (B) places greater limitations on the
14 awarding of attorneys fees for awards in excess
15 of \$150,000 than those provided for in this Act;

16 (C) permits a lower threshold for the peri-
17 odic payment of future damages than that pro-
18 vided for in this Act;

19 (D) establishes a shorter period during
20 which a health care liability action may be initi-
21 ated or a more restrictive rule with respect to
22 the time at which the period of limitations be-
23 gins to run than that provided for in this Act;
24 or

1 (E) either permits the introduction of evi-
2 dence of collateral source benefits or provides
3 for the mandatory offset of collateral source
4 benefits from damage awards.

5 (2) RULE OF CONSTRUCTION.—The provisions
6 of this Act shall not be construed to preempt any
7 State law that—

8 (A) permits State officials to commence
9 health care liability actions as a representative
10 of an individual;

11 (B) permits provider-based alternative dis-
12 pute resolution;

13 (C) places a maximum limit on the total
14 damages in a health care liability action;

15 (D) places a maximum limit on the time in
16 which a health care liability action may be initi-
17 ated; or

18 (E) provides for defenses in addition to
19 those contained in this Act.

20 (c) STATE OPTION.—

21 (1) IN GENERAL.—With respect to a provision
22 of this Act, such provision shall not apply to a
23 health care liability action involving parties that are
24 residents of the same State if the action is brought

1 in a court of that State and the State has enacted
2 a law—

3 (A) specifically citing the authority of this
4 subsection; and

5 (B)(i) proclaiming that the State has de-
6 termined that such provision shall not apply to
7 such actions; or

8 (ii) establishing provisions that specifically
9 contradict the provisions of this Act.

10 (2) MULTIPLE STATE.—With respect to a
11 health care liability action involving parties that are
12 residents of more than one State, if each such State
13 has enacted a law described in paragraph (1), the
14 choice-of-law rules of each such State shall govern
15 the rules and procedures applicable in the action.

16 (3) CORPORATE ENTITY.—For purposes of this
17 subsection, a corporate entity shall be deemed to be
18 a resident of the State in which such entity is incor-
19 porated and the State in which the principal place
20 of business of the entity is located.

21 (4) RULE OF CONSTRUCTION.—Nothing in this
22 subsection shall be construed as requiring a State to
23 reenact any provision of State law if such law ex-
24 isted on the date of enactment of this Act and such

1 law is not otherwise preempted under the provisions
2 of subsection (b).

3 (d) EFFECT ON SOVEREIGN IMMUNITY AND CHOICE
4 OF LAW OR VENUE.—Nothing in this Act shall be con-
5 strued to—

6 (1) waive or affect any defense of sovereign im-
7 munity asserted by any State under any provision of
8 law;

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

11 (3) affect the applicability of any provision of
12 the Foreign Sovereign Immunities Act of 1976;

13 (4) preempt State choice-of-law rules with re-
14 spect to actions brought by a foreign nation or a cit-
15 izen of a foreign nation;

16 (5) affect the right of any court to transfer
17 venue or to apply the law of a foreign nation or to
18 dismiss an action of a foreign nation or of a citizen
19 of a foreign nation on the ground of inconvenient
20 forum; or

21 (6) supersede any provision of Federal law.

22 (e) FEDERAL COURT JURISDICTION NOT ESTAB-
23 LISHED ON FEDERAL QUESTION GROUNDS.—Nothing in
24 this Act shall be construed to establish any jurisdiction
25 in the district courts of the United States over health care

1 liability actions on the basis of sections 1331 or 1337 of
2 title 28, United States Code.

3 **SEC. 5. STATUTE OF LIMITATIONS.**

4 A health care liability action that is subject to this
5 Act may not be initiated unless a complaint with respect
6 to such action is filed within the 2-year period beginning
7 on the date on which the claimant discovered or, in the
8 exercise of reasonable care, should have discovered the in-
9 jury and its cause, except that such an action relating to
10 a claimant under legal disability may be filed within 2
11 years after the date on which the disability ceases. If the
12 commencement of a health care liability action is stayed
13 or enjoined, the running of the statute of limitations under
14 this section shall be suspended for the period of the stay
15 or injunction.

16 **SEC. 6. LIMITATION ON NON-ECONOMIC DAMAGES.**

17 (a) IN GENERAL.—In any health care liability action
18 that is subject to this Act, the amount of noneconomic
19 damages shall not exceed \$250,000 regardless of the num-
20 ber of parties against whom the action is brought or the
21 number of claims or actions brought with respect to the
22 injury that is the subject of the action.

23 (b) CALCULATION OF AWARD.—For purposes of this
24 section, an award for future noneconomic damages in a
25 health care liability action shall not be discounted to

1 present value. A jury shall not be informed about the limi-
2 tation on noneconomic damages in such an action. Any
3 award for noneconomic damages that is in excess of
4 \$250,000 shall be reduced prior to the entry of judgment
5 or by an amendment of the judgment after such entry.
6 Any award of damages for noneconomic losses that is in
7 excess of \$250,000, shall be reduced to \$250,000 before
8 accounting for any other reduction in damages required
9 by law. If separate awards of damages for past and future
10 noneconomic damages are rendered and the combined
11 awards exceed \$250,000, the award of damages for future
12 noneconomic losses shall be reduced first.

13 **SEC. 7. REFORM OF PUNITIVE DAMAGES.**

14 (a) LIMITATION.—With respect to a health care li-
15 ability action, an award for punitive damages may only
16 be made, if otherwise permitted by applicable law, if it
17 is proven by clear and convincing evidence that the
18 defendant—

19 (1) intended to injure the claimant for a reason
20 unrelated to the provision of health care services;

21 (2) understood the claimant was substantially
22 certain to suffer unnecessary injury, and in pro-
23 viding or failing to provide health care services, the
24 defendant deliberately failed to avoid such injury; or

1 (3) acted with a conscious disregard of a sub-
2 stantial and unjustifiable risk of unnecessary injury
3 which the defendant failed to avoid in a manner
4 which constitutes a gross deviation from the normal
5 standard of conduct in such circumstances.

6 (b) PUNITIVE DAMAGES NOT PERMITTED.—Not-
7 withstanding the provisions of subsection (a), punitive
8 damages may not be awarded against a defendant with
9 respect to any health care liability action if no judgment
10 for compensatory damages, including nominal damages
11 (under \$500), is rendered against the defendant.

12 (c) REQUIREMENTS FOR PLEADING OF PUNITIVE
13 DAMAGES.—

14 (1) IN GENERAL.—No demand for punitive
15 damages shall be included in a health care liability
16 action as initially filed.

17 (2) AMENDED PLEADING.—A court may allow a
18 claimant to file an amended complaint or pleading
19 for punitive damages in a health care liability action
20 if—

21 (A) the claimant submits a motion to
22 amend the complaint or pleading within the
23 earlier of—

24 (i) 2 years after the complaint or ini-
25 tial pleading is filed, or

1 (ii) 9 months before the date the mat-
 2 ter is first set for trial; and

3 (B) after a finding by a court upon review
 4 of supporting and opposing affidavits or after a
 5 hearing, that after weighing the evidence the
 6 claimant has established by a substantial prob-
 7 ability that the claimant will prevail on the
 8 claim for punitive damages.

9 (d) SEPARATE PROCEEDING.—

10 (1) IN GENERAL.—At the request of any de-
 11 fendant in a health care liability action, the trier of
 12 fact shall consider in a separate proceeding—

13 (A) whether punitive damages are to be
 14 awarded and the amount of such award, or

15 (B) the amount of punitive damages fol-
 16 lowing a determination of punitive liability.

17 (2) ONLY RELEVANT EVIDENCE ADMISSIBLE.—

18 If a defendant requests a separate proceeding under
 19 paragraph (1), evidence relevant only to the claim of
 20 punitive damages in a health care liability action, as
 21 determined by applicable State law, shall be inadmis-
 22 sible in any proceeding to determine whether com-
 23 pensatory damages are to be awarded.

24 (e) DETERMINING AMOUNT OF PUNITIVE DAM-
 25 AGES.—In determining the amount of punitive damages

1 in a health care liability action, the trier of fact shall con-
2 sider only the following:

3 (1) The severity of the harm caused by the con-
4 duct of the defendant.

5 (2) The duration of the conduct or any conceal-
6 ment of it by the defendant.

7 (3) The profitability of the conduct of the de-
8 fendant.

9 (4) The number of products sold or medical
10 procedures rendered for compensation, as the case
11 may be, by the defendant of the kind causing the
12 harm complained of by the claimant.

13 (5) Awards of punitive or exemplary damages
14 to persons similarly situated to the claimant, when
15 offered by the defendant.

16 (6) Prospective awards of compensatory dam-
17 ages to persons similarly situated to the claimant.

18 (7) Any criminal penalties imposed on the de-
19 fendant as a result of the conduct complained of by
20 the claimant, when offered by the defendant.

21 (8) The amount of any civil fines assessed
22 against the defendant as a result of the conduct
23 complained of by the claimant, when offered by the
24 defendant.

1 (f) LIMITATION AMOUNT.—The amount of damages
2 that may be awarded as punitive damages in any health
3 care liability action shall not exceed 3 times the amount
4 awarded to the claimant for the economic injury on which
5 such claim is based, or \$250,000, whichever is greater.
6 This subsection shall be applied by the court and shall
7 not be disclosed to the jury.

8 (g) RESTRICTIONS PERMITTED.—Nothing in this
9 section shall be construed to imply a right to seek punitive
10 damages where none exists under Federal or State law.

11 **SEC. 8. PERIODIC PAYMENTS.**

12 With respect to a health care liability action, if the
13 award of future damages exceeds \$100,000, the adjudi-
14 cating body shall, at the request of either party, enter a
15 judgment ordering that future damages be paid on a peri-
16 odic basis in accordance with the guidelines contained in
17 the Uniform Periodic Payments of Judgments Act, as pro-
18 mulgated by the National Conference of Commissioners on
19 Uniform State Laws in July of 1990. The adjudicating
20 body may waive the requirements of this section if such
21 body determines that such a waiver is in the interests of
22 justice.

23 **SEC. 9. SCOPE OF LIABILITY.**

24 (a) IN GENERAL.—With respect to punitive and non-
25 economic damages, the liability of each defendant in a

1 health care liability action shall be several only and may
 2 not be joint. Such a defendant shall be liable only for the
 3 amount of punitive or noneconomic damages allocated to
 4 the defendant in direct proportion to such defendant's per-
 5 centage of fault or responsibility for the injury suffered
 6 by the claimant.

7 (b) DETERMINATION OF PERCENTAGE OF LIABIL-
 8 ITY.—With respect to punitive and noneconomic damages,
 9 the trier of fact in a health care liability action shall deter-
 10 mine the extent of each defendant's fault or responsibility
 11 for injury suffered by the claimant, and shall assign a per-
 12 centage of responsibility for such injury to each such de-
 13 fendant.

14 **SEC. 10. MANDATORY OFFSETS FOR DAMAGES PAID BY A**
 15 **COLLATERAL SOURCE.**

16 (a) IN GENERAL.—With respect to a health care li-
 17 ability action, the total amount of damages received by
 18 an individual under such action shall be reduced, in ac-
 19 cordance with subsection (b), by any other payment that
 20 has been, or will be, made to an individual to compensate
 21 such individual for the injury that was the subject of such
 22 action.

23 (b) AMOUNT OF REDUCTION.—The amount by which
 24 an award of damages to an individual for an injury shall
 25 be reduced under subsection (a) shall be—

1 (1) the total amount of any payments (other
2 than such award) that have been made or that will
3 be made to such individual to pay costs of or com-
4 pensate such individual for the injury that was the
5 subject of the action; minus

6 (2) the amount paid by such individual (or by
7 the spouse, parent, or legal guardian of such indi-
8 vidual) to secure the payments described in para-
9 graph (1).

10 (c) DETERMINATION OF COLLATERAL SOURCE BEN-
11 EFITS.—The reductions required under subsection (b)
12 shall be determined by the court in a pretrial proceeding.
13 At the subsequent trial—

14 (1) no evidence shall be admitted as to the
15 amount of any charge, payments, or damage for
16 which a claimant—

17 (A) has received payment from a collateral
18 source or the obligation for which has been as-
19 sured by a third party; or

20 (B) is, or with reasonable certainty, will be
21 eligible to receive payment from a collateral
22 source of the obligation which will, with reason-
23 able certainty be assumed by a third party; and

24 (2) the jury, if any, shall be advised that—

1 (A) except for damages as to which the
2 court permits the introduction of evidence, the
3 claimant's medical expenses and lost income
4 have been or will be paid by a collateral source
5 or third party; and

6 (B) the claimant shall receive no award for
7 any damages that have been or will be paid by
8 a collateral source or third party.

9 **SEC. 11. TREATMENT OF ATTORNEYS' FEES AND OTHER**
10 **COSTS.**

11 (a) IN GENERAL.—No attorney in any health care
12 liability action to which this Act applies shall charge, de-
13 mand, receive, or collect for services rendered in connec-
14 tion with such action in excess of 25 percent of any judg-
15 ment or settlement recovered under such action.

16 (b) CALCULATION OF PERIODIC PAYMENTS.—In the
17 event that a judgment or settlement includes periodic or
18 future payments of damages, the amount recovered for
19 purposes of computing the limitation under subsection (a)
20 shall be based on the cost of the annuity or trust estab-
21 lished to make the payments. In any case in which an an-
22 nuity or trust is not established to make such payments,
23 such amount shall be based on the present value of the
24 payments.

1 **SEC. 12. STATE-BASED ALTERNATIVE DISPUTE RESOLU-**
2 **TION MECHANISMS.**

3 (a) ESTABLISHMENT BY STATES.—Each State is en-
4 couraged to establish or maintain alternative dispute reso-
5 lution mechanisms that promote the resolution of health
6 care liability claims in a manner that—

7 (1) is affordable for the parties involved in the
8 claims;

9 (2) provides for the timely resolution of claims;
10 and

11 (3) provides the parties with convenient access
12 to the dispute resolution process.

13 (b) GUIDELINES.—The Attorney General, in con-
14 sultation with the Secretary and the Administrative Con-
15 ference of the United States, shall develop guidelines with
16 respect to alternative dispute resolution mechanisms that
17 may be established by States for the resolution of health
18 care liability claims. Such guidelines shall include proce-
19 dures with respect to the following methods of alternative
20 dispute resolution:

21 (1) ARBITRATION.—The use of arbitration, a
22 nonjury adversarial dispute resolution process which
23 may, subject to subsection (d), result in a final deci-
24 sion as to facts, law, liability or damages. The par-
25 ties may elect binding arbitration.

1 (2) MEDIATION.—The use of mediation, a set-
2 tlement process coordinated by a neutral third party
3 without the ultimate rendering of a formal opinion
4 as to factual or legal findings.

5 (3) EARLY NEUTRAL EVALUATION.—The use of
6 early neutral evaluation, in which the parties make
7 a presentation to a neutral attorney or other neutral
8 evaluator for an assessment of the merits, to encour-
9 age settlement. If the parties do not settle as a re-
10 sult of assessment and proceed to trial, the neutral
11 evaluator’s opinion shall be kept confidential.

12 (4) EARLY OFFER AND RECOVERY MECHA-
13 NISM.—The use of early offer and recovery mecha-
14 nisms under which a health care provider, health
15 care organization, or any other alleged responsible
16 defendant may offer to compensate a claimant for
17 his or her reasonable economic damages, including
18 future economic damages, less amounts available
19 from collateral sources.

20 (5) CERTIFICATE OF MERIT.—The requirement
21 that a claimant in a health care liability action sub-
22 mit to the court before trial a written report by a
23 qualified specialist that includes the specialist’s de-
24 termination that, after a review of the available med-
25 ical record and other relevant material, there is a

1 reasonable and meritorious cause for the filing of the
2 action against the defendant.

3 (6) NO-FAULT.—The use of a no-fault statute
4 under which certain health care liability actions are
5 barred and claimants are compensated for injuries
6 through their health plans or through other appro-
7 priate mechanisms.

8 (c) FURTHER REDRESS.—

9 (1) IN GENERAL.—The extent to which any
10 party may seek further redress (subsequent to a de-
11 cision of an alternative dispute resolution method es-
12 tablished by a State under this section) concerning
13 a health care liability claim in a Federal or State
14 court shall be dependent upon the methods of alter-
15 native dispute resolution adopted by the State in-
16 volved.

17 (2) CLAIMANT.—With respect to further redress
18 described in paragraph (1), if the party initiating
19 such court action is the claimant and the claimant
20 receives a level of damages that is at least 25 per-
21 cent less under the decision of the court than under
22 the State alternative dispute resolution method, such
23 party shall bear the reasonable costs, including legal
24 fees, incurred in the court action by the other party
25 or parties to such action.

1 (3) PROVIDER OR OTHER DEFENDANT.—With
2 respect to further redress described in paragraph
3 (1), if the party initiating a court action is the
4 health care professional or health care provider, or
5 other defendant in a health care liability action and
6 the health care professional, health care provider, or
7 other defendant is found liable for a level of dam-
8 ages that is at least 25 percent more under the deci-
9 sion of the court than under the State alternative
10 dispute resolution method, such party shall bear the
11 reasonable costs, including legal fees, incurred in the
12 court action by the other party or parties to such ac-
13 tion.

14 (d) TECHNICAL ASSISTANCE AND EVALUATIONS.—

15 (1) TECHNICAL ASSISTANCE.—The Attorney
16 General may provide States with technical assistance
17 in establishing or maintaining alternative dispute
18 resolution mechanisms under this section.

19 (2) EVALUATIONS.—The Attorney General, in
20 consultation with the Secretary and the Administra-
21 tive Conference of the United States, shall monitor
22 and evaluate the effectiveness of State alternative
23 dispute resolution mechanisms established or main-
24 tained under this section.

1 **SEC. 13. APPLICABILITY.**

2 This Act shall apply to all civil actions covered under
3 this Act that are commenced on or after the date of enact-
4 ment of this Act, including any such action with respect
5 to which the harm asserted in the action or the conduct
6 that caused the harm occurred before the date of enact-
7 ment of this Act.

8 **SEC. 14. SEVERABILITY.**

9 If any provision of this Act, an amendment made by
10 this Act, or the application of such provision or amend-
11 ment to any person or circumstance is held to be unconsti-
12 tutional, the remainder of this Act, the amendments made
13 by this Act, and the application of the provisions of such
14 to any person or circumstance shall not be affected there-
15 by.

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