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**[Product Liability]**

## STATE-BY-STATE COMPARISON ON PUNITIVE DAMAGES

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Deter- mination	Miscellaneous
Alabama		Clear and Convincing	"consciously or deliberately engaged in oppression, fraud, wantonness or malice"	Except in wrongful death actions, may not exceed \$250,000 absent aggravating circumstances <sup>1</sup>				Jury determination subject to de novo review by trial court and appellate court. <sup>2</sup> Punitives not available except in tort actions and wrongful death.
Alaska		Clear and Convincing	"reckless indifference"					
Arizona			more than gross negligence					FDA defense
Arkansas			"malicious, wanton, in violation of a relationship of trust or confidence, or which is done with a deliberate intent to injure another"					
California		Clear and Convincing	"guilty of oppression, fraud, or malice"		May not plead monetary figure for punitive damages	Bifurcated process: may not admit evidence of a defendant's profits or financial condition until after verdict awarding actual damages and finding defendant liable for punitives		Special pleading rules in medical malpractice cases.

<sup>1</sup> The Alabama Supreme Court has held this provision violates the provision of Alabama Constitution guaranteeing a right to trial by jury. Henderson v. Alabama Power Co., 627 S. 2d 878 (Ala. 1993).

<sup>2</sup> This provision was held unconstitutional by the Alabama Supreme Court in Armstrong v. Roger's Outdoor Sports, Inc., 581 So.2d 414 (ala. 1991).

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Deter- mination	Miscellaneous
Colorado	1/3 of all damages paid into state general fund <sup>3</sup>	beyond a reasonable doubt	"fraud, malice, or wilfull and wanton misconduct"	not to exceed amount of actual damages; court may increase award to not exceed 3 times the amount of actual damages where aggravating circumstances			See caps	evidence of net worth not considered in determining punitives. Court may reduce award if it finds purpose of punitive damages already served. Special rules in health care cases (including FDA defense).
Connecticut			"reckless disregard"	not to exceed twice the damages awarded				
Delaware			"intentional or wilfull conduct with reckless disregard"					
Florida	plaintiff-65%; 35% to general fund, unless for personal injury or wrongful death (then to Medical Assistance Fund <sup>4</sup> )	see caps	"wilfull, wanton or gross misconduct"	not to exceed 3 times amount of compensatory damages awarded, unless clear and convincing evidence that award is not excessive	claim for relief for punitive damages only after plaintiff establishes a reasonable basis for recovery.			limitations do not apply to class actions
Georgia	in product liability -- 75% of amount awarded, less costs, paid to state treasury. <sup>5</sup>	clear and convincing	willful misconduct, malice, fraud, wantonness, oppression, or want of care that would raise presumption of conscious indifference	in product liability -- only one award may be recovered in the state. Other caps in other types of tort actions	punitive damages must be specifically prayed for in the complaint	bifurcation between liability for punitives and determination of amount		

<sup>3</sup> This provision held to result in an unconstitutional taking in Kirk v. Denver Pub. Co., 818 P. 2d 262 (Colo. 1991); however state statute did not perform allocation until after judgment became property interest of the claimant.

<sup>4</sup> Predecessor provision (with 60% going to state) was held constitutional in Gordon v. State, 585 So. 2d 1033 (Fla. App. 1991).

<sup>5</sup> This provision was held unconstitutional in McBride v. General Motors, Inc., 737 F. Supp. 1563 (N.D. Ga. 1990). However, more recently, the Georgia Supreme Court held the statute was not unconstitutional. Georgia v. Moseley, 436 S.E. 2d 632 (Ga. 1993).

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Deter- mination	Miscellaneous
Hawaii								no limits
Idaho		preponderance	"oppressive, fraudulent, wanton, malicious or outrageous conduct"		No claim in initial pleadings; may amend complaint to plead if court concludes reasonable likelihood of success			"Nothing in this section is intended to change the rules of evidence or standards of proof used by a tier of fact in finding punitive damages"
Illinois	court may, in its discretion, apportion the award among the plaintiff, the plaintiff's attorney and the State Dept. of Rehabilitation Services	clear and convincing	"evil motive or with reckless and outrageous indifference or highly unreasonable"	not greater than 3 times the economic damages awarded	No claim in initial pleadings; may amend complaint to plead if court concludes reasonable likelihood of success; if bifurcation, evidence relevant to punitives only admissible in punitive hearing	defendant may request that issues relating to punitives be tried separately		no punitive damages in cases involving healing arts and legal malpractice; <sup>6</sup> punitive damages only where award of actual damages
Indiana		clear and convincing						
Iowa	If action directed at plaintiff, no allocation; if action directed at public in general, up to 25% paid to plaintiff, with remainder paid to civil reparations trust <sup>7</sup>	clear, convincing and satisfactory	"willful and wanton disregard for the rights or safety of another"		mere allegation or assertion of claim for punitives shall not form basis for discovery of wealth of defendant until claimant establishes prima facie case for punitive damages			

<sup>6</sup> This provision was upheld in Bernier v. Burris, 497 N.E. 2d 763 (1986).

<sup>7</sup> Held constitutional in Shepherd Components v. Brice Petrides, 473 N.W. 2d 612 (Iowa 1991).

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Deter- mination	Miscellaneous
Kansas	In medical malprac- tice, 50% to plaintiff and other half to Health Care Stabiliza- tion Fund. <sup>8</sup> This provision applies only to actions accruing between July 1, 1985 and July 1, 1988.	clear and convincing	"willful, wanton, fraud or malice"	In medical malpractice, cap equal to 25% of de- fendant's highest gross annual income during 5- years prior to act or \$3 million. In other cases, cap equal to lesser of defendant's highest gross income in any one year of the 5-years prior to the act or \$5 million, unless court determines profitability would ex- ceed this cap, in which the cap is 1 and 1/2 times the profit.	No claim in initial plead- ings; court may allow filing of amended plead- ing if plaintiff establishes there is a "probability that the plaintiff will prevail"	separate proceeding to determine amount of punitive damages	court determines amount using speci- fied factors <sup>9</sup>	
Kentucky		clear and convincing	"acted toward plaintiff with oppression, fraud or malice"					no punitives for breach of con- tract; statutory factors guide determination of amount.
Louisiana								no punitive damages allowed except by statute
Maine								no limits
Maryland					evidence of defendant's wealth not admissible until finding of punitive liability and that the finding is supportable			

<sup>8</sup> Found unconstitutional as violative of the right to trial by a jury, adequate remedy and due course of law in Kansas Malpractice Victims Coalition v. Bell, 757 P. 2d 251 (Kan. 1988)

<sup>9</sup> This provision was upheld by the Kansas Supreme Court in Smith v. Printup, 866 P. 2d 985 (Kan. 1993).

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Deter- mination	Miscellaneous
Massachu- setts								no limits
Michigan								no limits
Minnesota		clear and convincing	"deliberate disregard for the rights or safety of others"		initial complaint may not seek punitives; court may grant motion to amend where prima facie evi- dence to support award	if requested, trier of fact shall first deter- mine compensatory damages (evidence of defendant's wealth not admissible); then separate proceeding on whether/what amount punitives will be awarded		statutory list of factors in deter- mining size of award.
Mississippi		clear and convincing	"acted with malice, gross negligence which evidence, wanton or reckless disregard for the safety of others, or committed actual fraud"			first determine com- pensatory damages; if compensatory damag- es awarded, then the court may initiate hearing related to punitive damages		Statutory list of factors in deter- mining amount; trial court required to determine punitives are reasonable and rationally related to punishment and deter- rence (must consider whether criminal fines or other civil awards have been imposed). Product seller limitations; limits do not apply to asbestos.
Missouri	50% of punitive damages after deduc- tion of attorney's fees and expenses deemed rendered in favor of the state; amount deposited in Tort Victims' Compensa- tion Fund	preponder- ance			where recoverable peti- tion should state separate- ly the amount of such damages sought	In trial by jury, if requested by party, bifurcate compensato- ry damages and liabil- ity for punitives from determination of amount of punitives. Net worth evidence only admissible in second part.		within time for filing motion for new trial, defendant may seek to reduce punitive award by other punitives paid for same conduct (not applicable to judg- ments in other states with sub- stantially different procedures). Special rules for medical mal- practice (including limits on noneconomic damages).

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Deter- mination	Miscellaneous
Montana		clear and convincing	"actual fraud or actual malice" "conscious or intentional disregard of the high probability of injury"		evidence of net worth not admissible until proceeding to determine amount of punitives	separate proceeding to determine amount of punitive damages		when judge determines amount must make specific statutorily-required findings.
Nebraska								no punitive damages allowed under state constitution.
Nevada		clear and convincing	"oppression, fraud or malice, express or implied"	Except in product liability cases, three times the amount of compensatory damages if compensatory damages are \$100,000 or more; \$300,000 if compensatory damages are less than \$100,000.	evidence of financial condition of defendant not admissible until proceeding for determining amount of punitive damages	separate proceeding to determine amount of punitive damages		cap does not apply to product liability cases or to cases involving accidents caused while driving while intoxicated
New Hampshire								punitive damages statutorily outlawed, unless specifically provided by statute
New Jersey		preponderance	"actual malice or accompanied by a wanton and willful disregard of the safety"		see bifurcation	separate proceeding to determine liability and amount of punitive damages		statutory factors prescribed in determining whether to impose punitives and in what amount. FDA defense. No punitives in absence of an award of compensatory damages.

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Deter- mination	Miscellaneous
New Mexico			gross negligence, malicious, willful, reckless, wanton, fraudulent or in bad faith <sup>10</sup>					separate treatment of medical malpractice cases
New York								Until April 1, 1994, 20% of punitive damages collected were payable to the state
North Carolina								no statutory limits
North Dakota		clear and convincing	"oppression, fraud, or malice, actual or presumed"	not to exceed two times compensatory damages or \$250,000, whichever is greater; provided no award may be made if claimant is not entitled to compensatory damages.	original complaint may not seek punitives; party may file motion to amend, which court shall grant if it finds prima facie evidence; evidence of defendant's net worth not admissible in proceedings on punitive damages	if either party elects, trier first determine compensatory damages; if compensatory damages awarded, tier shall then determine whether punitives shall be awarded.		statutory factors prescribed in determining liability for punitives.
Ohio		clear and convincing	"flagrant disregard of the safety of persons who might be harmed by the product"				amount of damages determined by the court <sup>11</sup>	award of compensatory damages prerequisite to award of punitives; court to consider statutory factors in determining amount of punitive damages; FDA defense

<sup>10</sup> Uniform Jury Instructions

<sup>11</sup> Held unconstitutional under the state constitution in *Zoppo v. Homestead Insurance Co.*, 644 N.E. 2d 397 (Ohio 1994).

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Deter- mination	Miscellaneous
Oklahoma		see caps	"conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed."	amount not exceeding the amount of actual damages awarded, unless court concludes there is clear and convincing evidence of conduct meeting standard, in which case the limitation does not apply.	petition shall not state amount of damages sought but only whether punitives are sought and whether the amount sought is in excess of \$10,000		see caps	
Oregon	attorney shall receive agreed fee; remainder shall be split between the plaintiff and the state Criminal Injuries Compensation Account	clear and convincing	"wanton disregard for the healthy, safety and welfare of others"		evidence of defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover punitives			payments on judgments shall first be applied to compensatory damages and then to punitive damage; punitive damages generally not awardable against licensed health practitioner; statutory factors in determining whether the award punitives; FDA defense; separate (\$500,000) cap on noneconomic damages.
Pennsylvania			"wilfull or wanton misconduct"					
Rhode Island								no statutory limits
South Carolina		clear and convincing	malice, illwill, reckless conduct or callous indifference to statutorily protected rights	claims for punitive damages shall be in general terms and not for a stated sum				

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Deter- mination	Miscellaneous
South Dakota								punitive damages outlawed
Tennessee			"wilfully and mali- ciously, under circum- stances of rudeness or oppression, or in a manner which evinces a wanton and reckless disregard of the plain- tiff's rights"					actual damages must be award- ed;
Texas			"fraud, malice or gross negligence"	may not exceed four times the amount of actual damages or \$200,000, except for instances of malice and intentional tort				may be awarded only if damag- es other than nominal damages are awarded; several liability for punitives
Utah	50 percent in excess of \$20,000, after payment of attorneys' fees and costs, remit- ted to General Fund	clear and convincing	"wilful and malicious or intentionally fraudu- lent conduct or conduct that manifests a know- ing and reckless indif- ference toward, and disregard of, the rights of others."		evidence of party's wealth admissible only after a finding of liability for punitive damages has been made	see pleadings/evi- dence		may be awarded only if com- pensatory or general damages are awarded; special rule for torts occurring while driving under the influence
Vermont			actual malice					

STATE	Allocation	Burden	Standard	Caps	Pleadings/ Evidence	Bifurcation	Judicial Deter- mination	Miscellaneous
Virginia				not to exceed \$350,000				no other general statutory limits; bifurcation provision in special mass tort rules for asbestos cases
Washington								recovery of punitive damages not allowed unless expressly authorized by statute
West Virginia								may be awarded only if compensatory damages awarded; additional limits in government tort claims
Wisconsin								no statutory limits
Wyoming								no statutory limits

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SUBJECT: SUMMARY CHART

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>LOSER PAY: Rule 68/Diversity</p> <p>SCIENTIFIC EVIDENCE</p> <p>PREEMPTION</p> <p>PRODUCT LIABILITY:</p> <ul style="list-style-type: none"> <li>Product Sellers Defense</li> <li>Regulatory Defense</li> <li>Intoxication Defense</li> <li>Frivolous Pleadings</li> <li>Misuse or Alteration</li> <li>Time Limits: Stat. of Repose</li> <li>Foreign Products</li> </ul> <p>PUNITIVE DAMAGES:</p> <ul style="list-style-type: none"> <li>Caps</li> <li>Clear and Convincing</li> <li>Conscious, Flagrant</li> <li>Bifurcation</li> </ul> <p>SEVERAL LIABILITY</p> <p>MEDICAL MALPRACTICE</p>	<p>LOSER PAY: Exempts Low Income</p> <p>SCIENTIFIC EVIDENCE</p> <p>PREEMPTION: State opt Out</p> <p>No Provision</p> <p>PUNITIVE DAMAGES:</p> <ul style="list-style-type: none"> <li>Caps</li> </ul> <p>SEVERAL LIABILITY</p> <p>No Provision</p>	<p>No Provision</p> <p>No Provision</p> <p>PREEMPTION</p> <p>PRODUCT LIABILITY:</p> <ul style="list-style-type: none"> <li>Product Seller Defense</li> <li>Intoxication Defense</li> <li>Misuse or Alteration</li> <li>Time Limits</li> </ul> <p>Punitive Damages</p> <ul style="list-style-type: none"> <li>Caps</li> <li>Clear and Convincing</li> <li>Conscious, Flagrant</li> <li>Bifurcation</li> </ul> <p>Several Liability</p> <p>No Provision</p>	<p>LOSER PAY: Rule 68/Diversity</p> <p>SCIENTIFIC EVIDENCE</p> <p>PREEMPTION</p> <p>PRODUCT LIABILITY:</p> <ul style="list-style-type: none"> <li>Regulatory Defense</li> </ul> <p>PUNITIVE DAMAGES:</p> <ul style="list-style-type: none"> <li>Bar on Multiple Awards</li> <li>Clear and Convincing</li> <li>Conscious, Flagrant</li> </ul> <p>SEVERAL LIABILITY</p> <p>MEDICAL MALPRACTICE</p>

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
BIOMATERIALS	No Provision (But see S. 454)	No Provision (But see S. 303)	No Provision
No Provision	COLLATERAL SOURCE RULE	No Provision	No Provision
No Provision	ATTORNEY ACCOUNTABILITY	No Provision	ATTORNEY ACCOUNTABILITY
No Provision	LIMITS ON CONTINGENCY FEES	No Provision	STUDY ON CONTINGENCY FEES
RULE 11/FRIVOLOUS PLEADINGS	RULE 11/FRIVOLOUS PLEADINGS	No Provision	RULE 11/FRIVOLOUS FILINGS
No Provision	EARLY OFFER MECHANISM	No Provision	No Provision
No Provision	ADR	ADR	No Provision
No Provision	No Provision	No Provision	PRISONER LITIGATION

H.R. 956/H.R. 988	S. 300	FAIRNESS	HATCH
<p>(H.R. 988) Sec. 2. Award of Costs and Attorney's Fees in Federal Civil Diversity Litigation After an Offer of Settlement.</p> <p>Section 1332 of title 28, United States Code, is amended by adding at the end the following:</p> <p>"(e)(1) In any action over which the court has jurisdiction under this section, any party may, at any time not less than 10 days before trial, serve upon any adverse party a written offer to settle a claim or claims for money or property or to the effect specified in the offer, including a motion to dismiss all claims, and to enter into a stipulation dismissing the claim or claims or allowing judgment to be entered according to the terms of the offer. Any such offer, together with proof of service thereof, shall be filed with the clerk of the court.</p> <p>"(2) If the party receiving an offer under paragraph (1) serves written notice on the offeror that the offer is accepted, either party may file with the clerk of the court the notice of acceptance, together with proof of service thereof.</p> <p>"(3) The fact that an offer under paragraph (1) is made but not accepted does not preclude a subsequent offer under paragraph (1). Evidence of an offer is not admissible for any purpose except in proceedings to enforce a settlement, or to determine costs and expenses under this subsection.</p>	<p>Sec. 5. Equity in Legal Fees</p> <p>(d) Prevailing Party Costs and Attorneys' Fees.--</p> <p>(1) In General.--Subject to paragraphs (2) and (3), in any civil action filed against any person in any Federal or State court, based on any cause of action (including, but not limited to negligence, strict or product liability, breach of implied warranty or professional malpractice) in which damages are sought for tortious physical or mental injury, property damage, or economic loss the court may award each prevailing party costs and reasonable attorneys' fees.</p> <p>(2) Amount of Award.--An award of costs and reasonable attorneys' fees under paragraph (1) may not exceed--</p> <p>(A) the actual cost incurred by the nonprevailing party or the attorneys' fee payable for services in connection with such civil action; or</p> <p>(B) if no such cost was incurred by the nonprevailing party due to a contingency fee agreement, an amount equal to the reasonable costs that would have been incurred by the nonprevailing party for a noncontingent attorneys' fee payable for services in connection with such civil action.</p>	<p>No Provision</p>	<p>Section 304 of Senator Hatch's "Civil Justice Fairness Act" reportedly will include a provision similar to that in H.R. 988.</p>

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>"(4) At any time before judgment is entered, the court, upon its own motion or upon the motion of any party, may exempt from this subsection any claim that the court finds presents a question of law or fact that is novel and important and that substantially affects nonparties. If a claim is exempted from this subsection, all offers made by any party under paragraph (1) with respect to that claim shall be void and have no effect.</p> <p>"(5) If all offers made by a party under paragraph (1) with respect to a claim or claims, including any motion to dismiss all claims, are not accepted and the judgment, verdict, or order finally issued (exclusive of costs, expenses, and attorneys' fees incurred after judgment or trial) in the action under this section is not more favorable to the offeree with respect to the claim or claims than the last such offer, the offeror may file with the court, within 10 days after the final judgment, verdict, or order is issued, a petition for payment of costs and expenses, including attorneys' fees, incurred with respect to the claim or claims from the date the last such offer was made or, if the offeree made an offer under this subsection, from the date the last such offer by the offeree was made.</p>	<p>(3) <b>Limitation.</b>-- (A) Notwithstanding paragraph (1) or (2), the court shall not award an attorney's fee in any case in which the nonprevailing party--</p> <p style="padding-left: 40px;">(i) had a taxable income of less than \$75,000 in the calendar year preceding the calendar year in which the civil action was filed, if the nonprevailing party is an individual; or</p> <p style="padding-left: 40px;">(ii) had an average taxable income of less than \$50,000 for the 3 calendar years preceding the calendar year in which the civil action was filed, if the nonprevailing party is not an individual.</p> <p>(B) The court shall retain discretion to refuse to award or may reduce the amount awarded as an attorney's fee under paragraph (1) to the extent the court finds would be in the interests of justice.</p>	<p>No Provision</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>"(6) If the court finds, pursuant to a petition filed under paragraph (5) with respect to a claim or claims, that the judgment, verdict, or order finally obtained is not more favorable to the offeree with respect to the claim or claims than the last offer, the court shall order the offeree to pay the offeror's costs and expenses, including attorneys' fees, incurred with respect to the claim or claims from the date the last offer was made or, if the offeree made an offer under this subsection, from the date the last such offer by the offeree was made, unless the court finds that requiring the payment of such costs and expenses would be manifestly unjust.</p> <p>"(7) Attorney's fees under paragraph (6) shall be a reasonable attorney's fee attributable to the claim or claims involved, calculated on the basis of an hourly rate which may not exceed that which the court considers acceptable in the community in which the attorney practices law, taking into account the attorney's qualifications and experience and the complexity of the case, except that the attorney's fees under paragraph (6) may not exceed--</p>	<p>See Above</p>	<p>No Provision</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>"(A) the actual cost incurred by the offeree for an attorney's fee payable to an attorney for services in connection with the claim or claims; or                      "(B) if no such cost was incurred by the offeree due to a contingency fee agreement, a reasonable cost that would have been incurred by the offeree for an attorney's noncontingent fee payable to an attorney for services in connection with the claim or claims.</p> <p>"(8) This subsection does not apply to any claim seeking an equitable remedy."</p>	<p>See Above</p>	<p>No Provision</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>(H.R. 988) Sec. 3. Honesty in Evidence. Rule 702 of the Federal Rules of Evidence (28 U.S.C. pp.) is amended--</p> <p>(1) by inserting "(a) In general.--" before "If ", and</p> <p>(2) by adding at the end the following:</p> <p>"(b) Adequate basis for opinion.--Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion--</p> <p>"(1) is scientifically valid and reliable;  "(2) has a valid scientific connection to the fact it is offered to prove; and  "(3) is sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403.</p>	<p>Sec. 11. Reliability of Expert Evidence. Rule 702 of the Federal Rules of Evidence is amended --</p> <p>(1) by striking out "If" and inserting in lieu thereof "(a) IN GENERAL.--Subject to subsection (b), if"; and</p> <p>(2) by adding at the end thereof the following:</p> <p>"(b) Adequate Basis for Opinion.--Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion is--</p> <p>"(1) based on scientifically valid reasoning; and  "(2) sufficiently reliable so that the probative value of such evidence outweighs the dangers specified under rule 403.</p> <p>"(c) Expert Opinions on Novel Scientific Principles or Discoveries.--Where testimony in the form of an opinion by a witness is sought to be used to establish a novel scientific principle or discovery, it shall be admissible only if the principle or discovery, or its scientific underpinning, is sufficiently established to have gained general acceptance in the field in which it belongs.</p>	<p>No Provision.</p>	<p>Section 303 of Hatch's "Civil Justice Fairness Act" reportedly will also seek to modify Rule 702 of the Federal Rules of Evidence to restore the <u>Frye</u> rule.</p>

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>"(c) Disqualification.--Testimony by a witness who is qualified as described in subdivision (a) is inadmissible in evidence if the witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which the testimony is offered.</p> <p>"(d) Scope.--Subdivision (b) does not apply to criminal proceedings."</p>	<p>"(d) Disqualification.--Testimony by a witness who is qualified as an expert under subsection (a) is inadmissible in evidence if such witness is entitled to receive any compensation directly or indirectly contingent on the legal disposition of any claim with respect to which such testimony is offered."</p>	<p>No Provision.</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>(H.R. 956 -- Title I -- Product Liability)  <b>Sec. 101. Applicability and Preemption.</b></p> <p>(a) <b>Preemption.</b>--This title governs any product liability action brought in any State or Federal court, on any theory for harm caused by a product. A civil action brought for commercial loss shall be governed only by applicable commercial or contract law.</p> <p>(b) <b>Relationship of State Law.</b>--This title supersedes State law only to the extent that State law applies to an issue covered by this title. Any issue that is not governed by this title shall be governed by otherwise applicable State or Federal law.</p> <p>(H.R. 946 -- Title IV)  <b>Sec. 401. Application Limited to Interstate Commerce.</b> Titles I, II, and III shall apply only to product liability or other civil actions affecting interstate commerce. For purposes of the preceding sentence, the term "interstate commerce" means commerce among the several States or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such territory and another, or between any such territory and any State or foreign nation, or between the District of Columbia and any State or territory of foreign nation.</p>	<p><b>Sec. 13. Applicability. (a) Preemption.</b>--This Act shall preempt and supersede other Federal or State laws only to the extent any such law is inconsistent with this Act. This Act shall not preempt any Federal or State law that provides for defenses in addition to those contained in this Act, places greater limitations on the amount of attorney's fees that can be collected, or additional disclosure requirements upon attorneys, or otherwise imposes restrictions on economic, noneconomic, or punitive damages. Any issue arising under this Act that is not governed by the provisions of this Act shall be governed by applicable Federal or State law.</p> <p>(b) <b>Rule of Construction.</b>--Nothing in this Act shall be construed to--</p> <ol style="list-style-type: none"> <li>(1) waive or affect any defense of sovereign immunity asserted by any State under any provision of law;</li> <li>(2) waive or affect any defense of sovereign immunity asserted by the United States;</li> <li>(3) affect the applicability of any provision of chapter 97 of title 28, United States Code;</li> <li>(4) preempt State choice-of-law rules with respect to claims brought by a foreign nation or citizen of a foreign nation; or</li> <li>(5) affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign or of a citizen of a foreign nation on the ground of inconvenient forum.</li> </ol>	<p><b>Sec. 3. Applicability; Preemption. (a) Applicability.</b>--(1) <b>Actions Covered.</b>--Subject to paragraph (2), this Act applies to any product liability action commenced on or after the date of enactment of this Act, without regard to whether the harm that is the subject of the action or the conduct that caused the harm occurred before such date of enactment.</p> <p>(2) <b>Actions Excluded.</b>-- (A) <b>Actions for Damage to Product or Commercial Loss.</b>-- A civil action brought for loss or damage to a product itself or for commercial loss, shall not be subject to the provisions of this Act governing product liability actions, but shall be subject to any applicable commercial or contract law.</p> <p>(B) <b>Actions for Negligent Entrustment.</b>--A civil action for negligent entrustment shall not be subject to the provisions of this Act governing product liability actions, but shall be subject to any applicable State law.</p> <p>(b) <b>Scope of Preemption.</b>-- (1) <b>In General.</b>--This Act supersedes a State law only to the extent that State law applies to an issue covered under this Act.</p> <p>(2) <b>Issues not Covered Under this Act.</b> --Any issue that is not covered under this Act, including any standard of liability applicable to a manufacturer, shall not be subject to this Act, but shall be subject to applicable Federal or State law.</p>	

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<p>(H.R. 956 -- Title IV)                      Sec. 402 Effect on Other Law. Nothing in title I, II, or III shall be construed to--</p> <p>(1) waive or affect any defense of sovereign immunity asserted by any State under any law;</p> <p>(2) supersede any Federal law;</p> <p>(3) waive or affect any defense of sovereign immunity asserted by the United States;</p> <p>(4) affect the applicability of any provision of chapter 97 of title 28, United States Code;</p> <p>(5) preempt State choice-of-law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation; or</p> <p>(6) affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground of inconvenient forum.</p>	<p>(c) State Election Regarding Applicability.--A provision of this Act shall not apply to a State if such State enacts a statute--</p> <p>(1) citing the authority of this subsection; and</p> <p>(2) declaring the election of such State that such provision shall not apply to the State.</p>	<p>(c) Statutory Construction.--Nothing in this Act may be construed to--</p> <p>(1) waive or affect any defense of sovereign immunity asserted by any State under law;</p> <p>(2) supersede any Federal law, except * * * the "Federal Employers' Liability Act" and the Longshore and Harbor Workers' Compensation Act (* * *);</p> <p>(3) waive or affect any defense of sovereign immunity asserted by the United States;</p> <p>(4) affect the applicability of any provision of chapter 97 of title 28, U.S.C.;</p> <p>(5) preempt State choice-of-law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation;</p> <p>(6) affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground of inconvenient forum; or</p> <p>(7) supersede any statutory or common law, including any law providing for an action to abate a nuisance, that authorizes a State or person to institute an action for civil damages or civil penalties, cleanup costs, injunctions, restitution, cost recovery, punitive damages, or any other form of relief relating to contamination or pollution of the environment *** or the threat of such contamination or pollution.</p>	

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<p>(H.R. 956 -- Title I)  <b>Sec. 102. Liability Rules Applicable to Product Sellers.</b></p> <p>(a) <b>General Rule.</b>--Except as provided in subsection (b), in any product liability action, a product seller other than a manufacturer shall be liable to a claimant for harm only if the claimant establishes that--</p> <p>(1)(A) the product which allegedly caused the harm complained of was sold by the product seller; (B) the product seller failed to exercise reasonable care with respect to the product; and (C) such failure to exercise reasonable care was a proximate cause of the claimant's harm; or</p> <p>(2)(A) the product seller made an express warranty applicable to the product which allegedly caused the harm complained of, independent of any express warranty made by a manufacturer as to the same product; (B) the product failed to conform to the warranty; and (C) the failure of the product to conform to the warranty caused the claimant's harm; or</p>	<p>No Provision</p>	<p><b>Sec. 5. Liability Rules Applicable to Product Sellers.</b> (a) <b>General Rule.</b>-- (1) <b>In General.</b>--In any product liability action that is subject to this Act filed by a claimant for harm caused by a product, a product seller other than a manufacturer shall be liable to a claimant, only if the claimant establishes--</p> <p>(A) that-- (i) the product that allegedly caused the harm that is the subject of the complaint was sold by the product seller; (ii) the product seller failed to exercise reasonable care with respect to the product; and (iii) the failure to exercise reasonable care was a proximate cause of harm to the claimant;</p> <p>(B) that-- (i) the product seller made an express warranty applicable to the product that allegedly caused the harm that is the subject of the complaint, independent of any express warranty made by a manufacturer as to the same product; (ii) the product failed to conform to the warranty; and (iii) the failure of the product to conform to the warranty caused harm to the claimant; or</p>	

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<p>(3) the product seller engaged in intentional wrongdoing as determined under applicable State law and such intentional wrongdoing was a proximate cause of the harm complained of by the claimant.</p> <p>For purposes of paragraph (1)(B), a product seller shall not be considered to have failed to exercise reasonable care with respect to the product based upon an alleged failure to inspect a product where there was no reasonable opportunity to inspect the product in a manner which would, in the exercise of reasonable care, have revealed the aspect of the product which allegedly caused the claimant's harm.</p> <p>(b) <b>Exception.</b>--In a product liability action, a product seller shall be liable for harm to the claimant caused by such product as if the product seller were the manufacturer of such product if--</p> <p>(1) the manufacturer is not subject to service of process under the laws of any State in which the action might have been brought; or</p> <p>(2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.</p>	<p>No Provision</p>	<p>(C) that-- (i) the product seller engaged in intentional wrongdoing, as determined under applicable State law; and (ii) such intentional wrongdoing was a proximate cause of the harm that is the subject of the complaint.</p> <p>(2) <b>Reasonable Opportunity for Inspection.</b>--For purposes of paragraph (1)(A)(ii), a product seller shall not be considered to have failed to exercise reasonable care with respect to a product based upon an alleged failure to inspect a product if the product seller had no reasonable opportunity to inspect the product that allegedly caused harm to the claimant.</p> <p>(b) <b>Special Rule.</b>--A product seller shall be deemed to be liable as a manufacturer of a product for harm caused by the product if--</p> <p>(1) the manufacturer is not subject to service of process under the laws of any State in which the action may be brought; or</p> <p>(2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.</p>	

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<p>(c) Notwithstanding any other provision of law, any person, except a person excluded from the definition of product seller, engaged in the business of renting or leasing a product shall be subject to liability pursuant to subsection (a) of this section, but shall not be liable to a claimant for the tortious act of another solely by reason of ownership of such product.</p>	<p>No Provision</p>	<p>See Above</p>	

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<p>(H.R. 956 -- Title II)  <b>Sec. 201. Treble Damages as Penalty in Civil Actions. ****</b></p> <p><b>(f) Drugs and Devices.--</b></p> <p>(1)(A) Punitive damages shall not be awarded against a manufacturer or product seller of a drug * * * of the Federal Food, Drug, and Cosmetic Act * * * or medical device * * * which caused the claimant's harm where--</p> <p>(i) such drug or device was subject to premarket approval by the Food and Drug Administration with respect to the safety of the formulation or performance of the aspect of such drug or device which caused the claimant's harm or the adequacy of the packaging or labeling of such drug or device, and such drug was approved by the Food and Drug Administration; or</p> <p>(ii) the drug is generally recognized as safe and effective pursuant to conditions established by the Food and Drug Administration and applicable regulations, including packaging and labeling regulations.</p>	<p>No Provision</p>	<p>No Provision</p>	<p><b>Section 103 of Senator Hatch's "Civil Justice Fairness Act" reportedly will include a provision establishing an FDA defense for drugs and medical devices receiving premarket approval from the FDA.</b></p>

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<p>(B) Subparagraph (A) shall not apply in any case in which the defendant, before or after pre-market approval of a drug or device--</p> <p>(i) intentionally and wrongfully withheld from or misrepresented to the FDA information concerning such drug or device required to be submitted under the Federal Food, Drug, and Cosmetic Act * * * or section 351 of the Public Health Service Act * * * that is material and relevant to the harm suffered by the claimant, or</p> <p>(ii) made an illegal payment to an official or employee of the Food and Drug Administration for the purpose of securing or maintaining approval of such drug or device.</p> <p>(2) <b>Packaging.</b>--In a product liability action for harm which is alleged to relate to the adequacy of the packaging (or labeling relating to such packaging) of a drug which is required to have tamper-resistant packaging under regulations of the Secretary of Health and Human Services (including labeling regulations related to such packaging), the manufacturer of the drug shall not be held liable for punitive damages unless the drug is found by the court by clear and convincing evidence to be substantially out of compliance with such regulations.</p>	<p>No Provision</p>	<p>No Provision</p>	

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<p>(H.R. 956 -- Title I)  <b>Sec. 103. Defense Based on Claimant's Use of Intoxicating Alcohol or Drugs.</b></p> <p>(a) <b>General Rule.</b>--In any product liability action, it shall be a complete defense to such action if--</p> <p>(1) the claimant was intoxicated or was under the influence of intoxicating alcohol or any drug when the accident or other event which resulted in such claimant's harm occurred; and</p> <p>(2) the claimant, as a result of the influence of the alcohol or drug, was more than 50 percent responsible for such accident or other event.</p> <p>(b) <b>Construction.</b>--For purposes of subsection (a)--</p> <p>(1) the determination of whether a person was intoxicated or was under the influence of intoxicating alcohol or any drug shall be made pursuant to applicable State law; and</p> <p>(2) the term "drug" means any controlled substance as defined in the Controlled Substances Act (21 U.S.C. 802(6)) that has been taken by the claimant other than in accordance with the terms of a lawfully issued prescription.</p>	<p>No Provision</p>	<p><b>Sec. 6. Defenses Involving Intoxicating Alcohol or Drugs.</b></p> <p>(a) <b>General Rule.</b>--Notwithstanding any other provision of law, a defendant in a product liability action that is subject to this Act shall have a complete defense in the action if the defendant proves that--</p> <p>(1) the claimant was under the influence of intoxicating alcohol or any drug that may not lawfully be sold over-the-counter without a prescription, and was not prescribed by a physician for use by the claimant; and</p> <p>(2) the claimant, as a result of the influence of the alcohol or drug, was more than 50 percent responsible for the accident or event which resulted in the harm to the claimant.</p> <p>(b) <b>Construction.</b>--For purposes of this section, the determination of whether a person was intoxicated or was under the influence of intoxicating alcohol or any drug shall be made pursuant to applicable State law.</p>	

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<p>(H.R. 956 – Title I)  <b>Sec. 105. Frivolous Pleadings.</b></p> <p><b>(a) General Rule.— (1) Signing of Pleading. -</b>                      -The signing or verification of a pleading in a product liability action in a State court subject to this title constitutes a certificate that to the signatory's or verifier's best knowledge, information, and belief, formed after reasonable inquiry, the pleading is not frivolous as determined under paragraph (2).</p> <p><b>(2) Definitions.— (A) For purposes of this section, a pleading is frivolous if the pleading is—</b></p> <ul style="list-style-type: none"> <li>(i) groundless and brought in bad faith;</li> <li>(ii) groundless and brought for the purpose of harassment; or</li> <li>(iii) groundless and interposed for any improper purpose, such as to cause unnecessary delay or needless increase in the cost of litigation.</li> </ul> <p><b>(B) For purposes of subparagraph (A), the term "groundless" means—</b></p> <ul style="list-style-type: none"> <li>(i) no basis in fact; or</li> <li>(ii) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.</li> </ul>	<p>No Provision</p>	<p>No Provision</p>	

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<p>(b) Determination that Pleading Frivolous.--</p> <p>(1) Motion for Determination.--Not later than 60 days after the date a pleading in a product liability action in a State court is filed, a party to the action may make a motion that the court determine if the pleading is frivolous.</p> <p>(2) Court Action.--The court in a product liability action in a State court shall on the motion of a party or on its own motion determine if a pleading is frivolous.</p> <p>(c) Considerations.--In making its determination of whether a pleading is frivolous, the court shall take into account--</p> <ul style="list-style-type: none"> <li>(1) the multiplicity of parties;</li> <li>(2) the complexity of the claims and defenses;</li> <li>(3) the length of time available to the party to investigate and conduct discovery; and</li> <li>(4) affidavits, depositions, and any other relevant matter.</li> </ul> <p>(d) Sanction.--If the court determines that a pleading is frivolous, the court shall impose an appropriate sanction on the signatory or verifier of the pleading. The sanction may include one or more of the following:</p>	<p>No Provision</p>	<p>No Provision</p>	

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<p>(1) the striking of a pleading or the offending portion thereof;</p> <p>(2) the dismissal of a party; or</p> <p>(3) an order to pay to a party who stands in opposition to the offending pleading the amounts of the reasonable expenses incurred because of the filing of the pleading, including costs, reasonable attorney's fees, witness fees, fees of experts, and deposition expenses.</p> <p>(e) Construction.--For purposes of this section--</p> <p>(1) a general denial does not constitute a frivolous pleading; and</p> <p>(2) the amount requested for damages does not constitute a frivolous pleading.</p>	<p>No Provision</p>	<p>No Provision</p>	

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<p>(H.R. 956- Title I)  <b>Sec. 104. Misuse or Alteration.</b>  <b>(a) General Rule.</b>—In a product liability action, the damages for which a defendant is otherwise liable under State law shall be reduced by the percentage of responsibility for the claimant's harm attributable to misuse or alteration of a product by any person if the defendant establishes by a preponderance of the evidence that such percentage of the claimant's harm was proximately caused by—</p> <p>(1) a use or alteration of a product in violation of, or contrary to, a defendant's express warnings or instructions if the warnings or instructions are adequate as determined pursuant to applicable State law, or</p> <p>(2) a use or alteration of a product involving a risk of harm which was known or should have been known by the ordinary person who uses or consumes the product with the knowledge common to the class of persons who used or would be reasonably anticipated to use the product.</p>	<p>No Provision</p>	<p><b>Sec. 7. Reduction for Misues or Alteration of Product.</b> (a) <b>General Rule.</b>—(1) <b>In General.</b>                  —Except as provided in subsection (c), in a product liability action that is subject to this Act, the damages for which a defendant is otherwise liable under applicable State law shall be reduced by the percentage of responsibility for the harm to the claimant attributable to misuse or alteration of a product by any person if the defendant establishes that such percentage of the harm was proximately caused by a use or alteration of a product—</p> <p>(A) in violation of, or contrary to, the express warnings or instructions of the defendant if the warnings or instructions are determined to be adequate pursuant to applicable State law; or</p> <p>(B) involving a risk of harm which was known or should have been known by the ordinary person who uses or consumes the product with the knowledge common to the class of persons who used or would be reasonably anticipated to use the product.</p> <p>(2) <b>Use Intended by a Manufacturer is Not Misues or Alteration</b> —For the purposes of this Act, a use of a product that is intended by the manufacturer of the product does not constitute a misuse or alteration of the product.</p>	

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<p>(b) <b>Workplace Injury.</b>—Notwithstanding subsection (a), the damage for which a defendant is otherwise liable under State law shall not be reduced by the percentage of responsibility for the claimant’s harm attributable to misuse or alteration of the product by the claimant’s employer or any co-employee who is immune from suit by the claimant pursuant to the State law applicable to workplace injuries.</p>	<p>No Provision</p>	<p>(b) <b>State Law.</b>—Notwithstanding section 3(b), subsection (a) of this section shall supersede State law concerning misuse or alteration of a product only to the extent that State law is inconsistent with such subsection.</p> <p>(c) <b>Workplace Injury.</b>—Notwithstanding subsection (a), the amount of damages for which a defendant is otherwise liable under State law shall not be reduced by the application of this section with respect to the conduct of any employer or coemployee of the plaintiff who is, under applicable State law concerning workplace injuries, immune from being subject to an action by the claimant.</p>	

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See Below	No Provision	<p><b>Sec. 9. Uniform Time Limitations on Liability.</b></p> <p><b>(a) Statute of Limitations.--</b></p> <p>(1) <b>In General.--</b>Except as provided in paragraph (2) and subsection (b), a product liability action that is subject to this Act may be filed not later than 2 years after the date on which the claimant discovered or, in the exercise of reasonable care, should have discovered, the harm that is the subject of the action and the cause of the harm.</p> <p>(2) <b>Exceptions.--</b></p> <p><b>(A) Person With a Legal Disability.--</b>A person with a legal disability (as determined under applicable law) may file a product liability action that is subject to this Act not later than 2 years after the date on which the person ceases to have the legal disability.</p> <p><b>(B) Effect of Stay or Injunction.--</b>If the commencement of a civil action that is subject to this Act is stayed or enjoined, the running of the statute of limitations under this section shall be suspended until the end of the period that the stay or injunction is in effect.</p>	

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<p>(H.R. 956- Title I) Sec. 106. Statute of Repose.</p> <p>(a) <b>General Rule.</b>--A product liability action shall be barred unless the complaint is served and filed within 15 years of the date of delivery of the product to its first purchaser or lessee, who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product.</p> <p>(b) <b>Exception.</b>--Subsection (a)--</p> <p>(1) does not bar a product liability action against a defendant who made an express warranty in writing as to the safety of the specific product involved which was longer than 15 years, but it will apply at the expiration of such warranty,</p> <p>(2) does not apply to a physical illness the evidence of which does not ordinarily appear less than 15 years after the first exposure to the product, and</p> <p>(3) does not affect the limitations period established by the General Aviation Revitalization Act of 1994.</p>	<p>No Provision.</p>	<p>(b) <b>Statute of Repose.</b>--</p> <p>(1) <b>In General.</b>--Subject to paragraphs (2) and (3), no product liability action that is subject to this Act concerning a product that is a durable good alleged to have caused harm (other than toxic harm) may be filed after the 20-year period beginning at the time of delivery of the product.</p> <p>(2) <b>State Law.</b>--Notwithstanding paragraph (1), if pursuant to an applicable State law, an action described in such paragraph is required to be filed during a period that is shorter than the 20-year period specified in such paragraph, the State law shall apply with respect to such period.</p> <p>(3) <b>Exception.</b>--A motor vehicle, vessel, aircraft, or train that is used primarily to transport passengers for hire shall not be subject to this subsection.</p> <p>(c) <b>Transitional Provision Relating to Extension of Period for Bringing Certain Actions.</b>--If any provision of subsection (a) or (b) shortens the period during which a product liability action that could be otherwise brought pursuant to another provision of law, the claimant may, notwithstanding subsections (a) and (b), bring the product liability action pursuant to this Act not later than 1 year after the date of enactment of this Act.</p>	

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<p>(H.R. 956) Sec. 107. Foreign Products.</p> <p>(a) <b>General Rule.</b>--In any product liability action for injury that was sustained in the United States and that relates to the purchase or use of a product manufactured outside the United States by a foreign manufacturer, the Federal court in which such action is brought shall have jurisdiction over such manufacturer if the manufacturer knew or reasonably should have known that the product would be imported for sale or use in the United States.</p> <p>(b) <b>Admission.</b>--If in any product liability action a foreign manufacturer of the product involved in such action fails to furnish any testimony, document, or other thing upon a duly issued discovery order by the court in such action, such failure shall be deemed an admission of any fact with respect to which the discovery order relates.</p> <p>(c) <b>Process.</b>--Process in an action described in subsection (a) may be served wherever the foreign manufacturer is located, has an agent, or transacts business.</p>	<p>No Provision</p>	<p>No Provision</p>	

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<p>(H.R. 956)  <b>Sec. 108. Definitions.</b> As used in this title:</p> <p>(1) The term "claimant" means any person who brings a product liability action and any person on whose behalf such an action is brought. If such an action is brought through or on behalf of an estate, the term includes the claimant's decedent. If such action is brought through or on behalf of a minor or incompetent, the term includes the claimant's legal guardian.</p> <p>(2) The term "commercial loss" means any loss of or damage to a product itself incurred in the course of the ongoing business enterprise consisting of providing goods or services for compensation.</p> <p>(3) The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings, medical expense loss, replacement services loss, loss due to death, and burial costs) to the extent recovery for such loss is allowed under applicable State law.</p> <p>(4) The term "harm" means any physical injury, illness, disease, or death or damage to property caused by a product. The term does not include commercial loss or loss or damage to a product itself.</p>	<p>No Provision.</p>	<p><b>Sec. 2. Definitions.</b> For purposes of this Act, the following definitions shall apply:</p> <p>(1) <b>Claimant.</b>--The term "claimant" means any person who brings a product liability action and any person on whose behalf such an action is brought. If an action is brought through or on behalf of--</p> <p>(A) an estate, the term includes the decedent; or</p> <p>(B) a minor or incompetent, the term includes the legal guardian of the minor or incompetent.</p> <p>(2) <b>Claimant's Benefits.</b>--The term "claimant's benefits" means an amount equal to the sum of--</p> <p>(A) the amount paid to an employee as workers' compensation benefits; and</p> <p>(B) the present value of all workers' compensation benefits to which the employee is or would be entitled at the time of the determination of the claimant's benefits, as determined by the appropriate workers' compensation authority for harm caused to an employee by a product.</p>	

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See Above	No Provision.	<p>(3) Clear and Convincing Evidence.--</p> <p>(A) In General.--Subject to subparagraph (A), the term "clear and convincing evidence" is that measure of degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.</p> <p>(B) Degree of Proof.--The degree of proof required to satisfy the standard of clear and convincing evidence shall be--</p> <p>(i) greater than the degree of proof required to meet the standard of preponderance of the evidence; and</p> <p>(ii) less than the degree of proof required to meet the standard of proof beyond a reasonable doubt.</p> <p>(4) Commercial Loss.-- The term "commercial loss" means any loss incurred in the course of an ongoing business enterprise consisting of providing goods or services for compensation.</p>	

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See Above/Below	No Provision	<p>(5) <b>Durable Good.</b>--The term "durable good" means any product, or any component of any such product, which has a normal life expectancy of 3 or more years or is of a character subject to allowance for depreciation under the Internal Revenue Code of 1986, and which is--</p> <ul style="list-style-type: none"> <li>(A) used in a trade or business;</li> <li>(B) held for the production of income; or</li> <li>(C) sold or donated to a governmental or private entity for the production of goods, training, demonstration, or any other similar purpose.</li> </ul> <p>(6) <b>Economic Loss.</b>--The term "economic loss" means any pecuniary loss resulting from harm (including any medical expense loss, work loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities), to the extent that recovery for the loss is permitted under applicable State law.</p> <p>(7) <b>Harm.</b>--The term "harm" means any physical injury, illness, disease, or death caused by a product. The term does not include commercial loss or loss or damage to a product itself.</p> <p>(8) <b>Insurer.</b>--The term "insurer" means the employer of a claimant, if the employer is self-insured, or the workers' compensation insurer of an employer.</p>	

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<p>(5) The term "manufacturer" means--</p> <p>(A) any person who is engaged in a business to produce, create, make, or construct any product (or component part of a product) and who (i) designs or formulates the product (or component part of the product), (ii) has engaged another person to design or formulate the product (or component part of the product), or (iii) uses the design or formulation of the product developed by another person;</p> <p>(B) a product seller of the product who, before placing the product in the stream of commerce--</p> <p>(i) designs or formulates or has engaged another person to design or formulate an aspect of the product after the product was initially made by another, or</p> <p>(ii) produces, creates, makes, or constructs such aspect of the product, or</p> <p>(C) any product seller not described in subparagraph (B) which holds itself out as a manufacturer to the user of the product.</p>	<p>No Provision.</p>	<p>(9) <b>Manufacturer.</b>--The term "manufacturer" means--</p> <p>(A) any person who is engaged in a business to produce, create, make, or construct any product (or component part of a product), and who designs or formulates the product (or component part of the product), or has engaged another person to design or formulate the product (or component part of the product);</p> <p>(B) a product seller, but only with respect to those aspects of a product (or component part of a product) which are created or affected when, before placing the product in the stream of commerce, the product seller produces, creates, makes, constructs, designs, or formulates, or has engaged another person to design or formulate, an aspect of a product (or component part of a product) made by another person; or</p> <p>(C) any product seller that is not described in subparagraph (B) that holds itself out as a manufacturer to the user of the product.</p>	

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<p>(6) The term "noneconomic loss" means subjective, nonmonetary loss resulting from harm, including pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation.</p> <p>(7) The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity).</p> <p>(8)(A) The term "product" means any object, substance, mixture, or raw material in a gaseous, liquid, or solid state which--</p> <ul style="list-style-type: none"> <li>(i) is capable of delivery itself or as an assembled whole, in a mixed or combined state, or as a component part or ingredient;</li> <li>(ii) is produced for introduction into trade or commerce;</li> <li>(iii) has intrinsic economic value; and</li> <li>(iv) is intended for sale or lease to persons for commercial or personal use.</li> </ul> <p>(B) The term does not include--</p> <ul style="list-style-type: none"> <li>(i) human tissue, human organs, human blood, and human blood products; or</li> <li>(ii) electricity, water delivered by a utility, natural gas, or steam.</li> </ul>	<p>No Provision</p>	<p>(10) Noneconomic Loss.--The term "noneconomic loss"-- (A) means subjective, nonmonetary loss resulting from harm, including pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation; and humiliation; and (B) does not include economic loss.</p> <p>(11) Person.--The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity).</p> <p>(12) Product.-- (A) In General.--The term "product" means any object, substance, mixture, or raw material in a gaseous, liquid, or solid state that--</p> <ul style="list-style-type: none"> <li>(i) is capable of delivery itself or as an assembled whole, in a mixed or combined state, or as a component part or ingredient;</li> <li>(ii) is produced for introduction into trade or commerce;</li> <li>(iii) has intrinsic economic value; and</li> <li>(iv) is intended for sale or lease to persons for commercial or personal use.</li> </ul>	

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<p>(9) The term "product liability action" means a civil action brought on any theory for harm caused by a product or product use.</p> <p>(10) The term "product seller" means a person who, in the course of a business conducted for that purpose, sells, distributes, rents, leases, prepares, blends, packages, labels a product, is otherwise involved in placing a product in the stream of commerce, or installs, repairs, or maintains the harm-causing aspect of a product. The term does not include--</p> <p>(A) a seller or lessor of real property;                      (B) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or                      (C) any person who--</p> <p>(i) acts in only a financial capacity with respect to the sale of a product; or                      (ii) leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.</p>	<p>No Provision</p>	<p>(B) Exclusion.--The term "product" does not include--</p> <p>(i) tissue, organs, blood, and blood products used for therapeutic or medical purposes, except to the extent that such tissue, organs, blood, and blood products (or the provision thereof) are subject, under applicable State law, to a standard of liability other than negligence; and                      (ii) electricity, water delivered by a utility, natural gas, or steam.</p> <p>(13) Product Liability Action.--The term "product liability action" means a civil action brought on any theory for harm caused by a product.</p> <p>(14) Product Seller.-- (A) In General.--The term "product seller" means a person who--</p> <p>(i) in the course of a business conducted for that purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise is involved in placing a product in the stream of commerce; or                      (ii) installs, repairs, or maintains the harm-causing aspect of the product.</p>	

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<p>(11) The term "State" means any State of the United States, the District of Columbia, Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States, or any political subdivision of any of the foregoing.</p>	<p>No Provision.</p>	<p>(B) Exclusion.--The term "product seller" does not include:</p> <ul style="list-style-type: none"> <li>(i) a seller or lessor of real property;</li> <li>(ii) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or</li> <li>(iii) any person who--                             <ul style="list-style-type: none"> <li>(I) acts in only a financial capacity with respect to the sale of a product; and</li> <li>(II) leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.</li> </ul> </li> </ul> <p>(15) State.--The term "State" means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, or any political subdivision thereof.</p> <p>(16) Time of Delivery.--The term "time of delivery" means the time when a product is delivered to the first purchaser or lessee of the product that was not involved in manufacturing or selling the product, or using the product as a component part of another product to be sold.</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>(H.R. 956 – Title II)  <b>Sec. 201. Treble Damages as Penalty in Civil Actions.</b></p> <p>(a) <b>General Rule.</b>—Punitive damages may, to the extent permitted by applicable State law, be awarded in any civil action for harm in any Federal or State court against a defendant if the claimant establishes by clear and convincing evidence that the harm suffered was result of conduct—</p> <p>(1) specifically intended to cause harm, or  (2) conduct manifesting a conscious, flagrant indifference to the rights or safety of others.</p> <p>(b) <b>Proportional Awards.</b>—The amount of punitive damages that may be awarded in any civil action subject to this title shall not exceed 3 times the amount of damages awarded to the claimant for economic loss, or \$250,000, whichever is greater. This section shall be applied by the court and shall not be disclosed to the jury.</p> <p>(c) <b>Applicability.</b>—Except as provided in section 401, this section shall apply to any civil action brought in any Federal or State court on any theory where punitive damages are sought. This section does not create a cause of action for punitive damages. This section does not preempt or supersede any State or Federal law to the extent that such law would further limit the award of punitive damages.</p>	<p><b>Sec. 9. Limitations on Punitive Damages.</b></p> <p>(a) <b>In General.</b>—Except as provided under section 1977A of the Revised Statutes (42 U.S.C. 1981a), the amount of punitive damages that may be awarded in any civil action or claim filed in any Federal or State court, based on any cause of action to recover damages or compensation for tortious physical or mental injury, property damage, or economic loss shall not exceed the greater of—</p> <p>(1) 3 times the amount awarded to the claimant for the economic injury on which such claim is based; or</p> <p>(2) \$250,000.</p> <p>(b) <b>Application by Court.</b>—This section shall be applied by the court and shall not be disclosed to the jury.</p>	<p><b>Sec. 8. Uniform Standards for Award of Punitive Damages.</b></p> <p>(a) <b>General Rule.</b>—Punitive damages may, to the extent permitted by applicable State law, be awarded against a defendant in a product liability action that is subject to this Act if the claimant establishes by clear and convincing evidence that the harm that is the subject of the action was the result of conduct that was carried out by the defendant with a conscious, flagrant indifference to the safety of others.</p> <p>(b) <b>Limitation on Amount.</b>—The amount of punitive damages that may be awarded for a claim in any product liability action that is subject to this Act shall not exceed 3 times the amount awarded to the claimant for the economic injury on which the claim is based, or \$250,000, whichever is greater. This subsection shall be applied by the court and the application of this subsection shall not be disclosed to the jury.</p>	<p>Senator Hatch's "Civil Justice Fairness Act" reportedly will include provisions generally barring multiple punitive damage awards (Section 102); establishing a uniform standard for awards, requiring clear and convincing evidence and proof of "conscious, flagrant indifference."</p> <p>Senator Hatch's bill reportedly will also include a provision prohibiting parties from pleading punitive damages.</p>

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<p>(d) Bifurcation.—At the request of any party, the trier of fact shall consider in a separate proceeding whether punitive damages are to be awarded and the amount of such award. If a separate proceeding is requested, evidence relevant only to the claim of punitive damages, as determined by applicable State law, shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded.</p>	<p>See Above</p>	<p>(c) Bifurcation at Request of Either Party.—</p> <p>(1) In General.—At the request of either party, the trier of fact in a product liability action that is subject to this Act shall consider in a separate proceeding whether punitive damages are to be awarded for the harm that is the subject of the action and the amount of the award.</p> <p>(2) Admissible Evidence.—</p> <p>(A) Inadmissibility of Evidence Relative Only to a Claim of Punitive Damages in a Proceeding Concerning Compensatory Damages.—If either party requests a separate proceeding under paragraph (1), in any proceeding to determine whether the claimant may be awarded compensatory damages, any evidence that is relevant only to the claim of punitive damages, as determined by applicable State law, shall be inadmissible.</p> <p>(B) Proceeding with Respect to Punitive Damages.— Evidence that is admissible in the separate proceeding under paragraph (1)—</p> <p>(i) may include evidence of the profits of the defendant, if any, from the alleged wrongdoing; and</p> <p>(ii) shall not include evidence of the overall assets of the defendant.</p>	

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<p>(e) <b>Considerations.</b>—In determining the amount of punitive damages, the trier of fact shall consider all relevant, admissible evidence, including—</p> <ul style="list-style-type: none"> <li>(1) the severity of the harm caused by the conduct of the defendant,</li> <li>(2) the duration of the conduct or any concealment of it by the defendant,</li> <li>(3) the profitability of the specific conduct that caused the harm to the defendant,</li> <li>(4) the number of products sold, the frequency of services provided, or the type of activities conducted by the defendant of the kind causing the harm complained of by the claimant,</li> <li>(5) awards of punitive damages to persons similarly situated to the claimant,</li> <li>(6) possibility of prospective awards of compensatory damages to persons similarly situated to the claimant,</li> <li>(7) any criminal penalties imposed on the defendant as a result of the conduct complained of by the claimant,</li> <li>(8) the amount of any civil and administrative fines and penalties assessed against the defendant as a result of the conduct complained of by the claimant, and</li> <li>(9) whether the foregoing considerations have been a factor in any prior proceeding involving the defendant.</li> </ul>	<p>See Above</p>	<p>See Above</p>	

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<p>(H.R. 956 -- Title II)  <b>Sec. 203. Fair Share Rule for Noneconomic Damage Awards.</b></p> <p><b>(a) Fair Share of Liability Imposed According to Share of Fault.</b>--In any product liability or other civil action brought in State or Federal court, a defendant shall be liable only for the amount of noneconomic damages attributable to such defendant in direct proportion to such defendant's share of fault or responsibility for the claimant's actual damages, as determined by the trier of fact. In all such cases, the liability of a defendant for noneconomic damages shall be several and not joint.</p> <p><b>(b) Applicability.</b>--Except as provided in section 401, this section shall apply to any product liability or other civil action brought in any Federal or State court on any theory where noneconomic damages are sought. This section does not preempt or supersede any State or Federal law to the extent that such law would further limit the application of the theory of joint liability to any kind of damages.</p>	<p><b>Sec. 7. Reform of Joint and Several Liability.</b></p> <p><b>(a) Definition.</b>--As used in this section, the term "concerted action" or "acting in concert" means the participation in joint conduct by 2 or more persons who agreed to jointly participate in such conduct with actual knowledge of the wrongfulness of the conduct.</p> <p><b>(b) In General.</b>--(1) Except as provided under subsection (c), joint and several liability may not be applied to any civil action or claim against any person, filed in any Federal or State court, based on any cause of action to recover damages or compensation for tortious physical or mental injury, property damage, or economic loss.</p> <p>(2) A person found liable for damages in any such action--</p> <p>(A) may be found liable, if at all, only for damages directly attributable to the person's pro rata share of fault or responsibility; and</p> <p>(B) may not be found liable for damages attributable to the pro rata share of fault or responsibility of any other person (without regard to whether that person is a party to the action), including any person filing the action.</p> <p><b>(c) Limitation.</b>--This section shall not apply to persons acting in concert where the concerted action proximately caused the injury for which one or more persons are found liable for damages.</p>	<p><b>Sec. 10. Several Liability for Noneconomic Loss.</b></p> <p><b>(a) General Rule.</b>--In a product liability action that is subject to this Act, the liability of each defendant for noneconomic loss shall be several only and shall not be joint.</p> <p><b>(b) Amount of Liability.</b>-- (1) <b>In General.</b>  --Each defendant shall be liable only for the amount of noneconomic loss allocated to the defendant in direct proportion to the percentage of responsibility of the defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which the defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.</p> <p>(2) <b>Percentage of Responsibility.</b>--For purposes of determining the amount of noneconomic loss allocated to a defendant under this section, the trier of fact shall determine the percentage of responsibility of each person responsible for the amount of noneconomic loss caused to the claimant, whether or not such person is a party to the action.</p>	<p><b>Section 201 of Senator Hatch's "Civil Justice Fairness Act"</b> reportedly will limit a defendant's joint liability for non-economic damages.</p>

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<p>(H.R. 956 -- Title II)  <b>Sec. 202. Limitation on Noneconomic Damages in Health Care Liability Actions.</b></p> <p>(a) <b>Maximum Award of Noneconomic Damages.</b>--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. The maximum amount of such damages that may be awarded to a claimant shall be \$250,000. Such maximum amount shall apply regardless of the number of parties against whom the action is brought, and regardless of the number of claims or actions brought with respect to the health care injury. An award for future noneconomic damages shall not be discounted to present value. The jury shall not be informed about the limitation on noneconomic damages, but an award for noneconomic damages in excess of \$250,000 shall be reduced either before the entry of judgment or by amendment of the judgment after entry. An award of damages for noneconomic losses in excess of \$250,000 shall be reduced to \$250,000 before accounting for any other reduction in damages required by law. If separate awards of damages for past and future noneconomic damages are rendered and the combined award exceeds \$250,000, the award of damages for future noneconomic losses shall be reduced first.</p>	<p>No Provision</p>	<p>No Provision</p>	<p>Title IV of Senator Hatch's "Civil Justice Fairness Act" reportedly will include four provisions involving health care liability reform: (i) a limitation on noneconomic damages (sec. 401); (ii) a uniform statute of limitations (sec. 402); a provision allowing periodic payment of future damages (sec. 403); and a non-fault based patient compensation demonstration project (sec. 404).</p>

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<p>(b) <b>Applicability.</b>--Except as provided in section 401, this section shall apply to any health care liability action brought in any Federal or State court on any theory or pursuant to any alternative dispute resolution process where noneconomic damages are sought. This section does not create a cause of action for noneconomic damages. This section does not preempt or supersede any State or Federal law to the extent that such law would further limit the award of noneconomic damages. This section does not preempt any State law enacted before the date of the enactment of this Act that places a cap on the total liability in a health care liability action.</p> <p>(c) <b>Definitions.</b>--As used in this section:</p> <p>(a) The term "claimant" means any person who asserts a health care liability claim or brings 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.</p> <p>(b) The term "economic loss" has the same meaning as defined at section 203(3).</p>	<p>No Provision</p>	<p>No Provision</p>	

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<p>(c) The term "health care liability action" means a civil action brought in a State or Federal court or pursuant to any alternative dispute resolution process, 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.</p>	<p>No Provision</p>	<p>No Provision</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>(H.R. 956 -- Title II)  <b>Sec. 204. Definitions.</b> As used in this title:</p> <p>(1) The term "actual damages" means damages awarded to pay for economic loss.</p> <p>(2) The term "claimant" means any person who brings a civil action and any person on whose behalf such an action is brought. If such action is brought through or on behalf of an estate, the term includes the claimant's decedent. If such action is brought through or on behalf of a minor or incompetent, the term includes the claimant's legal guardian.</p> <p>(3) The term "clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. The level of proof required to satisfy such standard is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt.</p> <p>(4) The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings, medical expense loss, replacement services loss, loss due to death, and burial costs), to the extent recovery for such loss is allowed under applicable State law.</p>	<p>No Provision</p>	<p>No Provision</p>	

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<p>(5) The term "harm" means any legally cognizable wrong or injury for which punitive damages may be imposed.</p> <p>(6) The term "noneconomic damages" means damages other than punitive damages or actual damages.</p> <p>(7) The term "punitive damages" means damages awarded against any person or entity to punish or deter such person or entity, or others, from engaging in similar behavior in the future.</p> <p>(8) The term "State" means any State of the United States, the District of Columbia, Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States, or any political subdivision of any of the foregoing.</p>	<p>No Provision</p>	<p>No Provision</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>(H.R. 956 -- Title III)  <b>Sec. 301. Liability of Biomaterials Suppliers.</b>  A biomaterials supplier may, to the extent required and permitted by any other applicable law, be liable for harm to a claimant caused by a medical device, only if the claimant in a product liability action shows that the conduct of the biomaterials supplier was an actual and proximate cause of the harm to the claimant and--</p> <p>(1) the raw materials or component parts delivered by the biomaterials supplier either--</p> <p>(A) did not constitute the product described in the contract between the biomaterials supplier and the person who contracted for delivery of the product; or (B) failed to meet any specifications that were--</p> <p>(i) provided to the biomaterials supplier and not expressly repudiated by the biomaterials supplier prior to acceptance of delivery of the raw materials or component parts:</p> <p>(ii)(I) provided to the biomaterials supplier;</p> <p>(II) provided to the manufacturer by the biomaterials supplier; or</p> <p>(III) contained in a master file that was submitted by the biomaterials supplier to the Secretary of HHS and that is currently maintained by the biomaterials supplier of purposes of pre-market approval of medical devices; or</p>	<p>No Provision -- <b>BUT SEE EXCERPTS BELOW FROM S. 454</b> (introduced by Sen. McConnell on 2/16/95).</p> <p><b>Sec. 125. Liability of Biomaterials Suppliers.</b></p> <p><i>(a) IN GENERAL.-- (1) EXCLUSION FROM LIABILITY.--Except as provided in paragraph (2), a BIOMATERIALS supplier shall not be liable for harm to a claimant caused by an implant.</i></p> <p><i>(2) LIABILITY.--A BIOMATERIALS supplier that--</i></p> <p><i>(A) is a manufacturer may be liable for harm to a claimant described in subsection (b);</i></p> <p><i>(B) is a seller may be liable for harm to a claimant described in subsection (c); and</i></p> <p><i>(C) furnishes raw materials or component parts that fail to meet applicable contractual requirements or specifications may be liable for a harm to a claimant described in subsection (d).</i></p> <p><i>(b) LIABILITY AS MANUFACTURER.--(1) IN GENERAL. --A BIOMATERIALS supplier may, to the extent required and permitted by any other applicable law, be liable for harm to a claimant caused by an implant if the BIOMATERIALS supplier is the manufacturer of the implant.</i></p>	<p>No Provision -- <b>BUT SEE EXCERPTS FROM S. 303</b> (introduced by Sen. Lieberman on 1/31/95 below).</p>	

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<p>(iii)(I) included in the submissions for the purposes of premarket approval or review by the Secretary of HHS under section 510, 513, 515, or 520 of the Federal Food, Drug, and Cosmetic Act * * * ; and</p> <p>(II) have received clearance from the Secretary of HHS, if such specifications were provided by the manufacturer to the biomaterials supplier and were not expressly repudiated by the biomaterials supplier prior to the acceptance by the raw materials or component parts;</p> <p>(2) the biomaterials supplier intentionally and wrongfully withheld or misrepresented information that is material and relevant to the harm suffered by the claimant; or</p> <p>(3) the biomaterials supplier had actual knowledge of prospective fraudulent or malicious activities in the use of its supplies where such activities are relevant to the harm suffered by the claimant.</p>	<p><i>(2) GROUNDS FOR LIABILITY.--The biomaterials supplier may be considered the manufacturer of the implant that allegedly caused harm to a claimant only if the biomaterials supplier--</i></p> <p><i>(A)(i) has registered with the Secretary pursuant to section 510 of the Federal Food, Drug, and Cosmetic Act * * * and the regulations issued under such section; and (ii) included the implant on a list of devices filed with the Secretary pursuant to section 510(j) of such Act *** and the regulations issued under such section; or</i></p> <p><i>(B) is the subject of a declaration issued by the Secretary pursuant to paragraph (3) that states that the supplier, with respect to the implant that allegedly caused harm to the claimant, was required to-- (i) register with the Secretary under section 510 of such Act *** and the regulations issued under such section, but failed to do so; or (ii) include the implant on a list of devices filed with the Secretary pursuant to section 510(j) of such Act *** and the regulations issued under such section, but failed to do so.</i></p>	<p>SEE CAVEAT ABOVE</p>	

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<p><b>(b) Manufacturer of Medical Device Shall be Named a Party.</b>--The claimant shall be required to name the manufacturer of the medical device to which the biomaterials supplier furnished raw materials or component parts as a party to the product liability action, unless--</p> <p>(1) the manufacturer is subject to service of process solely in a jurisdiction in which the biomaterials supplier is not domiciled or subject to a service of process; or</p> <p>(2) an action against the manufacturer is barred by applicable law.</p> <p><b>(c) Proceedings on Motion to Dismiss.</b>--The following rules shall apply to any proceeding on a motion to dismiss filed under this section:</p> <p><b>(1) Affidavits Relating to Status of Defendant.</b>-- (A) <b>Defendant Affidavit.</b>--The defendant in the action may support a motion to dismiss by filing an affidavit demonstrating that defendant is a biomaterials supplier and that it is neither the manufacturer nor the product seller of the medical device which caused the harm alleged by the claimant.</p>	<p><i>(d) Liability for Violating Contractual Requirements or Specifications.</i>--A biomaterials supplier may, to the extent required and permitted by any other applicable law, be liable for harm to a claimant caused by an implant, if the claimant in an action shows, by a preponderance of the evidence, that--</p> <p><i>(1) the raw materials or component parts delivered by the biomaterials supplier either--</i></p> <p><i>(A) did not constitute the product described in the contract between the biomaterials supplier and the person who contracted for delivery of the product; or (B) failed to meet any specifications that were--</i></p> <p><i>(i) provided to the biomaterials supplier and not expressly repudiated by the biomaterials supplier prior to acceptance of delivery of the raw materials or component parts;</i></p> <p><i>(ii)(I) published by the biomaterials supplier; (II) provided to the manufacturer by the biomaterials supplier; or (III) contained in a master file that was submitted by the biomaterials supplier to the Secretary and that is currently maintained by the biomaterials supplier for purposes of premarket approval of medical devices; or</i></p>	<p>See Above</p>	

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<p>(B) <b>Response to Motion to Dismiss.</b> In response to a motion to dismiss * * *, the claimant may submit an affidavit demonstrating why it asserts that--</p> <p>(i) the defendant who filed the motion to dismiss is not a biomaterials supplier with respect to the medical device which caused the harm alleged by the claimant;</p> <p>(ii) on what basis it asserts that the supplier furnished raw materials or component parts in violation of applicable contractual requirements or specifications agreed to by the biomaterials supplier;</p> <p>(iii) the biomaterials supplier intentionally and wrongfully withheld or misrepresented information that is material and relevant to the harm suffered by the claimant; or</p> <p>(iv) the biomaterials supplier had actual knowledge of prospective fraudulent or malicious activities in the use of its supplies where such activities are relevant to the harm suffered by the claimant.</p> <p>(2) <b>Effect of Motion to Dismiss on Discovery.</b> If a defendant files a motion to dismiss, no discovery shall be permitted in connection with the action that is the subject of the motion, unless the affidavits submitted in accordance with this section raise material issues of fact concerning whether--</p>	<p><i>(iii)(I) included in the submissions for purposes of premarket approval or review by the Secretary under section 510, 513, 515, or 520 of the Federal Food, Drug, and Cosmetic Act ***; and</i></p> <p><i>(II) have received clearance from the Secretary, if such specifications were provided by the manufacturer to the biomaterials supplier and were not expressly repudiated by the biomaterials supplier prior to the acceptance by the manufacturer of delivery of the raw materials or component parts; and</i></p> <p><i>(2) such conduct was an actual and proximate cause of the harm to the claimant.</i></p> <p><i>Sec. 126. Procedures for Dismissal of Civil Actions Against Biomaterials Suppliers. (SIMILAR TO THOSE In H.R. 956).</i></p>	<p>See Above</p>	

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<p>(A) the supplier furnished raw materials or component parts in violation of applicable contractual requirements or specifications agreed to by the biomaterials supplier;</p> <p>(B) the biomaterials supplier intentionally and wrongfully withheld or misrepresented information that is material and relevant to the harm suffered by the claimant; or</p> <p>(C) the biomaterials supplier had actual knowledge of prospective fraudulent or malicious activities in the use of its supplies where such activities are relevant to the harm suffered by the claimant.</p> <p>Any such discovery shall be limited solely to such material facts.</p> <p>(3) <b>Response to Motion to Dismiss.</b>—The court shall rule on the motion to dismiss solely on the basis of the affidavits filed under this section and on the basis of any evidence developed in the course of discovery under paragraph (2) and subsequently submitted to the court in accordance with applicable rules of evidence.</p>	<p>See Above</p>	<p>See Above</p>	

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<p>(d) <b>Attorney Fees.</b>--The court shall require the claimant to compensate the biomaterials supplier for attorney fees and costs, if-</p> <p>(1) the claimant named or joined the biomaterials supplier; and</p> <p>(2) the court found the claim against the biomaterials supplier to be without merit and frivolous.</p> <p><b>Sec. 303. Definitions.</b> For purposes of this title:</p> <p>(1) The term "biomaterials supplier" means an entity that directly or indirectly supplies, or licenses another person to supply, a component part or raw material for use in the manufacture of a medical device--</p> <p>(A) that is intended by the manufacturer of the device--</p> <p>(i) to be placed into a surgically or naturally formed or existing cavity of the body for a period of at least 30 days; or</p> <p>(ii) to remain in contact with bodily fluids of internal human tissue through a surgically produced opening for a period of less than 30 days; and</p> <p>(B) suture materials used in implant procedures.</p>	<p>See Above</p>	<p>See Above</p>	

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<p>(2) Notwithstanding paragraph (1), the term "biomaterials supplier" excludes any person, with respect to a medical device which is the subject of a product liability action--</p> <p>(A) who is engaged in the manufacture, preparation, propagation, compounding, or processing (as defined in section 510(a)(1) of the Federal Food, Drug, and Cosmetic Act *** of the medical device, and has or should have registered with the Secretary of HHS pursuant to section 510 of the Federal Food, Drug, and Cosmetic Act *** and the regulations issued under such section, and has or should have included the medical device on a list of devices filed with the Secretary of HHS pursuant to section 510(j) of such Act *** and the regulations issued under such section; or</p> <p>(B) who, in the course of a business conducted for that purpose, has sold, distributed, leased, packaged, labeled, or otherwise placed the implant in the stream of commerce after it was manufactured.</p> <p>(3) The term "harm" means any physical injury, illness, disease, or death or damage to property caused by a product. The term does not include commercial loss or loss or damage to a product itself.</p> <p>(4) The term "product liability action" means a civil action brought on any theory for harm caused by a product or product use.</p>	<p>See Above</p>	<p>See Above</p>	

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<p>No Provision</p>	<p><b>Sec. 8. Single Recovery.</b></p> <p>(a) <b>Inadmissible Evidence.</b>—In any civil action or claim against any person, filed in any Federal or State court, based on any cause of action to recover damages or compensation for tortious physical or mental injury, property damage, or economic loss, the court shall not allow the admission into evidence of proof of economic losses that have been or will be paid by--</p> <ul style="list-style-type: none"> <li>(1) Federal, State, or other governmental disability, unemployment, or sickness programs;</li> <li>(2) Federal, State, or other governmental or private health insurance programs;</li> <li>(3) private or public disability insurance programs;</li> <li>(4) employer wage continuation programs;</li> <li>(5) any other program or compensation system, if the payment is intended to compensate the claimant for the same injury or disability which is the subject of the claim; or</li> <li>(6) persons other than family members of the claimant.</li> </ul> <p>(b) <b>Admissible Evidence.</b>—Only evidence of economic loss that has not or will not be paid by the sources described under subsection (a) shall be admissible in an action or claim covered by this section.</p>	<p>No Provision.</p>	

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<p>No Provision</p>	<p>(c) <b>Elimination of Subrogation.</b>--An entity that is the source of the payments for losses that are inadmissible under subsection (a)--</p> <p>(1) shall not recover any amount against the claimant;</p> <p>(2) shall not be subrogated to the rights of the claimant against the defendant; and</p> <p>(3) shall not have a lien against the claimant's judgment, on account of its payment to the claimant for economic loss.</p> <p>(d) <b>Pretrial Determination.</b>--The determination of whether a claimant seeking damages or compensation has received, will receive, or is entitled to receive, payment from any one or more sources described under subsection (a) (1) through (6) shall be made by the court in pre-trial proceedings.</p>	<p>No Provision.</p>	

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	<p><b>Sec. 5. Equity in Legal Fees.</b>  <b>(a) Disclosure of Fees Information.--</b></p> <p><b>(1) Definitions.--</b> For purposes of this subsection --</p> <p><b>(A)</b> the term "attorney" means any natural person, professional law association, corporation, or partnership authorized under applicable State law to practice law;</p> <p><b>(B)</b> the term "attorney's services" means the professional advice or counseling of or representation by an attorney, but such term shall not include other assistance incurred, directly or indirectly, in connection with an attorney's services, such as administrative or secretarial assistance, overhead, travel expenses, witness fees, or preparation by a person other than the attorney of any study, analysis, report, or test;</p> <p><b>(C)</b> the term "claimant" means any natural person who files a civil action arising under any Federal law or in any diversity action in Federal court and--</p> <p><b>(i)</b> if such a claim is filed on behalf of the claimant's estate, the term shall include the claimant's personal representative; or</p> <p><b>(ii)</b> if such a claim is brought on behalf of a minor or incompetent, the term shall include the claimant's parent, guardian, or personal representative;</p>	<p>No Provision.</p>	<p>Section 302 of Senator Hatch's "Civil Justice Fairness Act" reportedly will: (i) contain a sense of the Congress provision that each State should require attorneys who enter into contingent fee agreements to disclose to their clients the actual services performed; and (ii) a provision requiring the Attorney General to study and evaluate contingent fee awards and their abuses in State and Federal courts and to develop model legislation requiring certain client disclosures regarding contingent fee agreements.</p>

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<p>No Provision</p>	<p>(D) the term "contingent fee" means the cost or price of an attorney's services determined by applying a specified percentage, which may be a firm fixed percentage, a graduated or sliding percentage, or any combination thereof, to the amount of the settlement or judgment obtained;</p> <p>(E) the term "hourly fee" means the cost or price per hour of an attorney's services;</p> <p>(F) the term "initial meeting" means the first conference or discussion between the claimant and the attorney, whether by telephone or in person, concerning the details, facts, or basis of the claim;</p> <p>(G) the term "natural person" means any individual, and does not include an artificial organization or legal entity, such as a firm, corporation, association, company, partnership, society, joint venture, or governmental body; and</p> <p>(H) the term "retain" means the act of a claimant in engaging an attorney's services, whether by express or implied agreement, by seeking and obtaining the attorney's services.</p>		

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<p>No Provision</p>	<p>(2) <b>Decision on Compensation.</b>-- A claimant who retains an attorney may elect whether to compensate the attorney's services in connection with the claim on an hourly basis or a contingent fee basis.</p> <p>(3) <b>Disclosure at Initial Meeting.</b>--An attorney retained by a claimant shall, at the initial meeting, disclose to the claimant the claimant's right to elect the method of compensating the attorney's services and the claimant's right to receive a written statement of the information described under paragraph (5).</p> <p>(4) <b>Right of Attorney.</b>--If, within 30 days after receiving the information described under paragraph (5), a claimant has failed to elect the method of compensating the attorney's services, the attorney may select the method of compensation and shall notify the claimant of the selection.</p> <p>(5) <b>Information after Initial Meeting.</b> -- Within 30 days after the initial meeting, an attorney retained by a claimant shall provide a written statement to the claimant containing--</p> <p>(A) the estimated number of hours of the attorney's services that will be spent--</p> <p>(i) settling or attempting to settle the claim or action; and</p> <p>(ii) handling the claim through trial;</p>		

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<p>No Provision</p>	<p>(B) the attorney's hourly fee for services in the claim or action and any conditions, limitations, restrictions, or other qualifications on the fee the attorney determines are appropriate; and</p> <p>(C) the attorney's contingent fee for services in the claim or action and any conditions, limitations, restrictions, or other qualifications on the fee the attorney determines are appropriate.</p> <p>(6) <b>Information After Settlement.</b>--An attorney retained by a claimant shall, within a reasonable time not later than 30 days after the date on which the claim or action is finally settled or adjudicated, provide a written statement to the claimant containing--</p> <p>(A) the actual number of hours of the attorney's services in connection with the claim;</p> <p>(B) the total amount of the hourly fees or total contingent fee for the attorney's services in connection with the claim; and</p> <p>(C) the actual fee per hour of the attorney's services in connection with the claim, determined by dividing the total amount of the hourly fees or the total contingent fee by the actual number of hours of attorney's services.</p>	<p>No Provision.</p>	

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No Provision	<p>(7) <b>Failure to Disclose.</b>--A claimant to whom an attorney fails to disclose information required by this section may withhold 10 percent of the fee and file a civil action for damages in the court in which the claim or action was filed or could have been filed.</p> <p>(8) <b>Other Remedies.</b>--This section shall supplement and not supplant any other available remedies or penalties.</p>	No Provision	

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<p>No Provision</p>	<p>(b) Limitation on Attorney Contingent Fees.--</p> <p>(1) Definitions.--For purposes of this subsection, the term-</p> <p>(A) "allegedly liable party" means a person, partnership, corporation, and the insurers thereof, or any other individual or entity alleged by the claimant to be liable for at least some portion of the damages alleged by the claimant;</p> <p>(B) "claimant" means an individual who, in his or her own right, or vicariously, is seeking compensation for tortious physical or mental injury, property damage, or economic loss;</p> <p>(C) "contingent fee" means the fee negotiated in a contingent fee agreement which is only payable from the proceeds of any recovery on behalf of a claimant;</p> <p>(D) "contingent fee agreement" means a fee agreement between an attorney and a claimant wherein the attorney agrees to bear the risk of no or inadequate compensation in exchange for a proportionate share of part of or all of any recovery by settlement or verdict obtained for the claimant;</p>	<p>No Provision</p>	<p>See description above on Section 302 of Senator Hatch's "Civil Justice Fairness Act."</p>

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<p>No Provision</p>	<p>(E) "contingent fee attorney" means an attorney who agrees to represent a claimant in exchange for a contingent fee;</p> <p>(F) "fixed fee" means an agreement between an attorney and a claimant whereby the attorney agrees to perform a specific legal task in exchange for a specific sum to be paid by a claimant;</p> <p>(G) "hourly rate fee"--</p> <p>(i) means the fee generated by an agreement or otherwise by operation of law between an attorney and a claimant stating that the claimant pay the attorney a fee determined by multiplying the hourly rate negotiated, or otherwise set by law, between the attorney and the claimant, by the number of hours that the attorney has worked on behalf of the claimant in furtherance of the claimant's interest; and</p> <p>(ii) may also be a contingent fee to the extent it is only payable from the proceeds of any recovery on behalf of the claimant;</p>	<p>No Provision</p>	

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<p>No Provision</p>	<p>(H) "pre-retention offer" means an offer to settle a claim for compensation for damages arising out of a civil action made to a claimant not represented by an attorney at the time of the offer;</p> <p>(I) "post-retention offer" means an offer in response to a demand for compensation made within the time constraints, and conforming to the provisions of this subsection, to settle a claim for damages arising out of a civil action made to a claimant who is represented by a contingent fee attorney;</p> <p>(J) "response" means a written communication by a claimant or an allegedly responsible party or the attorney for either, deposited into the United States Mail and sent by certified mail; and</p> <p>(K) "settlement offer" means a written offer of settlement stated in a response filed within the time limits described in this subsection.</p>	<p>No Provision</p>	

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<p>No Provision</p>	<p>(2) <b>Applicability.</b>--(A) This subsection shall apply with respect to any civil action filed against any person in any Federal or State court based upon any cause of action (including, but not limited to negligence, strict or product liability, breach of implied warranty or professional malpractice) in which damages are sought for tortious physical or mental injury, property damage, or economic loss, except a civil action arising under a Federal law that authorizes an award of attorney fees to a prevailing party.</p> <p>(B)(i) Nothing in this section shall apply to any agreement between a claimant and an attorney to--</p> <p style="padding-left: 40px;">(I) retain the attorney on an hourly rate fee or fixed fee basis solely to evaluate a pre-retention offer; and</p> <p style="padding-left: 40px;">(II) retain the attorney to collect overdue amounts from an accepted pre-retention or post-retention settlement offer.</p> <p>(ii) This subsection shall not apply to contingent fee agreements in civil actions where neither a pre-retention nor a post-retention offer of settlement is made.</p>	<p>No Provision</p>	

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<p>No Provision</p>	<p>(3) <b>Written Hourly Rate Fee Agreement.</b> --                      With respect to a civil action, if a contingent fee attorney has not entered into a written agreement with a claimant at the time of retention setting forth the attorney's hourly rate, then a reasonable hourly rate shall be payable, subject to the limitations described in this section.</p> <p>(4) <b>Nature of Demand for Compensation.--</b></p> <p>(A) With respect to a civil action, at any time after retention, a contingent fee attorney shall, on behalf of the claimant, send a demand for compensation by certified mail to an allegedly responsible party.</p> <p>(B) The demand for compensation under subparagraph (A) shall contain the material facts relevant to the civil action involved and a description of the evidence determined by the contingent fee attorney to be discoverable by the alleged liable party during the course of litigation, including--</p> <p>(i) the name, address, age, marital status and occupation of the claimant or of the injured or deceased party if the claimant is operating in a representative capacity;</p> <p>(ii) a brief description of how the damages arose;</p>	<p>No Provision</p>	

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<p>No Provision</p>	<p>(iii) the names and, if known, the addresses, telephone numbers, and occupations of all known witnesses;</p> <p>(iv) copies of photographs in the claimant's possession which relate to the claim for damages;</p> <p>(v) the basis for claiming that the party to whom the claim is addressed is at least partially liable for causing the injury;</p> <p>(vi) if the claim for damages is based upon a physical or mental injury--</p> <p>(I) a description of the nature of the injury, the names and addresses of all physicians, other health care providers, and hospitals, clinics, or other medical service entities that provided medical care to the claimant or injured party including the date and nature of the service; and</p> <p>(II) medical records relating to the injury and those involving a prior injury or preexisting medical condition which an allegedly liable party would be able to introduce into evidence in a trial or, in lieu thereof, providing executed releases allowing the allegedly responsible party to obtain such records directly from the claimant's physicians, health care providers and entities that provided medical care; and</p>	<p>No Provision</p>	

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<p>No Provision</p>	<p>(vii) with respect to demand for a compensation that includes an amount for medical expenses, wages lost or other special damages suffered as a consequence of the injury, relevant documentation thereof, including records of earnings if a claimant is self-employed and employer records of earnings if a claimant is employed.</p> <p>(C) A claimant's attorney shall provide copies of each demand for compensation under this paragraph to the claimant and to each allegedly liable party at the time of the dispatch of the demand for compensation. Where reproduction costs would be significant relative to the size of the settlement offer, the claimant's attorney, may, in the alternative, offer other forms of access to the materials, convenient and at reasonable cost to allegedly responsible party's attorney.</p> <p>(D) A contingent fee attorney who fails to file a demand for compensation under this paragraph shall not be entitled to any fee greater than 10 percent of any settlement or judgment received by the claimant client after reasonable expenses have been deducted.</p>	<p>No Provision</p>	

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<p>No Provision</p>	<p>(5) Time Limit for Response Setting Forth Settlement Offer.-</p> <p>(A) An allegedly liable party shall have 60- days from the date of the receipt of a demand for compensation under paragraph (4) to issue a response stating a settlement offer.</p> <p>(B) If within 30 days after the date of the receipt of a demand for compensation under paragraph (4), an allegedly liable party notifies the attorney of the claimant that such party seeks to have a medical examination of the claimant, and the claimant is not made available for such examination within 10 days after the date of the receipt of such a request, the 60-day period described under subparagraph (A) shall be extended by one day for each day that such request is not honored after the expiration of such 10-day period. Any such extension shall also include a further period of 10 days from the date of the completion of the medical examination.</p>	<p>No Provision</p>	

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<p>No Provision</p>	<p>(C) A response under this paragraph shall be open for acceptance for a minimum of 30 days from the date of the receipt of such response by the attorney of the claimant and shall state whether such response expires in 30 days or remains open for acceptance for a longer period or until notice of withdrawal is given.</p> <p>(D) A settlement offer in a response under this subsection may be increased during the 60-day period described under subparagraph (A) by issuing an additional response.</p> <p>(E) If an additional response has been sent under this paragraph, the time for acceptance shall be 10 days from the date of the receipt of such additional response by the attorney of the claimant or 30 days from the date of the receipt of the initial response, whichever is later, unless the additional response specifies a longer period of time for acceptance as described under subparagraph (C).</p>	<p>No Provision</p>	

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<p>No Provision</p>	<p>(6) <b>Material to Accompany Offer.</b>-- An allegedly responsible party and the attorney of such party shall include in any response stating a settlement offer under paragraph (5) copies of materials in their possession concerning the claim upon which the allegedly liable party relied in making a settlement offer, except for material which such party believes in good faith would not be discoverable by the claimant during the course of litigation. Where reproduction costs would be significant relative to the size of the settlement offer, the allegedly responsible party, may, in the alternative, offer other forms of access to the materials, convenient and at reasonable cost to claimant's attorney.</p> <p>(7) <b>Effect of Pre-Demand Settlement Offer.</b> -- A settlement offer under this subsection to a claimant represented by a contingent fee attorney made prior to the receipt of a demand for compensation, which is open for acceptance for 60 days or more from the time of its receipt and which conforms to the requirements of paragraph (6), shall be considered a post-retention offer and shall have the same effect under this subsection as if it were a response to a demand for compensation.</p> <p>(8) <b>Pre-Retention Offer.</b> --(A) An attorney retained after a claimant has received a pre-retention offer may not enter into an agreement with the claimant to receive a contingent fee based upon or payable from the proceeds of the pre-retention offer which remains in effect.</p>	<p>No Provision</p>	

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<p>No Provision</p>	<p>(B) An attorney entering a fee agreement that would effectively result in a claimant's paying a percentage of a pre-retention offer to the attorney for prosecuting the claim shall be considered to have charged an unreasonable and excessive fee. Where a pre-retention offer has been provided--</p> <p>(i) the attorney may contract with a claimant to receive an hourly rate fee or fixed fee for advising the claimant regarding the pre-retention offer; or</p> <p>(ii) the attorney may contract with a claimant to receive a contingent fee applicable to any amount received by a claimant, by settlement or judgment, above the amount of the pre-retention offer.</p> <p>(9) Post Retention Offer Where a Pre-Retention Offer Has Been Made.--A claimant in receipt of a pre-retention offer under this subsection which such claimant has not accepted and who later receives a post-retention offer which is accepted, is not obligated to pay the retained attorney a fee greater than the hourly rate fee calculated on the basis of the number of hours the attorney has worked on behalf of claimant in furtherance of the claimant's claim, but not exceeding 20 percent of the excess of the post-retention offer less the pre-retention offer.</p>	<p>No Provision</p>	

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<p>No Provision</p>	<p>(10) <b>Post-Retention Offer Where No Pre-Retention Offer Has Been Made.</b>--A claimant not in receipt of a pre-retention offer under this subsection who has received a post-retention offer which is accepted, is not obligated to pay the retained attorney a fee greater than the hourly rate fee calculated on the basis of the number of hours the attorney has worked on behalf of claimant in furtherance of claimant's claim, but not exceeding 10 percent of the first \$100,000, plus 5 percent of any amount above \$100,000, of the accepted post-retention offer after reasonable expenses have been deducted.</p> <p>(11) <b>Calculation of Attorney Fee When There Is a Subsequent Resolution of the Claim.</b>-- If an allegedly liable party's post-retention settlement offer under this subsection is rejected, but a later settlement offer is accepted, or there is a judgment in favor of claimant, the claimant, irrespective of any pre-retention offer, is not obligated to pay the retained attorney a fee greater the sum of--</p> <p>(A) the amount of the fee that would have been calculated under paragraph (10) had the post-retention offer been accepted but only as applied to the subsequent settlement offer or judgment up to the amount of the post-retention offer; and</p>	<p>No Provision</p>	

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<p>No Provision</p>	<p>(B) the product of multiplying the contingent fee percentage negotiated between the contingent fee attorney and claimant and the amount by which the subsequent settlement or judgment exceeds the post-retention offer, after reasonable expenses have been deducted.</p> <p>(12) <b>Provision of Closing Statement.</b>--Upon receipt of any settlement or judgment under this subsection, and prior to disbursement thereof, a contingent fee attorney shall provide the claimant with a written statement detailing how the proceeds are to be distributed, including the amount of the expenses paid out or to be paid out of the proceeds, the amount of the fee, how the fee amount is calculated, and the amount due the claimant.</p> <p>(13) <b>Effect on Contravening Agreements.</b>--(A) A contingent fee attorney who enters into a fee agreement with a claimant which violates the provisions of this subsection is deemed to have charged an unreasonable and excessive fee.</p> <p>(B) A claimant who has entered into an agreement with a contingent fee attorney which violates the provisions of this subsection is entitled to recover from the attorney any reasonable fees and costs incurred to establish such agreement violated the provisions of this subsection.</p>	<p>No Provision</p>	

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No Provision	(C) The failure by the claimant's attorney, or the attorney for an alleged responsible party, to comply with the provisions of this subsection may be considered grounds for disciplinary proceedings and sanctions as determined appropriate by the licensing or regulatory agency or court of the State in which the claim arose.	No Provision	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>(H.R. 988) Sec. 4. Attorney Accountability.</p> <p>(a) Sanctions.--Rule 11(c) of the Federal Rules of Civil Procedure is amended--</p> <p>(1) in the matter preceding paragraph (1) by striking "may" and inserting "shall";</p> <p>(2) in paragraph (1)(A)--</p> <p>(A) in the second sentence by striking ", but shall" and all that follows through "corrected"; and</p> <p>(B) in the third sentence by striking "may" and inserting "shall"; and</p> <p>(3) in paragraph (2) by striking "A sanction imposed" and all that follows through "violation." and inserting the following: "A sanction imposed for a violation of this rule shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of an order to pay to the other party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee."</p> <p>(b) Applicability to Discovery.--Rule 11 of the Federal Rules of Civil Procedure is amended by striking subdivision (d).</p>	<p>(c) Amendment to the Federal Rules of Civil Procedure.--Rule 1(c) of the Federal Rules of Civil Procedure is amended--</p> <p>(1) in the matter preceding paragraph (1) by striking out "may" and inserting in lieu thereof "shall";</p> <p>(2) in subdivision (1)(A) in the third sentence by striking out "may" and inserting in lieu thereof "shall"; and</p> <p>(3) in paragraph (2)--</p> <p>(A) by amending the first sentence to read as follows:</p> <p>"A sanction imposed for a violation of this rule shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated and to compensate the parties that were injured by such conduct."; and</p> <p>(B) in the second sentence by striking ", if imposed on motion and warranted for effective deterrence,".</p>	<p>No Provision</p>	<p>Section 301 of Senator Hatch's "Civil Justice Fairness Act" will reportedly include a provision modifying Rule 11 along the lines in H.R. 988.</p>

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>No Provision</p>	<p><b>Sec. 6. Early Offer and Recovery Mechanisms.</b></p> <p>(a) <b>In General.</b>—Chapter 111 of title 28, United States Code, is amended by adding at the end thereof the following new section:</p> <p>“§ 1659. Early offer and recovery mechanisms</p> <p>“(a) For purposes of this section:</p> <p>“(1) The term ‘allegedly liable defendant’ means a person, partnership, or corporation alleged by the claimant to be responsible for at least some portion of an injury alleged by a claimant.</p> <p>“(2) The term ‘allowable expense’ means reasonable expenses incurred for products, services, and accommodations reasonably needed for medical care, training, and other remedial treatment and care of an injured individual.</p> <p>“(3) The term ‘claimant’ means an individual who, in his or her own right, or vicariously, is seeking compensation for tortious physical or mental injury, property damage or economic loss.</p>	<p>No Provision</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>No Provision</p>	<p>"(4) The term 'collateral benefits' means all benefits and advantages received or entitled to be received (regardless of the right of recoupment of any other entity, through subrogation, trust agreement, lien, or otherwise) by an injured individual or other entity as reimbursement of loss because of personal injury, payable or required to be paid--</p> <p>"(A) in accordance with the laws of any State or the Federal Government (other than through a claim for breach of an obligation or duty);</p> <p>"(B) under the terms of any health or accident insurance, wage or salary continuation plan, or disability income insurance; or</p> <p>"(C) in discharge of familial obligations or support.</p> <p>"(5) The term 'economic loss' means--</p> <p>"(A) pecuniary loss and monetary expenses incurred by or on behalf of an injured individual as a result of tortious physical or mental injury, property damage, or economic loss, including allowable expenses, work loss, and replacement services loss, whether caused by pain and suffering or physical impairment, but not including noneconomic loss; minus</p> <p>"(B) collateral benefits.</p>	<p>No Provision</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>No Provision</p>	<p>"(6) The term 'entity' includes an individual or person.                      "(7) The term 'intentional misconduct' means conduct, whether by act or omission, which intentionally causes, or attempts to cause, by the one who acts or fails to act, injury or with knowledge that injury is substantially certain to follow. A person does not intentionally cause, or attempt to cause, injury if such party's act or failure to act is for the purpose of averting bodily harm to such party or another.                      "(8) The term 'replacement services loss' means reasonable expenses incurred in obtaining ordinary and necessary services from others, not members of the injured individual's household or family, in lieu of those the injured individual would have performed for the benefit of the household or family, but does not include benefits received by the injured individual.                      "(9) The term 'serious injury' means bodily injury which results in dismemberment, significant and permanent loss of an important bodily function, or significant and permanent scarring or disfigurement.                      "(10) The term 'wanton conduct' means conduct that the allegedly responsible party must have realized was excessively dangerous, done heedlessly and recklessly, and with a conscious disregard to the consequences or the rights and safety of the claimant.</p>	<p>No Provision</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>No Provision</p>	<p>"(11) The term 'work loss' means loss of income from work the injured individual would have performed if the individual had not been injured, reduced by any income from substitute work actually performed by the individual or by income the individual would have earned in available appropriate substitute work that the individual was capable of performing but unreasonably failed to undertake.</p> <p>"(b)(1) In any civil action or claim against any person, filed in any Federal or State court, based on any cause of action to recover damages or compensation for tortious physical or mental injury, property damage, or economic loss, any allegedly liable defendant shall have the option to offer, not later than 120 days after an injury or after the initiation of the liability claim, to compensate a claimant for reasonable economic loss, including future economic loss, less amounts available from collateral sources, and including reasonable hourly attorneys' fees for the claimant. A claimant who agrees in writing to such offer shall be foreclosed from bringing or continuing a civil action against any allegedly liable defendant and any other individuals or entities included under subsection (c). The claimant may extend the time for receiving the offer.</p>	<p>No Provision</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>No Provision</p>	<p>"(2) Nothing in this section shall preclude a State from enacting a requirement that compensation benefits offered under paragraph (1) shall include a minimum dollar amount in response to a claim for serious injury.</p> <p>"(c) An offer under subsection (b) may include other allegedly liable defendants, individuals, or entities that were involved in the events which give rise to the civil action, regardless of the theory of liability on which the claim is based, with their consent.</p> <p>"(d) Future economic damages shall be payable to an individual under this section as such damages occur.</p> <p>"(e) If, after an offer is made under subsection (b), the participants in the offer dispute their relative contributions to the payments to be made to the individual, such disputes shall be resolved through binding arbitration in accordance with applicable rules and procedures established by the Attorney General of the United States.</p>	<p>No Provision</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>No Provision</p>	<p>"(f)(1) In no event shall a civil action be foreclosed under subsection (b) against any allegedly liable party if the injured individual elects to prove, beyond a reasonable doubt, that the allegedly liable party caused the injury by intentional or wanton misconduct.</p> <p>"(2) This subsection shall not apply with respect to a personal injury unless the injured individual provides the allegedly liable party making an offer with a notice of such an election not later than 90 days after the date the offer of compensation benefits was made.</p> <p>"(g) Nothing in this section shall be construed to effect any applicable statute of limitations of any State or of the United States."</p> <p><b>(b) Technical and Conforming Amendments.</b>--The table of sections for chapter 111 of title 28, United States Code, is amended by adding at the end thereof the following new item:</p> <p>"1659. Early offer and recovery mechanisms."</p>	<p>No Provision</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>No Provision</p>	<p><b>Sec. 10. Alternative Dispute Resolution.</b></p> <p>(a) <b>General Policy.</b>--The policy of the United States is to encourage the creation and use of alternative dispute resolution techniques, and to promote the expeditious resolution of such actions, because the traditional litigation process is not always suited to the timely, efficient, and inexpensive resolution of civil actions.</p> <p>(b) <b>Notice of Availability of Alternative Dispute Resolution.</b>-- In any civil action or claim arising under any Federal law or in any diversity action in Federal court, each attorney who has made an appearance in the case and who represents one or more of the parties to the action shall, with respect to each party separately represented, advise the party of the existence and availability of alternative dispute resolution options, including extra judicial proceedings such as minitrials, third-party mediation, court supervised arbitration, and summary jury trial proceedings.</p> <p>(c) <b>Certification of Notice.</b>--Each attorney described under subsection (b) shall, simultaneous with the filing of a complaint or a responsive pleading, file a certification to the court that the attorney has provided the notice required under subsection (b) to the client or clients of such attorney. The attorney shall state in the certification whether such client will agree to one or more of the alternative dispute resolution techniques.</p>	<p><b>Sec. 4. Alternative Dispute Resolution Procedures. (a) In General.--</b></p> <p>(1) <b>Service of Offer.</b>--A claimant or a defendant in a product liability action that is subject to this Act may, not later than 60 days after the service of the initial complaint of the claimant or the applicable deadline for a responsive pleading (whichever is later), serve upon an adverse party an offer to proceed pursuant to any voluntary, nonbinding alternative dispute resolution procedure established or recognized under the law of the State in which the product liability action is brought or under the rules of the court in which such action is maintained.</p> <p>(2) <b>Written Notice of Acceptance or Rejection.</b>--Except as provided in paragraph (3), not later than 10 days after the service of an offer to proceed under paragraph (1), an offeree shall file a written notice of acceptance or rejection of the offer.</p> <p>(3) <b>Extension.</b>--The court may, upon motion by an offeree made prior to the expiration of the 10-day period specified in paragraph (2), extend the period for filing a written notice under such paragraph for a period of not more than 60 days after the date of expiration of the period specified in paragraph (2). Discovery may be permitted during such period.</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>No Provision</p>	<p>(d) <b>Agreement to Proceed with Alternative Dispute Resolution.</b>-- If all parties to an action agree to proceed with one or more alternative dispute resolution proceedings, the court shall issue an appropriate order governing the conduct of such proceedings. The issuance of an order governing the proceedings shall constitute a waiver, by each party subject to the order, of the right to proceed further in court.</p>	<p>(b) <b>Defendant's Penalty for Unreasonable Refusal.</b>--(1) <b>In General.</b>The court shall assess reasonable attorney's fees (calculated in accordance with paragraph (2)) and costs against the offeree, if--</p> <p>(A) a defendant as an offeree refuses to proceed pursuant to the alternative dispute resolution procedure referred to subsection (a)(1);</p> <p>(B) final judgment is entered against the defendant for harm caused by the product that is the subject of the action; and</p> <p>(C) the refusal by the defendant to proceed pursuant to such alternative dispute resolution was unreasonable or not made in good faith.</p> <p>(2) <b>Reasonable Attorney's Fees.</b>--For purposes of this subsection, a reasonable attorney's fee shall be calculated on the basis of an hourly rate, which shall not exceed the hourly rate that is considered acceptable in the community in which the attorney practices law, taking into consideration the qualifications and experience of the attorney and the complexity of the case.</p> <p>(c) <b>Good Faith Refusal.</b>In determining whether the refusal of an offeree to proceed pursuant to the alternative dispute procedure referred to in subsection (a)(1) was unreasonable or not made in good faith, the court shall consider such factors as the court considers appropriate.</p>	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>(H.R. 956 -- Title IV)  <b>Sec. 403. Federal Cause of Action Precluded.</b></p> <p>The district courts of the United States shall not have jurisdiction pursuant to this Act based on section 1331 or 1337 of title 28, United States Code.</p>	<p><b>Sec. 12. Express Authorization for Private Right of Action.</b></p> <p>(a) <b>In General.</b>--Chapter 85 of title 28, United States Code, is amended by adding at the end thereof the following new section:</p> <p style="padding-left: 40px;">"§ 1368. Private right of action</p> <p style="padding-left: 40px;">"No district court shall have jurisdiction over any civil action filed by a party based on a private right of action, unless such private right of action is expressly authorized in the statute on which such action is based."</p> <p>(b) <b>Technical and Conforming Amendment.</b>  --The table of sections for chapter 85 of title 28, United States Code, is amended by adding at the end thereof the following new item:</p> <p style="padding-left: 40px;">"1368. Private right of action."</p> <p>(c) <b>State Courts.</b>--No Federal statute shall be construed to give rise to a private right of action in a State court, unless such private right of action is expressly authorized in the statute on which such action is based.</p>	<p><b>Sec. 3 Applicability; Preemption</b></p> <p>(d) <b>Construction.</b>--To promote uniformity of law in the various jurisdictions, this Act shall be construed and applied after consideration of its legislative history.</p> <p>(e) <b>Effect of Court of Appeals Decisions.</b>--Notwithstanding any other provision of law, any decision of a circuit court of appeals interpreting a provision of this Act (except to the extent that the decision is overruled or otherwise modified by the Supreme Court) shall be considered a controlling precedent with respect to any subsequent decision made concerning the interpretation of such provision by any Federal or State court within the geographical boundaries of the area under the jurisdiction of the circuit court of appeals.</p> <p>*****</p> <p><b>Sec. 12. Federal Cause of Action Precluded.</b></p> <p>The district courts of the United States shall not have jurisdiction under section 1331 or 1337 of title 28, United States Code, over any product liability action covered under this Act.</p>	<p>Title V of Senator Hatch's "Civil Justice Fairness Act" reportedly will include various reforms in prisoner litigation.</p>

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
		SEC. 206. Workers' Compensation Subrogation Standards (text not supplied).	

H.R. 956/ H.R. 988	S. 300	FAIRNESS	HATCH
<p>(H.R. 988)  <b>Sec. 5. Effective Date; Application of Amendments.</b></p> <p>(a) <b>Effective Date.</b>--Subject to subsection (b), this Act and the amendments made by this Act shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act.</p> <p>(b) <b>Application of Amendments.</b>-- (1) The amendment made by section 2 shall apply only with respect to civil actions commenced after the effective date of this Act.</p> <p>(2) The amendments made by section 3 shall apply only with respect to cases in which a trial begins after the effective date of this Act.</p> <p>(H.R. 956 -- Title IV)  <b>Sec. 404. Effective Date.</b></p> <p>Titles I, II, and III shall apply with respect to actions which are commenced after the date of the enactment of this Act.</p>	<p><b>Sec. 15. Effective Date.</b></p> <p>This Act shall take effect and apply to claims or actions filed on and after the date occurring 30 days after the date of enactment of this Act.</p>	<p><b>Sec. 6. Effective Date.</b></p> <p>This Act shall take effect on the date of its enactment and shall apply to all civil actions pursuant to this Act commenced on or after such date, including any action in which the harm or the conduct which caused the harm occurred before the effective date of this Act.</p>	