

**Calendar No. 423**109<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION**S. 23**

To improve women's access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the delivery of obstetrical and gynecological services.

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**IN THE SENATE OF THE UNITED STATES**

MAY 3, 2006

Mr. SANTORUM (for himself, Mr. GREGG, Mr. FRIST, Mr. McCONNELL, Mr. ENSIGN, Mr. HATCH, Mr. INHOFE, Mrs. DOLE, Mr. BURNS, Mr. TALENT, Mr. VOINOVICH, Mr. BURR, Mr. CORNYN, Mr. ALLARD, Mr. DEMINT, Mr. VITTER, and Mr. ALEXANDER) introduced the following bill; which was read the first time

MAY 4, 2006

Read the second time and placed on the calendar

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**A BILL**

To improve women's access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the delivery of obstetrical and gynecological services.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Healthy Mothers and  
3 Healthy Babies Access to Care Act”.

4 **SEC. 2. FINDINGS AND PURPOSE.**

5 (a) FINDINGS.—

6 (1) EFFECT ON WOMEN’S ACCESS TO HEALTH  
7 SERVICES.—Congress finds that—

8 (A) the current civil justice system is erod-  
9 ing women’s access to obstetrical and gynecolo-  
10 gical services;

11 (B) the American College of Obstetricians  
12 and Gynecologists (ACOG) has identified nearly  
13 half of the States as having a medical liability  
14 insurance crisis that is threatening access to  
15 high-quality obstetrical and gynecological serv-  
16 ices;

17 (C) because of the high cost of medical li-  
18 ability insurance and the risk of being sued, one  
19 in seven obstetricians and gynecologists have  
20 stopped practicing obstetrics and one in five has  
21 decreased their number of high-risk obstetrics  
22 patients; and

23 (D) because of the lack of availability of  
24 obstetrical services, women—

25 (i) must travel longer distances and  
26 cross State lines to find a doctor;

1 (ii) have longer waiting periods (in  
2 some cases months) for appointments;

3 (iii) have shorter visits with their phy-  
4 sicians once they get appointments;

5 (iv) have less access to maternal-fetal  
6 medicine specialists, physicians with the  
7 most experience and training in the care of  
8 women with high-risk pregnancies; and

9 (v) have fewer hospitals with mater-  
10 nity wards where they can deliver their  
11 child, potentially endangering the lives and  
12 health of the woman and her unborn child.

13 (2) EFFECT ON INTERSTATE COMMERCE.—

14 Congress finds that the health care and insurance  
15 industries are industries affecting interstate com-  
16 merce and the health care liability litigation systems  
17 existing throughout the United States are activities  
18 that affect interstate commerce by contributing to  
19 the high costs of health care and premiums for  
20 health care liability insurance purchased by health  
21 care system providers.

22 (3) EFFECT ON FEDERAL SPENDING.—Con-

23 gress finds that the health care liability litigation  
24 systems existing throughout the United States have

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

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

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

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

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

16 (1) improve the availability of health care serv-  
17 ices in cases in which health care liability actions  
18 have been shown to be a factor in the decreased  
19 availability of services;

20 (2) reduce the incidence of “defensive medi-  
21 cine” and lower the cost of health care liability in-  
22 surance, all of which contribute to the escalation of  
23 health care costs;

24 (3) ensure that persons with meritorious health  
25 care injury claims receive fair and adequate com-

1       pensation, including reasonable noneconomic dam-  
2       ages;

3           (4) improve the fairness and cost-effectiveness  
4       of our current health care liability system to resolve  
5       disputes over, and provide compensation for, health  
6       care liability by reducing uncertainty in the amount  
7       of compensation provided to injured individuals; and

8           (5) provide an increased sharing of information  
9       in the health care system which will reduce unin-  
10      tended injury and improve patient care.

11 **SEC. 3. DEFINITIONS.**

12       In this Act:

13           (1) ALTERNATIVE DISPUTE RESOLUTION SYS-  
14      TEM; ADR.—The term “alternative dispute resolution  
15      system” or “ADR” means a system that provides  
16      for the resolution of health care lawsuits in a man-  
17      ner other than through a civil action brought in a  
18      State or Federal court.

19           (2) CLAIMANT.—The term “claimant” means  
20      any person who brings a health care lawsuit, includ-  
21      ing a person who asserts or claims a right to legal  
22      or equitable contribution, indemnity or subrogation,  
23      arising out of a health care liability claim or action,  
24      and any person on whose behalf such a claim is as-

1       serted or such an action is brought, whether de-  
2       ceased, incompetent, or a minor.

3               (3) COLLATERAL SOURCE BENEFITS.—The  
4       term “collateral source benefits” means any amount  
5       paid or reasonably likely to be paid in the future to  
6       or on behalf of the claimant, or any service, product  
7       or other benefit provided or reasonably likely to be  
8       provided in the future to or on behalf of the claim-  
9       ant, as a result of the injury or wrongful death, pur-  
10      suant to—

11               (A) any State or Federal health, sickness,  
12              income-disability, accident, or workers’ com-  
13              pensation law;

14               (B) any health, sickness, income-disability,  
15              or accident insurance that provides health bene-  
16              fits or income-disability coverage;

17               (C) any contract or agreement of any  
18              group, organization, partnership, or corporation  
19              to provide, pay for, or reimburse the cost of  
20              medical, hospital, dental, or income disability  
21              benefits; and

22               (D) any other publicly or privately funded  
23              program.

24               (4) COMPENSATORY DAMAGES.—The term  
25       “compensatory damages” means objectively

1 verifiable monetary losses incurred as a result of the  
2 provision of, use of, or payment for (or failure to  
3 provide, use, or pay for) health care services or med-  
4 ical products, such as past and future medical ex-  
5 penses, loss of past and future earnings, cost of ob-  
6 taining domestic services, loss of employment, and  
7 loss of business or employment opportunities, dam-  
8 ages for physical and emotional pain, suffering, in-  
9 convenience, physical impairment, mental anguish,  
10 disfigurement, loss of enjoyment of life, loss of soci-  
11 ety and companionship, loss of consortium (other  
12 than loss of domestic service), hedonic damages, in-  
13 jury to reputation, and all other nonpecuniary losses  
14 of any kind or nature. Such term includes economic  
15 damages and noneconomic damages, as such terms  
16 are defined in this section.

17 (5) CONTINGENT FEE.—The term “contingent  
18 fee” includes all compensation to any person or per-  
19 sons which is payable only if a recovery is effected  
20 on behalf of one or more claimants.

21 (6) ECONOMIC DAMAGES.—The term “economic  
22 damages” means objectively verifiable monetary  
23 losses incurred as a result of the provision of, use  
24 of, or payment for (or failure to provide, use, or pay  
25 for) health care services or medical products, such as

1 past and future medical expenses, loss of past and  
2 future earnings, cost of obtaining domestic services,  
3 loss of employment, and loss of business or employ-  
4 ment opportunities.

5 (7) HEALTH CARE GOODS OR SERVICES.—The  
6 term “health care goods or services” means any ob-  
7 stetrical or gynecological goods or services provided  
8 by a health care institution, provider, or by any indi-  
9 vidual working under the supervision of a health  
10 care provider, that relates to the diagnosis, preven-  
11 tion, care, or treatment of any obstetrical or gynecolo-  
12 gical-related human disease or impairment, or the  
13 assessment of the health of human beings.

14 (8) HEALTH CARE INSTITUTION.—The term  
15 “health care institution” means any entity licensed  
16 under Federal or State law to provide health care  
17 services (including but not limited to ambulatory  
18 surgical centers, assisted living facilities, emergency  
19 medical services providers, hospices, hospitals and  
20 hospital systems, nursing homes, or other entities li-  
21 censed to provide such services).

22 (9) HEALTH CARE LAWSUIT.—The term  
23 “health care lawsuit” means any health care liability  
24 claim concerning the provision of obstetrical or gynecolo-  
25 gical goods or services affecting interstate com-



1 merce, or any health care liability action concerning  
2 the provision of (or the failure to provide) obstetrical  
3 or gynecological goods or services affecting interstate  
4 commerce, brought in a State or Federal court or  
5 pursuant to an alternative dispute resolution system,  
6 against a physician or other health care provider  
7 who delivers obstetrical or gynecological services or  
8 a health care institution (only with respect to obstet-  
9 rical or gynecological services) regardless of the the-  
10 ory of liability on which the claim is based, or the  
11 number of claimants, plaintiffs, defendants, or other  
12 parties, or the number of claims or causes of action,  
13 in which the claimant alleges a health care liability  
14 claim.

15 (10) HEALTH CARE LIABILITY ACTION.—The  
16 term “health care liability action” means a civil ac-  
17 tion brought in a State or Federal Court or pursu-  
18 ant to an alternative dispute resolution system,  
19 against a health care provider who delivers obstet-  
20 rical or gynecological services or a health care insti-  
21 tution (only with respect to obstetrical or gynecolo-  
22 gical services) regardless of the theory of liability  
23 on which the claim is based, or the number of plain-  
24 tiffs, defendants, or other parties, or the number of

1 causes of action, in which the claimant alleges a  
2 health care liability claim.

3 (11) HEALTH CARE LIABILITY CLAIM.—The  
4 term “health care liability claim” means a demand  
5 by any person, whether or not pursuant to ADR,  
6 against a health care provider who delivers obstet-  
7 rical or gynecological services or a health care insti-  
8 tution (only with respect to obstetrical or gynecolo-  
9 gical services), including third-party claims, cross-  
10 claims, counter-claims, or contribution claims, which  
11 are based upon the provision of, use of, or payment  
12 for (or the failure to provide, use, or pay for) obstet-  
13 rical or gynecological services, regardless of the the-  
14 ory of liability on which the claim is based, or the  
15 number of plaintiffs, defendants, or other parties, or  
16 the number of causes of action.

17 (12) HEALTH CARE PROVIDER.—

18 (A) IN GENERAL.—The term “health care  
19 provider” means any person (including but not  
20 limited to a physician (as defined by section  
21 1861(r) of the Social Security Act (42 U.S.C.  
22 1395x(r)), nurse, dentist, podiatrist, phar-  
23 macist, chiropractor, or optometrist) required  
24 by State or Federal law to be licensed, reg-  
25 istered, or certified to provide health care serv-

1           ices, and being either so licensed, registered, or  
2           certified, or exempted from such requirement by  
3           other statute or regulation.

4                   (B) TREATMENT OF CERTAIN PROFES-  
5           SIONAL ASSOCIATIONS.—For purposes of this  
6           Act, a professional association that is organized  
7           under State law by an individual physician or  
8           group of physicians, a partnership or limited li-  
9           ability partnership formed by a group of physi-  
10          cians, a nonprofit health corporation certified  
11          under State law, or a company formed by a  
12          group of physicians under State law shall be  
13          treated as a health care provider under sub-  
14          paragraph (A).

15                   (13) MALICIOUS INTENT TO INJURE.—The  
16          term “malicious intent to injure” means inten-  
17          tionally causing or attempting to cause physical in-  
18          jury other than providing health care goods or serv-  
19          ices.

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

1 mestic service), hedonic damages, injury to reputa-  
2 tion, and all other nonpecuniary losses of any kind  
3 or nature.

4 (15) OBSTETRICAL OR GYNECOLOGICAL SERV-  
5 ICES.—The term “obstetrical or gynecological serv-  
6 ices” means services for pre-natal care or labor and  
7 delivery, including the immediate postpartum period  
8 (as determined in accordance with the definition of  
9 postpartum used for purposes of title XIX of the So-  
10 cial Security Act (42 U.S.C. 1396 et seq.)).

11 (16) PUNITIVE DAMAGES.—The term “punitive  
12 damages” means damages awarded, for the purpose  
13 of punishment or deterrence, and not solely for com-  
14 pensatory purposes, against a health care provider  
15 who delivers obstetrical or gynecological services or  
16 a health care institution. Punitive damages are nei-  
17 ther economic nor noneconomic damages.

18 (17) RECOVERY.—The term “recovery” means  
19 the net sum recovered after deducting any disburse-  
20 ments or costs incurred in connection with prosecu-  
21 tion or settlement of the claim, including all costs  
22 paid or advanced by any person. Costs of health care  
23 incurred by the plaintiff and the attorneys’ office  
24 overhead costs or charges for legal services are not  
25 deductible disbursements or costs for such purpose.

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

8   **SEC. 4. ENCOURAGING SPEEDY RESOLUTION OF CLAIMS.**

9           (a) IN GENERAL.—Except as otherwise provided for  
 10          in this section, the time for the commencement of a health  
 11          care lawsuit shall be 3 years after the date of manifesta-  
 12          tion of injury or 1 year after the claimant discovers, or  
 13          through the use of reasonable diligence should have discov-  
 14          ered, the injury, whichever occurs first.

15          (b) GENERAL EXCEPTION.—The time for the com-  
 16          mencement of a health care lawsuit shall not exceed 3  
 17          years after the date of manifestation of injury unless the  
 18          tolling of time was delayed as a result of—

19                 (1) fraud;

20                 (2) intentional concealment; or

21                 (3) the presence of a foreign body, which has no  
 22          therapeutic or diagnostic purpose or effect, in the  
 23          person of the injured person.

24          (c) MINORS.—An action by a minor shall be com-  
 25          menced within 3 years from the date of the alleged mani-

1 festation of injury except that if such minor is under the  
2 full age of 6 years, such action shall be commenced within  
3 3 years of the manifestation of injury, or prior to the  
4 eighth birthday of the minor, whichever provides a longer  
5 period. Such time limitation shall be tolled for minors for  
6 any period during which a parent or guardian and a health  
7 care provider or health care institution have committed  
8 fraud or collusion in the failure to bring an action on be-  
9 half of the injured minor.

10 (d) RULE 11 SANCTIONS.—Whenever a Federal or  
11 State court determines (whether by motion of the parties  
12 or whether on the motion of the court) that there has been  
13 a violation of Rule 11 of the Federal Rules of Civil Proce-  
14 dure (or a similar violation of applicable State court rules)  
15 in a health care liability action to which this Act applies,  
16 the court shall impose upon the attorneys, law firms, or  
17 pro se litigants that have violated Rule 11 or are respon-  
18 sible for the violation, an appropriate sanction, which shall  
19 include an order to pay the other party or parties for the  
20 reasonable expenses incurred as a direct result of the filing  
21 of the pleading, motion, or other paper that is the subject  
22 of the violation, including a reasonable attorneys' fee.  
23 Such sanction shall be sufficient to deter repetition of such  
24 conduct or comparable conduct by others similarly situ-

1 ated, and to compensate the party or parties injured by  
2 such conduct.

3 **SEC. 5. COMPENSATING PATIENT INJURY.**

4 (a) UNLIMITED AMOUNT OF DAMAGES FOR ACTUAL  
5 ECONOMIC LOSSES IN HEALTH CARE LAWSUITS.—In any  
6 health care lawsuit, nothing in this Act shall limit the re-  
7 covery by a claimant of the full amount of the available  
8 economic damages, notwithstanding the limitation con-  
9 tained in subsection (b).

10 (b) ADDITIONAL NONECONOMIC DAMAGES.—

11 (1) HEALTH CARE PROVIDERS.—In any health  
12 care lawsuit where final judgment is rendered  
13 against a health care provider, the amount of non-  
14 economic damages recovered from the provider, if  
15 otherwise available under applicable Federal or State  
16 law, may be as much as \$250,000, regardless of the  
17 number of parties other than a health care institu-  
18 tion against whom the action is brought or the num-  
19 ber of separate claims or actions brought with re-  
20 spect to the same occurrence.

21 (2) HEALTH CARE INSTITUTIONS.—

22 (A) SINGLE INSTITUTION.—In any health  
23 care lawsuit where final judgment is rendered  
24 against a single health care institution, the  
25 amount of noneconomic damages recovered

1 from the institution, if otherwise available  
2 under applicable Federal or State law, may be  
3 as much as \$250,000, regardless of the number  
4 of parties against whom the action is brought  
5 or the number of separate claims or actions  
6 brought with respect to the same occurrence.

7 (B) MULTIPLE INSTITUTIONS.—In any  
8 health care lawsuit where final judgment is ren-  
9 dered against more than one health care insti-  
10 tution, the amount of noneconomic damages re-  
11 covered from each institution, if otherwise avail-  
12 able under applicable Federal or State law, may  
13 be as much as \$250,000, regardless of the  
14 number of parties against whom the action is  
15 brought or the number of separate claims or ac-  
16 tions brought with respect to the same occur-  
17 rence, except that the total amount recovered  
18 from all such institutions in such lawsuit shall  
19 not exceed \$500,000.

20 (c) NO DISCOUNT OF AWARD FOR NONECONOMIC  
21 DAMAGES.—In any health care lawsuit—

22 (1) an award for future noneconomic damages  
23 shall not be discounted to present value;



1           (2) the jury shall not be informed about the  
2           maximum award for noneconomic damages under  
3           subsection (b);

4           (3) an award for noneconomic damages in ex-  
5           cess of the limitations provided for in subsection (b)  
6           shall be reduced either before the entry of judgment,  
7           or by amendment of the judgment after entry of  
8           judgment, and such reduction shall be made before  
9           accounting for any other reduction in damages re-  
10          quired by law; and

11          (4) if separate awards are rendered for past  
12          and future noneconomic damages and the combined  
13          awards exceed the limitations provided for in sub-  
14          section (b), the future noneconomic damages shall be  
15          reduced first.

16          (d) FAIR SHARE RULE.—In any health care lawsuit,  
17          each party shall be liable for that party's several share  
18          of any damages only and not for the share of any other  
19          person. Each party shall be liable only for the amount of  
20          damages allocated to such party in direct proportion to  
21          such party's percentage of responsibility. A separate judg-  
22          ment shall be rendered against each such party for the  
23          amount allocated to such party. For purposes of this sec-  
24          tion, the trier of fact shall determine the proportion of  
25          responsibility of each party for the claimant's harm.

1 **SEC. 6. MAXIMIZING PATIENT RECOVERY.**

2 (a) COURT SUPERVISION OF SHARE OF DAMAGES  
3 ACTUALLY PAID TO CLAIMANTS.—

4 (1) IN GENERAL.—In any health care lawsuit,  
5 the court shall supervise the arrangements for pay-  
6 ment of damages to protect against conflicts of in-  
7 terest that may have the effect of reducing the  
8 amount of damages awarded that are actually paid  
9 to claimants.

10 (2) CONTINGENCY FEES.—

11 (A) IN GENERAL.—In any health care law-  
12 suit in which the attorney for a party claims a  
13 financial stake in the outcome by virtue of a  
14 contingent fee, the court shall have the power  
15 to restrict the payment of a claimant's damage  
16 recovery to such attorney, and to redirect such  
17 damages to the claimant based upon the inter-  
18 ests of justice and principles of equity.

19 (B) LIMITATION.—The total of all contin-  
20 gent fees for representing all claimants in a  
21 health care lawsuit shall not exceed the fol-  
22 lowing limits:

23 (i) 40 percent of the first \$50,000 re-  
24 covered by the claimant(s).

25 (ii)  $33\frac{1}{3}$  percent of the next \$50,000  
26 recovered by the claimant(s).

1 (iii) 25 percent of the next \$500,000  
2 recovered by the claimant(s).

3 (iv) 15 percent of any amount by  
4 which the recovery by the claimant(s) is in  
5 excess of \$600,000.

6 (b) APPLICABILITY.—

7 (1) IN GENERAL.—The limitations in subsection  
8 (a) shall apply whether the recovery is by judgment,  
9 settlement, mediation, arbitration, or any other form  
10 of alternative dispute resolution.

11 (2) MINORS.—In a health care lawsuit involving  
12 a minor or incompetent person, a court retains the  
13 authority to authorize or approve a fee that is less  
14 than the maximum permitted under this section.

15 (c) EXPERT WITNESSES.—

16 (1) REQUIREMENT.—No individual shall be  
17 qualified to testify as an expert witness concerning  
18 issues of negligence in any health care lawsuit  
19 against a defendant unless such individual—

20 (A) except as required under paragraph

21 (2), is a health care professional who—

22 (i) is appropriately credentialed or li-  
23 censed in 1 or more States to deliver  
24 health care services; and

1 (ii) typically treats the diagnosis or  
2 condition or provides the type of treatment  
3 under review; and

4 (B) can demonstrate by competent evi-  
5 dence that, as a result of training, education,  
6 knowledge, and experience in the evaluation, di-  
7 agnosis, and treatment of the disease or injury  
8 which is the subject matter of the lawsuit  
9 against the defendant, the individual was sub-  
10 stantially familiar with applicable standards of  
11 care and practice as they relate to the act or  
12 omission which is the subject of the lawsuit on  
13 the date of the incident.

14 (2) PHYSICIAN REVIEW.—In a health care law-  
15 suit, if the claim of the plaintiff involved treatment  
16 that is recommended or provided by a physician  
17 (allopathic or osteopathic), an individual shall not be  
18 qualified to be an expert witness under this sub-  
19 section with respect to issues of negligence con-  
20 cerning such treatment unless such individual is a  
21 physician.

22 (3) SPECIALTIES AND SUBSPECIALTIES.—With  
23 respect to a lawsuit described in paragraph (1), a  
24 court shall not permit an expert in one medical spe-  
25 cialty or subspecialty to testify against a defendant

1 in another medical specialty or subspecialty unless,  
2 in addition to a showing of substantial familiarity in  
3 accordance with paragraph (1)(B), there is a show-  
4 ing that the standards of care and practice in the  
5 two specialty or subspecialty fields are similar.

6 (4) LIMITATION.—The limitations in this sub-  
7 section shall not apply to expert witnesses testifying  
8 as to the degree or permanency of medical or phys-  
9 ical impairment.

10 **SEC. 7. ADDITIONAL HEALTH BENEFITS.**

11 (a) IN GENERAL.—The amount of any damages re-  
12 ceived by a claimant in any health care lawsuit shall be  
13 reduced by the court by the amount of any collateral  
14 source benefits to which the claimant is entitled, less any  
15 insurance premiums or other payments made by the claim-  
16 ant (or by the spouse, parent, child, or legal guardian of  
17 the claimant) to obtain or secure such benefits.

18 (b) PRESERVATION OF CURRENT LAW.—Where a  
19 payor of collateral source benefits has a right of recovery  
20 by reimbursement or subrogation and such right is per-  
21 mitted under Federal or State law, subsection (a) shall  
22 not apply.

23 (c) APPLICATION OF PROVISION.—This section shall  
24 apply to any health care lawsuit that is settled or resolved  
25 by a fact finder.

1 **SEC. 8. PUNITIVE DAMAGES.**

2 (a) PUNITIVE DAMAGES PERMITTED.—

3 (1) IN GENERAL.—Punitive damages may, if  
4 otherwise available under applicable State or Federal  
5 law, be awarded against any person in a health care  
6 lawsuit only if it is proven by clear and convincing  
7 evidence that such person acted with malicious in-  
8 tent to injure the claimant, or that such person de-  
9 liberately failed to avoid unnecessary injury that  
10 such person knew the claimant was substantially  
11 certain to suffer.

12 (2) FILING OF LAWSUIT.—No demand for puni-  
13 tive damages shall be included in a health care law-  
14 suit as initially filed. A court may allow a claimant  
15 to file an amended pleading for punitive damages  
16 only upon a motion by the claimant and after a find-  
17 ing by the court, upon review of supporting and op-  
18 posing affidavits or after a hearing, after weighing  
19 the evidence, that the claimant has established by a  
20 substantial probability that the claimant will prevail  
21 on the claim for punitive damages.

22 (3) SEPARATE PROCEEDING.—At the request of  
23 any party in a health care lawsuit, the trier of fact  
24 shall consider in a separate proceeding—

25 (A) whether punitive damages are to be  
26 awarded and the amount of such award; and

1 (B) the amount of punitive damages fol-  
2 lowing a determination of punitive liability.

3 If a separate proceeding is requested, evidence rel-  
4 evant only to the claim for punitive damages, as de-  
5 termined by applicable State law, shall be inadmis-  
6 sible in any proceeding to determine whether com-  
7 pensatory damages are to be awarded.

8 (4) LIMITATION WHERE NO COMPENSATORY  
9 DAMAGES ARE AWARDED.—In any health care law-  
10 suit where no judgment for compensatory damages  
11 is rendered against a person, no punitive damages  
12 may be awarded with respect to the claim in such  
13 lawsuit against such person.

14 (b) DETERMINING AMOUNT OF PUNITIVE DAM-  
15 AGES.—

16 (1) FACTORS CONSIDERED.—In determining  
17 the amount of punitive damages under this section,  
18 the trier of fact shall consider only the following:

19 (A) the severity of the harm caused by the  
20 conduct of such party;

21 (B) the duration of the conduct or any  
22 concealment of it by such party;

23 (C) the profitability of the conduct to such  
24 party;

1 (D) the number of products sold or med-  
2 ical procedures rendered for compensation, as  
3 the case may be, by such party, of the kind  
4 causing the harm complained of by the claim-  
5 ant;

6 (E) any criminal penalties imposed on such  
7 party, as a result of the conduct complained of  
8 by the claimant; and

9 (F) the amount of any civil fines assessed  
10 against such party as a result of the conduct  
11 complained of by the claimant.

12 (2) MAXIMUM AWARD.—The amount of punitive  
13 damages awarded in a health care lawsuit may not  
14 exceed an amount equal to two times the amount of  
15 economic damages awarded in the lawsuit or  
16 \$250,000, whichever is greater. The jury shall not  
17 be informed of the limitation under the preceding  
18 sentence.

19 (c) LIABILITY OF HEALTH CARE PROVIDERS.—

20 (1) IN GENERAL.—A health care provider who  
21 prescribes, or who dispenses pursuant to a prescrip-  
22 tion, a drug, biological product, or medical device  
23 approved by the Food and Drug Administration, for  
24 an approved indication of the drug, biological prod-  
25 uct, or medical device, shall not be named as a party



1 to a product liability lawsuit invoking such drug, bi-  
2 ological product, or medical device and shall not be  
3 liable to a claimant in a class action lawsuit against  
4 the manufacturer, distributor, or product seller of  
5 such drug, biological product, or medical device.

6 (2) **MEDICAL PRODUCT.**—The term “medical  
7 product” means a drug or device intended for hu-  
8 mans. The terms “drug” and “device” have the  
9 meanings given such terms in sections 201(g)(1) and  
10 201(h) of the Federal Food, Drug and Cosmetic Act  
11 (21 U.S.C. 321), respectively, including any compo-  
12 nent or raw material used therein, but excluding  
13 health care services.

14 **SEC. 9. AUTHORIZATION OF PAYMENT OF FUTURE DAM-**  
15 **AGES TO CLAIMANTS IN HEALTH CARE LAW-**  
16 **SUITS.**

17 (a) **IN GENERAL.**—In any health care lawsuit, if an  
18 award of future damages, without reduction to present  
19 value, equaling or exceeding \$50,000 is made against a  
20 party with sufficient insurance or other assets to fund a  
21 periodic payment of such a judgment, the court shall, at  
22 the request of any party, enter a judgment ordering that  
23 the future damages be paid by periodic payments. In any  
24 health care lawsuit, the court may be guided by the Uni-  
25 form Periodic Payment of Judgments Act promulgated by

1 the National Conference of Commissioners on Uniform  
2 State Laws.

3 (b) **APPLICABILITY.**—This section applies to all ac-  
4 tions which have not been first set for trial or retrial be-  
5 fore the effective date of this Act.

6 **SEC. 10. EFFECT ON OTHER LAWS.**

7 (a) **GENERAL VACCINE INJURY.**—

8 (1) **IN GENERAL.**—To the extent that title XXI  
9 of the Public Health Service Act establishes a Fed-  
10 eral rule of law applicable to a civil action brought  
11 for a vaccine-related injury or death—

12 (A) this Act shall not affect the application  
13 of the rule of law to such an action; and

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

17 (2) **EXCEPTION.**—If there is an aspect of a civil  
18 action brought for a vaccine-related injury or death  
19 to which a Federal rule of law under title XXI of  
20 the Public Health Service Act does not apply, then  
21 this Act or otherwise applicable law (as determined  
22 under this Act) will apply to such aspect of such ac-  
23 tion.

24 (b) **SMALLPOX VACCINE INJURY.**—

1           (1) IN GENERAL.—To the extent that part C of  
2 title II of the Public Health Service Act establishes  
3 a Federal rule of law applicable to a civil action  
4 brought for a smallpox vaccine-related injury or  
5 death—

6                   (A) this Act shall not affect the application  
7 of the rule of law to such an action; and

8                   (B) any rule of law prescribed by this Act  
9 in conflict with a rule of law of such part C  
10 shall not apply to such action.

11           (2) EXCEPTION.—If there is an aspect of a civil  
12 action brought for a smallpox vaccine-related injury  
13 or death to which a Federal rule of law under part  
14 C of title II of the Public Health Service Act does  
15 not apply, then this Act or otherwise applicable law  
16 (as determined under this Act) will apply to such as-  
17 pect of such action.

18           (c) OTHER FEDERAL LAW.—Except as provided in  
19 this section, nothing in this Act shall be deemed to affect  
20 any defense available, or any limitation on liability that  
21 applies to, a defendant in a health care lawsuit or action  
22 under any other provision of Federal law.

1 **SEC. 11. STATE FLEXIBILITY AND PROTECTION OF STATES'**  
2 **RIGHTS.**

3 (a) **HEALTH CARE LAWSUITS.**—The provisions gov-  
4 erning health care lawsuits set forth in this Act shall pre-  
5 empt, subject to subsections (b) and (c), State law to the  
6 extent that State law prevents the application of any pro-  
7 visions of law established by or under this Act. The provi-  
8 sions governing health care lawsuits set forth in this Act  
9 supersede chapter 171 of title 28, United States Code, to  
10 the extent that such chapter—

11 (1) provides for a greater amount of damages  
12 or contingent fees, a longer period in which a health  
13 care lawsuit may be commenced, or a reduced appli-  
14 cability or scope of periodic payment of future dam-  
15 ages, than provided in this Act; or

16 (2) prohibits the introduction of evidence re-  
17 garding collateral source benefits.

18 (b) **PREEMPTION OF CERTAIN STATE LAWS.**—No  
19 provision of this Act shall be construed to preempt any  
20 State law (whether effective before, on, or after the date  
21 of the enactment of this Act) that specifies a particular  
22 monetary amount of compensatory or punitive damages  
23 (or the total amount of damages) that may be awarded  
24 in a health care lawsuit, regardless of whether such mone-  
25 tary amount is greater or lesser than is provided for under  
26 this Act, notwithstanding section 5(a).

1 (c) PROTECTION OF STATE'S RIGHTS AND OTHER  
2 LAWS.—

3 (1) IN GENERAL.—Any issue that is not gov-  
4 erned by a provision of law established by or under  
5 this Act (including the State standards of neg-  
6 ligence) shall be governed by otherwise applicable  
7 Federal or State law.

8 (2) RULE OF CONSTRUCTION.—Nothing in this  
9 Act shall be construed to—

10 (A) preempt or supersede any Federal or  
11 State law that imposes greater procedural or  
12 substantive protections for a health care pro-  
13 vider or health care institution from liability,  
14 loss, or damages than those provided by this  
15 Act;

16 (B) preempt or supercede any State law  
17 that permits and provides for the enforcement  
18 of any arbitration agreement related to a health  
19 care liability claim whether enacted prior to or  
20 after the date of enactment of this Act;

21 (C) create a cause of action that is not  
22 otherwise available under Federal or State law;  
23 or

24 (D) affect the scope of preemption of any  
25 other Federal law.

1 **SEC. 12. APPLICABILITY; EFFECTIVE DATE.**

2       This Act shall apply to any health care lawsuit  
3 brought in a Federal or State court, or subject to an alter-  
4 native dispute resolution system, that is initiated on or  
5 after the date of the enactment of this Act, except that  
6 any health care lawsuit arising from an injury occurring  
7 prior to the date of enactment of this Act shall be gov-  
8 erned by the applicable statute of limitations provisions  
9 in effect at the time the injury occurred.



**Calendar No. 423**

109<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

**S. 23**

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**A BILL**

To improve women's access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the delivery of obstetrical and gynecological services.

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MAY 4, 2006

Read the second time and placed on the calendar